



# Student Tribunals

An Assessment of the Disciplinary Process  
in Georgia Public Schools (2019 Update)



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**Center for Law & Justice**

Georgia Appleseed Center for Law & Justice  
1600 Parkwood Circle SE, Suite 200  
Atlanta, Georgia 30339  
(678) 426-4640  
[www.GaAppleseed.org](http://www.GaAppleseed.org)

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## Our Pro Bono Volunteers (2014)

Georgia Appleseed is grateful to the pro bono volunteers whose efforts were vital to the preparation of this report:

**Kilpatrick Townsend & Stockton LLP**



## Key Team Leaders

Stephen A. Edwards  
William E. Dorris  
Diane L. Prucino  
Kristin M. Crall

## Volunteers

Susan A. Cahoon  
Victor L. Cangelosi  
Robert Curylo  
Bonnie M. Grant  
Sarah Grilli  
Kimberly Hunsucker  
Matthew C. Holohan  
Lynda Larsen  
Tywanda H. Lord

Scott L. Marrah  
Paula M. Nagarajan  
Shayne O'Reilly  
Susan W. Pangborn  
Elena S. Polovnikova  
Susan H. Richardson  
Sally M. Ridenour  
Miranda C. Rogers  
Paul M. Rosenblatt

Jennifer S. Schumacher  
James H. Sullivan, Jr.  
Katharine M. Sullivan  
Rena B. Wainwright  
E. Danielle T. Williams  
Maritza Knight Winfunke  
Alyson L. Wooten

## Pro Bono Volunteers from Savannah, Georgia

Megan Usher Manly  
*Ellis, Painter, Ratterree & Adams LLP*

Jason C. Pedigo  
*Ellis, Painter, Ratterree & Adams LLP*

Benjamin M. Perkins  
*Oliver Maner LLP*

## **Our Advisory Committee**

We acknowledge the members of the Project Advisory Committee for their guidance and recommendations. (Note: Members are listed with their affiliation at the time they joined the Advisory Committee).

Brad Bryant, *Past State Superintendent of Schools, Georgia Appleseed Board Liaison*

Eric Fisher, *Georgia Appleseed Young Professionals Council Liaison*

Craig Goodmark, *Atlanta Legal Aid Society*

Leslie Gresham, *Georgia Appleseed Young Professionals Council*

Cathy Henson, *Georgia Appleseed Board Liaison*

Andrea Landers, *Atlanta Legal Aid Society (Gwinnett Office)*

John McRae, *Georgia Appleseed Board Liaison*

Veronica McClendon, *Georgia Legal Services (Macon)*

Steve Reba, *Barton Juvenile Defender Clinic, Emory University School of Law*

Randee Waldman, *Barton Juvenile Defender Clinic, Emory University School of Law*

Kristin B. Williams, *Law Office of Kristin B. Williams*

Lauren H. Zeldin, *Georgia Appleseed Young Professionals Council*

## **Georgia Appleseed Project Team, 2014**

Rob Rhodes, Director of Projects

Sharon N. Hill, Executive Director

Margo Gold, Director of Development & Communications

Chanhee Lee, Emory University School of Law, 2014 Spring Extern

Courtney Fuller, University of California at Berkeley, Communications Intern

## **Georgia Appleseed Project Team, 2019**

Michael Waller, Director of Projects

Talley Wells, Executive Director

Terrence Wilson, Staff Attorney

# Student Tribunals

## An Assessment of the Disciplinary Process in Georgia Public Schools

### **Preface – Purpose and Scope**

In June 2011, the Georgia Appleseed Center for Law & Justice (“Georgia Appleseed”) issued a detailed report on student discipline policies, practices and outcomes in Georgia’s K-12 public schools.<sup>1</sup> In the 2011 Report, we noted the multiple negative consequences of the extensive use of exclusionary discipline by many school districts and individual schools in our state. To reduce the incidence of out of school suspensions and expulsions, we urged schools to consider the expanded use of “school wide effective learning environments through the implementation of positive behavioral interventions and supports (or similar) initiatives.”<sup>2</sup>

Since the issuance of the 2011 Report, there has been a growing consensus among academic researchers, educators, and other education stakeholders that overreliance on exclusionary discipline practices arising out of the “zero tolerance” movement initiated in the 1990s is a failed experiment.<sup>3</sup> In April 2013, for example, the National School Boards Association issued the following guidance to its members:

School disciplinary measures should not be used to exclude students from school or otherwise deprive them of an education, and should be used as a last resort in schools in order to preserve the safety of students and staff.<sup>4</sup>

Georgia Appleseed is firmly committed to working with the public education community in this state toward a time when out of school suspensions are issued as a last resort. When such discipline is imposed, however, it is important that the action be taken in a manner that is fair to the student and parent involved and that emphasizes the use of student discipline as an educational tool rather than primarily as a punitive measure.

In this report, we outline the “due process” rights established under federal and state constitutional and statutory provisions as interpreted by the courts and by the Georgia State Board of Education. We also discuss how these procedures have been embodied in student codes of conduct by a sampling of individual Georgia School Districts. In addition, as we did during the preparation of the 2011 Report, we sought input from stakeholders working on the front lines of the student disciplinary process. Their views are summarized in the section “From the Field.” Along with our findings, the report provides our recommendations for systemic change that will promote due process and better ensure that the imposition of school discipline is just and fair, and leads to improved outcomes for students and the entire school community.

## Legal Setting

Access to education is extraordinarily important for all children. The United States Supreme Court has observed that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education”<sup>5</sup> and recognized that providing education to their citizens is the most important function of state and local governments.<sup>6</sup>

Although the United States Supreme Court has not recognized a fundamental right to an education under the United States Constitution,<sup>7</sup> the Constitution of the State of Georgia comes very close to doing so. It provides that “the provision of an adequate public education for the citizens shall be a primary *obligation of the State of Georgia*.”<sup>8</sup>

Before public schools in Georgia can remove a student from school, they must comply with a variety of procedures and legal restrictions. This report summarizes those procedures and restrictions.

### I. Federal and State Constitutional Rights in School Discipline Hearings

#### A. Fourteenth Amendment Right to Due Process

The Due Process Clause of the Fourteenth Amendment to the United States Constitution (the “Due Process Clause”) provides that no state may “deprive any person of life, liberty, or property, without due process of law. . . .” The United States Supreme Court has stated that a student’s legitimate right to a public school education is a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.<sup>9</sup> Thus, it is a constitutional violation to suspend a student without providing constitutional due process.<sup>10</sup> Furthermore, the Court stated that, because a suspension can seriously damage a student’s reputation, a liberty interest is implicated as well.<sup>11</sup>

Procedural due process requires that the deprivation of life, liberty or property by adjudication be preceded by *notice and opportunity for a hearing appropriate to the nature of the case*.<sup>12</sup> Notice should be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>13</sup> The Eleventh Circuit has held that “[t]he right to attend a public school is a state-created, rather than a fundamental, right, for purposes of substantive due process,” and, therefore, “the ‘right’ to avoid school suspension may be abridged as long as proper procedural protections are afforded.”<sup>14</sup> Georgia state courts have likewise found that the right to attend public school is not explicitly protected under the Constitution.<sup>15</sup>

#### 1. Short-term suspensions (not exceeding 10 days):

The United States Supreme Court, in *Goss v. Lopez*, held that a student facing a suspension for 10 days or less must at least “be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”<sup>16</sup> According to the Court: “There need be no delay between the time ‘notice’ is given and the time of the hearing.”<sup>17</sup> As a general rule, the notice and hearing should precede removal of the student from the school.<sup>18</sup> However, if a student’s presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, he or she may be immediately removed from school, and the necessary notice and rudimentary hearing should follow as soon as practicable.<sup>19</sup> The Court’s holding was with respect only to suspensions not exceeding 10 days, and it stated that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”<sup>20</sup> The Court also noted the possibility that, in unusual situations, a short suspension may require more than rudimentary procedures.<sup>21</sup>

Construing *Goss*, the Eleventh Circuit has said that, when a student is suspended for 10 days or less,

[t]he dictates of *Goss* are clear and extremely limited: Briefly stated, once school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands. The only other requirement arises from the Court's admonishment that the hearing come before removal from school "as a general rule," unless a student's continued presence is dangerous or disruptive. In these instances, removal can be immediate.<sup>22</sup>

Likewise, Georgia state courts have applied the ruling of *Goss* to suspensions not exceeding 10 days. They hold that due process only requires "oral or written notice of the charges, an explanation of the evidence against him, and an opportunity to present his side of the story."<sup>23</sup>

## 2. Long-term suspensions (exceeding 10 days) and expulsions

The former Fifth Circuit<sup>24</sup> has held that a student must be given a fair hearing before he or she may be expelled from school or suspended for a period of more than 10 days.<sup>25</sup> It stated that the basic tenet of due process is the notion that punishment cannot be imposed before a hearing is given but recognized that there are exceptions to the rule, such as when the punishment imposed is minimal.<sup>26</sup> The court also recognized that a student can be sent home without a hearing for a short period of time if the school is "in the throes of violent upheaval."<sup>27</sup> But even in such a case, "a hearing would have to be afforded at the earliest opportunity."<sup>28</sup>

In *Dixon v. Ala. State Bd. of Educ.*, the former Fifth Circuit offered guidance on the nature of the notice and hearing required by due process prior to expulsion from a public school.<sup>29</sup> First, "notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion."<sup>30</sup> Next, "the nature of the hearing should vary depending on the circumstances of the particular case."<sup>31</sup> Charges of misconduct, as opposed to a failure to meet the scholastic standards of a school, depend upon a collection of facts concerning the charged misconduct and, therefore, require a hearing that gives the decision maker an opportunity to hear both sides in considerable detail.<sup>32</sup> However, "[t]his is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required."<sup>33</sup>

In the case before the *Dixon* court, where the students were expelled without notice, hearing or appeal, the court held that

... the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.<sup>34</sup>

In *Nash v. Auburn Univ.*, the Eleventh Circuit held that when the students are present at their hearing and able to confront the witnesses against them, the notice need not contain the names of the witnesses against them and a report of their testimony.<sup>35</sup> "There is no constitutional requirement that, to provide [the students] an opportunity to respond, [the students] must have received any more in the way of notice than a statement of the charge against them."<sup>36</sup> Due process requires that students have the right to respond, but their rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial.<sup>37</sup> Accordingly, the Eleventh Circuit found no constitutional violation where the students were allowed to question witnesses only by posing questions to the Chancellor, who would then direct the questions to the witnesses.<sup>38</sup>

### **B. First Amendment Constitutional Rights**

The United States Supreme Court has recognized that: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of expression at the schoolhouse gate. . . ." On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of

the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.<sup>39</sup>

According to Supreme Court cases addressing the issue of free speech under the First Amendment, school officials may not impose viewpoint-based restrictions on student speech unless (1) the expression leads school officials to reasonably forecast a substantial and material disruption of school activities,<sup>40</sup> (2) the student's expression might reasonably be perceived by the public as bearing the imprimatur of the school,<sup>41</sup> or (3) the student's expression can reasonably be regarded as encouraging illegal drug use.<sup>42</sup> Schools also may impose viewpoint-neutral, content-based restrictions on student expression that is "vulgar," "lewd," "obscene" or "plainly offensive."<sup>43</sup>

### C. *Fourth Amendment* Right to be Free from Unreasonable Searches and Seizures

The United States Supreme Court has held that (1) the *Fourth Amendment's* prohibition on unreasonable searches and seizures applies to searches conducted by school officials; (2) school officials need not obtain a warrant before searching a student who is under their authority; and (3) school officials need not strictly adhere to the requirement that searches be based on probable cause, but, rather, the legality of their search should depend simply on the reasonableness, under all of the circumstances, of the search.<sup>44</sup> Determining the reasonableness of any search involves a twofold inquiry: (1) was the action justified at its inception, and (2) was the search as actually conducted reasonably related in scope to the circumstances that justified the interference in the first place?<sup>45</sup>

Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.<sup>46</sup>

A search should be conducted with individualized suspicion except when "the privacy interests implicated by the search are minimal, and . . . an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion."<sup>47</sup> The Supreme Court of Georgia has similarly held that public school officials are "state officers whose action is state action bringing the *Fourth Amendment* into play."<sup>48</sup> In determining the reasonableness of a search by a school official, the Court considered governmental interests of "discipline, security, and enablement of the education function."<sup>49</sup> The Court concluded that searches of students are reasonable "on considerably less than probable cause," and that school officials

... must be allowed to search without hindrance or delay subject only to the most minimal restraints necessary to insure that students are not whimsically stripped of personal privacy and subjected to petty tyranny.<sup>50</sup>

Even if a search or seizure of a student is held to be in violation of a student's *Fourth Amendment* rights, as long as school officials act without law enforcement involvement, Georgia courts have held that the evidence may still be used against the student because the exclusionary rule does not apply.<sup>51</sup> Further, even if law enforcement is involved and the exclusionary rule would apply in a criminal proceeding, it is questionable whether the evidence obtained would have to be excluded from a school disciplinary hearing, as the Supreme Court has repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials.<sup>52</sup>

#### **D. Fifth Amendment Right against Self-Incrimination**

Under *Miranda v. Arizona*, 384 U.S. 436 (1966), persons must be advised of their Fifth Amendment right against self-incrimination prior to any questioning.<sup>53</sup> “Absent such advice, statements made during a custodial interrogation to law enforcement officers or their agents generally will be excluded from evidence.”<sup>54</sup> The State Board of Education for the State of Georgia (the “SBOE”) has repeatedly held, however, that due process does not require school officials to give students a *Miranda* warning before questioning them or to otherwise inform them that they do not have to testify against themselves.<sup>55</sup> This appears to be true regardless of further criminal consequences a student’s actions may have.<sup>56</sup>

The Georgia Court of Appeals has also held that questioning by school officials without law enforcement involvement does not require a *Miranda* warning.<sup>57</sup> Even if a student should have been given a *Miranda* warning because the questioning constituted a custodial interrogation by law enforcement officers, it is questionable whether the exclusionary rule would apply in a school disciplinary hearing because, as stated above, the Supreme Court has repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials.<sup>58</sup>

#### **E. Sixth Amendment Right to Appointed Counsel**

Georgia law gives a student and his or her parents the right to retain counsel,<sup>59</sup> but there is no right to appointed counsel if they cannot afford to retain one.<sup>60</sup>

The *Sixth Amendment* guarantees to an indigent defendant the right to state-appointed counsel in criminal proceedings where the defendant faces potential imprisonment.<sup>61</sup> Because school disciplinary hearings are civil proceedings that can lead only to suspension or expulsion from school, the *Sixth Amendment* right to appointed counsel does not apply in such proceedings.<sup>62</sup> Another avenue to the right to appointed counsel may come from the *Fourteenth Amendment*’s due process clause, however.<sup>63</sup>

### **II. Georgia Law (Title 20, Chapter 2, Article 16, Part 2 of the Ga. Code)**

#### **A. O.C.G.A. § 20-2-753 (the Fair Tribunal Act)**

Pursuant to O.C.G.A. § 20-2-752, local boards of education (“LBOEs”), by policy, rule or regulation, may establish disciplinary hearing officers, panels or tribunals of school officials to impose suspension or expulsion. If such hearing officers, panels, or tribunals are created, they must abide by specific rules set forth under the statute, which include procedures that govern fact-finding, hearings, and reporting recommendations to the local board.<sup>64</sup>

Irrespective of the LBOEs discretion to establish disciplinary hearing officers, panels, or tribunals under O.C.G.A. § 20-2-752, the Georgia Fair Tribunal Act (the “Act”) requires LBOEs to appoint a disciplinary hearing officer, panel, or tribunal and to hold disciplinary hearings in two specific instances: when an alleged violation of the student code of conduct is charged and the principal recommends a suspension or expulsion of longer than 10 school days; and when there is an allegation of assault or battery by a student upon any teacher or other school official or employee, and such teacher or other school official or employee so requests.<sup>65</sup>

The Act also outlines the procedural requirements to be followed in such disciplinary hearings as well as the student’s due process rights.<sup>66</sup> Specifically, a disciplinary officer, panel, or tribunal of school officials must ensure that all parties are afforded an opportunity for a hearing after reasonable notice; that the hearing is held no later than 10 school days after the beginning of the suspension; that all parties are afforded an opportunity to present and respond to evidence and to cross-examine witnesses; and that a verbatim record of the hearing is made available to all parties.<sup>67</sup> It is important that these requirements are followed. Additional rights may be provided to a student pursuant to any rules or regulations established under the LBOE’s respective general disciplinary hearings.<sup>68</sup>

## 1. Right to Reasonable Notice

All parties are afforded an opportunity for a hearing after “reasonable notice” is served personally or by mail.<sup>69</sup> Under the regulation, “reasonable notice” includes a statement of the time, place, and nature of the hearing; a short and plain statement of the matter asserted; and a statement as to the right of all parties to present evidence and to be represented by counsel.<sup>70</sup> Such notice must be given to all parties and to the parent or guardian of the student or students involved.<sup>71</sup>

One of the main reasons for requiring notice is to provide the accused the opportunity to prepare a defense.<sup>72</sup> To prepare a defense, the accused needs to know the rule or rules allegedly violated; the date, time and place the offense occurred; and the act or actions that result in an offense.<sup>73</sup> The amount of information needed to prepare the defense depends on the specificity of the rule involved.<sup>74</sup> In *B.F. vs. Evans Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2007-63 (Sept. 2007), the Board found that the Student’s due process rights were violated when the LBOE failed to provide reasonable notice of the disciplinary hearing. The Student asserted that the notice was defective because: 1) the notice merely stated the Student violated the rules, without identifying any times or conduct that constituted the violation; and 2) the notice was not delivered to the Student before the hearing. The Board found that such deficiencies did not allow the Student to defend the charges against him. Additionally, though the LBOE asserts it mailed the notice in accordance with the regulation, the record reflects that the notice was not delivered until eight days after the tribunal hearing was held; thereby rebutting the presumption of proper delivery by mail. The Board concluded the Student’s right of due process was violated and reversed the LBOE’s decision.

The Board has also ruled that reasonable notice, as provided to a student’s guardian, does not mean “legal guardianship.” Evidently, where “guardianship” can be established by way of authority to provide care for a child, *i.e.* a foster home, then reasonable notice to such guardian is sufficient under the regulation. In *M.R. v. Fulton Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2012-61 (Aug. 22, 2012), the Student allegedly violated the LBOE’s rules by skipping class and lighting a fire in the school restroom. The Student contended his legal guardian, the Fulton County Department of Family and Children Services (“DFCS”), was not provided notice of the hearing, though notice was sent to Ascension Homes, the group home at which DFCS placed the Student. The Board found that the Student’s school records indicate a representative of Ascension Homes as the contact and the Student did appear with a representative from Ascension Homes at the hearing. Neither the student, nor the representative asserted DFCS was the proper guardian. Furthermore, the Board found that there was no proof that DFCS did not provide Ascension Homes with the authority to provide care for the Student. Consequently, the Board held, given the facts of this matter, the Student failed to show that the representative at Ascension Homes did *not* have guardianship, and that such representative was provided with proper notice of the hearing. *See also J.S. vs. Peach Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1998-3 (May 14, 1998), where the Board held that the notice to the Student’s grandmother, with whom the Student lived, did not violate the Student’s due process rights, particularly because the Student’s mother was aware of and attended the hearing.

## 2. Right to a Timely Hearing

In accordance with the reasonable notice provisions, the Act also requires that the hearing must be held no later than 10 school days after the beginning of the suspension unless the school system and parents or guardians mutually agree to an extension.<sup>75</sup> Though the 10-day time frame suggests an urgency in holding a hearing without delay, the Board has stated that neither Georgia law nor case law establishes a minimum time that must elapse between when the notice is provided and when the hearing takes place. Nevertheless, the Board has held that a one-day notice does not provide the student enough time to engage the services of an attorney, or secure witnesses.<sup>76</sup> Additionally, the law requires that if the school system calls a teacher as a witness, the teacher must be given notice at least three days before the

hearing.<sup>77</sup> Such a requirement suggests that the student should have at least an equivalent amount of time to prepare a response.<sup>78</sup> Consequently, the student has a right to a hearing within 10 school days after the beginning of a suspension, with at least three days reasonable notice to prepare a response, retain counsel, and secure witnesses.

In *J.P. v. Polk Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2018-06 (Feb. 16, 2018), the Board held the LBOE violated the Student's due process rights when it failed to conduct a disciplinary hearing within 10 school days of the suspension. In this matter, the school suspended the Student on August 11, 2017. On the day the Student's parents were informed, the school offered them the opportunity to sign a waiver, forego a hearing, and accept the suspension. The parents signed the waiver; however, they called back the same day and asked for additional time to consider the school's offer, therein rescinding the waiver. Confused, the Student returned to school the following Monday, and the school offered the option of attending the alternative school. The Student's mother hesitantly agreed, and on the 14th day, the Student's father inquired about the tribunal hearing. The Board found that the process by which the Student and his parents were notified was not only confusing, but violated the Student's due process rights. The Board noted that had the school complied with the legal requirements and timely provided reasonable notice, before offering a waiver, there may have been less confusion.

Note: in instances when a student is in custody by the juvenile justice system *and* the suspension, along with the hearing, takes place *after* the student is released from such custody, the Act is not violated. See *I.F. v. Glynn Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2015-02 (Nov. 6, 2014), where the Board found that the incident that gave rise to the disciplinary proceedings occurred on May 8, 2014. The Student, however, was in custody of the juvenile justice system until May 19, 2014. The school imposed the suspension for the May 8, 2014 incident on May 20, 2014, and held a hearing on May 23, 2014. Under these circumstances, the Board found no error.

### 3. Right to be Represented by Counsel

Also embedded in the procedural requirement to provide reasonable notice of a disciplinary hearing under the Act is the right of all parties to present evidence and to be represented by legal counsel.<sup>79</sup> Whether a student in fact retains counsel, or the LBOE is represented by counsel and the student is not, does not bear on the student's due process rights. It is only required that the student and his or her parent or guardian be provided notice of the right to be represented by counsel at the hearing.

When the LBOE has notified all parties and the student's parent or guardian of the right to be represented by counsel at the hearing, an administrator's advice that legal counsel is unnecessary is also not a denial of such right. In *K.K. v. Gwinnett Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2000-4 (May 2000), the student disciplinary tribunal expelled the Student for attacking another student. The Student was informed of his right to have an attorney present, however, claims that a school official told him it was unnecessary for him to have an attorney present. The Board held that such personal opinion provided by an administrator is not a denial of the Student's due process rights. The fact that the Local Board had an attorney present after such advice was rendered by the school administrator was also of no consequence. See also *Z.W. v. Cherokee Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2009-08 (Oct. 2008), where the Board held that a student's due process rights were not violated when the student voluntarily decided to proceed with the hearing without his attorney after an alleged promise was made by the Principal to only recommend expulsion for the remainder of the school year.

The right to be represented by counsel is provided only under the Act. In instances where the student is subject to a general disciplinary hearing<sup>80</sup>, a student's request for counsel is subject to the LBOE's rules and regulations established by the local board's policy, rule or regulations.<sup>81</sup> Generally, most schools require advance notice if the student will be represented by an attorney. In such instances, if an attorney

represents the student upon request, the school's attorney may in turn present evidence on behalf of the school.

#### 4. Right to Present Evidence and Cross-Examination

All parties are afforded an opportunity to present and respond to evidence and to cross-examine witnesses on all issues unresolved.<sup>82</sup> Failing to provide the student with an opportunity to call a witness, or to cross-examine the school's witness, are grounds for reversal.<sup>83</sup> In *A.M. v. Forsyth Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2009-64 (Sept. 2009), the school offered written statements submitted by three anonymous students, each alleging the student exposed himself during class. The teacher and six other students testified that they did not see the student expose himself. The Board found that the student should have been afforded the opportunity to examine and cross-examine the anonymous witnesses on all issues unresolved as required under the law. Because he was denied such statutory due process, the hearsay statements had no probative value whatsoever. The Board reversed the decision.

Similarly, in *L.S. v. Carrollton City Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2007-58 (Oct. 2007), the Board found the LBOE did not present evidence that the Student possessed marijuana in class. The LBOE offered statements submitted by other students to establish that the Student possessed marijuana in school, however, the statements were out-of-court statements made by persons that were unavailable for cross-examination. Moreover, the statements did not contain any specifics, such as dates of when anything occurred, they did not assert that the students in fact saw marijuana passed, and there was no information about how the students would have known that marijuana was placed in the Student's purse. The assistant principal further stated he did not attempt to verify how the students would have known the substance at issue was marijuana. The Board held that any reliance on the statements constitutes a denial of due process as the Student was denied any opportunity to cross-examine the students who made them.

The statutory right to present evidence is also embodied in the Georgia State Education Rules and Regulation<sup>84</sup> requiring LBOEs to sign and issue subpoenas.<sup>85</sup> The regulatory distinction is necessary to understand that though the school board is required to issue a subpoena pursuant to its rules and are vested with the "power to summon witnesses" and take testimony if necessary, it does not have the statutory remedy to enforce it.<sup>86</sup> The Court of Appeals of Georgia recently ruled that, while school boards have the power to issue subpoenas, they do not possess the power to enforce it as there are no penalties under the law for a witnesses' failure to appear.<sup>87</sup>

Furthermore, notwithstanding the school board's requirement to issue subpoenas to witnesses at the request of a student<sup>88</sup>, the school is not required to present witnesses to meet its burden of proof that a violation occurred.<sup>89</sup> In *S.B. Henry Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2017-37 (June 15, 2017), the Student appealed a finding that she drank alcohol while at school and argued that she was prevented from cross-examining certain witnesses in violation of her due process rights. Specifically, she was denied the opportunity to read the statements of other students involved. The Board found that because the student was notified of the witnesses the local board intended to present, as well as her right to subpoena witnesses, which she did not exercise, the Student's due process rights were not violated. The Board held there is no requirements for a school system to present all of the possible evidence that might be available<sup>90</sup> and furthermore, the school system does not have the responsibility to have witnesses available that the student wanted to have available, especially if the student failed to ask for a subpoena.<sup>91</sup>

## 5. The Right to Record of the Hearing

The Act also affords the right to a verbatim electronic or written record of the hearing and requires it be created and made available to all parties.<sup>92</sup> The right is rooted in the student's right of appeal.

Deficiencies in a record, however, are not dispositive of a violation of due process. Only when the deficiencies in the record result in the denial of a student's effective right of appeal will it result in a violation of the student's due process rights. In *Dax C. v. Floyd Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No.1991-12 (Aug. 8, 1991), the Student asserted that the LBOE violated its rules for the hearing because it did not provide him with a complete copy of the transcript of the hearing. The Board found however, that the appeal does not concern any factual disputes and all the parties agree on the factual background about the incident. Though it is unfortunate that the record is incomplete and the many of the Student's attorney's statements were not recorded, the deficiencies did not result in denying the Student an effective right of appeal. *See also B.M. v. Henry Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No.2009-16 (Jan. 2009), where the Board held that though it is concerned with the number of instances in which the transcript appears inaudible, the deficiencies in the record do not change the record testimony and therefore did not affect the Student's due process rights.

## 6. The Right to a Neutral Hearing Officer

Additionally, pursuant to the Georgia School Board of Education Rules, all LBOEs must make available to all Qualified Student Discipline Hearing Officers and Discipline Tribunal or Panel members the initial and ongoing training course prior to the individual(s) serving in such capacity.<sup>93</sup> Under this rule, an individual who is selected by the local school system as a Qualified Student Discipline Hearing Officer or Disciplinary Tribunal or Panel Member, must be 1) in good standing with the State Bar of Georgia, or 2) have experience as a teacher, counselor, or administrator in a public school system; or 3) is actively serving as a hearing officer under an existing contract/ agreement with a Georgia schools system provided that such individual completes the tribunal training within 6 months of July 1, 2016.<sup>94</sup> The Tribunal Training Course requires at least 5 hours of instruction on several topics include applicable ethical standards and the role of the hearing officer and panel member *as an independent, neutral arbiter.*<sup>95</sup>

Recently, in *A.G. v. Polk Cty. Brd. Of Educ.*, Ga. State Brd. Of Educ., Case No. 2017-4, the Superior Court reversed the Board's decision that the local board's attorney could also serve as a hearing officer. The Board ruled that because the local board's attorney, who served as the hearing officer, did not retire with the tribunal while the tribunal deliberated, the Student's due process rights were not violated. The Superior Court, however, found that under O.C.G.A. § 20-2-759, individuals serving as hearing officers "function as independent, neutral arbiters." Accordingly, the court found the hearing officer in this instance did not and could not function as an independent or neutral arbiter because of his direct alignment with the school as legal counsel. Because the hearing officer was not independent and neutral, the Student's due process rights were violated and the Board's decision was reversed. *A.G. v. Polk Cnty Brd of Educ., Superior Court of Polk County, 2017CV-716L, May 18, 2018.* .

## B. Evidentiary Issues

While student disciplinary hearings afford students due process rights, the strict rules of evidence prevailing in courts of law are not applicable to hearings before LBOEs.<sup>96</sup> Indeed, the Eleventh Circuit has rejected a requirement that local school boards or tribunals follow strict rules of evidence or that student discipline matters require more formal proceedings.<sup>97</sup> Accordingly, differences between the two procedures and their respective governing evidentiary rules should be considered.

## 1. Burden of Proof

The burden of proof in any disciplinary matter is on the local board or school system to prove the charges made against the student.<sup>98</sup> Unlike the prosecution in a criminal proceeding that must prove charges beyond a reasonable doubt, the school's burden of proof is by a preponderance of the evidence, *i.e.*, that it is more likely than not that the student violated the policy.<sup>99</sup> In *J.G. v. Columbia Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1996-40 (Sept. 12, 1996), the Board reversed the LBOE's decision that the Student had violated "multiple offenses," because it failed, among other things, to introduce the policy into evidence and denied the Student the opportunity to present his one witness, whose uncontroverted testimony would have established that the Student did not commit the offense. Instead, the tribunal lectured the Student during the entire hearing and did not permit the Student to present any defense. Accordingly, with no evidence of the allegation presented at the hearing, the Board found the LBOE failed to carry its burden of proof and reversed the decision.

## 2. Use of Hearsay and Written Statements

Hearsay evidence is admissible in student disciplinary hearings. However, a decision may not "rest solely on hearsay."<sup>100</sup> Where hearsay evidence does not stand alone, but stands in concert with other evidence presented, it will be deemed properly admitted.<sup>101</sup> In *Z.B. v. Bartow Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2008-44 (May 2008), a student was charged with substance abuse based solely upon written statements submitted by student witnesses who did not appear at the hearing. The Board reversed the student's expulsion finding that the hearsay evidence presented had no probative value and could therefore not be used to establish any fact, even in an administrative hearing.

In a more recent case, *G.T.M. v. Fulton Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2017-22 (May 4, 2017), a student was charged with battery on and abduction of another student. The Student argued that his due process rights were violated when the hearing officer based her decision on impermissible hearsay evidence. Several witnesses, however, testified, including the alleged victim in the case, and a statement by the Student himself, admitting the charges. The Board found that the local board's decision did not "rest solely" on hearsay evidence and was therefore admissible.

## C. Legal Defenses

### 1. Self-Defense

Generally, under Georgia's Defenses to Criminal Prosecutions, a person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself or herself or a third person against such other's imminent use of unlawful force.<sup>102</sup> A person cannot claim self-defense, however, if he 1) initially provoked the use of force against himself with the intent to use such force as an excuse to inflict bodily harm upon the assailant; 2) is attempting to flee after the commission of a felony; or 3) was the aggressor or was engaged in a combat by agreement.<sup>103</sup> The Board upheld Georgia's law on self-defense and applied it in a case where the local board's policy defining "fighting" was contrary to the law.<sup>104</sup> In *B.B. v. Polk Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2016-29, the LBOE's policy defined "fighting" as a physical altercation between two or more individuals. In order to claim self-defense, a student who is "under attack" is required to "detach himself or herself" from the situation and seek help from an adult. On appeal, the Student contended that because Georgia is a stand your ground state, he had no duty to retreat, as required under the LBOE policy. The Board agreed and held the LBOE's policy null and void.

More recently, in *Henry Cty. Bd. Of Educ. v. S.G.*, 301 Ga. 794 (2017), the Georgia Supreme Court found that the state's criminal code on self-defense applies to school disciplinary hearings.<sup>105</sup> In *S.G.*,

the student was found guilty of violating the two student handbook rules for which she was charged as a result of being involved in a fight on school grounds. The Court found however that simply being involved in a fight is insufficient to constitute a disciplinary infraction if the student claims self-defense. Whether the local board considered the defense but rejected it is was not apparent in the record as the findings state the other student moved towards S.G. before the fight broke out, and that once the initial fight was broken up, the other student again walked toward S.G. and the fight continued. Like the Board in *B.B.*, the Court held that Georgia's self-defense law does not require a person to retreat when the person reasonably believes she is at risk of harm from another person's imminent use of unlawful force; the Court reversed and remanded the matter to the local board for further findings and conclusions in light of the appropriate law. Accordingly, Georgia's law on self-defense is applicable in all LBOE hearings

## 2. Off Campus Behavior

Generally, LBOEs have jurisdiction over conduct occurring on school property and at school related events; it does not, however, have jurisdiction over off campus conduct.<sup>106</sup> There must be a nexus between the off-campus behavior and the school in order to expel a student in accordance with the Act.<sup>107</sup> Georgia law requires that each student code of conduct contain provisions that address any off-campus behavior of a student which could result in the student being criminally charged with a felony and which makes the student's continued presence at school a potential danger to persons or property at school or which disrupts the educational process.<sup>108</sup> In *S.B. v. Henry Cty. Bd. of Educ.*, Ga. State Bd. of Educ., Case No. 2018-12, the Board held that a plain reading of the law requires both off-campus behavior which could result in a felony charge **and** the required nexus that the student's continued presence a potential danger to others or a disruption of the education process. Accordingly, the Board has consistently required local boards of education to prove both the felonious off-campus conduct and the legally required nexus.<sup>109</sup> The LBOE's argument that a felony charge of aggravated assault is sufficient in itself to demonstrate that the Student is a potential danger to persons or property at school was rejected. The Board held the LBOE has the duty to provide the Student with adequate notice of his charge prior to the tribunal hearing and because the charge letter and code section omitted mandatory language regarding the Student's presence being a danger to others, the Student was unable to prepare an adequate defense in violation of his due process rights.

## 3. Failure to Prove Intent

The local school board or school system must prove each element of the charges in order to find the student in violation of school rule or policy. There is an argument, however, that even where a school rule or policy does not require the element of intent (*i.e.*, via a zero-tolerance policy), the local school board must present evidence that the student intended on acting in violation of the policy as charged. In *Julie R. v. Hall Cty. Bd. of Educ.*, Ga. State Bd. Of Educ., Case No. 1996-22, the Student was suspended on violation of having a weapon on school property. Specifically, the Student's father placed a pistol in the pickup truck she drove because she was making a late night trip. The father and Student agreed that the father would remove the pistol when she returned, however, he forgot to remove it prior to her driving to school. The Student asserted that she did not intend on bring the weapon to school and therefore the local board failed to prove intent. The local board argued that it has adopted a zero-tolerance policy and it is unnecessary that it show intent. The Board however found that because the Student was aware that the pistol had been placed in the truck, though she was not aware that it had not been taken out, that she was aware of should have been aware of the pistol in the truck. The Board held that the local board had sustained its burden of proof consequently, disregarding the local board's argument that it is not required to prove the student's intent to violate the policy. *See also B.B. v. Polk Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2016-29. *But see D.W. vs. Fayette Cty. Brd. Of Educ.*, Ga. Brd. Of Educ., Case 2003-23, where the Board affirmed the local board's suspensions of the Student for assaulting a teacher, finding that the policy did not require malice or intent to do harm.

#### D. Timing of Written Decision and Appeal Right

LBOEs must establish rules granting a right to appeal to the local board when the punishment imposed by hearing officers panels or tribunals is long-term suspension or expulsion.<sup>110</sup> In instances where disciplinary hearings are held pursuant to the Act, the disciplinary officer, panel, or tribunal shall render a decision, in writing, based solely on the evidence presented at the hearing; and provide such decision to all parties within 10 days of the close of record.<sup>111</sup> A party thereafter has the right to appeal to the local board of education by filing a written notice within 20 days from the date the decision was rendered.<sup>112</sup> Any disciplinary action rendered at the hearing may be imposed by the school superintendent pending the outcome of the appeal.<sup>113</sup>

On appeal, the LBOE decision shall be rendered solely on the record and in writing within 10 days from the date it receives the notice of appeal, excluding weekends and public and legal holidays.<sup>114</sup> The LBOE may take any action it deems appropriate, and its decision is final.<sup>115</sup> All parties have the right to be represented by legal counsel at any appeal proceeding.<sup>116</sup> An LBOE may not impose a punishment that is harsher than that imposed by the disciplinary tribunal without an explanation of the harsher punishment.<sup>117</sup> Imposing a harsher penalty without stating any reasons is a violation of the student's due process.<sup>118</sup>

Notwithstanding the finality of the LBOE's decision, any party aggrieved by a decision by the LBOE, rendered on an issue respecting the administration or construction of school law may appeal to the state board ("SBOE") within 30 days.<sup>119</sup> The appeal to the SBOE shall be filed with the local school superintendent.<sup>120</sup> The appeal must be in writing and "shall distinctly set forth the question in dispute, the decision of the LBOE, and a concise statement of the reasons why the decision is complained of."<sup>121</sup> The appealing party must file with the appeal a transcript of the hearing, which is certified as correct and true.<sup>122</sup> The cost of the transcript shall be assumed by the party making the appeal.<sup>123</sup> Within 10 days of receipt of the appeal, the superintendent must submit a copy of the appeal together with the transcript of evidence and the hearing, the decision of the LBOE and any other matters relating to the appeal, to the SBOE. The decision of the LBOE will not be suspended during the SBOE appeal period.

After it is determined that the appeal is in proper form, it shall be docketed before the hearing officer of the SBOE at the "earliest practical time."<sup>124</sup> Within 10 days of docketing, oral arguments must be requested.<sup>125</sup> If an oral argument is granted, the appellant may be represented by counsel.<sup>126</sup> The appealing party must file an appeal brief with the SBOE outlining the party's position within 20 days of docketing. The opposing party shall have 40 days from the date of docketing to file a brief.<sup>127</sup>

The SBOE shall not consider new evidence. The SBOE may not consider any question not specifically raised in the written appeal or the statement of contentions.<sup>128</sup> Indeed, it is the role of the LBOE to weigh the evidence and determine the credibility of witnesses.<sup>129</sup> If there is any evidence to support the decision of the LBOE, then the LBOE's decision will stand unless there has been an abuse of discretion or the decision is so arbitrary and capricious as to be illegal.<sup>130</sup>

The SBOE shall issue its decision within 25 days after the hearing.<sup>131</sup> Any party may appeal the decision to the Superior Court of the county where the LBOE is situated. The appeal must be filed within 30 days from the decision of the SBOE. Within 10 days of filing the appeal, the State School Superintendent is required to transmit a certified copy of the record, transcript from the LBOE, the LBOE decision, and all orders of the SBOE to the Superior Court.<sup>132</sup>

If the Superior Court rules unfavorably, the decision may be reviewed by the Georgia Court of Appeals by filing an application for discretionary review.<sup>133</sup> "Under the any evidence standard of review, so long as evidence exists that supports the local board's decisions, it should not be reversed on appeal unless the record shows the local board grossly abused its discretion or acted arbitrarily or contrary to law."<sup>134</sup> See *S.G.*, 301 Ga. 794, *supra* at 796 and 802-03, where the Court held the Court of Appeals improperly shifted the burden when a local school board considers a student's claim of self-defense against a disciplinary charge for fighting; and

when the Court of Appeals substituted its own findings of facts instead of remanding the case to the local board to apply the proper law.

### III. Special Rules for Students with Disabilities (Special Education Students)

#### A. 20 U.S.C. §§ 1400-1487

These provisions of federal law are intended (1) to ensure that all children with disabilities have access to a “free appropriate public education” (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; (2) to ensure that the rights of children with disabilities and parents of such children are protected; (3) to assist States, localities, educational service agencies and Federal agencies to provide for the education of all children with disabilities; (4) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families; (5) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities, coordinated research and personnel preparation, coordinated technical assistance, dissemination and support, and technology development and media services; and (6) to assess and ensure the effectiveness of efforts to educate children with disabilities.<sup>135</sup> In enacting this title, the federal government decided that states would not have sovereign immunity under the *Eleventh Amendment* from suit in federal court for a violation of this title.<sup>136</sup>

Under 20 U.S.C. §1412, one of the requirements for federal assistance to states requires that, to the extent possible, students with disabilities are educated in the “least restrictive environment.” Accordingly, the title requires that children with disabilities be educated with children who are not disabled. It also requires that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.<sup>137</sup>

In *Stuart v. Nappi*,<sup>138</sup> the District Court of Connecticut addressed the concern that the right to education in the “least restrictive environment” may be circumvented if schools are permitted to expel students with disabilities. The court decided that this category of students is neither immune from school’s disciplinary process nor entitled to participate in programs when their behavior impairs the education of other children.<sup>139</sup> However, the court also held that a student with disabilities is entitled to a preliminary injunction enjoining the expulsion hearing, having demonstrated possible irreparable injury by virtue of her expulsion, concomitant lack of special education and probable success on the merits of claims under the “Education of Handicapped Act.” This Act concerns the denial of “appropriate public education,” the right to education in the “least restrictive environment” and the right to remain in her “current educational placement” during pendency of proceedings under the Act.<sup>140</sup>

Moreover, under 20 U.S.C. §1415, the federal government established procedural safeguards to ensure that any state or local agency that receives federal assistance must establish and maintain procedures in accordance with this section in order to assure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.<sup>141</sup> As part of that section, the federal government provides guidelines for placing children with disabilities in an alternative educational setting. According to 20 U.S.C. § 1415(k), school personnel have the authority to remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).<sup>142</sup>

If school personnel seek to order a change in placement that would exceed 10 school days *and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child’s disability*, the relevant disciplinary procedures applicable to children without disabilities may be applied to the disabled child

in the same manner and for the same duration.<sup>143</sup> The determination as to whether a behavior is a manifestation of the child's disability is governed by 20 U.S.C. § 1415(k)(1)(E). The local educational agency, the parent, and relevant members of the Individualized Education Program ("IEP") team must review all relevant information in the student's file, including the child's IEP, any teacher observations and any relevant information provided by the parents to determine:

- If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- If the conduct in question was the direct result of the local educational agency's failure to implement the IEP.<sup>144</sup>

If the local education agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall:

- Conduct a functional behavioral assessment and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination;
- In the situation where a behavioral intervention plan has already been developed for the child, review and modify it, as necessary, to address the behavior; and
- Return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.<sup>145</sup>

Special circumstances may give rise to an exception to the analysis just provided. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability in cases where a child:

- Carries or possesses a weapon to or at school, on school premises or to or at a school function under the jurisdiction of a State or local educational agency;
- Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises or at a school function under the jurisdiction of a State or local educational agency; or
- Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.<sup>146</sup>

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision and of all the procedural safeguards accorded under this section.<sup>147</sup>

#### **B. GaDOE Rule § 160-4-7-.10**

Georgia's Department of Education Rule § 160-4-7-.10 very closely follows the federal statute (20 U.S.C. §§ 1400-1487). Specifically, under this rule, each local education agency ("LEA") is given the responsibility to develop appropriate and legally based disciplinary procedures.<sup>148</sup> Accordingly, as a default, the code of student conduct applies to all children unless a child's individualized education program ("IEP") specifically provides otherwise.

### 1. Alternative Educational Settings for less than 10 Consecutive School Days

If a child with a disability violates the code of conduct, school personnel may determine whether to change the placement of that child. In doing so, the school personnel must consider any unique circumstances on a case-by-case basis.<sup>149</sup> School personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim placement for not more than 10 consecutive school days.<sup>150</sup>

### 2. Alternative Educational Settings for more than 10 Consecutive School Days

For disciplinary changes in placement that exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities.<sup>151</sup>

### 3. Manifestation Determination

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of the code of conduct, the LEA, the parent and the relevant members of the child's IEP team must review all relevant information in the child's file to determine: (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (2) if the conduct in question was the direct result of the LEA's failure to implement the IEP.<sup>152</sup> If the LEA, the parent and relevant members of the IEP team make the determination that the conduct was a manifestation of the child's disability, the IEP team must either (1) conduct a functional behavioral assessment and implement a behavioral intervention plan for the child; and (2) if a behavioral intervention plan already has been developed, review the plan and modify it as necessary.<sup>153</sup>

### 4. Notification

On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of school conduct, the LEA must notify the parents of that decision and provide the parents the procedural safeguards notice described in Rule 160-4-7-.09.<sup>154</sup>

### 5. Appeal

The parent of a child with a disability who disagrees with any decision regarding placement or the manifestation determination under this Rule, or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others may appeal the decision by requesting a hearing.<sup>155</sup> This is done by filing a due process hearing request pursuant to Rule 160-4-7-.12.<sup>156</sup> An administrative law judge or hearing officer hears the facts and makes a determination regarding an appeal under the disagreement.<sup>157</sup> In making a determination regarding an appeal, the administrative law judge or hearing officer may (i) return the child with a disability to the placement from which the child was removed if the administrative law judge or hearing officer determines that the removal was a violation of this Rule or that the child's behavior was a manifestation of the child's disability; or (ii) order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the administrative law judge or hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.<sup>158</sup> When an appeal under this Rule has been made by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the administrative law judge or hearing officer or until the expiration of the 45 school day time period, whichever comes first, unless the parent and the LEA agree otherwise.<sup>159</sup>

# Voices from the Field

## I. Introduction

Throughout 2012 and 2013, Georgia Appleseed volunteers conducted interviews with stakeholders in the school tribunal system in Georgia. Those interviewed included educators (several principals and assistant principals), directors of student affairs, discipline coordinators and other staff members from various Georgia schools with student discipline responsibilities. Superintendents, campus police officers, hearing officers and a number of attorneys who represent students in the hearing/tribunal process were also interviewed.

Such interviewees were asked about administrative hearing rights and procedures, such as the workings of notices, waivers and standard policies and the communication of appeal options. Our volunteers also asked interviewees how (or whether) they thought attorney involvement impacts the tribunal process as well as for suggestions for improvements to the tribunal process in general.

Recurring themes heard from these voices from the field are summarized in Section II.

## II. Insights from Interviews

### A. Notice

In most districts, the goal is to have a face-to-face meeting with the student and parents before the “charging” letter or notice is sent. This is to provide them with information about the infraction, the investigation that has been conducted, the proposed punishment and the hearing process. If such a meeting cannot happen in person, then a telephone conference is attempted. There are rare instances, however, when the parents do not participate in these discussions at all.

In some districts, a standard notice letter is sent, with details optionally being added to modify the form based on the situation at hand. In other districts, the notice is provided at the meeting where parents are asked to sign an acknowledgement of receipt. If the parent or student does not attend the meeting, then the notice form is mailed. Some districts mail an information packet with other enclosures attached to the original notice letter, such as the handbook, the waiver option (discussed in more detail below), copies of witness statements and other written evidence and documents that provide a description of the alleged offense and information about the tribunal process.

The law requires that adequate written notice be provided a reasonable time in advance of a scheduled hearing. Differing views were expressed about the adequacy and timeliness of these notices.

One school official commented that the goal is to provide notice at least a week or two before the hearing is scheduled. Some lawyers who represent students/parents, however, have pointed out that oftentimes this goal is not met, and parents may not receive notice until days after their child’s suspension has already taken effect. Two of the attorneys interviewed specifically noted that notice is sometimes given only one or two days prior to the hearing, while a different attorney claimed that this was the exception and that in most instances, notice tends to be prompt.

Several interviewees expressed other concerns about notices, such as:

- a) They tend to include so much detail about the rules, witnesses and student rights that the paragraphs about what the student actually did can get lost in the multiple pages;
- b) Their description of the evidence to be considered at the hearing is insufficient;
- c) All parents may not be able to understand the notices because they are written at a fairly high reading level.

## **B. Waiver of rights**

A parent may agree to waive the right to a hearing. Most schools use a standard waiver letter. In one district, the option to waive the hearing occurs during the initial parental face-to-face disciplinary conference.<sup>160</sup> In another district, the parents learn of waiver options after setting up a meeting with the hearing officer. During that meeting, the officer explains the parents' and their child's rights and informs them of the option to waive certain rights. In another district, the waiver materials are sent with the notice letter from the school and may indicate that a hearing need not occur if the parents are in agreement with both the rule violation and the discipline recommendation. One interviewee noted that the notice letter alludes to the ability to waive the hearing, but that the parent must contact the office to receive the formal waiver form. In another district, the waiver materials are sent with a packet of other materials related to the tribunal, following the notice letter. A number of assistant principals also mentioned discussing waiver options with parents by phone or in person.

In all districts, however, the interviewees reported that these waivers are confirmed in writing.

An interviewee from one district noted that, before 2013, the waiver form gave parents the option to waive their right to attend the hearing, but not to waive the hearing itself. Therefore, the panel still held the hearing upon submission of the waiver form, just without parental presence. Beginning in 2013, however, a parent in that district has the option to waive the tribunal process altogether.

Students may also opt to attend an alternative school and have the punishment coded as "placement to an alternate site," rather than as a long-term suspension or expulsion. One interviewee noted that choosing this option later benefits college applications or employment. Another interviewee noted that in their district, approximately 90-95% of the students who have a tribunal hearing attend an alternative school.

Parents may also waive certain rights in the context of postponement of the hearing. For example, if a parent cannot attend the hearing as scheduled, he or she may waive their rights concerning the timeliness of the hearing.

One of the attorneys interviewed expressed concerns about the way in which waivers are often handled. He noted that when waiver rights are discussed between the school and the parent in person, parents often feel pressured into waiving their child's tribunal rights. This is because often the only other options the school puts forth are immediate expulsion or placement of the student in an alternate school.

## **C. Tribunal process**

### **1. Presiding officers**

In all of the districts researched, the tribunal process presiding officer is a hearing officer. (A few of the districts used panels in the past, but those processes have been changed.) However, hearing officer qualifications vary by district. In two districts, the hearing officers are typically retired or former administrators/principals (who may be trained by the school attorney). In another district, the hearing officers are attorneys who work for the district and who are required to attend an annual training workshop. Another district uses a panel of three rotating hearing officers, all of whom are retired judges.

### **2. Attorney involvement**

Hearing notices indicate that the student has a right to bring an attorney. There is generally no delay in setting the hearing date if a student chooses to have an attorney (unless the delays are due to attorney scheduling conflicts, or if the notice is so short that a stay is requested and granted). Some districts have a lawyer present at each hearing and, regardless of the student's representation, do not require notice of the attorney's involvement prior to the hearing. Other districts are only represented by an attorney when the student has legal representation. These districts require advance notice by the student of the intent to have an attorney present. The consensus of all interviewees is that attorneys are engaged only in a very small number of cases.

Most interviewees indicated that the tribunals run longer if the student has an attorney present. Some attribute this to the fact that attorneys tend to ensure that the hearing is more thorough by cross-examining witnesses, presenting evidence and giving closing arguments to make for a stronger defense. Another interviewee noted that tribunals run longer when an attorney is present because they are often unfamiliar with school law and require that the hearing officer give special instructions. On the other hand, when a parent serves as the advocate, another interviewee noted that they often require an explanation of how to pose questions to witnesses, which can also add to the length of the hearing.

Non-attorneys are permitted to assist students in some districts, and most of the interviewees from those districts found this to be a beneficial option. “If the parent or student feels strongly enough that someone else would be a better advocate for them, they should be allowed to choose that person.” Another interviewee noted that being able to identify an alternate representative can benefit a parent who is uncomfortable, uneducated or otherwise has limitations that prevent him or her from being an effective advocate for the student. One interviewee, an assistant principal, stated that it was helpful when students brought preachers or people who personally knew them to their tribunal. She explained that this allowed the school administration to hear the student’s side of the story, get a better picture of the student’s life outside of school and become aware of any mitigating circumstances that may impact the case and would have otherwise gone unaddressed. Another interviewee from a different school in the same district expressed a different opinion, claiming that community advocates tend to bring up non-relevant information, “muddy things up” and interfere with the process altogether. A further interviewee stressed that beyond all else, what is most important is that the student advocate is involved in the entire tribunal process (including the meeting with the hearing officer) so that he or she understands the situation in its entirety (e.g., the charges, the recommended discipline, how to subpoena witnesses and how the hearing process works).

According to one interviewee, a hearing officer, non-attorneys (e.g., minister, aunt-uncle) in their district are not permitted to advocate during the hearing and can only make statements to the student’s character.

Another interviewee noted that non-attorney participants can make the process more convoluted, as they can become more “aggressive” than lawyer advocates.

Most of the attorney interviewees were in favor of allowing non-attorney advocates to attend the tribunal, reasoning that even an untrained advocate is better than no advocate. The students “do not have the maturity or even the understanding of what is happening to advocate for themselves.” None of the districts reported having any special training available for non-attorney advocates.

### **3. Comments from attorney advocates in tribunals**

Parents typically do not cross-examine witnesses unless they have retained an attorney or talked to an attorney prior to the tribunal. After listening to transcripts of tribunals where attorneys are not present, one interviewee found that the parent or student may make a short statement at the end but is virtually silent throughout the hearing.

Another attorney noted that the difference between a tribunal with and without an attorney present is like “night and day.” This interviewee’s experience was that while procedures are precisely followed when there is attorney representation, the tribunal only “sort of” follows procedure when an attorney is not present. Another attorney interviewee pointed out that attorney representation also results in a more thorough hearing and a more lenient punishment. In this person’s experience, without attorney representation, students are more often than not found to have engaged in the alleged misbehavior. With attorney representation, such is not the case, as the school (a) makes more of an effort to gather and hear from witnesses; (b) is less likely to rely on hearsay; (c) is more likely to take evidence about the student’s disabilities into consideration; and (d) generally conducts a more formal hearing.

The attorneys interviewed also found that the likelihood that the case can be settled or an agreement can be negotiated without a hearing is greater when they have been involved. While attorneys typically attempt to get the sides together before the hearing to arrive at a mutually agreeable resolution, unrepresented students may not take this extra step. Attorneys also counsel the students about their rights so that they act in a more informed way during the tribunal.

#### **D. Subpoenas**

The student has a right to request that the school board issue subpoenas to compel the presence of witnesses at the tribunal. There typically is a form that the student, parent or advocate can fill out to request that the school board issue the specified subpoena. Some interviewees commented that students or their advocates infrequently make this request and typically either (a) cross-examine only the witnesses already being called by the school; (b) bring in their own witnesses who are attending willingly; or (c) let the case proceed without witnesses due to the fact that they are simply unaware of the subpoena option. However, an almost equal number of interviewees claimed to have experienced the opposite, with students making subpoena requests on a frequent basis.

The subpoenas are generally served by school resource officers or the campus police department. In other instances, the principal or staff (e.g., an individual in the office of student discipline) delivers the subpoena and explains its purpose and effect. In one district, an interviewee noted that the parents are responsible for serving the subpoena, although another interviewee in that same district indicated that subpoenas are served via mail. When attorneys have been involved, they report filling out the subpoenas and having the district serve them on the district's employees or students.

When asked whether any changes to the subpoena process have been made since the 2011 court ruling determining that a school board subpoena was not enforceable,<sup>161</sup> most indicated that they were unaware of any changes. One interviewee responded that a witness subpoena is now called a "summons" and that there is no power to enforce it or at least that enforceability is questionable.

If a subpoenaed witness does not appear at the tribunal hearing, most indicated that no sanctions or charges can be brought. One interviewee noted an instance when a subpoenaed student witness did not appear, likely from fear of retaliation, and it became a deciding factor in the disciplined student's victory at the tribunal. If the subpoenaed person is a staff member, the district will contact that person, as he or she has a responsibility to attend and justify his or her absence. In all other circumstances, nothing can be done because compliance cannot be enforced. The tribunal process simply proceeds without the witness who fails to appear.

One attorney interviewee indicated that it has been difficult to get schools to release statements by students and thus are unable to identify potential witnesses and issue subpoenas.

#### **E. Right to appeal**

A formal appeals process exists in every jurisdiction. The right to appeal is laid out in the written disciplinary decision completed by the hearing officer and is provided to the student or parent. It is also explained at the conclusion of the hearing and is typically read into the record. One interviewee reported that the appeal right is also contained in a letter that informs the student or parent of the outcome of the hearing.

#### **F. Alternate Dispute Resolution**

Although most districts do not have a formal Alternate Dispute Resolution (ADR) process in place, alternate options to the tribunal may be pursued. One alternate option to the tribunal is to accept placement of the student in an alternative school, although some interviewees indicated that this practice is no longer in effect in certain districts. Interviews indicate that students and parents from one district reportedly engage in discipline team meetings with school personnel and a behavior specialist, where the parties attempt to reach an agreement. If successful, the case is closed upon the signing of the form waiver by the parent. In a different district, school

personnel have the option to recommend that the student enter into a behavior contract in lieu of the tribunal, using the hearing as a last resort.

More than one attorney interviewee noted that there is usually room for informal negotiations before the tribunal, but this is not a formalized process.

When asked about other mechanisms used to reach a mutually acceptable resolution, one interviewee noted that as evidence comes out during the parent meetings, matters can sometimes be resolved prior to a hearing. This interviewee also indicated that when a request for expulsion is made by a school, sometimes district personnel may get involved and could overrule the request or work out an alternative solution or form of punishment with the student or parent.

When asked about whether the district has the power to “stay” the imposition of the discipline to allow time for ADR or another informal resolution, some interviewees explained that a waiver of the 10-day suspension period may be made available.

### **III. From the Field: Suggestions for Improvements**

#### School district interviewees:

- Improve parent education about the process to ensure productive parental engagement.
- Use a panel of decision makers. Panels appear more impartial; a single hearing officer making the decision can appear unfair.
- Fine-tune the waiver process so that the parent is presented with a clear explanation of what it entails so that they can make a more informed waiver decision. (The district from which this comment came previously had a parent advocate/student liaison on staff to assist parents through the tribunal process, but this position was eliminated due to budget cuts.)
- Provide a summary of “school law” for attorneys and others representing the student, with detailed information about the procedural process and applicable law.
- Conduct a “pre-hearing conference” with the parents before the hearing date so that the precise scope and process of the hearing can be explained in advance, rather than on the day of the hearing.
- Intervene early and address the student’s behavior before it gets to the tribunal stage. Bad behavior is rarely deterred by tribunals and is easier to correct when confronted early on.
- Eliminate the “tribunal referral” process.<sup>162</sup> Seek to limit the interaction of the school and the district to completion of the required forms.
- Send parental notifications at least two ways (e.g., by mail and by telephone) to increase the likelihood that they are received.

#### From attorney interviewees:

- Seek more uniformity in the process.
- Allow the students and parents to find out potential witnesses in advance, so that they know who will be testifying against the student. The school should provide a packet of all witness statements before the hearing (without the attorney having to file a motion). Although the school typically provides a list of its witnesses, it can be difficult to find out who other witnesses are (who may be useful to the student’s case).

- Have separate hearings before different hearing officers or panels when multiple students are alleged to have been involved in an incident.
- Improve the notice process. Students and parents should receive notice of the hearing well in advance of the hearing, preferably at the time of commencement of suspension. Simplify the notice language so that it is easy to understand for people with low reading levels. Rather than list the infraction by student handbook code, specifically quote the rule that was violated. Send notice via registered mail (sending notice by regular mail can cause parents to miss it) and have school follow up via telephone or email to confirm receipt.
- Provide more training for the district personnel on due process and the tribunal procedure, as well as additional support and training for any participants advocating for the students.
- Create and implement a progressive disciplinary triage, with disciplinary actions ranging from the most lenient to the most severe, in accordance with the nature and severity of the student offence. This triage can provide a means to avoid sending students straight to tribunal for minor first offences and instead allow for the imposition of a more fitting form of discipline.
- Conduct hearings promptly. Make it clear that the student cannot be out of school for more than 10 days pending the tribunal process.
- Provide information on free legal services and free legal advice to the parents or provide a contact list of attorneys for potential representation. It is hard for parents to find an attorney on short notice.
- Require hearings to be more formal and rely on witness testimony, not hearsay. A tribunal decision should be made only with regard to evidence presented at the hearing.

## Conclusions & Recommendations

Each year, hundreds of student disciplinary administrative hearings are convened in Georgia public schools. In the vast majority of these cases, there are not meaningful disputes about the underlying facts. Rather, the key concern of the student and parents is whether the proposed long term suspension from attending classes is the appropriate disciplinary action. In most circumstances, the proposed disciplinary action is approved by the tribunal and upheld if appealed to the local school board and the State Board of Education. Due process is generally provided, as it is defined by federal and state courts, but it has become a process that is cumbersome and devoid of educational value.

While we offer suggestions of ways in which the tribunal process could be improved, the most significant way is to dramatically reduce the number of students subjected to the tribunal process in the first place. As noted at the outset of this report, extensive use of exclusionary discipline is a failed model when used to deter misbehavior and improve school safety and decorum. Alternative techniques that address student behavioral challenges without withholding educational time are available and effective.

### **Recommendation: Clear and Timely Notice**

Georgia Appleseed analysis shows that the clarity and timeliness of notice provided to students and parents as part of the tribunal process varies among school districts. We urge all school districts to review their notice letters to confirm that they not only include the minimum information required by law, but also that they (a) are written in language that can be understood by all parents; (b) clearly state the behavior that triggered the proposed suspension; (c) include a list of all witnesses to be called at the hearing; and (d) attach a copy of all documents to be introduced at the hearing.

The notices should be provided to parents in multiple ways to assure delivery, including by hand delivery, if feasible, by regular mail, by email and by directing the student to take a copy home. Delivery should come as early as possible in the 10-day period following the initial decision to suspend the student but absent extraordinary circumstances the parent should receive notice no less than five business days before the hearing to allow adequate time to prepare, to seek alternative solutions or to obtain counsel.

### **Recommendation: Administrative Review**

Consistent with our view that long term suspensions should be the proposed disciplinary action of last resort, we recommend a review process where school officials must seek and obtain approval from the district superintendent (or her/his designee) before imposing a suspension of greater than 10 days. Provided that each school district makes this a requirement, it will allow for an independent review that (a) assures that the student behavior rises to a level that warrants suspension; (b) assures that the district's progressive disciplinary triage has been followed; and (c) maintains disciplinary consistency within the district.

### **Recommendation: Access to Counsel**

This recommendation is directed to the members of the State Bar of Georgia. Georgia Appleseed strongly urges lawyers to consider meeting their ethical and professional responsibility to provide pro bono services to the poor by representing indigent students in student disciplinary tribunal proceedings.<sup>163</sup> Effective representation of students in these proceedings most often involves negotiating alternative disciplinary options that will address behavioral issues in a way that will not subject the child to a potentially crippling loss of educational time. Representation in these proceedings can change or save a child's life.



# End Notes

<sup>1</sup> GEORGIA APPLESEED CENTER FOR LAW & JUSTICE, *Effective Student Discipline: Keeping Kids in Class* (June 2011), available at <http://www.gaappleseed.org/keepingkidsinclass/> (“2011 Report”).

<sup>2</sup> *Id.* at 107.

<sup>3</sup> See, e.g., Losen, D.J. & Martinez, T.E., *Out of School & Off Track: The Overuse of Suspensions in American Middle and High Schools* (The Center for Civil Rights Remedies, UCLA, April 8, 2013), available at

<http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/>

[out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutOfSchool-OffTrack\\_UCLA\\_4-8.pdf](http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/out-of-school-and-off-track-the-overuse-of-suspensions-in-american-middle-and-high-schools/OutOfSchool-OffTrack_UCLA_4-8.pdf).

<sup>4</sup> NATIONAL SCHOOL BOARDS ASS’N, *Addressing the Out-of-School Suspension Crisis: A Policy Guide for School Board Members* (April 2013) at ii, available at <http://www.nsba.org/Board-Leadership/Surveys/Out-of-School-Suspension-Policy-Guide/Out-of-School-Suspension-Report.pdf>.

<sup>5</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>6</sup> *Id.*

<sup>7</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 (1973).

<sup>8</sup> Ga. Const., art. VIII, Sec. I, Para. I (emphasis supplied); see also *Crim v. McWhorter*, 242 Ga. 863 (1979) (Georgia’s state constitution guarantees a right to free education); *State ex rel. G.S.*, 749 A.2d 902, 907-08 (N.J. Super. Ct. Ch. Div. 2000) (New Jersey’s constitution guarantees right to free school instruction and the state has a constitutional obligation to provide an education to expelled juveniles).

<sup>9</sup> *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

<sup>10</sup> See *id.* at 574-76.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 579 (emphasis added).

<sup>13</sup> *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978) (quoting *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 314 (1950)).

<sup>14</sup> *C.B. By and Through Breeding v. Driscoll*, 82 F.3d 383, 387 (11th Cir. 1996); *Long v. Fulton Cty. Sch. Dist.*, 807 F. Supp. 2d 1274, 1289 (N.D. Ga. 2011) (citing *C.B.* with approval).

<sup>15</sup> *D.B. v. Clarke Cty. Bd. of Educ.*, 469 S.E.2d 438, 439 (Ga. Ct. App. 1996) (“‘Education, of course, is not among the rights afforded explicit protection under our Federal Constitution,’ nor is it implicitly so protected.”) (citations omitted).

<sup>16</sup> *Goss v. Lopez*, 419 U.S. at 581 (1975).

<sup>17</sup> *Id.* at 582.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 582-83.

<sup>20</sup> *Id.* at 584.

<sup>21</sup> *Id.*

<sup>22</sup> *C.B. By and Through Breeding*, 82 F.3d at 386.

<sup>23</sup> *Gamble v. Ware Cty. Bd. of Educ.*, 561 S.E.2d 837, 842 (Ga. Ct. App. 2002); see also *Wayne Cty. Bd. of Educ. v. Tyre*, 404 S.E.2d 809, 811 (Ga. Ct. App. 1991) (finding that due process was satisfied when school officials questioned a student at the location where the incident occurred and had a follow-up meeting with the principal the following school day).

<sup>24</sup> The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

<sup>25</sup> See *St. Ann v. Palisi*, 495 F.2d 423 (5th Cir. 1974) (“[T]his court has recognized that a lengthy suspension does constitute a serious punishment, the imposition of which must be preceded by a due process hearing.”); *Black Students of N. Fort Myers Jr.-Sr. High Sch. v. Williams*, 470 F.2d 957 (5th Cir. 1972) (holding that ten days was a substantial period of suspension so as to require a due process hearing); *Pervis v. La Marque Indep. Sch. Dist.*, 466 F.2d 1054, 1058 (5th Cir. 1972) (“Procedural due process must . . . be given prior to imposition of serious suspensions.”); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (“We are confident that precedent as well as a most fundamental constitutional principle support our holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.”).

<sup>26</sup> *Pervis*, 466 F.2d at 1058.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Although *Dixon* involved an expulsion from a tax-supported college, its holding

and analysis have been applied to expulsions from secondary school. See *Id.*

<sup>30</sup> *Dixon*, 294 F.2d at 158.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 159.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Nash v. Auburn Univ.*, 812 F.2d 655, 663 (11th Cir. 1987).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 664.

<sup>38</sup> See *id.* (stating, “Although an important notion in our concept of justice is the cross-examination of witnesses, there was no denial of [the students’] constitutional rights to due process by their inability to question the adverse witnesses in the usual, adversarial manner.”).

<sup>39</sup> *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506-07 (1969); see also *State v. Young*, 216 S.E.2d 586, 593 (Ga. 1975) (Jordan, J. & Ingram, J., concurring; Gunter, J., dissenting) (citing *Tinker*).

<sup>40</sup> *Id.* at 514.

<sup>41</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

<sup>42</sup> *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

<sup>43</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>44</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

<sup>45</sup> *Id.* at 341.

<sup>46</sup> *Id.* at 341-42.

<sup>47</sup> *Skinner v. Ry. Labor Execs.’ Ass’n.*, 489 U.S. 602, 624 (1989); see also *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1167-68 (11th Cir. 2001).

<sup>48</sup> *State v. Young*, 216 S.E.2d 586, 591 (Ga. 1975), (Jordan, J. & Ingram, J., concurring; Gunter, J., dissenting); see also *State v. Scott*, 630 S.E.2d 563, 566 (Ga. Ct. App. 2006) (“For purposes of *Young*, a police officer assigned to work at a school as a school resource officer should be considered a law enforcement officer, not a school official.”).

<sup>49</sup> *Young*, 216 S.E.2d at 592.

<sup>50</sup> *Id.* at 592-93.

<sup>51</sup> See *In the Interest of T.A.G.*, 663 S.E.2d 392, 394-96 (Ga. Ct. App. 2008); *Young*, 216 S.E.2d 592.

<sup>52</sup> See *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998); see also, *United States v. Johnson*, 455 F.2d 932, 933 (11th Cir. 1972) (refusing to apply the exclusionary rule to probation revocation hearing because it was an administrative proceeding and not an adversary or criminal proceeding).

<sup>53</sup> *Miranda*, 384 U.S. at 444; see also *State v. Lucas*, 593 S.E.2d 707, 709 (Ga. Ct. App. 2004) (requiring a statement of rights “after being taken into custody or otherwise deprived of their freedom of action in any significant way”).

<sup>54</sup> *T.A.G.*, 663 S.E.2d at 395.

<sup>55</sup> See *S.E. v. Gwinnett Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2003-30 (April 2003) (holding that due process did not require the student to be told that he did not have to testify against himself); *V.F. v. Fulton Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2003-24 (March 2003) (“Although the failure to provide a *Miranda* warning can result in the exclusion of evidence in a criminal proceeding, the courts have not held that there is any requirement for a *Miranda* warning in an administrative proceeding.”); *M.S. v. Clarke Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2002-25 (April 2002) (“[D]ue process does not require school officials to give students a *Miranda* warning before questioning them. A *Miranda* warning only has to be given in a criminal proceeding.”).

<sup>56</sup> See *M.S.*, Case No. 2002-25.

<sup>57</sup> See *T.A.G.*, 663 S.E.2d at 394-96.

<sup>58</sup> See *Scott*, 524 U.S. at 363; see also, *Johnson*, 455 F.2d at 933.

<sup>59</sup> O.C.G.A. § 20-2-724(b)(1).

<sup>60</sup> See *Brisendine v. Henry Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1978-36 (Feb. 8, 1979) (stating that due process requires only that notice of the right to retain counsel be provided); see also, Stephen M. Reba, Barton Child Law and Policy Center, Emory Law School, *Georgia’s Education Discipline Process: Fighting to Keep Students in School*, presented Nov. 8, 2011, Georgia Youth Law Conference (stating there is no right to appointed counsel).

<sup>61</sup> *Alabama v. Shelton*, 535 U.S. 654, 661-74 (2002).

<sup>62</sup> See *id.*; *Turner v. Rogers*, 564 U.S. 431, 441 (2011).

<sup>63</sup> See *In re Gault*, 387 U.S. 1, 41 (1967) (holding that the due process clause of the Fourteenth Amendment requires a child and his parents to be notified of their right to be represented by retained counsel, or to have

counsel appointed if they are unable to afford it, before the child can be committed to a juvenile home); see also, Ellen L. Mossman, *Navigating a Legal Dilemma: A Student’s Right to Legal Counsel in Disciplinary Hearings for Criminal Misbehavior*, 160 U. PA. L. Rev. 585 (2011-2012) (arguing that, “when a student faces both a disciplinary hearing and a potential criminal incarceration, an analysis of the interests at stake indicates that Fourteenth Amendment due process protection entitles a student to the assistance of counsel in both proceedings”). In *Gault*, the Court emphasized, however, that juvenile detention constituted incarceration against one’s will, and is a “deprivation of liberty.” *Gault* at 50. Unlike a juvenile court hearing, a school disciplinary hearing does not directly threaten incarceration, even though there may be a parallel criminal charge that does. Mossman, 160 U. PA. L. Rev. at 608.

<sup>64</sup> O.C.G.A. § 20-2-752(2).

<sup>65</sup> O.C.G.A. § 20-2-753.

<sup>66</sup> O.C.G.A. § 20-2-754.

<sup>67</sup> O.C.G.A. § 20-2-754(b)(1) through (5).

<sup>68</sup> O.C.G.A. § 20-2-752.

<sup>69</sup> O.C.G.A. § 20-2-754(b)(3) and (4).

<sup>70</sup> O.C.G.A. § 20-2-754(b)(3) and (4).

<sup>71</sup> O.C.G.A. § 20-2-754(b)(3) and (4).

<sup>72</sup> *Damon P. v. Cobb Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1993-9 (Apr. 14, 1994).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> O.C.G.A. § 20-2-754(b)(2).

<sup>76</sup> See *M.C. v. Peach Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2013-69 (Aug. 22, 2013).

<sup>77</sup> O.C.G.A. § 20-2-754(b)(4).

<sup>78</sup> *M.C. v. Peach Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2013-69 (Aug. 22, 2013).

<sup>79</sup> O.C.G.A. § 20-2-754(b)(1)

<sup>80</sup> O.C.G.A. § 20-2-752

<sup>81</sup> O.C.G.A. § 20-2-752.

<sup>82</sup> O.C.G.A. § 20-2-754(b)(3).

<sup>83</sup> See *A.M. v. Forsyth Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2009-64 (Sept. 2009) (discussed supra); *Z.B. v. Bartow Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. SBE 2008-44 (May 2008) (discussed supra); *J.G. v. Columbia Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1996-40 (Sept. 12, 1996) (reversing the finding where the tribunal, for unexplained

reasons, did not permit the student to call his only witness).

<sup>84</sup> Note, the Georgia State Education Rules are vested with the authority to set forth procedures pursuant to O.C.G.A. § 20-2-1160

<sup>85</sup> BCAEA 160-1-3-.04(3)(a)(2).

<sup>86</sup> *McIntosh v. Gordy*, 707 S.E.2d 609 (Ga. Ct. App. 2011).

<sup>87</sup> *Id.*

<sup>88</sup> SBOE Rule 160-1-3-.04(3).

<sup>89</sup> *Shaun B. v. Douglas Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1992-39 (Mar. 11, 1993).

<sup>90</sup> *Citing A.D. v. Bartow Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2006-06 (Oct. 2005).

<sup>91</sup> *Citing A.W. v. Clark Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2003-16 (Feb. 13, 2003).

<sup>92</sup> O.C.G.A. § 20-2-754(b)(5).

<sup>93</sup> Ga. Rules & Regs. 160-4-89-.15(2)(J).

<sup>94</sup> Ga. Rules & Regs. 160-4-89-.15(1)(j).

<sup>95</sup> Ga. Rules & Regs. 160-4-89-.15(1)(h)(1)(v) (emphasis added).

<sup>96</sup> Ga. Rules & Regs. 160-1-3-.04(3)(a)(5).

<sup>97</sup> See *Hammock ex rel. Hammock v. Keys*, 93 F. Supp. 2d 1222, 1229 (S.D. Ala. 2000).

<sup>98</sup> O.C.G.A. § 20-2-940(e)(4).

<sup>99</sup> *D.G. v. Pickens Cty. Bd. of Educ.*, Ga. State Bd. of Educ. 2005-40 (June 2005) (citing to O.C.G.A. § 24-4-3); see also Fulton County Schools’ Operating Guidelines, Section J, Title “Student Code of Conduct (May 20, 2011).

<sup>100</sup> *Sherry B. v. Dekalb Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1995-41 (Nov. 1995); see also *Audry Holston-Palmore v. Muscogee Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2002-16 (Feb. 2002); *Jacob C. V. Columbia Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1995-31 (Aug. 1995).

<sup>101</sup> *M.W. v. Cobb Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2017-53 (Nov. 9, 2017).

<sup>102</sup> Ga. Code Ann. § 16-3-21(a).

<sup>103</sup> Ga. Code Ann. § 16-3-21(b)(1)-(3).

<sup>104</sup> *B.B. v. Polk Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2016-29.

<sup>105</sup> *Id.* at 799.

<sup>106</sup> *S.B. v. Henry Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2018-12 (citing *Education Law: Principles, Policies, and*

*Practice*, page 260, first Edition, 2012, by John Dayton, J.D., Ed.D).

<sup>107</sup> *Id.*

<sup>108</sup> O.C.G.A. § 20-2-751.5(c).

<sup>109</sup> *S.B.*, Case No. 2018-12 (citing *W.f.E. V. Griffin-Spalding Cnty. Bd of Educ.*, Case No. 1996-7 (Ga. SBE, May 1996); *T.B. v. Houston Cnty. Bd. of Educ.*, Case No. 1995-6 (Ga. SBE, Apr. 1994); and *K.P. v. Bibb Cnty. Bd. of Educ.*, Case No. 2008-24 and *P.P. v. Bibb Cnty. Bd. of Educ.*, Case No. 2008-25 (Ga. SBE, Feb. 2008)).

<sup>110</sup> O.C.G.A. § 20-2-752.

<sup>111</sup> O.C.G.A. § 20-2-754(c).

<sup>112</sup> O.C.G.A. § 20-2-754(c).

<sup>113</sup> O.C.G.A. § 20-2-754(c).

<sup>114</sup> O.C.G.A. § 20-2-754(d).

<sup>115</sup> O.C.G.A. § 20-2-754(d).

<sup>116</sup> O.C.G.A. § 20-2-754(d).

<sup>117</sup> *B.J.D. v. Walker Cnty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2000-23 (Aug. 2000); *Chauncey Z. v. Cobb Cnty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1992-42 (Mar. 11, 1993).

<sup>118</sup> See *Ga. Real Estate Comm'n. v. Horne*, 233 S.E.2d 16 (Ga. Ct. App. 1977).

<sup>119</sup> BCAEA 160-1-3-.04(3)(a)(6).

<sup>120</sup> SBOE Rule 160-1-3-.04(d).

<sup>121</sup> O.C.G.A. § 20-2-1160(b).

<sup>122</sup> *Id.*

<sup>123</sup> SBOE Rule 160-1-3-.04.

<sup>124</sup> SBOE Rule 160-1-3-.04(f).

<sup>125</sup> SBOE Rule 160-1-3-.04(h).

<sup>126</sup> SBOE Rule 160-1-3-.04(i).

<sup>127</sup> SBOE Rule 160-1-3-.04(g).

<sup>128</sup> *Id.*

<sup>129</sup> *Henry Cnty. Bd. of Educ.*, 301 Ga. 794 at 798 (2017).

<sup>130</sup> *Ransum v. Chattooga Bd. of Educ.*, 242 S.E.2d 374 (Ga. Ct. App. 1978); *Antone v. Greene Cnty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No 1976-11 (Sept. 8, 1976).

<sup>131</sup> O.C.G.A. § 20-2-1160(c).

<sup>132</sup> *Id.*

<sup>133</sup> O.C.G.A. § 5-6-35(a)(1).

<sup>134</sup> *S.G.*, 301 Ga. 794 at 798.

<sup>135</sup> 20 U.S.C. § 1400 (d)(1)-(4).

<sup>136</sup> 20 U.S.C. § 1403(a).

<sup>137</sup> 20 U.S.C. § 1412(a)(5).

<sup>138</sup> *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> 20 U.S.C. § 1415(a).

<sup>142</sup> 20 U.S.C. § 1415(k)(1)(B).

<sup>143</sup> 20 U.S.C. § 1415(k)(1)(C).

<sup>144</sup> 20 U.S.C. § 1415(k)(1)(E).

<sup>145</sup> 20 U.S.C. § 1415(k)(1)(F).

<sup>146</sup> 20 U.S.C. § 1415(k)(1)(G).

<sup>147</sup> 20 U.S.C. § 1415(k)(1)(H).

<sup>148</sup> GaDOE § 160-4-7-.10(1)(a).

<sup>149</sup> GaDOE § 160-4-7-.10(2)(a).

<sup>150</sup> GaDOE § 160-4-7-.10(2)(b).

<sup>151</sup> GaDOE § 160-4-7-.10(2)(d).

<sup>152</sup> GaDOE § 160-4-7-.10(3)(a).

<sup>153</sup> GaDOE § 160-4-7-.10(4)(a).

<sup>154</sup> GaDOE § 160-4-7-.10(6)(a).

<sup>155</sup> GaDOE § 160-4-7-.10(8)(a).

<sup>156</sup> *Id.*

<sup>157</sup> GaDOE § 160-4-7-.10(3)(a).

<sup>158</sup> GaDOE § 160-4-7-.10(8)(b).

<sup>159</sup> GaDOE § 160-4-7-.10(9)(a).

<sup>160</sup> One interviewee noted that the waiver option is selected quite often because a tribunal level action is rarely proposed unless it is clearly warranted and there is adequate evidence to justify the action.

Another interviewee noted that parents are sometimes worried about taking time off from work to participate in a tribunal, so they waive the student's tribunal rights.

<sup>161</sup> See the discussion at pages 11-12 *supra*.

<sup>162</sup> The commenter is referring (and objecting) to a process in his district in which the principal has to present the case to district staff with a referral packet and a conference about why the hearing is warranted. The commenter noted that this can be problematic because it takes a good deal of time to put together and can also be unfair to the student because the hearing officer hears the school's case twice (and first) and only hears the student's case at the hearing, a time when the officer may already be prejudiced. Of course, the purpose of the process is to assure that only the most serious matters are referred in the first place.

<sup>163</sup> Georgia Appleseed and its Young Professionals Council have prepared a resource for attorneys who seek to take on such representation. See *Representing Students in School Tribunals in Georgia, Attorney Training Manual* (March 2013, Second Ed.), available at <http://www.gaappleseed.org/docs/representing-students.pdf>