

COLORADO SCHOOL DISCIPLINE LAW: GAPS AND GOALS

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ABSTRACT

This Article emphasizes the problem in Colorado with school discipline laws that fail to protect children. The school-to-prison pipeline runs strong for students of color, students with disabilities, and LGBTQIA students in particular. A comparison with the other states in the Tenth Circuit is included. However, as long as the Trump Administration refuses to provide guidance regarding discipline and disparity, our children will continue to suffer.

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INTRODUCTION

In December 2018, the U.S. Department of Education (USDOE) withdrew Obama Administration guidance instructing school districts to reduce both racial disparities in school discipline as well as the use of exclusionary disciplinary practices.¹ The USDOE determined that this guidance was unnecessary, in part, because of the “robust protections” against discrimination already available under federal law.² The decision to rescind the Obama-era guidance was based on recommendations from the Federal Commission on School Safety, which was established by President Donald Trump in March 2018.³ Critics of this rescission point out that racial disparities in school discipline are an ongoing challenge, and eliminating this guidance will not make schools safer.⁴ Additionally, in July 2019, the U.S. Commission on Civil Rights, “an independent, bipartisan agency,”⁵ issued a report and letter to President Trump detailing the ongoing disproportionate use of exclusionary school discipline against students of color—especially students of color with disabilities.⁶

1. KENNETH L. MARCUS & ERIC S. DREIBAND, U.S. DEP’T EDUC., DEAR COLLEAGUE LETTER ON NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 1–2 (2018).

2. *Id.* at 2.

3. FED. COMM’N ON SCH. SAFETY, FINAL REPORT 72 (2018); MARCUS & DREIBAND, *supra* note 1, at 2. The Federal Commission on School Safety included Secretary of Education Betsy DeVos, then-Attorney General Jeff Sessions (later former Acting Attorney General Matthew Whitaker), Secretary of Health & Human Services Alex Azar, and then-Secretary of Homeland Security Kirstjen Nielsen. *Federal Commission on School Safety*, U.S. DEP’T EDUC., <https://www.ed.gov/school-safety> (last visited Dec. 9, 2019).

4. *See, e.g., NASSP Statement on Final Report of Federal Commission on School Safety*, NASSP (Dec. 18, 2018), <https://www.nassp.org/2018/12/18/nassp-statement-on-final-report-of-federal-commission-on-school-safety/> (“There is no disputing that racial disparities persist in suspensions and expulsions, and the evidence shows that schools that address the true causes of the gaps see more positive culture and fewer violent incidents . . . The guidance encouraged many schools to find ways to help students succeed rather than react to behaviors that accelerate their failure, and therefore direct students on a path to prosperity rather than prison . . . the Commission asserts without foundation that this non-binding guidance makes school less safe. The conclusion is offensive, it’s infuriating, it’s nonsensical . . .”).

5. CATHERINE E. LHAMON, U.S. COMMISSION CIV. RTS., BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 2 (2019).

6. *Id.* at 5.

Research shows exclusionary discipline and zero-tolerance policies have not made schools safer nor improved educational outcomes for students.⁷ Instead, decades of research show certain school policies push students out of the classroom and into the juvenile and adult justice systems.⁸ Suspensions, expulsions, and referrals to law enforcement, in particular, increase the likelihoods that a student will drop out of high school and enter the criminal justice system.⁹ These outcomes are the result of a variety of mechanisms. For instance, students may lack adequate supervision while they are out of school, resulting in an increased probability of criminal activity—including drug use.¹⁰ Students experiencing exclusionary discipline may also feel disconnected from their school community, resulting in decreased attendance and engagement in coursework.¹¹ Students experiencing exclusionary discipline also miss important instruction and fall behind on coursework while out of school, making it hard to catch up.¹² This pattern can create a downward spiral to student dropout; a single suspension in ninth grade doubles a student’s chances of dropout.¹³

Police presence and referrals to law enforcement offer a more direct path into the criminal justice system. With police presence and the proliferation of metal detectors, “[s]tudents, particularly students of color, already attend schools that look and feel like prison.”¹⁴ Given the broader context of the relationship between police and minority communities, the presence of police on campus contributes to a sense of fear rather than safety for many students of color,¹⁵ which hinders a student’s ability to learn. In 1975, only 1% of American schools reported having a police officer on campus; by 2014, law enforcement could be found at 42% of secondary schools and 24% of elementary schools.¹⁶ Many schools have also increased their reliance on police to resolve relatively minor disciplinary

7. *Id.*; see, e.g., YOUTH UNITED FOR CHANGE AND ADVANCEMENT PROJECT, ZERO TOLERANCE IN PHILADELPHIA: DENYING EDUCATIONAL OPPORTUNITIES AND CREATING A PATHWAY TO PRISON 2, 4 (2011) (“[Zero tolerance] has needlessly undermined students’ opportunities to learn, pushed more youth out of schools and into the juvenile and criminal justice systems, harmed countless families and communities, and wasted taxpayers’ dollars.”).

8. Libby Nelson & Dara Lind, *The School to Prison Pipeline*, JUST. POL’Y INST. (Feb. 12, 2015), <http://www.justicepolicy.org/news/8775>; see also ROBERT BALFANZ ET AL., SENT HOME AND PUT OFF-TRACK: THE ANTECEDENTS, DISPROPORTIONALITIES, AND CONSEQUENCES OF BEING SUSPENDED IN THE NINTH GRADE 14 (2012); TONY FABELO ET AL., COUNCIL ST. GOV’TS JUST. CTR., BREAKING SCHOOL RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 85 (2011); Katherine C. Monahan et al., *From the School Yard to the Squad Car: School Discipline, Truancy, & Arrest*, 43 J. YOUTH ADOLESCENCE 1110, 1118–20 (2014).

9. FABELO ET AL., *supra* note 8, at 65, 85.

10. Committee on School Health, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003).

11. BALFANZ ET AL., *supra* note 8.

12. FABELO ET AL., *supra* note 8, at 20.

13. BALFANZ ET AL., *supra* note 8, at 8.

14. ADVANCEMENT PROJECT, WE CAME TO LEARN: A CALL TO ACTION FOR POLICE-FREE SCHOOLS 11–12 (2018).

15. *Id.*

16. *Id.* at 24.

issues, resulting in an increased rate of school-based arrests for often non-violent offenses:¹⁷ burping in gym class,¹⁸ throwing a lollipop at a classmate,¹⁹ or writing on a desk.²⁰

Research indicates these policies disproportionately punish the most at-risk youth, minorities, LGBTQIA youth, and those with special needs.²¹ Disproportionate discipline has been well documented nationally and in Colorado, where African-American students are three-and-a-half times as likely, and Hispanic students are nearly twice as likely, as white students to be suspended out of school.²² Although legislative advancements have offered some improvement in Colorado,²³ disproportionality has actually increased at times and remains pervasive in Colorado.²⁴

Lastly, while data collection and reporting of suspensions and expulsions have improved over time, concern over inaccurate reporting of certain discipline-related actions persists. Notably, in June 2019, the U.S. Government Accountability Office (GAO) issued a report showing school districts nationwide are dramatically underreporting instances of restraint and seclusion.²⁵ Of specific concern, approximately 70% of school districts reported zero incidents of restraint or seclusion in the last two years.²⁶

In light of these disparities and glaring deficiencies, laws and policies on school discipline need examination and reform. Part I of this Article provides a background of federal educational rights and procedural protections for students facing school disciplinary actions. Part II describes jurisdiction-specific protections for each state within the Tenth Circuit. And, Part III analyzes the current protections and gaps in protections for students facing school disciplinary actions and makes recommendations to improve such protections.

17. *School-To-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> (last visited Dec. 9, 2019).

18. *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123, 1130 (10th Cir. 2016).

19. Leslie Postal & Scott Travis, *Students Arrested for Throwing Spitballs, Lollipops*, SUN SENTINEL (Feb. 9, 2013), <https://www.sun-sentinel.com/news/fl-xpm-2013-02-09-fl-school-arrests-jail-pipeline-20130209-story.html>.

20. *12-Year-Old Girl Arrested for Doodling on Desk*, WRCBTV (Feb. 21, 2010, 11:29 AM), <https://www.wrcbtv.com/story/12019636/12-year-old-girl-arrested-for-doodling-on-desk>.

21. *Office for Civil Rights*, U.S. DEP'T EDUC., <http://www.ed.gov/ocr> (last visited Dec. 9, 2019); see also FABELO ET AL., *supra* note 8, at 42–45; DANIEL J. LOSEN & JONATHAN GILLESPIE, *CTR. CIV. RTS. REMEDIES, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 40–50* (2012); NEAL A. PALMER ET AL., *GLSEN, EDUCATIONAL EXCLUSION: DROP OUT, PUSH OUT, AND THE SCHOOL-TO-PRISON PIPELINE AMONG LGBTQ YOUTH 11–15* (2016).

22. PADRES & JOVENES UNIDOS, 3RD ANNUAL COLORADO SCHOOL DISCIPLINE REPORT CARD 4, 6–7 (2016).

23. See *infra* Section III.A.7–8.

24. PADRES & JOVENES UNIDOS, *supra* note 22, at 6, 10–11.

25. U.S. GOV'T ACCT. OFF., *K-12 EDUCATION: EDUCATION SHOULD TAKE IMMEDIATE ACTION TO ADDRESS INACCURACIES IN FEDERAL RESTRAINT AND SECLUSION DATA 3* (2019) (as part of the DOE's Civil Rights Data Collection, school districts must report restraint and seclusion data every two years).

26. *Id.*

I. BACKGROUND

States and local school districts enjoy broad authority over the creation and administration of school discipline policies—however, this authority is not absolute.²⁷ The U.S. Supreme Court has considered the constitutional rights of students in disciplinary proceedings in a handful of cases, which remain binding on states; challenging school discipline decisions also implicates principles of federal administrative law. This Part offers a brief summary of U.S. Supreme Court decisions and federal legislation shaping the minimum procedural requirements and protections that should be afforded to students in discipline matters.

A. Due Process Rights

For nearly forty-five years, the U.S. Supreme Court decision of *Goss v. Lopez*²⁸ remains the primary authority for addressing the procedural due process rights of students in school discipline proceedings.²⁹ In *Goss*, the U.S. Supreme Court held that temporary out-of-school suspensions implicate the Due Process Clause of the Fourteenth Amendment because students are legitimately entitled to, and have property interest in, a public education.³⁰ Consequently, students facing suspension—an interference with an established property interest—are entitled to “some kind of notice and afforded some kind of hearing.”³¹

Specifically, the U.S. Supreme Court held that when a student is suspended for ten days or less, the student must receive oral or written notice of the charges against them; if the student denies the charges, the student must receive an explanation of the evidence that school officials have, and the student must have an opportunity to present their side of the story.³² This “rudimentary” hearing can occur immediately after the misconduct, and in most cases, should occur before the student is removed.³³ The Court explicitly declined to impose additional procedural requirements (e.g., right to counsel, right to confront and cross-examine witnesses, etc.)

27. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (“The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards.”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities.”).

28. 419 U.S. at 565.

29. *Id.* at 574–76.

30. *Id.* at 574 (“Among other things, the State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”).

31. *Id.* at 579.

32. *Id.* at 581.

33. *Id.* at 582. If a student poses a “continuing danger,” then they can be removed immediately, and the required notice and hearing should be provided as soon as possible. *Id.* at 582–83.

within the context of short-term suspensions.³⁴ The Court limited its decision to only short-term removals, noting longer suspensions or expulsions may require more formal procedures.³⁵

Students who are eligible for special education are entitled to additional procedural protections under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, and their implementing regulations.³⁶ If a student with a disability violates a code of student conduct, school officials can remove the student from their current school placement for up to ten days during the school year.³⁷ If a district seeks removal of a student with a disability for more than ten days, then the district must convene a meeting with the student's parents to determine whether the student's misconduct was caused by or was substantially related to his or her disability.³⁸ If meeting participants determine that the student's conduct was a manifestation of his or her disability, then the student cannot be removed from the current educational placement for more than ten days during a single school year—absent an agreement between the district and the student's parents to a change in placement.³⁹

B. Search and Seizure Protections

In *New Jersey v. T.L.O.*,⁴⁰ the U.S. Supreme Court held that the Fourth Amendment applies to searches conducted by school officials and set forth a two-prong test for determining the constitutionality of student searches.⁴¹ In determining whether school officials should be considered government actors for purposes of the Fourth Amendment, the Court looked to earlier decisions regarding the constitutional rights of students in school, including *Goss* and *Tinker v. Des Moines Independent Community School District*.⁴² Consistent with the reasoning of *Goss* and *Tinker*, the Court determined that when school officials are carrying out searches and other disciplinary functions, they are acting as representatives of the

34. *Id.* at 583 (reasoning that “[b]rief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness.”).

35. *Id.* at 584.

36. 34 C.F.R. §§ 104.35, 300.530 (2019).

37. *Id.* § 300.530(b)(1). This rule was derived from the Supreme Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988). In *Honig*, the Supreme Court held that IDEA (at that time titled the Education of the Handicapped Act) prohibited state and local school authorities from unilaterally excluding disabled students from school due to behavioral issues that stem from their disabilities. *Id.* at 323–24. This rule was later codified through the 1997 IDEA amendments. U.S. DEP'T EDUC., IDEA '97 PROVISIONS OF SPECIAL INTEREST TO ADMINISTRATORS—TOPIC BRIEF (1999).

38. 34 C.F.R. § 300.530(e)(1)(i); *see also*, U.S. DEP'T EDUC., PARENT & EDUCATOR RESOURCE GUIDE TO SECTION 504 IN PUBLIC ELEMENTARY & SECONDARY SCHOOLS 22 (2016).

39. 34 C.F.R. § 300.530(f); U.S. DEP'T EDUC., *supra* note 38, at 23.

40. 469 U.S. 325 (1985).

41. *Id.* at 341.

42. *Id.* at 336; *see also* *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

State and, therefore, Fourth Amendment protections apply.⁴³ Further, the Court held that a student has a legitimate expectation of privacy in articles of personal property that the student brings onto school grounds.⁴⁴ Finally, while students enjoy a legitimate expectation of privacy, that expectation must be balanced with the school's "equally legitimate" need to maintain order in the educational environment.⁴⁵

In determining what Fourth Amendment standards apply for school searches, the U.S. Supreme Court held that school officials do not need a warrant or probable cause to conduct a search.⁴⁶ Instead, the Court held that the legality of a school search depends on reasonableness "under all the circumstances."⁴⁷ Determining the reasonableness of a school search requires examining (1) whether a search was reasonable at its inception and (2) whether the search itself "was reasonably related in scope to the circumstances which justified the interference in the first place."⁴⁸ The Court further clarified that a search would be reasonable at its inception if there are reasonable grounds for suspecting that a search will produce evidence that the student has violated or is violating the law or the school code.⁴⁹ Next, a search will be reasonable in scope if the measures used are reasonably "related to the objectives of the search and not excessively intrusive" given the "age and sex of the student and the nature of the [potential] infraction."⁵⁰

Since *T.L.O.*, the U.S. Supreme Court has applied the *T.L.O.* standards in two decisions regarding student-drug testing.⁵¹ In 2002, the U.S. Supreme Court considered a student-drug testing case on appeal from the Tenth Circuit—*Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.⁵² In *Earls*, the Court considered the constitutionality of a suspicionless drug-testing policy for students participating in any extracurricular activity, which had been implemented in an Oklahoma school district.⁵³ Ultimately, the U.S. Supreme Court upheld the school district's policy as a reasonable means of addressing the school district's important interest of deterring student drug use.⁵⁴ The Court also found that students participating in competitive extracurricular activities

43. *T.L.O.*, 469 U.S. at 336–37.

44. *Id.* at 338–39 ("In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.").

45. *Id.* at 339–40.

46. *Id.* at 340–41.

47. *Id.* at 341.

48. *Id.*

49. *Id.* at 341–42.

50. *Id.* at 342.

51. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 825 (2002) (upholding suspicionless urinalysis drug testing of students who participate in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648, 664–65 (1995) (upholding random, suspicionless urinalysis drug testing of student athletes).

52. *Earls*, 536 U.S. at 825, 827–28.

53. *Id.* at 826–28.

54. *Id.* at 837–38.

have a limited expectation privacy because they voluntarily participate in these activities and subject themselves to the related policies.⁵⁵

C. Appeal Procedures

Appeals of school discipline decisions largely take form under state law, and courts generally give high deference to school districts in these proceedings.⁵⁶ As noted above, the U.S. Supreme Court determined that students have a property interest in their education and, therefore, schools must provide students with some degree of due process.⁵⁷ Appeals of student discipline typically implicate federal administrative case law and related principles of due process jurisprudence.⁵⁸ The U.S. Supreme Court consistently holds that due process is a flexible standard and requires consideration of the particular situation at issue and the comprehensive effect of the procedure on the individual's rights.⁵⁹ In *Mathews v. Eldridge*,⁶⁰ the U.S. Supreme Court held that courts must consider three factors in analyzing potential due process violations: (1) the nature of the private interest that will be affected by the government action; (2) the risk of "erroneous deprivation" based on the procedures used, and the value of any additional or different procedural protections; and (3) the government's interest, including the cost and administrative burdens of additional or different procedural requirements.⁶¹ The flexible nature of due process requirements, coupled with the high deference afforded to school districts, has made successfully appealing school discipline decisions very challenging.

II. SCHOOL DISCIPLINE LAWS OF THE TENTH CIRCUIT

Part II outlines existing school discipline laws and regulations throughout the Tenth Circuit. After exploring Colorado law on school discipline, this Part provides the state law on school discipline from each remaining Tenth Circuit state.

A. Colorado

During the last three school years, the rates of school expulsions and suspensions—as compared to the total number of disciplinary incidents in a given year—have remained relatively stagnant in Colorado.⁶² In raw

55. *Id.* at 831–32. This echoed the reasoning of an earlier case addressing student-athletes' rights. See *Vernonia*, 515 U.S. at 657 (“[S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.”).

56. See Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 865–66 (2012).

57. See *supra* Section I.A.

58. See, e.g., *Nichols ex rel. v. DeStefano*, 70 P.3d 505, 507 (Colo. App. 2002) (analyzing whether the procedures implemented in a school expulsion proceeding violated a student's due process rights).

59. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

60. *Id.*

61. *Id.* at 335.

62. *Suspension/Expulsion Statistics*, COLO. DEP'T EDUC., <https://www.cde.state.co.us/cdereval/suspend-expelcurrent> (last visited Dec. 9, 2019). Compared to the total number of disciplinary actions, expulsions were implemented at the following rates: 2016

numbers, during the 2017–2018 school year, over a thousand students were expelled, and roughly 90,000 suspensions were assigned throughout Colorado.⁶³

1. Local Control

Colorado delegates substantial authority to its local school districts and charter schools (charters) to develop policies and procedures for student discipline.⁶⁴ Specifically, school districts and charters are tasked with creating policies and procedures to address:

- Disruptive student behavior, including a specific policy for removal of disruptive students from the classroom;⁶⁵
- Initiation of suspension or expulsion proceedings;⁶⁶
- Use of “reasonable and appropriate physical intervention or force” when “dealing with” disruptive students;⁶⁷
- When and how suspensions and expulsions will be imposed;⁶⁸
- Gang activity on school grounds and at school sanctioned events;⁶⁹
- Prohibition of student possession of dangerous weapons, drugs, or other controlled substances on school grounds or at school sanctioned events;⁷⁰
- Prohibition of student tobacco use, or possession on school grounds, or at school sanctioned events;⁷¹
- Student searches on school grounds, including searches of student lockers;⁷²
- Student dress codes and prohibition of clothing that is “disruptive to the classroom environment”;⁷³ and

(0.86%); 2017 (0.84%); and 2018 (0.75%). *Id.* Again, compared to the total number of disciplinary actions, in-school suspensions were assigned at the following rates: 2016 (34.29%); 2017 (28.92%); and 2018 (29.56%). *Id.* Finally, out-of-school suspensions were assigned the following rates: 2016 (55.03%); 2017 (48.47%); and 2018 (47.99%). *Id.*

63. *Id.* (Specifically, 1,022 students were expelled, 34,976 in-school suspensions, and 56,794 out-of-school suspensions were assigned).

64. *See, e.g.*, COLO. REV. STAT. § 22-32-109.1(2) (2019) (outlining the general issues that school districts and charter schools must address through policy and procedures in order “to provide a learning environment that is safe, conducive to the learning process, and free from unnecessary disruption . . .”); *see also* COLO. CONST. art. IX, § 15 (vesting control of instruction in public schools to local school boards).

65. COLO. REV. STAT. § 22-32-109.1(2)(a)(I)(B).

66. *Id.* § (2)(a)(I)(C).

67. *Id.* § (2)(a)(I)(D). Districts and charters are minimally limited in this area by language that prohibits adoption of a school code that conflicts with Colorado’s statutory definition of child abuse.

68. *Id.* § (2)(a)(I)(E).

69. *Id.* § (2)(a)(I)(F).

70. *Id.* § (2)(a)(I)(G).

71. *Id.* § (2)(a)(I)(H).

72. *Id.* § (2)(a)(I)(I).

73. *Id.* § (2)(a)(I)(J).

- Bullying prevention, education, and disciplinary consequences.⁷⁴

Not surprisingly, there are wide variations among school districts' policies and practices, and also significant variations in implementation at the school level.

2. Search and Seizure

Aside from the state requirement that school boards develop a policy regarding student searches on school grounds—including locker searches—there are no additional statutory or regulatory requirements under state law that restrain a school district's ability to conduct student searches.⁷⁵ However, the Colorado Supreme Court and Colorado Court of Appeals have issued several decisions regarding the constitutionality of student searches.⁷⁶ Overall, these decisions reinforce high deference to school districts within the context of general student searches, but less deference within the context of drug testing.

a. General Searches

*In the Interest of P.E.A.*⁷⁷ stemmed from a delinquency proceeding where the student sought suppression of evidence that was gathered during an impermissible school search.⁷⁸ Specifically, this case involved the search of the student's car by a school security officer at the direction of the school principal.⁷⁹ At trial, the principal and security officer both testified that it was the school's practice—upon report from *any* source (e.g., other students, staff, etc.) of potential drug possession—to conduct a pat down search of the student, a search of the student's pockets and locker, and a search of the student's car.⁸⁰ The Colorado Supreme Court determined that this search was permissible at its inception because a student told the security officer that two other students (not P.E.A.) brought marijuana to school. Because the security officer had "reasonable suspicion" to question those two students, he could "act on reasonable inference emanating from [this] investigation."⁸¹ Next, with minimal analysis, the Colorado Supreme Court concluded that the scope of the searches conducted by the principal and security officer were reasonable.⁸²

74. *Id.* § (2)(a)(I)(K) (this requirement was imposed starting in August of 2001).

75. *Id.* § (2)(a)(I)(I).

76. *See, e.g.,* Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998); Univ. of Colo. v. Derdeyn, 863 P.2d 929 (Colo. 1993); People *ex rel.*, 754 P.2d 382 (Colo. 1988); Martinez v. Sch. Dist. No. 60, 852 P.2d 1275 (Colo. App. 1992).

77. 754 P.2d at 382.

78. *Id.* at 384.

79. *Id.*

80. *Id.*

81. The decision further noted that "[r]easonable suspicion is not a requirement of absolute certainty but is the sort of common-sense conclusion about human behavior upon which practical people—including government officials are entitled to rely." *Id.* at 389 (internal quotations omitted).

82. *Id.* at 389–90.

In *Martinez v. School District No. 60*,⁸³ the Colorado Court of Appeals considered the constitutionality of a high school dance monitor requiring students to blow in his face to assess whether they had consumed alcohol.⁸⁴ The school official initiated this search based on verbal allegations from another student.⁸⁵ Based on the smell of their breath, the school official concluded that two students had consumed alcohol that evening.⁸⁶ Both students were sent home and suspended out-of-school for five days.⁸⁷ The Colorado Court of Appeals held that—even if this procedure constituted a search within the meaning of the Fourth Amendment—the official’s search was not unreasonable under the circumstances.⁸⁸ The court found that the school official had reasonable suspicion to initiate this search based on the statements of another student, who was under the influence of alcohol and who reported that the plaintiffs attended a party with him before the dance.⁸⁹

b. Drug Testing

In *Trinidad School District No. 1 v. Lopez*,⁹⁰ the Colorado Supreme Court held that a suspicionless drug-testing policy was unconstitutional.⁹¹ Specifically, Trinidad’s drug-testing policy that required all sixth- through twelfth-grade students who participated in any extracurricular activities—even those activities, like marching band, that qualified for class credit—to submit to urinalysis drug testing.⁹² The Colorado Supreme Court distinguished Trinidad’s policy from that in *Vernonia Sch. Dist. 47J v. Acton*⁹³ in three significant ways:⁹⁴ (1) Trinidad’s policy required testing of students who were enrolled in activities (e.g., marching band) as a for-credit class, not as a purely voluntarily basis of participation like the athletes in *Vernonia*;⁹⁵ (2) the court noted that Trinidad’s policy included students who were not demonstrably part of the drug problem within the district; and (3) the court noted that there was no demonstrated risk of immediate physical harm to members of the marching band related to drug use.⁹⁶ Ultimately, the court found that the student’s privacy interest in this matter was different from that of the athletes in *Vernonia*, and that the scope of Trinidad’s policy vastly exceeded the policy upheld in *Vernonia*.

83. 852 P.2d at 1275.

84. *Id.* at 1277.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1277.

89. *Id.* at 1278.

90. 963 P.2d 1095 (Colo. 1998).

91. *Id.* at 1110.

92. *Id.* at 1096–97.

93. 515 U.S. 646, 648 (1995).

94. *Trinidad Sch. Dist. No. 1*, 963 P.2d at 1109.

95. *Id.*

96. *Id.*

Similarly, in *University of Colorado v. Derdeyn*,⁹⁷ the Colorado Supreme Court held that suspicionless urinalysis drug testing of college athletes was unconstitutional, absent voluntary consent from the athletes.⁹⁸ In this case, the University of Colorado (CU) instituted a mandatory, random drug-testing policy, and if an athlete did not sign a form consenting to the drug testing, the student was prohibited from participating in collegiate athletics.⁹⁹ The court rejected CU's arguments that college athletes have a "greatly diminished" expectation of privacy and that its testing policy was not significantly intrusive.¹⁰⁰ Further, the court questioned the significance of CU's alleged concerns (e.g., maintaining the integrity of its athletic program) for purposes of the Fourth Amendment.¹⁰¹

3. Suspension

a. Procedures

Colorado Revised Statutes (C.R.S.) § 22-33-105 provides the procedures and limitations governing out-of-school suspensions.¹⁰² Every Colorado school district's board of education has authority to suspend students but may delegate the authority to suspend students for five days or less to "any school principal within the school district."¹⁰³ Authority to suspend for more than five days can be delegated to the district's executive officer, but not to a school official.¹⁰⁴ A suspension can only extend beyond ten days (up to a maximum of twenty-five days¹⁰⁵), if necessary, "to present the matter to the next meeting of the board of education" to consider expulsion.¹⁰⁶ The law requires that the school or district inform the parent or guardian of the length of the suspension, grounds for the suspension, and the time and place of the meeting to review the suspension with the school or district; yet, the law does not specify how the information is to be conveyed.¹⁰⁷ The student cannot return to school until that meeting has taken place; however, the district may readmit the student if the district is unable to contact the parents or the parents repeatedly fail to appear for the scheduled meetings.¹⁰⁸ The statute further directs districts to consider,

97. 863 P.2d 929 (Colo. 1993).

98. *Id.* at 949–50.

99. *Id.* at 930.

100. *Id.* at 945.

101. *Id.* at 945–46.

102. COLO. REV. STAT. § 22-33-105 (2019).

103. *Id.* § (2)(a).

104. *Id.* § (2)(b).

105. See *Hernandez v. Sch. Dist. No. 1*, 315 F. Supp. 289, 293–94 (D. Colo. 1970) (holding that a suspension of up to twenty-five days without a formal hearing was not a violation of due process); *but see* 20 U.S.C. § 1415 (2018) (effective July 1, 2005) (a child with a disability cannot be removed from their placement for more than ten days for behavior that is a manifestation of their disability. If they are removed for more than ten days in a year, and it does not constitute a change in placement, they must continue to receive services under IDEA "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.").

106. COLO. REV. STAT. § 22-33-105(2)(b).

107. *Id.* § (3)(a).

108. *Id.* § (3)(b)(II).

at the reentry meetings, “whether there is a need to develop a remedial discipline plan for the pupil in an effort to prevent further disciplinary action.”¹⁰⁹ The statute does not provide direction on when a remedial discipline plan is advisable or what a remedial discipline plan might include. Consistent with constitutional requirements,¹¹⁰ C.R.S. § 22-33-105(3)(c) requires that students suspended for ten days or less receive an informal hearing with the principal or designee before removal, or as soon as practicable after an emergency removal;¹¹¹ the informal hearing is an opportunity for the student to hear and respond to the allegations.

The Smart School Discipline Law also contains provisions intended to mitigate the effects of the school-to-prison pipeline.¹¹² Schools must give suspended students the opportunity to complete make-up work for at least partial credit, and the Smart School Discipline Law spells out that this is intended to “help prevent the pupil from dropping out of school because of an inability to reintegrate into the educational program.”¹¹³ In reality, most schools wait for the family to request the work, and secondary school students often have to request work from each of their teachers, which may or may not be provided before the suspension is over. The Smart School Discipline Law also requires that districts adopt policy that encourages parents or guardians to temporarily attend school with their student as an alternative to out-of-school suspension.¹¹⁴

b. Grounds

C.R.S. § 22-33-106(1) provides the grounds for suspensions and expulsions in Colorado. The grounds for both suspension and expulsions are the same, leaving whether to pursue suspension or expulsion for a given offense to the discretion of the district. The grounds for suspension are broad: “Continued willful disobedience” or “[b]ehavior on or off school property that is detrimental to the welfare or safety of other pupils or of school personnel.”¹¹⁵ Colorado school districts can suspend students for just about any behavior, including talking out of turn or skipping class.¹¹⁶ In fact, Colorado school districts can deem off-school-grounds, outside-of-school-hours behavior, that lacks any nexus to the school or the student body, as detrimental to the welfare of other students as a means to justify a suspension or expulsion.¹¹⁷ The negative impact of these suspensions is multiplied if the behavior is considered to have “caused a material and

109. *Id.*

110. *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (holding that “due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”).

111. COLO. REV. STAT. § 22-33-105(3)(c).

112. *See infra* Section III.A.7.

113. COLO. REV. STAT. § 22-33-105(3)(d)(III).

114. *Id.* § (4).

115. *Id.* § 22-33-106(1)(a), (c).

116. DENV. PUB. SCHS. BD. EDUC., SUSPENSIONS OR EXPULSIONS POLICY, at 6-1(B) (2018).

117. *Id.*

substantial disruption on school grounds, in a school vehicle, or at a school activity or sanctioned event.”¹¹⁸ Three or more suspensions in one year becomes grounds for expulsion—as long as the parent or guardian has been given proper written notice.¹¹⁹ For example, a student who talks to classmates instead of listening or working three times in a year could be expelled from school.

It is left to each board of education to develop its own disciplinary code. In Denver Public Schools (DPS), lower level offenses like classroom disruptions or use of profanity are not subject to suspension until after the fifth similar violation in the same school year.¹²⁰ However, in nearby Jefferson County Public Schools, the same offenses could result in a suspension the first time, at the discretion of school administrators.¹²¹

4. Expulsion

As a preliminary matter, students under the age of six cannot be suspended or expelled from school under the Colorado School Code.¹²² If an out-of-school suspension is assigned to a student in second grade or younger, the length of the suspension is limited to a maximum of three days unless the executive officer of the enrolling entity determines that a longer period is needed for safety reasons or to pursue expulsion.¹²³

a. Grounds

The Colorado School Code sets forth grounds for suspension or expulsion of students during the school year.¹²⁴ Absent the exceptions noted above, a student may be suspended or expelled for the following conduct:

- “Continued willful disobedience” or “open and persistent defiance” of school authority;
- Willful destruction or defacing of school property;
- Behavior that is “detrimental to the welfare or safety” of other students or school personnel—regardless of whether this conduct occurs on or off of school property;
- Being a “habitually disruptive student”;¹²⁵

118. See COLO. REV. STAT. § 22-33-106(1)(c.5)(II).

119. *Id.*

120. See DENV. PUB. SCHS. BD. EDUC., *supra* note 116; DENV. PUB. SCHS. BD. EDUC., DISCIPLINE LADDER ATTACHMENT C (2018).

121. JEFFERSON CTY. SCH. DIST., STUDENT DISCIPLINE POLICY, at JK-D (2013).

122. COLO. REV. STAT. § 22-33-105(1).

123. H.B. 1194, 2019 Gen. Assemb., Reg. Sess. (Colo. 2019).

124. COLO. REV. STAT. § 22-33-106(1).

125. “‘Habitually disruptive student’ means a child who has been suspended pursuant to [other grounds for suspensions set forth in this section] three times during the course of the school year for causing a material or substantial disruption in the classroom, on school grounds, in school vehicles, or at school activities or events.” *Id.* § (c.5)(II).

- Possession of a dangerous weapon on school grounds or at a school-sanctioned event, including possession of a look-alike firearm,¹²⁶
- Use, possession, or sale of a drug or controlled substance;
- Repeated interference with the school's ability to provide educational opportunities to other students; and
- Making a false accusation of criminal activity against a school employee.¹²⁷

Colorado statute requires school districts impose an expulsion of at least one year on any student who brings a firearm to school or possesses a firearm at school.¹²⁸ Superintendents have the authority to modify this penalty on a case-by-case basis, but the modification must be reported in writing.¹²⁹

If a student has been expelled from a school district in the last twelve months, they may be denied enrollment at another public school.¹³⁰

b. Procedures

Prior to suspending or expelling any student, school districts are “encouraged” to consider the following factors: (i) the age of the student; (ii) the student's disciplinary history; (iii) whether the student has a disability; (iv) the seriousness of the student's violation; (v) whether the student's conduct threatened the safety of any other students or school staff; and (vi) whether a lesser disciplinary intervention could properly address the student's violation.¹³¹

If a student is referred for expulsion, the student has the right to a hearing and may present evidence on their behalf.¹³² The school district's board of education can delegate authority to an executive officer or designee to preside over the hearing.¹³³ If a designee presides over the hearing, the designee must forward findings of fact and recommendations to the executive officer at the close of the hearing.¹³⁴ Then, the executive officer must issue a written opinion within five days after the hearing.¹³⁵ The executive officer must report on every expulsion decision to the board of

126. *Id.* § (1)(d)(I) permits administrators to make case-by-case decisions about the discipline of students who bring weapons to campus while COLO. REV. STAT. § 22-32-106(1.5) complies with federal law 20 USC § 7961 (2018), which mandates expulsion for the possession of a firearm at school with limited exceptions on a case-by-case basis.

127. COLO. REV. STAT. § 22-33-106(d)(II), (e), (g).

128. *Id.* § (1.5).

129. *Id.*

130. *Id.* § (3)(a).

131. *Id.* § (1.2)(a)–(f).

132. *Id.* § 22-33-105(2)(c).

133. *Id.*

134. *Id.*

135. *Id.*

education.¹³⁶ Students can appeal an expulsion decision of an executive officer to the board of education. An appeal will include review of the facts presented and determined at the hearing, arguments regarding the decision, and requests for clarification from the board of education.¹³⁷

Students are also entitled to judicial review of an expulsion decision from a board of education.¹³⁸ If a student or parent seeks judicial review, they must notify the board of education in writing within five days after receiving official notification of the board's action.¹³⁹ Upon notice, the board must issue a statement of the reasons for the board's action.¹⁴⁰ Within ten days of the board's response, the student or parent can file a petition requesting that the board's order be set aside.¹⁴¹ After a petition is filed, the court must notify the board, set the matter for hearing, and review the hearing decision.¹⁴² A district court will have authority to review the actions of a board of education for an abuse of discretion.¹⁴³

The Colorado statute regarding expulsion proceedings does not explicitly provide for compulsion of witnesses in expulsion hearings.¹⁴⁴ However, the Colorado Court of Appeals held that school districts can neither compel witnesses nor isolate potential witnesses from the student or from the student's attorney in an expulsion proceeding.¹⁴⁵ In *Nichols v. DeStefano*,¹⁴⁶ the Colorado Court of Appeals held that an expulsion hearing was unfair based on the differences in the parties' abilities to present evidence.¹⁴⁷ Specifically, the district presented numerous anonymous statements from other students—which the accused student could not challenge—and interfered with the accused student's ability to present witnesses.¹⁴⁸ Additionally, the court noted that, where expulsion is permissible (not mandatory), evidence of the student's character and other school behavior is relevant to determine whether expulsion was warranted.¹⁴⁹ Ultimately, the court reversed and remanded the expulsion decision for a new

136. *Id.*

137. *Id.*

138. *Id.* § 22-33-108(2).

139. *Id.*

140. *Id.*

141. *Id.* There are no docket or court fees assessed for these proceedings. *Id.*

142. *Id.* § (2)–(3).

143. *Id.* § (3); *Nichols ex rel. v. DeStefano*, 70 P.3d 505, 507 (Colo. App. 2002). Students and parents face a similar uphill battle if they choose to challenge a school district's actions in federal court. See *Wilk v. St. Vrain Valley Sch. Dist.*, No. 15-cv-01925-RPM, 2017 WL 3190443, at *9 (D. Colo. July 27, 2017) (“[A] school’s decision to impose disciplinary action will be upheld in the face of a substantive due process challenge ‘if the decision is not arbitrary, lacking a rational basis, or shocking to the conscience of federal judges.’”).

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

145. *Nichols ex rel.*, 70 P.3d at 508.

146. *Id.*

147. *Id.* at 508.

148. *Id.*

149. *Id.*

hearing because the student was not allowed to effectively present all relevant evidence or challenge the evidence offered against her.¹⁵⁰

As a final consideration, Colorado law prohibits students who have been expelled for certain offenses from enrolling or reenrolling in the same school where the victim, or a member of the victim's immediate family, is enrolled or employed.¹⁵¹

5. Administrative Transfers

Instead of expelling a student, districts might choose to educate a student in a different environment. This can be as simple as transferring a student to a different neighborhood school, which can offer a variety of benefits: (1) the student has a fresh start where they will not be judged on prior behaviors, (2) the student has the opportunity to escape negative peer influences and make new friends, and (3) the student is separated from individuals the student previously hurt. Other times, the district moves the student to a special program designed for students failing in their current setting.¹⁵² Many districts administratively transfer students to an online program; this can be problematic as an already struggling student is then expected to self-motivate and self-direct their learning with the help of online videos and quizzes.¹⁵³ If the student can get to a district-specified location, the district might offer drop-in hours where—at the student's self-direction—the student can seek help from licensed teachers.¹⁵⁴

Colorado law requires children between the ages of six to seventeen to attend school,¹⁵⁵ but Colorado law does not entitle students to attend a particular school. A student does not have the right to attend her neighborhood school; districts are free to transfer a student from one school to another as long as the districts continue to meet the minimum education requirements.¹⁵⁶ Unlike suspensions,¹⁵⁷ courts have placed no due process requirements on administrative transfers. Districts might choose to transfer a student to avoid the negative consequences associated with an expulsion or to give them an opportunity to thrive in a nontraditional environment. However, administratively transferring a student allows a district to avoid reporting the student to the Colorado State Board of Education as a

150. *Id.*

151. COLO. REV. STAT. § 22-33-106(4)(a)(1.5) (2019).

152. *See, e.g.*, ENDEAVOR ACAD., ENDEAVOR ACADEMY OVERVIEW (2019) (taking traditionally unsuccessful students who “have the goal of re-engaging in school, earning a high school diploma and participating in subsequent post-graduate training.”); *About Connections Learning Center*, CONNECTIONS LEARNING CTR., <https://connectionslearningcenter.jeffcopublicschools.org> (last visited Dec. 9, 2019) (“build rapport, differentiate instruction, and provide support guiding students to their success”).

153. *See, e.g.*, ENDEAVOR ACAD., *supra* note 152.

154. *See, e.g.*, *About Us*, ACHIEVE ONLINE, <https://www.d11.org/Page/2271> (last visited Dec. 9, 2019) (where students can access a tutoring center to interact with peers and teachers); THOMPSON ONLINE CAMPUS, <https://www.thompsonschoools.org/Thompson-Online> (last visited Dec. 9, 2019) (where additional support is available in learning labs).

155. *See* COLO. REV. STAT. § 22-33-104(1)(a).

156. *See generally id.* (for lack of textual evidence that children have this right).

157. *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

student “expelled from schools within the district.”¹⁵⁸ An administrative transfer of a student also allows the district to avoid due process requirements for a suspension or expulsion, including consideration of the factors outlined in statute.¹⁵⁹

6. Restraint and Seclusion

Under Colorado law, schools—including charter schools—are prohibited from imposing chemical, mechanical, or prone restraint on students.¹⁶⁰ In general, schools can use restraint or seclusion only in cases of emergency after the failure of less restrictive options and after a determination that less restrictive alternatives would be inappropriate or ineffective.¹⁶¹ Starting in August 2017, every school district is required to report any instance of any type of restraint to school officials within one school day of the incident.¹⁶² Within five calendar days of the incident, the school administration must issue written notice of the incident to the student’s parent or legal guardian.¹⁶³ At minimum, the written notice must include a description of the incident, any efforts made to de-escalate the situation, any attempts to use alternatives to restraint, the type and duration of the restraint, and any injuries that occurred during the incident.¹⁶⁴

One notable development in Colorado restraint and seclusion law is that the DPS Board of Education recently passed a resolution limiting the use of handcuffs with students.¹⁶⁵ Specifically, in June 2019, the DPS Board of Education passed a resolution that committed DPS to amend its policies and procedures: to eliminate the use of handcuffs with elementary students and to significantly decrease the use of handcuffs with middle and high school students.¹⁶⁶

7. School Discipline Reform

“Zero tolerance” policies—requiring specific, often harsh, disciplinary responses to various violations—grew in popularity in the 1990s¹⁶⁷ and promoted the concept of “broken windows policing”: that “cracking

158. COLO. REV. STAT. § 22-33-105(2.5).

159. *Id.* § 22-33-106(1.2). However, students with disabilities are still entitled to due process under IDEA when the transfer constitutes a change in placement. 34 C.F.R. §§ 300.530, 300.536 (2019).

160. COLO. REV. STAT. § 22-32-147(2).

161. *Id.* § 26-20-103(1), (2)(I)–(II).

162. *Id.* § 22-32-147(3)(a).

163. *Id.* § (3)(c).

164. *Id.*

165. *Board of Education Update—June 13, 2019 Board Education Meeting*, DENV. PUB. SCH. BOARD EDUC. (June 14, 2019), <http://board.dpsk12.org/2019/06/14/board-of-education-update-june-13-2019-board-of-education-meeting/>; *Board Resolution re Use of Handcuffs*, DENV. PUB. SCH. BOARD. OF EDUC. (June 13, 2019), [https://go.boarddocs.com/co/dpsk12/Board.nsf/files/BD4P4662BECD/\\$file/2019.06.13%20Board%20Resolution%20re%20Use%20of%20Handcuffs%20by%20DPS%20Department%20of%20Safety.pdf](https://go.boarddocs.com/co/dpsk12/Board.nsf/files/BD4P4662BECD/$file/2019.06.13%20Board%20Resolution%20re%20Use%20of%20Handcuffs%20by%20DPS%20Department%20of%20Safety.pdf).

166. *Board of Education Update—June 13, 2019 Board Education Meeting*, *supra* note 165.

167. *Are Zero Tolerance Policies Effective in the Schools?*, 63 AM. PSYCHOL. 852, 852 (2008).

down on minor crimes helps to prevent major ones.”¹⁶⁸ The U.S. Department of Education pushed for even more zero tolerance policies after the shooting at Columbine High School in Littleton, Colorado.¹⁶⁹ These implemented zero tolerance policies proved to be ineffective and detrimental.¹⁷⁰ School discipline reformers have focused on Colorado, and Denver specifically, for decades.¹⁷¹ In 2008, DPS became one of the first districts in the country to replace zero tolerance policies with a “graduated discipline ladder and matrix so there was consistency across the board in how interventions could be used.”¹⁷² After successfully achieving positive change in Denver, reformers, including Padres y Jóvenes Unidos, pushed for statewide reforms.¹⁷³

In May 2012, reformers succeeded in passing the Colorado Smart School Discipline Law that recognizes the ineffectiveness of zero tolerance policies and requires school districts to reduce reliance on disciplinary removals and referrals to police.¹⁷⁴ In moving away from zero tolerance, the Colorado Smart School Discipline Law required hearing officers to consider more than the student’s behavior when contemplating suspension or expulsion.¹⁷⁵ Because of the Colorado Smart School Discipline Law, districts are now required to consider the student’s age; the student’s disciplinary history; the student’s disability status; the seriousness of the violation; whether the behavior threatened safety; and “whether a lesser intervention would properly address the violation.”¹⁷⁶ However, the Colorado Smart School Discipline Law did not set out a mechanism for weighing these factors. In fact, every factor could point strongly towards keeping a student in school, and the district could still remove them, so long as they acknowledge the listed factors first. As a result, punitive, disproportionate practices persist throughout the state.¹⁷⁷

168. E.B., *What “Broken Windows” Policing Is*, *ECONOMIST* (Jan. 27, 2015), <https://www.economist.com/the-economist-explains/2015/01/27/what-broken-windows-policing-is>.

169. ADVANCEMENT PROJECT, *supra* note 14, at 1, 22.

170. *Are Zero Tolerance Policies Effective in the Schools?*, *supra* note 167, at 852, 856.

171. In conjunction with Advancement Project, Denver’s Padres y Jóvenes Unidos published their first report on the school to prison pipeline in 2005. ADVANCEMENT PROJECT, *EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK* (Mar. 2005).

172. SCH. SUPERINTENDENT’S ASS’N, *REFORMING DISCIPLINE IN DENVER PUBLIC SCHOOLS: THREE-PRONGED APPROACH FOR EQUITY AND JUSTICE* 1, 3.

173. PADRES & JÓVENES UNIDOS, *supra* note 22, 1, 3.

174. Rebecca Jones, *Zeroing Out School Zero-Tolerance Policies*, *CHALKBEAT* (Aug. 30, 2012), <https://www.chalkbeat.org/posts/co/2012/08/30/zeroing-out-school-zero-tolerance-policies/>.

175. COLO. SCH. SAFETY RES. CTR., *SCHOOL DISCIPLINE SB12-046, HB12-1345 SYNOPSIS* 1, 3 (2012).

176. COLO. REV. STAT. § 22-33-106(1.2) (2019).

177. After the 2014–2015 school year, racial disparities persisted, and had even increased in some areas. PADRES & JÓVENES UNIDOS, *supra* note 22, at 9.

B. Kansas

1. Grounds for Suspension and Expulsion

Kansas state law codifies grounds for the suspension or expulsion of a student in Kansas Statutes Annotated (K.S.A.) § 72-6114.¹⁷⁸ The statute authorizes Kansas-based boards of education to “suspend or expel, or by regulation authorize any certificated employee or committee of certificated employees to suspend or expel” students for certain conduct.¹⁷⁹ Kansas law authorizes suspension or expulsion for the following:

(a) [W]illful violation of any published regulation for student conduct adopted or approved by the board of education; (b) conduct which substantially disrupts, impedes or interferes with the operation of any public school; (c) conduct which endangers the safety of others or which substantially impinges upon or invades the rights of others at school, on school property, or at a school supervised activity; (d) conduct which, if the pupil is an adult, constitutes the commission of a felony or, if the pupil is a juvenile, would constitute the commission of a felony if committed by an adult; conduct at school, on school property, or at a school supervised activity which, if the pupil is an adult, constitutes the commission of a misdemeanor or, if the pupil is a juvenile, would constitute the commission of a misdemeanor if committed by an adult; or (f) disobedience of an order of a teacher, peace officer, school security officer or other school authority when such disobedience can reasonably be anticipated to result in disorder, disruption or interference with the operation of any public school or substantial and material impingement upon or invasion of the rights of others.¹⁸⁰

Kansas state law provides for mandatory expulsion from school for a period of not less than one year of any student “determined to be in possession of a weapon at school, on school property, or at a school supervised activity.”¹⁸¹

2. Procedures for Suspensions and Expulsions

K.S.A. § 72-6115 codifies the procedures that must be in place for suspensions and expulsions of students in Kansas schools.¹⁸² The statute codifies notice and hearing requirements for both long-term suspensions and expulsions and short-term suspensions.¹⁸³ By definition, a short-term suspension cannot exceed ten school days.¹⁸⁴ For short-term suspensions,

178. KAN. STAT. ANN. § 72-6114 (2019).

179. *Id.*

180. *Id.* § (a)–(f).

181. *Id.* § 72-6132(a).

182. *Id.* § 72-6115.

183. *Id.*

184. *Id.* § (a).

schools must provide oral or written notice and also a hearing.¹⁸⁵ The hearing may be informal and proceed immediately upon notice.¹⁸⁶ The student has the right to be present at the hearing; the right to be informed of the charges and the basis for the accusation; and the right to make statements in defense or mitigation of the charges or accusations.¹⁸⁷ Schools must send written notice of the short-term suspension and the reason for the suspension to the student's parent or guardian within twenty-four hours.¹⁸⁸

Long-term suspensions—defined as suspensions of greater than ten school days, but not exceeding ninety school days—and expulsions, which may not exceed 186 school days, must be accompanied by a formal hearing.¹⁸⁹ Schools must provide written notice of the proposal to impose a long-term suspension or expulsion to the student and the student's parents or guardians.¹⁹⁰ The notice must state the time, date, and place of the formal hearing, which shall be held no later than ten days from the date of the notice.¹⁹¹ The formal hearing may be conducted by any person or committee of persons authorized by the board of education to conduct the hearing.¹⁹²

Formal hearings conducted pursuant to K.S.A. § 72-6115 must provide certain procedural due process protections, not limited to:

- (1) the right of the pupil to have counsel of the pupil's own choice present and to receive the advice of such counsel or other person whom the pupil may select;
- (2) the right of the parents or guardians of the pupil to be present at the hearing;
- (3) the right of the pupil and the pupil's counsel or advisor to hear or read a full report of testimony of witnesses against the pupil;
- (4) the right of the pupil and the pupil's counsel to confront and cross-examine witnesses who appear in person at the hearing, either voluntarily or as a result of the issuance of a subpoena;
- (5) the right of the pupil to present the pupil's own witnesses in person or their testimony by affidavit;
- (6) the right of the pupil to testify in the pupil's own behalf and give reasons for the pupil's conduct;
- (7) the right of the pupil to have an orderly hearing; and
- (8) the right of the pupil to a fair and impartial decision based on substantive evidence.¹⁹³

K.S.A. § 72-6116 requires a written report of the findings and results of any hearing that ends in a long-term suspension or expulsion.¹⁹⁴ The

185. *Id.* § (b)(1). A hearing is not required for short-term suspensions “if the presence of the pupil endangers other persons or property or substantially disrupts, impedes or interferes with the operation of the school.” *Id.* § (b)(2). A hearing must be held within seventy-two hours of imposing a short-term suspension under KAN. STAT. ANN. § 72-6115(b)(2). *Id.* § (c).

186. *Id.* § b)(1).

187. *Id.*

188. *Id.* § (c).

189. *Id.* § (a), (d).

190. *Id.* § (d).

191. *Id.*

192. *Id.* § (f).

193. *Id.* § 72-6116(a)(1)–(8).

194. *Id.* § (c).

person or committee conducting the hearing is permitted to find that the student may return to school, pending appeal of the long-term suspension or expulsion.¹⁹⁵ In *B.O.A. ex rel. v. U.S.D. 480 Board of Education*,¹⁹⁶ a student was expelled for the 186-day maximum permitted by law, and appealed that expulsion to the board of education.¹⁹⁷ The board utilized a hearing officer; the hearing officer made findings of fact and recommended reducing the period of expulsion.¹⁹⁸ The board of education adopted the hearing officer's findings of fact, "[b]ut, contrary to her recommendation, the Board expelled [the student] . . . for 186 school days."¹⁹⁹ The student appealed the board's decision to the district court pursuant to K.S.A. § 60-2101(d). The court explained, under K.S.A. § 60-2101(d), the scope of review for the court is "limited to deciding whether: The board's decision was within the scope of its authority; its decision was substantially supported by the evidence; and it did not act fraudulently, arbitrarily, or capriciously."²⁰⁰ The court reversed the board's decision and reduced the term of expulsion to that recommended by the hearing officer, because it found the board acted arbitrarily and capriciously when it adopted all of the hearing officer's findings of fact but refused to accept her recommendation for reducing the period of expulsion.²⁰¹

C. Oklahoma

Seventy Oklahoma Statutes (Okla. St.) § 24-101.3 describes both students' rights as well as school and school districts' obligations to students when the school or district is pursuing an out-of-school suspension as a form of discipline.²⁰²

Students in Oklahoma may face suspension for violating a school regulation; possessing "an intoxicating beverage, low-point beer, . . . or missing or stolen property if the property is reasonably suspected to have been taken from a student, a school employee, or the school during school

195. *Id.*

196. 439 P.3d 322 (Kan. Ct. App. 2019).

197. *Id.* at 325.

198. *Id.*

199. *Id.*

200. *Id.* at 326.

201. *Id.* at 323, 326-27.

202. OKLA. STAT. ANN. Tit. 70, § 24-101.3(A) (2019). Of note, the statute mandates school district boards adopt a policy that "provides for out-of-school suspension of students." *Id.* This raises the question: Would a school district be in violation of Oklahoma state law were it to adopt a policy that promoted restorative justice instead of a policy promoting student push-out? It is also worth noting that neither this nor any other Oklahoma statute mentions expulsions. As the ensuing discussion of Oklahoma education law describes, Oklahoma treats longer suspensions like expulsions.

activities”; or “possession of a dangerous weapon or a controlled dangerous substance while on or within two thousand [sic] feet of public school property, or at a school event”²⁰³ Oklahoma state law provides:

Any student in grades six through twelve found to have assaulted, attempted to cause physical bodily injury, or acted in a manner that could reasonably cause bodily injury to a school employee or a person volunteering for a school . . . shall be suspended for the remainder of the current semester and the next consecutive semester²⁰⁴

Further, any student who has been suspended for:

[A] violent act or an act showing deliberate or reckless disregard for the health or safety of faculty or other students shall not be entitled to enroll in a public school . . . and no public school shall be required to enroll the student[] until the terms of the suspension have been met.²⁰⁵

Oklahoma absolves schools and districts of responsibility for providing an education “in the regular school setting” to students who have been adjudicated delinquent for violent offenses or who have been convicted of a violent adult offense.²⁰⁶

Students who have Individualized Education Program (IEP) plans, pursuant to the IDEA, may still be suspended; however, during a suspension, students with IEPs are still entitled to all “education and related services in accordance with the student’s [IEP].”²⁰⁷

Oklahoma state law requires an appeal process for all out-of-school suspensions.²⁰⁸ While the right to appeal extends to students experiencing out-of-school suspensions shorter than ten days, the right to appeal does

203. *Id.* § (C)(1). “[P]ossession of a firearm while on any public school property or while in any school bus or other vehicle used by a public school for transportation of students or teachers shall be suspended out-of-school for a period of not less than one (1) year.” *Id.* § (C)(2). “The term of the suspension may be modified by the district superintendent on a case-by-case basis.” *Id.* “The superintendent, principal, teacher, or security personnel of any public school in the State of Oklahoma, upon reasonable suspicion, shall have the authority to detain and search or authorize the search, of any pupil or property in the possession of the pupil when said pupil is on any school premises, or while in transit under the authority of the school, or while attending any function sponsored or authorized by the school” *Id.* § 24-102. “The extent of any search . . . shall be reasonably related to the objective of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.* (explicitly preventing strip searches). “The superintendent, principal, teacher, or security personnel searching or authorizing the search shall have the authority to detain the pupil . . . including the authority to authorize any other persons they deem necessary to restrain such pupil” *Id.* “Pupils shall not have any reasonable expectation of privacy towards school administrators or teachers in the contents of a school locker, desk, or other school property.” *Id.*

204. *Id.* § (C)(3). Again, this term “may be modified by the district superintendent on a case-by-case basis.” *Id.*

205. *Id.* § (E).

206. *Id.* § (F)(1)(a)–(b); *see also Id.* § (F)(2) (explaining that schools and districts may reenroll such students after determining “that the student no longer poses a threat to self, other students or school district faculty or employees.”); *Id.* § 24-101.4(A) (“[a] school district in which a student is enrolled or is in the process of enrolling in may request the student’s education records from any school district in which the student was formerly enrolled to ascertain safety issues . . . and ensure full disclosure.”). Then a district receiving such a records request has three days to comply. *Id.*

207. *Id.* § 24-101.3(G).

208. *Id.* § (B)(1)–(2).

not extend to students who experience the recommended consideration of “alternative in-school placement options . . . such as placement in an alternative school setting, reassignment to another classroom, or in-school detention.”²⁰⁹

Oklahoma state law requires districts to determine whether the appeal will “be to a local committee composed of district administrators or teachers or both, or to the district board of education.”²¹⁰ While the Oklahoma statute requires a “full investigation of the matter” upon appeal, the statute does not describe or define what a “full investigation” entails.²¹¹

Oklahoma limits suspensions: No suspension “shall extend beyond the current semester and the succeeding semester.”²¹² Generally, the length of a suspension is left to the discretion of the district’s board of education.²¹³

Schools and districts in Oklahoma are not obligated to “provide an education plan for students suspended . . . for five [] or fewer days.”²¹⁴ Instead, the responsibility “for the provision of a supervised, structured environment” immediately shifts to the parent or guardian of the student—and remains there “until the student is readmitted into school.”²¹⁵ Any school responsibility for ensuring the student remains on track with academic work extends only to administering a plan for reintegration in “core units” (i.e. English, math, science, social studies, and art as “required by the State Board of Education for grade completion.”)²¹⁶

D. New Mexico

1. Grounds for Suspension and Expulsion in New Mexico

New Mexico state standards for expulsion of nondisabled students are similar to the standards of many other states. A student may be suspended or expelled from school when a student commits or participates in an activity that violates New Mexico state law.²¹⁷ New Mexico law prohibits the following activities for students “whenever they are subject to

209. *Id.* § (A)–(B)(1).

210. *Id.* § (B)(1) (describing how, in certain districts, there may even be two levels of appeal); *see also id.* § (B)(2) (explaining that for suspensions longer than ten days, the board of education “may appoint a hearing officer to conduct the hearing and render the final decision.”).

211. *Id.* § (B). Additionally, this statute raises some due process concerns as it mandates the body reviewing the appeal must determine the student’s guilt or innocence. Were a student to receive a referral for suspension because of juvenile delinquency charges unrelated to school, school grounds, or anyone affiliated with the school, the body reviewing the appeal would, in theory, determine guilt or innocence as well as veracity and credibility of evidence submitted before the student appeared in court. *Id.*

212. *Id.* § (B)(2).

213. *Id.* § B) (encouraging boards to impose “reasonable[]” terms of suspension).

214. *Id.* § (D).

215. *Id.*

216. *Id.*

217. N.M. CODE R. § 6.11.2.9 (2019).

school control[.] . . . (1) criminal or delinquent acts; (2) gang related activity; (3) sexual harassment; (4) disruptive conduct; (5) refusal to identify self; and (6) refusal to cooperate with school personnel.²¹⁸

New Mexico law also requires school districts to adopt an expulsion policy that makes expulsion for not less than one year mandatory for any student who knowingly brings a weapon to school.²¹⁹

2. Procedures for Suspensions and Expulsions

When a student allegedly violates § 6.11.2.9(A), New Mexico law authorizes the local school board to initiate procedures based upon the severity of the violation. For a temporary suspension, the school board may limit the suspension period to less than ten school days.²²⁰ If the student denies the allegations, the school board must inform them of the charges the student is facing and of the evidence that supports the charge.²²¹ The school board must also give the student the opportunity to present facts in support of the student's position.²²² After the informal hearing process, the school board may immediately impose the temporary suspension.²²³

In regard to long-term suspensions and expulsions, a school may impose a temporary suspension for the duration of time that the school board takes to carry out the necessary procedures for a long-term suspension or expulsion.²²⁴ New Mexico prohibits the discipline hearing authority to also serve as the disciplinarian, and the disciplinarian is not required to follow the recommendation of the hearing authority.²²⁵ A reviewing authority has the discretion to overrule the disciplinarian's decision but is bound by the hearing authority's factual determinations.²²⁶ The student is entitled to written notice—either in person or by mail—through their parents.²²⁷ The notice must contain the school rule(s) the student allegedly violated; the date, time, and place of the hearing; a statement that the student has the right to have an attorney, parent, or other representative at the hearing; and a description of the procedures governing the hearing, among other information.²²⁸ The hearing must be held within five to ten school days from serving the notice on the parents.²²⁹ New Mexico state code provides that, at the hearing, the school has the burden of proving the misconduct, and

218. *Id.* § 6.11.2.9(A).

219. N.M. STAT. ANN. § 22-5-4.7(A) (2019).

220. N.M. CODE R. § 6.11.2.12(D)(1).

221. *Id.* § 6.11.2.12(D)(2).

222. *Id.*

223. *Id.*

224. *Id.* § (G)(1). Should a decision be delayed beyond the temporary suspension period, the student must be returned to school until a final decision is rendered. *Id.*

225. *Id.* § (G)(4)(a).

226. *Id.* § (G)(4)(b).

227. *Id.* § (G)(4)(e), (f).

228. *Id.* § (G)(4)(h)(i)–(vii).

229. *Id.* § (G)(4)(g).

[t]he student and his or her parent shall have the following rights: The right to be represented by legal counsel or other designated representative, however, the school is not required to provide representation; the right to present evidence, subject to reasonable requirements of substantiation at the discretion of the hearing authority and subject to exclusion of evidence deemed irrelevant or redundant; the right to confront and cross-examine adverse witnesses, subject to reasonable limitation by the hearing authority; the right to have a decision based solely on the evidence presented at the hearing and the applicable legal rules, including the governing rules of student conduct.²³⁰

When a student was facing a one-year suspension for possessing marijuana and a weapon on school grounds, the New Mexico Supreme Court held that (1) the school is not required to disclose the names of the students who inform the school of the incident and (2) if a student is not given the ability to confront those informing students, the school will not be found to have deprived the student of procedural due process.²³¹

Within five working days of the hearing, the hearing authority is required to mail or deliver a written decision to “the student, through the parent.”²³² New Mexico state law does not specify any review power by a judicial authority for appeals of expulsions. New Mexico state law does allow a “review authority”—“a person or group authorized by the local board”—“to review a disciplinarian's final decision to impose a long-term suspension or expulsion.”²³³

E. Utah

Utah statute grants “each local school board or charter school governing board” the authority and discretion to “adopt conduct and discipline policies.”²³⁴ Discipline policies created locally must be based on the “principle that every student is expected . . . to show respect for other people and to obey persons in authority at the school.”²³⁵ Notably, “[t]he [discipline] policies shall emphasize that certain behavior, most particularly behavior which disrupts, is unacceptable and may result in disciplinary action.”²³⁶

While guidance to school districts appears broad, Utah statutes provide minimum requirements for disciplinary policies.²³⁷ Among other requirements, disciplinary policies must include “standards and procedures

230. *Id.* § (G)(4)(l)(i)–(ii).

231. *Scanlon v. Las Cruces Pub. Sch.*, 172 P.3d 185, 187 (N.M. 2007).

232. N.M. CODE R. § 6.11.2.12(G)(4)(l)(viii).

233. *Id.* § 6.11.2.7(U).

234. UTAH CODE ANN. § 53G-8-202(2)(a) (2019). These policies must be “in accordance with Section 53G-8-211.” *Id.*

235. *Id.* § (2)(b)(ii).

236. *Id.* § (2)(d).

237. *Id.* § 53G-8-203.

for dealing with students who cause disruption in the classroom”;²³⁸ “procedures for the use of reasonable and necessary physical restraint in dealing with students posing a danger to themselves or others”;²³⁹ “procedures for the imposition of disciplinary sanctions, including suspension and expulsion”;²⁴⁰ and “standards and procedures for dealing with habitual disruptive or unsafe student behavior.”²⁴¹

Further, Utah law describes grounds for a school to use its discretion in suspending or expelling a student, which includes:

- “[F]requent or flagrant willful disobedience, defiance of proper authority, or disruptive behavior, including the use of foul, profane, vulgar, or abusive language”;²⁴²
- “behavior or threatened behavior which poses an immediate and significant threat to the welfare, safety, or morals of other students or school personnel or to the operation of the school”;²⁴³ and
- “behavior . . . which threatens harm or does harm to the school or school property, to a person associated with the school, or property associated with that person, regardless of where it occurs.”²⁴⁴

Utah law describes grounds for student suspension and expulsion, which include:

- “[T]he possession, control, or actual or threatened use of a real weapon”;²⁴⁵
- “the actual or threatened use of a look-alike weapon with intent to intimidate another person or to disrupt normal school activities”;²⁴⁶ and
- “the commission of an act involving the use of force or the threatened use of force which if committed by an adult would be a felony or class A misdemeanor.”²⁴⁷

238. *Id.* § (1)(b).

239. *Id.* § (1)(d).

240. *Id.* § (1)(f).

241. *Id.* § (1)(h).

242. *Id.* § 53G-8-205(1)(a). “Disruptive behavior” is defined in § 53G-8-210. This section also “establish[es] a procedure for a qualifying minor, or a qualifying minor’s parent, to contest a notice of disruptive student behavior.” § 53G-8-210(3)(a)(ii). The statute describes the complex method of qualifying a student as “disruptive,” what a student must do once they are designated as “disruptive,” and how a “disruptive student” is different from a “habitually disruptive student.” *Id.*

243. *Id.* § 53G-8-205(1)(c).

244. *Id.* § (1)(e). § 53G-8-212 addresses the specific offense of defacing or damaging school property. “If the students and the student’s parent or guardian are unable to pay for the damages or if it is determined by the school in consultation with the student’s parent or guardian that the student’s interests would not be served if the parent or guardian were to pay for the damages, the school shall provide for a program of work the student may complete in lieu of the payment.” *Id.* § 53G-8-212(3)(a).

245. *Id.* § 53G-8-205(2)(a)(i)(A).

246. *Id.* § (2)(a)(i)(B).

247. *Id.* § (2)(a)(ii).

A violation involving a real or look-alike weapon triggers mandatory expulsion for at least one year.²⁴⁸ If a student is expelled from any other school, in any other school district, within the preceding twelve months of entering a new school, the new school may deny that student admission.²⁴⁹

School boards “may delegate to any school principal or assistant principal . . . the power to suspend . . . for up to 10 school days.”²⁵⁰ If a student is suspended, the district must provide notice of the following to a parent or guardian: “[T]hat the student has been suspended; the grounds for the suspension; the period of time for which the student is suspended; and the time and place for the parent or guardian to meet with a designated school official to review the suspension.”²⁵¹ The student may not be readmitted until this meeting occurs—or, at the least, the student and their parent or guardian has agreed to such a meeting.²⁵²

While Utah law requires districts to provide alternatives to suspension or expulsion,²⁵³ the same statute enables school officials to “enlist the cooperation of the Division of Child and Family services, the juvenile court, or other appropriate state agencies, if necessary, in dealing with the student’s suspension.”²⁵⁴ Districts must “maintain a record of all suspended or expelled students and a notation of the recorded suspension or expulsion shall be attached to the individual student’s transcript.”²⁵⁵

Should a student be suspended or expelled “for more than 10 school days, the parent [or guardian] is responsible for undertaking an alternative education plan which will ensure that the student’s education continues during the period of suspension or expulsion.”²⁵⁶

Schools and districts in Utah must disseminate and make readily available “written procedures for the suspension and expulsion of, or denial of admission to, a student, consistent with due process and other provisions of law.”²⁵⁷

248. *Id.* § (2)(b). Additionally, a student subject to such an expulsion *must* appear before district administrators to hear “what conditions must be met by the student and the student’s parent for the student to return to school [and] if the student should be placed on probation in a regular or alternative school.” *Id.* § (2)(b)(ii)(A). The expulsion may be modified to less than a full year “if it would be in the best interest of both the school district or charter school, and the student . . . conditioned on approval by the local school board or governing board of a charter school and giving highest priority to providing a safe school environment for all students.” *Id.* § (2)(b)(ii)(C).

249. *Id.* § (3).

250. *Id.* § 53G-8-206(1)(a).

251. *Id.* § (4).

252. *Id.* § (5)(b).

253. *Id.* § 53G-8-207(1)(a).

254. *Id.* § (3). Section 53G-8-211 describes when and how school administrators should refer students to law enforcement, or implement a restorative justice methodology, as opposed to responding through a suspension or expulsion process based on the student’s alleged conduct. *Id.* § 53G-8-211(2)–(3)(a). Of note, this section requires “evidence-based” alternative interventions before referring a student to law enforcement. *Id.* § (3)(a)(iv).

255. *Id.* § 53G-8-208(4)(a).

256. *Id.* § (1). Parents and guardians will be responsible for the costs of this education. *Id.* § (3).

257. *Id.* § 53G-8-204(1)(a).

F. Wyoming

1. Grounds for Suspension and Expulsion

Wyoming state law provides the following grounds for suspension or expulsion:

- (i) Continued willful disobedience or open defiance of the authority of school personnel;
- (ii) [w]illful destruction or defacing of school property during the school year or any recess or vacation;
- (iii) [a]ny behavior which in the judgment of the local board of trustees is clearly detrimental to the education, welfare, safety or morals of other pupils, including the use of foul, profane or abusive language or habitually disruptive behavior...;
- (iv) [t]orturing, tormenting, or abusing a pupil or in any way maltreating a pupil or a teacher with physical violence;
- (v) [p]ossession, use, transfer, carrying or selling a deadly weapon...within any school bus...or within the boundaries of real property used by the district primarily for the education of students in grades kindergarten through twelve²⁵⁸ (12).²⁵⁹

Wyoming state law defines “habitually disruptive behavior” as “overt behavior willfully initiated by a student causing disruption in the classroom, on school grounds, on school vehicles or at school activities or events, which requires the attention of a teacher or other school personnel.”²⁶⁰ The superintendent, with the approval of the board of trustees, has the authority to modify the period of expulsion on a case-by-case basis based on the circumstances of the violation.²⁶¹

2. Procedures for Suspensions and Expulsions

Generally, Wyoming law provides authority for the board of trustees to suspend or expel a student subject to the notice and hearing requirements.²⁶² The board of trustees is authorized to “delegate the authority to suspend or expel a student to disciplinarians chosen from the administrative and supervisory staff.”²⁶³ Wyoming state law requires the disciplinarian to:

- (i) Give the student to be suspended or expelled oral or written notice of the charges against him and an explanation of the evidence the authorities have;
- (ii) [i]n good faith attempt to notify the student’s parents, guardians or custodians within twenty-four (24) hours of the student’s suspension or expulsion and the reasons for the suspension or expulsion, using contact information on record with the school or district. The disciplinarian shall keep record of the efforts to provide no-

258. Students found to be in violation of this provision are subject to a mandatory one-year expulsion. WYO. STAT. ANN. § 21-4-306(a)(i)–(v) (2019).

259. *Id.* § (c).

260. *Id.* § (b).

261. *Id.* § (d).

262. *Id.* § 21-4-305(a).

263. *Id.*

tice under this paragraph and whether the notice was provided successfully; (iii) [g]ive the student to be suspended or expelled an opportunity to be heard and to present his version of the charges against him . . .²⁶⁴

For suspensions of ten school days or less, Wyoming state law requires that the student be given an opportunity to be heard before removal, “unless the student’s presence endangers persons or property or threatens disruption of the academic process, in which case his immediate removal from school may be justified, but the opportunity to be heard shall follow as soon as practicable, and not later than seventy-two (72) hours after his removal . . .”²⁶⁵ For longer suspensions and expulsions, a hearing that accords with the protections of the Wyoming Administrative Procedure Act must generally be held within ten business days.²⁶⁶

Wyoming state law provides that “[a]ny decision of the board, or of a designated superintendent, shall be considered a final decision which may be appealed to the district court of the county in which the school district is located, pursuant to the provisions of the Wyoming Administrative Procedure Act.”²⁶⁷ Under the Wyoming Administrative Procedure Act, a district court may “hold unlawful and set aside” a decision to suspend or expel a student, if the decision is:

(A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) [c]ontrary to constitutional right, power, privilege or immunity; (C) [i]n excess of statutory jurisdiction, authority or limitations or lacking statutory right; (D) [w]ithout observance of procedure required by law; or (E) [u]nsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.²⁶⁸

III. ANALYSIS AND RECOMMENDATIONS

For many years prior to the passage of No Child Left Behind (NCLB), the federal government generally took a hands-off approach to public school administration. There were notable exceptions to this path—students with special needs—but, for the most part, education was administered locally. NCLB has not fundamentally altered this hands-off approach; most decisions are still made at the state and local levels.

However, over the past two decades, the federal government increasingly influences public school administration, most notably, the guidance issued by the Obama Administration to reduce racial disparities in the administration of student discipline. The Obama Administration’s guidance was far from perfect and sought to reduce suspensions and expulsions of

264. *Id.* § 21-4-306(b)(i)–(iii).

265. *Id.* § (c)(i).

266. *Id.* § (c)(ii).

267. *Id.* § (f).

268. *Id.* § 16-3-114(c)(ii)(A)–(E).

minority students without advising how to implement measures to reduce racially disproportionate school discipline. Additionally, the guidance did not recommend a replacement for traditional school discipline.

Nevertheless, the Obama Administration's guidance served as a starting point for a larger conversation about harsh school discipline. For years, the education community recognized that minority students and special education students have been disciplined at substantially higher rates.²⁶⁹ Despite the flaws of its guidance, the Obama Administration at least acknowledged that *something* should be done and emphasized the importance of reducing suspensions and expulsions of vulnerable populations. As a result, numerous school districts across the country considered the recommendations of the USDOE and began evaluating how suspensions and expulsions disproportionately impact minority students. As part of the evaluation process, many school districts went beyond simply considering how suspensions and expulsions affected minority students, and turned to how suspensions and expulsions impacted all students.

The Trump Administration, however, receded from this position entirely. The Trump Administration has yet to indicate willingness to provide guidance to schools regarding discipline as it is applied to minority students. The Trump Administration claims that existing antidiscrimination laws already address racial disparities in school discipline, flagrantly disregarding the U.S. Commission on Civil Rights' recognition of persisting, racial disparities among the administration of school discipline.²⁷⁰

A Pandora's Box remains open. After years of relying primarily on the harsh approach of suspensions and expulsions, schools have started *some* discussion examining the efficacy of harsh school discipline. It is now time for schools and state legislatures to move beyond discussion and towards reformative action.

This Article recommends starting school discipline reform with the following actions:

1. *Reinstate federal guidance regarding expulsions.* Even though the federal government has yet to issue directives requiring school districts to reduce suspensions and expulsions, past administrations have provided useful guidance in this area.²⁷¹ For example, in the 1970s, the federal government passed robust laws protecting

269. See generally U.S. COMMISSION ON CIV. RTS., MINORITIES IN SPECIAL EDUCATION (2007); Miner P. Marchbanks III & Jamilia J. Blake, *Assessing the Role of School Discipline in Disproportionate Minority Contact with the Juvenile Justice System: Final Technical Report*, TEXAS A&M U., (Aug. 2018); Lee Romney, *African-American Students with Disabilities Suspended at Disproportionately High Rates*, EDSOURCE (May 3, 2108), <https://edsource.org/2018/african-american-students-with-disabilities-suspended-at-disproportionately-high-rates/597052>; U.S. Department of Education *Takes Action to Deliver Equity for Students with Disabilities*, U.S. DEP'T EDUC., (Feb. 23, 2015), <https://www.ed.gov/news/press-releases/us-department-education-takes-action-deliver-equity-students-disabilities>.

270. See generally *supra* notes 5–6 and accompanying text.

271. See *supra* Part III.

disabled children; the strength of these laws grew in the past several decades.²⁷² If racial disparities in school discipline are similarly prioritized, federal guidance could lead to widespread action.

2. *Schools must adopt disciplinary policies that make expulsion an option of last resort—used sparingly only when required for the protection of other students.* Expulsion is used as a punitive measure rather than as a prophylactic measure. Schools and districts routinely suspend and expel students for actions that primarily hurt the students themselves (e.g. consumption of drugs or alcohol on school property). Such behavior certainly requires attention and consequences. But what is the benefit of kicking students out of school when the students are already struggling with issues leading to substance abuse? Schools and districts increasingly expel students for spontaneous, general threats against the school. Such threats should, of course, be taken seriously. However, schools and districts must also understand that students routinely act without thinking, and that the vast majority of kids who make a spontaneous threat lack the intention to act on that threat. Additionally, when a school expels a student who makes a threat against the school, the school can no longer monitor the student; the school loses access to the student and the opportunity to understand the student's thought processes and intention. Herein, the school forfeits the means to prevent a potentially dangerous incident from coming to fruition. And, more importantly, the school forfeits the opportunity to confront the issues and causes, which compelled the student to issue a threat. Often, the student may feel isolated, depressed, and hopeless—and that student could become legitimately dangerous.²⁷³ If the student, instead, remains in school, and the school treats the student with proper caution and a therapeutic approach, the school could more easily monitor that student and increase interventions when necessary. In general, the notion—that the only way to protect students by kicking out a small percentage of them—is false.
3. *Police officers should not be stationed at elementary schools or middle schools.* Given the recent frequency and severity of school shootings in the United States, it is tempting to believe that the presence of School Resource Officers (SROs)—regular police officers who are stationed at schools—would be beneficial. Leaving aside the question of whether a police presence at schools is the

272. See, e.g., Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 504 (1973); see also Individuals With Disabilities Education Act, 20 U.S.C. § 1401 (2019).

273. It should be noted, for example, that the student-shooter in Parkland, Florida, had been expelled and was no longer enrolled at Stoneman Douglas High School when the student-shooter returned to the school and killed seventeen people. Drew Griffin, Scott Glover, Jose Pagliery & Kyung Lah, *From 'Broken Child' to Mass Killer*, CNN (Feb. 16, 2018, 8:09 AM), <https://www.cnn.com/2018/02/16/us/shooter-profile-invs/index.html>.

most effective means to prevent school shootings, communities must recognize that reliance on SROs as a component of school discipline creates a new set of problems. For example, on a basic level, educators and police officers approach discipline differently. Teacher certification programs emphasize the importance of flexibility in dealing with young people.²⁷⁴ Police officers focus on securing a situation from danger.²⁷⁵ By approaching school discipline with the strictness inherent to law enforcement, schools risk introducing youth to the criminal justice system at a young age. Communities must ask whether it is truly desirable to bring more students into court.

4. *Schools should not seclude students unless such seclusion is necessary because a student is posing a risk to themselves or others.* Seclusion is highly punitive, and it can be an especially frightening experience for younger children. There is no evidence that the threat of seclusion actually improves behavior among kids.
5. *Schools should adopt greater due process protections for children who are facing expulsion.* Schools are not courts; schools are not equipped, nor should be expected, to provide the extensive due process rights that courts provide. At this point, however, the due process protections in many school districts provide little more than the bare minimum: notice and an opportunity to be heard. This is insufficient in light of what a child is facing—complete removal from a school. There are several, simple due process protections that school districts can enact.
 - a. *Hearing officers should be independent third parties.* Currently, school districts across the country may designate anyone of their choosing to serve as a hearing officer at an expulsion hearing. This is problematic because the people who are chosen to serve as a hearing officer are hired and paid by the school districts. This apparent conflict of interest sets the precedent that if the hearing officer does not meet expectations of the district, the district is unlikely to renew the hearing officer's contract. The district will likely select hearing officers who meet the district's expectations and make expulsion decisions in alignment with the district's desired outcomes. This is why expulsion is nearly an absolute certainty by the time a student appears before a hearing officer. The question at the hearing should be, "Will a student be expelled?" Instead, the question at the hearing is,

274. See generally *Reclaiming the Promise: A New Path Forward on School Discipline Practices*, AM. FED'N TEACHERS, <https://www.aft.org/position/school-discipline> (last visited Dec. 9, 2019).

275. DENV. POLICE DEP'T, OPERATIONS MANUAL, 13 (citing the number one aspect of law enforcement vision is "focusing on the prevention of crime and safety").

“For how long will the student be expelled?” The solution to this issue is to work with each state department of education for the provision of hearing officers. The state should create requirements for hearing officers and select and pay its hearing officers; then, hearing officers would be an entity independent of the districts and district incentives. Making hearing officers independent of district incentives is the single most important discipline due process reform.

- b. *There should be a right to confront and cross examine witnesses.* It should come as no surprise that students do not like getting into trouble. As a result, there are times when students will not be completely truthful when accusing other children of violating school rules. Because it is undesirable to transform classrooms into courtrooms, allowing students to informally question one another as witnesses should be a much easier process in the classroom than a courtroom. Examination of the student making the allegation that another student has committed a code violation should be allowed.
 - c. *Schools should be required to present evidence at least fifteen days before a formal hearing concerning expulsion.* Unfortunately, it is not unusual for schools to provide the evidence against a student just a few days before a hearing—or sometimes, not even until the hearing itself. This is unacceptable. Without time and notice of the evidence to be presented against a student, the student and the student’s family cannot prepare records or testimony to adequately address the allegations against the student. A student and a student’s family must be given adequate time to review the record when that student is facing a long-term removal from school.
6. *Students should be given the opportunity to “work off” suspensions and expulsions from their record.* Frequently, parents are concerned about what appears on student records. When students apply to college, colleges may receive records revealing troubling behavior or a high number of disciplinary referrals. Behavioral records do not necessarily bar students from college admission but could lead to admission issues. One should ask whether it makes sense to maintain long-term violations on a student’s record: Does it make sense to maintain violations that the student committed at age fourteen or fifteen when the student is now eighteen years old? When students prove their maturity, and have learned from past mistakes, schools should give students the opportunity to amend or even expunge their behavior record. A forgiving records policy would positively incentivize students to maintain good behavior and get help when they need it.

CONCLUSION

The majority of this Article focuses on school discipline laws in various jurisdictions within the Tenth Circuit. Mostly absent from the Article's exploration was the examination of how school discipline laws disproportionately impact students already vulnerable to discrimination. Research empirically demonstrates that students of color, students with disabilities, and LGBTQIA students all disproportionately experience school discipline—especially exclusionary school discipline like expulsions or referrals to law enforcement. Despite the clear evidence that these minority students do not commit school code violations or criminal violations at higher rates than their white, able-bodied, cis, and heterosexual-identifying peers, these minority students are most vulnerable to the slew of discipline laws described in this Article. The shortcomings and oversights of current school discipline law are particularly pronounced among minority students.

Communities, school districts, and schools need to broadly discuss disparities in code and law enforcement—particularly the enforcement disparities among schools. Improving the law governing school discipline, addressing the overly harsh and punitive school environments, and increasing the due process protections for students facing exclusionary school discipline will go far to mitigate disparities in school discipline. School discipline reform of this type will not only lay the foundation for addressing inequities and disparities but also improve conditions and education for students of all identities.