Student Tribunals

An Assessment of the Disciplinary Process in Georgia Public Schools

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To increase justice in Georgia through law and policy reform.

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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.[1] 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."[2]

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.[3] 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. [4]

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" [5] and recognized that providing education to their citizens is the most important function of state and local governments.[6]

Although the United States Supreme Court has not recognized a fundamental right to an education under the United States Constitution,[7] 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.*" [8]

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. [9] Thus, it is a constitutional violation to suspend a student without providing constitutional due process. [10] Furthermore, the Court stated that, because a suspension can seriously damage a student's reputation, a liberty interest is implicated as well.[11]

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*. [12] 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." [13] 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." [14] Georgia state courts have likewise found that the right to attend public school is not explicitly protected under the Constitution.[15]

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." [16] According to the Court: "There need be no delay between the time 'notice' is given and the time of the hearing." [17] As a general rule, the notice and hearing should precede removal of the student from the school. [18] However, if a student's presence poses a continuing danger to persons or property or an ongoing threat of disrupting academic process, he or she may be immediately removed from school and the necessary notice and rudimentary hearing should follow as soon as practicable.[19] 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." [20] The Court also noted the possibility that, in unusual situations, a short suspension may require more than rudimentary procedures. [21]

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 processes that the *Fourteenth Amendment* demands. The only other requirement arises from the Court's admonishment that the hearing comes 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.[22]

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." [23]

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

The former Fifth Circuit[24] 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.[25] 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.[26] 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." [27] But even in such a case, "a hearing would have to be afforded at the earliest opportunity." [28]

In *Dixon v. Alabama 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. [29] First, "notice should contain a statement of the specific charges and grounds, which, if proven, would justify expulsion." [30] Next, "the nature of the hearing should vary depending on the circumstances of the particular case." [31] 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. [32] However, "[t]his is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required." [33]

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. [34]

In *Nash v. Auburn University*, 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.[35] "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." [36] 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. [37] 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. [38]

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.[39]

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, [40] (2) the student's expression might reasonably be perceived by the public as bearing the imprimatur of the school, [41] or (3) the student's expression can reasonably be regarded as encouraging illegal drug use. [42] Schools also may impose viewpoint-neutral, content-based restrictions on student expression that is "vulgar," "lewd," "obscene" or "plainly offensive." [43]

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. [44] 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? [45]

> 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. [46]

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." [47] 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." [48] 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." [49] 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. [50]

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. [51] 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. [52]

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. [53] "Absent such advice, statements made during a custodial interrogation to law enforcement officers or their agents generally will be excluded from evidence." [54] 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. [55] This appears to be true regardless of further criminal consequences a student's actions may have.[56]

The Georgia Court of Appeals has also held that questioning by school officials without law enforcement involvement does not require a *Miranda* warning. [57] 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. [58]

E. *Sixth Amendment* Right to Appointed Counsel

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

The *Sixth Amendment* guarantees to an indigent defendant the right to state-appointed counsel in criminal proceedings where the defendant faces potential imprisonment. [61] 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. [62] Another avenue to the right to appointed counsel may come from the *Fourteenth Amendment*'s due process clause, however. [63]

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

A. O.C.G.A. § 20-2-754 (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. Further, pursuant to O.C.G.A. § 20-2-752(2), if such hearing officers, panels, or tribunals are created, they must abide by provisions governing procedures.

O.C.G.A. § 20-2-754 outlines procedures to be followed by a disciplinary officer, panel, or tribunal:

1. Requirement for Hearing

In addition to proceedings authorized in O.C.G.A. § 20-2-752, LBOEs must appoint a disciplinary hearing officer, panel, or tribunal of school officials to hold a disciplinary hearing following any instance of (a) an alleged violation of the student code of conduct where the principal recommends a suspension or expulsion of longer than 10 school days; or (b) which involves an alleged assault or battery by a student upon any teacher or other school official or employee, if such teacher or other school official or employee so requests. [64]

2. Notice

Prior to conducting the hearing, all parties are entitled to "reasonable notice." [65] The notice may be served personally or by mail [66] and shall be given to all parties and to the parent or guardian of the student or students involved. [67] The notice shall include: (a) a statement of the time, place and nature of the hearing, [68] (b) a short and plain statement of the matters asserted [69] and (c) a statement as to the right of all parties to present evidence and to be represented by legal counsel. [70]

3. Enforceability of Subpoenas

All parties are afforded an opportunity to examine and cross-examine witnesses on all unresolved issues. [71] Tribunals are vested with subpoena "power to summon witnesses and take testimony if necessary." [72] The LBOE must sign and issue the subpoenas. [73] If the witness is a teacher, he or she must be given three days advance notice of the hearing. [74] Despite this subpoena power, Georgia law contains no enforcement mechanism to compel attendance at the hearing.[75] Accordingly, attendance at tribunal hearings by witnesses who have been served with a school board subpoena is not mandatory.[76]

4. Hearing – Timing

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. [77]

5. Hearing – Witnesses

All parties are afforded an opportunity to present and respond to evidence and to examine and cross-examine witnesses on all issues. O.C.G.A. § 20-2-754(b)(3). Any teacher who is called as a witness by the school system shall be given notice no later than three days prior to the hearing. [78]

6. Hearing – Record

A verbatim electronic or written record of the hearing shall be created and made available to all parties. [79]

B. Standard of proof; applicable rules of evidence

1. Use of Hearsay and Written Statements

The use of hearsay in the form of written statements is impermissible in disciplinary hearings. For example, in *Z.B. v. Bartow Co. BOE* (SBE 2008-44), 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 because the student was not given an opportunity to cross-examine the witnesses. In particular, the Board noted that "courts have held that hearsay evidence has no probative value whatsoever and cannot be used to establish any fact, even in an administrative hearing." [80] "In the instant case, the only evidence presented was the hearsay statements of the other students. Since these statements have no probative value, the school system did not carry its burden of proof." [81] In *A.M. v. Forsyth Co. BOE* (SBE 2009-64), the school's evidence included the testimony of live witnesses and written statements submitted by other witnesses. Despite the presence of some live witnesses who were subject to cross-examination, the Board found that the student's due process rights were violated because the student did not have the opportunity to cross-examine the witnesses who submitted the written statements. [82]

2. Witnesses and Cross-Examination

At the hearing, all parties have the right to call witnesses and to cross-examine witnesses. [83] Failing to provide the student with an opportunity to call a witness, or to cross-examine the school's witness, has been found as a ground for reversal. [84]

Although witnesses are permitted, the school is not required to present a witness to meet its burden of proof that a violation occurred. [85]

School boards are required to issue subpoenas at the request of the student. [86] If the witness is a teacher, he or she must be given three days advance notice of the hearing.[87]

Excerpts from the policies of two school boards serve as examples:

> Witnesses may be requested and/or subpoenaed to testify at the hearing. Subpoenas for witnesses are obtained from the Office of Student Discipline and Behavioral Intervention. It is the responsibility of the student or parent/guardian to deliver subpoenas to the witnesses and arrange for their transportation to the hearing. [88]

> The administrator representing the school, the Board attorney, the student's representative, and the Hearing Officer are entitled to question witnesses about any matters which are relevant to the charges against the student or the appropriate discipline. [89]

The Court of Appeals of Georgia recently ruled that, while school boards have the power to issue subpoenas, they do not possess power to enforce the subpoenas. Accordingly, attendance by witnesses who have been served with a school board subpoena is not mandatory. [90]

3. Burden of Proof

The school has the burden of showing that the student violated one of its policies.[91] The school's burden is by a preponderance of evidence, i.e., that it is more likely than not that the student violated the policy.[92]

4. Participants

The student may be represented by an attorney who can present evidence on behalf of the student.[93] In general, most schools require advance notice if the student will be represented by an attorney. If an attorney represents the student, the school's attorney may present evidence on behalf of the school. The fact-finder (who renders a decision as to whether or not the school has met its burden) may be selected from a hearing officer, a tribunal or a panel. [94] The fact-finder serves as the presiding officer (akin to a judge) and will rule on issues of procedure and admissibility of evidence presented during the hearing. [95]

C. Co-Defendants: Separate Hearings

In Georgia's criminal courts, co-defendants are given the opportunity to seek separate trials. "A trial judge has discretion to grant severance based on the particular facts of the case and should do so whenever it appears necessary to guarantee the defendant a fair trial." [96] "Factors to be considered by the trial court are: whether a joint trial will create confusion of evidence and law; whether there is a danger that evidence implicating one defendant will be considered against a co-defendant despite limiting instructions; and whether the defendants are asserting antagonistic defenses." [97] Failure to grant severance can result in denial of due process.

Under the student codes of conduct providing for "group hearings," an administrator decides whether a group hearing may be conducted. [98] Depending on the specific county, the factors considered include the following:

1. Whether a single hearing will likely result in confusion; and

2. Whether a student will have his or her interests substantially prejudiced by a group hearing. [99]

In some cases, the code of conduct permits the person presiding over the hearing to order a separate hearing for a student if that student will be substantially prejudiced by the group hearing. In addition, some codes permit a student to object to participating in a group hearing in advance of the hearing.[100] At least one Georgia State Board of Education decision suggests that a student may object to the group hearing at the hearing itself. [101]

D. Timing of Written Decision and Appeal Right

After a disciplinary hearing pursuant to O.C.G.A. § 20-2-753, the student has the right to a written decision within 10 days of the close of the record. The disciplinary officer, panel, or tribunal conducting the hearing must base the decision solely on the evidence received at the hearing. [102] The written decision must be given to all parties and must notify the parties of their right to appeal. [103] The decision may then be appealed to the LBOE and is subject to modification by the LBOE. [104] The appeal to the LBOEs must be in writing and made within 20 days from the date the decision is rendered. [105] During this period, any disciplinary action imposed by the disciplinary officer, panel or tribunal may be suspended pending the outcome of the appeal by the school superintendent. [106]

After review of the record, the LBOE should render a decision in writing within 10 days (excluding weekends and public and legal holidays) from when the notice of appeal is received. [107] The decision should be based solely on the record and should be provided to all parties. The LBOE may take any action it deems appropriate, and any decision of the LBOE is final. A LBOE may not impose a punishment that is harsher than that imposed by the disciplinary tribunal without an explanation of the harsher punishment. [108] Imposing a harsher penalty without stating any reasons is a denial of due process.[109]

Within 30 days of the LBOE's decision, the decision can be appealed to the SBOE. [110] The appeal to the SBOE shall be filed with the local school superintendent. [111] 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 . . . ." [112] The appealing party must file with the appeal a transcript of the hearing, which is certified as correct and true. [113] The cost of the transcript shall be assumed by the party making the appeal. [114] 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." [115] Within 10 days of docketing, oral arguments must be requested. [116] 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. [117]

No new evidence shall be received by the SBOE. If an oral argument is granted, the appellant may be represented by counsel. [118] The SBOE may not consider any question not specifically raised in the written appeal or the statement of contentions. [119] 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.[120]

The SBOE shall issue its decision within twenty-five days after the hearing. [121] 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. [122]

If the Superior Court rules unfavorably, the decision may be reviewed by the Georgia Court of Appeals by filing an application for discretionary review. [123]

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. [124] 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.[125]

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. [126]

In *Stuart v. Nappi,* [127] 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. [128] 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. [129]

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. [130] 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). [131]

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. [132] 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. [133]

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. [134]

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. [135]

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. [136]

B. GaDOE Rule § 160-4-7-.10

Georgia's § 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. [137] 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. [138] 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. [139]

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.[140]

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 conduct code, 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. [141] 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. [142]

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. [143]

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. [144] This is done by filing a due process hearing request pursuant to Rule 160-4-7-.12. [145] An administrative law judge or hearing officer hears the facts and makes a determination regarding an appeal under the disagreement. [146] 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. [147] 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. [148]

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.[149] 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 wavier 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 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 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,[150] 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. [151] 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 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.[152] 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 potentially crippling loss of educational time. Representation in these proceedings can change or save a child's life.

End Notes

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

[2] *Id.* at 107.

[3] *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.

[4] 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.

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

[6] *Id.*

[7] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 (1973).

[8] 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).

[9] *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

[10] *See id.* at 574-76.

[11] *Id.*

[12] *Id.* at 579 (emphasis added).

[13] *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978) (quoting *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 314 (1950)).

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

[15] *D.B. v. Clarke Cnty. 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).

[16] *Goss v. Lopez*, 419 U.S. at 581 (1975).

[17] *Id.* at 582.

[18] *Id.*

[19] *Id.* at 582-83.

[20] *Id.* at 584.

[21] *Id.*

[22] C.B. *By and Through Breeding*, 82 F.3d at 386.

[23] *Gamble v. Ware Cnty. Board of Educ.*, 561 S.E.2d 837, 842 (Ga. Ct. App. 2002); see also *Wayne Cnty. 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).

[24] 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).

[25] *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 North Fort Myers Jr.-Sr. High School 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 Independent School Dist.*, 466 F.2d 1054, 1058 (5th Cir. 1972) ("Procedural due process must . . . be given prior to imposition of serious suspensions."); *Dixon v. Alabama 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 a hearing before a student at a tax-supported college is expelled for misconduct.").

[26] *Pervis*, 466 F.2d at 1058.

[27] *Id.*

[28] *Id.*

[29] Although Dixon involved an expulsion from a tax-supported college, its holding and analysis have been applied to expulsions from secondary school. *See Id.*

[30] *Dixon,* 294 F.2d at 158.

[31] *Id.*.

[32] *Id.* at 159.

[33] *Id.*

[34] *Id.*

[35] *Nash v. Auburn Univ.*, 812 F.2d 655, 663 (11th Cir. 1987).

[36] *Id.*

[37] *Id.* at 664.

[38] *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.").

[39] *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).

[40] *Id.* at 514.

[41] *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 271 (1988).

[42] *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

[43] *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

[44] *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

[45] *Id.* at 341.

[46] *Id.* at 341-42.

[47] *Skinner v. Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 624 (1989); see also *Thomas v. Roberts*, 261 F.3d 1160, 1167-68 (11th Cir. 2001).

[48] 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.").

[49] Young, 216 S.E.2d at 592.

[50] *Id.* at 592-93.

[51] *See In the Interest of T.A.G.*, 663 S.E.2d 392, 394-96 (2008); Young, 216 S.E.2d 592.

[52] *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).

[53] *Miranda*, 384 U.S. at 444; see also S*tate 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.").

[54] *T.A.G.*, 663 S.E.2d at 395.

[55] *See S.E. v. Gwinnett Cnty. Bd. of Educ.*, Case No. 2003-30 (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 Cnty. Bd. of Educ.*, Case No. 2003-24 ("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 Cnty. Bd. of Educ.,* Case No. 2002-25 ("... due 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.").

[56] *See M.S.*, Case No. 2002-25.

[57] See T.A.G., 663 S.E.2d at 394-96.

[58] *See Scott,* 524 U.S. at 363; *see also, Johnson,* 455 F.2d at 933.

[59] O.C.G.A. § 20-2-724(b)(1).

[60] *See Brisendine v. Henry Cnty. Bd. of Educ.*, Case No. 1978-36 (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).

[61] *Alabama v. Shelton*, 535 U.S. 654, 661-74 (2002).

[62] *See id.*; Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011).

[63] *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.

[64] O.C.G.A. § 20-2-753.

[65] O.C.G.A. § 20-2-754(b)(1).

[66] *Id.*

[67] *Id.; Harvey R. v. DeKalb Cnty. Bd. of Educ.*, Case No. 1986-38 (Ga. SBE, November 13, 1956) (notice delivered to parents home but placed in hands of student sufficient where parents are unable to show harm).

[68] *L.M. v. Gwinnett Cnty. Bd. of Educ.*, Case No. 2005-09 (Ga. SBE, December 2004) (notice complied with O.C.G.A. § 20-2-754(b)(1) and local board's policy by including statement of maximum penalty for alleged misconduct even though notice did not specifically state student could be subject to maximum penalty); see also SBOE Rule 160-1-3-.04(3)(a)(1) ("The LBOE shall notify the parties of the time and place of the hearing").

[69] V.*N. v. Pierce Cnty. Bd. of Educ.*, Case No. 2003-22 (Ga. SBE, March 2003) (notice sufficient in stating student charged with battery absent any other details of the battery where only one battery occurred and notice permitted student to present an effective defense against the charge); *Roshon E. v. Burke Cnty. Bd. of Educ.*, Case No. 1994-54 (Ga. SBE, November 10, 1994) (notice improper and local board's decision reversed where notice violated local board's policy requiring the notice to contain a description of the acts that allegedly violated the rules as well as a summary of the evidence to be used in support of the charges).

[70] O.C.G.A. § 20-2-754(b)(1).

[71] O.C.G.A. § 20-2-754(b)(3).

[72] This subpoena power originates from the provisions of O.C.G.A. § 20-2-1160 being made applicable to tribunal disciplinary proceedings. O.C.G.A. § 20-2-754(a). O.C.G.A. § 20-2-1160 provides that local boards shall constitute tribunals for hearing and determining any matter of local controversy in reference to the construction or administration of the school law.

[73] SBOE Rule 160-1-3.04(3)(a)(2).

[74] O.C.G.A. § 20-2-754(b)(4).

[75] *McIntosh v. Gordy*, 707 S.E.2d 609 (Ga. Ct. App. 2011) (while O.C.G.A. § 20-2-1160(a) provides that school boards have the "power to summon witnesses," the law contains no specific enforcement mechanism and no penalty for failure to comply with such a subpoena).

[76] See the discussion of this issue at pages 27-28 below.

[77] O.C.G.A. § 20-2-754(b)(2).

[78] O.C.G.A. § 20-2-754(b)(4).

[79] O.C.G.A. § 20-2-754(b)(5).

[80] *Z.B. v. Bartow Co. Bd. of Educ.*, Case No. 2008-44 (Ga. SBE, May 2008) (citing *McGahee v. Yamaha Motor Mfg. Corp.*, 448 S.E.2d 249 (Ga. Ct. App. 1994); *Finch v. Caldwell*, 273 S.E.2d 216 (Ga. Ct. App. 1980)).

[81] *Id.* (emphasis added).

[82] A.M. v. Forsyth Cnty. Bd. of Educ., Case No. 2009-64 (Ga. SBE, Sept. 2009) (citing Finch, 273 S.E.2d 216). Some earlier State Board decisions indicate that hearsay evidence is permissible and that cross-examination is not essential. E.g., *Harvey D. v. Raburn Co.* (SBE 1989-8), citing *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920 (6th Cir. 1988); *Chris V. v. DeKalb Cnty. Bd. of Educ.* (SBE 1986-13). However, it appears that these older cases have been overruled, at least implicitly, by a line of more recent cases cited in the text above holding that cross-examination is essential and that hearsay is impermissible.

[83] O.C.G.A. § 20-2-754(b)(3); SBOE Rule 160-1-3-.04(3).

[84] *See Forsyth Cnty. Bd. of Educ.* (SBE 2009-64) (discussed supra); Bartow Cnty. Bd. of Educ. (SBE 2008-44) (discussed supra); *J.G. v. Columbia Cnty. Bd. of Educ.*, Case No. 1996-40 (reversing the finding where the tribunal, for unexplained reasons, did not permit the student to call his only witness).

[85] *Shaun B. v. Douglas Cnty. Bd. of Educ.*, Case No. 1992-39.

[86] SBOE Rule 160-1-3-.04(3).

[87] SBOE Rule 160-4-8-.15; O.C.G.A. § 20-2-754(b)(4).

[88] Gwinnett County Public Schools, 2010-2011 Student/Parent Handbook, Grades 4-12, at p. 25 (describing participants at the hearing).

[89] Fulton County Schools' Operating Guidelines, Section J "Students," Part C "Student Code of Conduct" (May 20, 2011).

[90] *McIntosh v. Gordy,* supra, at footnote 75.

[91] *J.G. v. Columbia Cnty.*. BOE (SBE 1996-40) (school failed to carry burden); Harvey D. v. Rabun Co. Bd. of Educ., Case No. 1989-8 (disciplinary hearings need not follow stringent requirements of criminal proceedings).

[92] *D.G. v. Pickens Cnty. Bd. of Educ.* (SBE 2005-40) (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).

[93] O.C.G.A. § 20-2-754(b)(1) (requiring notice that all parties have the right "to be represented by legal counsel").

[94] O.C.G.A. § 20-2-752.

[95] Fulton County Schools' Operating Guidelines, Section J "Students," Part C "Student Code of Conduct" (May 20, 2011); Gwinnett County Public Schools, 2010-2011 Student/Parent Handbook, Grades 4-12, at p. 25 (describing participants at the hearing).

[96] *Ham v. State*, 692 S.E.2d 828 (Ga. Ct. App. 2010).

[97] *Rhodes v. State*, 619 S.E.2d 659 (Ga. Ct. App. 2005).

[98] *See* Fulton County Student Code of Conduct (2011-2012): http://portal.fultonschools.org/departments/Instruction/Support_Services/Documents/Student%20Discipline/ResponsibilityandHandbooks2011-2012/CodeofConductHandbook2011-2012-English-FINAL.pdf .

[99] *Id.; see also* Gwinnett County Student Code of Conduct (2011-2012): http://www.gwinnett.k12.ga.us/gcps-mainweb01.

[100] *Id.*

[101] *See* http://archives.gadoe.org/_documents/doe/legalservices/2008-33.pdf .

[102] O.C.G.A. § 20-2-754(c).

[103] SBOE Rule 160-1-3-.04(3); O.C.G.A. § 20-2-754(c).

[104] O.C.G.A. § 20-2-755.

[105] *Id.*

[106] Id.

[107] O.C.G.A. § 20-2-784(d).

[108] *B.J.D. v. Walker Cnty. Bd. of Educ.*, Case No. 2000-23; Chauncey Z. Cobb Cnty. Bd. of Educ., Case No. 1992-42.

[109] *See Georgia Real Estate Comm'n. v. Horne*, 233 S.E.2d 16 (Ga. Ct. App. 1977).

[110] O.C.G.A. § 20-2-1160.

[111] SBOE Rule 160-1-3-.04(d).

[112] O.C.G.A. § 20-2-1160(b).

[113] *Id.*

[114] SBOE Rule 160-1-3-.04.

[115] SBOE Rule 160-1-3-.04(f).

[116] SBOE Rule 160-1-3-.04(h).

[117] SBOE Rule 160-1-3-.04(g).

[118] SBOE Rule 160-1-3-.04(i).

[119] *Id.*

[120] *Ransum v. Chattooga Cnty. Bd. of Educ.*, 242 S.E.2d 374 (Ga. Ct. App. 1978); Antone v. Greene Cnty., Case No 1976-11.

[121] O.C.G.A. § 20-2-1160(c).

[122] *Id.*

[123] O.C.G.A. § 5-6-35(a)(1).

[124] 20 U.S.C.§ 1400 (d)(1)-(4).

[125] 20 U.S.C. § 1403(a).

[126] 20 U.S.C. § 1412(a)(5).

[127] *Stuart*, 443 F.Supp. 1235 (D. Conn. 1978).

[128] *Id.*

[129] *Id.*

[130] 20 U.S.C. § 1415(a).

[131] 20 U.S.C. § 1415(k)(1)(B).

[132] 20 U.S.C. § 1415(k)(1)(C).

[133] 20 U.S.C. § 1415(k)(1)(E).

[134] 20 U.S.C. §1415(k)(1)(F).

[135] 20 U.S.C. § 1415(k)(1)(G).

[136] 20 U.S.C. § 1415(k)(1)(H).

[137] GaDOE § 160-4-7-.10(1)(a).

[138] GaDOE § 160-4-7-.10(2)(a).

[139] GaDOE § 160-4-7-.10(2)(b).

[140] GaDOE § 160-4-7-.10(2)(d).

[141] GaDOE § 160-4-7-.10(3)(a).

[142] GaDOE § 160-4-7-.10(4)(a).

[143] GaDOE § 160-4-7-.10(6)(a).

[144] GaDOE § 160-4-7-.10(8)(a).

[145] *Id.*

[146] GaDOE § 160-4-7-.10(3)(a).

[147] GaDOE § 160-4-7-.10(8)(b).

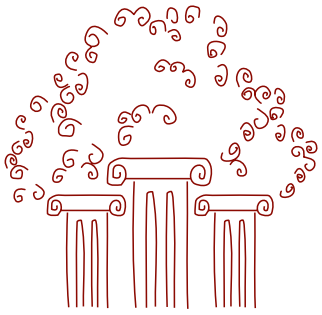
[148] GaDOE § 160-4-7-.10(9)(a).

[149] 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.

[150] See the discussion at pages 11-12 *supra*.

[151] 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.

[152] 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



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