

COVID-19 and the “Virtual” School-to-Prison Pipeline

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INTRODUCTION

On March 11, 2020, the World Health Organization (WHO) classified the COVID-19 disease¹ as a global epidemiological pandemic,² prompting an emergency response by countries that are members of WHO, including the United States.³ Two days later, the executive branch of the U.S. federal government declared the COVID-19 pandemic a national emergency, and the president began issuing executive orders concerning the administration of the federal government.⁴ Governors followed suit, doing the same at the state level.⁵ According to the Centers for Disease Control and Prevention, the global COVID-19 outbreak is the deadliest epidemiological pandemic to reach the United States since the 1918 influenza pandemic, which was also caused by the H1N1 virus.⁶

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¹ *About COVID-19*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-COVID-19.html> (last updated Sept. 1, 2020).

² *WHO Director-General’s Opening Remarks at the Media Brief on COVID-19*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

³ *Countries*, WORLD HEALTH ORG., <https://www.who.int/countries> (last visited Mar. 21, 2021).

⁴ Derek Hawkins et al., *Trump Declares Coronavirus Outbreak a National Emergency*, WASH. POST (Mar. 13, 2020), <https://www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/>; Shelby Brown et al., *Trump’s COVID-19 Relief Executive Actions: Everything Happening Now*, CNET (Aug. 26, 2020), <https://www.cnet.com/personal-finance/your-money/trumps-covid-19-relief-executive-actions-everything-happening-now/>.

⁵ *State Emergency Declarations and COVID-19*, ASS’N OF STATE & TERRITORIAL HEALTH OFFS. (Mar. 5, 2020), <https://www.astho.org/StatePublicHealth/State-Emergency-Declarations-and-COVID-19/03-05-20/>.

⁶ *1918 Pandemic (H1N1 Virus)*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html> (last updated Mar. 20, 2019); see also Alexandra Minna Stern et al., *The 1918-1919 Influenza Pandemic in the United States: Lessons Learned and Challenges Exposed*, 125 PUB. HEALTH REP. 6, 6 (2010) (“After the pandemic subsided in the winter of 1920, at least 50 million people had died worldwide, including approximately 550,000 in the United States.”).

A survey conducted by UNICEF found that 94% of all countries implemented some form of remote learning for children in response to the COVID-19 pandemic.⁷ Like many public entities throughout the United States, public school districts either closed their facilities altogether and began providing virtual school instruction or offered a hybrid learning experience in which children attend both in-school and virtual school instruction.⁸ Ongoing studies already indicate that federal and state responses to the COVID-19 pandemic—including shutting down schools and reliance on virtual instruction, social distancing protocols requiring separation from peers and community, and the adverse economic effects sustained by many families—all may impact the social and emotional well-being of youth.⁹

Because the first twenty-five years of life are critical for brain development,¹⁰ growing up during this “once in a lifetime” deadly pandemic may create mental health and behavioral consequences for youth. While the pandemic can serve as an opportunity for innovation when school leaders address these challenges, for some school districts, discipline has been more of the same. School districts are engaging in disciplinary practices that prevent students from accessing virtual school instruction.¹¹ These actions continue notwithstanding strong multidisciplinary research establishing that exclusionary discipline—suspensions, expulsions, school-based arrests, referrals to law enforcement, and unilateral transfers to alternative schools—are not only ineffective in reducing behavioral infractions in schools, but also lead to poorer academic outcomes and a greater

⁷ *COVID-19: Are Children Able to Continue Learning During School Closures?*, UNICEF (Aug. 2020), <https://data.unicef.org/resources/remote-learning-reachability-factsheet/>.

⁸ Mark Lieberman, *How Hybrid Learning Is (and Is Not) Working During COVID-19: 6 Case Studies*, EDUC. WEEK (Nov. 11, 2020), <https://www.edweek.org/leadership/how-hybrid-learning-is-and-is-not-working-during-covid-19-6-case-studies/2020/11>. This is not the first time that the United States has implemented remote learning for children. In 1937, students engaged in remote learning by way of “radio school” lessons in response to the 1937 polio pandemic. Katherine A. Foss, *Remote Instruction Isn’t New: Radio Instruction in the 1937 Polio Epidemic*, CONVERSATION (Oct. 5, 2020), <https://theconversation.com/remote-learning-isnt-new-radio-instruction-in-the-1937-polio-epidemic-143797>.

⁹ See Andreas Kluth, *An Epidemic of Depression and Anxiety Among Young Adults*, BLOOMBERG (Aug. 22, 2020), <https://www.bloomberg.com/opinion/articles/2020-08-22/coronavirus-millennials-are-suffering-an-epidemic-of-depression>; *Impact of COVID-19 on Youth Mental Health*, STRESS & DEV. LAB, HARV. UNIV., <https://sdlab.fas.harvard.edu/impact-covid-19-youth-mental-health> (last visited Mar. 21, 2021). See also Victor Jones, *In Moments of Uncertainty, Let Us Grown-Ups Not Forget That This World Belongs to Children*, LENS (Mar. 18, 2020), <https://thelensnola.org/2020/03/18/in-moments-of-uncertainty-let-us-grown-ups-not-forget-that-this-world-belongs-to-children/> (discussing the impact of disruption from in-school learning due to the COVID-19 pandemic).

¹⁰ Tell Me More, *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 10, 2011), <https://www.npr.org/templates/story/story.php?storyId=141164708>.

¹¹ Carolyn Jones, *How School Discipline – and Student Behavior – Has Changed During the Pandemic*, EDSOURCE (Nov. 17, 2020), <https://edsources.org/2020/how-school-discipline-and-student-misbehavior-has-changed-during-the-pandemic/643758>.

likelihood of juvenile justice system involvement for impacted students and to civil rights violations for students of color and students with disabilities.¹²

This article explores the use of exclusionary discipline practices in the era of virtual school instruction, or the “virtual” school-to-prison pipeline. Part I provides an overview of exclusionary discipline practices, how these practices impact students who are subjected to them, and the disproportionate use of these practices against students of color and students with disabilities. Part II will discuss virtual school discipline in the era of the pandemic, analyzing cases of children who have garnered national attention for receiving suspensions and/or expulsions for their alleged behavior during virtual school instruction. Part III will provide a discussion of the legal issues arising out of virtual school discipline, focusing on the potential and actual constitutional and civil rights violations resulting from the use of exclusionary practices. Lastly, Part IV will give recommendations to school districts for balancing the need to provide virtual instruction in the midst of a global pandemic with the need to cultivate a safe learning environment, while following the mandate to protect the civil rights of traditionally marginalized groups of children.

I. AN OVERVIEW OF EXCLUSIONARY DISCIPLINE PRACTICES IN SCHOOLS

A. *Origins and Implementation of Exclusionary Discipline Practices*

The U.S. Department of Education's Civil Rights Data Collection (CRDC),¹³ a biannual national survey of public school districts, defines exclusionary discipline to include detentions, in-school and out-of-school suspensions, expulsions, unilateral transfers to alternative school, school-based arrests, and school-based referrals to law enforcement.¹⁴ Essentially, exclusionary discipline occurs when a child is removed from the classroom setting where instruction is provided due to a behavioral infraction.¹⁵

Exclusionary discipline practices are implemented and promulgated through three interrelated policy mechanisms. The first is the federal Gun-Free Schools Act of 1994,¹⁶

¹² Deborah Fowler et al., *Making the Case for a School-and-Neighborhood Desegregation Approach to Deconstructing the School-to-Prison Pipeline*, 42 U. ARK. LITTLE ROCK L. REV. 723, 726-27 (2020); Erin M. Carr, *Educational Equality and the Dream That Never Was: The Confluence of Race-Based Institutional Harm and Adverse Childhood Experiences (ACEs) in Post-Brown America*, 12 GEO. J. L. & MOD. CRITICAL RACE PERSP. 115, 133 (2020).

¹³ *Civil Rights Data Collection*, OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/data.html> (last updated Mar. 24, 2021).

¹⁴ OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., 2017-18 CIVIL RIGHTS DATA COLLECTION: GENERAL OVERVIEW, CHANGES, AND LIST OF DATA ELEMENTS 5-6 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/2017-18-crdc-overview-changes-data-elements.pdf>.

¹⁵ Amity L. Noltemeyer & Caven S. McLoughlin, *Changes in Exclusionary Discipline Rates and Disciplinary Disproportionality Over Time*, 25 INT'L J. SPECIAL EDUC. 59, 59 (2010), <https://eric.ed.gov/?id=EJ890566> (“Exclusionary discipline involves the use of suspensions, expulsions, and other disciplinary action resulting in removal from the typical educational environment; it is frequently used as a consequence for inappropriate student behavior.”).

¹⁶ The Gun-Free Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3907, 3907-08 (2000) (codified at 20 U.S.C. §§ 8921-8923 (2000)), *amended by* No Child Left Behind Act Pub. L. No. 107-110, 115 Stat. 1762,

which ushered in the era of “zero tolerance” policies in schools by “mandat[ing] predetermined consequences or punishments for specific offenses,” and “requir[ing] all states to pass legislation mandating a one-year expulsion for any student found carrying firearms on school property.”¹⁷ The Act was conceived in response to growing fears surrounding school shootings, coupled with political rhetoric from the Clinton administration’s 1994 Crime Bill.¹⁸

Subsequent to the enactment of the 1994 Gun-Free Schools Act, states began to pass “willful disobedience” or “willful defiance” statutes¹⁹ as an extension of the zero tolerance policies required to receive federal funding from the Department of Education.²⁰ These state statutes removed schoolteachers’ and administrators’ ability to use discretion to determine what, if any, disciplinary action was appropriate for a student’s violation of the school district’s code of conduct.²¹ Instead, statutes prescribed automatic punishments—exclusionary practices—for engaging in violent or nonviolent conduct.²²

Lastly, the emergence of school resource officer (SRO) programs in the United States has provided a vehicle for law enforcement involvement in student discipline. Under SRO programs, school districts contract with local law enforcement agencies to provide officers on school campuses and at school-sanctioned activities.²³ SRO programs first appeared in the United States when Flint, Michigan’s Police Department placed law enforcement in public schools during the 1950s.²⁴ SRO programs gained federal traction in 1973, when the National Advisory Commission on Criminal Justice Standards and Goals recommended implementing these programs in school districts.²⁵ Then, in the early 2000s, the U.S. Department of Justice, through its Community Oriented Policing Services program, allocated \$68 million to school districts to establish SRO programs throughout the nation.²⁶

1762–63 (2002) (codified at 20 U.S.C. § 7151 (2006)) (repealing the Gun-Free Schools Act of 1994, but simultaneously enacting another, similar Gun-Free Schools Act as a subpart of the No Child Left Behind Act of 2001); currently Gun-Free Schools Act, 20 U.S.C. § 7961 (2018).

¹⁷ Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of Fuller v. Decatur Public School Board of Education School District*, 2002 BYU EDUC. & L.J. 159, 161.

¹⁸ Kathleen M. Cerrone, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131, 159-60, 163 (1999).

¹⁹ Danielle Dankner, *No Child Left Behind Bars: Suspending Willful Defiance to Disassemble the School-to-Prison Pipeline*, 51 LOY. L.A. L. REV. 577, 586-87 (2018).

²⁰ See Gun-Free Schools Act, 20 U.S.C. § 7961(b)(1) (2018) (“Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school . . .”).

²¹ See Dankner, *supra* note 19.

²² *Id.*

²³ See CHEYENNE BLACKBURN & VICTOR M. JONES, S. POVERTY L. CTR., THE DATA GAP: SCHOOL POLICING IN LOUISIANA 1, 3 (2019),

https://www.splcenter.org/sites/default/files/com_la_school_policing_final_no_crops.pdf.

²⁴ *Id.* at 3.

²⁵ *Id.*

²⁶ *Id.* at 4.

The role of SROs is largely undefined, and therefore in practice, SROs often serve the role of disciplinarian.²⁷ The limited data on SRO programs and their effectiveness shows that the presence of SROs in school districts has led to an increase in school-based arrests and referrals to law enforcement, largely for Black students and mainly for non-violent offenses.²⁸

Together, these federal and state policies aimed to address safety issues in public school districts. What came about instead were unintended consequences.

B. Impact of Exclusionary Discipline Practices

At least two decades of multi-disciplinary research finds that the use of exclusionary discipline practices against children in schools does not serve its goals of reducing disruptive and unsafe behavior.²⁹ Further, research indicates that exclusionary discipline may negatively affect academic performance. According to the UCLA Civil Rights Project, when California school districts began outlawing suspensions in elementary schools, school districts saw overall academic improvements.³⁰

Instead of improving school performance, the use of exclusionary discipline wreaks negative short-term and long-term consequences on children—especially children of color and children with disabilities—and on society as a whole. At least one study has found that children who are repeatedly suspended or expelled are much less likely to be politically or

²⁷ *Id.*

²⁸ LEADERSHIP FOR EDUC. EQUITY, EMERGING MODELS FOR POLICE PRESENCE IN SCHOOLS 1-2 (n.d.), https://educationalequity.org/sites/default/files/documents/emerging_models_for_school_resource_officers_final.pdf (last visited Mar. 22, 2021). *But see* RICHARD R. JOHNSON, DOLAN CONSULTING GRP., WHAT EFFECT DO SCHOOL RESOURCE OFFICERS HAVE ON SCHOOLS? 3-4 (2016), <https://www.dolanconsultinggroup.com/wp-content/uploads/2019/02/What-Effects-do-School-Resource-Officers-Have-on-Schools.pdf> (arguing that the presence of SROs does not create a school-to-prison pipeline).

²⁹ Stacey Jones Bock et al., *Suspension and Expulsion: Effective Management for Students?* 34 INTERVENTION SCH. & CLINIC 50, 51 (1998); Am. Psych. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCH. 852, 854 (2008), <https://www.apa.org/pubs/info/reports/zero-tolerance.pdf>; AM. PSYCH. ASS'N, THE PATHWAY FROM EXCLUSIONARY DISCIPLINE TO THE SCHOOL TO PRISON PIPELINE 2 (n.d.), <https://www.apa.org/advocacy/health-disparities/discipline-facts.pdf> (last visited Mar. 22, 2021). *See also* Michael Karson, *Punishment Doesn't Work*, PSYCH. TODAY (Jan. 14, 2014), <https://www.psychologytoday.com/us/blog/feeling-our-way/201401/punishment-doesnt-work>; Linda Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, 2003 NEW DIR. YOUTH DEV. 17, 25; Sara Luster, *How Exclusionary Discipline Creates Disconnected Students*, NAT'L EDUC. ASS'N (Jul. 19, 2018), <https://www.nea.org/advocating-for-change/new-from-nea/how-exclusionary-discipline-creates-disconnected-students>.

³⁰ DANIEL J. LOSEN ET AL., CTR. FOR CIV. RTS. REMEDIES, CLOSING THE SCHOOL DISCIPLINE GAP IN CALIFORNIA: SIGNS OF PROGRESS ii (2015), https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/ccrr-school-to-prison-pipeline-2015/UCLA15_Report_9.pdf.

civically engaged later in life, including voting and volunteering in civic activities.³¹ Students who are placed out of school are more likely to engage in risky behaviors, including criminal conduct, drug use, and adolescent sexual intercourse, while out of school.³² Students who are repeatedly subjected to exclusionary practices also face poorer educational outcomes, as absence from school over time interrupts their learning and increases the chances that they will drop out of high school.³³ Most tragically, longitudinal data from multiple studies has concluded that students who are subjected to exclusionary practices are at a significantly higher risk of becoming involved in the juvenile justice system in their youth, and in the criminal system as adults.³⁴ Hence the term, the “school-to-prison pipeline.” Additionally, exclusionary discipline practices are costly for school districts, where attendance rates impact the amount of state and federal funding that school districts receive. A study conducted by Texas Appleseed found that the eleven largest school districts in Texas lost a combined \$11.3 million in funding due to student absences from suspension or expulsion.³⁵

The link between exclusionary discipline and the school-to-prison pipeline becomes especially troublesome because of its disproportionate use by school officials against protected classes of children, namely students of color and students with disabilities. Data from 2009–2010 found that Black and Latinx youth were the subject of 70% of school-based arrests and referrals to law enforcement.³⁶ A March 2018 report by the Government Accountability Office (GAO), a non-partisan research agency under the jurisdiction of Congress,³⁷ analyzed 2013–2014 CRDC data and concluded that Black students were overrepresented in every form of school discipline.³⁸ These findings, according to the GAO, “were widespread and persistent regardless of the type of

³¹ Aaron Kupchik & Thomas J. Catlaw, *Discipline and Participation: The Long-Term Effects of Suspension and School Security on the Political and Civil Engagement of Youth*, 47 YOUTH & SOC’Y 95, 109, 116 (2014).

³² See Ctrs. for Disease Control & Prevention, *Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School – United States, 1992*, 43 MORBIDITY & MORTALITY WKLY. REP. 129, 130 (1994).

³³ Lawrence M. DeRidder, *The Impact of School Suspensions and Expulsions on Dropping Out*, 60 EDUC. HORIZONS 153, 154 (1990); ELIZABETH PUFALL JONES ET AL., CTR. FOR PROMISE, DISCIPLINED AND DISCONNECTED: HOW STUDENTS EXPERIENCE EXCLUSIONARY DISCIPLINE IN MINNESOTA AND THE PROMISE OF NON-EXCLUSIONARY ALTERNATIVES 3 (2018), <https://gradnation.americaspromise.org/report/disciplined-and-disconnected>.

³⁴ J.C. Barnes & Ryan T. Motz, *Reducing Racial Inequalities in Adulthood Arrest by Reducing Inequalities in School Discipline: Evidence from the School-to-Prison Pipeline*, 54 DEV. PSYCH. 2328, 2329 (2018); Kerrin C. Wolf & Aaron Kupchik, *School Suspensions and Adverse Experiences in Adulthood*, 34 JUST. Q. 407, 408 (2017).

³⁵ TEXAS APPLESEED, *BREAKING RULES, BREAKING BUDGETS: THE COST OF EXCLUSIONARY DISCIPLINE IN DALLAS ISD 1* (2012), <https://www.texasappleseed.org/sites/default/files/160-STPP-DISDCostAnalysis.pdf>.

³⁶ Artika Tyner, *Disrupting the School to Prison Pipeline*, HUFF. POST (Jan. 24, 2016), https://www.huffpost.com/entry/disrupting-the-school-to-_b_9061680.

³⁷ See *What GAO Does*, U.S. GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/about/what-gao-does> (last visited Mar. 22, 2021).

³⁸ U.S. GOV’T ACCOUNTABILITY OFF., *GAO-18-258, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 12* (2018), <https://www.gao.gov/assets/700/690828.pdf>.

disciplinary action, level of school poverty, or type of public school attended.”³⁹ Additional data shows that Black boys are three times more likely than White boys to be suspended, and that Black girls are suspended six times as often as White girls.⁴⁰ A review of data from the 2015–2016 CRDC report, the most recent national data set, found that Black and Latinx youth faced harsher discipline outcomes overall than their White counterparts.⁴¹ Given the disproportionate discipline of students of color and the pipeline to criminal system involvement, it is no surprise that they are also disproportionately represented in the juvenile justice system population.

The March 2018 GAO report further revealed that while students with disabilities—such as students with behavioral disabilities (e.g., anxiety, attention deficit hyperactive disorder, post-traumatic stress disorder) and developmental disabilities (e.g., autism)—“represented approximately 12 percent of all public school students,” they “accounted for nearly 25 percent or more of students referred to law enforcement, arrested for a school-related incident, or suspended from school.”⁴² For Black and Latinx students who are disabled, the likelihood of being subjected to exclusionary discipline is even more heightened.⁴³

Racial disparities in discipline transcend the K-12 education space. Federal data from the Department of Education released in 2014 found that preschool-aged children were expelled “at a rate far higher than their older peers in K-12,” and that Black preschool-aged children “were more likely to be pushed out.”⁴⁴ More recent data shows that despite only representing 18% of the male preschool population, Black boys make up 41% of male preschool suspensions.⁴⁵ Black girls experience even greater rates of suspension—making up only 19% of the female preschool population, but accounting for over half of female preschool suspensions.⁴⁶

Researchers point to racial implicit bias in schoolteachers, including schoolteachers of color, as the cause of the disproportionate use of exclusionary discipline against students of color.⁴⁷ Multiple studies have found that children of color, namely Black children, are viewed as older and therefore less innocent than White children.⁴⁸ Even within populations

³⁹ *Id.* at 1.

⁴⁰ Aja Frost, *Study: Black Girls Are Suspended 6 Times More Often Than White Girls*, USA TODAY (Feb. 11, 2015), <https://www.usatoday.com/story/college/2015/02/11/study-black-girls-are-suspended-6-times-more-often-than-white-girls/37400597/>.

⁴¹ Kristen Harper et al., *Black Students and Students with Disabilities with Disabilities Remain More Likely to Receive Out-of-School Suspensions, Despite Overall Declines*, CHILD TRENDS (Apr. 29, 2019), <https://www.childtrends.org/publications/black-students-disabilities-out-of-school-suspensions>.

⁴² U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 38, at 16.

⁴³ *Id.* at 16-17.

⁴⁴ Valerie Strauss, *New Federal Data Shows Black Preschoolers Still Disciplined at Far Higher Rates than Whites*, WASH. POST (Nov. 26, 2020), <https://www.washingtonpost.com/education/2020/11/26/new-federal-data-shows-black-preschoolers-still-disciplined-far-higher-rates-than-whites/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Barnes & Motz, *supra* note 34, at 2335-36.

⁴⁸ REBECCA EPSTEIN ET AL., GEO. L. CTR. ON POVERTY & INEQ., *GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 4-5* (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp->

of students of color, darker-skinned students face harsher disciplinary outcomes than lighter-skinned students.⁴⁹ This bias in race and skin tone is rooted in the centuries-old belief that people of color are inherently inferior to White people, and for America, this belief was demonstrated through the genocide of Indigenous people⁵⁰ and the enslavement of African people.⁵¹ The implicit bias present in society and in schoolteachers against people with disabilities is similarly rooted in Eurocentric values pre-dating the establishment of the United States, which dictated that people with disabilities must be segregated and excluded from society.⁵²

Racial disparities in school discipline exist from pre-kindergarten through twelfth grade,⁵³ and such disparities exist based on disability status from kindergarten through twelfth grade.⁵⁴ Because students of color and students with disabilities disproportionately experience discipline, it is no surprise that they are also disproportionately funneled down the school-to-prison pipeline.

II. PROFILES OF VIRTUAL SCHOOL DISCIPLINE

The proceeding anecdotes will demonstrate that the use of exclusionary practices by school districts, and the underlying implicit biases that teachers harbor against students of color and students with disabilities, have permeated public education during the COVID-19 pandemic. The finite or permanent removal of students from virtual school instruction as disciplinary action for behavior that they engage in while sitting in front of a computer has become the new form of exclusionary discipline in the COVID-19 era, as the following examples from Jefferson Parish, Louisiana and from across the nation will show.

content/uploads/sites/14/2017/08/girlhood-interrupted.pdf; Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERS. & SOC. PSYCH. 526, 529, 536 (2014), <https://www.apa.org/pubs/journals/releases/psp-a0035663.pdf>.

⁴⁹ Jamaal Abdul-Alim, *Darker-Skinned African-American Students Suspended More Frequently*, DIVERSE ISSUES HIGHER EDUC. (Oct. 6, 2014), <https://diverseeducation.com/article/67245/>; Tanzina Vega, *Schools’ Discipline for Girls Differ by Race and Hue*, N.Y. TIMES (Dec. 10, 2014), <https://www.nytimes.com/2014/12/11/us/school-discipline-to-girls-differs-between-and-within-races.html>.

⁵⁰ See, e.g., Haley A. Strass, *Effects of Stereotypical Media Representations of American Indians on Implicit and Explicit Bias: The Power of Pocahontas* (2016) (M.S. thesis, Iowa State University), <https://lib.dr.iastate.edu/etd/15193/>.

⁵¹ See B. Keith Payne et al., *Historical Roots of Implicit Bias in Slavery*, 116 PNAS 11693, 11697 (2019).

⁵² *Dehumanization, Discrimination, and Segregation*, DISABILITY JUST., <https://disabilityjustice.org/justice-denied/dehumanization-discrimination-and-segregation/> (last visited Mar. 22, 2021).

⁵³ Moriah Balingit, *Racial Disparities in School Discipline Are Growing, Federal Data Show*, WASH. POST (Apr. 24, 2018), https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee_story.html; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 38, at 13-14.

⁵⁴ Katherine Reynolds Lewis, *Why Schools Over-Discipline Children with Disabilities*, ATLANTIC (Jul. 24, 2015), <https://www.theatlantic.com/education/archive/2015/07/school-discipline-children-disabilities/399563/>.

A. Jefferson Parish Public Schools System, Louisiana

Jefferson Parish Public Schools System (JPPSS) is a public school district in Louisiana that has garnered national attention for its virtual school disciplinary practices during the COVID-19 pandemic. JPPSS is the largest public school district in Louisiana, consisting of eighty schools in Jefferson Parish attended by approximately 50,000 children.⁵⁵ Population estimates from the U.S. Census Bureau as recent as July 2019 indicate that there are 432,493 people residing in Jefferson Parish.⁵⁶ Of the parish's residents, 64.9% are White, 28.3% are Black, and 14.9% are Latinx.⁵⁷ Politically, Jefferson Parish is a consistently Republican district,⁵⁸ largely a result of mainly racism-driven "white flight" from the adjacent Orleans Parish (New Orleans) to Jefferson Parish that began in the 1950s.⁵⁹

Tangential to the racial backdrop of JPPSS and Jefferson Parish is the historically disproportionate use of criminal punishment and disciplinary action against constitutionally protected classes, namely Black people. Throughout the twentieth and twenty-first centuries, in all but one year in recent history, Louisiana has consistently maintained the highest incarceration rate in the United States.⁶⁰ As of June 2020, the United States was ranked as the leading nation in incarceration rates in the world.⁶¹ Gretna, a city in Jefferson Parish, was the arrest capital of the United States in 2013 according to statistics from the Federal Bureau of Investigation.⁶² Because Jefferson Parish is located in Louisiana (the "mass incarcerator" of the U.S.)⁶³ and the United States leads the world in incarceration rates, some may make the logical inference that Jefferson Parish is the incarceration capital of the world.

Relatedly, JPPSS has a documented history of using exclusionary discipline against Black and disabled students at significantly disproportionate rates compared to White and non-disabled students. In January 2012, a federal complaint was filed against JPPSS with the U.S. Department of Education's Office for Civil Rights (OCR), stating that while only

⁵⁵ JEFFERSON PARISH SCHOOLS, <https://www.jpschools.org/> (last visited Mar. 22, 2021).

⁵⁶ *Quick Facts: Jefferson Parish, Louisiana*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/jeffersonparishlouisiana> (last visited Mar. 8, 2021).

⁵⁷ *Id.*

⁵⁸ See Tyler Bridges, *John Bel Edwards Carried Jefferson Parish, Long a Republican Stronghold, But Can Other Democrats?*, ADVOC. (Nov. 30, 2019), https://www.theadvocate.com/baton_rouge/news/politics/elections/article_160d483e-12f8-11ea-a84a-378d444e89eb.html.

⁵⁹ *White Flight*, THE DATA CTR., <https://www.datacenterresearch.org/pre-katrina/tertiary/white.html> (last visited Mar. 8, 2021).

⁶⁰ Lea Skene, *Louisiana Once Again Has Nation's Highest Imprisonment Rate After Oklahoma Briefly Rose to Top*, ADVOC. (Dec. 25, 2019), https://www.theadvocate.com/baton_rouge/news/article_4dcdfe1c-213a-11ea-8314-933ce786be2c.html.

⁶¹ *Countries with the Largest Number of Prisoners Per 100,000 of the National Population, as of June 2020*, STATISTA (Dec. 1, 2020), <https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/>.

⁶² Mark Gimein, *Welcome to the Arrest Capital of the United States*, FUSION (June 22, 2016), <https://fusion.tv/story/256788/gretna-louisiana-arrest-capital-america/>.

⁶³ Skene, *supra* note 60.

46% of the district’s students were Black, 76% of the district’s 453 school arrests were made against Black students during the 2010–2011 school year.⁶⁴ The complaint further stated that the school-based arrests were frequently the result of minor school violations, such as skipping school, using a cell phone during class, and walking in school hallways without a hall pass.⁶⁵ The federal complaint against JPPSS was supplemented in 2015 to allege that Black and disabled students continued to be disproportionately subjected to exclusionary discipline practices by the district.⁶⁶ In 2019, the Department of Education dismissed the complaints, citing a failure by the parties to reach a settlement⁶⁷—a casualty of then Education Secretary Betsy DeVos’s practice of summarily dismissing “old” and outstanding OCR complaints.⁶⁸

As a result, the same disciplinary practices utilized by JPPSS at the time of the OCR complaint remain intact to date. The proceeding cases demonstrate that JPPSS’s disciplinary practices continued during the COVID-19 pandemic, even after the district elected to utilize a hybrid instruction approach in which students attended school virtually from computers in their homes at times and in person at others.

1. Ka’Mauri Harrison

Ka’Mauri Harrison is a nine-year-old Black boy in the fourth grade, attending public school at Woodmere Elementary in JPPSS.⁶⁹ On the morning of September 11, 2020, Ka’Mauri attended his virtual social studies class in his bedroom at home and took an English test on his computer.⁷⁰ While taking his test, Ka’Mauri’s younger brother entered their shared bedroom and tripped over a BB gun.⁷¹ Ka’Mauri responded by muting

⁶⁴ Complaint Under Title IV of the Civil Rights Act of 1964, *Q.B. v. Jefferson Parish Pub. Sch.*, No. 06121151 (Off. for Civ. Rts., Jan. 11, 2012); *see also Q.B. v. Jefferson Parish Public School System*, S. POVERTY L. CTR. [hereinafter *Q.B. v. JPPSS*], <https://www.splcenter.org/seeking-justice/case-docket/qb-v-jefferson-parish-public-school-system> (last visited Mar. 8, 2021).

⁶⁵ *Q.B. v. JPPSS*, *supra* note 64.

⁶⁶ *Discrimination Against Students of Color Rampant in Louisiana School District*, S. POVERTY L. CTR. (May 8, 2015), <https://www.splcenter.org/news/2015/05/08/discrimination-against-students-color-rampant-louisiana-school-district>; Letter from S. Poverty L. Ctr. to the U.S. Dep’t of Just., Civ. Rts. Div. and the Off. for Civ. Rts., Dallas Div. (May 7, 2015), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/supplement_to_q_b_et_al_v_jefferson_parish_public_school_system_5_7_15_final_redacted.pdf.

⁶⁷ The Author served as counsel for plaintiffs in this case during his time as Senior Supervising Attorney at Southern Poverty Law Center from 2018-2019. This information is therefore based on the Author’s role as counsel for plaintiffs.

⁶⁸ Annie Waldman, *DeVos Has Scuttled More Than 1,200 Civil Rights Probes Inherited from Obama*, PROPUBLICA (June 21, 2018), <https://www.propublica.org/article/devos-has-scuttled-more-than-1-200-civil-rights-probes-inherited-from-obama>.

⁶⁹ Tim Elfrink, *A Teacher Saw a BB Gun in a 9-Year-Old’s Room During Online Class. He Faced Expulsion*. WASH. POST (Sept. 25, 2020), <https://www.washingtonpost.com/nation/2020/09/25/louisiana-student-bbgun-expulsion/>.

⁷⁰ *Id.*

⁷¹ Minyvonne Burke, *Boy, 9, Suspended After Teacher Sees BB Gun in His Room During Virtual Class; Family Sues*, NBC NEWS (Oct. 6, 2020), <https://www.nbcnews.com/news/us-news/boy-9-suspended-after-teacher-sees-bb-gun-his-room-n1242275>.

his computer, leaning over from his chair to pick up the BB gun, and setting it next to him.⁷² Ka'Mauri inadvertently placed the BB gun barrel in the view of his computer camera where it was observed by his teacher and classmates.⁷³ His teacher attempted to get his attention but was unsuccessful because Ka'Mauri had muted his computer.⁷⁴

Ka'Mauri was suddenly disconnected from his virtual class and did not know why.⁷⁵ He notified his older sister that he had been disconnected from the class.⁷⁶ After Ka'Mauri's parents received phone calls from the school, they learned that he was suspended and could be expelled.⁷⁷ His parents objected to the punishment, explaining that the gun was not loaded, that it was a BB gun and not a rifle, and that Ka'Mauri was simply trying to remove the gun from his younger brother after he tripped on it.⁷⁸

Notwithstanding the explanation provided by Ka'Mauri's parents, by the end of the same day, Ka'Mauri was suspended from virtual school for six days and recommended for expulsion for bringing an unauthorized weapon onto school grounds.⁷⁹ Ka'Mauri's parents received an incident report from the school, notifying them of the disciplinary action taken against Ka'Mauri and his expulsion hearing before JPPSS's hearing officer scheduled for September 22.⁸⁰ The incident report stated that Ka'Mauri "presented a weapon that appeared to be a rifle/shotgun during his Google Meets classroom session."⁸¹ According to Ka'Mauri's attorney, school officials acknowledged that Ka'Mauri did not hold the BB gun in his hand nor point it at the screen during the time it was seen on his computer camera, despite the incident report allegations.⁸²

Ka'Mauri's expulsion hearing was held via Zoom and was attended by his school teacher, the school's principal, Ka'Mauri, his parents, and an attorney that his parents had recently retained in response to the incident.⁸³ The hearing officer decided not to expel Ka'Mauri,⁸⁴ but upheld the six-day suspension for "displaying a facsimile weapon while

⁷² Elfrink, *supra* note 69.

⁷³ Burke, *supra* note 71.

⁷⁴ *Id.*

⁷⁵ Faimon A. Roberts III, *A BB Gun Was Seen in a Harvey Fourth Grader's Bedroom During Virtual Class. Now, He's Suspended*, TIMES PICAYUNE-NEW ORLEANS ADVOC. (Sept. 23, 2020) [hereinafter Roberts, *A BB Gun Was Seen*], https://www.nola.com/news/education/article_06e7ff0a-fdd2-11ea-a060-0f7b484dca71.html.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*; Harrison v. Jefferson Par. Sch. Bd., No. CV 20-2916, 2020 WL 7053298, at *2 (E.D. La. Nov. 23, 2020).

⁸¹ Roberts, *A BB Gun Was Seen*, *supra* note 75.

⁸² Burke, *supra* note 71.

⁸³ Harrison, 2020 WL 7053298, at *2. The information concerning the virtual mode of the hearing and the retention of legal counsel is in the possession of the Author.

⁸⁴ Faimon A. Roberts III, *Family of Student Suspended for BB Gun in Bedroom Sues Jefferson Parish School System*, TIMES PICAYUNE-NEW ORLEANS ADVOC. (Oct. 2, 2020), https://www.nola.com/news/education/article_ea17ca7e-04eb-11eb-b64d-a7ec002ee7c6.html.

receiving virtual instruction” in violation of JPPSS’s internet usage and weapons policies.⁸⁵ The school further amended Ka’Mauri’s punishment to include a social work assessment.⁸⁶

Ka’Mauri returned to school two days later.⁸⁷ By then, what happened to him had garnered national and international attention;⁸⁸ and the district’s handling of the matter made allies out of otherwise diametrically opposed groups. By September 25, Louisiana Attorney General Jeff Landry, a staunch conservative,⁸⁹ launched an investigation into JPPSS’s handling of the incident, alleging multiple violations of the Louisiana and federal Constitutions.⁹⁰ On that same day, Dr. Walter Kimbrough, president of Dillard University—a historically Black college located in New Orleans, Louisiana—published an open letter to JPPSS Superintendent James Gray urging him to remove the suspension from Ka’Mauri’s record.⁹¹ In his letter, Dr. Kimbrough cited the national overcriminalization of Black boys in schools as a basis for overturning the suspension.⁹² The National Rifle Association (NRA) also sided with Ka’Mauri’s family, denouncing the district’s decision as “hysterical and irrational behavior” on Twitter.⁹³ Days later, on September 28, the American Civil Liberties Union (ACLU) of Louisiana issued a statement condemning the district’s treatment of Ka’Mauri and his family, citing the overuse of exclusionary discipline practices in schools against Black students and a 2017 Tulane University Research Alliance study finding that Black students are twice as likely to be suspended as their White peers.⁹⁴

⁸⁵ Gisela Crespo, *Parents Sue Louisiana School District After 4th Grader Suspended for BB Gun During Virtual Class at Home*, CNN (Oct. 4, 2020) [hereinafter Crespo, *Parents Sue Louisiana School District*], <https://www.cnn.com/2020/10/04/us/student-suspended-gun-virtual-lawsuit-trnd/index.html>.

⁸⁶ Gisela Crespo, *4th Grader Suspended for Having a BB Gun in His Bedroom During Virtual Learning*, CNN (Oct. 4, 2020), <https://www.cnn.com/2020/09/26/us/student-suspended-gun-virtual/index.html>.

⁸⁷ WWL Staff, *4th Grader Returns to School After Being Suspended for Having a BB Gun in Virtual Classroom*, 4WWL (Sept. 24, 2020), <https://www.wvlw.com/article/news/local/jefferson/4th-grader-suspended-after-bb-gun-seen-in-virtual-classroom/289-46fb899b-85ea-47b0-ae96-28da94fb3692>.

⁸⁸ *E.g.*, Elfrink, *supra* note 69.

⁸⁹ Mark Ballard, *Louisiana Attorney General Jeff Landry Easily Wins Reelection*, ADVOC. (Oct. 12, 2019), https://www.theadvocate.com/baton_rouge/news/politics/elections/article_4f7ae2e2-eac2-11e9-b2a6-938faf8c5391.html.

⁹⁰ Joshua Bote, *Louisiana AG Investigates School for Suspended 4th Grader After Teacher Noticed BB Gun During Online Class*, USA TODAY (Sept. 25, 2020), <https://www.usatoday.com/story/news/education/2020/09/25/louisiana-9-year-old-suspended-having-bb-gun-room-class/3532484001/>.

⁹¹ *HBCU President: Student’s BB Gun Suspension Should Be Voided*, ABC NEWS (Sept. 25, 2020), <https://abcnews.go.com/US/wireStory/hbcu-president-students-bb-gun-suspension-voided-73239283>.

⁹² *Id.*

⁹³ Faimon A. Roberts III, *Suspended Student Sees ‘Overwhelming’ Support From NRA, Gun Clubs After Virtual BB Gun Violation*, TIMES-PICAYUNE-NEW ORLEANS ADVOC. (Sept. 28, 2020), https://www.nola.com/news/education/article_77d7c92e-00df-11eb-9b99-93ad4afac42b.html.

⁹⁴ *ACLU of Louisiana Condemns Suspension of 4th Grader Ka’Mauri Harrison for BB gun*, ACLU OF LA. (Sept. 28, 2020), <https://www.laclu.org/en/press-releases/aclu-louisiana-condemns-suspension-4th-grader-kamauri-harrison-bb-gun>; Wilborn P. Nobles III, *Black Students 2 Times as Likely to be Suspended as White Peers, Tulane Study Says*, TIMES-PICAYUNE (July. 22, 2019), https://www.nola.com/news/education/article_9fc7be6e-0475-54a8-923c-4b78fd94f233.html.

Ka'Mauri's parents sought an appeal to the JPPSS school board from the suspension on his record and the requirement that he be assessed by a social worker.⁹⁵ However, the school board denied the family's request for an appeal.⁹⁶ Ka'Mauri's parents responded to the school board's decision by filing for a preliminary injunction and temporary restraining order ("TRO Petition") on October 6 in the civil district court of Jefferson Parish against the JPPSS school board, Superintendent Dr. James Gray, Woodmere Elementary school officials, and the district's attorney Patricia Adams.⁹⁷ The TRO Petition sought to enjoin the school board from subjecting Ka'Mauri to a social work assessment.⁹⁸ The Harrison family also sought damages for the mental anguish, pain, suffering, and emotional distress experienced by Ka'Mauri and his family, arising, they alleged, from JPPSS's treatment of the BB gun incident.⁹⁹ The TRO Petition was granted on October 6.¹⁰⁰

On October 16, the family amended its TRO Petition to add a retaliation claim against the school district under the First Amendment of the U.S. Constitution, alleging that the school board refused to hear Ka'Mauri's appeal because his family spoke with the media about his discipline.¹⁰¹ The school district responded by removing the case to the U.S. District Court for the Eastern District of Louisiana on October 26.¹⁰²

Even before the case was removed, Ka'Mauri's incident had already led to the creation of legislation to address the rights of families statewide whose children were subjected to virtual school suspensions or expulsions.¹⁰³ Ka'Mauri, his father, and their attorney testified before the state legislature in support of the bill.¹⁰⁴ The legislation, House Bill 83, gives students the right to appeal their suspensions to the school board before having to seek judicial relief.¹⁰⁵ The bill further requires public school districts in Louisiana to develop virtual school discipline policies,¹⁰⁶ in response to JPPSS's vague policy that impermissibly extended its on-campus weapons policy to virtual school. The bill also

⁹⁵ Faimon A. Roberts III, *Family of Student Suspended Over BB Gun Wins Restraining Order Against Jefferson School Districts*, TIMES PICAYUNE-NEW ORLEANS ADVOC. (Oct. 5, 2020), https://www.nola.com/news/education/article_2cbe0d70-0753-11eb-820f-b7e28e2b4f95.html.

⁹⁶ *Id.*

⁹⁷ *Harrison v. Jefferson Par. Sch. Bd.*, No. CV 20-2916, 2020 WL 7053298, at *1, *3 (E.D. La. Nov. 23, 2020).

⁹⁸ *Id.* at *3.

⁹⁹ Crespo, *Parents Sue Louisiana School District*, *supra* note 85.

¹⁰⁰ *Harrison*, 2020 WL 7053298, at *3.

¹⁰¹ *See id.*

¹⁰² *Id.*

¹⁰³ Will Sentell, *Push to Change Law Wins 93-0 After 4th Grader's BB Gun Suspension, and It'll Be Named After Him*, ADVOC. (Oct. 21, 2020), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_e1a5ab2e-13d5-11eb-bac9-7b1a70737476.html; *Session Information for the 2020 Second Extraordinary Session*, LA. STATE LEGISLATURE, http://www.legis.la.gov/Legis/SessionInfo/SessionInfo_202ES.aspx (last visited Mar. 8, 2021).

¹⁰⁴ Sentell, *supra* note 103.

¹⁰⁵ *Id.*; *HB83 by Representative Troy D. Romero*, LA. STATE LEGISLATURE, <http://www.legis.la.gov/Legis/BillInfo.aspx?s=202ES&b=HB83&sbi=y> (last visited Apr. 4, 2021).

¹⁰⁶ *HB83 by Representative Troy D. Romero*, *supra* note 105.

allows families to collect attorney’s fees if the school official’s use of discipline is found to be grossly negligent.¹⁰⁷ House Bill 83 garnered bipartisan support in the House of Representatives and the Senate; it passed 93-0 in the House, and 35-0 in the Senate.¹⁰⁸ The bill was signed by Louisiana Governor John Bel Edwards on November 5, becoming Act No. 48 and effective immediately.¹⁰⁹ The bill was appropriately dubbed the “Ka’Mauri Harrison Act.”¹¹⁰

With the passage and enactment of the Ka’Mauri Harrison Act, Ka’Mauri’s family again sought an appeal of his suspension in a hearing before the JPPSS school board on December 4, 2020.¹¹¹ The family’s attorneys raised the same arguments: that the suspension should be overturned and removed from Ka’Mauri’s record due to what they alleged were violations of the family’s constitutional rights to privacy and due process.¹¹² The school district maintained its position that Ka’Mauri had violated the district’s “no weapons” policy by brandishing a weapon on his computer screen during virtual instruction, and that it had taken disciplinary action against Ka’Mauri without violating his constitutional rights.¹¹³ In what turned out to be a very contentious public hearing, the JPPSS school board ultimately upheld Ka’Mauri’s suspension, retroactively reducing it from six to three days, and affirmed the hearing officer’s decision to keep the suspension and weapons charge on his school record.¹¹⁴

Litigation concerning the discipline of Ka’Mauri and the process by which JPPSS reached its decision is ongoing. On February 8, 2021, Attorney General Jeff Landry filed a motion for intervention in Ka’Mauri’s federal case, arguing that the district violated Section 416 of Louisiana’s school discipline statute, the Ka’Mauri Harrison Act, and Ka’Mauri’s constitutional rights to privacy and due process.¹¹⁵ To date, Ka’Mauri’s suspension and weapons offense remain on his educational record.

¹⁰⁷ Sentell, *supra* note 103.

¹⁰⁸ *Id.*

¹⁰⁹ See *HB83 by Representative Troy D. Romero*, *supra* note 105.

¹¹⁰ Sentell, *supra* note 103.

¹¹¹ Faimon A. Roberts III, *First of Its Kind Suspension Appeal Hearing Begins in Jefferson Parish BB Gun Case*, *TIMES PICAYUNE-NEW ORLEANS ADVOC.* (Dec. 4, 2020), https://www.nola.com/news/education/article_c75c336c-364b-11eb-9af6-efccd77a9cd3.html.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Faimon A. Roberts III, *Tempers Flare in Six-Hour Jefferson School Board Hearing for Ka’Mauri Harrison*, *TIMES PICAYUNE-NEW ORLEANS ADVOC.* (Dec. 4, 2020), https://www.nola.com/news/education/article_6fc8d660-3681-11eb-af9d-0b6be993cb95.html.

¹¹⁵ J.C. Canicosa, *In BB Gun Suspension Case, AG Jeff Landry Joins Families Fighting Jefferson Parish School Board*, *LA. ILLUMINATOR* (Feb. 9, 2021), <https://lailluminator.com/2021/02/09/in-bb-gun-suspension-case-ag-jeff-landry-joins-families-fighting-jefferson-parish-school-board/>; *State of Louisiana Joins Federal Lawsuit Against Jefferson Parish School Board Over Violations of Ka’Mauri Harrison’s Constitutional Rights*, *ATT. GEN. JEFF LANDRY* (Feb. 8, 2021), <https://www.ag.state.la.us/Article/10858>.

2. Tomie Brown

Ka'Mauri's case is not the only example of the use of exclusionary virtual school discipline by JPPSS.¹¹⁶ Tomie Brown is a White, eleven-year-old sixth grader attending Grand Isle School in JPPSS.¹¹⁷ On September 9, 2020, two days before Ka'Mauri's incident, Tomie was attending virtual school on his computer at home when, during a break in his science class, Tomie showed a BB gun to his classmates.¹¹⁸ Tomie's teacher did not see Tomie brandish the BB gun, but overheard two of his classmate giggling and saying something about a gun.¹¹⁹ When Tomie's teacher interrogated the students, Tomie disclosed that he was responsible for making them giggle.¹²⁰ When the teacher questioned Tomie about what happened, Tomie began to apologize for having a BB gun.¹²¹ In his disciplinary report, Tomie's teacher noted that he did not see the BB gun, and that he did not believe that Tomie was brandishing the BB gun to threaten anyone.¹²²

Tomie's father alleged that he met with school personnel the day following the incident, and that the principal notified him that there would be no need to retain counsel because the school did not intend to discipline Tomie.¹²³ Tomie's father was subsequently notified by the school district that Tomie was suspended for three days (unlike Ka'Mauri's six-day suspension), placed on probation, and recommended expulsion for violating the school district's weapons-free campus policy.¹²⁴ Similar to Ka'Mauri's case, Tomie had an expulsion hearing before a JPPSS hearing officer, who upheld his three-day suspension but dropped the expulsion charge.¹²⁵

¹¹⁶ See *Louisiana District Suspends More Students for Online Weapons*, ABC NEWS (Oct. 25, 2020) [hereinafter *Louisiana District*], <https://abcnews.go.com/US/wireStory/louisiana-district-suspends-students-online-weapons-73820737>.

¹¹⁷ Natasha Robin, *A Second Jefferson Parish Student Accused of Violating Weapons Policy While Virtually Learning*, FOX 8 (Oct. 16, 2020), <https://www.fox8live.com/2020/10/15/second-jefferson-parish-student-is-accused-violating-weapons-policy-while-virtually-learning/>; Faimon A. Roberts III, *Second Jefferson Parish Student Suspended for BB Gun in Room During Virtual School Lesson*, TIMES PICAYUNE-NEW ORLEANS ADVOC. (Oct. 15, 2020) [hereinafter Roberts, *Second Jefferson Parish Student Suspended*] https://www.nola.com/news/education/article_a43b1d7e-0f0b-11eb-a753-eb7bb03149f8.html; J.C. Canicosa, *2 BB Gun Suspensions, 2 Lawsuits Filed Against the Jefferson Parish School Board*, LA. ILLUMINATOR (Dec. 15, 2020) [hereinafter Canicosa, *2 BB Guns Suspensions*], <https://lailluminator.com/2020/12/15/two-bb-gun-suspensions-two-lawsuits-filed-against-the-jefferson-parish-school-board/>.

¹¹⁸ Canicosa, *2 BB Gun Suspensions*, *supra* note 117.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Jennifer Crockett, *WDSU Investigates: Second Jefferson Parish Family Fighting School System*, WDSU6 NEWS (Oct. 14, 2020), <https://www.wdsu.com/article/wdsu-investigates-second-jefferson-parish-family-fighting-school-system/34375456>.

¹²³ Roberts, *Second Jefferson Parish Student Suspended*, *supra* note 117; Canicosa, *2 BB Gun Suspensions*, *supra* note 118.

¹²⁴ Roberts, *Second Jefferson Parish Student Suspended*, *supra* note 117.

¹²⁵ Canicosa, *2 BB Gun Suspensions*, *supra* note 117.

Like Ka’Mauri, Tomie’s family attempted to appeal the school’s decision to the JPPSS school board.¹²⁶ The school board heard Tomie’s appeal on December 4, the same day it denied Ka’Mauri’s appeal request.¹²⁷ The school board decided to uphold the hearing officer’s decision regarding Tomie’s suspension.¹²⁸

On December 14, Tomie’s family filed a lawsuit in state court against the school district and officials.¹²⁹ Tomie’s family retained the same attorney that Ka’Mauri’s family had hired.¹³⁰ The family alleged various due process violations, including that they were misled by school officials into believing that Tomie would not be disciplined.¹³¹ They also alleged that there was no school policy in place that defined “school grounds” to include one’s home during virtual school instruction, and therefore a violation of the district’s weapons-free campus policy was unwarranted.¹³² The lawsuit further alleged that Tomie’s hearing was tainted by racial bias, arguing that the school board only upheld Tomie’s suspension to avoid appearing more lenient towards a White student than Ka’Mauri, a Black student.¹³³

Litigation concerning Tomie’s virtual school discipline is ongoing, and to date, the suspension and weapons charge remain on his educational record.¹³⁴

3. “Adam”¹³⁵

Within the same month as Ka’Mauri and Tomie, JPPSS subjected a third student to exclusionary virtual school discipline. The student in question, “Adam,” is a ninth-grade student at Thomas Jefferson High School.¹³⁶ Adam is a student of color who suffers from type 2 diabetes, which can cause his blood sugar to sometimes drop to the point of him becoming unfocused and irritable.¹³⁷ Though the school was aware of his medical condition

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Jefferson Parish Student Alleges Racial Bias in BB Gun Hearing; Lawsuit Filed*, WDSU6 NEWS (Dec. 14, 2020) [hereinafter *Jefferson Parish Student Alleges Racial Bias*], <https://www.wdsu.com/article/jefferson-parish-student-alleges-racial-bias-in-bb-gun-hearing-lawsuit-filed/34965443>.

¹³² *Brown v. Jefferson Par. Sch. Bd.*, No. 21-40, 2021 WL 949679, at *3 (E.D. La., Mar. 12, 2021).

¹³³ *Jefferson Parish Student Alleges Racial Bias*, *supra* note 131.

¹³⁴ *See Brown*, 2021 WL 949679, at *9 (Mar. 12, 2021 order granting the State of Louisiana’s Motion to Intervene).

¹³⁵ “Adam” is a pseudonym for a child-client represented by the Author, whose family wishes to maintain their anonymity.

¹³⁶ Faimon A. Roberts III, *Two More Jefferson Parish Students Suspended for Handling Knives, Sword During Virtual Lessons*, TIMES PICAYUNE-NEW ORLEANS ADVOC. (Oct. 24, 2020) [hereinafter Roberts, *Two More Jefferson Parish Students*], https://www.nola.com/news/education/article_996483c4-13a5-11eb-a4aa-7763de22ff9f.html.

¹³⁷ This information is in the possession of the Author.

and its potential behavioral manifestations, there was no school accommodation plan in place for Adam at the time of the incident at issue.¹³⁸

At some point during his virtual class on September 16, Adam became distracted and, as he had done in the past, picked up the nearest objects within arms' reach and began fiddling with them.¹³⁹ This time, the objects were two butterfly knives that were owned by his adult brother,¹⁴⁰ and he began twirling them with his hands.¹⁴¹ Adam's conduct was observed by his classmates,¹⁴² and one of them recorded the incident and showed the video to his mother.¹⁴³ Adam twirled the knives for less than a minute, and the video depicts him not making any eye contact with anyone while doing so.¹⁴⁴ Adam further made no verbal or written threats to anyone while twirling the knives or thereafter.¹⁴⁵

The classmate's mother submitted the recording of Adam's activity to the school's principal.¹⁴⁶ On September 18, Adam's school required him to submit a written statement providing his account of the incident, in which he apologized and explained that he had no malicious intent behind his actions.¹⁴⁷ Adam further explained that he felt the urge to keep his hands in a constant state of motion by twiddling with objects.¹⁴⁸

On September 21, Adam's family received notice from JPPSS that he had been suspended for six days, commencing on that day, and that the district had recommended him for expulsion for violating Louisiana's school discipline statute and JPPSS policy by displaying a knife in excess of two inches during school instruction.¹⁴⁹

On September 24, Adam's family received a notice from the school district that his expulsion hearing was set for September 28.¹⁵⁰ That same day, the principal of Adam's school notified his mother that he would have to undergo a behavioral assessment with a mental health provider to determine whether Adam posed a threat to himself or others.¹⁵¹ On September 25, Adam's mother retained a child medical psychologist to evaluate Adam; the psychologist determined that Adam did not pose a potential threat to himself or others and notified Adam's school principal of these evaluation results.¹⁵²

The night before the hearing, Adam's mother obtained legal counsel to represent the family in the matter.¹⁵³ On the day of the hearing, Adam's attorney alleged that the school had violated Adam's constitutional rights to privacy and due process, as well as potentially violated Section 504 of the Rehabilitation Act of 1973 because of the district's

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Roberts, *Two More Jefferson Parish Students*, *supra* note 136.

¹⁴² *Id.*

¹⁴³ This information is in the possession of the Author.

¹⁴⁴ *Id.*

¹⁴⁵ Roberts, *Two More Jefferson Parish Students*, *supra* note 136.

¹⁴⁶ This information is in the possession of the Author.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ This information is in the possession of the Author.

alleged failure to evaluate Adam’s medical condition in their recommendation that he be expelled.¹⁵⁴ The next day, Adam’s family received a letter from the JPPSS hearing officer upholding his six-day suspension and revoking the district’s expulsion charge.¹⁵⁵ The letter further permitted Adam to return to school on September 30.¹⁵⁶

Afraid of being identified, Adam’s family chose not to speak publicly about their case.¹⁵⁷ Unwilling to face the same scrutiny by JPPSS that Ka’Mauri’s family faced, Adam’s family decided to not pursue legal action against the school district.¹⁵⁸ The suspension and weapons offense remain on Adam’s educational record.¹⁵⁹

4. “Ben”¹⁶⁰

Ben is a twelve-year-old, Latinx seventh grade student¹⁶¹ attending Patrick F. Taylor Science & Technology Academy, a public school under the jurisdiction of JPPSS.¹⁶² Ben is hearing impaired¹⁶³ and receives special education and related services as a result.¹⁶⁴ Ben’s mother has limited English language proficiency, and therefore communicates with his school through a district-assigned interpreter and translator.¹⁶⁵ Since he was six years old, Ben has taken martial arts training courses using a katana sword.¹⁶⁶ Learning basic katana exercises has helped him overcome the insecurities he developed at an early age as a hearing-impaired student and helped him form relationships with his peers.¹⁶⁷

On the afternoon of October 9, 2020, Ben was attending his seventh period U.S. History course via virtual instruction on his computer in his home.¹⁶⁸ Ben and some of his classmates had been chatting about martial arts that day, and he decided during instruction to show them his katana sword to impress them.¹⁶⁹ Ben’s teacher overheard him and some of his classmates chatting and giggling, and proceeded to ask them to be quiet and pay attention.¹⁷⁰ Minutes after the incident, one of Ben’s classmates sent his teacher two screenshots allegedly showing Ben displaying the sword, explaining to the teacher that Ben’s actions were the source of the chatting and giggling that the teacher had overheard.¹⁷¹

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ “Ben” is a pseudonym for a child-client represented by the Author, whose family wishes to maintain their anonymity.

¹⁶¹ This information is in the possession of the Author.

¹⁶² *Louisiana District*, *supra* note 116.

¹⁶³ Roberts, *Two More Jefferson Parish Students*, *supra* note 136.

¹⁶⁴ *See Louisiana District*, *supra* note 116.

¹⁶⁵ This information is in the possession of the Author.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

The teacher sent the two screenshot images to the school's principal, who then notified Ben's mother that he would be suspended for six days and recommended for expulsion.¹⁷² Ben's mother alleges that no interpreter was provided for her during this conversation.¹⁷³

On October 15, the school met with Ben's mother to discuss the incident, this time with a translator.¹⁷⁴ The school principal reiterated to Ben's mother that Ben was suspended and recommended for expulsion for violating Louisiana's student discipline statute and JPPSS policy by allegedly brandishing an unauthorized weapon on his computer camera during virtual school instruction.¹⁷⁵ Ben received the same disciplinary action as Ka'Mauri and Adam.¹⁷⁶

Ben was required to submit a written statement to the school principal explaining the incident.¹⁷⁷ In his statement, Ben explained that his katana training was a sport, and that he did not brandish the weapon with any malicious or violent intent.¹⁷⁸ Ben further explained that he felt as if his peers underestimated him due to his hearing impairment, and that he felt that he would garner his peers' respect by showing off his katana training skills.¹⁷⁹ Ben expressed remorse for the incident and vowed never to show his katana on his computer camera during virtual instruction again.¹⁸⁰

Ben's expulsion hearing was set for October 20.¹⁸¹ For the first time in any of the district's virtual school discipline hearings, a court reporter was present.¹⁸² Also present at the hearing was Ben, his mother, his adult sister, a district-assigned English translator for his mother, a parent advocate, and Ben's attorney, who was located by the parent advocate just hours before the hearing.¹⁸³ During the hearing, Ben's attorney alleged the same constitutional violations as those raised on behalf of Ka'Mauri and Adam.¹⁸⁴ The attorney raised the additional argument that Ben's mother, who was entitled to and required translation services under the school district's English Language Learner (ELL) program,¹⁸⁵ was denied due process when such services were not provided during her initial meeting with the school concerning the incident.¹⁸⁶

Hours after his hearing, Ben's mother received a letter from the JPPSS hearing officer with the same outcome as that of Ka'Mauri and Adam—Ben's six-day suspension

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ This information is in the possession of the Author.

¹⁷⁶ Roberts, *Two More Jefferson Parish Students*, *supra* note 136.

¹⁷⁷ This information is in the possession of the Author.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *Developing Programs for English Language Learners: Plan Development*, OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/ell/plandev.html> (last updated Jan. 16, 2020).

¹⁸⁶ This information is in the possession of the Author.

was upheld and the district dropped its expulsion recommendation against him.¹⁸⁷ The letter stated that Ben was to return to virtual school the next day.¹⁸⁸

Ben’s family did not appeal the hearing officer’s decision to uphold his suspension to the school board; therefore, Ben’s suspension remains on his educational record.¹⁸⁹ He no longer wants to practice martial arts or use his katana because of the trouble that it caused him.¹⁹⁰

Ka’Mauri. Tomie. Adam. Ben. These four students have all been subjected to virtual school discipline in JPPSS. All male students. Three of the four are children of color. Two of the four are children with disabilities. Tomie, the only White and non-disabled student, originally received the least harsh punishment—a three-day suspension compared to the six-day suspensions his counterparts received.

B. Other Virtual School Discipline Cases

The Jefferson Parish Public Schools System is not the only school district in the nation to engage in exclusionary discipline practices during the era of COVID-19 virtual school instruction. Each of these cases highlight the difficulties that school districts face in navigating their mandates to provide public education in a novel time period such as the COVID-19 pandemic, while also serving as anecdotal proof of the pre-COVID-19 pandemic school-to-prison pipeline that has plagued America’s education systems.

In the clearest example of the “virtual” school-to-prison pipeline, a fifteen-year-old Black girl with ADHD in Michigan was sent to a juvenile detention center in May 2020 for failing to turn in her online homework, an act that the juvenile court determined was a violation of her probation.¹⁹¹ The girl served seventy-eight days in juvenile detention, and was released only after widespread backlash.¹⁹²

In August 2020, Isaiah Elliot, a twelve-year-old Black student with ADHD in Colorado, was attending virtual school on his computer at home when he picked up a NERF toy gun and it was seen briefly on his computer camera.¹⁹³ The school district suspended

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Jodi S. Cohen, *A Teenager Didn’t Do Her Online Schoolwork. So a Judge Sent Her to Juvenile Detention*, PROPUBLICA (Jul. 14, 2020), <https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention>.

¹⁹² Jodi S. Cohen, *Out of Jail and Back in School, Grace Finds Her Voice*, PROPUBLICA (Oct. 31, 2020), <https://www.propublica.org/article/out-of-jail-and-back-in-school-grace-finds-her-voice>.

¹⁹³ Breanna Edwards, *School Called Police on Black 12-Year-Old Playing with Toy Gun During Online Class*, ESSENCE (Sept. 9, 2020), <https://www.essence.com/news/police-called-elliott-toy-gun-online-school/>; Mia Jankowicz, *Colorado School Officials Called the Sheriff and Suspended a 12-year-old Black Boy After He Showed a Toy Gun in His Zoom Class*, INSIDER (Sept. 8, 2020), <https://www.insider.com/colorado-school-called-sheriff-black-boy-toy-gun-zoom-class-2020-9>.

Isaiah for five days and called the police to conduct a welfare check on Isaiah before notifying his parents.¹⁹⁴

That same month, Audrey Taito, a nine-year-old Black girl in Sacramento, California, was attending virtual school when she was blocked from accessing her email because the district regarded her requests to the district's technology support department as excessive.¹⁹⁵ Audrey made these repeated requests because she was unable to navigate virtual instruction, finding the technology confusing.¹⁹⁶ Though only blocked from accessing her school's email account for a few hours, Audrey reported feeling very embarrassed and ashamed that she was disciplined.¹⁹⁷ She also reported experiencing difficulties with submitting her assignments via email subsequent to her punishment.¹⁹⁸

The disciplinary practices of JPPSS and public school districts throughout the nation during the COVID-19 pandemic are equally as harmful as those before the pandemic, and are demonstrative of the national recognition that exclusionary discipline practices disproportionately impact students of color and students with disabilities.

III. LEGAL ISSUES ARISING FROM VIRTUAL SCHOOL DISCIPLINE

The foregoing anecdotes further illuminate how the use of exclusionary discipline practices in virtual school instruction may give rise to constitutional and other civil rights issues. Some of these legal issues are unique to virtual school discipline, specifically the right to privacy issues, while others—due process and statutory civil rights issues—routinely arise from the use of exclusionary discipline practices, both prior to the COVID-19 pandemic and during the accompanying era of virtual school instruction.

A. Constitutional Issues

1. Right to Privacy

Because students subjected to exclusionary discipline during virtual instruction are almost always sanctioned for behavior that occurred in their homes or for objects that were seen in their homes, the right to privacy is strongly implicated in these cases.

In 1890, Samuel Warren and Louis Brandeis published an article in the *Harvard Law Review* encouraging courts to recognize a right to privacy¹⁹⁹ in response to the development of technologies, like the telephone, the microphone, and the camera, that could allow access to the activities of individuals in private settings, including their

¹⁹⁴ Jankowicz, *supra* note 193; Jaclyn Peiser, *A Black Seventh-grader Played with a Toy Gun During a Virtual Class. His School Called the Police*, WASH. POST (Sept. 8, 2020),

<https://www.washingtonpost.com/nation/2020/09/08/black-student-suspended-police-toy-gun/>.

¹⁹⁵ Rebecca Klein, *The New School Suspension: Blocked from Online Classrooms*, HUFF. POST (Aug. 11, 2020), https://www.huffpost.com/entry/school-discipline-remote-learning_n_5f329829c5b64cc99fde4d64.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

homes.²⁰⁰ Both the U.S. Supreme Court and Congress have recognized the right to privacy, and in some instances, held it to be a fundamental right.²⁰¹ Gerald B. Cope, Jr. elaborated in 1977 that “there is no general constitutional or statutory right of privacy as a matter of federal or state law” and that “[i]nstead, there are certain specific privacy rights, or privacy interests, in certain very carefully defined areas.”²⁰² The First and Fourth Amendments of the federal Constitution have, for example, been interpreted to include a reasonable expectation of privacy concerning activities conducted in one’s home.²⁰³ State constitutions have relied upon this federal interpretation to enact freestanding privacy provisions in their constitutions as well.²⁰⁴

Students and families impacted by exclusionary discipline in virtual classrooms cite to the federal and state constitutional rights to privacy when arguing that a school district cannot utilize virtual school instruction to intrude upon activities that occur in their homes.²⁰⁵ Nor can virtual school instruction, they argue, become a basis for school districts to regulate what objects are allowed to be in their homes, such as BB guns.²⁰⁶ Families have further argued that using images of their children recorded during virtual school instruction without their consent as evidence of violation of a school policy is “fruit of the poisonous tree,” or evidence unlawfully obtained under the Fourth Amendment, and that school officials therefore cannot use these images in their determinations of disciplinary action.²⁰⁷

JPPSS has responded to students and their families invoking the right to privacy by claiming that the mere act of engaging in virtual school extends physical school grounds to include a student’s computer, and that any objects and activities that are observed on computer cameras during virtual school instruction occur on school grounds.²⁰⁸ There is no direct precedent for this argument. School districts instead rely on the progeny of First and Fourth Amendment Supreme Court jurisprudence finding that students’ civil rights and liberties, including the right to privacy, are not absolute and are diminished upon entering

²⁰⁰ Gerald B. Cope, Jr., *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. L. REV. 631, 633-34 (1977).

²⁰¹ *Id.* at 636.

²⁰² *Id.*

²⁰³ *Katz v. United States*, 389 U.S. 347, 351 (1967).

²⁰⁴ Cope, *supra* note 200, at 636; *see also Katz*, 389 U.S. at 350-51 (“[T]he protection of a person’s general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of individual states.”).

²⁰⁵ *See, e.g., Brown v. Jefferson Par. Sch. Bd.*, No. 21-40, 2021 WL 949679, at *3 (E.D. La., Mar. 12, 2021).

²⁰⁶ *See id.*

²⁰⁷ *See id. But see James v. Unified Sch. Dist.*, 899 F. Supp. 530, 533 (D. Kan. 1995) (indicating that “case law does not prohibit using the fruits of [a Fourth Amendment] violation in school disciplinary hearings.” (citing *U.S. v. Janis*, 428 U.S. 433 (1976))).

²⁰⁸ *See Joshua Bote, Louisiana AG Investigates School for Suspended 4th Grader After Teacher Noticed BB Gun During Online Class*, USA TODAY (Sept. 25, 2020), <https://www.usatoday.com/story/news/education/2020/09/25/louisiana-9-year-old-suspended-having-bb-gun-room-class/3532484001/>.

school grounds or engaging in school-sanctioned activities where student safety is at issue.²⁰⁹

As cases, like Ka'Mauri's, that challenge virtual school discipline continue to make their way through federal court, district courts will have to make novel interpretations of the right to privacy under federal and state constitutional provisions as it relates to discipline of students for activities conducted in their homes and observed during virtual school instruction.

2. Procedural Due Process

All four students discussed in this article that were subjected to virtual school suspension and the threat of expulsion by JPPSS raised procedural due process arguments during their expulsion hearings.²¹⁰ The students argued that the district, in hastily extending its on-campus weapons policy to virtual classrooms, failed to provide the children and their families with notice and meaningful opportunity to be heard and challenge the disciplinary actions taken against them.²¹¹ This argument, and others, were sufficient for school district hearing officers not to proceed with expelling the children, but it was insufficient to remove the suspensions from their educational records.²¹²

The federal Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."²¹³ Due process means that before one is deprived of a life, liberty, or a property interest by governmental action, they must be provided adequate and meaningful notice, and an opportunity to contest the deprivation prior to its taking place.²¹⁴ In the due process context, "[p]roperty interests may take many forms, including the right to attend public school, if provided by state law."²¹⁵ In viewing exclusionary practices as a deprivation of the right to attend public school, a deprivation of a property interest, due process requires, at a minimum, that students and their families be provided timely and adequate notice of the basis of the disciplinary action and a meaningful opportunity to contest the disciplinary action.²¹⁶

Returning to the JPPSS cases, Tomie's father specifically alleged that he was denied due process when he met with the school's principal to discuss the disciplinary

²⁰⁹ For First Amendment student speech jurisprudence, see *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007). For Fourth Amendment searches jurisprudence, see *Healy v. James* 408 U.S. 169 (1972); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Veronia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *Safford Unified Sch. Dist. v. Redding* 557 U.S. 364 (2009).

²¹⁰ See *supra* Part II, Sections A1-4.

²¹¹ *Id.*

²¹² *Id.*

²¹³ U.S. CONST. amend. XIV, § 1.

²¹⁴ Dennis J. Christensen, *Educational Law: Democracy in the Classroom: Due Process and School Discipline*, 58 MARQ. L. REV. 705, 711-12 (1975).

²¹⁵ Larry Bartlett & James McCullagh, *Exclusion from the Educational Process in the Public Schools: What Process Is Now Due*, 1993 BYU EDUC. & L.J. 1, 6.

²¹⁶ Melissa Frydman & Shani M. King, *School Discipline 101: Students' Due Process Rights in Expulsion Hearings*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 370, 372-73 (2006).

actions taken against Tomie and was reassured by the principal that he would not need to obtain an attorney.²¹⁷ When Ben’s mother, who does not speak English, first met with the school district, she alleged that she was not provided with an interpreter or translator.²¹⁸ Prior to the passage of the Ka’Mauri Harrison Act, Ka’Mauri and Adam were unable to appeal the hearing officer’s decisions to the JPPSS school board, instead were presented with only the option of judicial remedy.²¹⁹

These issues all present due process concerns under the 1975 Supreme Court case *Goss v. Lopez*, which generally mandates procedural due process for students facing suspension of ten days or less or expulsion.²²⁰ In *Goss*, the Supreme Court reasoned:

“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 [Due Process] Clause must be satisfied. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.²²¹

One might argue, in defense of JPPSS, that instances in which a student poses an imminent or immediate threat of danger would justify the delay of the full due process protections accorded to students concerning their discipline. However, such a position is undermined by the district’s own concession that none of these students pointed the objects at their computer screens or at a student, nor did the students make threatening remarks to anyone during their virtual school instruction. Additionally, the mere fact that students are in their homes, away from other students and with no evidence that they have access to other students, essentially erases the district’s ability to claim that any threat of harm was imminent or immediate. The physical distance between students created by virtual learning illuminates how futile it is for a school to treat the presence of a weapon at a student’s home the same way they would on school grounds.

3. Equal Protection

There is an additional potential constitutional violation that arises out of the Fourteenth Amendment when the disproportionate use of exclusionary practices against students of color is at issue—the Equal Protection Clause of the Fourteenth Amendment,

²¹⁷ See *Brown v. Jefferson Par. Sch. Bd.*, No. 21-40, 2021 WL 949679, at *2, *3 (E.D. La., Mar. 12, 2021).

²¹⁸ This information is in possession of the Author.

²¹⁹ *Id.*

²²⁰ *Goss v. Lopez*, 419 U.S. 565, 581-82 (1975).

²²¹ *Id.* at 574-75 (citations omitted).

which states that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”²²²

The Supreme Court, most famously in the 1954 case of *Brown v. Board of Education*, interpreted the Equal Protection Clause to prohibit public schools from intentionally discriminating against students on the basis of their race in the provision of public education.²²³ The Court explained that the practice of separating children “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be done.”²²⁴ The Court concluded that “[s]eparate educational facilities are inherently unequal,” and therefore that the plaintiffs in that case—Black children attending public schools—were “by reason of the segregation complained of, deprived of the equal protection of laws guaranteed by the Fourteenth Amendment.”²²⁵

Subsequent to *Brown*, courts have extended equal protection analyses to cases concerning the disproportionate use of discipline against children of color in schools.²²⁶ To prevail in an equal protection claim in these cases, or any other discrimination case, the plaintiff must establish that the action taken against them was done with the intent to discriminate.²²⁷ Application of the Equal Protection Clause to any person alleging discrimination on the basis of their disability, however, was practically foreclosed by the Supreme Court in 1985,²²⁸ five years prior to Congress’s enactment of the Americans with Disabilities Act.

While Ka’Mauri, Adam, and Ben are all students of color, their attorneys did not assert equal protection claims because they were unable to establish that JPPSS’s virtual discipline practices *intentionally* discriminated against students of color.²²⁹ After all, there is no direct proof of JPPSS’s intent behind its disciplinary actions taken against the three students; and Tomie Brown is White. Because of the difficulty in finding direct proof of discriminatory intent by school officials, it is difficult for equal protection claims to prevail in school discipline cases.²³⁰

²²² U.S. CONST. amend. XIV, § 1.

²²³ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

²²⁴ *Id.* at 494.

²²⁵ *Id.* at 495.

²²⁶ See, e.g., *Simonian v. Fowler Unified Sch. Dist.*, 473 F. Supp. 2d 1065 (E.D. Cal. 2007); *Fuller v. Decatur Pub. Sch. Bd. of Educ.*, 78 F. Supp. 2d 812 (C.D. Ill., 2000); *Tasby v. Estes*, 643 F.2d 1103 (5th Cir. 1981).

²²⁷ *Washington v. Davis*, 426 U.S. 229, 240-42 (1976).

²²⁸ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (finding that mentally disabled persons are a group of people protected by state and federal legislation, and not in a class of people historically subjected to discrimination).

²²⁹ This information is in possession of the Author.

²³⁰ See Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1090 (2009) (“If black students are disciplined at much higher rates than white students, but these disparities are shown to be based on racially neutral decision making by school officials, then the disparity is not considered unconstitutional racial discrimination.”); Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J. L. & PUB. POL’Y 327, 335 (2005) (opining that an equal protection claim

4. Substantive Due Process

During their expulsion hearings, counsel for Adam and Ben raised arguments that the school district’s extension of its weapons policy to their home was an unjustifiable deprivation of their right to privacy, and therefore a substantive due process violation.²³¹

While the Due Process Clause of the Fourteenth Amendment “speaks only of the procedures that are required prior to depriving individuals of ‘life, liberty, or property,’” the clause “has taken on a substantive component that looks not only to procedures, but also to the content of laws” or government action.²³² Substantive due process is not defined explicitly by the Constitution, nor it is defined by the Supreme Court, from which the doctrine emerged.²³³ Leading constitutional law scholar Erwin Chemerinsky writes that “[s]ubstantive due process asks the question of whether the government’s deprivation of a person’s life, liberty or property is justified by a sufficient purpose.”²³⁴ Chemerinsky elaborates that substantive due process “looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.”²³⁵

In the context of public school policies, including discipline policies, substantive due process refers to the level of intrusion that schools may use to regulate the behavior of students. Specifically,

[a] typical substantive due process challenge to an educational practice usually involves a situation where a student or a teacher has a grievance with an administrative decision but has been given a chance to air those grievance in some sort of hearing. Because the plaintiff in these cases has been granted procedural guarantees, the plaintiff is left to argue that the underlying educational practice is fundamentally unfair. The argument is made that the educational practice was so fundamentally unfair that it rises to a deprivation of a constitutionally protected right under the due process clause. This challenge to the substance or content of the action is made under the doctrine of substantive due process.²³⁶

Courts have analyzed substantive due process claims to determine whether the disciplinary punishment is related to a legitimate school purpose and whether it is rationally related to achieving that purpose.²³⁷

will likely not prevail in a school discipline case, “because a successful equal protection claim will require proof of discriminatory intent.”).

²³¹ This information is in possession of the Author.

²³² Note, *A Right to Learn? Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1324 n.9 (2007).

²³³ Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Keith Hendricks, *Substantive Due Process Challenges: Are They Creeping into Education Under a New Standard of Review?* 2 BYU J. PUB L. 307, 307 n.3 (1988).

²³⁷ See, e.g., *James v. Unified Sch. Dist.*, 899 F. Supp. 530 (D. Kan. 1995); *Petrey v. Flaughner*, 505 F. Supp. 1087 (E.D. Ky. 1981).

A central theme in all of the JPPSS cases, and others nationwide, is the intrusion by the school districts into the privacy of students and their families, through the districts' application of school weapons policies to the virtual learning environment. The practice of suspending and recommending expulsion of a student who possesses a BB gun in their home, attorneys in the JPPSS cases specifically argued, is a fundamentally unfair deprivation of their right to privacy.²³⁸ Though the attorneys asserted that procedural due process was not provided to the students, they also argued that assuming that such a process was provided, it would not have cured the underlying privacy violations that arose from the enactment of the virtual school discipline policies.²³⁹

Ultimately, whether the extension of a school district's discipline policy to activities conducted by children in their homes during virtual school instruction impinges upon a child or their family members' right to privacy is yet another matter of first impression with which federal courts may have to grapple.

5. Restraint on Speech

At this stage, the issue of free speech and the restraints that public school districts can place on students in their homes while attending virtual school is one that is purely hypothetical. For example, can a school district discipline a student who has a poster of a BB gun in their room that is observed on camera by his teacher and classmates during virtual school instruction? Whether the limits imposed by the Supreme Court on the speech of children upon entering school grounds or engaging in school-sanctioned activities²⁴⁰ extends to virtual school instruction is yet another matter of first impression for federal courts.

B. Statutory Civil Rights Issues

Even prior to the COVID-19 pandemic, the use of exclusionary discipline caused systemic civil rights violations for students of color and students with disabilities. The use of these disciplinary practices in the pandemic-induced era of virtual school instruction gives rise to potential issues concerning discipline and due process under Section 504 of the Rehabilitation Act of 1973²⁴¹ and the Individuals with Disabilities Education Act (IDEA)²⁴² for students with disabilities; Title VI of the Civil Rights Act of 1964²⁴³ for

²³⁸ This information is in the possession of the Author.

²³⁹ *Id.*

²⁴⁰ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

²⁴¹ Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (2006)).

²⁴² Individuals with Disabilities Education Act, Pub. L. No. 94-142, § 602(25), 104 Stat. 1142 (codified as amended at 20 U.S.C. § 1400 (1990)).

²⁴³ Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252 (codified as 42 U.S.C. § 2000d et seq. (1964)).

students of color and English Language Learner (ELL) families; and the Equal Education Opportunities Act of 1974 (EEOA)²⁴⁴ specifically for ELL-eligible families.

During the Obama administration, school districts faced the highest level of civil rights investigations into their practices concerning discipline and education.²⁴⁵ The Trump administration would subsequently cancel many of the Obama-era policies concerning school discipline.²⁴⁶ It is unknown whether and to what extent the newly formed Biden administration’s Department of Education or Department of Justice will resume this practice of engaging in civil rights pattern and practice investigations, or “investigations into misconduct or clusters of troubling trends,”²⁴⁷ in school districts given that reopening schools is a top priority during the pandemic.²⁴⁸ However, the administration’s plan to strengthen all cabinet-level agency civil rights divisions, including the Department of Justice,²⁴⁹ might signal the administration’s intent to resume the school investigation work of the Obama administration.

Anecdotally, both Ben and Adam alleged that their rights were violated under these civil rights statutes.²⁵⁰ Specifically, Ben alleged a violation of Section 504 because the school district did not conduct a manifest determination review hearing prior to his recommendation for expulsion to determine whether his alleged conduct—twiddling his brother’s knife—was a manifestation of his disability and therefore not grounds for expulsion.²⁵¹ Adam, who is hearing impaired and receives special education, alleged the same under Section 504 and the IDEA, and also argued that the district’s failure to provide his mother, who speaks Spanish, with an interpreter and translator at her initial school meeting constituted a violation of Title VI and the EEOA.²⁵²

²⁴⁴ Equal Education Opportunities Act, Pub. L. 93-380, title II, § 202, 88. Stat. 514 (codified as 20 U.S.C. § 1701 et seq. (1974)).

²⁴⁵ See Evie Blad, *School Civil Rights Took Spotlight Under Obama*, EDUC. WEEK (May 31, 2016), <https://www.edweek.org/policy-politics/school-civil-rights-took-spotlight-under-obama/2016/05>.

²⁴⁶ Collin Binkley, *Trump Officials Cancel Obama-Era Policy on School Discipline*, AP NEWS (Dec. 21, 2018), <https://apnews.com/article/07c8e7c5a69942699f7640890677c2d2>; Anya Kamenetz, *DeVos to Rescind Obama-Era Guidance on School Discipline*, NPR (Dec. 18, 2018), <https://www.npr.org/2018/12/18/675556455/devos-to-rescind-obama-era-guidance-on-school-discipline>; Andrew Ujifusa, *Betsy DeVos Revokes Obama Discipline Guidance Designed to Protect Students of Color*, EDUC. WEEK (Dec. 21, 2018), <https://www.edweek.org/policy-politics/betsy-devos-revokes-obama-discipline-guidance-designed-to-protect-students-of-color/2018/12>.

²⁴⁷ Kenneth Alonzo Anderson & Meredith B.L. Anderson, *Framing a Legislative Agenda to Achieve Meaningful School Safety and Policing Reform*, BROOKINGS (June 25, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/06/25/framing-a-legislative-agenda-to-achieve-meaningful-school-safety-and-policing-reform/>.

²⁴⁸ Sophie Tatum, *Biden Administration’s COVID-19 Plan Prioritizes Schools Reopening*, ABC NEWS (Jan. 26, 2021), <https://abcnews.go.com/Politics/biden-administrations-covid-19-plan-prioritizes-schools-reopening/story?id=75427211>.

²⁴⁹ See *The Biden Plan to Build Back Better by Advancing Racial Equity Across the American Economy*, BIDEN HARRIS, <https://joebiden.com/racial-economic-equity/> (last visited Mar. 25, 2021).

²⁵⁰ This information is in possession of the Author.

²⁵¹ *Id.*

²⁵² *Id.*

The actual and potential legal issues that school districts engaging in virtual school exclusionary practices face warrant a reexamination of their existing disciplinary and school safety practices.

IV. RECOMMENDATIONS FOR SCHOOL DISTRICTS

For purposes of disciplinary policies, treating virtual school instruction and pre-COVID-19 pandemic school instruction the same is an untenable action. The article therefore proposes the following recommendations for school districts to maintain a safe learning environment while protecting the rights of children and their families during virtual school instruction.

First, to the extent that a school district believes that virtual discipline is necessary, school districts should convene a group of stakeholders to develop a virtual school disciplinary policy. This group should be composed of schoolteachers, other school officials, parents, students, and importantly, civil rights and children's rights advocates—to ensure that the policies developed protect the rights of children and their families.

Second, and substantively, virtual school disciplinary policies should not extend campus “weapons-free” zero tolerance policies to virtual schooling. There is no legal support for schools to do so. Additionally, in instances where school officials acknowledge that the student was not behaving in a threatening manner, as in the case of the four JPPSS students who were disciplined, the policy should not call for any disciplinary action to be taken against the student. School districts should instead immediately notify parents of the infraction and require parents to ensure that the matter is resolved. Further, the policy should prohibit students from recording their peers during virtual school instruction to protect the privacy rights of all students. Districts should also consider developing neutral video screen backgrounds for students to use during virtual school instruction to prevent anyone from being able to view into the homes of students during instruction.

Finally, any virtual school disciplinary policy enacted by a school district should include a counseling component. Students should be provided the opportunity to speak to a counselor to process their emotions, especially surrounding the stresses of attending virtual school and the COVID-19 pandemic. Providing this outlet for students can serve as a deterrent to any potentially violent or disruptive behavior for students. Anyone who is working with students should, relatedly, undergo continuous implicit bias training, including trainings on the use of exclusionary discipline practices against students of color and students with disabilities.

CONCLUSION

School districts should use this novel time period for innovation and revisit the manner in which students are educated, including their approach to defining and addressing disruptive classroom behaviors. In the era of the COVID-19 pandemic, the need for trauma-informed practices in schools is paramount. The lives of children have been turned upside down; their way of existence, including the ways that they learn, grow, and interact with their peers, has been altered by the pandemic. School districts must keep this critical

consideration in mind when providing education to children. When families are fighting to maintain their health and stability, the last thing a child or parent should have to worry about is whether an unintentional action caught on a computer camera during virtual school instruction can lead to disciplinary actions that bode adverse and potentially lifelong consequences.

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