

When Virtual Discipline Becomes Virtual Suspension: Protecting the Due Process Rights of Virtual Learners

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ABSTRACT

*It is well established that public school students do not shed their constitutional rights at the schoolhouse door.¹ But what about when the “schoolhouse door” is a computer screen, with students entering and exiting the learning environment from the comfort of their homes through an internet-enabled device? The rise of virtual learning, expedited by the COVID-19 pandemic, raises questions about when and how constitutional rights apply to public school students in the virtual setting. This Paper examines one of those constitutional questions, by exploring the application of procedural due process to the emerging practice of virtual discipline. The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution was first applied to school discipline by the U.S. Supreme Court in *Goss v. Lopez*, where the Court found that suspensions of up to ten days required notice and hearing under the Due Process Clause. The due process protections established under *Goss* represent important protections for students from wrongful and unnecessary school exclusions, which have been linked to long-term adverse impacts on student outcomes and school climates. Further, data shows these adverse impacts are borne disproportionately by already marginalized groups of students, such as Black students and students with disabilities. As such, ensuring these constitutional protections are extended to discipline in the virtual environment is of utmost importance. After reviewing *Goss* and its subsequent applications to various forms of traditional school discipline, this Paper will explore how different acts of virtual discipline might invoke due process concerns. Where the Due Process Clause is implicated in acts of virtual discipline, this Paper will also analyze what procedures are constitutionally mandated. Finally, recognizing that proactive action is*

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1. *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (citing *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969)).

needed to prevent infringement on students' constitutional rights in the virtual setting, this Paper will prescribe steps that school districts can take to prevent unnecessary or wrongful disciplinary exclusions, as well as the responsibilities of state and federal educational agencies to provide oversight and monitoring in this area.

I. INTRODUCTION

In Sacramento, in the spring of 2020, a fourth-grade student struggled to use the new online learning platform adopted by her school in the wake of the COVID-19 pandemic.² The nine-year-old had always attended school in person; but now, her school had moved to virtual learning for health and safety reasons. For the first time ever, she had to do everything online and she found the technology confusing. She tried to ask for help. However, her teacher and school principal say she bombarded the district's tech support department with requests, and, as a result, they blocked her email account. The student was worried she had been suspended. She was embarrassed and confused. She did not know when she would be able to use her school email again. Even once her email privileges were restored, she had difficulty submitting assignments for weeks.

A few months later, in September, another fourth grader in Louisiana's Jefferson Parish was participating in a virtual classroom session from home.³ While in class, he moved a BB gun out of the way so his brother did not trip on it. The gun briefly appeared on his screen during the Zoom session. His teacher saw it and reported it, resulting in a six-day suspension for the student. The student was confused when the principal said he had broken the school's rule prohibiting weapons on campus. How could he have brought a weapon on campus when he had never left his house?

In early 2020, faced with an emerging global pandemic due to the spread of the COVID-19 virus, public schools across the country were confronted with the problem of educating children while also protecting

2. See Rebecca Klein, *The New School Suspension: Blocked from Online Classrooms*, HUFFPOST (Aug. 11, 2020, 10:45 AM), https://www.huffpost.com/entry/school-discipline-remote-learning_n_5f329829c5b64cc99fde4d64.

3. See Robby Soave, *School Board Won't Reverse Fourth-Grader's Suspension*, REASON (Dec. 7, 2020, 1:20 PM), <https://reason.com/2020/12/07/kamauri-harrison-school-virtual-bb-gun-suspension/>.

the health of their students, staff, and broader community. In most districts, the solution relied heavily on a shift to virtual learning, which allowed students to continue learning from the safety of their homes. Virtual education, which most districts had only dabbled in, became the primary method of instruction for a majority of students in many communities.⁴

With this shift to virtual learning came many new logistical and pedagogical challenges, including how to manage classroom behavior and discipline in the new virtual environment. The transition was not always smooth. Quickly, reports surfaced of students who were being punished for appearing on camera without wearing their uniforms or for failing to properly submit their work online.⁵ Sometimes punishment involved being removed from the virtual classroom or having access to email and online programming restricted.⁶ Other times, as in the cases involving the display of weapons, the school took steps to formally suspend students from virtual school.⁷

Thus far, the mainstream conversation around virtual discipline has focused on how school rules designed primarily for controlling student behavior within the walls of a school building can or should be applied to the virtual environment. Experts have also begun to weigh in on best practices to provide positive behavior supports to prevent and manage

4. Anya Kamenetz, *Morning Edition: 5 Things We've Learned About Virtual School in 2020*, NPR (Dec. 4 2020, 5:00 AM), <https://www.npr.org/2020/12/04/938050723/5-things-weve-learned-about-virtual-school-in-2020>.

5. Klein, *supra* note 2.

6. See, e.g., Kalyn Belsha, *Virtual Suspensions. Mask Rules. More Trauma.*, CHALKBEAT (Aug. 21, 2020, 7:14 PM), <https://www.chalkbeat.org/2020/8/21/21396481/virtual-suspensions-masks-school-discipline-crisis-coronavirus>; Tim Elfrink, *A Teacher Saw a BB Gun in a 9-Year-Old's Room During Online Class*, WASH. POST (Sept. 25, 2020, 5:14 AM), <https://www.washingtonpost.com/nation/2020/09/25/louisiana-student-bbgun-expulsion/>; Joe Heim & Valerie Strauss, *School Discipline Enters New Realm with Online Learning*, WASH. POST (Sept. 15, 2020, 6:00 AM) https://www.washingtonpost.com/education/school-discipline-enters-new-realm-with-online-learning/2020/09/14/e19a395e-f393-11ea-999c-67ff7bf6a9d2_story.html.

7. See, e.g., Edward Helmore, *Colorado School Suspends Black Boy for Playing with Toy Gun During Virtual Class*, GUARDIAN (Sep. 8, 2020, 11:35 AM), <https://www.theguardian.com/us-news/2020/sep/08/colorado-springs-boy-suspended-toy-gun-virtual-class-police>; Soave, *supra* note 3.

student misbehavior in the virtual setting.⁸ However, there has been less discussion on the new methods of discipline that arise in the virtual setting and the procedural rights that students have to protect them from wrongful exclusion from the learning environment.⁹

This is an important conversation and the focus of this Paper. Discipline practices that remove students from the classroom, often termed “exclusionary discipline,” have long-term negative impacts on students and the overall school climate.¹⁰ Further, as explored below, these exclusions can infringe upon a student’s constitutional property interest in education and liberty interest in their reputation.

Traditionally, due process rights that give students an opportunity for notice and hearing prior to their removal from school have helped prevent erroneous or unnecessary exclusions from the learning environment.¹¹ The same will be true in the virtual setting, where districts need to be vigilant about how virtual discipline practices may result in wrongful or excessive removals and proactive in designing policies that ensure students’ due process rights are protected. The old rules must be examined closely to determine how they will apply to this new frontier of virtual discipline, especially since virtual learning is likely here to stay for many students—even once the pandemic allows a return to in person learning.

Generally, school discipline law is a matter of local and state regulation.¹² However, those regulations must comply with federal

8. See, e.g., Center on Positive Behavioral Interventions & Supports, *Practice Briefs: Creating a PBIS Behavior Teaching Matrix for Remote Instruction*, UNIV. OF OREGON (Mar. 2020), <https://www.pbis.org/resource/creating-a-pbis-behavior-teaching-matrix-for-remote-instruction> [hereinafter PBIS]; Transforming School Discipline Collaborative, *Toolkit for Transforming School Discipline in Remote and Blended Learning During COVID-19* (2020), <https://drive.google.com/file/d/1G748iOa1cgGPEavoQghn65OV09yEjeZy/view>.

9. As of publication of this Paper, no state or federal courts have addressed the issue of federal procedural due process in virtual discipline. However, at least one case has been brought in federal district court raising due process concerns with more cases likely to be filed. See *Harrison v. Jefferson Parish Sch. Bd.*, No. 20-2916, 2020 U.S. Dist. LEXIS 217655 (E.D. La., Nov. 20, 2020).

10. 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’T JUSTICE CTR. ix (2014), https://safesupportivelearning.ed.gov/sites/default/files/The_School_Discipline_Consensus_Report.pdf.

11. *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975).

12. See *Laws & Guidance*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/landing.jhtm?src=ft> (last visited Jan. 26, 2021).

law.¹³ All states have statutes that set out a broad framework for public school discipline.¹⁴ In turn, those statutes typically authorize local boards of education to adopt district-specific policies that comport with the state's overarching framework.¹⁵ Both the state statutes and local policies must follow their respective state constitutions and the United States Constitution. Additionally, to the extent the district receives federal educational dollars, local policies must also follow all federal legislation that affects school discipline.¹⁶

This Paper will focus on the procedural rights of suspended students that have been established under the Due Process Clause of the U.S. Constitution. Beginning with *Goss v. Lopez*, 419 U.S. 565 (1975), where the U.S. Supreme Court first established that the federal Due Process Clause was implicated when students received suspensions of up to ten days, subsequent case law has applied that reasoning to other forms of exclusionary discipline.¹⁷ That same analysis must be applied to virtual discipline. The first Section of this Paper will discuss the procedural framework established in *Goss*, as well as explore how lower courts have applied the Due Process Clause to other forms of exclusionary school discipline in the in-person setting. The second Section will then

13. See U.S. CONST. art. VI, cl. 2.

14. *Compendium of School Discipline Laws and Regulations for the 50 States, District of Columbia and the U.S. Territories*, U.S. DEP'T OF EDUC. (Mar. 2021), <https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/School%20Discipline%20Laws%20and%20Regulations%20Compendium.pdf>

15. *Id.*

16. See, e.g. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491 (2020) (requiring schools that accept federal funds to provide special education services and protections, including disciplinary protections, to eligible students with disabilities); Title VI, 42 U.S.C. §§ 2000d-2000d-7 (1964) (prohibiting discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance, including a ban on discrimination in school discipline policies and practices).

17. See *Cole v. Newton Special Mun. Separate Sch. Dist.*, 676 F. Supp. 749, 751-52 (S.D. Miss. 1987), *aff'd*, 853 F.2d 924 (5th Cir. 1988) (holding that placing a student in isolation within the school building could trigger due process); *Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647 (W.D. Tex. 2000) (holding that more formal due process was required where the transfer to an alternative school would significantly affect student's educational opportunities); *McCall v. Bossier Par. Sch. Bd.*, 785 So.2d 57 (La. Ct. App. 2001) (holding that minimal due process was required for students transferred to an alternative school for disruptive behavior); *Laney v. Farley*, 501 F.3d 577, 584 (6th Cir. 2007) (holding that in-school suspension can violate due process in certain circumstances); *Couture v. Bd. of Ed. of the Albuquerque Pub. Schs.*, 535 F.3d 1243, 1257 (10th Cir. 2008) (holding that excessive punishment timeouts could require procedural due process).

apply that framework to emerging virtual discipline practices to determine when and what due process protections are required. Finally, recognizing that proactive action is needed to prevent infringement on students' constitutional rights in the virtual setting, this Paper will prescribe steps that school districts can take, as well as the responsibilities of state educational agencies and legislatures to provide oversight and monitoring in this area.

II. *GOSS V. LOPEZ* AND THE APPLICATION OF FEDERAL DUE PROCESS TO SCHOOL DISCIPLINE

There is no federal right to education.¹⁸ In fact, the United States Constitution neglects to mention education at all. However, this absence does not reflect upon the fundamental importance of education in the eyes of the federal judiciary. In *Brown v. Board of Education*, 347 U.S. 483 (1954), the U.S. Supreme Court recognized that “education is perhaps the most important function of state and local governments.”¹⁹ All fifty states have education clauses embedded in their state constitutions, as well as a complex statutory and regulatory framework to establish and maintain a statewide public school system.²⁰

Though state and local government create and define a student's interest in education, the federal Constitution still plays a role in protecting that interest. The U.S. Supreme Court has established that where an independent source, such as a state constitution or statute, creates an entitlement, the Fourteenth Amendment forbids the State to deprive a person of that interest without due process of law.²¹ The Court extended this principle to school discipline in the seminal case of *Goss v. Lopez*, by ruling that students facing temporary suspension from a public school have property and liberty interests that qualify for protection under the Due Process Clause of the Fourteenth Amendment.²²

18. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

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

20. Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMM'N OF THE STATES (Mar. 2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>.

21. *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

22. *Id.* at 565.

A. *Goss v. Lopez*

In *Goss v. Lopez*, a group of Ohio public high school students, who were suspended from school for up to ten days without a hearing, claimed a denial of due process in violation of the Fourteenth Amendment.²³ In hearing the case, the Supreme Court recognized that Ohio is not constitutionally obligated to establish and maintain a public school system.²⁴ However, in choosing to do so and requiring that children attend, “[t]he State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest protected by the Due Process Clause and which [consequently] may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”²⁵

Further, the Court stated that the Due Process Clause prohibits “arbitrary deprivations of liberty.”²⁶ According to the Court, a suspension, even a short-term one, could seriously harm the students’ standing with their peers and teachers, as well as interfere with future higher education and employment opportunities.²⁷ The Court elaborated: “Where a person’s good name, reputation, honor, and integrity is at stake because of what the government is doing to him, the minimal requirements of the Clause must be satisfied.”²⁸ Therefore, a suspension from school injures both a student’s reputation and education, depriving them of liberty and property.²⁹

The *Goss* Court explicitly rejected the school district’s argument that due process is not required because the loss of ten school days does not subject a student to a severe detriment or grievous loss. Emphasizing the importance of education, the Court found “the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child.”³⁰ Further, the Court clarified that the application of due process requirements is not based on the *weight* of the harm, but the

23. *Id.* at 567.

24. *Id.* at 574.

25. *Id.*

26. *Id.* at 575.

27. *Id.* at 574-75.

28. *Id.* at 575 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

29. *Id.* at 574-75.

30. *Id.* at 576.

nature of the interest at stake.³¹ While the length and severity of a deprivation may be a factor to weigh in determining the appropriate form of hearing, it is not determinative of whether a hearing of some kind is due.³² The Court stressed that “[a]s long as the property deprivation is not *de minimis*, its gravity is irrelevant to the question of whether account must be taken of the Due Process Clause.”³³

After finding that a suspension of up to ten school days is not *de minimis* and may not be imposed in complete disregard of the Due Process Clause, the *Goss* Court turned to the question of “what process is due.”³⁴ The Court concluded that, for students facing temporary suspensions up to ten days, due process requires they receive oral or written notice of the charges against them and, if the student denies the charges, an explanation of the evidence the school authorities have and an opportunity to explain their version of the facts.³⁵ The Court asserted that in most cases, this informal notice and opportunity to respond should occur prior to the suspension.³⁶ However, if the school authority determines that the continuing presence of the student represents a danger to the other students or staff, they may remove the student immediately.³⁷ In such a case, the necessary notice and rudimentary hearing must occur as soon as practicable.³⁸

Beyond this, the *Goss* Court was reluctant to define precise procedures that schools must follow when offering notice and hearing to short-term suspended students.³⁹ Instead, the details have been left to individual jurisdictions. The Court’s lack of specificity has resulted in a relatively permissive approach to what satisfies the Due Process Clause in these situations, with many courts allowing schools to rely on vague rules and descriptions of allegations when providing notice, withhold parental notification, and even collapse the notice and hearing

31. *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71 (1972)).

32. *Id.*

33. *Id.* (citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring); *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971); *Roth*, 408 U.S. at 570).

34. *Goss*, 419 U.S. at 576.

35. *Id.* at 582.

36. *Id.* at 582-83.

37. *Id.*

38. *Id.*

39. *Id.* at 578 (“Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint By and large, public education in our Nation is committed to the control of state and local authorities.” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

requirements into one conversation without notice of the student's rights.⁴⁰

While the ultimate effectiveness of the due process procedures established by schools may be in question, the *Goss* Court was clear about what it was attempting to achieve. That is, the Court attempted to strike a balance to provide a “meaningful hedge against erroneous action” while not creating an excessive burden for schools.⁴¹ While informal, the notice and hearing protections allow the principal to be alerted to potential disputes about the facts and arguments without overwhelming administrative resources.⁴² This also allows the disciplinarian to more effectively determine how to resolve those disputes, use their discretion in an informed manner, and substantially reduce the risk of error.⁴³ Ultimately, the *Goss* Court concluded that providing students who will be involuntarily removed from school for up to ten days with notice of the alleged offense and an opportunity to be heard would serve both students' interests in avoiding unfair or mistaken exclusion from the educational process and schools' interests in effective discipline.⁴⁴

As *Goss* only addressed out-of-school suspensions for up to ten days, exactly what, if any, constitutional due process is owed for other school exclusions has been largely left to the lower courts. For less severe disciplinary consequences, such as in-school suspension or disciplinary transfers, the primary question has been whether the Due Process Clause is implicated at all. For more severe disciplinary consequences, such as long-term suspension or expulsion, the question has been how much process is owed to students. In facing these questions, courts have varied in their applications of *Goss*, yet some general trends have emerged.

40. Elizabeth J. Upton, Note, “Some Kind of Notice” Is No Kind of Standard: The Need for Judicial Intervention and Clarity in Due Process Protections for Public School Students, 86 GEO. WASH. L. REV. 655, 665-68 (2018).

41. *Goss*, 419 U.S. at 582-83.

42. *Id.* at 583-84.

43. *Id.*

44. *Id.* at 584.

B. More Than *De Minimis*?

In *Goss*, the Supreme Court did not mandate procedural due process for all disciplinary exclusions. Instead, only those disciplinary exclusions that involved a legally significant student interest, akin to “the total exclusion from the educational process for more than a trivial period,” implicate a property interest which requires due process.⁴⁵ The Court labeled an out-of-school suspension that lasts up to ten days as significant but left open the possibility that a shorter or less severe exclusion may be *de minimis* and legally insignificant.⁴⁶ As such, lower courts have been left to interpret whether the Due Process Clause is implicated by less severe forms of exclusionary discipline, such as in-school suspension and disciplinary transfers.

i. In-School Suspension

Only a few courts have tackled the issue of procedural due process for in-school suspensions. In most schools, in-school suspension means the disciplinary removal of a student from the classroom but not the school building.⁴⁷ It is intended to be a milder disciplinary response that achieves the goal of removing a disruptive student from class while still allowing them some access to the school environment.⁴⁸ Unlike a student who receives an out-of-school suspension, a student who receives an in-school suspension is still required to come to the school building but is denied access to their regular classes. Instead, they spend the school day in a separate room or area, isolated from the general school population. During the period of in-school suspension, a staff

45. *Id.* at 576.

46. *Id.* (Four Justices in dissent objected, arguing that a one-day suspension now involves “a new constitutional right.”); *id.* at 585 (Powell, J., dissenting) (“[The Court] justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension.”).

47. The U.S. Department of Education’s Office of Civil Rights defines in-school suspension as “[i]nstances in which a child is temporarily removed from his or her regular classroom(s) for at least half a day but remains under the direct supervision of school personnel. Direct supervision means school personnel are physically in the same location as students under their supervision.” *Suspension*, SCHOOL DISCIPLINE SUPPORT INITIATIVE, <https://supportiveschooldiscipline.org/learn/reference-guides/suspension> (last visited Jan. 26, 2021).

48. Brent E. Troyan, Note, *The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students*, 81 TEX. L. REV. 1637, 1662 (2003).

member, who may or may not be a certified teacher, usually supervises the student.⁴⁹ Whether the student receives work from or has access to their assigned teachers depends on the school's policies and practices.⁵⁰ Additionally, as part of the punishment, the student is usually barred from participating in extracurricular activities while serving their in-school suspension.⁵¹

Most courts that have addressed in-school suspension directly have acknowledged that there are circumstances in which an in-school suspension *could* constitute as much of a deprivation as an out-of-school suspension, thus triggering due process.⁵² However, it is rare for a court to actually make such a finding. Where the removal from the classroom is extremely brief, courts have typically found *de minimis* interference.⁵³ Further, at least one court, in analyzing whether a punishment “time-out” invoked procedural due process, reasoned that “a teacher’s ability to manage his or her classroom would be inappropriately undermined by a hearing requirement prior to placing the student in timeout.”⁵⁴

Where the removal is for a longer duration, such as a formal in-school suspension for multiple days, courts have looked at a variety of

49. *Id.* at 1657.

50. *Id.* at 1656-58.

51. *Id.* at 1660.

52. See *Couture v. Bd. of Ed. of the Albuquerque Pub. Schs.*, 535 F.3d 1243, 1257 (10th Cir. 2008) (It is possible, “[a]t some point, punishment timeouts used excessively might become the functional equivalent of the out-of-school suspension” requiring procedural due process.); *Laney v. Farley*, 501 F.3d 577, 584 (6th Cir. 2007) (an in-school suspension, even where students are provided with educational instruction, can violate due process when it “so isolates a student from educational opportunities that it infringes her property interest in an education”); *Cole v. Newton Special Mun. Separate Sch. Dist.*, 676 F. Supp. 749, 751-52 (S.D. Miss. 1987), *aff’d*, 853 F.2d 924 (5th Cir. 1988) (stating that because classroom instruction is the primary thrust of the educational process, a student could be excluded as much by being placed in isolation within the school building as by being barred from the school grounds).

53. *Couture*, 535 F.3d at 1257-58 (missing 12 hours of class through punishment time-outs over the course of 2.5 months was *de minimis* interference); *Burreson v. Barneveld Sch. Dist.*, 434 F. Supp. 2d 588, 594 (W.D. Wis. 2006) (where student was removed from class on multiple occasions for police interviews, court stated “No court has ever held that missing a single class may constitute an educational deprivation, even if the class is missed on more than one occasion.”); *Rasmus v. Arizona*, 939 F. Supp. 709 (D. Ariz. 1996) (holding that where student was excluded from the classroom and denied the ability to work on his assignments for only ten minutes, the restriction of his property right was *de minimis*).

54. *Couture*, 535 F.3d at 1258 (“We are reluctant to limit a teacher’s ability to manage her classroom by requiring her to give the student a ‘hearing’ of some form” and such a requirement would be “an undue administrative burden we will not impose unless the timeouts rise to the level of the functional equivalent of a lengthy in-school suspension”).

factors, all of which connect to the “total exclusion” standard outlined in *Goss*. The factors weighed by courts in making this determination can be broken down into three primary considerations: the student’s ability to complete assignments,⁵⁵ whether the student received instruction,⁵⁶ and the student’s access to teachers.⁵⁷ Generally, courts will only consider the Due Process Clause implicated where one or more of these factors was lacking in such a way that the in-school suspension infringed upon the student’s opportunity to learn, resulting in total exclusion from the educational process.

With few exceptions, the courts who have tackled the issue of in-school suspension have found that the suspension at hand did not invoke the Due Process Clause because the student had some access to the educational process during the in-school suspension.⁵⁸ Because of this, it is generally accepted that a traditional in-school suspension does not implicate the federal Due Process Clause.⁵⁹ Thus, the procedures for sentencing a student to in-school suspension are left to state and local policy and are generally less formal than those required to suspend a student from school.

55. See *Laney*, 501 F.3d at 577; *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560 (8th Cir. 1988); *I.U. Roy v. Pioneer Valley Chinese Immersion Charter Sch.*, 2016 U.S. Dist. LEXIS 124947, (D. Mass. June 10, 2016); *Burge v. Colton Sch. Dist.* 53, 100 F. Supp. 3d 1057 (D. Or. 2015); *Jones v. Long Cnty. Sch. Dist.*, 2012 U.S. Dist. LEXIS 114591, 2012 WL 3562300 (S.D. Ga. August 14, 2012); *Rasmus*, 939 F. Supp. 709; *Dickens v. Johnson Cnty. Bd. of Ed.*, 661 F. Supp. 155 (E.D. Tenn. 1987); *Fenton v. Stear*, 423 F. Supp. 767 (W.D. Pa. 1976).

56. See *Laney*, 501 F.3d 577; *Esparza v. Bd. of Trs.*, 182 F.3d 915 (5th Cir. 1999); *Cole*, 676 F. Supp. at 751-52; *Jones*, 2012 U.S. Dist. LEXIS 114591; *Alabama & Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993) [hereinafter *Coushatta Tribes*]; *Dickens*, 661 F. Supp. 155.

57. See *Wise*, 855 F.2d 560; *Burge*, 100 F. Supp. 3d 1057; *Dickens*, 661 F. Supp. 155; *Esparza*, 182 F.3d at 915; *Fenton*, 423 F. Supp. at 767.

58. See *Couture*, 535 F.3d 1243; *Laney*, 501 F.3d 577; *Esparza*, 182 F.3d 915; *Wise*, 855 F.2d at 563; *I.U. Roy*, 2016 U.S. Dist. LEXIS 124947; *Burge*, 100 F. Supp. 3d 1057; *Jones*, 2012 U.S. Dist. LEXIS 114591; *Burreson*, 434 F. Supp. 2d 588; *Rasmus*, 939 F. Supp. 709; *Dickens*, 661 F. Supp. 155; *Fenton*, 423 F. Supp. 767. *But see Coushatta Tribes*, 817 F. Supp. 1324 (finding students were deprived of a property interest when suspended for a month in-school, supervised by an unlicensed teacher, and not given regular instruction by teacher, causing the students to fall behind in their school work); *Cole*, 676 F. Supp. at 751-52 (holding that under certain circumstances, in-school suspension could constitute as much of a deprivation of education as out-of school suspension, thus triggering due process protections).

59. *Contra* Devon L. DiSiena, Note, *Back Down to Bullying? The Detrimental Effects of Zero Tolerance Policies on Bullied Adolescents*, 22 *CARDOZO J.L. & GENDER* 337, 354-55 (2016) (arguing that lower courts interpretations of in-school suspensions as *de minimis* have downplayed the severity of the potential consequences of even a brief period of in-school suspension).

ii. Disciplinary Transfers

Disciplinary transfers are another form of school discipline that some advocates argue implicates the Due Process Clause. Disciplinary transfers occur when a school involuntarily transfers a student to an alternative education setting or program in response to a disciplinary incident or a pattern of misbehavior.⁶⁰ These alternative education programs are, in theory, intended to remove the disruptive student from the regular classroom while also providing a more supportive environment to meet the student's needs.⁶¹

However, in reality, the programs are often innately inferior to regular public schools, offering fewer course options, curricular opportunities, and extracurricular activities.⁶² Many programs lack in-person instruction or rely on teachers who have less experience or qualifications than those in regular public schools.⁶³ The majority of these programs are housed in separate facilities outside the regular school environment⁶⁴ and usually employ harsher discipline practices.⁶⁵ Research shows that students who are disciplinary transferred are more likely to drop out of school altogether.⁶⁶ Despite the potential harms, the

60. Camilla A. Lehr et al., *Alternative Schools: A Synthesis of State-Level Policy and Research*, 30 REMEDIAL & SPECIAL EDUC. 19, 23-24 (2009).

61. See Priscilla Rouse Carver et al., *Alternative Schools and Programs for Public School Students at Risk of Educational Failure: 2007-08*, U.S. DEP'T OF EDUC., 1 (March 2010), <https://nces.ed.gov/pubs2010/2010026.pdf>.

62. Barbara Fedders, *Schooling at Risk*, 103 IOWA L. REV. 871, 898-99 (2018).

63. Fedders, *supra* note 62, at 900; Carver et al., *supra* note 61, at 1.

64. Carver et al., *supra* note 61, at 1.

65. Fedders, *supra* note 62, at 899.

66. Fedders, *supra* note 62, at 915; Jamie Dicus, *Missing the Mark: Alternative Schools in the State of Mississippi*, ACLU, 51 (Feb. 2009), https://www.aclu.org/files/pdfs/racialjustice/missingthemark_report.pdf; Tony Fabelo et al., *BREAK SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* 54 (July 2011), https://csgjusticecenter.org/wpcontent/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf; Heather Vogell & Hannah Fresques, *'Alternative' Education: Using Charter Schools to Hide Dropouts and Game the System*, PROPUBLICA (Feb. 21, 2017), <https://www.propublica.org/article/alternative-education-using-charter-schools-hide-dropouts-and-game-system> (reporting a high percentage of Florida alternative school students leave school).

practice of disciplinary transfer has been growing, with over half a million students attending alternative programs each year.⁶⁷

There is no constitutional right to enrollment in a particular school placement, so most assignments between schools or programs will not implicate the Due Process Clause.⁶⁸ However, when the reassignment is for disciplinary reasons, courts have struggled with whether schools owe procedural due process. Advocates argue that, given the inferior and punitive nature of such programs, disciplinary transfers are akin to out-of-school suspensions that infringe upon both the student's liberty and property interests.⁶⁹

In addressing these claims, courts have generally found that due process is not required where the student is transferred to a program that still provides them with an opportunity to learn, even if that program has different or fewer offerings and opportunities.⁷⁰ Only where the alternative school education is significantly different from or inferior to that received at the regular public school setting,⁷¹ where the timing of the transfer would significantly affect the student's educational

67. Lehr et al., *supra* note 60, at 23-24 (noting that in 2007-2008, there were 646, 500 students enrolled in public school districts attending alternative schools and programs for at-risk students); Vogell & Fresques, *supra* note 66.

68. Everett v. Marcase, 426 F. Supp. 397, 400 (E.D. Pa. 1977).

69. Patrick v. Success Acad. Charter Schs., Inc., 354 F. Supp. 3d 185 (E.D.N.Y., 2018).

70. Chyma v. Tama Cnty. Sch. Bd., 2008 U.S. Dist. LEXIS 80177, at *4 (N.D. Iowa 2008) ("The consensus view seems to be that a student does not have a property interest in attending a particular school, thereby triggering a right to procedural due process, unless the education provided at the alternative school is significantly inferior to that provided in the student's original school."); *see also* Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 906-14 (2011); Patty Blackburn Tillman, *Procedural Due Process for Texas Public School Students Receiving Disciplinary Transfers to Alternative Education Programs*, 3 TEX. WESLEYAN L. REV. 209, 212 (1996).

71. Wayne v. Shadowen, 15 Fed. App'x 271 (6th Cir. 2001) (approving transfer to an in-school classroom suspension program where, among other things, the program would not have been significantly different from or inferior to what was available in the traditional classrooms); Buchanan v. City of Bolivar, Tenn., 99 F.3d 1352, 1359 (6th Cir. 1996) (suggesting that an imposition of a ten-day attendance at an alternative school may not give rise to procedural due process, "absent some showing that the education received at the alternative school is significantly different from or inferior to that received at his regular public school"); S.B. v. Ballard Cnty. Bd. of Educ., 780 F. Supp. 2d 560, 567 (W.D. Ky. 2011) (student's "reassignment to the Alternative School does not implicate her procedural due process rights, as the education she is receiving is not 'significantly different from or inferior to that received at [her] regular public school'"); J.K. v. Minneapolis Pub. Sch., 849 F. Supp. 865 (D. Minn. 2011) (adopting general rule and finding that it was highly unlikely that student could show that school to which administratively transferred was substantially inferior to the school that had been attended); Chyma, 2008 U.S. Dist. LEXIS 80177, at *3.

opportunities,⁷² or where the transfer gives rise to a constitutionally protected liberty interest in the student's reputation⁷³ have courts found that such transfers invoke constitutional due process.

C. What Process is Due?

Once the court determines that a disciplinary action constitutes "total exclusion" triggering due process, the next question is what process is owed. Because courts have seldom found that less severe disciplinary consequences, such as in-school suspension and disciplinary transfers, rise to the level of constitutional significance, there has been little opportunity to determine what process might be due in those circumstances. In *Cole*, where the court analyzed whether an in-school suspension invoked due process, the court stated that should the deprivation rise to the level of an out-of-school suspension, the procedures outlined in *Goss* should be required.⁷⁴ Thus, in evaluating what process is due for less severe disciplinary consequences that ultimately trigger due process, it is reasonable to assume that *Goss* sets the constitutional minimum.

On the other hand, for more severe disciplinary exclusions, the *Goss* Court recognized that more formal procedures may be required.⁷⁵ In arriving at the standard of informal notice and hearing for suspensions of up to ten days, the *Goss* Court attempted to strike a balance to provide a "meaningful hedge against erroneous action" while not creating an excessive burden for schools.⁷⁶ The Court declined to require more

72. *Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647 (W.D. Tex. 2000) (more formal due process required where, among other things, the timing of the transfer to an alternative school would significantly affect student's educational opportunities because he would be prohibited from participating in or benefiting from the comments of his teachers and peers during in-class reviews for exams).

73. *Minneapolis Pub. Sch.*, 849 F. Supp. 2d 865 (finding that student was unlikely to prevail on his procedural due process claim where there was no evidence that the transfer would create any additional stigma); *McCall v. Bossier Par. Sch. Bd.*, 785 So.2d 57 (La. Ct. App. 2001) (where alternative schools, by statute, were for children "whose behavior is disruptive," liberty interest arose requiring minimal due process when student was to be transferred to an alternative school because the punishment imposed would harm the student's good name and reputation).

74. *Cole v. Newton Special Mun. Separate Sch. Dist.*, 676 F. Supp. 749, 751-52 (S.D. Miss. 1987), *aff'd*, 853 F.2d 924 (5th Cir. 1988).

75. *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

76. *Id.* at 582-83.

formal requirements and explicitly rejected the idea that the Due Process Clause requires all short-term suspended students have the opportunity to secure counsel, confront and cross examine witnesses, or call their own witnesses.⁷⁷ The Court felt requiring such formal procedures for short-term suspensions might overwhelm administrative facilities, divert resources, and cost more than it would save in education effectiveness.⁷⁸ However, the Court left open the possibility that a long-term or indefinite expulsion from school could trigger these more formal procedures.⁷⁹

School suspensions that last longer than ten days are intended for more serious offenses that pose a significant disruption to the school environment or threat to safety.⁸⁰ However, many schools use long-term suspension and expulsion for a wide range of conduct.⁸¹ The reliance on suspension as a disciplinary consequence, as well as the proliferation of punitive zero-tolerance policies that mandate suspension, led to a significant increase in the number of long-term suspensions and expulsions in the past twenty years.⁸² A disproportionate number of those suspensions are given to Black students and students with disabilities.⁸³ Suspension, especially long-term suspensions, have been linked to negative outcomes for students and have been shown to be ineffective at curbing misbehavior or improving school safety.⁸⁴ Given the proliferation of long-term suspensions since *Goss* was decided, and

77. *Id.* at 583.

78. *Id.*

79. *Id.* at 584.

80. See Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U.L.Q. 65, 108 (2003).

81. *Id.*

82. Daniel J. Losen & Tia Elena Martinez, *Out of School & Off Track: the Overuse of Suspensions in American Middle and High Schools*, THE CTR. FOR CIVIL RIGHTS REMEDIES, UCLA CIVIL RIGHTS PROJECT 1, 20 (April 2013), https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutOfSchool-OffTrack_UCLA_4-8.pdf.

83. Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, THE CTR. FOR CIVIL RIGHTS REMEDIES, UCLA CIVIL RIGHTS PROJECT 1, 6 (August 2012), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-crrr-research/losen-gillespie-opportunity-suspended-2012.pdf>.

84. See Blumenson & Nilsen, *supra* note 80, at 108.

the risk of harm caused by them, many courts have tackled the issue of procedural due process during long-term suspensions.

Some lower courts have interpreted Goss's "more formal procedures" suggestion rigidly, requiring that long-term suspended and expelled students be permitted to have counsel and cross-examine witnesses at the hearing.⁸⁵ However, the majority of courts have followed a more flexible approach in determining what procedures are necessary, invoking the procedural due process framework provided by the Supreme Court in *Mathews v. Eldridge*.⁸⁶ In *Mathews*, the Court laid out three factors to consider when determining the constitutional adequacy of afforded procedures: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁸⁷

Most courts considering cases involving long-term suspensions have weighed the considerations outlined in *Mathews* to determine whether the value gained from additional procedural safeguards outweighs the burden of those safeguards on the school.⁸⁸ The results have been mixed, with most courts declining to establish a constitutional

85. See *Johnson v. Collins*, 233 F. Supp. 2d 241, 248 (D.N.H. 2002) (citing *Carey ex rel. Carey v. Me. Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 919 (D. Me. 1990)) (listing seven minimum requirements for long-term school disciplinary hearings, including the student's right to have counsel and cross-examine adverse witnesses); *Gonzales v. McEuen*, 435 F. Supp. 460, 467 (C.D. Cal. 1977) ("*Goss* clearly anticipates that where the student is faced with the severe penalty of expulsion he shall have the right to be represented by and through counsel, to present evidence on his own behalf, and to confront and cross-examine adverse witnesses."); see also, Casey B. Nathan, *Confronting a Double-Edged Sword: Providing Bullies Due Process Protections without Undercutting Massachusetts' Efforts to Combat Bullying*, 34 B.C. J.L. & Soc. JUST. 111, 119-23 (2014) (providing an analysis of post-*Goss* court decisions addressing the procedural due process rights of long-term suspended students).

86. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (addressing procedures necessary under the Due Process Clause of the Fourteenth Amendment to terminate Social Security disability benefit payments).

87. *Id.* at 335.

88. See *Newsome v. Batavia Loc. Sch. Dist.*, 842 F.2d 920, 924 (6th Cir. 1988); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14-15 (1st Cir. 1988); *Nash v. Auburn Univ.*, 812 F.2d 655, 660 (11th Cir. 1987); see also Nathan, *supra* note 85, at 120.

right to counsel and cross-examination in disciplinary proceedings.⁸⁹ Those courts have reasoned that school disciplinary hearings without counsel are fundamentally fair unless the proceedings are overly complex, criminal charges are also being brought against the student, or the school has legal representation at the hearing.⁹⁰ Courts have also recognized that entitling students to an attorney may unnecessarily heighten the adversarial nature of the hearing, resulting in excess administrative costs to the school.⁹¹ Overall, courts have been disinclined to give student's a right to counsel in school disciplinary proceedings unless the consequences in a particular hearing, such as a risk of error, substantially outweigh the administrative costs to the school.⁹²

Further, with rare exceptions,⁹³ courts have generally held the Due Process Clause does not entitle students to confront and cross-examine other students at long-term disciplinary hearings.⁹⁴ In their findings,

89. Donald H. Stone & Linda S. Stone, *Dangerous & Disruptive or Simply Cutting Class; When Should Schools Kick Kids to the Curb?: An Empirical Study of School Suspension and Due Process Rights*, 13 J.L. & FAM. STUD. 1, 3-6 (2011).

90. See *Flaim v. Med. Coll. Of Ohio*, 418 F.3d 629, 636, 640 (6th Cir. 2005) (holding that the school was not required to permit the student to bring an attorney as the hearing was not overly complex); *Gorman*, 837 F.2d at 16 (“[T]he weight of authority is against representation by counsel at disciplinary hearings, unless the student is also facing criminal charges stemming from the incident in question.”); *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (“Had an attorney presented the University’s case, or had the hearing been subject to complex rules of evidence or procedure, plaintiff may have had a constitutional right to representation.”); Nathan, *supra* note 85, at 120.

91. See, e.g., *Flaim*, 418 F.3d at 636, 640-41 (observing that the value added to the students’ defense by permitting counsel in expulsion hearings does not outweigh the associated administrative cost); *Osteen v. Henley*, 13 F.3d 221, 225-26 (7th Cir. 1993) (noting high administrative costs associated with allowing student to bring counsel to disciplinary hearing because school may then have to hire its own lawyers).

92. See *Osteen*, 13 F.3d at 226 (“The cost of judicializing disciplinary proceedings by recognizing a right to counsel is nontrivial, while the risk of error—specifically the risk that [the student] was unjustly ‘sentenced’—is rather trivial.”); *Gorman*, 837 F.2d at 16 (noting the weight of authority is against representation of counsel); Nathan, *supra* note 85, at 120.

93. *Johnson*, 233 F. Supp. 2d at 249-50 (student was deprived of “any meaningful opportunity” to defend themselves against expulsion charges because school refused to allow cross-examination of witnesses).

94. See, e.g., *B.S. ex rel. Schneider v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891, 897, 899 (N.D. Ind. 2003) (“[T]he clear weight of authority holds that a student facing an expulsion hearing does not have the right to cross-examine witnesses or even learn their identities.”); *Newsome v. Batavia Loc. Sch. Dist.*, 842 F.2d 920, 923-25 (6th Cir. 1988) (finding high school student had no due process right to learn identity of or cross-examine accusing students in an expulsion proceeding); *E.K. v. Stamford Bd. of Educ.*, 557 F. Supp. 2d 272, 276-78 (D. Conn. 2008)

courts have reasoned that school administrators, who usually know the student witness first-hand, can properly gauge the believability of the student's accusation.⁹⁵ Further, the school has an obligation to protect student witnesses.⁹⁶ These considerations outweigh the value of allowing the accused student to confront and cross-examine their accusers.⁹⁷

Goss and its progeny of cases offer a critical framework for the application of the Due Process Clause to virtual discipline. That framework, applied in the next Section, will help answer the question of when a particular act of virtual discipline is likely to be more than *de minimis* and trigger procedural due process. For instances where due process is owed, it will also guide the analysis of what that virtual process should be. The answers to these questions ultimately inform the recommendations made in Part III of this Paper, which are intended to help schools better manage virtual discipline without infringing on their students' constitutional rights.

III. APPLYING THE DUE PROCESS CLAUSE TO VIRTUAL DISCIPLINE

The landscape of education has changed drastically due to the COVID-19 pandemic and subsequent shift to virtual learning in many districts. Although some schools and districts dabbled in virtual learning prior to the pandemic, students are now learning online in unprecedented numbers.⁹⁸ In fall 2020, reports noted that between 40–60% of students were enrolled in districts that offer only remote learning.⁹⁹ Forced to adapt in a matter of months, schools had to quickly implement abundant technical, pedagogical, and curricular changes. On

(finding student accused of making threatening comments to another student has no due process right to confront the student in an expulsion proceeding); *Brown v. Plainfield Cmty. Consol. Dist.* 202, 522 F. Supp. 2d 1068, 1070-71, 1075-76 (N.D. Ill. 2007) (finding school did not violate student's due process rights when refusing to allow him to cross-examine adverse student witnesses).

95. *Newsome*, 842 F.2d at 924.

96. *Id.*

97. *Id.* at 925.

98. See Mark Lieberman, *COVID-19 Fuels Big Enrollment Increases in Virtual Schools*, EDUC. WEEK (Sept. 3, 2020), <https://www.edweek.org/leadership/covid-19-fuels-big-enrollment-increases-in-virtual-schools/2020/09>.

99. Kamenetz, *supra* note 4.

top of it all, teachers and administrators also had to navigate virtual classroom management, usually without any guidance on how the old rules apply to the new virtual environment.

When *Goss* was decided, virtual learning did not exist. Given the recency of virtual learning, there has been scant opportunity for courts to weigh in on how discipline in these virtual environments implicates the federal Due Process Clause. The lack of jurisprudence on virtual discipline creates a gap that is likely to result in significant harm to students who are removed from the virtual classroom without any procedural protections. Soon after most districts switched to virtual learning, reports began to emerge of students being kicked off their virtual class session for minor behaviors such as taking themselves off mute or wearing pajamas.¹⁰⁰ Many experts quickly weighed in on what types of behavior schools should or should not police in the virtual environment, as well as the most effective ways to virtually manage student behavior.¹⁰¹ While important conversations to have, the advisability of whether certain conduct can or should be regulated in the virtual classroom is not the subject of this Paper. Instead, this Paper looks exclusively at the extension of public schools' responsibilities to provide constitutional due process to students who are disciplined in the virtual environment to ensure "a meaningful hedge against erroneous action" as envisioned by *Goss*.¹⁰²

This Section explores the different types of virtual discipline that are starting and will continue to arise in the new virtual environment. Applying *Goss* and subsequent decisions, it analyzes whether such actions are likely to invoke the federal Due Process Clause and, if so, what protections are due. In many instances, the answer will be clear because the virtual disciplinary response so clearly resembles the disciplinary response that occurs in the in-person setting. For example, there have been a rush of cases involving students suspended from

100. See Klein, *supra* note 2.

101. See Belsha, *supra* note 6; Kathleen Foody, *What Happens to Classroom Rules When School is at Home?*, CHRISTIAN SCI. MONITOR (Oct. 13, 2020) <https://www.csmonitor.com/USA/Education/2020/1013/What-happens-to-classroom-rules-when-school-is-at-home/>; Heim & Strauss, *supra* note 6; Carolyn Jones, *How School Discipline – and Student Misbehavior – has Changed During the Pandemic*, EDSOURCE (Nov. 17, 2020), <https://edsources.org/2020/how-school-discipline-and-student-misbehavior-has-changed-during-the-pandemic/643758>; Aaricka Washington, *The Inanity of Zoom School Suspensions*, N.Y. TIMES (Sept. 4, 2020) <https://www.nytimes.com/2020/09/04/opinion/coronavirus-schools-suspensions.html>.

102. *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975).

virtual learning for displaying real or fake weapons during virtual class sessions.¹⁰³ In most of those cases, the exclusion from virtual learning was formally documented as a suspension or expulsion, triggering the same notice and hearing procedures under state and local policy that would attach to a similar removal from the in-person setting.¹⁰⁴

The more novel questions arise in situations that are unlikely to be reported. For example, what, if any, process is due to the student who refuses to turn their camera on and so is unilaterally removed from a virtual class session by their teacher and left sitting alone at home without access to instruction for the rest of the day? Similarly, what protections are owed to a student who continues to make disruptive or inappropriate remarks and, as a consequence, gets their access to their student email and the district's online programs blocked?¹⁰⁵

These situations are likely underreported because, in many instances, administrators and parents¹⁰⁶ may not even be aware these removals are occurring. Unless there is a procedure or directive in place, it is up to the teacher or student to willingly report the incident to an administrator or parent. This is different than the in-person setting, where the involvement of administrators and parents is a more natural byproduct of classroom removal because the teacher typically has to send the student to the office or another designated area within the school building to ensure constant supervision. During traditional periods of classroom removal, the school's designated administrator is

103. Elfrink, *supra* note 6 (student recommended for expulsion and ultimately suspended for having unloaded BB gun in bedroom after teacher saw gun during virtual session); Heim & Strauss, *supra* note 6 (student suspended for five days for displaying toy gun on screen during virtual class session).

104. Elfrink, *supra* note 6; Heim & Strauss, *supra* note 6. See also Emma North & Rachel Keller, *Henrico County Student Suspended After Protesting in Virtual Classroom, Seeks to Appeal with Help of ACLU*, ABC 8 NEWS (Nov. 20, 2020, 7:09 PM) <https://www.wric.com/news/local-news/henrico-county/henrico-county-student-suspended-for-protesting-in-virtual-classroom-seeks-to-appeal-with-help-of-aclu/>; Faimon A. Roberts, *First of Its Kind Suspension Appeal Hearing Begins in Jefferson Parish BB Gun Case*, NOLA (Dec. 4, 2020, 2:15 PM) https://www.nola.com/news/education/article_c75c336c-364b-11eb-9af6-efccd77a9cd3.html (initial suspension proceedings run under the district's established policies regarding out-of-school suspension).

105. See Belsha, *supra* note 6.

106. For the sake of brevity, I use the term parent as defined by the federal Family Educational Rights and Privacy Act (FERPA), which defines "parent" to include "a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." 34 C.F.R. § 99.3 (2011).

usually charged with officially documenting the incident and determining the consequence. If the administrator wants to send the student home, they must communicate that with the parent or guardian in some way to ensure the student's safe transportation home. These natural points of communication between school and home during disciplinary response do not occur in the virtual setting, likely leading to underreporting of student removals from class.¹⁰⁷

There is also a lack of clarity about how current data collection and reporting requirements for suspensions apply in the virtual environment.¹⁰⁸ Advocates have expressed concern that the lack of clear categories or definitions for out-of-school or in-school suspension from online instruction will lead to a lack of reporting and less transparency about how much class time students are missing for disciplinary reasons.¹⁰⁹ However, just because something is not reported as a suspension does not mean that an equivalent deprivation has not occurred, thus triggering federal due process and all attendant local and state procedures meant to ensure the student's constitutional rights are not infringed.

The following analysis attempts to shed some light on when virtual removals, however they might or might not be formally documented, implicate federal due process protections and, when such protections are triggered, what minimum process is owed.

A. When Is Virtual Discipline More Than *De Minimis*?

In *Goss*, the Court stated that “total exclusion from the educational process for more than a trivial period” is a serious event that constitutes more than *de minimis* interference in the student's property interest in education and reputational liberty interest.¹¹⁰ Where such interference occurs, the Due Process Clause is implicated. The same interests are at stake in the virtual learning environment.¹¹¹ Thus, the question becomes, what acts of virtual discipline constitute more than *de minimis* interference, thus invoking due process protection.

107. Belsha, *supra* note 6.

108. *Id.*

109. *Id.*

110. *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

111. Kamenetz, *supra* note 4.

As described above, some acts of virtual discipline, such as a formal suspension of a student from the virtual program in response to a serious disciplinary incident, clearly raise due process concerns.¹¹² In these cases, schools have typically been able to translate and apply their current procedural policies for out-of-school suspension to the virtual environment without issue or question.¹¹³ What policies should be followed when the removal is informal or for a shorter period of time and where there are not clear corollary responses in the virtual environment are less obvious. For example, a teacher who is typically able to handle a disruptive student by sending them to the office or the in-school suspension room does not have the same option in the virtual environment. In these cases, a close examination of *Goss* and subsequent case law helps reveal when such a removal might exceed the *de minimis* standard and rise to level of “total exclusion from the educational process for more than a trivial period.”

Many courts have recognized that classroom removals that are not technically out-of-school suspensions could constitute more than *de minimis* interference with a student’s property and liberty interests.¹¹⁴ In evaluating cases that involve in-school suspension, courts have looked at how the removal impacts the student’s opportunity to learn and typically focus on factors such as the student’s ability to complete assignments, receive instruction, and access teachers during the removal.¹¹⁵ Similarly, in cases involving disciplinary transfers to an alternative education program, courts generally look at whether the alternative education being offered is significantly different from or inferior to the traditional program, if the timing of removal would significantly affect the student’s educational opportunities, or if the removal gives rise to protected liberty interest in the student’s

112. See Elfrink, *supra* note 6; Heim & Strauss, *supra* note 6; North & Keller, *supra* note 104.

113. See Elfrink, *supra* note 6; Heim & Strauss, *supra* note 6; North & Keller, *supra* note 104. *But see* Harrison v. Jefferson Parish Sch. Bd., No. 20-2916, 2020 U.S. Dist. LEXIS 217655 (E.D. La., Nov. 20, 2020) (ongoing legal fight about appeal process owed under state law).

114. See Couture v. Bd. of Ed. of the Albuquerque Pub. Schs., 535 F.3d 1243, 1257 (10th Cir. 2008); Laney v. Farley, 501 F.3d 577, 584 (6th Cir. 2007); Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749, 751-52 (S.D. Miss. 1987), *aff’d*, 853 F.2d 924 (5th Cir. 1988).

115. See discussion *supra* Part II(B)(i).

reputation.¹¹⁶ These precedents are helpful in analyzing when a virtual removal might meet the “total exclusion” standard.

Of course, many virtual discipline acts are unlikely to be considered a total exclusion for more than a trivial period. For example, a student who is muted by the teacher to prevent disruptive noises or remarks does not experience “total exclusion” so long as they can still see and hear the teacher.¹¹⁷ Similarly, based on prior decisions, it is unlikely that being removed from one virtual class, even if it happens on several different occasions, would cause more than *de minimis* harm because the removals are for a trivial period.¹¹⁸

However, the analysis likely changes if a student is kicked out of class and prohibited from logging back on for the rest of the day, causing them to miss multiple lessons or subjects. Similarly, a student who is completely blocked from the school’s online program and their email, with no opportunity to receive instruction, access teachers, or complete assignments, likely suffers a total exclusion as defined by *Goss*. Unlike a traditional in-school suspension, where the student is removed from class, but kept in the school building under the supervision of educators, a virtual removal that completely severs the student’s connection to the school environment for more than a trivial period creates a significant impediment to the child’s opportunity to learn and is more akin to an out-of-school suspension.

Some schools might argue that a student who is virtually removed from class but who can still access an online platform to see materials and submit assignments is not experiencing more than *de minimis* infringement. However, asynchronous instruction is not right for all subjects or all students and is most effective when paired with synchronous instruction that gives students real-time access to their teacher.¹¹⁹ As such, a student who is removed from live class sessions for disciplinary reasons and only allowed to participate in class through

116. See discussion *supra* Part II(B)(ii).

117. While such disciplinary action may not implicate federal due process concerns, this paper does not assert that such a response is best practice in the virtual environment. For more information on research-based interventions in the virtual environment, see PBIS, *supra* note 8.

118. See discussion *supra* Part II(B)(i).

119. Stefan Hrastinski, *Asynchronous and Synchronous E-Learning*, EDUCAUSE (Nov. 17, 2008), <https://er.educause.edu/articles/2008/11/asynchronous-and-synchronous-elearning>; Mark Lieberman, *Virtual Education Dilemma: Scheduled Classroom Instruction vs. Anytime Learning*, EDUC. WEEK (Mar. 30, 2020), <https://www.edweek.org/teaching-learning/virtual-education-dilemma-scheduled-classroom-instruction-vs-anytime-learning/2020/03>.

asynchronous online materials could be deprived of their opportunity to learn. In these cases, a closer look at the facts would be needed to determine whether the lack of synchronous instruction and access to teachers resulted in the student's total exclusion as contemplated by *Goss*.

Along these same lines, some districts have created "virtual in-school suspension" programs, which function much like traditional in-school suspensions.¹²⁰ In these programs, a student accused of misbehavior is removed from their virtual classroom and temporarily re-assigned to a separate virtual classroom where they have access to a school staff member who can assist them in completing assignments and making educational progress.¹²¹ For these students, due process is unlikely owed unless the student does not have the opportunity to learn because the programming in the alternative virtual setting is significantly different from or inferior to the regular education programming, the timing of removal significantly affects the student's educational opportunities, or if the removal gives rise to protected liberty interest in the student's reputation.¹²²

To avoid running afoul of the Constitution, schools must be clear about when Due Process is implicated in the virtual environment. Many schools are likely currently engaging in virtual discipline practices that constitute more than *de minimis* infringement on their students' rights without providing any procedural safeguards to those students. The first step is going through the analysis above and identifying when those instances occur. The next step is determining what process is owed to the students whose rights have been infringed.

B. What Virtual Process Is Due?

In outlining the due process requirements for suspensions of up to ten days, the *Goss* Court attempted to strike a balance between creating a "meaningful hedge against erroneous action" while not creating an excessive burden for schools.¹²³ The resulting requirement is that for suspensions of up to ten days due process means the student must

120. See discussion *infra* Part III(B).

121. See discussion *infra* Part III(B).

122. See discussion *supra* Part II(B)(ii).

123. *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975).

receive oral or written notice of the charges against the student, and, if the student denies the charges, an explanation of the school authorities' evidence and an opportunity to explain the student's version of the facts.¹²⁴

In looking at less severe disciplinary consequences, such as in-school suspension, courts have suggested that where the deprivation rises to the level of constitutional significance, the procedures outlined in *Goss* set the constitutional minimum.¹²⁵ When evaluating more severe disciplinary consequences such as long-term suspension or expulsion, courts have evaluated the additional due process owed based on a balance of three primary factors outlined in *Mathews*: the student's interest that will be affected; the risk of error and whether additional or substitute procedures would help prevent the error; and the school's interest, including any fiscal or administrative burden that would result from additional or substitute procedures.¹²⁶

Extending this reasoning to the virtual environment, it follows that where a temporary virtual removal results in "the total exclusion from the educational process for more than a trivial period" but no more than ten school days, the school has a responsibility to extend, at minimum, the due process outlined in *Goss*.¹²⁷ Most school districts have detailed local policies that dictate the exact dimensions of how that notice and hearing will be provided to students suspended for up to ten days. Absent updated policies adapted for the virtual environment, it would be in schools' best interest to extend those same procedures and protections to virtually suspended students to avoid constitutional infringement. Similarly, for students who are virtually suspended for more than ten days, schools would be advised to extend the same local procedures they would employ otherwise for students who are long-term suspended from the in-person environment.

The extension of current procedures as a minimum floor for virtual suspensions is supported when applying the three-pronged *Mathews* balancing test in the virtual environment. Starting with the first factor—the student's interest that will be affected—the weight given in the virtual environment is unchanged from that given in the in-person

124. *Id.* at 582.

125. *Cole v. Newton Special Mun. Separate Sch. Dist.*, 676 F. Supp. 749, 751-52 (S.D. Miss. 1987), *aff'd*, 853 F.2d 924 (5th Cir. 1988).

126. See discussion *supra* Part II(C) and notes 84-85.

127. See *Goss*, 419 U.S. at 576.

environment. A student's property and liberty interests in attending school are not diminished just because the public education they are entitled to is now being provided in the virtual environment. This is especially true in districts where virtual education is the only form of education being offered.¹²⁸

Turning to the second factor—the risk of error and ability of additional procedures to help prevent such error—greater weight should actually be given in the virtual environment because the lack of clarity about how traditional student rules apply in the virtual classroom leads to a greater risk of error in the virtual environment. A slew of reported cases confirm that schools are grappling with how to extend rules developed for in-person learning to the virtual school setting.¹²⁹ For example, does a student who wears their pajamas to virtual class violate the dress code?¹³⁰ Should a student who does not have a quiet, private workspace in their home be considered “disruptive” or “non-compliant” because of the background noise and distractions they bring into the virtual classroom?¹³¹ Is a student who does not attend class due to technical difficulties in violation of the district's attendance policy?¹³² In this new virtual environment, the rules are not clearly established, giving extra importance to the requirement that schools clearly articulate *why* a student has been removed and allowing that student to share their version of the facts.

Further, the exchange that occurs during the implementation of due process will help school administrators identify gaps in current policies and address barriers to learning. It is in the schools' interests to detect and correct these barriers so that they can create more effective discipline policies and practices in the virtual environment. For example, in providing notice and hearing to a student who has been removed from class for attendance issues, an administrator might be made aware of technical issues that could be addressed by the district's IT support. Alternatively, the student might be having difficulties

128. Kamenetz, *supra* note 4.

129. *See supra* notes 5-7 and accompanying text.

130. *See* Will Wright, *No Pajama Pants Allowed While Learning from Home, Illinois District Says*, N.Y. TIMES (Aug. 8, 2020), <https://www.nytimes.com/2020/08/08/us/pajamas-school-springfield-dress-code.html?auth=login-email&login=email>.

131. *See* Heim & Strauss, *supra* note 6.

132. *Id.*

participating because they are also providing childcare for their young siblings. Instead of a punitive approach, the administrator could instead refer the student's family for social work support to help address the underlying childcare issues. Ultimately, in applying the notice and hearing requirements to virtual removals, school administrators will not only prevent erroneous removals, but they will also be better able to utilize their discretion to achieve their own goals of effective discipline and better student outcomes.

As a final point, the very nature of the virtual environment will result in less of a fiscal and administrative burden to provide due process in most cases. Because the conversation providing notice and hearing will likely be done virtually, the administrator can provide it without even having to leave their office. Further, in schools and districts where a large number of students are participating virtually, initial reports indicate disciplinary incidents are down, meaning that administrators have more disciplinary resources available to employ virtual due process.¹³³

Given these factors, the weight of the balancing test falls on the side of providing students who are virtually removed, at minimum, the same notice and hearing they would be owed if they were out-of-school suspended from the in-person environment for the same time period.

IV. RECOMMENDATIONS FOR VIRTUAL DISCIPLINE

Although virtual learning has been forced upon schools and students due to the COVID-19 pandemic, many teachers, students, and schools have found that learning in the virtual environment is actually preferable in some cases.¹³⁴ Even as the pandemic subsides and a majority of students return to in-person learning, many districts have maintained virtual offerings, resulting in an increase of virtual learning from pre-

133. Jones, *supra* note 101; see e.g., Kimberly L. Quintus, *JJAC's Juvenile Age Interim Report*, N.C. DEP'T OF PUBLIC SAFETY 23 (Jan. 5, 2021), <https://files.nc.gov/ncdps/documents/files/RtA-Update-01052021-for-JJAC-Report.pdf> (reporting a significant statewide decrease in school-based offenses in 2020).

134. Alyson Klein, *We Love Virtual Learning: Students, Parents Explain Why*, EDUC. WEEK (Jan. 6, 2021), <https://www.edweek.org/technology/we-love-virtual-learning-students-parents-explain-why/2021/01>.

pandemic days.¹³⁵ As virtual learning becomes a mainstay of public education, it is important for districts to be mindful of their responsibilities under the federal Due Process Clause when doling out virtual discipline. Ideally, districts will take proactive steps to ensure all discipline meets constitutional requirements. State and federal education agencies can also offer guidance and technical assistance in this area. This Section outlines some of those recommended steps.

A. Adopt Clear Discipline Policies for the Virtual Environment.

The first, and most important step that districts can take to ensure procedural due process in virtual discipline is to adopt clear policies for the virtual environment. As discussed above, simply extending current policies to the virtual environment results in gaps because it is sometimes unclear how rules apply to a student learning online from home. Further, for some traditional in-person disciplinary consequences, such as in-school suspension, there is no corollary discipline response in the virtual environment unless the school proactively establishes one.

It is critical for schools to review their discipline policies to identify gaps. Where such gaps exist, schools need to update old policies or draft new ones for the virtual environment that not only clarify what constitutes virtual misbehavior but also contemplate a new range of consequences and the procedural safeguards that attach to each of those consequences. These new policies must recognize that if students are going to be removed from the virtual environment for more than a trivial period without access to teachers, assignments, or instruction, these students are likely owed notice and hearing as outlined under *Goss*.

Fortunately, some districts recognized the need for clarity around procedures for virtual discipline early in the pandemic. In Shelby County, which includes Memphis, the district created “Virtual Student Conduct Expectations” to help guide discipline in the virtual

135. Heather Schwartz & Paul Hill, *Analysis: Survey of District Leaders Shows Online Learning is Here to Stay*, THE 74 MILLION (Jan. 25, 2021), <https://www.the74million.org/article/analysis-survey-of-district-leaders-shows-online-learning-is-here-to-stay-some-ways-of-making-it-work-for-students-beyond-the-pandemic/>.

environment for the 2020-2021 school year.¹³⁶ The guidance established and defined new categories of virtual discipline, including virtual detention (or supervised study) and virtual in-school suspension.¹³⁷ The guidance required that the virtual in-school suspension and supervised study environments be conducive for learning and provide ongoing instruction during the span of the student's stay.¹³⁸ It also provided detailed information about the virtual due process and appeals process, which applied to all removals from virtual classes that exceeded one day, even if the student was assigned to virtual in-school suspension.¹³⁹ Because students continued to have an opportunity to learn during virtual in-school suspensions under these policies, courts are unlikely to find the Due Process Clause implicated. Even so, the Shelby County virtual discipline policy exceeded the procedural requirements imposed by most courts, making it unlikely to run afoul of its students' procedural rights under the U.S. Constitution.¹⁴⁰

On the other hand, some districts established virtual discipline policies only after getting in hot water about the application of discipline in the virtual learning environment. One such example is described in the introduction to this Paper. In Lafayette Parish, where the district virtually suspended the fourth-grader after he moved a BB gun out of the way of his younger brother, national attention and scrutiny prompted the Louisiana state legislature to pass a new law requiring all school systems in the state to write new discipline policies for virtual education.¹⁴¹ The new state law required districts to clearly define the rules of conduct for students engaged in virtual instruction and the

136. Shelby County Schools, Shelby Cnty., Tenn., Virtual Student Conduct Expectations (Aug. 20, 2020) (on file with author) [hereinafter: Shelby Virtual Conduct]; see also Denver Pub. Schs., Student Discipline in a Virtual Classroom (Apr. 2020) (on file with author).

137. Shelby Virtual Conduct, *supra* note 136, at 15.

138. *Id.*

139. *Id.* at 18-20.

140. Keeping students connected to learning during virtual removals is also likely to help improve student outcomes because research shows discipline practices that remove students from the classroom have long-term negative impacts on students and the overall school climate. MORGAN ET AL., *supra* note 10.

141. 2020 Second Extraordinary Session LA. ACTS 48 (Student/Discipline: Provides relative to student discipline) [hereinafter: LA. ACTS 48]; see also Faimon A. Roberts, *Jefferson Parish School Board Prepares to Challenge Ka'Mauri Harrison Act in Court*, NOLA (Nov. 17, 2020 1:15 PM), https://www.nola.com/news/education/article_bab55f88-28f1-11eb-9753-87dc8f48d6d8.html.

consequences of misconduct.¹⁴² Additionally, the new law required that districts, in developing discipline rules for the virtual environment, take into consideration the students' and their families' constitutional rights and provide additional due process procedures for any student suspended or expelled for behavior displayed while participating in virtual instruction.¹⁴³

However, in Lafayette Parish, where the BB gun incident occurred, the virtual discipline policy ultimately adopted in compliance with the new state law did not go far enough. While the policy did address what conduct was prohibited in the virtual learning environment, it did not tackle the unique disciplinary responses that arise in virtual discipline, such as short-term removals from virtual class that might equate to an out-of-school suspension.¹⁴⁴ In this failure, the district, and others like it, leave themselves at risk of imposing virtual removals that infringe on the federal due process rights of its students.

All in all, at the end of the 2020-2021 school year, the large majority of schools had no policies in place that clarified the disciplinary rules and procedures that applied in the virtual environment.¹⁴⁵ While ill-advised, it is unsurprising given how quickly schools had to shift to virtual learning and how many administrative resources had to be dedicated to technical and pedagogical changes connected with this shift.¹⁴⁶ Even schools that engaged in virtual programming for years lacked clear and comprehensive disciplinary policies tailored to the virtual environment. For example, in Spring 2020, the North Carolina Virtual Academy (NCVA), a fully online public charter school that has been providing virtual instruction to students since 2015, still listed as a disciplinary response the "removal of student access to NCVA instructional computing resources, which could result in his/her inability to complete learning activities" without any corresponding due process requirements.¹⁴⁷ If schools that were explicitly established to

142. LA. ACTS 48, *supra* note 141.

143. *Id.*

144. Lafayette Par. Schs., Virtual Discipline Policy (2020) (on file with author).

145. Klein, *supra* note 2.

146. *Id.*

147. N.C. Virtual Academy, Parent/Student Handbook (2019-20),

<https://www.k12.com/content/dam/schools/ncva/files/SY1920-Handbook.pdf>; Greg Childress,

provide virtual education and have done so for years do not recognize the importance of due process protections during virtual removals, it is understandable that schools new to this format struggled to adapt.

However, just because it is understandable does not make it acceptable. A school's duty to protect the constitutional rights of its students does not evaporate in the virtual environment. Not only that, as virtual education is likely to remain a feature of public education in the future, it is in schools' best interests to take proactive steps to create clear and effective disciplinary policies for this new educational setting. Discipline practices that are focused on prevention and reinforcement of positive behaviors have been proven to reduce student misbehavior, improve the overall school climate, and enhance academic outcomes.¹⁴⁸ Fortunately, there is a growing body of guidance aimed at implementing positive behavior supports and interventions in the virtual environments.¹⁴⁹ Schools should adopt these research-based practices to avoid unnecessary classroom removals.

Of course, as in traditional school settings, there will be instances in the virtual classroom when students need to be removed due to disruptive or unsafe behaviors. In these instances, schools can and should find creative ways to ensure students still have an opportunity to learn. For example, as in Shelby County, a district could create a virtual in-school suspension program where students can go during virtual removals to continue their learning.¹⁵⁰ Schools could also give students access to recorded lessons and the ability to connect with the teacher outside of virtual class for individualized support.

Ensuring students stay connected to the education process during virtual removal not only helps schools stay in line with federal due process requirements but also likely improves student outcomes.¹⁵¹ Additionally, even if not constitutionally mandated, extending notice

NC May Turn to Low-Performing Virtual Charters in Response to Demand for Online Education, N.C. POLICY WATCH (Aug. 7, 2020), <http://www.ncpolicywatch.com/2020/08/07/n-c-may-turn-to-low-performing-virtual-charters-in-response-to-demand-for-online-education/>.

148. See CTR. ON POSITIVE BEHAV. INTERVENTIONS & SUPPORTS (PBIS), *Getting Started*, <https://www.pbis.org/pbis/getting-started> (last visited Feb. 3, 2021) [hereinafter *Getting Started*].

149. See, e.g., PBIS, *supra* note 8; Transforming Sch. Discipline Collaborative, *supra* note 8.

150. Shelby Virtual Conduct, *supra* note 136, at 15; see also D.C. PUB. SCHS., *What is Virtual In-School Suspension?*, <https://dcpsreopentstrong.com/faqs/what-is-virtual-in-school-suspension/> (example of a district defining their virtual suspension program).

151. See *Getting Started*, *supra* note 148.

and hearing protections for students who are removed to a virtual detention or in-school suspension room will help prevent erroneous removals and identify gaps in current policies, advancing overall fair and effective virtual discipline.

B. Provide Robust and Widespread Training and Technical Assistance for Teachers and Administrators.

Virtual classroom management and discipline is a new frontier, and even experienced educators might have difficulties adapting.¹⁵² Given the unprecedented challenges that schools are facing, training around discipline practices might fall to the bottom of the priority list, leaving students at risk of erroneous and unnecessary virtual removals in violation of their constitutional rights.¹⁵³ Instead of leaving teachers and administrators to adapt on their own, districts and state education agencies must prioritize widespread training on best practices in virtual discipline, including training on their procedural responsibilities. This is especially true where new policies or laws specific to the virtual environment have been adopted.

Some districts have already begun such trainings, although most have been focused on preventing virtual removals, instead of the procedures to follow during periods of removal. In Houston, prior to the start of the 2020-2021 school year in which approximately 35,000 students would be attending remotely, the Spring Independent School District held a virtual training for principals about handling student behavior in this new environment.¹⁵⁴ The training emphasized prevention, increased supports for struggling students, and utilized strategies that would not contribute to existing inequities.¹⁵⁵ In Georgia, Clayton County Public Schools rolled out a new district-wide social-emotional learning curriculum to help students cope with the impact of COVID-19.¹⁵⁶ The county also set up a system allowing students to reach a school support team directly if learning challenges occur,

152. See Heim & Strauss, *supra* note 6.

153. Jones, *supra* note 101.

154. Belsha, *supra* note 6.

155. *Id.*

156. Klein, *supra* note 2.

guaranteeing a response within twenty-four hours.¹⁵⁷ These efforts to prevent student misbehavior are admirable and should be replicated. However, it is equally important that all trainings relating to discipline and classroom management contemplate that virtual removals may occur and instruct teachers and administrators of their procedural responsibilities during those periods of removals to ensure students' rights are protected.

C. Invest in Technology.

Along with new policies and robust trainings, another step that districts can take to avoid constitutional violations is to invest in technology that allows administrators and teachers greater flexibility in dealing with disruptive students. For example, a district should choose an online learning platform that allows a teacher to easily mute a noisy student or cut off the video of a student behaving inappropriately without completely removing the student from class.¹⁵⁸ Similarly, in choosing a platform, schools should be mindful of having enough virtual spaces to hold students who might be assigned to a virtual supervised study or in-school suspension.

If these options are available, teachers will have greater ability to address disruptions in a targeted way without invoking "total exclusion" concerns and the school's attendant due process responsibilities. Of course, in choosing what technology to utilize, schools also need to be mindful of ensuring there is sufficient technical support for teachers and families. This will likely involve hiring more IT staff members who can train educators on new platforms and who can also promptly respond to technological problems that may unintentionally result in student exclusions from virtual class.

Unfortunately, most public schools do not have the financial resources they need to sufficiently invest in appropriate technology. Even before the COVID-19 pandemic, the nation's public education system was severely and inequitably underfunded.¹⁵⁹ With the

157. *Id.*

158. Heim & Strauss, *supra* note 6 (reporting that teachers have praised these functions for making discipline issues much easier to handle in the online-only environment).

159. Closing America's Education Funding Gaps, THE CENTURY FOUND., (July 2020), <https://tcf.org/content/report/closing-americas-education-funding/> (estimating that K-12 public schools in the U.S. are underfunded by nearly \$150 billion annually).

pandemic and subsequent recession, education policymakers will be forced to balance an unprecedented range of competing interests with the same, or even fewer, resources available.¹⁶⁰ Still, equipping educators with more effective technological tools for managing student misbehavior in the virtual environment should be a funding priority given the role such tools can play in reducing unnecessary virtual removals. Reducing virtual removals in this way not only will help promote positive student outcomes and school climates,¹⁶¹ but it also will lessen the risk of constitutional due process violations, which can result in costly litigation.¹⁶²

D. Update Monitoring and Accountability Systems

The agencies responsible for collecting and reporting discipline data will also need to take steps to update their monitoring and accountability systems to account for virtual removals. All public schools and districts are required to report aggregate disciplinary data to the U.S. Department of Education's Office for Civil Rights.¹⁶³ The majority of states also require some level of reporting on school discipline, with some requiring suspension and expulsion data be disaggregated by race, gender, and/or disability status.¹⁶⁴ This data plays a critical role in helping policy-makers develop discipline policies that better address school safety concerns while also reducing the harm caused by exclusionary discipline practices.¹⁶⁵ In fact, federal guidance recommends that districts regularly examine data and review disciplinary policies to determine how often exclusionary disciplinary

160. See Anya Kamenetz, *Enrollment is Dropping in Public Schools Around the Country*, NPR (October 9, 2020, 6:00 AM), <https://www.npr.org/2020/10/09/920316481/enrollment-is-dropping-in-public-schools-around-the-country> (decreasing public school enrollment due to pandemic and switch to virtual learning has resulted in budget cuts).

161. *Getting Started*, *supra* note 148.

162. Litigation raising due process claims for virtual suspensions are already starting to arise. See *Harrison v. Jefferson Parish Sch. Bd.*, No. 20-2916, 2020 U.S. Dist. LEXIS 217655 (E.D. La., Nov. 20, 2020).

163. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RTS., *Civil Rights Data Collection*, <https://www2.ed.gov/about/offices/list/ocr/data.html?src=rt/>.

164. Alyssa Rafa, *50-State Comparison: State Policies on School Discipline*, EDUC. COMM. OF THE STATES (Aug. 28, 2018), <https://www.ecs.org/50-state-comparison-state-policies-on-school-discipline/>.

165. *Id.*

actions are being used and whether they are being imposed disproportionately to certain groups of students.¹⁶⁶

Given the importance of accurate data in establishing fair and effective discipline policies, there is a growing concern that current systems used to collect and report discipline data may not reliably capture virtual removals and suspensions.¹⁶⁷ Advocates are worried that new forms of online discipline that are, essentially, out-of-school suspensions, are not being tracked or released as part of a district's usual discipline data.¹⁶⁸ Researchers who study school discipline say that virtual removals need to be documented and likely even need their own distinct category, separate from traditional categories used for in-person removals so that trends in virtual discipline can be better understood.¹⁶⁹ Because concerns about excessive and discriminatory school removals still exist in the virtual environment, school districts, with leadership from state and federal agencies, will need to update their practices and policies to effectively track and report virtual removals and suspensions.

V. CONCLUSION

The rise of virtual learning continues to fuel questions about when and how constitutional rights apply to public school students in the virtual setting. Since first established in *Goss v. Lopez*, the right to procedural due process for students facing school removals has played an important role in preventing unnecessary and harmful exclusions. This Paper argues that the same constitutional rights apply in the virtual environment and that many virtual removals trigger the same protections owed to students experiencing out-of-school suspension. To avoid constitutional infringement in the virtual classroom, schools must take proactive steps to develop disciplinary policies and procedures that tackle the unique nature of the virtual environment and provide sufficient notice and hearing where appropriate. Educators also need the

166. U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, & U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline* (2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

167. Sarah D. Sparks, *As States Fall Short on Tracking Disciplines, Concerns for Equity Grow*, EDUC. WEEK (May 4, 2021), <https://www.edweek.org/leadership/as-states-fall-short-on-tracking-discipline-concerns-for-equity-grow/2021/05>.

168. Belsha, *supra* note 6.

169. Jones, *supra* note 101.

training and technology to implement these new policies effectively. Finally, there must be assistance from state and federal education agencies to ensure that virtual removals are accurately documented and reported so that policymakers and the public can monitor discipline practices and address any potential problems.