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

*Elizabeth J. Upton**

ABSTRACT

Public backlash over zero tolerance policies that funnel public school students to jail through the "school to prison pipeline" has unveiled the systemic issues associated with discriminatory application and the detrimental effects of exclusionary discipline. What remains unaddressed and largely ignored is the lack of procedural safeguards afforded to students who face suspension or expulsion from school. In 1975, the Supreme Court laid out minimum protections for students facing short-term suspensions under the Due Process Clause of the Fourteenth Amendment. Nonetheless, school administrators have significantly increased the use of exclusionary discipline in the last forty years, while the protections for students have not kept pace. As schools throw more and more students out of school, courts have dismissed these students' cases, almost blindly deferring to the school districts. This Note argues that it is time for the courts to more closely review school disciplinary procedures and articulate a clearer, higher standard for the process due before a student can be denied public education. Courts should require that schools provide compre-

* J.D., expected May 2018, The George Washington University Law School; M.A., Special Education, 2012, University of Alabama; B.S., Economics, 2010, Oklahoma State University. I would like to thank the staff of *The George Washington Law Review* for their work on this piece. I would particularly like to thank Professor Derek Lawlor and Katelin Shugart-Schmidt for their assistance in developing this idea and shaping early drafts, as well as editors Komal Shah and Morgan Kelley for their insightful suggestions and revisions.

hensive notice to include the specifics of the alleged rule violations and affirmatively inform students and their guardians of their procedural and representative rights.

Table of Contents

Introduction

During the 2011–2012 school year, 3.45 million public school students were given out-of-school suspensions and 130,000 students were expelled.[1] The use of exclusionary school punishment[2] has been on the rise over the past several decades, with suspension rates in public schools doubling since the 1970s, in large part due to the adoption of "zero tolerance policies."[3] The use of exclusionary discipline remains

1 *See School Climate and Discipline: Know the Data*, U.S. Dep't of Educ., http://www.ed.gov/policy/gen/guid/school-discipline/data.html [https://perma.cc/GH92-FPS7] (last updated July 11, 2016).

2 This term refers to out-of-school suspensions and expulsions where the student is removed from the learning environment for a period of time ranging from one day to indefinitely. Precise definitions of "suspension" and "expulsion" vary. This Note will use "short-term suspension" to refer to temporary removal of a student from school for up to ten days, "long-term suspension" to refer to temporary removal for a period greater than ten days, and "expulsion" to refer to an indefinite or permanent removal.

3 *See* Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 Soc. Probs. 68, 70–71 (2016) (zero tolerance policies "mandate[] automatic suspension or expulsion for serious or repeated offenses"). The American

a nationwide problem despite efforts to curb its use. For example, amid attempts to reduce suspension rates through improved school climate and the use of restorative practices,[4] suspensions in Baltimore nevertheless went up twenty-five percent in the 2015–2016 school year compared to the previous year.[5]

Exclusionary discipline negatively impacts students emotionally and academically. When students are wrongly or excessively punished, they suffer reputational harm, emotional turmoil, and academic losses. Being excluded from school can result in reputational harm because students may come to be labeled as troublemakers, leading to social exclusion by peers and school staff.[6] In addition to immediate alienation, the reputational damage of a marred record may impair a student's ability to seek employment or admission to higher education.[7] Students with a high level of "school connectedness" tend to be physically and mentally healthier and are less likely to engage in high-risk behavior.[8] Exclusionary discipline both physically severs and figuratively strains students' connections to their peers and school.[9] Furthermore, schools with zero tolerance policies have been associated with lower school connectedness.[10]

The negative effects of exclusion extend to the school culture and affect nonexcluded students as well.[11] One study found that decreased

---

Psychological Association defines "zero tolerance" as "a philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context." Am. Psychological Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?*, 63 AM. PSYCHOLOGIST 852, 852 (2008).

4 Restorative practices "call for rehabilitative responses to misbehavior that teach children conflict resolution and relationship building." Erica L. Green, *Baltimore Suspending Many More Students from School*, BALT. SUN (Nov. 15, 2016, 12:28 PM), http://www.baltimoresun.com/news/maryland/education/bs-md-ci-school-suspension-increase-20161031-story.html [https://perma.cc/772N-U9MG].

5 *Id.*

6 *See* Goss v. Lopez, 419 U.S. 565, 575 (1975) (acknowledging the potential for exclusion to cause serious damage to a student's reputation and the subsequent detrimental effect on peer and teacher relationships and future opportunities).

7 *Id.*

8 Brian Daly et al., *Promoting School Connectedness Among Urban Youth of Color: Reducing Risk Factors While Promoting Protective Factors*, 17 PREVENTION RESEARCHER 18, 18 (2010) ("High levels of school connectedness are associated with increased emotional well-being, less substance abuse, better physical health, decreased levels of suicidal ideation, reduced depressive symptoms, lower risk of violent or deviant behavior, and reduced risk for teen pregnancy . . . .").

9 *Id.*

10 *Id.*

11 *See* Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOC. REV. 1067, 1081 (2014).

academic success in *nonsuspended* students was associated with high rates of exclusionary discipline.[12] The researchers proposed this "collateral damage" results from the "volatile and socially disorganized environment" created by frequent suspensions and culture of anxiety created by the threat of harsh punishment.[13]

While the detrimental impact of high levels of exclusion on non-excluded students may surprise some, it is no surprise that excluded students suffer academically; excluded students have higher dropout rates, higher incarceration rates, and lower employment rates.[14] For instance, students who are suspended or expelled may be up to ten times more likely than their peers to drop out.[15] This can be particularly detrimental for students entitled to special education services or students who are already far behind.[16] Consider Kuran Johnson, a Baltimore ninth-grader with a disability, who was suspended in October 2015 for fighting and ultimately sent to an alternative school where he was denied special education services.[17] After four months, administrators determined Johnson was not even involved in the fight, but only after his family received legal representation in the matter from the Maryland Disability Law Center.[18] Kuran represents just one example of a broken nationwide system.[19] Mistakes like this are more

---

12 *See id.* at 1082–83.

13 *Id.* at 1071, 1083.

14 *See* Amity L. Noltemeyer, Rose Marie Ward & Caven Mcloughlin, *Relationship Between School Suspension and Student Outcomes: A Meta-Analysis*, 44 SCH. PSYCHOL. REV. 224, 226, 234–35 (2015) (demonstrating an unfavorable relationship between suspensions and academic achievement and explaining studies that show correlations between suspensions and dropout rates and the associated negative impact on earning potential and likelihood of incarceration).

15 *See generally* Am. Acad. of Pediatrics, *Out-of-School Suspension and Expulsion*, PEDIATRICS, Mar. 2013, at e1001, http://pediatrics.aappublications.org/content/pediatrics/131/3/e1000.full.pdf [https://perma.cc/H4RJ-BUQ8].

16 *See* Noltemeyer, Ward & Caven, *supra* note 14, at 234–35 ("[S]tudents who may experience heightened risk [of dropping out] from the outset"—low-income and urban students—"may be doubly disadvantaged by their schools' use of disciplinary practices that may further exclude them from instruction that they need to progress educationally and alienate them from the school setting."); *see also* Brian J. Fahey, Note, *A Legal-Conceptual Framework for the School-to-Prison Pipeline: Fewer Opportunities for Rehabilitation for Public School Students,* 94 NEB. L. REV. 764, 795 (2016).

17 Rachel M. Cohen, *Arrests and Suspensions Are out of Control in Baltimore Schools*, VICE (Mar. 9, 2016, 1:00 PM), https://www.vice.com/en_us/article/arrests-and-suspensions-are-out-of-control-in-baltimore-schools [https://perma.cc/V38K-8VV3]; *see* Green, *supra* note 4.

18 *See* Cohen, *supra* note 17.

19 *See* Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 877–92 (2012) (describing "[t]he [s]hift [t]oward [s]chool [c]rime [c]ontrol" that began in the late 1990s and saw the proliferation of police and zero tolerance policies in schools, and highlighting examples of resulting negative statistical and anecdotal impacts from states across the nation, includ-

likely where school districts fail to provide sufficient notice to students and their families of what violations are charged, what consequences will be imposed, and what the student's rights are when contesting the exclusion.

By virtue of students' age and relative position of power and knowledge compared with school administrators, there is a significant risk that students will be unaware of their rights and how to exercise them. The inherent superiority of school administrators creates an unbalanced dynamic[20] that should not be compounded by permitting school officials to create and capitalize on information asymmetry by keeping students in the dark about details of the allegations.

The power imbalance is exacerbated because students usually do not have a parent or representative present.[21] This "closed door" policy may allow officials to manipulate students into believing that confessing will get them out of trouble and prevent their parents from being notified.[22] In this context, students may be coerced to confess, despite lacking knowledge of what exactly they are confessing to and that the confession could be used for school exclusion or even to support criminal charges.[23] Research has also demonstrated that youths are particularly susceptible to false confessions because of their "lim-

---

ing Florida, Illinois, Ohio, Louisiana, and Texas); Letter from Congressman A. Donald McEachin and sixty-one other members of Congress to Betsy DeVos, Sec'y of Educ. (July 26, 2017), http://democrats-edworkforce.house.gov/imo/media/doc/7.26.17%20McEachin%20Letter%20to%20Devos%20re.%20School%20Discipline.pdf [https://perma.cc/FD2H-3BPX] (requesting that the Secretary of Education provide information on the Department of Education's plan to "work with states to reduce exclusionary and aversive discipline" because of the "systemic issue of discipline disparities in our nation's schools").

20 *See* TREVOR W. GARDNER, DISCIPLINE OVER PUNISHMENT: SUCCESSES AND STRUGGLES WITH RESTORATIVE JUSTICE IN SCHOOLS 22 (2016) ("This is a common dynamic in schools: Adults have all the power . . . .").

21 *See, e.g.*, Cason v. Cook, 810 F.2d 188, 193 (8th Cir. 1987) (finding no constitutional or statutory violation from failure to notify a parent where a high-school student was questioned and searched by a school official in the presence of a school police officer because the student was not "in custody"); Pollnow v. Glennon, 594 F. Supp. 220, 224 (S.D.N.Y. 1984) (finding no requirement that school officials advise a sixteen-year-old student "that he could call his parents before discussing the incident" because such discussions are "informal" and "non-custodial"), *aff'd*, 757 F.2d 496 (2d Cir. 1985); *see also* Eleftheria Keans, Note, *Student Interrogations by School Officials: Out with Agency Law and in with Constitutional Warnings*, 27 B.C. THIRD WORLD L.J. 375, 404 (2007) ("Many school policies have similar requirements that . . . allow school officials to question students for any reason without notifying the students' parents or guardian . . . .").

22 *See* J.D.B. v. North Carolina, 564 U.S. 261, 265–67 (2011) (describing situation in which a thirteen-year-old was questioned by a school official and police officer in a "closed-door conference room").

23 *See* Julie K. Waterstone, *Counsel in School Exclusion Cases: Leveling the Playing Field*, 46 SETON HALL L. REV. 471, 488 n.92 (2016) ("[M]ost families do not realize that a written or

ited appreciation for the future, impulsiveness, and inadequate legal knowledge."[24] It is exceptionally unjust for disciplinary procedures to neglect to inform students of their rights and the possible consequences for the violations of which they are accused.

Insufficient procedures are further problematic when the students least able to protect themselves are the most likely to suffer the consequences of inadequate process. The imbalance of power has been shown to be exacerbated for at-risk populations, particularly minority students, low-income students, and students with disabilities.[25] These students are more likely to be behind their peers due to the well-documented "achievement gap,"[26] and thus are at an increased knowledge deficit compared to school administrators. Moreover, these students are more likely to come from families that lack either the financial resources to obtain representation to explain and defend their rights or the language or educational skills to advocate for the student themselves.[27]

---

oral statement with an admission of guilt can be provided to the district attorney as evidence for an arrest or in a juvenile delinquency proceeding.").

24 Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 441 (2013) (discussing susceptibility of youths to false confessions in police interrogation). Although this research was in context of police interrogations, the traits of youths are no different in an administrator's office. *See J.D.B.*, 564 U.S. at 269 (noting that the risk of false confession in custodial interrogations is higher for juveniles than adults, for whom false confession risk is already "frighteningly high").

25 *See* GARDNER, *supra* note 20, at 8 ("There are few institutions where the power dynamic between those who are serving and those who are being served is so one-sided. At most schools, being accused . . . by a teacher or administrator is equivalent to a conviction, especially at schools that serve mostly low-income students whose parents have limited political or social capital."); *cf.* Karin E. Liiv, Defiance, Insubordination, and Disrespect: Perceptions of Power in Middle School Discipline 3 (2015) (unpublished Ph.D. dissertation, Harvard Graduate School of Education), https://dash.harvard.edu/handle/1/16461057 [https://perma.cc/S8DX-TF6N] ("Teachers can also hold power over students by virtue of their role as teachers and adults, as well as the power that society ascribes to certain demographic categories (e.g., a white middle-class teacher belongs to demographic categories ascribed more power than a low-SES student of color).").

26 *See* Morris & Perry, *supra* note 3, at 69 (describing the long-existent disparities in achievement between white and African American students). Explanations for the achievement gap include income inequality, development of noncognitive skills before entering school, and lack of funding and quality of education at predominantly minority schools. *Id.* The achievement gap is often discussed in terms of race, but socioeconomic status may be just as relevant. *See id.*

27 *See, e.g.*, COMM'N ON YOUTH AT RISK & COMM'N ON HOMELESSNESS & POVERTY, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 118B, at 11–14 (2009); Patricia A. Massey & Stephen A. Rosenbaum, *Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs*, 11 CLINICAL L. REV. 271, 281 (2005) ("The parents who manage to avail themselves of procedural due process appear to be largely white, upper- to middle-class, English-speaking, and well educated."); Waterstone, *supra* note 23, at 477 ("[M]ost of the time families (particularly low-income families) do not have the means to

Yet, exclusionary punishments are disproportionately used to discipline these at-risk groups.[28] Black students are three times more likely to be suspended and expelled than their white peers.[29] Students with disabilities receive out-of-school suspensions at double the frequency of their nondisabled peers.[30] Insufficient procedures add insult to injury where students who are discriminatorily targeted for exclusion also lack the resources to challenge the school districts. Thus, it is particularly unjust that the burden of ensuring that a vulnerable student understands her rights falls on the student herself, not on the capable and powerful school administrators.

Schools are not currently required to explain students' rights because the Supreme Court has provided only a minimal, vague framework for determining what process is due to public school students facing short-term suspension and has not addressed long-term suspension or expulsion at all.[31] This lack of guidance has set an unacceptably low bar, allowing school districts to implement procedures that fail to adequately protect students' rights. Because courts are deferential to local and state authorities, there is no effective mechanism in place to prevent school districts from taking advantage of students who are unaware of their rights or otherwise unable to challenge the school district.

This Note argues that courts should interpret the Fourteenth Amendment's Due Process Clause to require greater procedural protections for students subject to public school expulsion and long-term suspension. Part I of this Note provides background on the Due Process Clause as applied to exclusionary discipline. Part II expands on the problem by demonstrating how the current notice standards have played out in school districts and courts across the country. Part III discusses alternate solutions previously proposed and addresses the shortcomings of these solutions. Part IV introduces and explains a so-

---

obtain counsel, do not know how or where to find counsel, or do not fully understand the ramifications of not obtaining counsel in these types of cases.").

28 *See* EDWARD J. SMITH & SHAUN R. HARPER, UNIV. OF PA. CTR. FOR THE STUDY OF RACE AND EQUITY IN EDUC., DISPROPORTIONATE IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES 3 (2015).

29 *See* U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT (SCHOOL DISCIPLINE) 1–4 (2014), https://www.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf [https://perma.cc/B65Q-T3M4] (noting that in the 2011–2012 school year, African American children represented eighteen percent of enrollment in public preschools, but accounted for forty-eight percent of multiple out-of-school preschool suspensions); Morris & Perry, *supra* note 3, at 70.

30 U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 29, at 1.

31 *See* Goss v. Lopez, 419 U.S. 565, 584 (1975); *infra* Part I.

lution: courts should require more rigorous procedures before a school can deprive a student of public education. Specifically, courts should require notice that explains (1) the time, place, nature, and surrounding circumstances of the student's alleged prohibited conduct; (2) the specific rule violated; (3) the potential consequences; (4) the type and extent of evidence forming the basis of the allegation; and (5) an explanation of the student's rights.

This solution would ensure greater consistency in the notice provided to students across different states and federal districts. It serves to protect students who are otherwise unable to challenge the system due to lack of knowledge of their rights or resources. The solution would not require federal or state legislation, which is politically impracticable in many cases. Further, because a small number of significant cases could set precedent that would be binding on all schools within that jurisdiction, the proposed solution would not require that individual students from *every* district bring lawsuits for it to be successful.

I. Standard of Due Process in Public School Discipline: *Goss*'s Constitutional Minimum

The United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[32] Procedural due process claims involve assessing "(1) whether the plaintiff has a liberty or property interest that is entitled to procedural due process protection; and (2) if so, what process is due."[33] In determining whether there is an interest at stake that is entitled to due process, the Supreme Court has established that "property" encompasses far more than just "actual ownership of real estate, chattels, or money."[34] However, a person claiming a property interest must have a "legitimate claim of entitlement" to that interest that is created and defined by state law or some other source independent from the Constitution.[35]

"[E]ducation is perhaps the most important function of state and local governments."[36] Fittingly, the Supreme Court answered the threshold question of whether access to public education can be an

32 U.S. Const. amend. XIV, § 1.

33 16B Am. Jur. 2d *Constitutional Law* § 957 (2017); *see also* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

34 Bd. of Regents v. Roth, 408 U.S. 564, 571–72 (1972).

35 *Id.* at 577.

36 Goss v. Lopez, 419 U.S. 565, 576 (1975) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

interest protected by the Due Process Clause in the affirmative in *Goss v. Lopez*.[37] The Court determined that students have a "legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause" despite the states' "very broad" authority to set standards of conduct in schools.[38] The Court further acknowledged a related liberty interest that is jeopardized by school disciplinary records, which could damage students' reputations and "interfere with later opportunities for higher education and employment."[39]

In acknowledging a property interest in public education, the *Goss* Court relied on a state statute that provided for free education for residents and a compulsory-attendance law.[40] Because all fifty states have enacted similar laws providing free public education,[41] due process protections exist for all public school students in America. Exclusionary discipline thus implicates a liberty or property interest that is entitled to procedural due process protections, satisfying the first requirement of a procedural due process claim.

"Once it is determined that due process applies, the question remains what process is due."[42] General due process jurisprudence provides that "at a minimum," deprivation of a protected interest must "be preceded by notice and opportunity for hearing appropriate to the nature of the case."[43] Generally, "[t]here is no rigid standard of due process,"[44] and indeed, there are no precise requirements for school disciplinary due process procedures. In the absence of clear guidance, courts often look to a three-factor balancing test, announced by the Supreme Court in *Mathews v. Eldridge*,[45] to determine what extent of process is due in a particular circumstance. The *Mathews* balancing

---

37 419 U.S. 565, 572–74 (1975).

38 *Id.* at 574.

39 *Id.* at 574–75 ("'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied." (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971))).

40 *Id.* at 572–74.

41 Krista Gesaman, *Student Media Guide to Due Process Claims*, STUDENT PRESS L. CTR. (Nov. 17, 2014. 9:58 AM), http://www.splc.org/article/2014/11/due-process-claims [https://perma.cc/R56G-PABS].

42 Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

43 Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

44 SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS 100 (James C. Hanks ed., 2004).

45 424 U.S. 319, 335 (1976). The *Mathews* test arose in the administrative law context, but has been applied in a multitude of other areas of the law. *See* Andrey Spektor & Michael Zuckerman, *Judicial Recusal and Expanding Notions of Due Process*, 13 U. PA. J. CONST. L. 977, 1006 (2011).

test weighs (1) the private interest at stake and (2) "risk of an erroneous deprivation" of that interest and "probable value, if any, of additional or substitute procedural safeguards" against (3) the Government's interest, i.e., the administrative burden and financial costs of the proposed additional safeguards.[46] This test combines, first, a kind of cost-benefit analysis of additional procedures, and second, a balancing of the governmental and individual interests involved.[47]

In the context of public school discipline, due process procedures generally entail at least notice, a right to hearing prior to exclusion, and an appeals process.[48] The *Goss* Court laid out a skeletal framework for the extent of process due before most "short suspensions" of ten days or less.[49] The *Goss* standard requires that "[a]t the very minimum[,] . . . students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing."[50] For these short-term suspensions, a student must "be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[51] The Court further curtailed these admittedly "rudimentary precautions" by allowing that "there need be no delay between the time 'notice' is given and the time of the hearing," and that when a student "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process," the notice and hearing need not precede the student's removal.[52] For long-term suspensions and expulsions, the Court merely noted such deprivations "may require more formal procedures."[53]

The *Goss* Court explicitly expressed its reluctance to impose precise procedures on public schools.[54] Instead, the details are left to indi-

---

46 *See Mathews*, 424 U.S. at 335.

47 *See* Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 37 HOUS. L. REV. 635, 642–43 (2000).

48 U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 14 (2014), https://www.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf [https://perma.cc/FRN9-RNWA].

49 *See* Goss v. Lopez, 419 U.S. 565, 584 (1975) (reserving the possibility that in "unusual situations" a short suspension could still require more than the procedures prescribed).

50 *Id.* at 579.

51 *Id.* at 581.

52 *Id.* at 581–82. The Court also explicitly stated that schools need not provide students "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." *Id.* at 583.

53 *Id.*

54 *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

vidual jurisdictions that must simply ensure they are operating within the broad *Goss* framework for short-term suspensions. As discussed in the following two Sections, the vague *Goss* standards have led to the adoption of minimal procedural safeguards for vulnerable students.

A. "Some Kind of Notice"

Even for due process procedures generally, there is no "rigid formula as to the kind of notice that must be given."[55] Instead, "notice required will vary with circumstances and conditions."[56] In the public school context, *Goss* required only that oral or written notice must inform a student of the charge against him.[57] Moreover, *Goss* established the minimum standards of notice for short-term suspensions but for longer exclusions, merely noted that more may be necessary.[58] Generally, courts have not yet imposed more stringent requirements for long-term suspensions and expulsions.[59] Therefore, *Goss*'s ethereal "*some* kind of notice" standard has permitted schools to (1) rely on vague rules and descriptions of allegations, (2) withhold parental notification, and (3) collapse the notice and hearing requirements into one conversation without notice of the student's rights.

First, *Goss*'s dearth of clear expectations and allowance of oral notice has led courts to uphold school officials' generic rule explanations and vague factual descriptions as sufficient notice.[60] For example, the Nebraska Supreme Court found notice satisfied where written notice did not include details of the multiple incidents of fighting—whose aggregation the student was being suspended for—because the "school officials had explained . . . the rule against fighting" to the student and had discussed the individual incidents with the parents when they initially occurred.[61]

In many instances, only the very broadest rules and an outright absence of notice seem impermissible under *Goss*. For example, some courts have held that vague phrases that fail to specify what offense or

---

Nation is committed to the control of state and local authorities." (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968))).

55 Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956).

56 *Id.*

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

58 *See supra* text accompanying note 53.

59 *See infra* Section II.A.

60 *See* Philip T.K. Daniel & Karen Bond Coriell, *Suspension and Expulsion in America's Public Schools: Has Unfairness Resulted from a Narrowing of Due Process?*, 13 HAMLINE J. PUB. L. & POL'Y 1, 16–17 (1992).

61 *See id.* at 17 (citing Walker v. Bradley, 320 N.W.2d 900, 902 (Neb. 1982)).

rule violation is alleged, such as "violating school rules" or "serious misconduct" are inadequate notice.[62] Similarly, one New York student was granted a new suspension hearing because the written hearing notice referred only to "allegations of conduct that endanger the health, safety and welfare of students" and thus did not identify the precise allegations.[63] While the student's appeal to the Commission of Education was pending, the superintendent voluntarily granted a second hearing to be scheduled after more detailed notice was provided.[64]

Although some courts may find lack of notice in the most glaring circumstances, such as where no notice was provided prior to a hearing,[65] other courts have neglected to require even a basic level of specificity, leaving students and their advocates to defend against uncertain charges.[66] When a student does not understand which specific rule he allegedly violated and what evidence the accusation is

---

62 *Id.* at 16 (citing Mills v. Bd. of Educ., 348 F. Supp. 866, 882 (D.D.C. 1972)); *see also* Miller *ex rel.* Miller v. Penn Manor Sch. Dist., 588 F. Supp. 2d 606, 626–30 (E.D. Pa. 2008) (finding "anything that is a distraction to the education environment" was unconstitutionally overbroad). *But see* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) ("Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.").

63 Pollnow v. Glennon, 594 F. Supp. 220, 221 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 496 (2d Cir. 1985).

64 *Id.* at 222. Notably, the Commissioner of Education stated the second hearing was granted only because the first hearing "*may* have been procedurally defective," thereby avoiding deciding the then-moot complaint of inadequate notice. *Id.* (emphasis added).

65 *See, e.g.*, Waln v. Todd Cty. Sch. Dist., 388 F. Supp. 2d 994, 1004–05 (D.S.D. 2005) (finding insufficient notice when notice was not provided until *after* the imposition of a long-term suspension, one day before the hearing, and where it stated only that the Board of Education would "discuss this matter further" with no indication the student would have "an opportunity to present his version of the incident"); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 451–52 (W.D. Pa. 2001) (finding a complete failure to provide notice violated due process, but declining to decide categorically if notice one day, or even less than twelve hours, prior to hearing would be valid). *But see* Carey v. Savino, 397 N.Y.S.2d 311, 313 (Sup. Ct. 1977) (holding notice received the night before a hearing to be held at 5:30 PM the next day insufficient as a matter of law without explanation, but noting the student had a right to counsel and that this was clearly insufficient time to secure representation).

66 *See, e.g.*, McGath v. Hamilton Local Sch. Dist., 848 F. Supp. 2d 831, 840 (S.D. Ohio 2012) (finding noticed charge of "Drugs/Alcohol" was sufficient to satisfy due process where student was not informed until his hearing that "the school changed its charges against him to include being under the influence"); Hinds Cty. Sch. Dist. Bd. of Trs. v. D.B.L. *ex rel* R.B., 10 So. 3d 387, 401 (Miss. 2008) (reversing the lower courts' rulings in favor of the student and his father, finding no due process violation where no notice was given of the school board hearing that resulting in his expulsion because notice of an earlier hearing was given and where there was no opportunity given to "view and present arguments undermining the veracity of[ ] the students who gave statements implicating R.B.," leaving the student and his father "forced to defend against unknown allegations" (quoting *id.* at 408 (Graves, J., dissenting)); *supra* text accompanying notes 60–61.

based on, he is unable to protect himself by offering an explanation or defense. Moreover, because details of a particular incident may be relevant to a determination of guilt, notice "must inform students of the infraction and the consequences with enough specificity to allow them a fair opportunity to present a defense at the hearing."[67]

Second, under *Goss*, courts have not required schools to notify students of rights that could significantly impact their ability to defend themselves, such as parental notification. The Ninth Circuit has held that for short-term suspensions, parental notification is not constitutionally required.[68] This lack of process was upheld even where disciplinary proceedings without prior parental notice ultimately resulted in not just a short-term suspension, but a long-term suspension of ninety days.[69] In one case, the student was questioned by school officials at a detention center after being taken into custody by the police—all prior to his parents being notified and without being told that he could be expelled.[70] Some courts have held that even in cases of expulsion where students are provided the right to have parents present during the initial meeting, schools are not required to notify students of this right.[71]

Finally, *Goss* permits the hearing for a short-term suspension to occur immediately after the notice.[72] Frequently, both the notice and the hearing amounts to a school official—sometimes along with a police officer stationed at the school[73]—meeting with the student, stating the accusation, and questioning the student on the spot.[74] In general, however, notice should be given with enough time and information for a student to have a "reasonable opportunity to prepare" a defense.[75] Under the collapsed procedure, the risks of inadequate notice are heightened. It is critical that students are fully informed before they are interrogated because the student will not get to consult with anyone else and the disciplinary decision depends on their ability to de-

---

67 Daniel & Coriell, *supra* note 60, at 17.

68 *See* Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062, 1072–73 (9th Cir. 2013).

69 *Id.*

70 *Id.* at 1066 (failing to notify student's parents after student refused an offer to have them present).

71 *See* Daniel & Coriell, *supra* note 60, at 21 (citing Boynton v. Casey, 543 F. Supp. 995, 998 (D. Me. 1982)).

72 *See* Goss v. Lopez, 419 U.S. 565, 582 (1975).

73 *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261 (2011).

74 *See* Simone Marie Freeman, Note, *Upholding Students' Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 Fam. Ct. Rev. 638, 643 (2007).

75 *See In re* Gault, 387 U.S. 1, 33 (1967).

fend themselves on the spot. Moreover, the significance of inadequate notice is not alleviated by a later hearing because additional assistance and time and even the "hearing [itself] is useless if the accused has no idea of the claims he/she is supposed to be defending against."[76]

B. "Some Kind of Hearing"

Due process requires an "opportunity for hearing appropriate to the nature of the case."[77] Regrettably, most courts have denied adversarial hearings for short-term school suspensions, meaning students cannot necessarily present their own evidence or witnesses.[78] Though some school districts provide for a more formal hearing, often before the school district's Board of Education,[79] it is more common when a student faces long-term suspension or expulsion.[80] At a formal hearing, a representative for the school or district will typically make opening and closing arguments, present evidence, and may call witnesses; the student is often given an opportunity to speak, after which a hearing officer usually makes a recommendation for punishment.[81] Some school districts allow students to present witnesses and cross-examine witnesses for the school.[82]

There is no general right to counsel for disciplinary hearings, regardless of level of formality. *Goss* explicitly declined to require schools to provide the "opportunity to secure counsel" for students facing a short suspension,[83] but some states have provided and some courts have mandated a right to hire counsel, usually when formal hearings are held for long-term suspensions or expulsions.[84] Critics have argued that this right and access to representatives should be expanded.[85]

---

76 Daniel & Coriell, *supra* note 60, at 15; *see also infra* Section IV.A (addressing risk of coerced, false, or irrelevant confessions).

77 Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

78 *See* Daniel & Coriell, *supra* note 60, at 25.

79 *See* Freeman, *supra* note 74, at 639–40.

80 *See* Daniel & Coriell, *supra* note 60, at 25.

81 *See* Freeman, *supra* note 74, at 639.

82 *See id.* at 639.

83 Goss v. Lopez, 419 U.S. 565, 583 (1975).

84 *See* Gesaman, *supra* note 41; *see also, e.g.*, CAL. EDUC. CODE § 48918(b)(5) (West 2015) (acknowledging student's right to be represented by counsel at an expulsion hearing); D.C. Mun. Regs. tit. 5-B, § 2506.4 (2017) (same); *In re* Roberts, 563 S.E.2d 37, 42 (N.C. Ct. App. 2002) (finding due process requires right to counsel at long-term suspension hearing), *overruled on other grounds by* N.C. Dep't of Env't & Nat. Res. v. Carroll, 599 S.E.2d 888, 895–97 (N.C. 2004).

85 For an in-depth review of this type of proposal, see Freeman, *supra* note 74. In addition to representation, critics have also called for alternatives to the entire hearing process, such as mediation. *Id.*

Another area of inconsistency and uncertainty is whether a student's admission of guilt will impact the process due to them—e.g., if it will amount to a waiver of the right to a hearing. Admissions of guilt obtained in the makeshift "hearings" that are just conversations between a student and one or more school officials are inherently suspect due to the informational and power imbalance between student and official. It may nevertheless seem that an admission of guilt nullifies the value of a formal hearing for long-term suspension or expulsion.[86] However, even a legitimate confession does not negate the necessity of a hearing because there may be relevant context that could impact the type and severity of punishment.[87] The student should still have an opportunity to "characterize his conduct" and present mitigating circumstances to inform the decision of punishment, especially where the proposed punishment is severe.[88]

Courts have gone even further and found that due process is satisfied under *Goss* even where the student does not affirmatively confess but gives even the paltriest response to an official's accusation. For example, the Western District of Tennessee found *Goss* due process satisfied where the student was "asked . . . to defend her behavior" and given "an opportunity to respond, which she did."[89] While this may not sound unreasonable, the student was a sixth-grader who testified that she was crying the whole time she was being questioned by the vice principal about her tweets, and was only asked if the victim "deserved this," to which the accused student "said no" and "told [the vice principal] we were just joking."[90] Thus, an emotional, scared child can be deemed to have had a "hearing" based on replying in any way to questions from a school official on the topic.

Similarly, the Eleventh Circuit has stated that "once school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands."[91] Accordingly,

---

86 *See* Cole *ex rel.* Cole v. Newton Special Mun. Separate Sch. Dist., 676 F. Supp. 749, 752 (S.D. Miss. 1987) ("[W]hen a student admits to the conduct giving rise to the suspension, the need for a due process hearing is obviated, since the purpose of a hearing is to safeguard against punishment of students who are innocent of the accusations against them.").

87 *See Goss*, 419 U.S. at 584; Strickland v. Inlow, 519 F.2d 744, 746 (8th Cir. 1975) (noting that "opportunity to be heard is no less important when, as here, there is not a serious dispute over the factual basis of the charge" and thus requiring a hearing subsequent to notice even where students had confessed to the infraction).

88 *Goss*, 419 U.S. at 584 ("[T]hings are not always as they seem to be . . . .").

89 Nixon v. Hardin Cty. Bd. of Educ., 988 F. Supp. 2d 826, 841 (W.D. Tenn. 2013).

90 *Id.* at 840–41.

91 Breeding *ex rel.* C.B. v. Driscoll, 82 F.3d 383, 386 (11th Cir. 1996).

these sham "protections" established by *Goss*—which have not been expanded by lower courts—do not provide adequate safeguards against erroneous, arbitrary, or discriminatory application of exclusionary discipline. The Court in *Goss* even admitted the imposed requirements were "less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."[92]

II. Limitations of the Current Regime

In the forty years since *Goss*, states and school districts have had an opportunity to further define their disciplinary processes. In this time, it seems that despite claims that due process requirements have handicapped school officials,[93] many school districts have failed to implement rigorous processes.[94] Moreover, courts have overwhelmingly deferred to school districts and administrators in policy and disciplinary decisions,[95] leaving students with no voice and no recourse.

A. Scope and Criticisms of Goss

Some critics have complained that "[t]he procedural protections of *Goss* and its progeny have . . . constrained school officials from issuing suspensions and expulsions, thus crippling their ability to maintain effective order for the teaching-learning process."[96] However, research indicates exclusionary discipline does not translate to higher schoolwide academic performance or safer schools.[97] Nevertheless, accepting for the moment the premise that schools *need* to use exclusionary discipline, is it true that *Goss* has had this "crippling" effect? One study attempted to answer this question by looking at the frequency and outcomes of *Goss* "progeny" cases in the lower courts

92 *Goss*, 419 U.S. at 583.

93 *See, e.g.*, Stuart Taylor Jr., *How Courts and Congress Wrecked School Discipline*, Atlantic (Nov. 1, 2003), http://www.theatlantic.com/politics/archive/2003/11/how-courts-and-congress-wrecked-school-discipline/378175/ [https://perma.cc/6X5S-BD4F] (arguing that new requirements have "cloud[ed] every disciplinary decision with doubt and clog[ged] educational systems with complex due process administrative rules").

94 *See* Freeman, *supra* note 74, at 642–43 (describing the failure of states and local school districts to implement or monitor procedural due process protections for students facing exclusionary discipline).

95 *See infra* Section II.B.

96 Perry A. Zirkel & Youssef Chouhoud, *The* Goss *Progeny: A Follow-Up Outcomes Analysis*, 13 U.C. Davis J. Juv. L. & Pol'y 333, 336 (2009).

97 *See, e.g.*, Am. Acad. of Pediatrics, *supra* note 15, at e1001 ("Research has demonstrated, however, that schools with higher rates of out-of-school suspension and expulsion are not safer for students or faculty."); Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 3, at 854 (noting higher rates of suspension and expulsion were associated with lower schoolwide academic achievement, even when controlling for demographic factors).

from 1986 through 2005.[98] The study concluded that *Goss* was "far from paralyzing" for schools' ability to exclude students, rather, "the outcomes clearly and consistently favored the district-defendants for the entire period."[99] In fact, when students did prevail over the schools in their due process challenges, the success was "attributable to state legislation and regulations that *expanded* the procedural protections of *Goss*."[100] Therefore, the claim that *Goss* prevented schools from keeping order fails both in its assumption of exclusionary discipline's necessity, and more importantly, in its core assertion that *Goss* had the effect of restricting school use of this disciplinary method.

A follow-up study further looked into the relevance of state expansions on due process protections by separating the decisions on a variety of factors including whether decisions regarding suspensions (isolated from expulsions)[101] were based on the Fourteenth Amendment or state laws.[102] This study revealed that rulings under state laws "extend[ing] and expand[ing] the procedural protections for suspensions and expulsions" beyond the *Goss* minimum came out in favor of the student at over four times the rate of rulings where students' only procedural protections were those provided by *Goss*.[103] For cases categorized as federal rulings under *Goss*—i.e., limited short-term suspensions—not a single student had a conclusive ruling in their favor (compared with a sixteen percent success rate for the same duration of exclusion under state standards).[104] The authors surmised that school districts' increased success under *Goss* was due to the "wide latitude afforded in the constitutional holding in *Goss*, along with its flexible multi-factor test, as opposed to the relatively straight strictures of the pertinent state laws."[105] In other words, the federal *Goss* "standard" does not seem to provide meaningful protection because states are able to defeat all challenges to adopted procedures, despite being unable to defeat similar challenges based on protections provided by state and local standards.

---

98 *See* Zirkel & Chouhoud, *supra* note 96, at 333.

99 *Id.* at 337.

100 *Id.* (emphasis added).

101 For their purposes, the authors deemed "suspensions" as one to ten day exclusions and anything longer an "expulsion." *Id.* at 338.

102 *See id.* at 339–41.

103 *Id.* at 333, 341 (finding that cases brought under state law expanding *Goss* had a conclusive result favorable to the student in twenty-seven percent of cases (sixty-three percent conclusive for the school district), compared with only six percent of rulings under the federal standards (and a corresponding seventy-nine percent for the school district)).

104 *Id.* at 343.

105 *Id.* at 346 (footnote omitted).

Ultimately, the authors "disconfirm[ed] the hypothesis that *Goss* has spawned a modern trend of judicial intervention that has hampered public school discipline."[106] This Note suggests a secondary conclusion: the data suggest that the *Goss* standard is too low a bar to provide meaningful protection to students, and that there are too few challenges to schools' exclusions of students. To conclude alternatively would be to suggest that school districts are not found in violation of the federal standards because they simply never violate those standards. Such a conclusion is unduly optimistic, and in fact belied by *Goss* itself, in which the Court observed that "the disciplinary process [is not] a totally accurate, unerring process, never mistaken and never unfair."[107] The lack of protection afforded students by the low bar of *Goss* for short-term suspensions and lack of binding or clear guidance for long-term suspensions and expulsions is made worse by lack of meaningful access to the judicial system for redress because courts overly defer to the school administrators in lawsuits.

B. Judicial Deference to State and Local Rules and Decisions

It is not entirely unwarranted for courts to give deference to school administrators and to local rules. However, courts' extreme deference can rise to the level of abdication of their constitutional duties.[108] Although states may define the procedures for school discipline, it remains the role of judiciary to determine whether those procedures satisfy the constitutional requirements of due process.[109]

Justice White's majority opinion in *Hazelwood School District v. Kuhlmeier*[110] is frequently cited to support such deference, specifically his claim that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."[111] That these parties have the *primary* responsibility for education does not mean that federal judges are not

---

106 *Id.* at 347.

107 Goss v. Lopez, 419 U.S. 565, 579–80 (1975).

108 *See* Morse v. Frederick, 551 U.S. 393, 441 (2007) (Stevens, J., dissenting) ("To the extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility."); Grutter v. Bollinger, 539 U.S. 306, 348–49 (2003) (Scalia, J., dissenting) ("[D]eference does not imply abandonment or abdication of judicial review." (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003))).

109 *See* Landon v. Plasencia, 459 U.S. 21, 34–35 (1982) ("The role of the judiciary is . . . to determin[e] whether the procedures meet the essential standard of fairness under the Due Process Clause . . . .").

110 484 U.S. 260 (1988).

111 *Id.* at 273; *see, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 686 (2010) (citing this passage from *Hazelwood*); Snyder *ex*

still obligated to fulfill their constitutional mandate[112] to step in to protect the infringement of constitutional rights. Moreover, when reviewing procedures for discipline, it is not the teachers and principals with their "boots on the ground" to whom the courts are deferring, but the school boards and state legislatures.[113] It is doubtful that these politicians are better suited to acknowledge and address constitutional deficiencies than judges.

Deference to school administration is appropriate only after the circumstances of each case have been analyzed to determine if and how much deference is due.[114] But it is not the case that in many disciplinary scenarios such thoughtful attention has been given, as with zero tolerance policies. Still, "courts are reluctant to overturn . . . all but the most egregious" school policies.[115] In fact, in the still-existent zero tolerance and "three-strike regimes,"[116] such consideration is not just *unlikely*, it is *impossible* because such policies mandate students' exclusion. Additionally, deference has come to be a misnomer for what is actually a presumption of validity for school rules and actions against students.[117] This concern for deference is heightened by the well-established, widespread discriminatory application of discretionary exclusionary discipline against minority students and students with disabilities.[118] School officials' judgment is particularly suspect and un-

---

rel. J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011) (same); Wallace *ex rel.* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1014 (7th Cir. 1995) (same).

112 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

113 *See* Fahey, *supra* note 16, at 778 n.76.

114 *Cf.* Joseph F. Weis, Jr., *A Judicial Perspective on Deference to Administrative Agencies: Some Grenades from the Trenches*, 2 ADMIN. L.J. 301, 307 (1988) (noting the need for careful review before deferring to administrative agency actions and determinations and noting that without this careful analysis "there is a danger that indiscriminate judicial deference may amount to judicial abdication").

115 Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1057 (2001).

116 A three-strike regime requires suspension or expulsion after certain, repeated offenses. *Cf.* Morris & Perry, *supra* note 3, at 70.

117 *See* Bernard James, Tinker *in the Era of Judicial Deference: The Search for Bad Faith*, 81 UMKC L. REV. 601, 606 (2013).

118 *See, e.g.*, TONY FABELO ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR. & PUB. POL'Y RES. INST., TEX. A&M UNIV., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 46 (2011), https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf [https://perma.cc/8W3X-VNVX] (finding that in Texas, consistent with national studies, African-American students are more likely to be subject to school disciplinary action than otherwise identical white students, a result of receiving more punishments inflicted at the discretion of school employees); *see also supra* text accompanying notes 28–30.

deserving of presumptive judicial deference in light of the vast evidence that there is disproportionate, and seemingly discriminatory, exclusion of certain groups of students. School board and administrators may have "substantial disciplinary authority," but that authority derives from the law and "its exercise is subject ultimately to the Constitution of the United States."[119]

Courts are failing to do the necessary meaningful investigation into the process provided and its sufficiency under the Due Process Clause. As one author put it, "judicial appetite for reviewing school board decisions is at an ominous low."[120] However, since *Goss*, the Supreme Court has demonstrated an increased willingness to evaluate "the impact of investigations and punishments on students in determining whether the rights of those students warrant restriction."[121] This may trigger an openness of the Court, and a cue to lower courts, to reign in local school officials and legislators where students' constitutional rights are at risk.

III. Problems with Legislative Solutions

Because Congress and state legislators have failed to set adequate standards, a judicial solution is the most feasible means available to ensure students' rights to education are adequately protected under the Due Process Clause.

Undoubtedly, a variety of solutions across a swath of disciplines will be necessary to fully solve the broader issue of how to keep schools safe and create effective learning environments while avoiding disciplinary policies that are vague and susceptible to discriminatory application and unconstitutional implementation.[122] School discipline reform has garnered increased attention and traction in light of the

---

119 Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985).

120 James, *supra* note 117, at 602.

121 Kim, *supra* note 19, at 874–76 (first citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); then citing Bd. of Educ. v. Earls, 536 U.S. 822 (2002); and then citing Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364 (2009)) (detailing the Supreme Court's trend away from assuming school disciplinary practices that benefit students and serve educational interests and toward performing fact-intensive assessments of these practices and their impact on students).

122 The right and access to counsel has been raised as one such reform, but it is rife with limitations: populations of students most affected by exclusionary discipline are unlikely to have resources to secure counsel, and it would be costly for school districts, which are often short on funds, to provide counsel. For an in-depth consideration of the right and access to counsel, see generally Freeman, *supra* note 74. Even if a right to counsel was established and the access issue were resolved, such representation is unlikely to have a systematic impact if challenges that do make it to court are rejected under the current low, vague standards and deference to school districts.

increased focus in recent years on racist and discriminatory policies and practices across America, particularly those perpetrated by agents of the government (including public education providers).[123] Indeed, after over a decade of research and advocacy, some states and school systems are beginning to move away from zero tolerance policies,[124] but rates of suspension and expulsion remain high.[125] Although legislative responses to inadequate process would be beneficial, neither Congress nor the states have demonstrated the desire or capability to solve this nationwide issue in the near future.

A. Federal Standards

Congress has the authority to pass federal legislation regarding education.[126] Historically, however, the federal government has primarily left education to the states.[127] This approach has a constitutional basis: "the omission of education from the purview of federal authority and the Tenth Amendment's reservation of state authority in all

123 *See* Rachel M. Cohen, *Rethinking School Discipline,* AM. PROSPECT (Nov. 2, 2016), http://prospect.org/article/rethinking-school-discipline [https://perma.cc/M858-NSD5] (referencing the Black Lives Matter movement as "spotlight[ing] racist policies afflicting black Americans" including "school discipline disparities").

124 *See id.*; *see also, e.g.*, Mackenzie Ryan, *Des Moines School Discipline Reform Stirs Backlash*, DES MOINES REG., http://www.desmoinesregister.com/story/news/education/2016/11/26/des-moines-school-discipline-reform-stirs-backlash/91745014/ [https://perma.cc/2D72-YN37] (last updated Nov. 27, 2016, 9:38 AM) (discussing Des Moines school leaders' efforts to change "the district's use of discipline to sharply reduce suspensions and eliminate expulsions"). Reduced use of these zero tolerance policies is, at best, a slow and incremental solution that is insufficient to fully address the deprivation of due process to public school students; even less restrictive policies are unlikely to eliminate exclusionary discipline. So long as exclusionary methods of discipline are in place, students subjected to them should be adequately protected.

125 *See* U.S. DEP'T OF EDUC., *supra* note 1 (reporting 3.45 million students were suspended out-of-school and 130,000 students were expelled in the 2011–2012 school year); *see also* THE EVERY STUDENT EVERY DAY COALITION, DISTRICT DISCIPLINE: THE OVERUSE OF SCHOOL SUSPENSION AND EXPULSION IN THE DISTRICT OF COLUMBIA 1 (2013) ("At DCPS middle schools, 35.1% of students were suspended at least once, and some DCPS middle schools recorded more suspensions than students.").

126 U.S. CONST. art. I, § 8, cl. 1; *see* Ryan Lee, Comment, *Federal Government Coerces the Adoption of Common Core: Keeping America's Youth Common Among the World's Elite*, 49 J. MARSHALL L. REV. 791, 795 (2016) ("Congress may still act indirectly under its spending power to encourage uniformity among the states' education policies."). Congress has done this in the education context before, as when it used its spending power to prohibit discrimination based on sex by "any education program or activity receiving Federal financial assistance." Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2012). Thus, all public schools must comply with the discrimination prohibition or forfeit federal funding. *Id.*

127 *See* Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 968–69 (2015) ("Historically, the hallmarks of education federalism within the United States have been decentralized state and local control over public schools and a limited federal role.").

areas that the Constitution does not assign to Congress."[128] Since *Goss* was decided, the federal government has expanded its role in education oversight, but there is still a general attitude that education policymaking should be done on the state and local level.[129]

Following harsh criticism of the federal government's role in education through the No Child Left Behind Act of 2001 ("NCLB"),[130] Congress—with overwhelming bipartisan support—passed the Every Student Succeeds Act ("ESSA")[131] in 2015.[132] ESSA replaced NCLB's federal achievement standards with a system that permits each state to adopt its own approach to school quality.[133]

In addition to the general preference for state and local control of education issues, critics have explicitly blamed Congress for undermining school discipline.[134] It is unlikely that the next few years will see any shift in this decentralization trend from Washington. President Trump's administration and the current Congress are unlikely to support federal action regarding education because of the risk of "undermin[ing]" ESSA's return to state and local authority over school policymaking.[135]

---

128 *Id.* at 969.

129 *Id.* ("Finally, the tradition of local control of education remains an important value for many within the American public. Many view state and local control over public elementary and secondary education as a central component of state and local government. While public opinion polls reveal an increasing comfort with federal involvement in education, the polls continue to indicate that Americans generally prefer state and local control over education." (footnotes omitted)).

130 No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301–7941 (2012)).

131 Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

132 *Id.*; *see also* Julie Hirschfeld Davis, *President Obama Signs into Law a Rewrite of No Child Left Behind*, N.Y. TIMES (Dec. 10, 2015), https://www.nytimes.com/2015/12/11/us/politics/president-obama-signs-into-law-a-rewrite-of-no-child-left-behind.html [https://perma.cc/89N8-LZWM] ("[T]he path to higher standards and better teaching and real accountability is community by community, classroom by classroom, state by state, and not through the federal government dictating the solution." (quoting Senator Lamar Alexander)).

133 *See* Lyndsey Layton, *Senate Overwhelmingly Passes New National Education Legislation*, WASH. POST (Dec. 9, 2015), https://www.washingtonpost.com/local/education/senate-overwhelmingly-passes-new-national-education-legislation/2015/12/09/be1b1f94-9d2a-11e5-a3c5-c77f2cc5a43c_story.html?utm_term=.971d6af6cfa1 [https://perma.cc/NU54-ZZ7B].

134 *See* Taylor, *supra* note 93 (criticizing Congress for passing the Individuals with Disabilities Education Act in 1975, which "has also made it impossible to expel, and extremely difficult to discipline, any student diagnosed as having 'serious emotional disturbance'—a concept broad enough to include just about any chronically disruptive child").

135 Leo Doran, *What Will Become of the Obama School Discipline Agenda?*, INSIDE SOURCES (Feb. 22, 2017), http://www.insidesources.com/school-discipline-obama/ [https://perma.cc/5QJ6-Q9G4] (noting that it is also expected that recent legislation intended to discourage the use of corporal punishment in the nineteen states that still permit it will not be able to garner

B. State Legislation

States can—and should—enact legislation or regulations defining the procedures or standards for exclusionary discipline that would be applicable to all schools in that state. This solution, however, would require independent action by each individual state; thus, it fails to provide a comprehensive solution and contributes to varying standards across states. This variance may disadvantage transient students and their families because they cannot rely on a reasonable baseline expectation of protections. When the school already has the upper hand in setting and applying the rules, varying standards just create one additional burden preventing students from knowing and understanding their rights. The impact of these discrepancies is further demonstrated by the variation in outcomes of student challenges to disciplinary action between jurisdictions with protections expanded beyond *Goss*, described in Section II.A. While some degree of variation in procedures may be reasonably expected across school districts and states, the higher uniform constitutional baseline proposed by this Note would minimize this challenge.

Of perhaps greater concern than discrepancies across geographies is that a state legislative approach is simply not politically feasible. States do not have a strong record of standing up for students as demonstrated by the continuing use of corporal punishment[136] and trends reiterated throughout this Note of criminalizing school discipline, pushing out students, and applying discipline in a discriminatory manner.[137] Despite recent efforts to abandon zero tolerance and curb the school-to-prison pipeline,[138] states continue to frequently turn student discipline over to law enforcement, shirking their responsibility for discipline and funneling students into the criminal justice sys-

---

enough support for passage); *see* Will Sentell, *Trump Victory Promises More Autonomy for Public Schools, Officials Say*, ADVOCATE (Nov. 14, 2016, 4:00 AM), http://www.theadvocate.com/baton_rouge/news/education/article_844be9ca-a782-11e6-8265-2392496fb2e7.html [https://perma.cc/QN7S-5RFR] ("Trump's win means federal education dollars will arrive in Louisiana with fewer strings."); Donald Trump (@realDonaldTrump), TWITTER (Feb. 10, 2016, 6:51 PM), https://twitter.com/realDonaldTrump/status/697613947655086080 [https://perma.cc/36CY-5ACX] ("Get rid of Common Core—keep education local!").

136 For example, nineteen states still permit corporal punishment in schools. Doran, *supra* note 135. This type of punishment may be considered "criminal assault or battery" against an adult in some of those states. Letter from John B. King, Jr., Sec'y of Educ., to Governors and Chief State School Officers (Nov. 22, 2016), https://www.ed.gov/policy/gen/guid/school-discipline/files/corporal-punishment-dcl-11-22-2016.pdf [https://perma.cc/JTP4-GAZH].

137 *See supra* Introduction.

138 *See, e.g.*, *supra* note 124 and accompanying text.

tem.[139] From 2011 to 2016, despite empirical evidence that zero tolerance policies were ineffective and detrimental, only fourteen states passed legislation to reduce the use of exclusionary discipline.[140] Even where states seek to decrease exclusionary discipline, there can be backlash from school employees and the community,[141] which may limit the effectiveness and duration of these changes and prevent other areas from attempting similar rollbacks on exclusion. Protecting students from erroneous deprivation of education is particularly urgent because of the high volume of students facing exclusion today. There is no indication that schools will abandon exclusionary discipline altogether in the foreseeable future, and if even *some* students are being deprived of their right to public education, the changes urged by this Note are necessary.

Although states and school districts have the discretion to set standards that *exceed* the constitutional requirements, due process remains a constitutional question, so federal law, and ultimately the courts, will continue to determine the *minimum* standard.[142] There is something that can be done right away to further protect students from the harmful effects of exclusionary discipline: courts, as cases come before them, should clearly articulate a higher standard for the constitutional due process required before depriving a child access to public education through exclusionary discipline.

IV. Proposed Judicial Response

Under the existing *Mathews* balancing framework[143] for the extent of due process warranted, additional protections should be provided to students because their interest in education is significant

139 *See* Tex. Appleseed & Texans Care for Children, Dangerous Discipline: How Texas Schools Are Relying on Law Enforcement, Courts, and Juvenile Probation to Discipline Students 2 (2016), http://stories.texasappleseed.org/dangerous-discipline [https://perma.cc/ETE3-FFZ4] ("Texas school districts continue to rely on police officers, juvenile probation, and courts to address low-level, school-based behaviors."); Ryan, *supra* note 124.

140 *See* Kavitha Mediratta, *A Powerful Partner: Philanthropy's Role in Promoting Positive Approaches to School Discipline*, Am. Educator, Winter 2015–2016, at 34, 37.

141 *See, e.g.*, Ryan, *supra* note 124 ("[A] rising chorus of parents and teachers complain that Des Moines' new policy escalates disruptive behavior in classrooms, at times creating unmanageable situations that hurt the learning of other students.").

142 "It is well-accepted that 'state law does not ordinarily define the parameters of due process for Fourteenth Amendment purposes; rather, the minimum, constitutionally mandated requirements of due process in a given context and case are supplied and defined by federal law, not by state law or regulations.'" Shuman *ex rel.* Shertzer v. Penn Manor Sch. Dist., 422 F.3d 141, 150 n.4 (3d Cir. 2005) (quoting Patterson v. Armstrong Cty. Children & Youth Servs., 141 F. Supp. 2d 512, 537 (W.D. Pa. 2001)).

143 *See supra* text accompanying notes 45–47.

(particularly given the serious repercussions of exclusion) and the government's interest is seriously diminished by the lack of efficacy of exclusionary discipline. Courts should respond by clearly articulating higher standards for the notice required before any interview with a school administrator where that discussion will either serve as a "hearing" or is intended to solicit an admission of guilt. Adequate notice should be given in advance enough for students to prepare a defense and should clearly state (1) the specific circumstances surrounding the allegations including the time, place and nature of the alleged prohibited conduct the student engaged in; (2) the specific rule violated; (3) the potential consequences; (4) the type and extent of evidence forming the basis of the allegation; and (5) an explanation of the students' rights.

A. Judicial Balancing: Educational Deprivation vs. Ineffective Discipline

The judiciary has an opportunity to review existing state and school district procedures every time a case arises challenging the use of (or procedures for implementation of) exclusionary discipline.[144] The judiciary is the appropriate avenue for establishing higher notice standards because it is the role of the courts to interpret the Constitution, and, because of the power of precedent, a comparatively small number of cases could clarify and raise the standard being applied across the country. Unlike Congress, which is unlikely to act, and state legislatures, which have limited scope of impact and only have the authority to announce, not enforce new standards, courts provide a mechanism for both change and accountability: they can enunciate the requirements for adequately safeguarding student rights *and* ensure such procedures and safeguards are implemented accurately.

Courts are responsible for defining the procedures required by due process.[145] Under the circumstances surrounding exclusionary discipline and the long "leash" the Supreme Court has given lower courts in this area,[146] lower courts hearing new challenges to school procedures could articulate a higher standard without violating Supreme

144 *See, e.g.*, Clodfelter v. Alexander Cty. Bd. of Educ., No. 5:16-CV-00021-RLV-DCK, 2016 WL 7365183, at *4 (W.D.N.C. Dec. 19, 2016).

145 *See* Brooke Grona, Note, *School Discipline: What Process is Due? What Process is Deserved?*, 27 Am. J. Crim. L. 233, 237 (2000) ("Thus the legal requirements for schools are clarified by the courts.").

146 *See* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. Rev. 383, 414 (2007) ("[O]ne might think of a Supreme Court opinion as the 'leash' which defines a zone of discretion in which lower courts may legitimately exercise their judgment. Depending upon how an opinion is

Court precedent. Arguably, the vagueness of the "standards" of *Goss* created a larger zone of discretion—a longer leash—for lower courts to determine if specific fact-patterns satisfy "*some* kind of notice" or "*some* kind of hearing." *Goss*'s inapplicability to long-term suspensions coupled with the Court's dicta suggesting additional procedures could be necessary signal that lower courts are, at a minimum, free to articulate a higher standard.[147]

Lower courts have an ongoing responsibility to apply the Court's broad due process standards to new, fact-specific contexts, which ultimately leads to greater clarity on what constitutes constitutionally sufficient notice in specific circumstances.[148] In other due process circumstances, courts have done just that. Relatively recently, the Supreme Court sided with a group of circuit courts that opted to require a higher notice standard for the government before it could affect property deprivation.[149] In *Jones v. Flowers*,[150] the Court held that, under *Mullane v. Central Hanover Bank & Trust Co.*,[151] the government has an obligation to take "additional reasonable steps to notify a property owner" when notice regarding property deprivation (e.g., a tax sale) sent via certified mail is returned as undeliverable.[152] This demonstrates a willingness by the Court to ratchet up due process requirements in the face of changed circumstances and new evidence, while adhering to traditional standards.

In evaluating challenges to the process provided to students facing exclusionary discipline, lower courts should apply the *Mathews* test through the lens of *Goss* to find that the balance tips in favor of additional procedural protections for students. Both the first and second prong of the *Mathews* test counsel in favor of increased procedural protections. Applying the first prong of *Mathews*, the private

---

crafted, the 'leash' may be longer or shorter, granting lower courts a greater or narrower zone of discretion in which to operate.").

147 *See* Goss v. Lopez, 419 U.S. 565, 579 (1975).

148 *Compare* Akey v. Clinton Cty., 375 F.3d 231, 235–36 (2d Cir. 2004) (requiring additional efforts to notify property owners of a pending deprivation when notice sent via certified mail was returned undeliverable), *with* Smith v. Cliffs on the Bay Condo. Ass'n, 617 N.W.2d 536, 541 (Mich. 2000) (per curiam), *abrogated by* Jones v. Flowers, 547 U.S. 220, 225 (2006) (declining to "impose on the state [an investigative] obligation" in similar circumstances to *Akey*).

149 *See Jones*, 547 U.S. at 225.

150 547 U.S. 220 (2006).

151 339 U.S. 306 (1950). *Mullane* is a seminal due process case regarding notice; however, it focuses on whether notice is reasonably apprised to reach the affected party. *Id.* at 315. In this context, the *Mathews* balancing test is more relevant to determining whether the exclusionary discipline procedures, on the whole, satisfy due process.

152 *Jones*, 547 U.S. at 225.

interest at stake weighs heavily for additional student protections.[153] Without appropriate process, students are deprived of access to public education. Expulsion may rise to the level of "total deprivation of education," and the Court has left open whether this could implicate a fundamental right.[154] In the absence of such a finding, there is still a property right that ensures students are entitled to due process before being excluded from public education.[155] The impacts of exclusionary discipline can be steep and irreparable: a single suspension in ninth grade doubles the odds that a student will not graduate,[156] which in turn reduces a person's earning potential and increases their likelihood of incarceration.[157] In some cases, exclusion from one district leads to exclusion from others without any process at all, a compounding deprivation of access to public education.[158] Moreover, the second prong of the *Mathews* test also weighs in favor of additional protections because, as discussed in Part II, the risk of erroneous exclusion is substantial, and additional procedural safeguards would decrease this risk.[159]

Under the third *Mathews* prong, courts must also weigh the interests of the government—here, the schools—taking into consideration the administrative and financial expenses of providing additional safeguards.[160] Admittedly, the relevant interests of the state are not insignificant: safety and disruption of learning are frequently cited

153 *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

154 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (observing that where there was not "an absolute denial of educational opportunities" to any children, there was no "interference with fundamental rights"). For an in-depth discussion of education as a fundamental right, see Brooke Wilkins, Note, *Should Public Education be a Federal Fundamental Right?*, 2005 BYU EDUC. & L.J. 261.

155 *See* Goss v. Lopez, 419 U.S. 565, 574 (1975) ("[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."). In *Goss*, the Court also acknowledged school discipline methods can implicate "arbitrary deprivations of liberty" due to damage reputation and "interfere with later opportunities for higher education and employment," thus implicating the Due Process Clause. *Id.* at 574–75.

156 *See* Robert Balfanz, Vaughan Byrnes & Joanna Fox, *Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade*, 5 J. APPLIED RES. ON CHILD., no. 2, 2014, at 1, 7.

157 *See supra* note 14 and accompanying text.

158 *See, e.g.*, Patricia L. v. Or. Sch. Dist., No. 2013AP293, 2014 WL 1386872, at *1–2, *5 (Wis. Ct. App. Apr. 10, 2014) (finding that a school district's decision to prohibit a student who was expelled from another district from enrolling is not protected by due process rights).

159 *See infra* Section IV.B.

160 *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

justifications for exclusionary discipline.[161] Where the means fail to accomplish the desired ends, however, the means are unjustifiable. Evidence suggests that exclusionary discipline methods do not achieve the valid goal of preserving a safe and conducive learning environment.[162] Higher rates of exclusionary discipline by schools have been found to correspond—even when controlling for demographic differences—with disproportionately higher amounts of time spent on school discipline matters, lower school-climate ratings, and lower "school-wide academic achievement."[163]

Although the cost to schools is also relevant, requiring administrators to provide more thorough notice to students as described in Section IV.A above would not require significant financial expenditures. Any additional burden of providing better procedures does not outweigh the students' interest or the chance to increase accuracy in disciplinary matters, such as for Kuran Johnson (described in the Introduction), who missed four months of school for a fight in which he took no part. In fact, the increased dropout rate associated with exclusionary discipline leads to significant costs to society—one study estimated the cost of suspensions to taxpayers at $11 billion.[164] Accordingly, exclusionary discipline does not often achieve the states' goals and deprives students of education thereby ultimately harming society. Therefore, more adequate protection is due to decrease the likelihood of erroneous exclusion, and courts should clearly delineate requirements for more rigorous notice and hearing policies and procedures.

---

161 *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 580 (1975) ("Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device."); CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 83 (2010) (noting that courts acknowledge "a school's interest in maintaining discipline and a safe environment conducive to learning is important" when compared with the weight of restricting a student's interest in continuing education through long-term suspension or expulsion).

162 *See supra* note 97 and accompanying text.

163 Am. Psychological Ass'n Zero Tolerance Task Force, *supra* note 3, at 854.

164 *See* RUSSELL W. RUMBERGER & DANIEL J. LOSEN, CTR. FOR CIVIL RIGHTS REMEDIES, THE HIGH COST OF HARSH DISCIPLINE AND ITS DISPARATE IMPACT 11, 22 (June 2, 2016), https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA_HighCost_6-2_948.pdf [https://perma.cc/9ZP6-YQMJ] (these fiscal costs represent "lower income tax revenues and higher government expenditures on health and social services, and on the criminal justice system"); *see also supra* notes 13–14 and accompanying text.

B. More Notice

"*Some* kind of notice" has not sufficiently protected students. Where vague rules and generic descriptions of violations have become "acceptable" predicates to school officials questioning students and eliciting confessions which may be the basis for expulsion,[165] constitutional due process is not satisfied.

The "essence of due process" is that a person facing deprivation of a protected interest must be given "notice of the case against him and opportunity to meet it."[166] The detailed information described above must be presented to students before they are interrogated and expected to explain or defend themselves—whether at an informal or formal hearing. Appropriate process must consider "the capacities and circumstances" of the accused,[167] thus courts should require schools to consider the age and sophistication of a student when calculating what constitutes fair notice.[168] Providing students with a clear statement of the factual details underlying any allegations and the evidence against them ensures that students' answers and admissions are limited to the issues under inquiry. The alternative would allow school officials to go on a "fishing expedition" where vague accusations could elicit false or irrelevant confessions due to the power imbalance, fear, and information asymmetry at play.[169]

Students should be fully informed of the potential consequences they face and their rights in the disciplinary process prior to any discussion with school officials, especially those during which a confession will be sought or on which the school intends to rely for satisfaction of the hearing requirement. "[C]hildren are more easily coerced and impulsive than adults, less likely to foresee the implica-

---

165 *See supra* Part II.

166 Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)).

167 Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970); *see supra* notes 20–30 and accompanying text (discussing the impact of students' age and immaturity in the school discipline context).

168 *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) (finding that a child's age is relevant to a *Miranda* custody analysis and noting that childhood is relevant when applying the reasonable person standard in negligence suits). "The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *Id.* at 273. The law reflects this, for example, in the limitations on children's ability to "marry without parental consent." *Id.*

169 Research has demonstrated that youth are particularly susceptible to false confessions because of their "limited appreciation for the future, impulsiveness, and inadequate legal knowledge." Henning, *supra* note 24, at 441 (discussing susceptibility of youth to false confessions in police interrogation). Although this research was in context of police interrogations, the traits of youth are substantially similar an administrator's office.

tions of their actions and more likely to make false confessions."[170] Notifying students of the specific rule violated and the potential consequences puts the situation into context and permits the student to make an informed decision about such issues as whether to confess, to request representation, or to speak with a parent first.[171]

A student who understands the full severity of potential consequences (such as exclusion or even criminal charges), may be less likely to confess falsely, due to coercion, or under a false belief that he or she can avoid parental notification or a certain level of punishment by cooperating. Courts have acknowledged this thought process as it relates to school arrests, where the student is interviewed by a school official and school resource officer operating as law enforcement without being read his *Miranda* warning.[172] Although *Miranda* rights do not apply when there is no criminal charge, the rejection of confessions in these contexts, in part, reflects that students consider the scale of consequences when deciding whether to confess.

Where a student is given the right—by the school district rules or state law—to counsel or to consult a parent,[173] courts should require the student be informed of this right before discussing the allegations with the school officials in order to further address the risk of school officials pressuring or misleading students to confess.[174] Because students may wish to hide potential punishment from their parents, they may be inclined to waive a right to talk to their parents before speaking with school officials. School officials should be required to notify students when the potential consequence will involve automatic pa-

---

170 Donna St. George, Miranda-*Rights Debate Unfolds at Fairfax School*, WASH. POST, July 18, 2011, at A6.

171 *Cf.* Henning, *supra* note 24, at 441 (noting that "minimization of the severity of the crime or the suspect's culpability . . . take[s] advantage of adolescents' particular vulnerabilities and increase[s] the likelihood of a false confession").

172 *See J.D.B.*, 564 U.S. at 274–275 (finding that statements made by a student in a school discipline discussion with a school administrator when anyone deemed "law enforcement" is present are not admissible unless the student was read his or her *Miranda* warning).

173 Although outside the scope of this Note, school districts and states should enact policies and legislation giving students the right to consultation with, and representation by, parents, guardians, or counsel. For an argument in support of providing a right to counsel, see Freeman, *supra* note 74, at 643–46.

174 Some school districts—in at least eight states—have had their school administrators trained in police interrogation techniques, such as the "Reid Technique." Douglas Starr, *Why Are Educators Learning How to Interrogate Their Students?*, NEW YORKER (Mar. 25, 2016), http://www.newyorker.com/news/news-desk/why-are-educators-learning-how-to-interrogate-their-students [https://perma.cc/48XW-LHBR]. The Reid Technique includes a "nine-step interrogation, a nonviolent but psychologically rigorous process that is designed, according to Reid's workbook, 'to obtain an admission of guilt.'" *Id.*

rental notification (based on applicable school, district, or state requirements). This ensures that school administrators do not discourage students from reaching out to their parents for support—an instinct that schools may wish to take advantage of to interview students alone.[175]

If students are aware of the severity of the consequences, they may recognize that they want or need additional support before further discussion with school officials. By involving parents—whose top priority is the well-being of the accused student—the power dynamic is adjusted and possibilities for manipulation are decreased.[176] This increases both the fairness and accuracy of the school disciplinary system and prevents the irreversible consequences of a confession, even where additional process such as a subsequent formal hearing is provided.[177]

Due to the extremely severe consequences of permanent or indefinite removal from school, when long-term suspensions and expulsions are possible consequences, students should not be required to speak with officials about the incident until after written parental or guardian notice has been given.[178] No formal hearing should be held without enough time to prepare a defense, which means guardians should have enough time to speak to their child and make arrangements to attend or secure representation. The precise amount of time that is reasonable may vary depending on circumstances, but certainly anything less than twenty-four hours is unreasonable, and reasonable requests for additional time to ensure a parent or representative can attend (if permitted) should be granted.[179] When the overarching priority is to discover the truth and prevent erroneous deprivation of ed-

175 School officials have demonstrated an attitude toward avoiding parental inclusion prior to questioning students. *See id.* ("One vice-principal told [a law professor] that the first thing he does when he interrogates students is take away their cell phones, 'so they can't call their mothers.'").

176 *Cf.* Henning, *supra* note 24, at 441 (noting that "isolation from supportive adults . . . take[s] advantage of adolescents' particular vulnerabilities and increase[s] the likelihood of a false confession").

177 Even conversations between students and administrators that do not result in an affirmative confession can have conclusive negative consequences for students, thus underscoring the need for additional protections and supports in such "hearings." *See supra* notes 90–91 and accompanying text.

178 The feasibility of this approach is demonstrated by the fact that similar procedures already exist in some states. *See, e.g.*, 22 PA. CODE §§ 12.6(b)(iv), 12.8(c) (2017) (requiring written parental notice and permitting an informal hearing for suspensions greater than three days).

179 *See* Minnicks v. McKeesport Area Sch. Dist., 74 Pa. D. & C.2d 744, 752 (Ct. Com. Pl. 1975) (finding notice received only twenty-four hours before expulsion hearing was not adequate notice and, as such, "must of necessity taint the subsequent hearing").

ucational opportunities, schools should not discourage the exercise of student rights and parental involvement.

C. *Judicial Restraint*

To articulate the higher requirements described, courts must complete a thorough and searching analysis of the facts and circumstances underlying cases challenging process provided in school exclusion. It is true that courts have traditionally exercised judicial restraint in education policy;[180] however, such judicial restraint can only go so far before rising to the level of abdication of the courts' constitutional mandate.[181] Indeed, although "*premature* interference with the informed judgments made at the state and local levels"[182] may be unwise, it has been over forty years since the Court decided *Goss*. In that time, states and school districts have had the opportunity to establish what kind of notice and hearing they find to be most appropriate while remaining within the confines of the Constitution. The current state of affairs, however, demonstrates that students' constitutional rights are subverted by deference to the conflicting priorities of schools in favor of removing students rather than addressing the causes of misbehavior.[183]

Such judicial restraint has been justified as providing space for "research and experimentation" that is "vital" to solving educational problems.[184] However, research currently shows that the actions taken by many states are *not* solving educational problems: exclusion fails to create safe and effective learning environments and in fact leads to worse educational results for excluded students and their peers.[185] States and schools have thus demonstrated that they are not effectively utilizing the discretion provided them by minimal due process

---

180 *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) ("[D]ifficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.'" (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970))).

181 *See supra* note 108 and accompanying text.

182 *San Antonio Indep. Sch. Dist.*, 411 U.S. at 42 (emphasis added).

183 *See* Grona, *supra* note 145, at 237 ("The rights of students balanced against the interests of the school should be remembered when considering student discipline.").

184 *San Antonio Indep. Sch. Dist.*, 411 U.S. at 43 ("[T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.").

185 *See supra* Section II.B.

standards to experiment with creative solutions. Courts can no longer turn a blind eye to the subversion of students' rights to the detriment of those students and their schools in the name of judicial restraint.

Judicial restraint must not be allowed to morph into a full abdication of duty. Given the exceptionally low bar of *Goss* and its inapplicability to long-term exclusion, the courts can and should clarify due process requirements without dictating procedures in such detail as to create "inflexible constitutional restraints" that may not make sense in the admittedly unpredictable future.[186] Basic, minimum standards, such as those proposed by this Note, do not require courts to step into the shoes of school administrators and question every determination of policy or fact guiding the details of procedure for a given disciplinary incident.[187] Determining whether existing protections are sufficient to provide the requisite protection of the Fourteenth Amendment is not an overstep by, but a mandate for, the courts.[188]

Conclusion

Education is an issue that affects every person in the United States, not just individual students and their families.[189] Three-and-a-half million students are excluded from school each year; these students, their schools, and their communities are harmed by this exclusion.[190] This occurs despite evidence that such disciplinary measures are ineffective at altering student behavior and ensuring safer schools.[191] Not only are the school environments not improved, but the students subjected to such measures are substantially *worse* off.[192] Despite this empirical evidence, schools are slow to reform and un-

186 *San Antonio Indep. Sch. Dist.*, 411 U.S. at 43.

187 *See* Wood v. Strickland, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.").

188 When school actions rise to the level of a constitutional violation, the court cannot simply defer to the discretion of the school administrators or state or local governments. *See id.* ("The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.").

189 *See, e.g.*, Justin Marquis, *How Educational Inequality Affects Us All*, Online U.: Educ. Unbound (Jan. 17, 2012), http://www.onlineuniversities.com/blog/2012/01/how-educational-inequality-affects-us-all/ [https://perma.cc/P5PC-ZBSU].

190 *See supra* text accompanying note 1.

191 *See supra* text accompanying note 96.

192 *See supra* note 6–10 and accompanying text.

likely to dispose of exclusionary discipline completely any time soon.[193]

The Court in *Goss* appropriately refrained from preemptively establishing overly specific requirements in education, an area traditionally reserved for state and local governance. However, after over forty years, it has become clear that the states and school districts have taken advantage of the vague minimum articulated,[194] while simultaneously increasing the use of exclusionary discipline.[195] It is time for the judiciary to take a closer look at the process provided to students facing exclusion and acknowledge that "*some* kind of notice" and "*some* kind of hearing" sets effectively no standard at all, and certainly fails to meaningfully protect this vulnerable population. Courts must set higher, more specific standards for process due to students facing exclusionary discipline. These standards should include notice that makes the circumstances of the allegation and potential consequences clear, and informs students of their rights before any kind of hearing. As the final word on what protections the Due Process Clause mandates, courts are authorized and obligated to protect citizens against state abuse.[196] Schools should be seeking to teach students conflict resolution and how to be productive citizens, instead of taking advantage of students' ignorance of their rights and seeking to toss them out of school, or worse yet, into jail. It is time for the judiciary to step up, step in, and ensure students are not forced to "shed their constitutional rights . . . at the schoolhouse gate."[197]

193 *See, e.g.*, *supra* note 4 and accompanying text.

194 *See supra* Section II.A.

195 *See* Introduction.

196 *See supra* note 112.

197 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Although *Tinker* involved the First Amendment rights to freedom of speech and expression, due process ought not be any different.