No. 34791-5-III

**COURT OF APPEALS FOR THE STATE OF WASHINGTON**
**DIVISION THREE**

**QUINCY MARIN**

**Appellant**

**v.**

**SPOKANE PUBLIC SCHOOLS NO. 81**

**Respondent**

# BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### State Cases



### Federal Cases

**Cases from Other State Jurisdictions**



**Constitutional Provisions**

**Statutes**



**Session Laws**



**Regulations**



**Other Authorities**

## I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 75,000 members dedicated to the preservation and promotion of civil liberties. The ACLU has worked both to advance the constitutional right to education and to combat the school to prison pipeline, including in collaboration with community stakeholders in Spokane. The ACLU has submitted numerous *amicus* briefs to this Court and others.

## II. ISSUE TO BE ADDRESSED BY *AMICUS CURIAE*

1. Whether this Court should review the school board's decision upholding Quincy's suspension *de novo*, applying heightened scrutiny.
2. Whether a student can be long-term suspended, meaning a months-long loss of schooling, for a first-time instance of misconduct, which did not involve a true threat.

## III. STATEMENT OF THE CASE

Quincy Martin, a then 17-year-old homeless African-American was long-term suspended for 151 days[1] from Spokane Public Schools for misbehaving at a school dance during the 2015-2016 school year. CP 108. The incident started with a verbal dispute between Quincy and several girls. CP 82-83. The incident led to Mr. Skidmore, the principal's assistant

[1] The school board, on review, shortened the suspension imposed to 61 days. CP 60-61.

at Lewis and Clark High School, ordering Quincy to leave the dance. CP 64. Quincy, though verbally agitated and frustrated, complied. CP 92. Nevertheless, after Quincy had left the dance and was waiting outside for his date (though still verbally venting his frustration and using profanity), Mr. Skidmore told Quincy he was emergency expelled. CP 93.

At that point, Quincy said, "[y]ou know what? I'm going to go to [the] school board and I'm going to basically let them know about you putting your hands on me." CP 93. This account was substantiated by Assistant Principal Tracey Leyde and by Mr. Skidmore. CP 73; CP 95. Ms. Leyde and Mr. Skidmore also recall Quincy saying something to the effect of, "I am going to the school board. I did not like how you put your hands on me. If you ever come near me again you'll regret it," CP 73, or "touch me again and see what happens." CP 95.

Based upon that single episode, the high school and Spokane Public Schools first emergency expelled Quincy, CP 107, and converted the emergency expulsion to a long-term suspension for the remainder of the school year (151 school days). CP 108. The ultimate justification offered for the long-term suspension was "Threats to Staff." *Id.*

At a subsequent school discipline hearing, the hearing officer reduced the long-term suspension to 61 days. CP 60-61. The decision gave no findings or reasons why it found a basis to reduce the length of the

suspension. *Id.* Quincy then appealed to the board without being apprised of the rationale for the hearing officer's decision. CP 58-59. The school board upheld Quincy's long-term suspension and this appeal followed.

## IV. ARGUMENT

### A. This Court Should Review the School Board's Decision to Uphold the Suspension *De Novo* and Determine Whether the Long-Term Deprivation of a Student's Right to Education Was Justified

#### 1. RCW 28A.645.030 requires this Court to review the school board's decision *de novo*.

The Washington education statutory and regulatory schemes afford a student and their family a right to challenge or appeal imposition of exclusionary discipline. Students who have received a long-term suspension have three days from receipt of notice of the discipline to request a discipline appeal. WAC 392-400-270. If the discipline hearing officer upholds the imposed discipline, then the student and family must timely appeal to the school board or disciplinary appeal council (if one exists). WAC 392-400-315. Should the board or council uphold the imposed discipline, Washington's Common Schools Code provides a process for persons to appeal to Washington State superior court from a school board's decision. RCW 28A.645.010.

The applicable statute states that the appeal of a long-term suspension "**shall**" be heard *de novo* by superior court. RCW 28A.645.030

(emphasis added). *Amicus* agrees with and adopts Appellant's argument setting forth why the school board's decision to uphold Quincy's suspension was quasi-judicial and therefore subject to *de novo* review.

The District argues for a more relaxed standard of review, urging this Court to "borrow" the standards from the Administrative Procedures Act ("APA"). Even if this Court accepts that argument, it must still evaluate whether the long-term suspension here is legally justified. Under the APA, the Court still has authority to determine whether the agency erroneously interpreted or applied the law. RCW 34.05.570(3)(d) (APA standard for judicial review of agency adjudicative proceeding); *Clarke v. Shoreline Sch. Dist. No. 412, King Cnty.*, 106 Wn.2d 102, 110, 720 P.2d 793 (1986) (finding under statute with standards identical to the APA, reviewing court is "free to determine the correct law independent of a hearing officer's decision and apply it to the facts found by the hearing officer"); *Campbell v. State Empl. Security Dep't*, 180 Wn.2d 566, 574, 326 P.3d 713 (2014) ("[T]he process of applying the law to facts is a question of law subject to *de novo* review" in case subject to the APA.).

Given the paramount constitutional importance of the right to education, and the significant deprivation of that right via long-term suspension, this Court should scrutinize the school board's interpretation of the laws governing long-term suspension and application of that law to

the facts of this case.

### 2. *De novo* review of a student's long-term suspension is essential to protect the constitutional right to education.

#### *a. Long-term suspension deprives students of their constitutional right to education and has serious long-term consequences.*

Washington State's Constitution, in Article IX, section 1 makes it the "paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." Wash. Const. art. IX, § 1. Coexisting with the State's duty to affirmatively act to uphold the right is a corresponding right for students that "has equal stature." *Seattle Sch. Dist. No. 1, King Cnty. v. State*, 90 Wn.2d 476, 511-12, 585 P.2d 71 (1978); *McCleary v. State*, 173 Wn.2d 477, 518, 269 P.3d 277 (2012) ("[T]he corresponding right is likewise elevated to a paramount status."). The right is a "positive constitutional right," requiring Courts to review whether "state action achieves or is reasonably likely to achieve the constitutionally prescribed end." *McCleary*, 173 Wn.2d at 519 (internal quotation marks omitted).[2] Washington's constitution is unique among the states both in the language used and in making education paramount among the State's duties. *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 498.

[2] The *McCleary* court also rejected the argument that it should apply rational basis review to determine whether the state had met its constitutional duty. *McCleary*, 173 Wn.2d at 519.

The seminal case of *Goss v. Lopez* recognized that a long-term suspension (unlike exclusion for shorter period) effectuates a more significant deprivation of a student's interest in continuing education than suspension for a shorter period.[3] A deprivation of education for "more than a trivial period" is "a serious event in the life of the suspended child" that "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Goss v. Lopez*, 419 U.S. 565, 575-76, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). The need for *de novo* review is apparent in light of the significant of the constitutionally protected interest that is harmed when a student is long-term suspended.

The Washington legislature has similarly recognized that suspending students from school undercuts the constitutional right of every student to education. Most recently, the legislature recognized the State's constitutional obligation meant that no one is excluded and highlighted "additional work was needed to fulfill the promise of

[3] As a threshold matter, this Court should reject the District's argument that Quincy was merely "excluded" from a particular high school, not "suspended from school." Resp.'s Br. at 22-23. Washington law defines suspension as "a denial of attendance (other than for the balance of an immediate class period for 'discipline' purposes) for any single subject or class, or for any full schedule of subjects or classes for a stated period of time. A suspension also may include a denial of admission to, or entry upon, real and personal property that is owned . . . by the school district." WAC 392-400-205. Quincy's exclusion from Lewis and Clark high school clearly falls within this definition. The fact that Quincy was offered some form of alternative education does not eliminate the District's duty to comply with constitutional and statutory limits on suspension and expulsion.

excellence and opportunity for students of certain demographic groups." RCW 28A.600.015, note; Laws of 2016, ch. 72. In particular, the Legislature noted the need to "reduce the length of time students of color are excluded from school due to suspension and expulsion and provide students support for reengagement plans." *Id.*

Research also confirms that exclusionary school discipline—like long-term suspension—has significant long-term consequences for students and the community. There is broad national consensus that suspension and expulsion harm students.[4] Students who are out-of-school suspended and expelled are significantly less likely to graduate from high school.[5] Students who miss school due to suspension find it hard to catch up with assignments, and consequently drop out. In one survey of high school dropouts, 43% said a top reason they dropped out was because they missed too many days of school and could not catch up.[6] Each subsequent disciplinary action increases the likelihood of dropping out.[7]

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[4] Emily Morgan, et. al., *The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and out of the Juvenile Justice System*, Council of State Gov'ts (2014), https://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf.

[5] U.S. Dep't of Justice & U.S. Dep't of Educ., *Dear Colleague Letter: Non-Discriminatory Administration of School Discipline*, 4-5 (Jan. 8, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf (collecting studies).

[6] John Bridgeland et al., *The Silent Epidemic: Perspectives of High School Dropouts*, The Bill & Melinda Gates Foundation, iii (Mar. 2006), https://docs.gatesfoundation.org/documents/thesilentepidemic3-06final.pdf.

[7] *The School Discipline Consensus Report*, *supra* note 4, at 9.

The negative impacts of suspension and expulsion extend over a lifetime and into the community. Students who do not complete high school earn less over their working careers: high school dropouts earn $200,000 less than high school graduates.[8] Students who have been suspended or expelled are more likely to become involved in the juvenile and criminal justice systems. One study showed that suspended students were three times as likely to have contact with the juvenile justice system within a year.[9] Researchers have estimated that suspensions nationally result in tens of billions of dollars in social cost.[10] The extensive and severe consequences of long-term suspension support a *de novo* standard of review in addition to the clear statutory language and case law.

*b. Because education is a paramount constitutional right in Washington, as part of its de novo review, this Court should evaluate whether a suspension is tailored to promote school safety and order.*

Applying a *de novo* standard of review to long-term suspensions is also consistent with the importance of the constitutional rights at stake. In light of the importance of education under Washington's Constitution and

[8] Claudio Sanches & Linda Wertheimer, *School Dropout Rates Add to Fiscal Burden*, Nat'l Public Radio (July 24, 2011), http://www.npr.org/2011/07/24/138653393/school-dropout-rates-adds-to-fiscal-burden.
[9] *The School Discipline Consensus Report*, *supra* note 4, at 11.
[10] Russel W. Ramberger & Daniel J. Losen, *The High Cost of Harsh Discipline and its Disparate Impact*, Ctr. For Civil Rights Remedies, 20 (June 2016), https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA_HighCost_6-2_948.pdf.

the long-term serious consequences of suspension and expulsion, it is appropriate that the State bear the burden of proving that (1) infringement of the right is necessitated by a substantial governmental interest, and (2) the governmental interference is narrowly drawn to meet the compelling interest involved. *See In re Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998); *cf. Plyler v. Doe*, 457 U.S. 202, 223-24, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (court's analysis determined whether state law that deprived children of right to education and imposed "lifetime hardship" on students "furthers some substantial goal of the state").[11]

There is no dispute that the government has a substantial interest in maintaining school safety and a beneficial learning environment. The more pressing question, then, is whether the long-term deprivation of education for 61 days was, under the circumstances, sufficiently "narrowly drawn" that it was necessary to achieve school safety and order.

Washington's regulations governing student discipline implicitly

[11] The District argues for an extremely deferential standard of review, citing to cases from jurisdictions that either do not recognize a fundamental constitutional right to education, or that have constitutional language different from Washington's. *See, e.g.*, *Doe v. Superintendent of Schs. of Worcester*, 421 Mass 117, 653 N.e.2d 1088 (Mass. 1995) (holding that the Massachusetts Constitution does not guarantee each student the fundamental right to education); Ill. Const. art. X, § 1 (establishing only a "fundamental goal" that the state provide for educational development of all persons); Ariz. Const. art. XI § 1 (the legislature "shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system."); Ark. Const. art. XIV, § 1 ("the State shall ever maintain a general, suitable, and efficient system of free public schools"). Those cases are inapposite. *Cf. Seattle Sch. Dist. No. 1*, 90 Wn.2d at 498 (finding such difference in language and interpretation rendered comparisons with other states "equally inapposite" or "equally irrelevant").

recognize that long-term suspensions should be tailored to the particular student and situation. WAC 392-400-260(3) requires school districts to consider "the nature and circumstances of the violation" and whether they "reasonably warrant a long-term suspension and the length of suspension involved." Although school boards may establish general rules about corrective action that may be taken as a consequence of proscribed misconduct, disciplinarians must be "allowed to grant exceptions in cases involving extenuating or exceptional circumstances." WAC 392-400-260(3)(a). Moreover, "as a general rule, no student shall be suspended for a long term unless another form of corrective action reasonably calculated to modify his or her conduct has been previously imposed upon the student as a consequence of misconduct of the same nature," subject to limited exceptions discussed in section IV.B.1 of this Brief. WAC 392-400-260. These regulations functionally require the school district to ensure that long-term suspension is both tailored and a necessary corrective action for a particular student and situation. Accordingly, this Court should determine *de novo* whether the school board correctly applied this law and sufficiently narrowly tailored the long-term suspension in this case to the circumstances.

## B. The School Board Misapplied the Law in Upholding a Long-Term Suspension Based on a Single Incident that Did not Constitute a True Threat

### 1. A school district cannot issue a long-term suspension unless a student's actions constitute "exceptional misconduct."

Under regulations promulgated by the Office of Superintendent of Public Instruction, "as a general rule, no student shall be suspended for a long term unless another form of corrective action reasonably calculated to modify his or her conduct has previously been imposed upon the student as a consequence of misconduct of the same nature." WAC 392-400-260(4). The only exception to this rule is for offenses designated by a school board, after consultation with an ad-hoc citizen's group, to be "exceptional misconduct." WAC 392-400-260(3).

It is undisputed that Quincy had no prior disciplinary history with Spokane Public Schools. CP 101. Thus, the District could long-term suspend Quincy only if he engaged in "exceptional misconduct" under District policy. The District asserts that Quincy made a "threat to staff," which is defined as exceptional misconduct. CP 156. But Quincy's statements do not amount to a "threat" under either the First Amendment or the District's own definition.

#### *a. Quincy's statements do not constitute a true threat and do not constitute exceptional misconduct.*

Quincy's statements do not constitute a "threat" under either the

District's own definition, or the "true threat" analysis applied to student statements. The District's policies in effect at the time of Quincy's suspension define "threats of violence or harm" as "communications that create reasonable fear of physical harm to a specific individual or individuals, communicated directly or indirectly by any means." Resp.'s Br. App'x A at 12. This definition is similar to the standard applied by courts evaluating whether a statement falls within the class of "true threats" unprotected by the First Amendment. *See, e.g., Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969) (per curiam); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) ("[T]hreats of violence are outside the First Amendment.");*Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (noting that the First Amendment permits restrictions upon the content of speech only in a few limited areas, including true threats); *Elonis v. United States*, 135 S. Ct. 2001, 192 L.Ed.2d 1 (2014) (analyzing whether statements amount to true threat).

The Washington Supreme Court has defined a "true threat" as "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another individual." *State v. Trey M.*, 186 Wn.2d 884, 894, 383

P.3d 474 (2016) (quoting *State v. Williams*, 144 Wn.2d. 197, 207-08, 26 P.3d 890 (2001)) (internal quotation marks and alterations omitted). Federal courts define a true threat to "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. Courts have applied the "true threat" standard to determine whether a student can be disciplined for speech. *See, e.g., J.S. ex. rel. H.S. v. Bethlehem Area Sch. Dist.*, 569 Pa. 638, 653, 807 A.2d 847 (Pa. 2002) (evaluating whether a student's speech contained a true threat unprotected by the First Amendment).

The only specific statement relied upon by the District to indicate a true threat does not indicate impending violence, but rather a statement of Quincy's desire to engage in a political response to perceived unfairness. Although the record is somewhat inconsistent on exactly what Quincy said, the parties generally agree that Quincy stated he was going to the school board because he disliked that Mr. Skidmore put hands on him. CP 73 (Leyde Statement), CP 93 (Quincy Statement), CP 95 (Skidmore Statement). District employees also stated that Quincy said if Mr. Skidmore physically engaged Quincy again, Mr. Skidmore would regret what happened. CP 72 (Leyde Statement); CP 95 (Skidmore Statement). That statement was made close in time to when Quincy specifically

indicated that he was going to the School Board, supporting the inference that the "regret" referred to Quincy exercising his right to complain to the School Board. CP 93 (Quincy's account); CP 73 (Leyde's account).

In context, Quincy's statement indicates his desire to go to the School Board to complain. There is no evidence supporting that it was a serious expression of intent to inflict bodily harm. Neither does the fact that Quincy used profanity in expressing his desire to engage in political advocacy convert his statements to a threat. *Cf. State v. Locke*, 175 Wn. App 779, 791, 307 P.3d 771 (2013) (holding email calling the governor a "f***ing c***" and stating she "should be burned at the stake" not a true threat). Rather, the profanity is more indicative of a "hyperbolic expression of frustration" by an adolescent. *Cf. State v. Kohonen*, 192 Wn. App. 567, 582, 370 P.3d 16 (2016).

Second, Quincy's statement that Mr. Skidmore would "regret" it if the administrator put hands on him again is not a threat because it is conditioned on an event that may never occur. Whatever action Quincy promised is conditioned upon Mr. Skidmore's physically engaging (i.e. putting hands on) Quincy again. Such a conditional statement is not a true threat. In *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), the U.S. Supreme Court considered whether a young Vietnam War protester could be criminally punished for stating "[i]f they

ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Court held that the statement was not a threat because it was "expressly made conditional upon an event—induction into the armed forces—which the petitioner vowed would never occur." *Id.* at 707. Here, because there was no immediately foreseeable instance in which Mr. Skidmore would again physically touch Quincy, his statement was conditional in nature and not a true threat.

**2. The District is limited to short-term suspension as punishment for profane or disruptive speech.**

The District argues that it need not prove a student's statement is a true threat before disciplining the student. Resp.'s Br. at 35. This is correct, but does not justify a long-term suspension in this case. Schools may discipline students for speech that is unprotected by the First Amendment, including true threats and libel. *See, e.g.*, *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616, 194 Ed. Law Rep. 497 (5th Cir. 2004). Moreover, in the special context of schools, administrators may discipline students for speech that would otherwise be protected by the First Amendment. Schools may, for example, discipline students for otherwise protected speech that causes a substantial disruption to the orderly operations of schools or protected speech that advocates unlawful drug use. *See Morse v. Frederickson*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed.

2d 290 (2007) (advocates unlawful drug use); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-82, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) (lewd speech); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (substantial disruption).

Nevertheless, under Washington law and the District's policies in effect at the time Quincy was suspended, a first time offense can be punished with long-term suspension only if it is "exceptional misconduct." WAC 392-400-260(3)-(4); *see* Resp.'s Br. App'x A at 19 (incorporating language from WAC 392-400-260(3) into District policy), 25 (defining exceptional misconduct). Disruptive, profane, or insubordinate speech is not among the District's designated exceptional misconduct. Resp.'s Br. App'x A at 25. Thus, law and school policy require that a first time instance of disruptive or profane speech be punished, at most, by a short term suspension of up to 10 days. A school can (consistent with the First Amendment) punish a student for speech that falls short of a true threat. But, Washington law limits the school to short-term suspension as punishment for a first time incident of such speech.

**3. In considering whether the "nature and circumstances" justify suspension, schools should consider disparate impact and evidence-based alternatives.**

*a. Students of color and low-income students, like Quincy, are disproportionately suspended and expelled.*

Washington schools now better understand and are grappling with addressing an unintended consequence of traditional school discipline practices – the practices and policies have resulted in disproportionate rates for students of color, low-income students, and homeless students receiving out-of-school suspensions and expulsions.

Students of color are suspended or expelled at higher rates than their white student peers.[12] In Washington, 7.95% of Black students were suspended or expelled in 2016, compared to 3.19% of White students.[13] American Indian students, Pacific Islander Students, multi-racial students, and Latinx students are similarly suspended at higher rates than average.[14] Low income students are nearly three times as likely to be suspended as students who are not low income.[15] These disparities are also present in Spokane Public Schools. In 2015, black students in Spokane were

[12] Maria Flores & Kathleen Callahan, *Closing the Opportunity Gap in Washington's Public Education System: 2017 Annual Report*, Educ. Opportunity Gap Oversight & Accountability Comm., 15 (2017), http://www.k12.wa.us/Workgroups/EOGOAC/pubdocs/EOGOAC2017AnnualReport.pdf

[13] *Id.*

[14] *Id.* In 2016, the suspension and expulsion rates for these groups are: American Indian, 6.65%; Pacific Islander, 5.07%; multi-racial, 4.3%; Latinx, 4.19%.

[15] Office of Superintendent of Public Instruction, *Performance Indicators – Data and Analytics: Discipline*, http://www.k12.wa.us/DataAdmin/PerformanceIndicators/DataAnalytics.aspx#discipline (follow "Discipline Rates (School years 2012-13, 2013-14, 2014-15)" hyperlink located under the "Data Files" subheading to download Excel data file; then, in Excel file select the "Summary" tab). In 2015, 5.95% of low income students were suspended compared to 1.86% of non-low income students.

suspended almost two times as often as other students,[16] and low-income students account for 80% of students suspended to date in the 2016-2017 school year, despite being only 48% of the district population.[17]

When a disciplinary policy has a disparate impact, schools should consider whether the policy is necessary to meet an important educational goal, or whether comparably effective alternative policies (such as treating the incident here as profanity or disruptive speech rather than as "exceptional" misconduct) would meet the district's aims.[18] Additionally, these same considerations should animate the District's consideration of whether the "nature and circumstances" of any particular incident justify the suspension of any individual student. In particular, given the documented racial disparity in suspension, the District should consider whether Quincy, as a low-income Black teenager, was perceived as more threatening, or more deserving of strict punishment than a similarly situated white teenager would have been.

*b. Student misbehavior may be a product of other causes that can be safely addressed in the school*

[16] Eli Francovich, *Spokane Public Schools Tries Active but Patient Approach to Decrease Suspensions*, Spokesman Review (May 22 2016), http://www.spokesman.com/stories/2016/may/22/spokane-public-schools-tries-active-but-patient-ap/

[17] Eli Francovich, *Poorer Spokane Students More Likely to Be Suspended than their Wealthier Peers*, Spokesman Review (Feb. 13, 2017), http://www.spokesman.com/stories/2017/feb/13/poorer-spokane-students-more-likely-to-be-suspende/

[18] *Dear Colleague Letter*, *supra* note 5.

> *environment, without resort to long-term suspension.*

Student misbehavior can stem from various causes-from hunger, stress, disability, health issues, unaddressed trauma,[19] or developmental differences between children and adults.[20] Students like Quincy, who are homeless or have experienced poverty, can also experience a higher level of trauma and stress that can lead to more negative outcomes in school.[21] Just as schools can teach students academic subjects, they can teach behavioral expectations and support students who do not meet those expectations in addressing their needs. *Cf. Seattle Sch. Dist.*, 90 Wn.2d at 516 (defining basic education as "all that series of instruction and discipline which is intended to enlighten the understanding, correct the temper, and form the manners and habit of youth, and fit them for usefulness in the future").

The U.S. Departments of Education and Justice have recognized that evidence-based, multi-tiered behavior frameworks, such as positive behavioral interventions and supports, can improve school climate and

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[19] *See, e.g.*, Joe Morin & Rosemary Battalio, *Construing Misbehavior: The Efficacy Connection in Responding to Misbehavior*, 6 J. Positive Behav. Interventions 251, 252 (2004).

[20] *See State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359, 364-65 (2015) (discussing studies regarding features of youthfulness and indicating that fundamental differences exists between adolescent and mature brains in a host of areas); *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 131 S. Ct. 2394, 180 L. Ed. 2d. 310 (2011) (recognizing that developmental differences between children and adults affect behaviors and decision-making).

[21] *The School Discipline Consensus Report*, *supra* note 4, at 123, 137.

safety without resort to suspension.[22] Similarly, the Council of State Governments has recognized that schools can use a variety of evidence-based alternatives to suspension that address the underlying causes of student misbehavior while keeping students in school.[23] In an individual student discipline case, schools considering whether the nature and circumstances of the offense justify long-term suspension should also consider whether evidence-based alternatives to suspension could support the student in meeting behavioral expectations.

## V. CONCLUSION

Students in Washington have a constitutional right to education, and school exclusion should be reserved for circumstances where necessary to protect school safety and order. This Court should review the decision to uphold the suspension *de novo*. Under the circumstances, a 61 day suspension for a single instance of misconduct that did not amount to a true threat, is excessive.

RESPECTFULLY SUBMITTED this 10th day of April, 2017.

By: /s/Nicole K. McGrath
Nicole K. McGrath, WSBA #32330

[22] *Dear Colleague Letter*, *supra* note 5 (describing remedies including providing school-based supports for struggling students, and developing and implementing strategies for teaching, including the use of appropriate supports and interventions, which encourage and reinforce positive student behaviors and use exclusionary discipline as a last resort.)
[23] *The School Discipline Consensus Report*, *supra* note 4, at 109-181 (collecting options and discussing research).

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No. 347915-III

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**SPOKANE PUBLIC SCHOOLS NO. 81**

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below, I caused to be served a copy of the *BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON* in the following manner:

| **COUNSEL FOR APPELANT** | **COUNSEL FOR RESPONDENT** |
|---|---|
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