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[REDACTED]

Attorneys for Plaintiff [REDACTED]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

[REDACTED], an individual,) Civil No. [REDACTED]
)
Plaintiff,)
)
vs.)
)
[REDACTED], an)
individual; and COLORADO SCHOOL)
DISTRICT NO. [REDACTED], a governmental)
or quasi-governmental entity in the form)
of a school district organized under)
Colorado law,)
)
Defendants.)
)

**MEMORANDUM OF POINTS AND AUTHORITIES
SUBMITTED BY PLAINTIFF [REDACTED]
IN SUPPORT OF APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND ORDER TO SHOW
CAUSE IN RE PRELIMINARY INJUNCTION**

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I

STATEMENT OF FACTS

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3 Plaintiff ██████████ (“Plaintiff”) was expelled from the “special remedial education”
4 program conducted at ██████████ County High School (“█████CHS”) by Defendant Colorado School District
5 No. ██████ (“District”) on ██████████ 2005 following his arrest on ██████████, 2005. The arrest, made by
6 Defendant ██████████ (██████████ was made in connection with an alleged ██████████, 2005
7 incident at ██████CHS involving the purported theft of approximately \$150 in cash from the desk of the
8 ██████CHS school Principal, ██████████ (“██████████”). There were no witnesses to the actual theft at the
9 time it allegedly occurred; Plaintiff’s arrest came pursuant to a warrant obtained by Defendant ██████ on
10 ██████████, 2005 after he determined that three students had been in the vicinity and thus each had the
11 opportunity to commit the theft during the relevant time-frame. Defendant ██████ and Plaintiff’s mother,
12 ██████████ have had an ongoing feud of long-standing arising from Ms. ██████████’s position as
13 Town Treasurer of the City of ██████████, the entity which employs Defendant ██████ as a police
14 officer. In the course of her duties as Treasurer, Ms. ██████████ has had the occasion to reprimand
15 Defendant ██████ over issues involving, for example, Defendant ██████’s negligent handling of the local
16 police department’s police dog program.¹ Ms. ██████████ and Defendant ██████ have also exchanged
17 differences on matters involving the City-funded budget for one of Defendant ██████’s “pet” police
18 programs,² as well as issues involving compensation claimed by Defendant ██████ but which Ms. ██████████
19 has contended, on behalf of the City, is not due.³ The evidence at trial will show that Defendant ██████
20 is a particularly “badge heavy,” revenge-oriented police officer who in response to the personnel issues
21 as between himself and Ms. ██████████ has now decided to “raise the stakes” in the form of “payback” for
22 the perceived actions of Plaintiff’s mother by arranging for Plaintiff’s arrest on unsubstantiated charges
23 as well as inducing the Defendant District to wrongfully expel Plaintiff from school. Moreover,
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25
26 ¹ As related in detail in the Declaration of ██████████ ██████████ submitted herewith (“██████████
Declaration”). See in particular ██████████ Declaration at p. 2, lns. 11 - 23.

27
28 ² See ██████████ Declaration at p. 2, lns. 24 - 28, and p. 3, lns. 1-2.

³ See ██████████ Declaration at p. 2, lns. 3 - 5.

1 Defendant District has compounded the wrongs inflicted by Defendant [REDACTED] by instructing third-party
2 witnesses not to cooperate by giving statements to either Plaintiff's counsel or to the private investigator
3 hired by Plaintiff's counsel to investigate the circumstances surrounding Plaintiff's arrest,⁴ as well as by
4 attempting to intimidate prospective material witnesses.⁵

5 Plaintiff seeks immediate injunctive relief in the form of a Temporary Restraining Order and
6 Order to Show Cause in re Preliminary Injunction as a consequence of Defendant District's summary
7 expulsion of Plaintiff from school on April 1, 2005 following a visit by Defendant [REDACTED] during the
8 course of which Defendant [REDACTED] intimated that Plaintiff had "been charged with a felony."⁶
9 Specifically, Plaintiff seeks readmission to Defendant District's "special remedial education" program at
10 [REDACTED] CHS in order that he may timely complete his senior year of high school, graduate as scheduled in
11 December, 2005, and thereafter pursue his post-secondary education ambitions.⁷ Defendant District's
12 expulsion of Plaintiff was made without affording Plaintiff any of the constitutionally-required
13 procedural due process safeguards to which Plaintiff was entitled, despite Plaintiff having made specific
14 demand upon the District for proper notice of the District's basis for his expulsion, the opportunity to be
15 heard, and all other applicable protections. Specifically, on [REDACTED] 2005, in the immediate aftermath
16 of his [REDACTED] 2005 expulsion, Plaintiff delivered the letter referenced as Exhibit "A" in the
17 Compendium of Exhibits submitted herewith ("Compendium") to Ms. [REDACTED] as the District's
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19
20 ⁴ See the Declaration of [REDACTED] ("[REDACTED] Declaration") submitted herewith at p. 2, Ins. 17-
21 27.

22 ⁵ See the Declaration of [REDACTED] ("[REDACTED] Declaration") submitted herewith at p. 2, Ins. 4 -
23 22.

24 ⁶ In point of fact, Plaintiff had not been formally charged with *anything*, and has not been so
25 charged as of the time of filing of Plaintiff's instant Application. He was released on bail within an hour
26 of his [REDACTED], 2005 arrest.

27 ⁷ Plaintiff was attending Defendant District's "special remedial education" program because he
28 has special education needs. Following poor academic performance in science and geometry while
attending the regular high school curriculum, Plaintiff's mother applied on his behalf for, and Plaintiff
was granted, admission into [REDACTED] CHS' program wherein students receive particular attention in the areas in
which they are academically or otherwise deficient. See [REDACTED] Declaration at p. 3, Ins. 23 - 28, and p.
4, Ins. 1 - 3.

1 representative. The District responded two days later by delivering the letter marked Exhibit "B" in the
2 Compendium on ██████ 2005. In that letter, the District banished Plaintiff to a program of "home
3 study" wherein he was supposed to report for one hour each Friday to drop off completed assignments
4 and receive new assignments. Supposedly, teaching materials as well as access to teaching staff
5 members were to be afforded Plaintiff.⁸ Seeking to look good on paper while in actual fact deliberately
6 depriving Plaintiff of the ability to further carry on meaningful coursework, Defendant District next
7 failed to furnish any of the educational necessities referenced in Ms. ██████'s ██████, 2005 letter.⁹
8 These blatant efforts to permanently sabotage Plaintiff's chances of completing his high school
9 education continue on an ongoing basis as of the time of filing of this Application for injunctive relief
10 (see further, ██████ Declaration at p. 4, Ins. 13 - 28, and p. 5, Ins. 1 - 23; and ██████ Declaration at p. 2,
11 Ins. 8 - 28, and p. 3, Ins. 1 - 24).

12 Overhanging this entire situation is the unmistakable, ugly pall of racial prejudice. Plaintiff is
13 one of three original Hispanic students in ████ CHS' special remedial education program; now, two of these
14 students, including Plaintiff, have been expelled by Defendant District, leaving but a single lone
15 Hispanic.¹⁰ When a group of seven of the District's Caucasian students were expelled approximately
16 three weeks ago in the aftermath of drug-related arrests, the District leased space in a local bank building
17 for use as a separate classroom and afforded these students their own full-time special education
18 teacher.¹¹ Plaintiff, accused by Defendant ██████ (but not yet charged) of stealing \$150 from Principal
19

21 ⁸ As set forth in Principal ██████'s own letter dated ██████ 2005 and delivered on the afternoon
22 of April 4, 2005 as directed to ██████ ██████ (see Compendium, Exhibit "B").

23 ⁹ Plaintiff and his mother ██████ appeared as directed at ████ CHS' campus on Friday, ██████ 2005,
24 only to be told that not a single staff teacher to which Plaintiff had supposedly been assigned was
25 available to see them, and that the school had no books or other materials available for Plaintiff to use
26 during his studies. These facts were attested to by Ms. ██████ herself when she signed a memorandum
27 entitled "Work Tres Can't Do" (see Compendium, Exhibit "C"). Plaintiff's counsel brought these facts
28 to the attention of Defendant District's counsel prior to the filing of these proceedings (see
Compendium, Exhibit "E", and ██████ Declaration at p. 2, Ins. 12 - 16), all to no avail.

¹⁰ According to the most recent United States Census, Chaffee County on the whole is composed of
approximately 8.6% Hispanic residents.

1 ■■■■■s desk, has by contrast been relegated to a purported program of “home study” without access
2 to instructors, textbooks, other necessary teaching materials,¹² or even the ability to turn in his “make-
3 work” assignments unless they are typewritten. The implications of this disparate treatment between
4 Caucasian students charged with serious drug offenses, on the one hand, versus Plaintiff’s treatment as a
5 Hispanic merely accused by a single, biased police officer of a single incidence of petty theft, on the
6 other, are obvious.

7 Plaintiff’s only recourse in the face of the onslaught of Defendant ■■■■■ personal vendetta
8 against his mother, coupled with Defendant District’s continuing denial of Plaintiff’s rights to both an
9 education as well as his constitutional rights to notice and a fair and impartial hearing of the charges
10 upon which the District based its improper decision to expel Plaintiff from school, is the equitable power
11 of this Court to enjoin and restrain Defendant District from continuing its wrongful actions by ordering
12 the District to readmit Plaintiff to the ■■■■■CHS “special remedial education” program forthwith.

14 II

15 PLAINTIFF’S CONSTITUTIONAL RIGHTS

16 HAVE BEEN ABROGATED BY DEFENDANT DISTRICT

17 It is fundamental that “...the right to attend the public schools is a civil right or privilege” within
18 the scope of the due process requirements of both the United States as well as the Colorado
19 Consitions, and further that “Unauthorized expulsion of pupils from school under our laws,
20 constitution and decisions, deprives them of a civil right.” *Zavilla v. Masse*, 112 Colo. 183, 188, 147
21 P.2d 823 (1944). This right, created by both the Colorado Constitution as well as by Colorado statutory
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23
24 ¹¹ In other words, at least as to Caucasian students, the District has acknowledged its obligation
25 under C.R.S. §22-33-203(2)(a) to “...provide, for any student who is expelled from the school district,
26 any educational services that are deemed appropriate...to enable the student to return to the school in
27 which he or she was enrolled prior to expulsion, to successfully complete the GED, or to enroll in a
28 nonpublic, nonparochial school or in an alternative school...” The Colorado Legislature said specifically
that “The educational services provided pursuant to this section are designed to provide a second chance
for the student to succeed in achieving an education.” C.R.S. §22-33-203(2)(b). By contrast to the way
Caucasian students are being treated, Plaintiff has been given *no chance*.

¹² See Compendium, Exhibit “C”.

1 law (see *Florman v. School District No. 11*, 6 Colo.App. 319, 40 P. 469, 470 (1931)), is protected by the
2 Due Process Clause of the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct.
3 2701, 33 L.Ed.2d 548 (1972).

4 The United States Supreme Court made the rights of persons situated similarly to Plaintiff very
5 clear in its decision in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). In *Goss*, the
6 Court opined:

7 “School authorities here suspended appellees from school for periods of
8 up to 10 days based on charges of misconduct. If sustained and recorded,
9 those charges could seriously damage the students’ standing with their
10 fellow pupils and their teachers as well as interfere with later opportunities
11 for higher education and employment. It is apparent that the claimed right
12 of the State to determine unilaterally and without process whether that
13 misconduct has occurred immediately collides with the requirements of
14 the Constitution.”

15 *Goss, supra*, is “The judicial fountainhead of procedural due process rights of school children.”
16 *Bivens v. Albuquerque Pub. Sch.*, 899 F.Supp. 556, 561 (D.N.M. 1995), *aff’d without op.* 131 F.3d 151
17 (10th Cir. 1997).

18 The *Goss* Court went on to say:

19 “Appellees were excluded from school only temporarily, it is true, but the
20 length and consequent severity of a deprivation, while another factor to
21 weigh in determining the appropriate form of hearing, ‘is not decisive of
22 the basic right’ to a hearing of some kind. [Citation omitted] The Court’s
23 view has been that as long as a property deprivation is not de minimis, its
24 gravity is irrelevant to the question whether account must be taken of the
25 Due Process Clause. [Citations omitted] A 10-day suspension from
26 school is not de minimis in our view and may not be imposed in complete
27 disregard of the Due Process Clause.” [Emphasis added]

28 The Court in *Goss* further noted that:

1 “Since the landmark decision of the Court of Appeals for the Fifth Circuit
2 in *Dixon v. Alabama State Board of Education*, 294 F.2d 150, *cert. denied*,
3 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961), the lower federal courts
4 have uniformly held the Due Process Clause applicable to decisions made
5 by tax-supported educational institutions to remove a student from the
6 institution long enough for the removal to be classified as an expulsion.”

7 [Citations omitted]

8 The decisions since *Goss, supra* involving Colorado schools have consistently held that school
9 districts seeking to expel students must as a precondition to expulsion first afford the student procedural
10 due process in the form of a hearing on the charges upon which the expulsion is predicated. *Watson v.*
11 *Beckel*, 242 F.3d 1237 (10th Cir. 2001). “...procedural due process in a disciplinary hearing that could
12 lead to expulsion or a long term detention [*sic*; suspension] requires, at a minimum, notice of the charges
13 to be heard and an opportunity for the student to present his side of the story.” *Butler v. Rio Rancho*
14 *Public School Board of Education*, -- F.Supp.2d --, 2002 WL 31986796 (D.N.M. 2002). See also, e.g.,
15 *Martinez v. School Dist. No. 60*, 852 P.2d 1275, 83 Ed. Law Rep. 454 (Colo.Ct.App. 1992); see also
16 *Tepley v. Public Employees Retirement Ass’n.*, 955 P.2d 573, 578 (Colo.App. 1997), and *Carpenter v.*
17 *Civil Service Comm’n.*, 813 P.2d 773 (Colo.App. 1990), both cited with approval in the very recent case
18 of *Nichols v. DeStefano*, 2002 WL 1869011 (Colo.App. 2002). Even prior to *Goss, supra*, the Tenth
19 Circuit had already held “...that due process entitles students in the public schools to be accorded the
20 rudimentary elements of a hearing before they are expelled or suspended for a length or indefinite
21 period, absent some extraordinary situation requiring immediate action before a hearing.” *Hatch v.*
22 *Goerke*, 502 F.2d 1189, 1194-95 (10th Cir. 1974). Due process “...requires advance notice of the
23 charges, a fair opportunity to be heard, and an impartial decision-maker.” *Tellefsen v. University of*
24 *North Carolina at Greensboro*, 877 F.2d 60, 1989 WL 64301 (4th Cir. 1989), citing *Goss, supra*, and
25 *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970).

1 In the action at bar, Plaintiff was expelled¹³; demanded his rights under both the federal and state
2 Constitutions to a hearing and notice of the charges against him; was afforded neither, in any form
3 whatsoever; and now, fourteen days later, is still sitting at home, watching the time run out on his hopes
4 and dreams of a high school diploma and admission into post-secondary studies.

5
6 **III**

7 **THE DISTRICT HAS FURTHER FAILED TO FOLLOW COLORADO'S**
8 **STATUTORY REQUIREMENTS FOR SCHOOL SUSPENSIONS**
9 **AND EXPULSIONS IN ADDITION TO ITS DENIAL OF**
10 **PLAINTIFF'S CONSTITUTIONAL RIGHT TO DUE PROCESS**

11 C.R.S. §22-33-105(1) provides that “No child who has attained the age of six years and is under
12 the age of twenty-one shall be suspended or expelled from or be denied admission to the public schools,
13 except as provided by this article.” C.R.S. §22-33-105(2)(a) then breaks down “suspensions” into two
14 categories: School districts may delegate to school principals or other designees “...the power to
15 suspend a pupil in his school for not more than five school days on the grounds stated in section 22-33-
16 106(1)(a), (1)(b), (1)(c), or (1)(e)...” or “...not more than ten school days on the grounds stated in section
17 22-33-106(1)(d), unless expulsion is mandatory pursuant to such provision...”

18 The grounds encompassed in the first of these two scenarios, and which justify up to an initial
19 five day suspension, include “Continued willful disobedience or open and persistent defiance of proper
20 authority [§106(1)(a)],” “willful destruction or defacing of school property [§106(1)(b)],” “Behavior on
21 or off school property which is detrimental to the welfare or safety of other pupils or of school personnel
22 including behavior which creates a threat of physical harm to the child or to other children
23 [§106(1)(c)],” and “Repeated interference with a school’s ability to provide educational opportunities to
24 other students [§106(1)(e)].” The grounds encompassed in the second of the two statutory scenarios,
25 and which justify up to an initial ten day suspension or possible permanent expulsion, are limited to
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28 ¹³ And, in any case, by Defendant District’s counsel’s own admission, at the very least wrongfully
suspended for a period in excess of ten days (see Compendium, Exhibit “E”; ██████ Declaration, at p. 2,
Ins. 12 - 16).

1 “Serious violations in a school building or in or on school property...” Section 106(1)(d) then goes on to
2 describe at length what constitute “serious violations” – these are confined to offenses involving
3 dangerous weapons, sales of drugs, robbery, and assault.

4 Plaintiff in the within action has been accused, but not charged, with the simple crime of a non-
5 violent theft of \$150. At best, Defendant District might argue that if true, these allegations could
6 constitute “willful destruction or defacing of school property” within the meaning of C.R.S. §22-33-
7 106(1)(b). Plaintiff has been accused of no other conduct whatsoever, and certainly not of anything
8 coming close to a “serious violation” within the meaning of C.R.S. §22-33-106(d). Yet Plaintiff was
9 actually expelled summarily by Principal [REDACTED] on [REDACTED] 2005, and denied any opportunity for
10 notice or a hearing. The Courts of this district have recognized Colorado’s statutory scheme and noted
11 the requirement that expulsion beyond the temporary suspension periods authorized by the law cannot
12 be made without the appropriate due process protections. See *Hernandez v. School Dist. No. One,*
13 *Denver, Colo.*, 315 F.Supp. 289 (1970).

14 Most recently, in *Nichols v. DeStefano, supra*, the Court therein held that a local school board
15 had violated a high school student’s due process rights when it did not give the student a fair hearing to
16 determine whether she should have been expelled for fighting; the student was not allowed to speak with
17 teachers to gather information or request their attendance at a hearing to present evidence regarding her
18 character, and the school district’s ability to thereby offer a more expansive view of the relevant facts
19 than could the student was held to be a denial of the student’s due process rights. By contrast, in the
20 action at bar, Plaintiff has not been afforded even a rudimentary hearing – and further, Defendant
21 District has even been telling witnesses not to cooperate with Plaintiff’s representatives by giving
22 statements regarding Plaintiff’s expulsion!¹⁴

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28 ¹⁴ See [REDACTED] Declaration, at p. 2, lns. 4 – 22.

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IV

**PRELIMINARY INJUNCTIVE RELIEF IN THE FORM OF A
TEMPORARY RESTRAINING ORDER AND AN ORDER TO SHOW
CAUSE IN RE PRELIMINARY INJUNCTION ARE PLAINTIFF'S
ONLY APPROPRIATE REMEDIES**

The principal cause of action of Plaintiff's Complaint in these proceedings is one under 42 U.S.C. §1983 *et seq.* The United States Supreme Court has held specifically that §1983 applies to protect the constitutional rights of public school students who are subjected to expulsion proceedings. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). In general, §1983 is not itself a source of any substantive rights: It provides a way in which a person can seek redress when his federal constitutional rights have been deprived under color of state law. *Wilkerson v. State*, 830 P.2d 1121 (Colo.Ct.App.1992).

Here, Plaintiff has been deprived wholesale of any due process protections whatsoever.

It is foreseeable that Defendant District may seek to contend that Plaintiff has failed to exhaust his administrative remedies prior to bringing this action and seeking injunctive relief from this Court, or that the District may after-the-fact seek to afford Plaintiff the hearing it has so far denied him despite the expiration of some fourteen days since the time of his expulsion. Any such effort must fail. The United States Supreme Court held in *Steffel v. Thompson*, 415 U.S. 452, 472-473, 94 S.Ct. 1209, 1222, 39 L.Ed.2d 505 (1974), that:

“When federal claims are premised on [§1983] – as they are here – we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.”

The Supreme Court also noted, in *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), that:

“Beginning with *McNeese v. Board of Education*, 373 U.S. 668, 671-673, 83 S.Ct. 1433, 1435-1436, 10 L.Ed.2d 622 (1963), we have on numerous occasions rejected the argument that a §1983 action should be dismissed

1 where the plaintiff has not exhausted state administrative remedies.
2 [Citations omitted] ... this Court has stated categorically that exhaustion
3 is not a prerequisite to an action under §1983, and we have not deviated
4 from that position in the 19 years since *McNeese*.”

5 Plaintiff seeks from this Court the remedy that he should have been afforded in the aftermath of
6 the hearing that he never got despite having demanded it from the District: Reinstatement into the
7 “special remedial education” program at █ CHS.

8 Nor is any issue of qualified immunity involved in this case. This is not an action for damages
9 brought against school district officials – Plaintiff merely seeks, against the District itself, injunctive
10 relief against the continuing violation of his constitutional rights by Defendant District, and damages
11 occasioned by the breaches of these constitutional rights. And in any case, “entity defendants,” such as
12 Defendant District, are not entitled to qualified immunity against 42 U.S.C. §1983 actions. *McCook v.*
13 *Springer School District*, 44 Fed.Appx. 896, 2002 WL 1788529 (10th Cir. N.M. 2002), citing *Hollander*
14 *v. Sandoz Pharms. Corp.*, 289 F.3d 1193, 1214 (10th Cir. 2002).

15
16 V

17 **CONCLUSION**

18 Plaintiff respectfully requests that this Court grant his application for injunctive relief in the form
19 of a Temporary Restraining Order and Order to Show Cause in re Preliminary Injunction as requested in
20 the Application submitted herewith.

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22 Dated: █, 2005

23 Respectfully submitted,

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27 By _____
28 █, Attorneys for
Plaintiff █