

## SUSPENDING REASON: AN ANALYSIS OF GEORGIA'S OFF-CAMPUS SUSPENSION STATUTE

RANDEE J. WALDMAN\* AND STEPHEN M. REBA\*\*

I. Introduction .....	3
II. The Origins of O.C.G.A. § 20-2-751.5(c).....	5
A. School Discipline in a Historical Context .....	5
B. The Passage of O.C.G.A. § 20-2-751.5(c).....	9
III. Removal Should Be Disfavored as Policy.....	10
A. Removal from School is Developmentally Inappropriate .....	11
B. Removal from School is Ineffective in Improving School Discipline .....	15
C. The Negative Consequences of Suspension and Expulsion .....	18
D. The Impact of Removal on At-Risk Populations.....	20
1. Minorities: Focus on the Black Male.....	21
a. Black Males are Removed from School at Higher Rates than their Peers .....	21
b. Black Youth are Arrested at Higher Rates than their Peers .....	23
c. Implications of O.C.G.A. § 20-2-751.5(c) on Black Male Students in Georgia.....	24
2. Special Education.....	25
a. Students Requiring Special Education are Removed at Higher Rates than Non- Disabled Students .....	25

---

\* Clinical Instructor of Law and Director, Barton Juvenile Defender Clinic, Emory University School of Law; J.D., *with honors*, University of Chicago School of Law; B.A., Haverford College.

\*\* J.D. Candidate, May 2008, John Marshall Law School; B.A., Clemson University.

We would like to thank Kirsten Widner and Erika Palmer for their feedback.

b. Youth with Educational Disabilities are Arrested at Higher Rates than their Non-Disabled Peers. ....	27
c. Implications of O.C.G.A. § 20-2-751.5(c) on Students with Disabilities in Georgia .....	29
E. Georgia Should Recognize the Flaws in the Policy of Removal .....	29
IV. Legal Challenges to O.C.G.A. § 20-2-751.5(c).....	30
A. Individual District Codes of Conduct Exceed Statutory Authority .....	31
1. The Legislative Intent of O.C.G.A. § 20-2-751.5(c) .....	32
2. District Codes of Conduct Exceed Statutory Bounds .....	33
3. Off-Campus Behavior Being Punished.....	38
B. Application of the Void-for-Vagueness Doctrine to O.C.G.A. § 20-2-751.5(c).....	41
1. Void-for-Vagueness Challenges to Off-Campus Conduct Provisions in Other States .....	42
2. Application of the Void-for-Vagueness Doctrine to the Georgia Statute.....	46
a. Facial Challenge .....	47
b. As-Applied Challenge .....	49
V. Implications of O.C.G.A. § 20-2-751.5(c) on Georgia Students .....	51
A. Suspensions under O.C.G.A. § 20-2-751.5(c).....	51
1. Total Number of Students Suspended Under O.C.G.A. § 20-2-751.5(c).....	52
2. School District Usage of O.C.G.A. § 20-2-751.5(c)-Mandated Provision .....	52
3. Grade-Level Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions .....	53
4. Age Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions .....	54
5. Gender Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions .....	55
6. Racial Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions in Georgia.....	55
7. Racial Composition of O.C.G.A. § 20-2-	

No. 1]	<i>Suspending Reason</i>	3
	751.5(c)-Suspensions in Districts .....	56
	a. Gwinnett County School District.....	57
	b. DeKalb County School District.....	58
	c. Hall County School District.....	59
	d. Cobb County School District.....	60
	e. Muscogee County School District .....	60
	f. Atlanta Public Schools .....	61
	g. Bibb County School District.....	62
	8. Student Disability Composition of O.C.G.A.	
	§ 20-2-751.5(c)-Suspensions .....	62
	a. Georgia.....	63
	b. Reportable Districts .....	63
	9. Economic Composition of O.C.G.A. § 20-2-	
	751.5(c)-Suspensions.....	65
	a. Georgia.....	65
	b. Reportable Districts .....	65
	B. Expulsions under O.C.G.A. § 20-2-751.5(c) .....	67
VI.	Recommendations for Legislative Reform.....	67
	A. O.C.G.A. § 20-2-751.5(c) Should be Repealed.....	67
	B. At a Minimum, O.C.G.A. § 20-2-751.5(c)	
	Should be Limited in Scope and Application.....	68
	1. The Statute Should be Amended to Provide	
	Clear Parameters for Districts to Follow .....	68
	a. District Codes of Conduct Should Not	
	Exceed the Parameters Set forth in the	
	Statute .....	69
VII.	Conclusion .....	69

## I. INTRODUCTION

Four years ago, the Georgia Legislature passed a law intended as an emergency mechanism to allow schools to remove a student who had committed a felony off school grounds if the student's presence at school was a danger or disruption.<sup>1</sup> The result of this enactment has been the removal from school of over 1,300 Georgia students who are predominantly black, male, middle-school-aged, and socio-economically disadvantaged. Furthermore, the vast majority of

---

1. O.C.G.A. § 20-2-751.5(c) (2007); *see infra* Part II.B.

students removed under this law have not committed an act that could result in them being criminally charged with a felony.<sup>2</sup>

Prior to the enactment of O.C.G.A. § 20-2-751.5(c), the Georgia Code was silent with respect to a school's ability to discipline Georgia students for their off-campus behavior. The impetus for amending O.C.G.A. § 20-2-751.5(c) was a specific incident where a student shot and killed a classmate over the weekend.<sup>3</sup> When he returned to school on Monday, his presence caused an "uproar" in the building.<sup>4</sup> With the aim of addressing the same or similar incidents, the Legislature amended O.C.G.A. § 20-2-751.5(c) to enable schools to remove students for off-campus behavior "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 the school or which disrupts the educational process."<sup>5</sup>

While the Legislature intended this statute to be limited in scope and application, the data demonstrates a much broader use of the statute by several Georgia school districts. This Article examines how this broader application creates unintended consequences for students and their communities, and argues that O.C.G.A. § 20-2-751.5(c) should be repealed, or, in the alternative, amended to provide clearer parameters for school districts' codes of conduct.

Specifically, Part II of this Article places removal policies in context by providing a historical overview of education policies. Part II also reviews the legislative history of O.C.G.A. § 20-2-751.5(c).

Part III examines the implications of removal policies. It explains why removal should be disfavored and presents empirical research that demonstrates the effect of school removal on a student's life. Finally, it discusses the disproportionate effect of removal on two at-risk populations—minority students and students with disabilities.

---

2. Email from Pat Mills, Education Policy Analyst, Legal Services, Ga. Dept. of Educ., to Stephen M. Reba, Editor-in-Chief, John Marshall Law Journal (Oct. 11, 2007, 11:47:00 EST) (On file with the John Marshall Law Journal) [hereinafter *O.C.G.A. § 20-2-751.5(c) Open Records Request*].

3. See *infra* Part IV.B.2.a.

4. *Id.*

5. O.C.G.A. § 20-2-751.5(c).

Part IV discusses two possible legal challenges that can be brought against individual school districts for their implementation of O.C.G.A. § 20-2-751.5(c). First, many school districts have drafted their codes of conduct more broadly than the mandate provided by the authorizing statute. Accordingly, Part IV analyzes whether these districts have exceeded their statutory authority. Second, it considers whether O.C.G.A. § 20-2-751.5(c) is void for vagueness.

Part V looks closely at data obtained through an open records request to the Georgia Department of Education to see how Georgia's school districts are implementing O.C.G.A. § 20-2-751.5(c). This examination shows that students suspended pursuant to this statute are predominantly economically disadvantaged black males in middle school, and that students with disabilities are overrepresented in students suspended pursuant to this statute.

Part VI recommends legislative and district-level reforms and, finally, Part VII concludes the Article.

## II. THE ORIGINS OF O.C.G.A. § 20-2-751.5(C)

### *A. School Discipline in a Historical Context*

In recent years, the educational system's overall approach to discipline has become progressively more severe, especially since the implementation of zero tolerance policies in the 1990s.<sup>6</sup> The public schools of early America handled school

---

6. RUSSELL SKIBA ET AL., AM. PSYCHOLOGICAL ASS'N ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN OUR SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 2 (2006), available at <http://www.apa.org/ed/cpse/zttfreport.pdf> [hereinafter *Zero Tolerance Task Force Report*] (defining zero tolerance policies as a philosophy "that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the seriousness of behavior"). Commonly used zero tolerance policies remove students for any connectedness with: firearms, alcohol, drugs, violence, tobacco possession, and threats to school officials and school property. GALE M. MORRISON ET AL., *School expulsion as a process and an event: Before and after effects on children at risk for school discipline*, in NEW DIRECTIONS FOR YOUTH DEVELOPMENT 47 (Russell J. Skiba and Gil G. Noam eds., 2001).

discipline locally.<sup>7</sup> Dating back to the implementation of the first compulsory attendance laws and spanning all the way to the early twentieth century, schools punished students in the classroom.<sup>8</sup> As school populations grew, classroom punishment became less practical, and school administrators were forced to discipline students.<sup>9</sup> In the 1960s and the early 1970s, school administrators used out-of-school suspension and expulsion as quick-fix solutions in the face of rapidly increasing enrollment.<sup>10</sup> In the mid-1970s, however, there was a decrease in student-removal, and schools began to utilize in-school suspension as the primary disciplinary response to student behavior.<sup>11</sup> In-school suspension served more rehabilitative purposes by keeping the student in school and focusing on the student's behavioral issues while not losing valuable instructional time.<sup>12</sup>

Today, removal from school in the form of a suspension or expulsion is often the initial response to unwanted student behavior.<sup>13</sup> Zero tolerance policies, which require automatic suspension or expulsion for certain violations of school rules, have further contributed to rising suspension and expulsion rates.<sup>14</sup> Not only have the number of suspensions and

---

7. Marsha L. Levick, *Zero Tolerance: Mandatory Sentencing Meets the One Room Schoolhouse*, 8 KY. L.J. 2 (2000).

8. Irwin A. Hyman & Eileen McDowell, *An Overview*, in CORPORAL PUNISHMENT IN AMERICAN EDUCATION 4 (Irwin A. Hyman & James H. Wise eds., 1979); Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1044 (2001).

9. Hyman, *supra* note 8, at 4.

10. Troy Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140 (2000).

11. *Id.* This change came about in response to growing social pressure for more humane student disciplinary methods, and to court decisions affording students greater rights. *Id.*

12. Adams, *supra* note 10.

13. Liz Sullivan, *Reframing School Discipline through Human Rights Standards*, CHILD. RTS. LITIG. NEWSL. (Child. Rts. Litig. Committee, A.B.A.), Winter 2007, at 13.

14. The stories of those students whose behavior should not be punished, but are caught by the strict adherence to zero tolerance, are well documented. Ellen M. Boylan, *Advocating For Reform Of Zero Tolerance Student Discipline Policies: Lessons From the Field* (Educ. L. Center, N.Y.), 2002,

expulsions dramatically increased from the mid-seventies to the turn of the twenty-first century,<sup>15</sup> but many schools “have lowered their threshold for referring misbehaving students to law enforcement and the justice system.”<sup>16</sup>

Consequently, the educational and juvenile justice systems are, at times, difficult to distinguish.<sup>17</sup> Schools increasingly use

---

at 17-18. A twelve-year-old who brought a butter knife to school for dissection of a vegetable in science class was suspended and recommended for expulsion. *Id.* Another student was expelled after a bread knife was found in the bed of his pick-up truck, which was left there after the student had helped move his grandmother’s possessions. *Id.* An eight-year-old was suspended and recommended for expulsion when he mistakenly took his mother’s keychain to school, which had a nail-clipper on it. *Id.* Another eight-year-old was suspended after pointing a breaded chicken finger at a teacher and saying, “pow, pow, pow.” *Id.* These are just a small sampling of the many factually-similar cases which occur across the country each year. For more examples of stories with similar facts to those mentioned above, see *Zero Tolerance Task Force Report*, *supra* note 6, at 27-32.

15. *Schools and Suspensions: Self-Reported Crime and the Growing Use of Suspensions* (Just. Pol’y Inst., Wash. D.C.), Sept. 1, 2001, at 3 (“Between 1974 and 1998, the rate at which America’s students were suspended and expelled from schools has almost doubled from 3.7% of students in 1974 (1.7 million students suspended), to 6.8% of students in 1998 (3.2 million students suspended)); *Suspensions and Expulsions at a Glance*, IDEA, available at <http://idea.gseis.ucla.edu/publications/suspension/index.html> (In 2000, U.S. public schools handed out over three million suspensions and close to 100,000 expulsions).

16. *Zero Tolerance Task Force Report*, *supra* note 6, at 76.

17. There are also parallels between the development of the education and juvenile justice systems. Much like the education system, the juvenile justice system has grown increasingly more punitive over the years. The juvenile justice system in the United States was founded in recognition of the inherent differences between children and adults, and was firmly rooted in the ideal of rehabilitation. Laurence Steinberg & Robert G. Shwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL* 11, 12 (Thomas Grisso & Robert G. Schwartz eds., 2000). Juvenile courts clearly and intentionally distinguished themselves from adult courts and adult penal systems. The punishments of adult courts were discarded, and the focus was instead placed almost entirely on treatment and rehabilitation. RICHARD LAWRENCE, *SCHOOL CRIME AND JUVENILE JUSTICE* 32 (2007). The rehabilitative purpose of the system faced challenges in the 1960s as criticism of the juvenile justice system’s perceived failure to actually rehabilitate youth rose. LAWRENCE, at 34-35; Richard E. Redding et al., *Juvenile Delinquency Past and Present*, in *JUVENILE DELINQUENCY: PREVENTION, ASSESSMENT, AND INTERVENTION* 9 (Kirk Heilbrun, Naomi E.

police officers, metal detectors, and other aggressive safety policies to manage day-to-day disciplinary problems.<sup>18</sup> Students are frequently arrested in school for infractions that had traditionally been considered matters of school discipline, leading certain commentators to criticize the “criminalization” of school discipline policies.<sup>19</sup>

As schools become more enmeshed with the juvenile and criminal justice systems, those systems likewise are becoming more intimately connected with the school system. Motivated largely by concerns for school safety, many states now permit or require courts and/or law enforcement agencies to provide information to schools upon arrest, conviction, or adjudication.<sup>20</sup> For example, juvenile courts in Georgia are mandated to notify schools when a student is adjudicated delinquent for a second time, or when a student is adjudicated delinquent of a designated felony.<sup>21</sup> It is within this

---

Sevin Goldstein, & Richard E. Redding eds., 2007). Additionally, the Supreme Court’s 1967 decision in *In re Gault* to require many of the procedural protections of the adult criminal system in juvenile court signaled an “adultification” of the juvenile justice system. *In re Gault*, 387 U.S. 1 (1967); Steinberg & Shwartz, at 13; see also Elizabeth Scott, *Criminal Responsibilities in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL* 291, 296 (Thomas Grisso & Robert G. Schwartz eds., 2000). However, *Gault* did not completely remove the system from its rehabilitative roots. The true uprooting occurred in the 1990s, when nearly every state drastically amended its juvenile code, in what some described as a response to a rise in violent youth crime. Steinberg & Shwartz, at 14; see also LAWRENCE, at 39-40. Specific changes included: expanding opportunities to transfer juveniles to adult court, sentencing youth to adult correctional facilities, and limiting confidentiality protections. LAWRENCE, at 39-40.

18. Sullivan, *supra* note 13, at 15.

19. Sarah Biehl, *CRLC Subcommittee on Education Tackles School Discipline Reform*, CHILD. RTS. LITIG. NEWSL. (Child. Rts. Litig. Committee, A.B.A), Spring 2006, at 9.

20. See Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?* 79 N.Y.U. L. REV. 520 (2004).

21. O.C.G.A. § 15-11-80 (2007) (“Within 30 days of any proceeding in which a child is adjudicated delinquent for a second or subsequent time or any adjudicatory proceeding involving a designated felony, the court shall provide written notice to the school superintendent or his or her designee of the school in which such child is enrolled. . .Such notice shall include the specific delinquent act or designated felony act that such child committed.”).

environment that we examine the implications of O.C.G.A. § 20-2-751.5(c) on Georgia's students.

*B. The Passage of O.C.G.A. § 20-2-751.5(c)*

Georgia, like other states, has adopted more aggressive school discipline policies over the last twenty years.<sup>22</sup> While some of this has occurred at the local school district level, the Georgia General Assembly has enacted a number of statutes requiring districts to adopt specific policies.<sup>23</sup> One of these statutes was House Bill 1190, which passed in the 2003-2004 legislative session and was subsequently signed into law by the Governor.<sup>24</sup> Although the primary focus of the Bill was the regulation of student driver licenses, the section mandating the contents of local school district student codes of conduct was also amended.<sup>25</sup> This amendment created the current version of O.C.G.A. § 20-2-751.5(c), which reads:

Each student code of conduct shall also 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 the school or which disrupts the educational process.<sup>26</sup>

This language originated in Senate Bill 428, which was later added to House Bill 1190.<sup>27</sup> Senator Joey Brush, a sponsor of the original bill, expressed the reasoning behind the language in

---

22. Most Georgia school districts have adopted some form of zero tolerance policy. See *Complete File of Accessible School District Codes of Conduct* (on file with the John Marshall Law Journal).

23. For example, in 1995 the General Assembly enacted O.C.G.A. § 20-2-751.1 which requires school districts to adopt policies requiring "the expulsion from school for a period of not less than one calendar year of any student who is determined... to have brought a weapon to school."

24. Jennifer Evans, Legislative History, *Education*, 21 GA. ST. U. L. REV. GEORGIA STATE PEACH SHEETS, HB 1190, Jennifer Evans (2004), available at [http://law.gsu.edu/lawreview/index/archives/show/?art=21-1/21-1\\_Education\\_Evans.htm](http://law.gsu.edu/lawreview/index/archives/show/?art=21-1/21-1_Education_Evans.htm) (last visited Mar. 31, 2008).

25. *Id.*

26. O.C.G.A. § 20-2-751.5(c).

27. Evans, *supra* note 24.

floor debate.<sup>28</sup> Senator Brush explained that the impetus of the legislation was an incident that occurred while he was working at the Georgia Department of Education, when a student had shot and killed another student over the weekend during a game of Russian roulette.<sup>29</sup> The Senator, while answering questions from his colleagues concerned with the breadth of the language, reiterated that O.C.G.A. § 20-2-751.5(c) was intended to be an emergency mechanism for schools to use in very limited situations.<sup>30</sup>

Since O.C.G.A. § 20-2-751.5(c) was first implemented in 2004, 1,332 students have been removed from school. Later, in Part IV, we will examine the legality of these removals. In the following section, however, we look at the policy implications of removing students from school, and examine four problematic aspects of removal policies more generally, using current educational and neuropsychological research as our guide.

### III. REMOVAL SHOULD BE DISFAVORED AS POLICY

Removal from school, for lengthening stretches of time, is becoming an increasingly common response to disruptive but usually normal student behavior. Although this Article intentionally focuses on a specific provision of Georgia law that permits removal from school for certain off-campus behavior, a broader examination of removal policies is needed. The aim of this Part, however, is not to examine those policies intensively, but to provide perspective on the implications of O.C.G.A. § 20-2-751.5(c) by addressing four problematic aspects of school removal, namely that removal from school: (A) is developmentally inappropriate; (B) does not serve its intended purposes; (C) has negative consequences on suspended students' educational outcomes and future opportunities; and D) disproportionately affects already at-risk populations.

---

28. *See supra* Part II.B; *see infra* Part IV.A.1.

29. Video Recording of Sen. Proceedings, Feb. 3, 2004 (remarks by Sen. Brush), *available at* [http://www.georgia.gov/00/channel\\_title/0,2094,4802\\_6107103,00.html](http://www.georgia.gov/00/channel_title/0,2094,4802_6107103,00.html) [hereinafter *Senate Proceedings*].

30. *Id.*

*A. Removal from School is Developmentally Inappropriate*

Research on adolescent development sheds light on the behavioral tendencies of youth and can provide direction as to how our educational and juvenile justice systems should respond to those tendencies. Many studies show that by the age of sixteen, adolescents' cognitive abilities—their intelligence or ability to reason—closely mirror that of adults.<sup>31</sup> However, adolescence is also a time when young people are still learning to modulate their impulses, regulate their emotions, delay short-term gratification, and understand the long-term consequences of their behavior. Adolescents also tend to be more susceptible to peer influence and dependent on peer approval than adults.<sup>32</sup>

While adolescent behavior has long been the subject of study, recent breakthroughs in brain science have corroborated some earlier findings. Recent research demonstrates that the portion of the brain that controls decision-making abilities is the last portion to fully develop.<sup>33</sup> Developmental neuroscientists, using magnetic resonance imaging to study the brains of a large sample of children, discovered that two portions of the brain—the frontal lobe and the prefrontal cortex—continue to grow and develop through the early twenties.<sup>34</sup> The frontal lobe is the

---

31. MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, Issue Brief 3: *Less Guilty by Reason of Adolescence*, available at [http://www.adjj.org/downloads/6093issue\\_brief\\_3.pdf](http://www.adjj.org/downloads/6093issue_brief_3.pdf); Scott, *supra* note 27, at 297-307 (discussing adolescent and adult similarities and differences).

32. MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, *Development and Criminal Blameworthiness*, available at <http://www.adjj.org/downloads/3030PPT%20Adolescent%20Development%20and%20Criminal%20Blameworthiness.pdf>; AMERICAN BAR ASSOCIATION, et al, Understanding Adolescents, A Juvenile Court Training Curriculum, "Kids are Different: How Knowledge of Adolescent Development Theory can Aid Decision-Making in Court, available at <http://www.adjj.org/downloads/3030PPT%20Adolescent%20Development%20and%20Criminal%20Blameworthiness.pdf> [hereinafter *Kids are Different*]; Margo Gardner & Laurence Steinberg, *Peer Influence on Risk-Taking, Risk Preference, and Risky Decision-Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOL. 625, 635 (2005).

33. E. Sowell et al., *Development of cortical and subcortical brain structures in childhood and adolescence: A structural MRI study*. 44 DEV. MED. & CHILD. NEUROL. 1, 4-16 (2002).

34. *Id.*; *Teenage Brain: A work in progress*, (Nat'l Inst. of Mental Health,

part of the brain that controls the decision-making process, including long-term planning, risk assessment, and impulse control.<sup>35</sup> The prefrontal cortex is responsible for cognitive processing, problem solving and emotional control.<sup>36</sup> Thus, adolescents may take more risks than adults and fail to reason about the consequences of their actions at least partly because key areas of their brains are still developing.<sup>37</sup> This “may help to explain certain teenage behavior that adults can find mystifying, such as poor decision-making, recklessness, and emotional outbursts.”<sup>38</sup>

While not desirable, much of the behavior exhibited by delinquent adolescents is also not abnormal.<sup>39</sup> Experimenting with drugs, shoplifting, skipping school, and staying out late are common adolescent behaviors.<sup>40</sup> Moreover, serious delinquent behavior is normal among a large portion of youth. One study found that “serious delinquent behavior is a part of growing up for one-quarter to one-third of all youth,” regardless of race.<sup>41</sup> Though such behavior should not be condoned as acceptable, responding with services that help adolescents identify errors, recognize options, and make better choices is more

---

2001) available at <http://www.nimh.nih.gov/health/publications/teenage-brain-a-work-in-progress.shtml> [hereinafter *Teenage Brain*]; Jeffrey Fagan, *Adolescents, Maturity And The Law*, AM. PROSPECT, Aug. 14, 2005, available at [http://www.prospect.org/cs/articles?article=adolescents\\_maturity\\_and\\_the\\_law](http://www.prospect.org/cs/articles?article=adolescents_maturity_and_the_law).

35. Fagan, *supra* note 34.

36. *Teenage Brain*, *supra* note 34.

37. Research on brain development during adolescence highlights the instability of behavior that has a biological base and the relevance of that instability for judgments of blameworthiness. As developmental neuroscientist Jay Giedd stated: “it’s sort of unfair to expect adolescents to have adult levels of organizational skills or decision making before their brain is finished being built.” *Zero Tolerance Task Force*, *supra* note 6, at 69 (citing Dr. Jay Geidd on the Public Broadcasting Service’s program, *Frontline*, in 2002).

38. *Facts and Findings*, (Assets Coming Together for Youth), May, 2002, available at <http://www.actforyouth.net/documents/may02factsheetadolbraindev.pdf>.

39. *Kids are Different*, *supra* note 34, at 5.

40. *Id.*

41. Ellen Hinton Hoytt et al., *Pathways to Juvenile Detention Reform: Reducing Racial Disparities in Juvenile Detention*, in PATHWAYS TO JUVENILE JUSTICE REFORM 1, 21 (2001).

developmentally appropriate than a purely punitive response.<sup>42</sup>

The U.S. Supreme Court recognized the limitations on a purely punitive approach to adolescent offenses in 2005 when it abolished the death penalty for those between the ages of sixteen and eighteen.<sup>43</sup> In declaring that juveniles could not be classified among the worst offenders, the Court identified three primary differences between juveniles and adults. First, a juvenile's lack of maturity and underdeveloped sense of responsibility often result in "impetuous and ill-considered actions and decisions."<sup>44</sup> Second, the Court noted that juveniles are more susceptible to negative influences and outside pressures.<sup>45</sup> Finally, the Court recognized that the character of a juvenile is not as well formed as that of an adult.<sup>46</sup>

Research regarding adolescent development should guide not only our juvenile justice policies, but also our policies in the educational setting. Schools should acknowledge that their students' judgment is still developing and treat misbehavior as part of the learning process. Instead of removing students, schools should implement programs designed to train adolescents' still-developing brains to make good decisions. For example, recent attention has been paid to the concept of school-wide positive behavioral interventions and support.<sup>47</sup> One study that focused on positive behavior support studied a group of schools from around the country, including Oakhurst

---

42. See *Kids are Different*, *supra* note 34, at 5.

43. *Roper v. Simmons*, 543 U.S. 551 (2005). In *Roper*, the Supreme Court reversed the 1989 decision of *Stanford v. Kentucky*, 492 U.S. 361 (1989), which rejected a Constitutional bar on capital punishment for juvenile offenders under the age of eighteen. Previously, in *Thompson v. Oklahoma*, 487 U.S. 815, 818-38 (1988), the Court barred capital punishment for those juveniles fifteen years-old and younger.

44. *Roper*, 543 U.S. at 569 (internal citations omitted).

45. *Id.*

46. *Id.* at 570.

47. Schools implementing a system of School-Wide Positive Behavior Support seek to achieve the reduction in problem behavior and enhanced learning environments through an emphasis on school-wide systems of support that include proactive strategies for defining, teaching and supporting appropriate student behaviors. Positive Behavior Intervention Systems, *OSEP Technical Assistance Center on Positive Behavioral Interventions and Supports*, <http://www.pbis.org>.

Elementary in Decatur, Georgia.<sup>48</sup> Oakhurst Elementary has implemented a three-level approach to positive behavior support.<sup>49</sup> The base level seeks to provide a school-wide foundation by involving students, staff, and families in school activities.<sup>50</sup> Drawing largely upon this solid base, the second level focuses on early intervention, where at-risk factors are addressed with protective measures.<sup>51</sup> When early intervention techniques are insufficient, the third level, which consists of intensive intervention, is utilized.<sup>52</sup> Under this approach, the staff of Oakhurst Elementary work hard to build relationships with families, so they can detect problems as soon as possible.<sup>53</sup> The method has produced a school where “students and parents are made to feel welcome and special,” and instead of suspending a student, the school administration will often drive the student home and discuss the problem with the parent.<sup>54</sup>

Another interesting approach to discipline that is taking hold in a small number of communities is the reformation of destructive discipline through international human rights standards.<sup>55</sup> The central theme of this approach is that the child’s dignity must be protected, and discipline should be implemented as a form of growth.<sup>56</sup> Policies and practices that do not support a child’s development or which undermine the child’s dignity are seen as inconsistent with the child’s human rights. Disciplinary action must be nondiscriminatory, and promote students’ confidence and self-expression, while fostering a safe and supportive learning environment.<sup>57</sup> Rather than utilizing removal policies, schools should utilize a human rights framework, where students and parents help shape disciplinary policies, and the focus is on prevention, supporting

---

48. DAVID M. OSHER ET AL., *The best approach to safety is to fix schools and support children and staff*, in NEW DIRECTIONS FOR YOUTH DEVELOPMENT 127, 128, 135 (Russell J. Skiba and Gil G. Noam eds., 2001).

49. *Id.*

50. *Id.* at 131.

51. *Id.*

52. *Id.*

53. *Id.* at 137.

54. *Id.* at 133, 137.

55. Sullivan, *supra* note 13, at 13.

56. *Id.*

57. *Id.*

positive behavior, counseling, and mediation.<sup>58</sup>

*B. Removal from School is Ineffective in Improving School Discipline*

Schools have limited resources with which to educate their students and maintain a safe environment. When a child is disruptive and occupies more of a teacher's scarce time and attention, or when the child may pose a risk to others, it is perhaps unsurprising that the preferred method of discipline is exclusion from school through suspension or expulsion.<sup>59</sup>

Accountability has become a guiding principle of educational policy and its disciplinary counterpart is zero tolerance.<sup>60</sup> Proponents of zero tolerance argue that these rigid policies allow schools to focus fewer resources on disruptive students, leaving more resources for students who remain in the classroom and creating a better learning environment.<sup>61</sup> Supporters of zero tolerance policies also contend that strict rules show students that schools are serious about discipline, and that disciplined students will be dissuaded from engaging in prohibited behavior again.<sup>62</sup> Most importantly, proponents of zero tolerance claim that strict policies ensure safer schools.<sup>63</sup>

The American Psychological Association created a Zero Tolerance Task Force to examine the effectiveness of these policies.<sup>64</sup> The Task Force holistically examined the use of zero

---

58. *Id.* at 16.

59. See GALE M. MORRISON ET AL., *supra* note 6, at 45. More cynical commentators take the position that "zero tolerance policies provide administrators with an easy way to remove low-scoring students." Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191, 209 (2002).

60. *Zero Tolerance Task Force Report*, *supra* note 6, at 2.

61. *Id.* at 22.

62. RUSSELL SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 8-9 (2000).

63. *Id.* As demonstrated below, and mentioned by Dr. Skiba, there are very few studies that have examined the outcomes of security measures. *Id.* at 17. However, the most extensive of those studies show a "negative relationship between school security measures and school safety," and none of them show a positive correlation. *Id.*

64. *Zero Tolerance Task Force Report*, *supra* note 6, at 2. The APA's Council of Commissioners commissioned the Zero Tolerance Task Force, comprised of the authors of the Report, to study the effects of zero tolerance

tolerance policies over more than a decade, focusing on its effectiveness in achieving its goals of safety, deterrence, and more stable learning environments.<sup>65</sup> The Task Force released its comprehensive report in 2006, noting, “[i]t seems intuitive that removing disruptive students from school will make schools better places for those students who remain, or that severe punishment would improve the behavior of the punished student. . .but the available evidence consistently flies in the face of these beliefs.”<sup>66</sup>

The Task Force concluded that schools are not any safer now than they were before the implementation of zero tolerance policies.<sup>67</sup> Their report found that while violence in school is an issue of serious importance, contrary to popular belief, it is not “out-of-control.”<sup>68</sup> It found that zero tolerance policies have not increased the consistency of application of discipline in school.<sup>69</sup> More importantly, schools with higher rates of removal were not safer; they often focused an inordinate amount of time on disciplining students and had below average ratings for school climate and school governance.<sup>70</sup> Furthermore, zero tolerance policies not only failed to deter students from misbehaving, those who were punished were more likely to offend again.<sup>71</sup> Essentially, the Report rejected

---

policies on students. *Id.*

65. *Id.*

66. *Id.* at 113. In addressing the issue of increased school safety, the Task Force addressed each of the five key assumptions (or beliefs) of zero tolerance: school violence is at serious levels; zero tolerance increases the consistency of punishment; removal provides a more conducive environment of learning for the students who remain; zero tolerance has a deterrent effect; and parents overwhelmingly support zero tolerance policies. *Id.* at 3, 6, 7, 8, 10.

67. *Id.* at 112.

68. *Id.* at 37, 38.

69. *Id.* at 40.

70. *Id.* at 47. The Task Force also found that the implementation of zero tolerance policies has increased referrals to the juvenile justice system for behaviors that used to be handled at school. *Id.* at 76.

71. *Id.* at 50. Although removal from school has been shown to be a highly negative action with ample alternatives that can both aid and teach a child, suspension and expulsion rates soar. MORRISON ET AL., *supra* note 6, at 49. Many argue that this upward trend in the number of suspensions and expulsions is itself proof of the ineffectiveness of removal as a method of

all rationale for the implementation of zero tolerance policies, and concluded by stating, “[i]t is time to make the shifts in policy, practice, and research to implement policies that can keep schools safe *and* preserve the opportunity to learn for all students.”<sup>72</sup>

Although these findings focused on zero tolerance policies, the authors’ conclusions are applicable to the function of O.C.G.A. § 20-2-751.5(c), and removals in general. The authors of the report acknowledge the rather fluid definition of what constitutes a zero tolerance policy;<sup>73</sup> and while the Georgia statute would not fall into that definition, the purpose and effect of both zero tolerance policies and O.C.G.A. § 20-2-751.5(c) are similar. Both policies have a core goal of increasing school safety, and both attempt to achieve that goal through sweeping measures that require little nexus to specific safety concerns. That is, zero tolerance policies do not look at factors other than the rule violation to determine whether a child is dangerous, and O.C.G.A. § 20-2-751.5(c) does not require any particular behavior at school.

Virtually every study that has closely examined removal

---

dissuasion. Tara M. Brown, *Lost and Turned Out: Academic, Social, and Emotional Experiences of Students Excluded From School*, 42 URB. EDUC. 432, 435 (2007); *see also*, Douglas C. Breumlin et al., *Conflict Resolution Training as an Alternative to Suspension for Violent Behavior*, 95 J. EDUC. RES. 349 (2002) (discussing that evidence in support of this view is the fact that “40% of school suspensions are due to repeat offenders.”).

72. *Zero Tolerance Task Force Report*, *supra* note 6, at 114. The APA, based on the findings of the report, recommended the following changes: “Allow more flexibility with discipline and rely more on teachers’ and administrators’ expertise within their own school buildings; have teachers and other professional staff be the first point of contact regarding discipline incidents; use zero tolerance disciplinary removals for only the most serious and severe disruptive behaviors; replace one-size-fits all discipline; gear the discipline to the seriousness of the infraction; require school police and related security officers to have training in adolescent development; attempt to reconnect alienated youth or students who are at-risk for behavior problems or violence. use threat assessment procedures to identify those at risk; develop effective alternatives for learning for those students whose behavior threatens the discipline or safety of the school that result in keeping offenders in the educational system, but also keep other students and teachers safe.” APA Press Release, *available at* [http://www.apa.org/releases/zero\\_tolerance.html](http://www.apa.org/releases/zero_tolerance.html).

73. *Zero Tolerance Task Force Report*, *supra* note 6, at 2-3.

practices has found that suspension and expulsion are simply not serving their intended purpose. The authors of one such study concluded with this powerful language:

Schools can be lifelines . . . opportunities which potentially lead from pathways associated with deviant or destructive outcomes . . . The schools we studied explode the myth that it is necessary to chose between harsh discipline of students and safe, academically productive schools. Their staff demonstrates that it is possible to create schools for all students that are humane, caring places where discipline issues are minimal and when they do arise are viewed as opportunities that can contribute to growth and development.<sup>74</sup>

Removal not only fails to ensure school safety, to dissuade students from offending, and to promote a stable learning environment, it may also have devastating consequences on the removed student's life.

### *C. The Negative Consequences of Suspension and Expulsion*

Removal from school has numerous negative consequences for the student, including loss of classroom instruction time, reduced academic achievement, social stigma, and emotional impact.<sup>75</sup> The overarching problem is the loss of instructional time.<sup>76</sup> Not only is the student excluded for the actual allotted time of his or her sentence, but significant time is lost in awaiting a hearing or by delays in readmission to school.<sup>77</sup> The

---

74. DAVID M. OSHER ET AL., *supra* note 88, at 149 (citing ROBERT B. CAIRNS & BEVERLY D. CAIRNS, *LIFELINES AND RISKS: PATHWAYS OF YOUTH IN OUR TIME* (Cambridge University Press. 1994)).

75. Brown, *supra* note 71, at 443.

76. *Id.* As an example of lost instructional time, Ellen M. Boylan discussed a case she worked on in New Jersey where a youth was expelled, only to be placed back in school twenty-two months later, after appealing the decision. Boylan, *supra* note 14, at 17-18. Boylan reported that the majority of the time, he received no educational services whatsoever. *Id.* In another case, a student was expelled from school after altering a computer shut-down screen. *Id.* at 4. Before an appeal was successful and the student was reinstated, the student was out of school for a year and a half. *Id.* at 5. In both cases, the students suffered emotional distress including distrust, anger, depression, and difficulty in understanding why they were considered so menacing. *Id.* at 8, 17.

77. Brown, *supra* note 71, at 438.

loss in instructional time is of particular concern in Georgia, where school districts are not mandated to provide alternative instruction for suspended or expelled students.<sup>78</sup>

Missed school time detrimentally impacts students' adjustment to school and their academic progress.<sup>79</sup> Student-respondents, in a study conducted by Tara Brown, reported that they felt far behind, and that they missed valuable information.<sup>80</sup> Overall, there was a sense of dejection over the time missed among the students.<sup>81</sup> Though Brown's study was conducted on a small scale,<sup>82</sup> this finding seems to dispel the notion that all students who are suspended or expelled do not want to learn.<sup>83</sup> Brown also found that prolonged absence from school seemed to erase any hope these students had that education could be a path to success.<sup>84</sup>

The student's loss in instructional time is only one of the negative consequences of suspension or expulsion. A suspension or expulsion significantly increases the likelihood that a student will suffer permanent educational loss, because removed students are more likely to drop out of school.<sup>85</sup> When

---

78. *See* D.B. v. Clark County Bd. of Educ., 469 S.E.2d 438 (Ga. Ct. App. 1996).

79. Brown, *supra* note 71, at 443-45. Brown found that time missed "wreak[ed] havoc on students' academic progress." *Id.* at 445.

80. *Id.* at 445-46.

81. *Id.*

82. Brown studied thirty-seven students who had been suspended or expelled. *Id.* at 432.

83. *Id.* at 433. Many of Brown's students made comments about lost time in terms of missed opportunities or missed learning experience. *Id.* Furthermore, they seemed to demonstrate concern over lost time they could have spent in the class room. *Id.* at 445-46.

84. *Id.* at 450. Brown found in the students her study focused on that, "...school exclusion fostered distrust of both school adults and disciplinary procedures and contributed to perceptions of school as a place where they would be neither cared for nor treated fairly...Students with high numbers of suspensions were most likely to feel that they did not have good relationships with teachers and that staff did not care about their well being." *Id.*

85. MORRISON ET AL., *supra* note 6, at 57. States have studied the relationship between removal and drop-out, finding a strong correlation. *See, e.g.*, Wisconsin Department of Public Instruction, Indicator # 4, available at <http://dpi.state.wi.us/sped/spp-susp-exp.html>; *see also* North Carolina, Recommendation from the Drop-out, Suspension, and Expulsion Committee, available at <http://dpi.state.wi.us/sped/spp-susp-exp.html>. In an

youth are not in a school setting, dangerous behaviors such as fighting, smoking, drinking, drug use, and criminal activity increase dramatically.<sup>86</sup> Moreover, children who are not in school are more likely to enter the juvenile justice system.<sup>87</sup>

As removed students are more likely to drop out of school, they are less likely to earn a high school diploma, which has serious consequences in today's society.<sup>88</sup> Studies show that those "with no post-secondary schooling face a bleak economic future."<sup>89</sup> The average annual salary for high-school dropouts is \$17,299, while those with a high school diploma average \$26,933, those with an associate degree average \$36,645, and those with a bachelor degree average \$52,671.<sup>90</sup> Thus, removing a student from school has both an immediate consequence on the student's loss of education and can have a dramatic limiting effect on the remainder of the student's life.

#### *D. The Impact of Removal on At-Risk Populations*

The consequences of suspension and expulsion can be devastating, and their effects are intensified when they fall on children who are already at risk. A uniform definition of "at risk" in the educational setting is difficult to find. However, a student is generally at risk because factors that are beyond the student's control, such as poverty, parental absence, or

---

attempt to lower drop-out rates, these states have proactively tried to reduce suspension and expulsion rates.

86. *School Suspension: Effects and Alternatives*, ISSUE BRIEF (Advocates for Children & Youth), Apr., 2006, at 2.

87. *Abandoned in the Back Row: New Lessons in Education and Delinquency Prevention*, ANNUAL REPORT (Coalition for Juvenile Justice), 2001, at 1. Also, once a youth identifies with a "deviant peer group, they have a 70% chance of felony arrest in two years." *School Suspension: Effects and Alternatives*, ISSUE BRIEF (Advocates for Children & Youth), Apr., 2006, at 2.

88. ANDREW SUM ET AL., *The Educational Attainment of the Nation's Young Black Men and Their Recent Labor Market Experiences: What Can Be Done to Improve Their Future Labor Market and Educational Prospects* 2 (2007).

89. *Id.* at 2, 4.

90. *The High Cost of High School Dropouts, What the Nation Pays for Inadequate High Schools*, ISSUE BRIEF (Alliance for Excellent Educ., Wash. D.C.), Oct. 2007, at 1.

disability, have decreased the student's likelihood of success.<sup>91</sup> Essentially, the at-risk student has obstacles in his or her path that a student without one or more of those factors does not have to overcome.

This section focuses on two specific at-risk populations and their disproportionate representation among removals and arrests: (1) black male students and (2) students with disabilities.<sup>92</sup> Because these student populations are more likely to be removed from school and more likely to be arrested than other students, we would also expect them to be far more likely to suffer the negative consequences of O.C.G.A. § 20-2-751.5(c). Data collected over the last four years on the implementation of the statute bears this out.

### *1. Minorities: Focus on the Black Male*

#### *a. Black Males are Removed from School at Higher Rates than their Peers*

Over three million youth are suspended or expelled from this nation's public schools in an academic year, and they are disproportionately black or Latino, poor and male.<sup>93</sup> Although black students only made up 17% of the enrollment in public schools in 2000, they comprised 33% of the total suspensions; white students made up 63% of the student enrollment, but only comprised 53% of the total suspension.<sup>94</sup>

Furthermore, there is a difference in behaviors reported and

---

91. See, e.g., The National At-Risk Education Network, *available at* <http://www.atriskeducation.net/about/index.html#definition>.

92. Statistically, black males and students with disabilities are among those least likely to experience educational success. See GAIL L. THOMPSON, WHAT AFRICAN AMERICAN PARENTS WANT EDUCATORS TO KNOW 14 (2003); see also Coalition for Juvenile Justice, *Abandoned in the Backrow: New Lessons in Education and Delinquency Prevention*, 2001 Annual Report, *available at* [http://www.juvjustice.org/media/resources/resource\\_22.pdf](http://www.juvjustice.org/media/resources/resource_22.pdf) [hereinafter *CJJ Report*].

93. Brown, *supra* note 71, at 433; Zweifler & De Beers, *supra* note 59, at 204; UCLA-IDEA, *Suspensions and Expulsions At-A-Glance*, <http://idea.gseis.ucla.edu/publications/suspension/index.html> [hereinafter *Suspensions and Expulsions At-A-Glance*].

94. *Suspensions and Expulsions At-A-Glance*, *supra* note 93.

the frequency of reports made.<sup>95</sup> Black students are referred to the school office twice as often as white students, and referred for less serious behavior.<sup>96</sup> The descriptions used for black students' rule-violations are vague terms such as loitering, disrespect, and conduct interference.<sup>97</sup> White students' violations are described more specifically, such as "smoking, endangering, obscene language, vandalism, and drugs/alcoholism."<sup>98</sup> Thus, standards of conduct leading to the suspension of black students are more subjective, and some suggest they are also culturally biased.<sup>99</sup>

While there is no specific study that links the disparate removal of black students from school to cultural bias, studies of cultural stereotypes show that respondents still associate black males "with hostility, aggressiveness, violence, and danger," despite the fact that privately held beliefs have grown increasingly positive in recent times.<sup>100</sup> Moreover, certain researchers believe that this racial disparity in students who are removed is not the result of obvious breaches of school rules but breaches of "implicit racial codes."<sup>101</sup>

Whatever the impetus, black students are suspended and expelled at a much higher rate than their white peers.

---

95. Zweifler & De Beers, *supra* note 59, at 204 (citing Dr. Russell Skiba, *Zero Tolerance: Issues of Equity and Effectiveness*, (Feb. 18, 2000)).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Zero Tolerance Task Force Report*, *supra* note 6, at 59-60 (citing Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. OF PERSONALITY & SOC. PSYCH. 1314 (2002)).

101. *Zero Tolerance Task Force Report*, *supra* note 6, at 58-9 (citing Francis Vavrus & Kim Marie Cole, "I Didn't Do Nothin'": *The Discursive Construction of School Suspension*, 34 URB. REV. 87, 109 (2002)). The authors stated the following, quoted by the Zero Tolerance Task Force, in referring to the implicit racial codes: "suspensions are the result of a complex sequence of events that together form a disciplinary moment, a moment when one disruptive act among many is singled out for action by the teacher. This singling-out process, we contend, disproportionately affects students whose race and gender distance them from their teachers, and this subtle, often unconscious process may be one of the reasons why students of color often experience suspension in the absence of violent behavior." *Id.*

Exacerbating their already at-risk status is the fact that suspension and expulsion both increase the rate of dropout<sup>102</sup> and the likelihood that a student will commit a delinquent act or crime.<sup>103</sup> Accordingly, it is unsurprising that over half of all black males who do not have a high school diploma have a prison record.<sup>104</sup>

*b. Black Youth are Arrested at Higher Rates than their Peers*

The disproportionate make-up of removals, which sees black youth critically overrepresented, is mirrored in the juvenile justice system. While there appears to have been a reduction of the disparity in arrests between minority and white youth over the last two decades, the numbers still point to an enormous arrest bias in the juvenile justice system. Black juveniles were arrested for violent crime in the late 1980s at six times the white rate; by 2003, the arrest rate had fallen to four times that of white juveniles. During the same period, drug violation arrests for black juveniles fell from five times to less than double the white rate.<sup>105</sup> Despite the recent reductions in the arrest bias, these statistics demonstrate that black youth are still significantly more likely to be arrested than white youth.

Disproportionate arrest rates are not necessarily indicative of higher levels of criminality on the part of black youth. Nationally, white youth were slightly more likely than black youth to commit vandalism, at rates of 39% and 33% respectively.<sup>106</sup> Black youth are also less likely than white youth to have used illicit drugs in the past year. This applies across the full spectrum of specific substances, including marijuana and crack cocaine.<sup>107</sup> Only in violent crimes did

---

102. *See supra* note 85.

103. *See CJJ Report, supra* note 92.

104. Richard J. Cooley & Paul E. Barton, *Locked Up and Locked Out: An Educational Perspective on the U.S. Prison Population* (February 2006) at 3.

105. Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report* (U.S. DEP'T OF JUSTICE, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention) at 70, available at <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

106. *Id.*

107. *Punishment and Prejudice: Racial Disparities in the War on Drugs, Racially Disproportionate Drug Arrests*, (Human Rights Watch, 2000),

black youth show a higher percentage of participation than white youth. Thirty-six percent of black youth are involved in a serious violent crime—defined as aggravated assaults, robberies, or rapes involving a weapon—by the time they reach seventeen, compared to 25% of white youth.<sup>108</sup> These differences in violent offending, however, are insufficient to explain the huge difference in arrest rates between white and black youth even for such offenses.<sup>109</sup>

*c. Implications of O.C.G.A. § 20-2-751.5(c) on Black Male Students in Georgia*

Consistent with national trends, black youth in Georgia are 2.86 times more likely to be arrested than white youth.<sup>110</sup> Georgia's disproportionate arrest rates vary by county, as illustrated by three of the larger counties: DeKalb, Gwinnett and Fulton. In DeKalb and Gwinnett Counties, black youth are twice as likely to be arrested as white youth,<sup>111</sup> but in Fulton County, black youth are eight times more likely to be arrested than white youth.<sup>112</sup> Overall, this disproportionate arrest rate means that black juveniles in Georgia are almost three times as likely to be penalized within the school system for off-campus conduct as are white juveniles.

The data also demonstrates that black students in Georgia are removed from school at higher rates than their peers. While black students comprise 38% of the total school population in Georgia,<sup>113</sup> they account for 60% of students suspended since 2004<sup>114</sup> and 66% of the students expelled since 2004.<sup>115</sup> When

---

available at [http://www.hrw.org/reports/2000/usa/Rcedrg00-05.htm#P307\\_63738](http://www.hrw.org/reports/2000/usa/Rcedrg00-05.htm#P307_63738).

108. Ellen Hinton Hoytt et al., *Pathways to Juvenile Detention Reform: Reducing Racial Disparities in Juvenile Detention*, in PATHWAYS TO JUVENILE JUSTICE REFORM 1 (2001), available at <http://www.aecf.org/upload/publicationfiles/reducing%20racial%20disparities.pdf>.

109. *Id.* at 17-18

110. *Georgia's Plan for Reducing Disproportionate Minority Contact (DMC)*, (The Burns Institute), available at [http://www.burnsinstitute.org/dmc/ga/ga\\_plan.pdf](http://www.burnsinstitute.org/dmc/ga/ga_plan.pdf).

111. *Id.* at 2, 4.

112. *Id.* at 3.

113. *O.C.G.A. § 20-2-751.5(c) Open Records Request*, *supra* note 2.

114. *Id.*

looking only at suspensions under O.C.G.A. § 20-2-751.5(c), black students account for over 65% of the suspensions under the statute.<sup>116</sup>

Similarly, male students are overrepresented in school removals. Since 2004, male students have accounted for 68% of all school removals<sup>117</sup> and 83.5% of students suspended under O.C.G.A. § 20-2-751.5(c).<sup>118</sup>

## 2. *Special Education*

### *a. Students Requiring Special Education are Removed at Higher Rates than Non-Disabled Students*

While the consequences of removal can be particularly problematic for minorities, students with disabilities and special education needs are at risk as well. Students enrolled in special education programs generally have unique needs due to learning difficulties, physical or developmental disabilities, and/or mental health issues.<sup>119</sup> While it would seem logical that because of these students' special needs, school administrators would have greater tolerance in dealing with the actions of these youth, studies show the opposite to be true.<sup>120</sup>

Pursuant to the Individuals with Disabilities Education Act, a child is eligible for special education services if they have one or more of a broad range of qualifying disabilities, including the two most common disabilities found in the juvenile justice system: specific learning disability and emotional disturbance.<sup>121</sup> Although special education students represent 11-14% of the total school population, they represent 20-24% of the suspended or expelled population.<sup>122</sup> Students classified as

---

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. See U.S. DEP'T OF EDUC., Office of Special Education Programs (OSEP), <http://www.ed.gov/about/offices/list/osers/osep/index.html>.

120. See MORRISON ET AL., *supra* note 6, at 51.

121. 20 U.S.C. § 1401(3); Sue Burrell & Loren Warboys, *Special Education and the Juvenile Justice System* (July 2000), [http://www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/page1.html#definition](http://www.ncjrs.gov/html/ojjdp/2000_6_5/page1.html#definition).

122. *Zero Tolerance Task Force Report*, *supra* note 6, at 63. Studies show that special education students are removed over three times the rate

emotionally disturbed are at a particularly high risk of removal.<sup>123</sup> Nearly half of elementary and middle school students and nearly three-quarters of high school students with emotional disturbance reported being suspended or expelled.<sup>124</sup> Studies are mixed as to whether students with disabilities engage in more serious forms of misbehavior.<sup>125</sup> There has been some suggestion, however, that the disparity in removal between students with disabilities and those without is due to the fact that non-disabled students are more adept at “eluding detection.”<sup>126</sup>

This overrepresentation of special education students exists despite federal mandates that students not be removed from their educational program for more than ten days for conduct that arises from their disabilities. This mandate was first announced by the U.S. Supreme Court in 1988 in the case of *Honig v. Doe*,<sup>127</sup> and was later codified in the Individuals with Disabilities Education Act (IDEA) and its implementing regulations.<sup>128</sup> Pursuant to special education law, any removal from school for more than ten days<sup>129</sup> consists of a change of special education placement, triggering a series of obligations

---

regular education students are removed. *Id.* Furthermore, of the regular education students, studies have shown that 52% exhibited behaviors that should have triggered referral to special education resources. Zweifler & De Beers, *supra* note 59, at 206. According to Zweifler and De Beers, this is a result of some schools’ refusal to test students even when there are obvious signs of learning problems. *Id.*

123. *Zero Tolerance Task Force Report*, *supra* note 6, at 63.

124. *Id.* The actual rates are 47.7% for elementary and middle school students and 72.9% for high schoolers. *Id.* Students with other disabilities were only removed at a rate of 11.7% at the elementary/middle school level, and a rate of 27.6% at the high school level. *Id.* Another statewide study showed that students who suffered from emotional disturbance were “7.5 times as likely to receive a suspension or expulsion compared to their non-[emotionally disturbed] disabled peers, and twelve times as likely compared to all other students with and without disabilities. *Id.*

125. *Zero Tolerance Task Force Report*, *supra* note 6, at 63.

126. *Id.* at 63, 64.

127. *Honig v. Doe*, 484 U.S. 305 (1988).

128. 20 U.S.C. § 1415; 34 C.F.R. §§ 300.530-300.536 (2008); *see also* Georgia Special Ed. Rules, 160-4-7-.10.

129. The ten-day trigger refers both to removals for a consecutive period of ten days as well as a series of removals totaling more than ten days if those removals constitute a pattern. 34 C.F.R. § 300.536.

on behalf of the school system. Within ten school days of the decision of a school district to change a student's placement for disciplinary reasons, the school district must determine whether the student's conduct was a manifestation of his disability.<sup>130</sup> If the conduct is not a manifestation, the student may be removed in the same manner as his non-disabled peers. However, during the removal, the school district must continue to provide the student with his special education services.<sup>131</sup> If the conduct is a manifestation of the student's disability, except in limited circumstances, the student must be returned to his current educational setting.<sup>132</sup>

*b. Youth with Educational Disabilities are Arrested at Higher Rates than their Non-Disabled Peers.*

Approximately 14% of public school students qualify for special education services.<sup>133</sup> Within the juvenile justice system, youth with disabilities are much more likely to have both identified and unidentified disabilities.<sup>134</sup> Although estimates of the percentage of youth with disabilities vary from study to study, some studies suggest that as many as 70% of incarcerated youth suffer from disabling conditions.<sup>135</sup>

---

130. 34 C.F.R. § 300.530. Conduct is a manifestation of a student's disability if: (i) the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) the conduct in question was the direct result of the LEA's failure to implement the IEP. *Id.*; Georgia Special Ed. Rules, 160-4-7-.10.

131. 34 C.F.R. § 300.530.

132. *Id.* Even if the conduct is determined to be a manifestation of the student's disability, a student may be sent to an alternative placement for up to forty-five days if, while at school, on school premises or at a school function, he (i) possesses a weapon, (ii) possesses, uses, sells or solicits the purchase of drugs, or (iii) inflicts serious bodily injury upon another. *Id.* A student's placement may also be changed upon agreement between the parent and the school district. *Id.*

133. National Center for Educational Statistics, *Percentage of Students Enrolled with Disability*, available at [http://nces.ed.gov/programs/digest/d07/tables/dt07\\_049.asp](http://nces.ed.gov/programs/digest/d07/tables/dt07_049.asp).

134. The Special Needs of Youth in the Juvenile Justice System: Implications for Effective Practice, (Children's Law Center, June 2001), at 33, available at [http://www.cjck.org/pdf/special\\_needs.pdf](http://www.cjck.org/pdf/special_needs.pdf) [hereinafter *Children's Law Center Report*].

135. *Id.* (citing Peter E. Leone et al., *Understanding the*

For a variety of reasons, young people with disabling conditions are more susceptible to involvement with the juvenile justice system. Youth with disabilities are often more prone to make poor decisions and social judgments, leading to involvement in criminal activity. They also often have weak or no avoidance techniques, making it more likely that they will get caught.<sup>136</sup> Moreover, because it is difficult for them to learn from prior experiences, youth with learning disabilities are more likely to re-offend.<sup>137</sup>

Accordingly, young people with emotional and learning disabilities are more likely to be arrested than their non-disabled peers. Studies have demonstrated that learning disabled youth are 200% more likely to be arrested than non-disabled youth for comparable delinquent activity.<sup>138</sup> Once arrested, youth with learning disabilities are also more likely to be adjudicated delinquent and to receive lengthier terms of incarceration and probation.<sup>139</sup> Similarly, youth with emotional disabilities are also more likely to be arrested than their non-disabled peers. Twenty percent of students with serious emotional disabilities are arrested at least once before they leave school.<sup>140</sup> Fifty-eight percent of youth with emotional disturbance<sup>141</sup> and 31% of youth with a learning disability<sup>142</sup> who have been out of school

---

*Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389 (1995)).

136. *Children's Law Center Report*, *supra* note 134, at 33-34 (citing Youth Law Center, *Disabilities that Compromise Their Ability to Comprehend, Learn and Behave*, in UNDERSTANDING ADOLESCENTS: A JUVENILE COURT TRAINING CURRICULUM 12 (ABA Juvenile Justice Center (2000))).

137. *Children's Law Center Report*, *supra* note 134, at 34.

138. *Id.* (citing N. Cowardin, *Punishing Disabilities*, in THE SENTENCING PROJECT (M. Young, ed., In Press 2001)).

139. *Id.*

140. Susan Black, *Learning Behind Bars*, AM. SCH. BD. J. (2005), available at <http://web.archive.org/web/20060104100611/http://www.asbj.com/2005/09/905research.html>; see also Chesapeake Institute, National Agenda for Achieving Better Results for Children and Youth with Serious Emotional Disturbance, (U.S. DEPT. OF EDUC., Office of Special Education and Rehabilitation Services, 1994), <http://cecp.air.org/resources/ntlagend.asp>.

141. *Id.*

142. Burrell & Warboys, *supra* note 121.

for three to five years have been arrested.<sup>143</sup>

*c. Implications of O.C.G.A. § 20-2-751.5(c) on Students with Disabilities in Georgia*

While arrest data relating to disability status is not available for youth in Georgia, a 1997 study of youth in Georgia Regional Youth Detention Centers (RYDC) revealed that 61% of youth in the facilities had at least one diagnosable psychiatric disorder, with 44% of youth admitted to the RYDCs presenting with two or more diagnoses.<sup>144</sup> Thirty percent of the youth had at least one anxiety disorder, 19% had a mood disorder, 35% had a disruptive behavior disorder, and 30% had a substance use disorder.<sup>145</sup> The prevalence of disorders was much higher than in general population studies, with especially high rates of anxiety disorders, disruptive behavior, and substance use disorders.<sup>146</sup>

Similarly, youth with disabilities are overrepresented in suspensions under O.C.G.A. § 20-2-751.5(c). While students with disabilities comprise approximately 12% of the population statewide,<sup>147</sup> they account for over 30% of the students suspended under this statute.<sup>148</sup> In particular, in Gwinnett County, students with disabilities have been suspended at six times the rate of their population in the school district.<sup>149</sup>

*E. Georgia Should Recognize the Flaws in the Policy of Removal*

Alternative methods of discipline may be more difficult to implement and may require more effort from schools and their teachers. However, the benefits which new methods will yield, particularly on at-risk students, cannot be overstated.

---

143. *Id.*

144. F. Marsteller et al., *The Prevalence of Substance Use Disorders Among Juveniles Admitted to Regional Youth Detention Centers Operated by the Georgia Department of Children and Youth Services*, (CSAT Final Report, 1997), available at <http://behav.com/projects/CSATFinalReport.html>.

145. *Id.*

146. *Id.*

147. O.C.G.A. § 20-2-751.5(c) *Open Records Request*, *supra* note 2.

148. *Id.*

149. *Id.*

Rehabilitative school discipline policies have the capability to break societal cycles of incarceration, unemployment, crime, and lack of economic contribution to the tax base, all which are more likely to result from a student's removal from school. With the causal connection between removal and destructive behavior well documented, it is perfectly reasonable to project that a change in our educational disciplinary policy will produce widespread positive effects. Georgia, as a whole, can follow the lead of schools like Oakhurst Elementary in Decatur and dispel the idea that a certain portion of students will inevitably turn to behavior that is destructive to society.

#### IV. LEGAL CHALLENGES TO O.C.G.A. § 20-2-751.5(c)

Under O.C.G.A. § 20-2-751.5(c), schools can suspend or expel a student for off-campus behavior if a two-part test is met. First, the student must have acted in a way "which could result in the student being criminally charged with a felony."<sup>150</sup> Second, that action must be one "which makes the student's continued presence at school a potential danger to persons or property at the school or which disrupts the educational process."<sup>151</sup>

Today in Georgia there are 181 public school systems: 159 are county systems; 21 are city systems; and 1 is run by the Department of Juvenile Justice.<sup>152</sup> Each school system has a student code of conduct that, pursuant to O.C.G.A. § 20-2-751.5(c), includes a provision designed to address discipline for off-campus activity. Suspensions and expulsions handed out under these provisions may be subject to two different legal challenges, one based on each prong of the two-part test laid out by the code section's language. The first prong of the test uses the language "which could result in the student being criminally charged. . ." This language places a limit on local school districts' authority to discipline for off-campus activity. However, most schools' current codes of conduct exceed this limitation, and are thus subject to challenge for exceeding statutory authority. Second, the language of the second prong of the test is too broad and amorphous, and is therefore subject

---

150. O.C.G.A. § 20-2-751.5(c).

151. *Id.*

152. GA. DEPT. OF EDUC., Data Report, *available at* [www.doe.k12.ga.us](http://www.doe.k12.ga.us).

to a void for vagueness challenge under the Due Process clauses of the U.S. and Georgia Constitutions. Both challenges are explored below.

*A. Individual District Codes of Conduct Exceed Statutory Authority*

The Georgia State Constitution provides that “[t]he provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation.”<sup>153</sup> Though the right to education is expressly provided for in the State Constitution, the Supreme Court of Georgia has held that education is not a fundamental right.<sup>154</sup> Moreover, the government’s obligation to provide free public education is not unlimited under the Georgia Constitution. That obligation can be further defined and limited by statute,<sup>155</sup> and the actions of individual school districts must fit within the parameters of an authorizing statute.<sup>156</sup>

The Georgia General Assembly enacted the Public School Disciplinary Tribunal Act<sup>157</sup> in recognition of the need for local boards of education to limit students’ access to education in response to disciplinary infractions.<sup>158</sup> This Act required that individual county codes of conduct identify consequences of specific misbehavior.<sup>159</sup> O.C.G.A. § 20-2-751.5(c) provides the only statutory authority for schools to punish students for off-campus behavior, and its specific language limits the off-campus behavior a school can punish to actions “which could result in the student being criminally charged with a felony.”<sup>160</sup> Thus, if a school is punishing off-campus behavior that is not encompassed by O.C.G.A. § 20-2-751.5(c), the school may be

---

153. GA. CONST. art. VIII, § 1, ¶ 1.

154. *See* *McDaniel v. Thomas*, 285 S.E.2d 156, 167-68 (Ga. 1981); *see also D.B.*, 469 S.E.2d at 439.

155. *See* *Crim v. McWhorter*, 252 S.E.2d 421, 423-25 (Ga. 1979); *D.B.*, 469 S.E.2d at 439-40.

156. *D.B.*, 469 S.E.2d at 440.

157. *See* O.C.G.A. § 20-2-750 (2007).

158. *See D.B.*, 469 S.E.2d at 439-40.

159. *See* O.C.G.A. § 20-2-751.2(d) (2007) (allowing school action against students convicted or adjudicated for a felony).

160. O.C.G.A. § 20-2-751.5(c) (2007).

exceeding its statutory authority in this area.

Determining whether statutory authority is being exceeded requires three steps. First, O.C.G.A. § 20-2-751.5(c) must be examined to determine if the Legislature intended to limit the student behavior that school districts can punish. Second, if it is determined that the statute does create limits, school districts' code of conduct provisions regulating the punishment of off-campus behavior must be examined to determine compliance with those limits. Finally, if schools' codes of conduct are out of technical compliance with the law, statistical information on what off-campus behavior is being punished under the code of conduct provisions must be analyzed to determine if there have been actual violations.

*1. The Legislative Intent of O.C.G.A. § 20-2-751.5(c)*

The first part of the statutory provision specifically refers to conduct "which could result in the student being criminally charged with a felony."<sup>161</sup> A plain language reading of this provision creates the impression that the student must have committed a felony for which he or she could be criminally charged in order to be subject to discipline under this provision. The legislative history of O.C.G.A. § 20-2-751.5(c) supports this view, because it demonstrates that the legislators who introduced this language intended that same meaning.

In the 2004 Georgia Legislative session, Senate Bill 428 was added to House Bill 1190, which ultimately created the current version of § 20-2-751.5(c). The exact language of this provision originated in Senate Bill 428, and its legislative intent was made clear by its sponsor, Education Committee Chairman, Senator Brush in the following exchange with Senator Steve Henson:

Sen. Henson: On page nine it mentions the behavior of a student off-campus. Line 11 and 12 it says behavior of a student "which could result in a student being criminally charged with a felony." The term "could be charged" is open to some interpretation, Senator. And I would like to know what you feel, who will interpret that they could be charged. Someone has a fight after school, maybe it's possible they could be charged with assault, but they aren't

---

161. O.C.G.A. § 20-2-751.5(c).

charged with assault. Are you concerned with the interpretation, and the abuse of that section Senator?

Sen. Brush: I'm not worried about . . . we are leaving that up to the principal and the local school board to make that decision. I think the key to that addition is though that later in the sentence it says "which makes the student's continued presence at the school a potential danger." I think that is the key in the measurement the principal and the school board have to make in the local system. We have incidences of that, where we have had to deal with that in this state, where the continued presence of that student is a disruption and a danger to that school.

Sen. Henson: . . . so, first you have to have to determination that they could be charged with a felony, and then secondly, you would have to make the determination that the continued presence is a danger? You would have to have both things?

Sen. Brush: Absolutely. Absolutely. And I think that is the key. The second part is the key. They have to both be present. It is not "or" but "and."<sup>162</sup>

This portion of Senate floor debate supports a plain meaning reading of the statutory language, making it clear that the statute is addressing criminally punishable, felonious behavior. Thus, O.C.G.A. § 20-2-751.5(c) is properly interpreted to limit school punishment for off-campus behavior to felonious behavior for which the student could be criminally charged.

## *2. District Codes of Conduct Exceed Statutory Bounds*

Having determined that O.C.G.A. § 20-2-751.5(c) limits the off-campus behavior that can be punished, the next step is to look at individual school districts' codes of conduct to see if they mirror what the statute is proscribing. The following chart provides samples of Georgia school districts' language codifying O.C.G.A § 20-2-751.5(c).

---

162. Video of Sen. Proceedings, Feb. 3, 2004 (response by Sen. Brush to Sen. Henson), [http://www.georgia.gov/00/channel\\_title/0,2094,4802\\_6107103,00.html](http://www.georgia.gov/00/channel_title/0,2094,4802_6107103,00.html) (follow "2004 Senate Session" hyperlink; then follow "3-2" hyperlink on February 2004 calendar) (last visited Mar. 23, 2008).

School Dist.	Conduct Provision Addressing Off-Campus Behavior
Cobb	"Students shall be disciplined for engaging in off-campus conduct that affects the safety and welfare of the school, staff, students, and/or property at the school or that disrupts the discipline or educational environment of the school." <sup>163</sup>
Rome	"Any student involved in conduct off the school campus which may cause disruption or threaten the safety or wellbeing of other students may at the discretion of the principal be excluded from school (suspended or expelled) or transferred to the transitional academy or a combination of both." <sup>164</sup>
Thomaston-Upson	"Administrators are authorized to take disciplinary action for student conduct which has or may have a direct impact on the school discipline, the educational function of the school, or the welfare of the students and staff. This authorization extends to conduct which may occur (a) on the school grounds or within the school safety zone at any time; (b) off the school grounds at a school activity, function, or event; (c) enroute to and from school or a school activity; and (d) during off-campus, non school related situations, at any time of the year." <sup>165</sup>
Fayette	"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 the school or which disrupts the educational process. This includes any such conduct

163. Cobb County School District, *Administrative Rules*, [http://www.cobb.k12.ga.us/centraloffice/adminrules/J\\_Rules/Rule%20JICD A-H.pdf](http://www.cobb.k12.ga.us/centraloffice/adminrules/J_Rules/Rule%20JICD A-H.pdf) (last visited April 1, 2008) (on file with the John Marshall Law Journal).

164. Rome City School System, *Rome High School Student Code of Conduct (2007-2008)*, <http://www.rcs.rome.ga.us/rhs/07-08handbook.pdf> (last visited April 1, 2008) (on file with the John Marshall Law Journal).

165. Thomaston-Upson County School System, *Upson-Lee High School Code of Conduct*, [http://ulhs.upson.k12.ga.us/www/Upson\\_ULHS/site/hosting/Student%20Resources/Student%20Handbook%202007-2008.pdf](http://ulhs.upson.k12.ga.us/www/Upson_ULHS/site/hosting/Student%20Resources/Student%20Handbook%202007-2008.pdf) (last visited April 1, 2008) (on file with the John Marshall Law Journal).

No. 1]

*Suspending Reason*

35

	outside of school hours or away from school that shows disrespect to school personnel or which endangers the health, safety, morals, or well being of other students, teachers, or employees within the school system (such as, theft or vandalism to property of a school employee). <sup>166</sup>
Jackson	“A student who has been arrested, charged, or convicted in a court with a felony or an offense which could be considered to be a felony if the student were an adult, or is charged with an assault upon another student, a violation of the drug laws, or sexual misconduct of a serious nature, or any other criminal offense, and whose presence at school is reasonably certain to endanger other students or staff or cause a substantial disruption to the educational climate may be disciplined or excluded from school.” <sup>167</sup>
Forsyth	“Off-Campus Behavior: A student who is alleged to have committed an offense off-campus on the way to or from school, or any time if the offense is a felony or would be a felony if the student were an adult, may be disciplined at school or excluded from school if his or her continued presence at school poses a potential danger to persons or property or is likely to disrupt the educational process.” <sup>168</sup>
Lumpkin	“Students may be disciplined for conduct off campus which is felonious or which may pose a threat to the school’s learning environment or the safety of students and employees.” <sup>169</sup>

166. Fayette County School System, *Student Code of Conduct (2007-2008)*, [http://www.fcboe.org/discipline/docs/codeofconduct\\_secondary.pdf](http://www.fcboe.org/discipline/docs/codeofconduct_secondary.pdf) (last visited April 1, 2008) (on file with the John Marshall Law Journal).

167. Jackson County School System, *Student Code of Conduct (2007-2008)*, <http://www.jackson.k12.ga.us/administration/JC-CodeOfConduct.pdf> (last visited April 1, 2008) (on file with the John Marshall Law Journal).

168. Forsyth County Board of Education, *2007-2008 Code of Conduct and Discipline Procedures Grade 6-12*, [http://www.forsyth.k12.ga.us/1294106162160263/lib/1294106162160263/2008\\_Code\\_of\\_Conduct\\_6\\_-\\_12.pdf](http://www.forsyth.k12.ga.us/1294106162160263/lib/1294106162160263/2008_Code_of_Conduct_6_-_12.pdf) (last visited April 1, 2008) (on file with the John Marshall Law Journal).

169. Lumpkin County School District, *Lumpkin County High School Student Code of Conduct (2007-2008)*, [http://lchs.lumpkin.k12.ga.us/handbook/handbook/Handbook\\_07-08.pdf](http://lchs.lumpkin.k12.ga.us/handbook/handbook/Handbook_07-08.pdf) (last visited April 1, 2008) (on file with the John Marshall Law Journal).

Fulton	“Students shall be disciplined for engaging in off-campus conduct that affects the safety and welfare of the school, staff, and/or students or that has a direct effect on the discipline or educational environment of the school. Off-campus misconduct for which a student shall be disciplined includes, but is not limited to, any off-campus conduct that (a) is prohibited by the Georgia or United States criminal codes; (b) is punishable as a felony or would be punishable as a felony if committed by an adult; and (c) is conduct for which a student has been arrested, indicted, adjudicated to have committed, or convicted. O.C.G.A. § 20-2-751.5(c).” <sup>170</sup>
Bibb	“Authority to take disciplinary action also extends to any off-campus non-school related actions by students, at any time of the year, which have a direct and immediate impact on school discipline, the educational function of the school, or the welfare of students and staff. A student who has committed a criminal act while off campus is subject to disciplinary action and may be excluded from school. Such act could include, but is not limited to, a felony, a delinquent act which would be considered to be a felony if committed by an adult, an assault upon another student, a violation of the laws prohibiting controlled substances, or sexual misconduct of a serious nature.” <sup>171</sup>
Crisp	“Off-campus conduct that affects the safety and welfare of the school, staff, and/or students or that has a direct effect on the discipline or education environment of the school shall have a disciplinary consequence. Off-campus misconduct for which a student shall be disciplined includes, but is not limited

170. Fulton County School System, *Student Discipline/Code of Conduct* (2007), <http://www.boarddocs.com/ga/fcss/Board.nsf/b85702f9a50fefc885256ebb00642c8a/6047450072e48bc5852572aa00622b4e?OpenDocument> (last visited April 1, 2008) (on file with the John Marshall Law Journal).

171. Bibb County School District, *Northeast High School Student Code of Conduct* (2006), [http://www.bibb.k12.ga.us/Board%20of%20Ed%20nd%20level/secondary\\_conduct.pdf](http://www.bibb.k12.ga.us/Board%20of%20Ed%20nd%20level/secondary_conduct.pdf) (last visited October 25, 2007) (on file with John Marshall Law Journal).

	to, any conduct that is prohibited by the Georgia or United States criminal codes, is punishable as a felony or would be punishable as a felony if committed by an adult and for which a student has been arrested, indicted, adjudicated to have committed or convicted. The student is required to report such charges to the administrator immediately upon return to school.” <sup>172</sup>
--	--

These code of conduct provisions are representative of those found throughout the state. Generally, local districts that have gone beyond the command of O.C.G.A. § 20-2-751.5(c) have done so in one of four ways. First, districts like Cobb, Rome, and Thomaston-Upson have completely abandoned the requirement of felonious behavior and have simply crafted their own off-campus rule, which could cover any potential behavior, even if that behavior is not criminal in nature at all. Second, districts like Fayette, Jackson, and Forsyth recite O.C.G.A. § 20-2-751.5(c) accurately, but then go on to list a broad range of behavior not limited to felonious acts as encompassed by the rule. Third, districts like Lumpkin have turned the conjunctive felony and dangerous or disruptive inquiry into an either/or proposition. Finally, districts such as Fulton, Bibb, and Crisp have added the subtle yet expansive language “includes, but not limited to” to their discussion of the specific acts that could lead to punishment.

A large minority of districts have stayed within the boundaries of O.C.G.A. § 20-2-751.5(c), usually reciting it verbatim.<sup>173</sup> However, the majority of districts have deviated from the requirements of the statute in one of the four ways listed above, and in so doing have exposed students to punishment for off-campus behavior beyond the authority granted by the Legislature.

---

172. Crisp County School System, *Student Code of Conduct (2007-2008)*, <http://www.gsbaepolicy.org/policy.asp?PC=JCDA&S=4048&RevNo=1.53&C=J&Z=P> (last visited April 1, 2008) (on file with the John Marshall Law Journal).

173. See *Complete File of Accessible School District Codes of Conduct* (on file with the John Marshall Law Journal).

### *3. Off-Campus Behavior Being Punished*

As the preceding sections demonstrate, the off-campus behavior that may be punished is limited by the plain language of the statute, and a majority of Georgia school districts' codes of conduct exceed those bounds. This section examines data collected from the Georgia Department of Education to determine whether the actual practices of Georgia school districts in applying these codes of conduct exceed statutory limits.

Before delving into the statistics, however, a few facts about the jurisdiction of juvenile and superior courts in Georgia should be noted. Juvenile courts are civil, not criminal, in nature. Therefore, when a child appears in juvenile court, that child is not criminally charged. Under Georgia law, a student is considered a child for purposes of juvenile court jurisdiction if she is under seventeen years of age.<sup>174</sup> When a child commits an act designated as a crime by the laws of Georgia, that child is deemed to have committed a "delinquent act."<sup>175</sup> As a general rule, juvenile courts in Georgia have exclusive original jurisdiction over juvenile matters, and are the sole courts for initiating actions concerning any child who is alleged to be delinquent.<sup>176</sup> However, there are seven offenses that, if committed by a child between the ages of thirteen and seventeen, give the superior court exclusive jurisdiction over the child. Referred to colloquially by those involved in juvenile justice in Georgia as "SB 440 offenses" or the "seven deadly sins," these offenses are murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation, aggravated sexual battery, and armed robbery committed with a firearm.<sup>177</sup> These are the only offenses for which a juvenile between the ages of thirteen and seventeen can be directly criminally charged.<sup>178</sup> All other offenses by juveniles result in civil delinquency charges. Moreover, a child under the age of

---

174. O.C.G.A. § 15-11-2(2) (2007).

175. O.C.G.A. § 15-11-2(6)(a).

176. O.C.G.A. § 15-11-28(a) (2007).

177. O.C.G.A. § 15-11-28(b)(2) (2007) (the name SB 440 is in reference to Senate Bill 440 from the 1994 Georgia Legislative Session).

178. *See* O.C.G.A. §§ 15-11-30.2, 15-11-30.3 (2007) (under certain limited circumstances, the Georgia Code also permits a juvenile judge to transfer a case to superior court).

thirteen can never be criminally charged.<sup>179</sup>

Accordingly, for a student between the ages of thirteen and seventeen to be subject to discipline under O.C.G.A. § 20-2-751.5(c), she would have to have committed one of the “seven deadly sin” offenses. Otherwise, the school could not identify the child’s behavior as that “which could result in the student being criminally charged with a felony.” However, the data shows that students are being suspended and expelled for a much broader range of activity.

The following chart shows the grounds for reported student suspensions pursuant to O.C.G.A. § 20-2-751.5(c) since it was enacted in 2004.<sup>180</sup>

	2007	2006	2005	2004	Total
Miscellaneous	-	-	-	-	-
Alcohol	-	-	-	-	-
Arson	-	-	-	-	-
Battery	-	4%	-	-	1%
Burglary	-	-	-	-	-
Computer Trespass	-	-	-	-	-
Disorderly Conduct	-	-	-	-	-
Drugs Not Alcohol	12%	-	4%	-	4%
Fighting	-	-	-	-	-
Homicide	-	-	-	-	-
Kidnapping	-	-	-	-	-
Larceny Theft	-	4%	-	8%	3%
Motor Vehicle Theft	-	-	-	-	-
Robbery	-	-	-	-	-
Sexual Battery	-	-	-	-	-
Sexual Harassment	-	-	4%	-	1%
Sexual Offense	-	-	5%	-	1%
Threat Intimidation	30%	35%	16%	23%	26%
Tobacco	-	-	-	-	-
Trespass	-	-	-	-	-
Vandalism	5%	-	9%	-	3%
Weapon – Knife	6%	-	-	-	1%

179. O.C.G.A. § 15-11-28.

180. O.C.G.A. § 20-2-751.5(c) *Open Records Request*, *supra* note 2.

Weapon – Handgun	-	-	-	-	-
Weapon – Rifle	-	-	-	-	-
Weapon – Other	-	-	-	-	-
Serious Bodily Injury	-	-	-	-	-
Other Offense	47%	57%	61%	69%	59%

The ages of the children affected by those suspensions break down as follows:

	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>	<b>Total</b>
0-6 years-old	-	-	-	-	-
7-9 years-old	6%	8%	5%	7%	5%
10-12 years-old	41%	37%	27%	24%	32%
13-15 years-old	47%	44%	50%	60%	52%
16-18 years-old	6%	17%	18%	8%	11%
18+ years-old	-	-	-	-	-

This data demonstrates that almost all of the students removed pursuant to O.C.G.A. § 20-2-751.5(c) cannot be criminally charged with a felony. First, 37% of the students being suspended under O.C.G.A. § 20-2-751.5(c) are under the age of thirteen,<sup>181</sup> and therefore cannot be criminally charged under any circumstances. Second, 52% of the students removed for off-campus behavior are between the ages of thirteen and fifteen, and therefore cannot be criminally charged unless they commit one of the “seven deadly sins.” As the chart above illustrates, there have not been any removals on the grounds of murder, manslaughter, aggravated sexual battery, or armed robbery. While the Department of Education has identified several students as being suspended for “sexual offense,” this category consists of a total of 1% of all removals under this statute. Thus, even reading this category in the broadest of possible interpretations, at most 1% of the thirteen-to-fifteen-year-old students could have been criminally charged with a felony. This leaves us with the 11% of the students who are between sixteen and eighteen. While the seventeen and eighteen year olds in this grouping could be criminally charged

---

181. *Id.*

with a felony, the data indicates that there is a high likelihood that the offenses for which students are being removed do not constitute a felony.

Accordingly, the statute, code of conduct provisions, and these statistics all demonstrate that in many cases school districts are exceeding the statutory authority granted to them by O.C.G.A. § 20-2-751.5(c).

*B. Application of the Void-for-Vagueness Doctrine to O.C.G.A. § 20-2-751.5(c)*

As the last section demonstrated, many individual school districts' codes of conduct implementing O.C.G.A. § 20-2-751.5(c) are subject to legal challenge based on the fact that they exceed the authority the statute grants schools to punish off-campus behavior. This section explores a legal challenge to the statute itself on void-for-vagueness grounds.

The void-for-vagueness doctrine is derived from the overarching ideal of fairness embodied in the Due Process Clauses of the 5<sup>th</sup> and 14<sup>th</sup> amendments to the United States Constitution.<sup>182</sup> It serves two central purposes: (1) To provide fair notice of prohibitions, so that individuals may steer clear of unlawful conduct;<sup>183</sup> and (2) To prevent arbitrary and discriminatory enforcement.<sup>184</sup>

The case law defining the specific tests to be used is varied and not entirely consistent. However, a review of the decisions indicates that the factors that should be considered include the type of rights implicated,<sup>185</sup> the severity of the sanctions faced

---

182. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 159 (1974); Mason v. Florida Bar, 208 F.3d 952, 959 (11th Cir. 2000). For a detailed discussion of the doctrine in the Supreme Court before 1960, see Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

183. Fair notice requires that the statute provide an adequate description of the conduct in "language that the common world will understand." U.S. v. Lanier, 520 U.S. 259, 264 (1997) (citing McBoyle v. U.S., 283 U.S. 25, 27 (1931)).

184. To prevent arbitrary enforcement, the statute must provide clear standards for those who apply them. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357-58 (1983); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Smith v. Goguen, 415 U.S. 566 (1974).

185. *See, e.g.*, Village of Hoffman Estates v. Flipside, Hoffman Estate, 455 U.S. 489, 499 (1981).

by violators of the law,<sup>186</sup> the need for flexibility in enforcement,<sup>187</sup> and whether the challenge is to the law on its face or as applied.<sup>188</sup>

*1. Void-for-Vagueness Challenges to Off-Campus Conduct Provisions in Other States*

Approximately half of the states currently have statutes regulating off-campus behavior.<sup>189</sup> While actions challenging

---

186. See, e.g., *Id.*; see also *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986); *Barenblatt v. United States*, 360 U.S. 109, 137 (1959).

187. See *Bethel School Dist. No. 403*, 478 U.S. at 686.

188. See *Grayned*, 408 U.S. at 108.

189. See, e.g., Texas, V.T.C.A. § 37.006(d) (2007) (a student may be removed for off-campus behavior if: “(1) the superintendent or the superintendent’s designee has a reasonable belief that the student has engaged in conduct defined as a felony offense other than those defined in Title 5, Penal Code; and (2) the continued presence of the student in the regular classroom threatens the safety of other students or teachers or will be detrimental to the educational process); Colorado, C.R.S.A. § 22-33-106(1)(c) (2007) (suspension or expulsion for “[b]ehavior on or off school property that is detrimental to the welfare or safety of other pupils or of school personnel”); Connecticut, C.G.S.A. § 10-233(a)(1) (2007) (suspension or expulsion is authorized for conduct off school grounds that “is violative of [a published school board] policy and is seriously disruptive of the educational process.”); UTAH CODE ANN. § 53A-11-904(1) (2007) (student may be suspended or expelled for conduct that “threatens harm or does harm to the school or school property, to a person associated with the school, or property associated with that person, regardless of where it occurs.”); Vermont, 16 V.S.A. § 1162(a) (2007) (authorizes suspension or expulsion for off-campus misconduct “where direct harm to the welfare of the school can be demonstrated.”); Wisconsin, WIS. STAT. § 120.13(1)(b)(2)(d) (2006) (suspension for off campus conduct that endangers the property, health or safety of others at the school or under school supervision, or of any school employee or board member); Alaska, AS § 14.30.045(5) (2008 West) (“conviction of a felony that the governing body of the district determines will cause the attendance of the child to be inimicable to the welfare or education of other pupils.”); Massachusetts, ALM GL ch. 71, § 37H1/2 (2007) (provided the continued presence of the student “would have a substantial detrimental effect on the general welfare of the school.”); TENN. CODE ANN. § 49-6-3401(a)(14) (2007) (provided the continued presence of the student in Tennessee, “would pose[] a danger to persons or property or disrupt[] the educational process.”); Wyoming, WYO. STAT. § 21-4-305 (e) (2007) (Suspension or expulsion may be imposed as additional punishment for criminal offense if it “is of such nature that

the constitutional validity of these statutes on void-for-vagueness grounds are not common, a brief examination of several of these cases provides useful insight into an analysis of Georgia's law.

In *Clements v. Board of Trustees*, the Wyoming Supreme Court held that the statute permitting suspension for behavior that is "clearly detrimental to the education, welfare, safety or morals of other pupils" was constitutional on its face.<sup>190</sup> The Wyoming Supreme Court held that the statute was not void-for-vagueness because it focused on conduct "directed toward other pupils—a narrowed class of individuals" and "the conduct proscribed is strictly limited to conduct which is hostile to welfare, safety, or morals and could not be utilized to prohibit all forms of socially unacceptable conduct."<sup>191</sup> The Court also found the statute to be constitutionally valid as-applied to the student, because there was a direct relationship between the student's actions—he intentionally drove his car slowly in front

---

continuation of the child in school would clearly be detrimental to the education, welfare, safety or morals of other pupils."). Kansas, K.S.A. § 72-8901 (2006) (suspension or expulsion is authorized for "conduct which, if the pupil is an adult, constitutes the commission of a felony or, if the pupil is a juvenile, would constitute the commission of a felony if committed by an adult."); New Hampshire, N.H. REV. STAT. § 193:13(II) (2008) (expulsion for enumerated acts of theft, destruction, or violence as defined by N.H. REV. STAT. § 193-D:1 (2008)); South Carolina, S.C. Code Ann. § 59-63-210 (2006) (punishment authorized for commission of any crime, gross immorality, gross misbehavior, etc.); Hawaii, HRS § 302A-1134(a) (2007) (student may be excluded from school if he or she "becomes a detriment to the morals or discipline of any school."); Idaho, I.C. § 33-205 (2007) (board may expel any student "whose presence in a public school is detrimental to the health and safety of other pupils"); Illinois, 105 ILCS 5/10-22.6 (2008) (authorizes suspension or expulsion for "gross disobedience or misconduct"); New Jersey, N.J. STAT. § 18A:37-2(c) (2007) ("Conduct of such character as to constitute a continuing danger to the physical well-being of other pupils" constitutes grounds for suspension or expulsion.); New York, NY CLS EDUC § 3214(3) (2007) (authorizes suspension of student whose conduct "endangers the safety, morals, health or welfare of others."); North Carolina, N.C.G.S.A. § 115C-391(d) (2008) (authorizes expulsion of "any student 14 years of age or older whose behavior indicates that the student's continued presence in school constitutes a clear threat to the safety of other students or employees").

190. *Clements v. Board of Trustees*, 585 P.2d 197 (Wyo. 1978).

191. *Id.* at 204 (citing *People in Interest of K.P.*, 182 Colo. 409, 414 (1973)).

of a school bus—and the welfare of other school students.<sup>192</sup>

Similarly, in *T.W. v. School District of Philadelphia*, a student was removed from school for an off-campus physical altercation under a provision that allowed removal “for conduct that may reasonably be expected to undermine the proper disciplinary authority of the school, the safety of students or staff, or cause disruption within the school.”<sup>193</sup> The court held the statute was constitutional as-applied to the student, relying heavily on the fact that the party where the fight occurred was hosted by students from the Plaintiff’s school and, further, that discussion about the fight disrupted school on Monday.<sup>194</sup>

However, not all of these statutes have survived a void-for-vagueness challenge. In *Packer v. Board of Education of the Town of Thomaston*,<sup>195</sup> a student who had been suspended from school for a drug arrest, off school grounds and after school hours, brought a vagueness challenge to the Connecticut statute, which authorized discipline for conduct of a student which was “seriously disruptive of the educational process.”<sup>196</sup>

In assessing the plaintiff’s as-applied challenge to the statute, the court articulated the standard it would apply to the facts of the plaintiff’s case: an as-applied attack will succeed if (1) the statute does not provide fair warning that it applies to the conduct at issue, or (2) if the plaintiff was the victim of arbitrary enforcement practices.<sup>197</sup> In applying this standard to the statutory provision at issue, the court stated that it would read the statute narrowly, rather than broadly, and apply any prior court interpretations.<sup>198</sup> Because no prior interpretations existed, the court stated that it was guided by the language in question: “seriously disruptive of the educational process.”<sup>199</sup> First, the court looked to the dictionary to define each statutory

---

192. *Id.* at 205.

193. *T.W. v. School District of Philadelphia*, No. CIV.A. 02-886 (April 8, 2003).

194. *Id.* at 8.

195. *Packer v. Board of Educ. of the Town of Thomaston*, 246 Conn. 89 (1998).

196. *Id.* at 105; C.G.S.A. §10-233(d) (2007).

197. *Packer*, 246 Conn. at 107.

198. *Id.*

199. *Id.*

word.<sup>200</sup> After defining each word, the court concluded that the statute was intended “to apply to conduct that markedly interrupts or severely impedes the operation of a school.”<sup>201</sup> Applying the vagueness standard to the defined language of the statute, the court concluded that a reasonable person could not be certain whether the possession of drugs off-campus and after school hours is “by itself and without some tangible nexus to school operation, ‘seriously disruptive of the educational process.’”<sup>202</sup> Holding the statute to be void-for-vagueness as applied to the plaintiff because of a lack of notice, the court did not reach the second prong.<sup>203</sup>

Turning to the facial challenge, the court stated that it “must search for an effective and constitutional construction that reasonably accords with the Legislature’s underlying intent.”<sup>204</sup> The court translated the previously quoted language into two prongs: (1) the Legislature must have intended the phrase to mean what its plain words mean; and (2) the statute must possess a core meaning of sufficient clarity to allow it to defeat a facial vagueness attack.<sup>205</sup>

The court determined that the first prong was met by comparing the definitional meaning of the phrase in question to the legislative history of the statute.<sup>206</sup> The court also concluded that the statute was not devoid of core meaning.<sup>207</sup> Although the ordinary person might have difficulty in determining that a sufficient nexus exists to bring the conduct into the authority of the school, the court said a student would have less difficulty in determining what conduct to refrain from to avoid expulsion.<sup>208</sup> Accordingly, the court found the statute to be valid on its face.<sup>209</sup>

---

200. *Id.* at 109.

201. *Id.*

202. *Id.* at 110.

203. *Id.* at 110, 119.

204. *Id.* at 115.

205. *Id.* at 119.

206. *Id.* at 115-16.

207. *Id.* at 119.

208. *Id.* at 118-19.

209. *Id.* at 119.

## 2. Application of the Void-for-Vagueness Doctrine to the Georgia Statute

O.C.G.A. § 20-2-751.5(c) requires that, first, a student must have acted in a way “which could result in the student being criminally charged with a felony;”<sup>210</sup> and second, that action must be one “which makes the student’s continued presence at school a potential danger to persons or property at the school or which disrupts the educational process.”<sup>211</sup> The second part of the statute is the focus of the void-for-vagueness analysis.

Because the amount of deference to be afforded a statute depends, in part, upon the type of rights implicated, a brief review of the statute’s implications is in order. Although education is an explicit right under the Georgia constitution,<sup>212</sup> Georgia courts have held it to be something less than fundamental.<sup>213</sup> Accordingly, the statute does not implicate a fundamental right. Similarly, the statute is not criminal in nature. Instead, O.C.G.A. § 20-2-751.5(c) mandates the enactment of school board regulations that provide for long-term suspensions and expulsions.<sup>214</sup> While a school’s need to have flexibility in discipline is well-recognized in the case law,<sup>215</sup> given what we know about the effects of removal, these sanctions could be considered severe.<sup>216</sup>

---

210. O.C.G.A. § 20-2-751.5(c).

211. *Id.*

212. GA. CONST. art. VIII, § 1, ¶ 1.

213. While the Georgia Supreme Court has acknowledged that a student’s right to free education is guaranteed by the Georgia constitution, the right to education is subject to statutory limitation, and is not a fundamental right. *See Crim*, 252 S.E.2d at 423-25; *see also D.B.*, 469 S.E.2d at 439-40. Thus, O.C.G.A. § 20-2-751.5(c) could not reach the elevated facial standard on the grounds that it implicates a fundamental right.

214. In *Bethel School Dist. No. 403*, the Supreme Court recognized that unique circumstances exist within a school, which require a certain degree of flexibility in disciplinary matters in order to maintain security and order. 478 U.S. at 686. The Court further recognized that schools “need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process.” *Id.* Accordingly, the Court held that school disciplinary rules do not need to be as detailed as a criminal code that imposes criminal sanctions. *Id.* Finally, the Court held that two days’ suspension from school “does not rise to the level of penal sanction.” *Id.*

215. *See, e.g., Bethel School Dist. No. 403*, 478 U.S. at 686.

216. *See supra* Part III.B and Part III.C. While the Court in *Bethel* held a

Examining these factors and the decisions regarding statutes from other states discussed above, it appears that O.C.G.A. § 20-2-751.5(c) will likely survive a facial challenge.<sup>217</sup> However, much like the Connecticut statute challenged in *Packer*,<sup>218</sup> the Georgia statute is vague enough so that in certain circumstances it may be susceptible to an as-applied challenge.

*a. Facial Challenge*

Because the statute neither implicates a fundamental right nor is criminal in nature, a facial challenge will be successful only if the statute is vague in all its applications.<sup>219</sup>

In evaluating a facial challenge to a state statute on void-for-vagueness grounds, “courts traditionally have relied on the common usage of statutory language, judicial explanations of its meaning, and previous applications of the statute to the same or similar conduct.”<sup>220</sup> Courts will also consider legislative intent.<sup>221</sup>

Because the language is undefined in the Georgia Code and there have been no previous interpretations, it is appropriate to look to the dictionary to identify the statute’s ordinary meaning.<sup>222</sup> Using the dictionary to define the key words of the

---

two-day suspension was not severe, other cases have indicated that the Supreme Court does recognize the need for additional protections for longer removals. *See Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss*, the Court held that a student who is suspended for ten days or less is entitled to minimal levels of due process, but that suspension of more than ten days would require more formal proceedings. *Id.* at 582. Accordingly, in the school regulation case, the Court has left open the question of whether a more heightened vagueness analysis might be appropriate for those suspensions of greater than ten days. *Id.*

217. *Packer*, 246 Conn. at 107; *Clements*, 585 P.2d at 204.

218. *Packer*, 246 Conn. at 105.

219. *Village of Hoffman Estates*, 455 U.S. at 495.

220. *Stephenson v. Davenport Community School District*, 110 F.3d 1303, 1309 (8th Cir. 1997) (internal quotations omitted); *see also Village of Hoffman Estates*, 455 U.S. at 501 n. 18; *Grayned*, 408 U.S. at 110; *Kolender*, 461 U.S. at 355; *High Ol’ Times, Inc. v. Busbee*, 673 F.2d 1225, 1229 (11th Cir. 1982) (“a court may cure a law’s vagueness by statutory interpretation”).

221. *High Ol’ Times, Inc.*, 673 F.2d at 1229 (citing *U.S. v. Balint*, 258 U.S. 250 (1922)).

222. *See, e.g., Village of Hoffman Estates*, 455 U.S. at 501 n. 18; *see also Central Georgia Railroad Co. v. Johnson*, 132 S.E. 78, 79 (1898).

statute, the phrase “which makes the student’s continued presence at school a potential danger to persons or property at the school or which disrupts the educational process” applies to students who behaved in a criminally chargeable, felonious manner under the first prong of the statutory test only if their uninterrupted attendance at school could possibly expose persons or property at the school to harm or prevent the normal continuance of the operation of the school.<sup>223</sup>

The legislative history of O.C.G.A. § 20-2-751.5(c) supports this definition of the statute. In the following speech on the Senate floor in support of the language, Senator Brush, the sponsor of the legislation, told the story which was the basis for the Bill:

We had some students—off-campus, off-hours, on the weekend. I believe it was a middle school. This particular instance I was aware of, the two boys were playing with a weapon. One of the boys was shot and killed. We don’t really know what happened. We think they was [sic] playing Russian roulette with the weapon. Monday morning the other child showed up at the classroom. All the students knew it, what had happen. The school was disrupted, in an uproar. Kids were scared, crying, and parents were taking their kids home because of that. The principal and the school board made the decision to remove the child from the school and send him to alternative school. We were sued as the state of Georgia, and the courts forced us to put that child back in that classroom, because we didn’t have a code of conduct that addressed off-campus behavior.<sup>224</sup>

Senator Brush’s comments affirm the intent of the plain language of the statute. Moreover, Senator Brush’s story provides a situation where the statute would be applicable. In

---

223. Webster’s dictionary defines the key words of the statute as follows: “continued” is defined as uninterrupted; “presence” is defined as one’s attendance; “potential” is defined as existing in possibility or capable of development into actuality; “danger” is defined as exposure or liability to injury, pain, harm, or loss; “disrupt” is defined as to throw into disorder or turmoil, or to interrupt to the extent of stopping, preventing normal continuance of or destroying; “educational” is defined as the action or process of educating or of being educated; and “process” is defined as progressively continuing operation that consists of a series of controlled actions. WEBSTER’S DICTIONARY (11th ed. 2006).

224. See *Senate Proceedings*, *supra* note 29.

the situation described by Senator Brush, the operation of the school was clearly disrupted; students were scared and crying, and parents were taking their children home from the school. In this situation, and others like it, the principal would be acting within the parameters of O.C.G.A. § 20-2-751.5(c) in removing this student. Because there are situations that will easily fall within these parameters, O.C.G.A. § 20-2-751.5(c) will likely survive a facial attack.

*b. As-Applied Challenge*

A party making an as-applied challenge must show (1) that the statute does not provide fair warning that it applies to the conduct at issue, or (2) that she was the victim of arbitrary enforcement practices.<sup>225</sup> Because the as-applied analysis assumes that the statute has been applied to a specific set of facts, we will present a scenario to consider. Let's consider the case of a foster-care child living in a group home. On a Saturday afternoon, this student threatened the house manager at his group home, thus committing the offense of making a terroristic threat, a felony.<sup>226</sup> The offense took place away from any other children, and none of the students at this child's school are aware of the incident. Nonetheless, because juvenile courts have reporting requirements,<sup>227</sup> the school is notified of this incident and decides to suspend our hypothetical student.<sup>228</sup>

A court presiding over an as-applied challenge on these facts must determine if O.C.G.A. § 20-2-751.5(c) provides fair notice to this student that his or her off-campus conduct "makes the student's continued presence at school a potential danger to persons or property at the school or which disrupts the educational process,"<sup>229</sup> by examining whether people of

---

225. See *Grayned*, 408 U.S. at 108; *Goguen*, 415 U.S. at 573.

226. See O.C.G.A. § 16-11-37 (2007).

227. See O.C.G.A. § 15-11-80.

228. We have reason to believe that numerous students are being suspended pursuant to O.C.G.A. § 20-2-751.5(c) in circumstances similar to those attributed to our hypothetical student. According to data provided to us by the Georgia Department of Education, threat intimidation is the single largest identified type of off-campus offense for which students are being suspended. See O.C.G.A. § 20-2-751.5(c) *Open Records Request*, *supra* note 2.

229. O.C.G.A. § 20-2-751.5(c).

ordinary intelligence could differ as to whether a student's uninterrupted attendance at school possibly exposes persons or property at the school to harm or prevents the normal continuance of the operation of the school.<sup>230</sup>

It seems likely that persons of ordinary intelligence might differ as to whether our hypothetical student's presence in school exposes persons at the school to harm. While some might believe that any student capable of threatening an adult poses a danger to others, it is just as likely that other persons of ordinary intelligence would see no nexus between the off-campus actions of the student and the potential for harm within the school. Indeed, if all such off-campus behavior were punishable, there would be no need for the nexus language to be included in the statute at all.<sup>231</sup> Accordingly, O.C.G.A. § 20-2-751.5(c), as applied to our hypothetical student, would be void-for-vagueness because of its failure to provide proper notice.

A reviewing court would also look at the second prong of the test, which focuses on whether the challenging party was the victim of arbitrary or discriminatory enforcement of the statute. In evaluating this prong, the context in which the statute was enforced must be considered.<sup>232</sup> Accordingly, the specific facts of the challenging party's case will be examined, and the focus will be whether the behavior falls squarely within what is proscribed by the statute, so no reasonable official could doubt the application in the circumstances.<sup>233</sup> Although this prong is a separate inquiry from the first, there are overlapping determinations. Where the challenging party has been charged with an off-campus offense that does not have any noticeable connection to the school, it seems likely that just as persons of ordinary intelligence would likely differ as to the application of the statute, so too would reasonable school officials.

As with any as-applied attack, the specific facts of the challenging party's case are crucial. However, the analysis

---

230. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984); see also *Village of Hoffman Estates*, 455 U.S. at 489.

231. As Senator Brush, the sponsor of the legislation which gave us the language in O.C.G.A. § 20-2-751.5(c), said, "The [nexus] is the key. They have to both be present. It is not "or" but "and." See *supra* Part III.A.1.

232. See, e.g., *Parker v. Levy*, 417 U.S. 733, 754 (1974); see also *Perez v. Hoblock*, 368 F.3d 166, 176-77 (2d Cir. 2004).

233. *Perez*, 368 F.3d at 176-77.

presented here demonstrates that there are some circumstances where an as-applied challenge to O.C.G.A. § 20-2-751.5(c) could be successful.

#### V. IMPLICATIONS OF O.C.G.A. § 20-2-751.5(C) ON GEORGIA STUDENTS

This section will present the data collected from the Georgia Department of Education through an Open Records Request<sup>234</sup> seeking suspension and expulsion statistics from each School District under O.C.G.A. § 20-2-751.5(c).<sup>235</sup>

##### A. *Suspensions under O.C.G.A. § 20-2-751.5(c)*

The students suspended pursuant to O.C.G.A. § 20-2-751.5(c) are overwhelmingly black, male, in middle school, and economically disadvantaged. Furthermore, students with disabilities are overrepresented in these suspensions.

---

234. *O.C.G.A. § 20-2-751.5(c) Open Records Request, supra* note 2. Specifically, with respect to O.C.G.A. § 20-2-751.5(c), the Open Records Request sought the following information: (1) The number of students expelled during each of the last 5 school years in each county pursuant to a student code of conduct provision mandated by O.C.G.A. § 20-2-751.5(c), broken down by: Race; Gender; Age; Grade; Free lunch status; and Disability; and (2) The number of students suspended during each of the last 5 school years in each county pursuant to a student code of conduct provision mandated by O.C.G.A. § 20-2-751.5(c), broken down by: Race; Gender; Age; Grade; Free lunch status; and Disability. *Id.*

235. The Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232(g), protects the privacy of student records maintained by schools that receive funds from the U.S. Department of Education. Pursuant to that law, the Department of Education withheld demographic information when there were less than five (5) students in any given category. For all of the demographic charts provided in this section, we have identified the number of students falling into the demographic category in both total numbers as well as in percentages of reported demographics within each category. For example, of the 1,270 students who have been suspended we have been provided with grade-level information for 469 students. The percentages represented in the grade level chart represent a percentage of students out of the 469.

*1. Total Number of Students Suspended Under O.C.G.A. § 20-2-751.5(c)*<sup>236</sup>

One thousand two hundred and seventy<sup>237</sup> students have been suspended pursuant to an O.C.G.A. § 20-2-751.5(c)-mandated provision since 2004, the year the statute became law. The suspensions per year were as follows:

	2007 <sup>238</sup>	2006	2005	2004	Total
Georgia Students	291	308	299	372	<b>1,270</b>

*2. School District Usage of O.C.G.A. § 20-2-751.5(c)-Mandated Provision*<sup>239</sup>

One hundred and six school districts have used their O.C.G.A. § 20-2-751.5(c)-mandated provision to suspend a student.<sup>240</sup> Most School Districts averaged five or fewer

236. *O.C.G.A. § 20-2-751.5(c) Open Records Request, supra* note 2.

237. This is the total number of students reported by the Georgia Department of Education. According to the Georgia Department of Education, this number represents all out-of-school suspensions reported by the districts. Telephone Conversation with Mark Vignati, Operations Analyst, Technology Management, Georgia Department of Education (February 25, 2008).

238. Information for 2007 is current through October 11, 2007, the date we received the response to our Open Records Request from the Georgia Department of Education.

239. *See id.*

240. Those School Districts were: Appling County; Atkinson County; Atlanta Public Schools; Banks County; Bibb County; Brooks County; Bryan County; Buford City; Bulloch County; Burke County; Camden County; Candler County; Carroll County; Carrollton City; Catoosa County; Chatham County; Chattahoochee County; Chattooga County; Cherokee County; Clarke County; Clayton County; Cobb County; Colquitt County; Columbia County; Commerce City; Cook County; Coweta County; Crisp County; Dalton City; Dawson County; Decatur County; DeKalb County; Douglas County; Dublin City; Emanuel County; Fayette County; Floyd County; Forsyth County; Franklin County; Fulton County; Gainesville City; Gilmer County; Glynn County; Gordon County; Grady County; Greene County; Gwinnett County; Hall County; Haralson County; Harris County; Henry County; Houston County; Irwin County; Jackson County; Jasper County; Jeff Davis County; Jenkins County; Jones County; Lamar County; Liberty County; Long County; Lowndes County; Lumpkin County; Macon County; Madison County; Marietta City Marion County; McDuffie County; Meriwether County; Monroe County; Montgomery County; Morgan County;

No. 1]

*Suspending Reason*

53

O.C.G.A. § 20-2-751.5(c) suspensions per school-year.<sup>241</sup> We have chosen to highlight the following nine school districts because they had reportable demographic information for each year the statute has been in existence.

	2007	2006	2005	2004	Total
Gwinnett County	74	87	106	62	<b>329</b>
DeKalb County	53	65	51	84	<b>253</b>
Hall County	16	16	14	28	<b>74</b>
Cobb County	20	19	16	13	<b>68</b>
Muscogee County	16	12	14	23	<b>65</b>
Atlanta Public Schools	11	10	2	11	<b>34</b>
Fulton County	9	3	6	15	<b>33</b>
Chatham County	9	9	8	0	<b>27</b>
Bibb County	2	5	8	11	<b>26</b>

*3. Grade-Level Composition of O.C.G.A. § 20-2-751.5(c)-  
Suspensions*

A majority of students suspended under O.C.G.A. § 20-2-751.5(c) are in grades six through eight. Student in these middle school grades comprise 59.7% of reported suspension in this demographic.<sup>242</sup>

---

Muscogee County; Newton County; Oconee County; Peach County; Pickens County; Pierce County; Polk County; Putnam County; Richmond County; Rockdale County; Rome City; Screven County; Spalding County; State Schools Stephens County; Sumter County; Talbot County; Taliaferro County; Tattnall County; Taylor County; Thomas County; Thomaston-Upson County; Thomasville City Tift County; Towns County; Troup County; Twiggs County; Vidalia City Walker County; Walton County; Ware County; Wayne County; Whitfield County; Wilkes County.

241. Pursuant to the Department's policy regarding FERPA, we have very limited demographic data regarding suspensions in those districts.

242. O.C.G.A. § 20-2-751.5(c) *Open Records Request*, *supra* note 2.

<b>O.C.G.A. § 20-2-751.5(c)-Suspensions by Grade</b>					
	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>	<b>Total</b>
Grade 3	<sup>243</sup>	8	-	-	8 (1.4%)
Grade 4	7	9	6	6	28 (4.9%)
Grade 5	12	9	17	13	51 (9.0%)
Grade 6	8	16	8	6	38 (6.7%)
Grade 7	52	51	29	18	150 (26.4%)
Grade 8	33	18	37	73	151 (26.6%)
Grade 9	10	21	-	12	43 (7.6%)
Grade 10	6	6	17	-	29 (5.1%)
Grade 11	-	13	13	8	34 (6.0%)
Grade 12	9	-	19	8	36 (6.3%)

#### *4. Age Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions*

The most represented age category for O.C.G.A. § 20-2-751.5(c) suspensions is thirteen-to-fifteen-year-olds, followed closely by ten-to-twelve-year-olds.<sup>244</sup>

---

243. Due to the limitations placed upon the information provided to us to comply with FERPA, the lack of students identified in any given field does not mean that no such students exist. Instead, it means that there were less than five students meeting that demographic in any school district.

244. *O.C.G.A. § 20-2-751.5(c) Open Records Request*, *supra* note 2.

No. 1]

*Suspending Reason*

55

<b>O.C.G.A. § 20-2-751.5(c)-Suspensions by Age</b>					
	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>	<b>Total</b>
0-6 yrs-old	-	-	-	-	-
7-9 yrs-old	9	15	9	15	28 (3.9%)
10-12 yrs-old	66	66	50	52	234 (32.4%)
13-15 yrs-old	76	79	94	129	378 (52.3%)
16-18 yrs-old	10	20	34	18	82 (11.4%)
18+ yrs-old	-	-	-	-	-

*5. Gender Composition of O.C.G.A. § 20-2-751.5(c)-  
Suspensions*

Male students are vastly overrepresented in O.C.G.A. § 20-2-751.5(c) suspensions, representing 83.5% of all such suspensions.<sup>245</sup>

<b>O.C.G.A. § 20-2-751.5(c)-Suspensions by Gender</b>					
	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>	<b>Total</b>
Male Students	171 (88.1%)	168 (83.6%)	165 (83.8%)	200 (79.7%)	704 (83.5%)
Female Students	23 (11.9%)	33 (16.4%)	32 (16.2%)	51 (20.3%)	139 (16.5%)

*6. Racial Composition of O.C.G.A. § 20-2-751.5(c)-  
Suspensions in Georgia*

Statewide, black students are overrepresented in O.C.G.A. § 20-2-751.5(c) suspensions; while black students comprise 38% of the total school population, they account for over 65% of all suspensions under the statute.<sup>246</sup>

---

<sup>245.</sup> *Id.*

<sup>246.</sup> *Id.*

<b>Racial Composition of Georgia<sup>247</sup></b>			
	<b>2006-07</b>	<b>2005-06</b>	<b>2004-05</b>
Black Students	38%	38%	38%
White Students	47%	48%	49%
Hispanic Students	9%	8%	8%
Asian Students	3%	3%	3%
Multiracial Students	3%	2%	2%
Nat. Am./ AK Native	0%	0%	0%

<b>Racial Composition of O.C.G.A. § 20-2-751.5 (c)-Suspensions Statewide<sup>248</sup></b>					
	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>	<b>Total</b>
Black Students	123 (70.3%)	130 (68.4%)	117 (62.2%)	154 (66.1%)	524 (66.7%)
White Students	42 (24.0%)	45 (23.7%)	61 (32.4%)	64 (27.5%)	212 (27.0%)
Hispanic Students	10 (5.7%)	15 (7.9%)	10 (5.3%)	15 (6.4%)	50 (6.3%)
Asian Students	-	-	-	-	-
Multiracial Students	-	-	-	-	-
Native Am./ AK Native	-	-	-	-	-

### *7. Racial Composition of O.C.G.A. § 20-2-751.5(c)- Suspensions in Districts*

With the possible exception of Hall County, black students are overrepresented in every school district for which we have received reportable demographic data.<sup>249</sup>

247. GA. DEP'T OF EDUC., *Report Card, Student and School Demographics, Georgia*, <http://www.doe.k12.ga.us/ReportingFW.aspx?PageReq=102&StateId=ALL&T=1>.

248. *O.C.G.A. § 20-2-751.5(c) Open Records Request*, *supra* note 2.

249. We were not provided with enough information regarding the racial composition of Fulton County School District and Chatham County School District to provide any meaningful statistics.

No. 1]

*Suspending Reason*

57

*a. Gwinnett County School District*

<b>Racial Composition of Gwinnett<sup>250</sup></b>			
	<b>2006-07</b>	<b>2005-06</b>	<b>2004-05</b>
Black Students	26%	25%	23%
White Students	39%	42%	47%
Hispanic Students	21%	19%	18%
Asian Students	10%	10%	10%
Multiracial Students	4%	3%	3%
Nat. Am./ AK Native	0%	0%	0%

<b>Racial Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions in Gwinnett<sup>251</sup></b>				
	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>
Black Students	31 (43.7%)	34 (41.5%)	43 (43.9%)	24 (40.0%)
White Students	30 (42.3%)	39 (47.5%)	45 (45.9%)	27 (45.0%)
Hispanic Students	10 (14.0%)	9 (11.0%)	10 (10.2%)	9 (15.0%)
Asian Students	-	-	-	-
Multiracial Students	-	-	-	-
Nat. Am./ AK Native	-	-	-	-

250. GA. DEP'T OF EDUC., *Report Card, Student and School Demographics, Gwinnett County*, <http://www.doe.k12.ga.us/ReportingFW.aspx?PageReq=102&CountyId=667&T=1&FY=2007>.

251. O.C.G.A. § 20-2-751.5(c) *Open Records Request*, *supra* note 2.

*b. DeKalb County School District*

<b>Racial Composition of DeKalb<sup>252</sup></b>			
	<b>2006-07</b>	<b>2005-06</b>	<b>2004-05</b>
Black Students	76%	77%	77%
White Students	10%	10%	10%
Hispanic Students	8%	8%	7%
Asian Students	3%	3%	3%
Multiracial Students	2%	2%	2%
Nat. Am./ AK Native	0%	0%	0%

<b>Racial Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions in DeKalb<sup>253</sup></b>				
	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>
Black Students	50 (94.3%)	62 (95.4%)	49 (96.1%)	77 (91.2%)
White Students	-	-	-	-
Hispanic Students	-	-	-	-
Asian Students	-	-	-	-
Multiracial Students	-	-	-	-
Native Am./ AK Native	-	-	-	-

252. GA. DEP'T OF EDUC., *Report Card, Student and School Demographics, Gwinnett County*, <http://www.doe.k12.ga.us/ReportingFW.aspx?PageReq=102&CountyId=667&T=1&FY=2007>.

253. O.C.G.A. § 20-2-751.5(c) *Open Records Request*, *supra* note 2.

No. 1]

*Suspending Reason*

59

*c. Hall County School District*

<b>Racial Composition of Hall<sup>254</sup></b>			
	<b>2006-07</b>	<b>2005-06</b>	<b>2004-05</b>
Black Students	5%	5%	5%
White Students	58%	60%	63%
Hispanic Students	32%	31%	28%
Asian Students	1%	1%	1%
Multiracial Students	3%	2%	2%
Nat. Am./ AK Native	0%	0%	0%

<b>Racial Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions in Hall<sup>255</sup></b>				
	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>
Black Students	-	-	-	-
White Students	12 (75.0%)	6 (37.5%)	9 (64.3)	27 (96.4)
Hispanic Students	-	-	-	-
Asian Students	-	-	-	-
Multiracial Student	-	-	-	-
Nat. Am./AK Native	-	-	-	-

---

254. GA. DEP'T OF EDUC., *Report Card, Student and School Demographics, Gwinnett County*, <http://www.doe.k12.ga.us/ReportingFW.aspx?PageReq=102&CountyId=667&T=1&FY=2007>.

255. O.C.G.A. § 20-2-751.5(c) *Open Records Request*, *supra* note 2.

*d. Cobb County School District*

<b>Racial Composition of Cobb<sup>256</sup></b>			
	<b>2006-07</b>	<b>2005-06</b>	<b>2004-05</b>
Black Students	29%	29%	28%
White Students	48%	50%	53%
Hispanic Students	14%	12%	11%
Asian Students	4%	4%	4%
Multiracial Students	4%	4%	3%
Nat. Am./ AK Native	0%	0%	0%

<b>Racial Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions in Cobb<sup>257</sup></b>				
	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>
Black Students	11 (55.0%)	7 (36.8%)	6 (37.5%)	-
White Students	-	-	7 (43.8%)	7 (53.8%)
Hispanic Students	-	6 (30.0%)	-	-
Asian Students	-	-	-	-
Multiracial Students	-	-	-	-
Nat. Am./ AK Native	-	-	-	-

*e. Muscogee County School District*

<b>Racial Composition of Muscogee<sup>258</sup></b>			
	<b>2006-07</b>	<b>2005-06</b>	<b>2004-05</b>
Black Students	59%	59%	59%
White Students	31%	31%	32%
Hispanic Students	4%	4%	3%

256. GA. DEP'T OF EDUC., *Report Card, Student and School Demographics, Gwinnett County*, <http://www.doe.k12.ga.us/ReportingFW.aspx?PageReq=102&CountyId=667&T=1&FY=2007>.

257. *O.C.G.A. § 20-2-751.5(c) Open Records Request*, *supra* note 2.

258. GA. DEP'T OF EDUC., *Report Card, Student and School Demographics, Gwinnett County*, <http://www.doe.k12.ga.us/ReportingFW.aspx?PageReq=102&CountyId=667&T=1&FY=2007>.

No. 1]

*Suspending Reason*

61

Asian Students	2%	2%	1%
Multiracial Students	4%	4%	3%
Nat. Am./ AK Native	0%	0%	0%

<b>Racial Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions in Muscogee<sup>259</sup></b>				
	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>
Black Students	12 (75.0%)	11 (91.7%)	12 (85.7%)	20 (87.0%)
White Students	-	-	-	-
Hispanic Student	-	-	-	-
Asian Student	-	-	-	-
Multiracial Student	-	-	-	-
Nat. Am./ AK Native	-	-	-	-

*f. Atlanta Public Schools*

<b>Racial Composition of Atlanta Public<sup>260</sup></b>			
	<b>2006-07</b>	<b>2005-06</b>	<b>2004-05</b>
Black Students	85%	86%	87%
White Students	9%	8%	8%
Hispanic Students	4%	4%	4%
Asian Students	1%	1%	1%
Multiracial Students	1%	1%	1%
Nat. Am./ AK Native	0%	0%	0%

<b>Racial Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions in Atlanta Public<sup>261</sup></b>				
	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>
Black Students	11 (100%)	10 (100%)	- (-%)	10 (91.0)

---

259. O.C.G.A. § 20-2-751.5(c) Open Records Request, *supra* note 2.

260. GA. DEP'T OF EDUC., *Report Card, Student and School Demographics, Gwinnett County*, <http://www.doe.k12.ga.us/ReportingFW.aspx?PageReq=102&CountyId=667&T=1&FY=2007>.

261. O.C.G.A. § 20-2-751.5(c) Open Records Request, *supra* note 2.

White Students	-	-	-	-
Hispanic Students	-	-	-	-
Asian Students	-	-	-	-
Multiracial Students	-	-	-	-
Nat. Am./ AK Native	-	-	-	-

*g. Bibb County School District*

<b>Racial Composition of Bibb<sup>262</sup></b>			
	<b>2006-07</b>	<b>2005-06</b>	<b>2004-05</b>
Black Students	73%	73%	72%
White Students	22%	23%	24%
Hispanic Students	2%	2%	1%
Asian Students	1%	1%	1%
Multiracial Students	1%	1%	1%
Nat. Am./ AK Native	0%	0%	0%

<b>Racial Composition of O.C.G.A. § 20-2-751.5(c)- Suspensions in Bibb<sup>263</sup></b>				
	<b>2007</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>
Black Students	- (-%)	- (-%)	7 (87.5%)	11 (100%)
White Students	-	-	-	-
Hispanic Students	-	-	-	-
Asian Students	-	-	-	-
Multiracial Students	-	-	-	-
Nat. Am./ AK Native	-	-	-	-

*8. Student Disability Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions*

Statewide, students with disabilities are suspended pursuant to O.C.G.A. § 20-2-751.5(c) at greater rates than their non-disabled peers; while they represent 12% of students in Georgia

262. GA. DEP'T OF EDUC., *Report Card, Student and School Demographics, Gwinnett County*, <http://www.doe.k12.ga.us/ReportingFW.aspx?PageReq=102&CountyId=667&T=1&FY=2007>.

263. O.C.G.A. § 20-2-751.5(c) *Open Records Request*, *supra* note 2.

No. 1] *Suspending Reason* 63

public schools, they represent 30.5% of suspensions pursuant to the statute.<sup>264</sup>

*a. Georgia*

Total % of Disabled Students Enrolled <sup>265</sup>	12% <sup>266</sup>
Disabled Students Suspended Under O.C.G.A. § 20-2-751.5(c)	262 (30.5%) <sup>267</sup>
Total % of Non-Disabled Students Enrolled	88%
Non-Disabled Students Suspended Under O.C.G.A. § 20-2-751.5(c)	596 (69.5%)

*b. Reportable Districts*

Students with disabilities are overrepresented in all counties for which we have reportable data, with the exception of Bibb County. In Gwinnett County, students with disabilities have been suspended at six times the rate of their student population in the school district.<sup>268</sup>

---

264. *Id.*

265. The percentage of the state and each District's enrollment of Disabled and Non-Disabled students was arrived at by averaging the yearly percentages from 2004-2007.

266. *See supra* note 247.

267. *O.C.G.A. § 20-2-751.5(c) Open Records Request, supra* note 2.

268. The percentage of the state and each District's enrollment of Disabled and Non-Disabled students was arrived at by averaging the yearly percentages from 2004-2007; *see id.*; *see supra* note 260; GA. DEP'T OF EDUC., *Report Card, Student and School Demographics, Chatham County*, <http://www.doe.k12.ga.us/ReportingFW.aspx?PageReq=102&CountyId=625&T=1&FY=2007>; *see supra* note 256; *see supra* note 252; GA. DEP'T OF EDUC., *Report Card, Student and School Demographics, Fulton County*, <http://www.doe.k12.ga.us/ReportingFW.aspx?PageReq=102&CountyId=660&T=1&FY=2007>; *see supra* note 250; *see supra* note 254; *see supra* note 258.

	Muscogee County	Hall County	Gwinnett County	Fulton County	DeKalb County	Cobb County	Chatham County	Bibb County	Atlanta Public
<b>Total % of Disabled Students Enrolled</b>	13%	11%	11%	11%	9%	12%	12%	11%	9%
<b>Disabled Students Suspended Under O.C.G.A. § 20-2-751.5(c)</b>	15 (23.1%)	15 (20.3%)	214 (65.0%)	4 (16.7%)	42 (16.7%)	11 (16.2%)	4 (15.4%)	1 (5.3%)	7 (22.6%)
<b>Total % of Non-Disabled Students Enrolled</b>	87%	89%	89%	89%	91%	88%	88%	89%	91%
<b>Non-Disabled Students Suspended Under O.C.G.A. § 20-2-751.5(c)</b>	50 (76.9%)	59 (79.7%)	115 (35.0%)	20 (83.3%)	210 (83.3%)	57 (83.8%)	22 (84.6%)	18 (94.7%)	24 (77.4%)

No. 1] *Suspending Reason* 65

9. *Economic Composition of O.C.G.A. § 20-2-751.5(c)-Suspensions*<sup>269</sup>

Statewide, students who are eligible to receive free lunch are overrepresented in O.C.G.A. § 20-2-751.5(c) suspensions; while they comprise 50% of students in Georgia, they represent over 65% of students suspended pursuant to the statute.

a. *Georgia*

<b>Georgia</b>	
Total % of Students Eligible for Free Lunch <sup>270</sup>	50% <sup>271</sup>
Free Lunch Students Suspended Under O.C.G.A. § 20-2-751.5(c)	549 (65.9%) <sup>272</sup>
Total % of Students Not Eligible for Free Lunch	50%
Non-Free Lunch Students Suspended Under O.C.G.A. § 20-2-751.5(c)	284 (34.1%)

b. *Reportable Districts*

Students who are eligible to receive free lunch are overrepresented in all counties for which we have reportable data, with the exception of Atlanta Public Schools.<sup>273</sup>

269. The percentage of each District's enrollment of Free Lunch Eligible and Non-Free Lunch Eligible students was arrived at by averaging the yearly percentages from 2004-2007.

270. The National School Lunch Program is a federally assisted meal program operating in public and nonprofit private schools. See U.S. DEP'T OF AGRIC., *Food Nutrition Website*, available at <http://www.fns.usda.gov/cnd/lunch/>. Under federal guidelines, students qualify for free lunch when their family has income up to 130% of the federal poverty level. *Id.* For illustration, a student from a family of four during the 2006-2007 school year qualified for free lunch with a family income of \$26,000 or less. *Id.*

271. See *supra* note 247.

272. O.C.G.A. § 20-2-751.5(c) *Open Records Request*, *supra* note 2.

273. See *supra* note 280; see *supra* note 260; see *supra* note 262; see *supra* note 272; see *supra* note 256; see *supra* note 252; see *supra* note 250; see *supra* note 254; see *supra* note 258; *id.*

	Muscogee County	Hall County	Gwinnett County	Fulton County	DeKalb County	Cobb County	Chatham County	Bibb County	Atlanta Public
<b>Total % of Free Lunch Students</b>	59%	49%	37%	35%	63%	33%	60%	70%	75%
<b>Free Lunch Suspensions Under O.C.G.A. § 20-2-751.5(c)</b>	49 (75.4%)	44 (60.3%)	151 (45.9%)	14 (58.3%)	207 (82.1%)	28 (41.2%)	14 (77.8%)	9 (81.8%)	22 (73.3%)
<b>Total % of Non-Free Lunch Students</b>	41%	51%	63%	65%	37%	67%	40%	30%	25%
<b>Non-Free Lunch Suspensions Under O.C.G.A. § 20-2-751.5(c)</b>	16 (24.6%)	29 (39.7%)	178 (54.1%)	10 (41.7%)	45 (17.9%)	40 (58.8%)	4 (22.2)	2 (18.2)	8 (26.7%)

No. 1] *Suspending Reason* 67

*B. Expulsions under O.C.G.A. § 20-2-751.5(c)*<sup>274</sup>

Twenty-seven School Districts<sup>275</sup> used their O.C.G.A. § 20-2-751.5(c)-mandated provision between 2004 and 2007 to expel sixty-two students.<sup>276</sup>

	2007	2006	2005	2004	Total
Georgia Students	11	14	18	19	62

VI. RECOMMENDATIONS FOR LEGISLATIVE REFORM

The widespread suspension and expulsion of Georgia's students for off-campus behavior is counterproductive. Accordingly, in this section we recommend that the Legislature repeal O.C.G.A. § 20-2-751.5(c). In the event that the statute is not repealed, we recommend that the statute be amended to provide clearer parameters for school districts' codes of conduct.

*A. O.C.G.A. § 20-2-751.5(c) Should be Repealed*

In Part III of this Article, we demonstrated that removal from school fails to ensure school safety, has long-term negative consequences for students, and disproportionately impacts youth of color and youth with disabilities. When a child is arrested for conduct that occurs away from school, the processes in place through the judicial system are sufficient to ensure that the safety concerns of the community are addressed. In the event that the court determines that a child should be released into the community, the student's potential to be rehabilitated will best be met by allowing him or her to return to school.

274. O.C.G.A. § 20-2-751.5(c) *Open Records Request*, *supra* note 2.

275. Those School Districts were: Bibb County; Bulloch County; Chatham County; Chattahoochee County; Cherokee County; Clarke County; Cobb County; Columbia County; Crawford County; Dade County; Dalton City; DeKalb County; Fayette County; Forsyth County; Habersham County; Hall County; Houston County; Lanier County; Meriwether County; Paulding County; Polk County; Rome City; Screven County; Social Circle City; Spalding County; Tift County; Vidalia City.

276. Because of FERPA restrictions, this is the extent of the information available on O.C.G.A. § 20-2-751.5(c)-expulsions.

Therefore, we recommend that the Legislature repeal O.C.G.A. § 20-2-751.5(c).

*B. At a Minimum, O.C.G.A. § 20-2-751.5(c) Should be Limited in Scope and Application*

In the event that the Legislature deems O.C.G.A. § 20-2-751.5(c) necessary to respond to extreme circumstances, several steps should be taken to cure potential constitutional defects and to make sure that the statute is used in the limited circumstances for which it was intended.

*1. The Statute Should be Amended to Provide Clear Parameters for Districts to Follow*

The current statute does not provide clear enforcement guidelines to individual school districts, resulting in a vague statute that has the potential for arbitrary enforcement. To cure this defect, the statute should be modified in several ways. First, we recommend that the statute be amended to read as follows: “Each student code of conduct shall also 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 disrupts the educational process.”

The phrase that has been removed from our amended statute, “which makes the student’s continued presence at school a potential danger to persons or property at the school” is vague, does not provide any guidelines for enforcement, and is inconsistent with the legislative intent of the statute as described by Senator Brush;<sup>277</sup> it has been argued by school districts that the commission of a felony automatically means that a student is a *potential* danger to persons or properties in the school. Such an interpretation leaves the conjunctive nature of the statute entirely irrelevant. Further, the courts are a more appropriate venue for determining a student’s danger to the community.

Second, we recommend that the Legislature add a subsection clearly defining the phrase “disrupts the educational process.” We recommend that this definition require a substantial nexus between the student’s off-campus conduct and the learning environment. For instance, school districts should be required

---

277. *See supra* Part IV.B.2.a.

to demonstrate, at a minimum, that other students are aware of the off-campus conduct, that they have reacted to it, and that removal of the student will lessen the disruption.

*a. District Codes of Conduct Should Not Exceed the Parameters Set forth in the Statute*

The plain language of the statute, as well as a review of the legislative history, demonstrates that O.C.G.A. § 20-2-751.5(c) currently requires that districts address any off-campus behavior of a student which: (1) could result in the student being criminally charged with a felony; and (2) makes the student's continued presence at school a potential danger to persons or property at the school or disrupts the educational process.<sup>278</sup>

Yet, the majority of school districts have enacted codes of conduct that far exceed this mandate. Most of these districts have permitted removal for acts for which the student could not be criminally charged with a felony; some have even permitted removal for acts that do not constitute a crime.<sup>279</sup> To rectify this problem, we recommend that the statute expressly limit the circumstances for which a student may be disciplined to those referenced in the statute itself.

## VII. CONCLUSION

In 2004, the Georgia Legislature enacted a statute that was intended to be used in extraordinary circumstances. Instead, school districts have used this statute to remove more than 1,300 students from school.

However, the vast majority of empirical data shows that removal from school fails to ensure school safety, fails to dissuade students from offending, and fails to promote a stable learning environment. At the same time, suspension results in lost instructional time, reduced academic achievement, social stigma, and emotional distress. Communities also become less safe as removal rates increase because dangerous and delinquent behaviors increase when children are out of school. All of these consequences produce financial costs to society that are quite substantial—incarceration, unemployment, crime, and lack of

---

278. O.C.G.A. § 20-2-751.5(c) (emphasis added).

279. See *supra* Part IV.A.2.

economic contribution to the tax base are all more likely to result from a student's removal from school.

By ending the overuse of removal in school discipline and implementing more constructive alternatives, Georgia can protect taxpayer dollars and promote public safety while enhancing children's growth and rehabilitation.