

## ARE PRINCIPALS DRIVING THE COP CAR? THE GROWTH IN SCHOOL DISCIPLINE FOR OFF-CAMPUS CONDUCT

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## I. Introduction

### A. Wayne, New Jersey Case Study

On October 29, 2011, an altercation took place among high school students at a weekend house party<sup>1</sup> that erupted into a community dispute reflecting significant legal and policy questions for the proper role of school districts in private life. According to police, two Wayne, New Jersey high schoolers were attacked at an off-campus house party, with one individual knocked unconscious.<sup>2</sup> Approximately one week later, police charged nine teenagers with aggravated assault.<sup>3</sup> After the criminal charges were filed, controversy erupted as some of the students charged were stars on the Wayne Hills High School football team and were slated to play in upcoming playoff football games.<sup>4</sup>

On November 11, 2011, Interim School Superintendent Michael Roth decided against suspending the football players.<sup>5</sup> Roth cited legal precedent and a New Jersey administrative statute restricting school discipline for off-campus offenses.<sup>6</sup> As a result, the students participated in the first playoff football game, which the team won.<sup>7</sup> However, on November 16, 2011, Roth reversed his earlier decision and suspended the players, banning them from participating in the next playoff game.<sup>8</sup> School board members remained silent for the most part, although some told the press that they supported the reversal by Roth.<sup>9</sup>

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<sup>1</sup> Matthew McGrath, *9 Wayne Hills students, including star football player, arrested on assault charges*, THE RECORD, Nov. 9, 2011, [http://www.northjersey.com/news/crime\\_courts/9\\_Wayne\\_Hills\\_students\\_.html](http://www.northjersey.com/news/crime_courts/9_Wayne_Hills_students_.html).

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

<sup>3</sup> *Id.*

<sup>4</sup> Matthew McGrath and Hannan Adely, *Superintendent: Law allows accused Wayne Hills students to play*, THE RECORD, Nov. 11, 2011, [http://www.northjersey.com/news/crime\\_courts/Arrested\\_Wayne\\_Hills\\_High\\_players\\_can\\_take\\_part\\_in\\_tonights\\_playoff\\_game.html](http://www.northjersey.com/news/crime_courts/Arrested_Wayne_Hills_High_players_can_take_part_in_tonights_playoff_game.html).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; see N.J. ADMIN. CODE § 6A:16-7.6.

<sup>7</sup> Matthew McGrath, *Officials silent on plans for accused Wayne Hills players*, THE RECORD, Nov. 15, 2011, [http://www.northjersey.com/news/133942503\\_Officials\\_silent\\_on\\_football\\_decision.html](http://www.northjersey.com/news/133942503_Officials_silent_on_football_decision.html).

<sup>8</sup> Matthew McGrath, *Accused Wayne Hills players barred from football*, THE RECORD, Nov. 16, 2011, [http://www.northjersey.com/news/crime\\_courts/111611\\_Accused\\_Wayne\\_Hills\\_players\\_bared\\_from\\_football.html](http://www.northjersey.com/news/crime_courts/111611_Accused_Wayne_Hills_players_bared_from_football.html).

<sup>9</sup> *Id.*

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After the superintendent's actions, the Board of Education met on November 16, 2011 and November 17, 2011 to discuss Roth's new decision to suspend the players.<sup>10</sup> At these meetings, Wayne Hills football players packed the public portion of the school board meeting in protest of the suspensions.<sup>11</sup> Chris Olsen, the school's athletic director and football coach, spoke out and called the suspensions a "rush to justice."<sup>12</sup> He added, "Let's say some of the boys, or all of them, are found not guilty. What do we say to them? 'We're sorry?'"<sup>13</sup> Supporters of the players argued they should have "a chance to refute the charges," and cited the Duke University lacrosse controversy where players accused of rape were suspended and later acquitted.<sup>14</sup> Additionally, in a closed Board of Education session, lawyers for some of the accused players presented evidence that "at least three boys were not present during the alleged attack," and this "created doubt in the board's mind" about suspending the players.<sup>15</sup> Based on this new information, the Board stayed Roth's suspension and scheduled another hearing.<sup>16</sup>

Consequently, the accused players were allowed to play in a November 18 playoff football game, which the team also won.<sup>17</sup> At this point, the football controversy "made national news," with the Board conceding that "the 'majority of people' were upset with its handling of the matter."<sup>18</sup> In this light, on November 25, the Board lifted its stay on Roth's suspension, rendering the players ineligible for a December 3 championship game.<sup>19</sup> In response, the players filed suit, seeking emergent relief with the Commissioner of Education on November 28,

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<sup>10</sup> *Id.*

<sup>11</sup> Matthew McGrath and Erik Shilling, *60 Wayne Hills players crowd into meeting*, THE RECORD, Nov. 17, 2011, [http://www.northjersey.com/news/crime\\_courts/111611\\_Accused\\_Wayne\\_Hills\\_players\\_barrred\\_from\\_football.html](http://www.northjersey.com/news/crime_courts/111611_Accused_Wayne_Hills_players_barrred_from_football.html).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Matthew McGrath, *Wayne Hills football team plays after week of controversy*, THE RECORD, Nov. 18, 2011, <http://www.northjersey.com/sports/WAYNEHILLS.html>.

<sup>16</sup> *Id.*

<sup>17</sup> Matthew McGrath and Patricia Alex, *Assault case puts Wayne Hills football dynasty in tough spot*, THE RECORD, Nov. 27, 2011, [http://www.northjersey.com/news/112711\\_Assault\\_case\\_puts\\_Wayne\\_Hills\\_football\\_dynasty\\_in\\_tough\\_spot.html](http://www.northjersey.com/news/112711_Assault_case_puts_Wayne_Hills_football_dynasty_in_tough_spot.html).

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

<sup>19</sup> *Id.*

2011, and the Superior Court on November 29, 2011.<sup>20</sup>

Hearing the lawsuit the next day on November 30, Superior Court Judge Thomas Brogan met with attorneys for the Board and players but did not make a ruling.<sup>21</sup> Brogan instead deferred to the Commissioner of Education, citing state policy that when an issue arises under school laws, the Department of Education should have primary jurisdiction.<sup>22</sup> Accordingly, both sides met with Administrative Law Judge Ellen Bass on December 1, 2011.<sup>23</sup> That day, Bass heard arguments and denied the players' request for emergent relief.<sup>24</sup> Subsequently, in a determination rendered on December 2, the Commissioner of Education affirmed Bass' decision, and thus, the players were ultimately suspended for the championship game on December 3.<sup>25</sup>

After three reversals in decision, the Wayne Hills School District ultimately punished the students for their alleged conduct that occurred entirely off school grounds. This punishment follows a new trend in New Jersey and around the country in which school districts are increasingly involving themselves in matters that occur beyond the educational environment.<sup>26</sup> In response to the Wayne Hills controversy and other similar situations, a national debate has developed on whether school districts should be assuming the role of disciplining students for their misdeeds outside of school.<sup>27</sup> There is passion on both sides of this

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<sup>20</sup> Mike Vorkunov, *Suspended Wayne Hills football players appeal Board of Education's decision in court*, THE STAR-LEDGER, Nov. 29, 2011, [http://www.nj.com/hssports/blog/football/index.ssf/2011/11/suspended\\_wayne\\_hills\\_football\\_players\\_appeal\\_board\\_of\\_educations\\_decision\\_in\\_court.html](http://www.nj.com/hssports/blog/football/index.ssf/2011/11/suspended_wayne_hills_football_players_appeal_board_of_educations_decision_in_court.html).

<sup>21</sup> John Petrick, *Wayne Hills students' case to be subject of Newark hearing*, THE RECORD, Nov. 30, 2011, [http://www.northjersey.com/news/Judge\\_defers\\_to\\_education\\_commissioner\\_on\\_Wayne\\_Hills\\_suspensions.html](http://www.northjersey.com/news/Judge_defers_to_education_commissioner_on_Wayne_Hills_suspensions.html).

<sup>22</sup> *Id.*

<sup>23</sup> Mike Vorkunov, *Judge denies Wayne Hills football players' appeal to play in state final*, STAR-LEDGER, Dec. 1, 2011, [http://www.nj.com/hssports/blog/football/index.ssf/2011/12/judge\\_denies\\_wayne\\_hills\\_football\\_players\\_appeal\\_to\\_play\\_in\\_state\\_final.html](http://www.nj.com/hssports/blog/football/index.ssf/2011/12/judge_denies_wayne_hills_football_players_appeal_to_play_in_state_final.html).

<sup>24</sup> *Id.*

<sup>25</sup> Matthew McGrath, *Education commissioner bars Wayne Hills players from championship*, THE RECORD, Dec. 2, 2011, [http://www.northjersey.com/news/passaic\\_morris/passaic\\_news/Education\\_commissioner\\_bars\\_Wayne\\_Hills\\_players\\_from\\_championship.html](http://www.northjersey.com/news/passaic_morris/passaic_news/Education_commissioner_bars_Wayne_Hills_players_from_championship.html).

<sup>26</sup> Laura Bruno, *Schools enforce year-round conduct rules*, USA TODAY, Oct. 12, 2010, <http://www.usatoday.com/news/education/2010-10-11-school-discipline.htm>.

<sup>27</sup> Such school disciplinary policies are often referred to as 24/7 policies or "24-hour

issue. Some school administrators argue that school districts should be involved in off-campus affairs, as they believe school districts can better reach kids through discipline.<sup>28</sup> Critics charge this type of school involvement goes too far and infringes on parental rights.<sup>29</sup>

### B. Current 24-Hour Codes in New Jersey

Most New Jersey 24-hour codes passed by individual school districts sanction discipline for alleged drug and alcohol violations away from school. The Randolph Board of Education in New Jersey, for example, passed a policy that disciplined student athletes for drug and alcohol possession at all times.<sup>30</sup> Similarly in Haddonfield, New Jersey, student athletes and parents are required to sign an agreement stating that students will be disciplined for possession or use of tobacco, alcohol, illegal drugs, and anabolic steroids.<sup>31</sup> Finally, the Ramapo Indian Hills Regional High School District passed a regulation that held any violation of the New Jersey criminal code or a municipal code as a student violation subject to discipline.<sup>32</sup>

Other New Jersey 24-hour codes discipline students for traffic offenses away from school. The Freehold Regional High School District in New Jersey disciplines students for motor vehicle violations pursuant

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codes,” a term this note will hereafter use. Julia Terruso, *From Cranford to Ohio, school districts weigh disciplining teens for off-campus behavior*, STAR-LEDGER, Feb. 26, 2012, [http://www.nj.com/news/index.ssf/2012/02/cranford\\_school\\_district\\_weigh.html](http://www.nj.com/news/index.ssf/2012/02/cranford_school_district_weigh.html).

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

<sup>29</sup> *Id.*

<sup>30</sup> The policy “disciplines high school student athletes and those in extracurricular activities if they are caught using or in possession of drugs or alcohol – even if an incident occurs off campus after school or on weekends.” 12 No. 3 Quinlan, Student Discipline Law Bulletin art 5. (Mar. 2010).

<sup>31</sup> The “24/7 Drug and Alcohol Policy” prohibits “the use of tobacco in any form, drinking, possessing or providing alcoholic beverages and/or use, possession, or providing illegal drugs including anabolic steroids, at any time.” *Doe v. Banos*, 713 F. Supp. 2d 404, 408 (D.N.J. 2010).

<sup>32</sup> The policy banned “student participants in Board-sponsored extracurricular activities . . . from the use, possession or distribution of any alcoholic beverage or other drugs (unless prescribed by a physician) *both on and off school grounds* . . . With respect to conduct occurring away from school grounds/events, an alleged violation of the above conduct requirements shall occur if a student is formally charged and/or arrested by law enforcement for an alleged violation of the New Jersey Code of Criminal Justice, and/or applicable municipal codes or ordinance provisions.” *G.D.M. and T.A.M. o/b/o B.M.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg’l High Sch. Dist.* (B.M.M. II), EDU 11597-09, Final Decision (Sept. 13, 2010) (policy was found to be unlawful by the New Jersey Commissioner of Education).

to an agreement with police, under which the school district receives a list of students who receive traffic citations from the local police department.<sup>33</sup> The district then suspends a student's campus parking permit for thirty days for any off-campus moving violation, and if the violation involves an accident, the school revokes the student's parking permit "for the year or until [the] legal system determines student to be innocent of charges."<sup>34</sup> Similarly in Holmdel, New Jersey, the Board of Education passed a policy that revokes a student's on-campus parking privilege for thirty days after two reported traffic offenses.<sup>35</sup>

### C. Overview of Note

With a principal focus on New Jersey law, this Note will first discuss how 24-hour codes create potential constitutional violations and public policy problems. Next, this Note will review state laws that currently exist to address the issue of 24-hour codes. Then, this Note will review instances where school districts have exceeded the scope of state laws that sanction discipline for off-campus conduct. Finally, this Note will reach conclusions about the merits of 24-hour codes and suggest legislation to protect all the stakeholders in the educational process by creating clarity that would prevent disputes such as the Wayne Hills football controversy from occurring in the future.

## II. 24-Hour Codes Create Constitutional Violations and Poor Policy

In a wide range of litigation, parents and students have argued that 24-hour codes are unconstitutional. Specifically, they have alleged such codes violate the Fourteenth Amendment to the United States Constitution by failing to satisfy procedural or substantive due process. This section will review the relevant case law and discuss how school districts are potentially sanctioning unconstitutional discipline under 24-hour codes. Then, this section will review various public policy

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<sup>33</sup> Freehold Regional High School District, *Senior Driving Privileges/Campus Vehicle Procedures* (Mar. 2011), <http://www.frhsd.com/district/files/Senior%20Driving%20PrivilegesCampus%20Vehicle%20Procedures.pdf>.

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

<sup>35</sup> The author of this Note opposed the Holmdel off-campus driving disciplinary policy as a member of the Holmdel Township Board of Education. Jacqueline Hlavenka, *Holmdel BOE keeps student driving policy*, INDEPENDENT (Monmouth Cty., N.J.), July 15, 2010, [http://ind.gmnews.com/news/2010-07-15/Schools/Holmdel\\_BOE\\_keeps\\_student\\_driving\\_policy.html](http://ind.gmnews.com/news/2010-07-15/Schools/Holmdel_BOE_keeps_student_driving_policy.html).

considerations as they relate to 24-hour codes.

A. *Procedural Due Process Challenges to 24-Hour Codes*

Students have alleged they are unconstitutionally denied procedural due process during the disciplinary process under 24-hour codes.<sup>36</sup> This student due process right is derived from *Goss v. Lopez*, where the U.S. Supreme Court concluded that under the Fourteenth Amendment, a suspended student is entitled to “oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”<sup>37</sup> The Court, however, “stopped short of requiring” that a student be given a formal opportunity to secure counsel, confront witnesses, or call witnesses.<sup>38</sup>

The main caveat is that this procedural due process right is contingent on the school discipline involving the deprivation of a constitutionally protected property interest.<sup>39</sup> In *Goss*, the U.S. Supreme Court held that a student’s ten-day scholastic suspension triggers a property interest.<sup>40</sup> As a result, suspended students are afforded notice and a hearing.<sup>41</sup> It is unclear, though, whether procedural due process applies to extracurricular activities, which are typically the subject of discipline under 24-hour codes.<sup>42</sup>

In a relevant Third Circuit case, *Palmer by Palmer v. Merluzzi*, a student was caught consuming beer and smoking marijuana inside the school radio station.<sup>43</sup> The student received a procedural due process

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<sup>36</sup> See L.A. *ex rel* R.A. v. Bd. of Educ. of Wayne, EDU 14241-11, Initial Decision (Dec. 1, 2011).

<sup>37</sup> *Palmer by Palmer v. Merluzzi*, 868 F.2d 90, 93 (3d Cir. 1989) (citing *Goss v. Lopez*, 419 U.S. 565, 581 (1975)).

<sup>38</sup> *Id.* at 93-94 (citing *Goss*, 419 U.S. at 584).

<sup>39</sup> “The threshold issue is whether the interests that could be adversely affected in the proceeding [are] such that the due process clause was implicated.” *Id.* at 93; see U.S. CONST. amend. XIV, § 1 (“No state shall . . . deprive any person of . . . property . . . without due process of law”).

<sup>40</sup> *Id.* at 93 (citing *Goss*, 419 U.S. at 581).

<sup>41</sup> Lisa L. Swem, Note, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359, 366 (1987).

<sup>42</sup> “The question of whether a student has a protectable interest in his continuing participation in extracurricular activities has been faced by numerous courts with differing results.” *Palmer by Palmer v. Merluzzi*, 868 F.2d 90, 97 (3d Cir. 1989) (Cowen, J., concurring in part and dissenting in part).

<sup>43</sup> *Id.* at 91-92.

hearing, and thereafter was suspended from school for ten days.<sup>44</sup> Later, the superintendent added a sixty-day extracurricular activities suspension on top of the academic suspension.<sup>45</sup> The student sued, arguing he did not receive procedural due process when the superintendent decided the additional extracurricular suspension.<sup>46</sup> The court found for the school, but overtly avoided the question of whether the sixty-day extracurricular suspension comprised a property interest requiring procedural due process.<sup>47</sup>

A concurring judge addressed this issue, however, and argued that the majority opinion “implicitly acknowledges that [the student] has a protected property interest in his continued participation in extracurricular activities.”<sup>48</sup> The judge further argued that distinguishing extracurricular activities from other academic activities is becoming an inappropriate distinction:

[T]he notion upon which many of the New Jersey cases rely—that participation in extracurricular activities is a mere *privilege* as opposed to a *right*—is fast becoming outdated. Indeed, courts and commentators increasingly attack the “privilege” versus “right” distinction. Although New Jersey may not be constitutionally obligated to establish and maintain a system of extracurricular activities, many of its public schools, nevertheless, have done so. The New Jersey statutes implicitly acknowledge the importance of extracurricular activities. Public funds support the schools’ various “extracurricular” activities. Further, the Commissioner of Education has *required* teachers to supervise such activities when called upon to do so. Most importantly, a growing consensus indicates that the programs are not “extra” curriculars, but rather, are an integral part of the whole curriculum. Authority in New Jersey does support the proposition that “each pupil has a right to the opportunity to participate in interscholastic athletics and other extracurricular

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<sup>44</sup> *Id.* at 92.

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

<sup>46</sup> *Id.* at 91.

<sup>47</sup> “Resolution of this appeal does not require that we address the issue found dispositive by the ALJ and the district court – whether procedural due process is required whenever a public school student in New Jersey faces or receives for a breach of discipline solely a suspension from participation in his or her school’s athletic program.” *Id.* The court instead reviewed the property interest in the 60-day extracurricular suspension in conjunction with the 10-day suspension that was levied. *Id.*

<sup>48</sup> *Palmer by Palmer*, 868 F.2d at 96 (Cowen, J., concurring in part and dissenting in part).



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activities.<sup>49</sup>

Based in large part on this reasoning, the judge concluded that the New Jersey Supreme Court would today find “a protected interest in participation in extracurricular activities, assuming eligibility requirements are met.”<sup>50</sup>

Assuming *arguendo* that this concurring judge is correct and procedural due process rights apply to extracurricular discipline, it is highly questionable how school districts could constitutionally discipline for off-campus offenses. As discussed earlier, due process in student disciplinary matters “minimally requires adequate notice, an opportunity for a hearing, and substantial evidence to support the penalty.”<sup>51</sup> When a student commits an offense at school, school administrators act on accounts from school employees or students who corroborate and provide evidence relating to the alleged offense. But for alleged offenses that occur off-campus, evidence arises from either a police report or a third-party account that is somehow relayed to school administrators. Illustrating this, some school districts have used mere “Facebook posts” that confirmed “gossip” about a house party where there was alcohol as sufficient evidence to discipline a student.<sup>52</sup>

It is difficult to imagine that unsubstantiated online chatter and other third-party sources amount to substantial evidence, as required under procedural due process.<sup>53</sup> For example, as previously discussed, the Freehold Regional School District in New Jersey revokes a student’s parking permit after having an off-campus motor vehicle accident for the year or “until [the] legal system determines student to be innocent of charges.”<sup>54</sup> The policy makes clear that the school district will suspend a parking permit before the student has an opportunity to contest his or her traffic citation in municipal court. As this illustrates, the current procedures for administering 24-hour codes have a significant potential to lack the requisite procedural due process.

While some may argue that procedural due process is inappropriate for school discipline, past cases have shown the benefits of procedural due process in the proper adjudication of student discipline. As

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<sup>49</sup> *Id.* at 98-99 (Cowen, J., concurring in part and dissenting in part) (citations omitted).

<sup>50</sup> *Id.* at 99 (Cowen, J., concurring in part and dissenting in part).

<sup>51</sup> Swem, *supra* note 41, at 366 (citations omitted).

<sup>52</sup> Terruso, *supra* note 27.

<sup>53</sup> *See Palmer by Palmer*, 868 F.2d at 93.

<sup>54</sup> *See supra* note 33.

discussed in the introduction, the Wayne Hills superintendent suspended nine football players for an alleged off-campus assault pursuant to police accounts without granting the players a procedural due process hearing.<sup>55</sup> The students later received a hearing before the school board, at which point the students produced evidence that “at least three of the accused players weren’t present” during the alleged assault.<sup>56</sup> The school board then stayed the suspensions, with the school board president noting, “[t]he evidence presented at the hearing, which the board and the superintendent had not previously had access to, raised substantial concern regarding the nature and extent of the involvement of some of the students in the incident . . . . The stay was placed so that additional facts and information could be considered.”<sup>57</sup> As these comments demonstrate, procedural due process hearings provide an essential opportunity for a school district to consider any facts that contradict the third-party account that the school is otherwise relying on.

In creating the student procedural due process right, the U.S. Supreme Court held that notice and a hearing protect a student from “unfair or mistaken exclusion from the educational process, with all its unfortunate consequences,” such as damage to “the students’ standing with their fellow pupils as well as interfere[nce] with later opportunities for higher education and employment.”<sup>58</sup> This notion is keenly applicable to the growing adoption of 24-hour codes, where without procedural due process, school administrators are subjecting students to discipline based on third-party accounts without even hearing a student’s side of the story.

From a legal standpoint, if courts find that there is a property interest in extracurricular discipline or parking permits, then there is a significant likelihood that the disciplinary process of 24-hour codes would fail to meet procedural due process requirements. But even if courts conclude that there is no property right to trigger procedural due process, states ought to consider the fairness of student discipline under frameworks where school districts know they are not required to afford students notice and a hearing—let alone find substantial evidence of off-campus misconduct. As such, states should consider legislation that would codify the constitutional safeguards afforded under procedural

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<sup>55</sup> McGrath, *supra* note 8.

<sup>56</sup> McGrath, *supra* note 15.

<sup>57</sup> *Id.*

<sup>58</sup> *Goss v. Lopez*, 419 U.S. 565, 575, 579 (1975).

due process.

*B. Substantive Due Process Challenges to 24-Hour Codes*

Parents have alleged that 24-hour codes violate their parental rights under the federal constitution.<sup>59</sup> In *Meyer v. Nebraska*, the U.S. Supreme Court held the Fourteenth Amendment guarantees parents the right to “establish a home and bring up children” and “to control the education of their own.”<sup>60</sup> In subsequent cases, the Court has reaffirmed this substantive due process right as “protect[ing] the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>61</sup>

The Third Circuit interpreted this right and its interaction with public schools in *Greunke v. Seip*, in which a high school swim coach asked a female swimmer to submit to a pregnancy test.<sup>62</sup> The court concluded “there may be circumstances in which school authorities, in order to maintain order and a proper educational atmosphere in the exercise of police power, may impose standards of conduct on students that differ from those approved by some parents.”<sup>63</sup> However, when “a school’s policies might come into conflict with the fundamental right of parents to raise and nurture their child[ren] . . . the primacy of the parents’ authority must be recognized and should yield only where the school’s action is tied to a *compelling interest*.”<sup>64</sup> Thus, the court established that the Fourteenth Amendment’s parental rights subject certain school district actions to strict scrutiny analysis.

In a recent Third Circuit case that addressed school discipline, the court rejected a parents’ substantive due process claim.<sup>65</sup> In *J.S. v. Blue Mountain School District*, a student was disciplined for online speech that “ma[de] fun of her middle school principal.”<sup>66</sup> While the court reversed the student’s discipline on First Amendment grounds, the court

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<sup>59</sup> See Complaint, *Bernal-Silva v. Borough of Mountain Lakes*, No. 207CV02941, 2009 WL 1873401 (D.N.J. Apr. 3, 2009).

<sup>60</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923).

<sup>61</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

<sup>62</sup> *Greunke v. Seip*, 225 F.3d 290, 295 (3d Cir. 2000).

<sup>63</sup> *Id.* at 304 (“[F]or some portions of the day, the children are in the compulsory custody of state-operated school systems,” where “the state’s power is ‘custodial and tutelary.’”); see also *Veronia Sch. Dist. v. Acton*, 515 U.S. 646, 655, 664-65 (1995).

<sup>64</sup> *Greunke*, 225 F.3d at 305 (emphasis added).

<sup>65</sup> *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc).

<sup>66</sup> *Id.*

rejected the parents' Fourteenth Amendment substantive due process claim.<sup>67</sup> The court held "the parents' liberty interest will only be implicated if the state's action 'deprived them of their right to make decisions concerning their child,' and not when the action merely 'complicated the making and implementation of those decisions.'"<sup>68</sup> Based on this, the Third Circuit held that the school discipline did not prevent the parents "from reaching their own disciplinary decision" or force the parents "to approve or disapprove of [the student's conduct]."<sup>69</sup> Further, the court held the ten-day suspension in question was insufficient to trigger a Fourteenth Amendment liberty interest.<sup>70</sup>

In a matter regarding 24-hour codes, the parents of a student who attended a Ramapo, New Jersey high school asserted a substantive due process claim in their challenge to a school policy that made any state or municipal offense subject to school discipline.<sup>71</sup> In a preliminary decision, an administrative law judge held that the school district's 24-hour code violated the parents' substantive due process rights.<sup>72</sup> He asserted that "dealing with charges against a teenager unrelated to school is the proper function of the parents without interference from school authorities," and that this "is particularly true when the student's alleged misconduct occurred in the parent's home."<sup>73</sup> Based in part on this constitutional violation, the administrative law judge struck down the Ramapo 24-hour code.<sup>74</sup> The Commissioner of Education and the New Jersey Superior Court, Appellate Division avoided this constitutional question, however, and decided the case on strictly statutory grounds.<sup>75</sup>

Given this jurisprudence, 24-hour codes have the potential of violating the Fourteenth Amendment's parental substantive due process right. While a federal court has not yet ruled in favor of a parent in a

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 934 (citing *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005)).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 934, 922.

<sup>71</sup> *G.D.M. and T.A.M. o/b/o B.M.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist. (B.M.M. I)*, EDU 11579-09, Initial Decision (June 11, 2010).

<sup>72</sup> *Id.*

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

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

<sup>75</sup> *G.D.M. and T.A.M. o/b/o B.M.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist. (B.M.M. II)*, EDU 11597-09, Final Decision (Sept. 13, 2010) ("In light of the fact that [the district policy] does not comply with [state law], there is no need to explore the constitutional arguments made by the petitioner and discussed by the ALJ.").

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case concerning student discipline for off-campus conduct, the growing number of 24-hour codes creates the likelihood of a legal challenge on these grounds. So long as a court finds that a 24-hour code implicates a parent's right "to make decisions concerning the care, custody, and control of their children," as the New Jersey administrative law judge in the Ramapo, New Jersey case held, the relevant 24-hour code will be subject to strict scrutiny review.<sup>76</sup>

While proponents believe that the policy goals of 24-hour codes are laudable, it is difficult to argue that school discipline for conduct in the home is narrowly tailored to address a compelling government interest. As 24-hour codes expand in the scope of conduct that they cover, they become less likely to satisfy a heightened standard of review. Accordingly, the policies have the potential of violating parental constitutional rights. Given the possibility that school districts can be disciplining in an unconstitutional manner with these policies, it is imperative that legislatures address the issue of 24-hour codes with legislation that ensures school districts' policies comport with parental constitutional rights in the disciplining of students.

### *C. Public Policy Problems in 24-Hour Codes*

School districts have passed 24-hour codes disciplining students for off-campus traffic offenses, drinking offenses, and other misconduct that are tangentially related to the school environment. While such misdeeds are not to be condoned, this paper questions the policy wisdom behind school disciplinary action to address these out-of-school issues. In this section, this paper will discuss a multitude of policy rationales that have been offered by numerous parties and weigh against 24-hour codes.

First, this Note holds that courts are the best venue for adjudging criminal conduct that occurs away from school. As established under state criminal law, the judicial system is fitted with the tools and procedures needed to ensure that the safety concerns of the community are addressed.<sup>77</sup> Further, courts provide a better venue for assessing a student's danger to the community than schools.<sup>78</sup> Since off-campus misconduct constitutes a violation of state or municipal law, it is only

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<sup>76</sup> See *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>77</sup> Randee J. Waldman & Stephen M. Reba, *Suspending Reason: An Analysis of Georgia's Off-Campus Suspension Statute*, 1 J. MARSHALL L.J. 1, 67 (2008).

<sup>78</sup> *Id.* at 68.

fitting that the criminal justice system governs the disciplinary regime for the offending citizen, who in these instances merely happens to be a public school student.

Second, this Note asserts that 24-hour codes unwittingly create a “double penalty” factor that is inequitable to students. If a student is charged with an offense outside of school, he or she is subject to the relevant criminal laws and is prosecuted accordingly. As criminal statutes are designed to “maintain order in society,” they are already written to incorporate the criminal law goals of deterrence, incapacitation, and retribution.<sup>79</sup> In this light, subsequent school discipline simply adds an additional consequence on top of the underlying criminal penalty.<sup>80</sup>

As articulated by others who have written on this subject, 24-hour codes can be characterized as an “overreaction on the part of the school authorities” that “offends our sense of justice,” because “a precept of justice [is] that punishment for [a] crime should be graduated and proportioned to the offense.”<sup>81</sup> Since school policies “are adopted to preserve order in the school environment,” schools should not play a role in supplementing criminal statutes.<sup>82</sup> As Holmdel Township Board of Education member Ana Vander Woude stated in opposing a 24-hour code, students “are already being punished [by the criminal justice system] if the infraction occurs and [if] it is [then] channeled through the school district for a second type of penalty . . . it would be overlegislating.”<sup>83</sup> In this instance, Vander Woude opposed Holmdel’s aforementioned policy of revoking a student’s campus parking privilege for off-campus traffic offenses that have already been enforced by the municipal court system.<sup>84</sup>

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<sup>79</sup> James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. & PUB. POL’Y 369, 376 (2001).

<sup>80</sup> Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream’s Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 UC DAVIS J. JUV. L. & POL’Y 289, 321 (2005).

<sup>81</sup> Peden, *supra* note 79, at 370 (quoting *Weems v. United States*, 217 U.S. 347, 367 (1910)).

<sup>82</sup> *Id.* at 376.

<sup>83</sup> Jacqueline Hlavenka, *Police will notify school of student traffic tickets*, INDEPENDENT (Monmouth Cty., N.J.), Oct. 8, 2009, <http://ind.gmnews.com/news/2009-10-08/schools/005.html>.

<sup>84</sup> *Id.*

Third, this Note finds that removing students from extra-curricular activities for off-campus violations runs counter to the goals of reducing off-campus misconduct. With respect to correcting teenage behavior, research has shown that “responding with services that help adolescents identify errors, recognize options, and make better choices is more developmentally appropriate than a purely punitive response.”<sup>85</sup> Further, researchers have found that “instead of removing students, schools should implement programs designed to train adolescents’ still-developing brains to make good decisions.”<sup>86</sup> Empirically, studies have shown that students who are suspended or expelled are more likely to drop out of school and become “psychologically damaged.”<sup>87</sup> They also are more likely to exhibit a variety of poor behaviors.<sup>88</sup> Based on these considerations, it is apparent that troubled students are best served by remaining in an educational environment, rather than being suspended and left apt to commit further off-campus malfeasance.<sup>89</sup>

In a similar vein, 24-hour codes that remove students from extracurricular activities reduce the very social benefit provided by extracurricular activities. Empirical studies indicate that participation in extracurricular activities reduces the rates of early school dropout, especially among students at the highest risk of dropping out.<sup>90</sup> If a student receives an extracurricular suspension for consuming alcohol off-campus, kicking the student off the football team will remove the student from an activity that is proven to reduce delinquency. In these cases, 24-hour codes run counter to the merits of extracurricular programs, namely keeping at-risk youth engaged in school instead of walking the streets.

Finally, this Note submits that 24-hour codes unnecessarily expose school districts to potential tort liability. In a Mountain Lakes, New Jersey case, police detained a star high school basketball player on a

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<sup>85</sup> Waldman, *supra* note 77, at 12-13.

<sup>86</sup> *Id.* at 13.

<sup>87</sup> Hanson, *supra* note 80, at 289, 330-31.

<sup>88</sup> Suspended students are more likely to become involved in a physical fight, carry a weapon, smoke, use alcohol and drugs, have sex, drop out of school, feel isolated from society, and commit further offenses. Melanie Riccobene Jarboe, Note, “Expelled to Nowhere”: School Exclusion Laws in Massachusetts, 31 B.C. THIRD WORLD L.J. 343, 349-50 (2011).

<sup>89</sup> *Id.*

<sup>90</sup> Joseph L. Maloney & Robert B. Carins, *Do Extracurricular Activities Protect Against Early School Dropout*, 33 DEVELOPMENTAL PSYCHOLOGY 241, 248 (1997).

weekend night, contending she was leaving the scene of a house party.<sup>91</sup> During this encounter, the student maintained that she did not consume alcohol, and in the end the police never filed any charges against the student.<sup>92</sup> Regardless, and based solely on the police account, the high school suspended the girl from the basketball team.<sup>93</sup> Her parents sued, arguing that their daughter's basketball suspension was unfounded and caused her to lose collegiate scholarship opportunities.<sup>94</sup> The parents alleged numerous torts against the local school district and police department, including tortious interference with a prospective economic advantage and defamation.<sup>95</sup> While the case was never tried, the local police department settled for \$50,000 and the school district settled for an undisclosed amount.<sup>96</sup> Given these settlements, one must ask whether public school districts should assume such liability arising from discipline for off-campus conduct. As 24-hour codes grow in prevalence, there are likely to be many similar tort claims brought after instances of unfounded discipline. Considering school districts are publicly funded, 24-hour codes can recklessly expose taxpayers to liability whenever off-campus discipline is improperly sanctioned.

Based on these considerations, this Note submits that 24-hour codes present numerous public policy shortcomings. Under 24-hour codes that are currently in operation, school districts are unilaterally taking punitive measures that are duplicative of those already taken by the criminal justice system. At the same time, these actions troublingly expose school districts to tort liability while unwittingly removing at-risk students from schools.

For the policy and legal reasons discussed in this section, this Note submits that states must craft laws that curtail the application of 24-hour codes to specific areas where they are both constitutional and necessary for the safety of a school's operation.<sup>97</sup> The next section will discuss

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<sup>91</sup> Complaint, *Bernal-Silva v. Borough of Mountain Lakes*, 2009 WL 1873401 (D.N.J. Apr. 3, 2009).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Eugene Paik, *Mountain Lakes pays \$50K to settle suit by former basketball standout*, STAR-LEDGER, Feb. 2, 2010, [http://www.nj.com/news/local/index.ssf/2010/02/mountain\\_lakes\\_pays\\_50000\\_to\\_s.html](http://www.nj.com/news/local/index.ssf/2010/02/mountain_lakes_pays_50000_to_s.html).

<sup>97</sup> For example, as a school board member, the author of this note promoted specific instances where school intervention into off-campus affairs is justifiable:

“If there was a party over the weekend and there were two groups that get into



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how several states have attempted to limit the scope of off-campus discipline, pursuant to principles this note supports, and yet school districts have routinely exceeded these limitations.

### ***III. Lack of Compliance with State Laws that Govern 24-Hour Codes***

#### *A. Overview of Laws Governing 24-Hour Codes*

School discipline for off-campus conduct has historically been sanctioned in specific instances where student conduct “poses a threat or danger to the safety of other students, staff or school property or disrupts the educational program of the school.”<sup>98</sup> For example, in New Jersey, a 1970 case laid the groundwork for the present restrictions on off-campus discipline.<sup>99</sup> In *R.R. v. Board of Education of Shore Regional High School District*, a New Jersey court reviewed a student’s suspension for an out-of-school altercation.<sup>100</sup> The court said it was unable to find a New Jersey decision holding that school officials had the power to expel or suspend a student for conduct away from school grounds.<sup>101</sup> As a result, the court looked to other jurisdictions and secondary sources, and fashioned a rule that school officials may discipline a student for conduct away from school only when it is “reasonably necessary for the student’s physical or emotional safety and well-being, or for reasons relating to the safety and well-being of other

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a fight and the police are aware of it, [school administrators] need to know what happened because there could very well be spillover into the building,” Collins said . . . . “There are many different circumstances beyond the scope of the imagination where administrative intervention is appropriate and necessary, but I do believe that our policies, namely the alcohol and driving policies, incorporate instances where [the conduct] fails [to] materially and substantially” interfere with the school’s operation, as required under state statute.

Jacqueline Hlavenka, *Holmdel BOE to amend controversial off-campus policy*, THE INDEPENDENT (Monmouth Cty., N.J.), Oct. 21, 2010, [http://ind.gmnews.com/news/2010-10-21/Schools/Holmdel\\_BOE\\_to\\_amend\\_controversial\\_offcampus\\_polic.html](http://ind.gmnews.com/news/2010-10-21/Schools/Holmdel_BOE_to_amend_controversial_offcampus_polic.html).

<sup>98</sup> Ronald D. Wenkart, *Discipline of K-12 Students for Conduct Off School Grounds*, 201 ED. LAW REP. 531, 531 (2006).

<sup>99</sup> *R.R. v. Bd. of Ed. of Shore Reg’l High Sch. Dist.*, 263 A.2d 180 (N.J. Super. 1970); see *G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg’l High Sch. Dist.*, 427 N.J. Super. 246, 263 (2012) (“The two-pronged test set forth in N.J.A.C. 6A:16-7.6 is derived from the trial court’s decision in *R. R. v. Board of Education of the Shore Regional High School District* . . .”).

<sup>100</sup> *Id.* at 182.

<sup>101</sup> *Id.* at 184.

students, teachers or public school property.”<sup>102</sup>

Many state laws follow this court’s approach, and overall, there is a national trend towards limiting 24-hour codes to a “reasonableness” standard that reaches only certain conduct that directly affects the school environment.<sup>103</sup> For example, in Connecticut, the legislature passed a law that only allowed 24-hour codes to reach off-campus conduct that “markedly interrupts or severely impedes the day-to-day operation of a school.”<sup>104</sup> The state teacher’s union president supported this standard, saying the legislature’s task is to balance “students’ [due process] rights and the rights of a class which may be disrupted [as well as the rights of an] individual who is assaulted or harassed.”<sup>105</sup> Similarly, Georgia legislators restricted off-campus discipline to specific offenses where a student “could be charged” with a felony.<sup>106</sup> The Georgia law also contains a second requirement that the conduct “makes the student’s continued presence at the school a potential danger,” which the law’s legislative sponsor said is “key” to avoid having school districts disciplining students for off-campus offenses that do not affect the school environment.<sup>107</sup>

### B. New Jersey Law Governing 24-Hour Codes

In order for school districts to discipline students for off-campus conduct, they must have the legal authority to do so. In New Jersey, a local school board’s power is “no greater than the authority conferred by statute.”<sup>108</sup> Therefore, to establish disciplinary authority, the state must statutorily authorize the student discipline.<sup>109</sup> To this end, the New Jersey State Board of Education has administrative rulemaking power

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<sup>102</sup> *Id.* at 184; see N.J. ADMIN. CODE § 6A:16-7.6 (quoted language adopted in administrative code).

<sup>103</sup> Daniel E. Feld, Annotation, *Right to discipline pupil for conduct away from school grounds or not immediately connected with school activities*, 53 A.L.R.3D 1124 (1973).

<sup>104</sup> *Packer v. Bd. of Educ. of Thomaston*, 717 A.2d 117, 134 (Conn. 1998).

<sup>105</sup> *Id.* at 133.

<sup>106</sup> Waldman, *supra* note 77, at 32-33.

<sup>107</sup> *Id.* at 33.

<sup>108</sup> G.D.M. and T.A.M. o/b/o B.M.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg’l High Sch. Dist. (B.M.M. III), EDU 13033-10, Initial Decision (July 6, 2011).

<sup>109</sup> Waldman, *supra* note 77, at 32 (“First, [a statute] 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.”).

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and has promulgated rules addressing 24-hour codes.<sup>110</sup> The relevant rule authorizes discipline for off-campus offenses in specific cases:

(a) School authorities have the right to impose a consequence on a student for conduct away from school grounds, including on a school bus or at a school-sponsored function, that is consistent with the district board of education's code of student conduct, pursuant to N.J.A.C. 6A:16-7.1.

1. This authority shall be exercised only when it is reasonably necessary for the student's physical or emotional safety, security and well-being or for reasons relating to safety, security and well-being of other students, staff or school grounds, pursuant to N.J.S.A. 18A:25-2 and 18A:37-2.

2. This authority shall be exercised only when the conduct which is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.

3. The consequence pursuant to (a) above shall be handled in accordance with the district board of education approved code of student conduct, pursuant to N.J.A.C. 6A:16-7.1, and as appropriate, in accordance with N.J.A.C. 6A:16-7.2, 7.3, or 7.5.<sup>111</sup>

Pursuant to this administrative rule, New Jersey school districts may sanction off-campus discipline by enacting 24-hour codes at the local level, subject to the limits set forth in state law.<sup>112</sup> School boards must publicly vote to approve the 24-hour codes, and typically include them as part of the district's student code of conduct.<sup>113</sup>

By passing laws that govern 24-hour codes, states are addressing two important considerations that were promoted in the previous section. First, states are addressing the policy concerns about having school districts involved in discipline for off-campus conduct. In this respect, state statutes serve to "ensure[] that a school board is unable to

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<sup>110</sup> N.J. STAT. ANN. § 18A:11-1 ("The board shall . . . [e]nforce the rules of the state board . . . [and p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.").

<sup>111</sup> N.J. ADMIN. CODE § 6A:16-7.6.

<sup>112</sup> Waldman, *supra* note 77, at 32.

<sup>113</sup> N.J. ADMIN. CODE § 6A:16-7.1 (New Jersey requires that "[e]ach district board of education . . . develop, adopt and implement a code of student conduct which establishes standards, policies and procedures."); *see also* N.J. ADMIN. CODE § 6A:16-1.4 ("Each district board of education shall develop and adopt written policies, procedures, mechanisms or programs governing . . . [d]evelopment and implementation of a code of student conduct . . .").

usurp the parental role unless a child's off-campus conduct interferes with the school's legitimate custodial role."<sup>114</sup> Second, these state laws help provide a statutory framework for school districts to follow, helping "ensure that school board authority is exercised consistently with [applicable] constitutional protections."<sup>115</sup>

*C. School District 24-Hour Codes Found to Exceed Governing State Laws*

Despite some state laws that explicitly define when school districts may discipline students for off-campus conduct,<sup>116</sup> as discussed in the previous section, there is evidence that school districts enact policies that exceed these state laws. In one such case, a parent whose child attended a Ramapo, New Jersey high school successfully challenged a 24-hour code for exceeding state law.<sup>117</sup> The school district policy in question established as a school conduct violation any violation of the New Jersey criminal code or relevant municipal codes.<sup>118</sup> The New Jersey Commissioner of Education struck down this 24-hour code, finding that it "encompass[e] too many potential conduct violations that [did] not meet the elements" required under state law before off-campus discipline is permitted.<sup>119</sup> The Commissioner further held the state law governing off-campus conduct "emphasizes the notion that there must be some link between the conduct and the school environment" for discipline to be sanctioned.<sup>120</sup>

The school district appealed this decision to the Superior Court of New Jersey, Appellate Division.<sup>121</sup> On appeal, the school district alleged the Commissioner (1) misinterpreted the term "consequence" in the state code and (2) rendered a decision that is inconsistent with other statutes that promote responses by school authorities to "substance

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<sup>114</sup> Brief for American Civil Liberties Union of New Jersey as Amici Curiae Supporting Respondents at 10, *G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist.*, 427 N.J. Super. 246 (App. Div. 2012).

<sup>115</sup> *Id.* at 7.

<sup>116</sup> See N.J. ADMIN. CODE § 6A:16-7.6.

<sup>117</sup> *G.D.M. and T.A.M. o/b/o B.M.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist. (B.M.M. II)*, EDU 11597-09, Final Decision, at 3 (Sept. 13, 2010).

<sup>118</sup> *Id.* at 1, 3.

<sup>119</sup> *Id.* at 7.

<sup>120</sup> *Id.* (citing N.J. ADMIN. CODE § 6A:16-7.6.)

<sup>121</sup> *G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist.*, 427 N.J. Super. 246 (2012).

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abuse and bullying.”<sup>122</sup> To start, the court found that the term “consequence” should be interpreted according to its common meaning, thus rendering a mandatory meeting with school administrators and/or suspensions for extracurricular activities subject to state statute.<sup>123</sup> Further, the court agreed with the Commissioner that the statute requires any off-campus conduct subject to discipline to have a “nexus” to the “orderly administration of the school,” thus affirming the striking down of the broad Ramapo policy.<sup>124</sup>

While the Ramapo lawsuit represents only one school district that violated state law, there is empirical evidence that school districts regularly ignore state laws restricting off-campus discipline. Legal researchers studied the disciplinary policies passed by local school boards in Georgia and compared them to the off-campus discipline requirements established under applicable state law.<sup>125</sup> Georgia law allows schools to punish for off-campus conduct only if a student (1) “acted in a way ‘which could result in the student being criminally charged with a felony[,]’” and (2) “that action . . . ‘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>126</sup> The researchers found that Georgia school districts have regularly “gone beyond the command” of this law.<sup>127</sup> Specifically, they found that a “majority of districts” maintained policies that deviated from state law.<sup>128</sup> The school district policies were inconsistent with Georgia’s statute for many reasons, including (1) completely abandoning the felonious behavior requirement and incorporating non-criminal activity, (2) including a broad range of behaviors that are not limited to felonies, (3) converting the two-part test into an either/or test, or (4) adding broadening language to the list of acts subject to punishment.<sup>129</sup>

When school districts promulgate policies that deviate from state law, they are “expos[ing] students to punishment for off-campus behavior beyond the authority granted by the Legislature.”<sup>130</sup> Given this

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<sup>122</sup> *Id.* at 257-58, 264; *see also* N.J. ADMIN. CODE § 6A:16-7.6.

<sup>123</sup> *G.D.M.*, 427 N.J. Super. at 262.

<sup>124</sup> *Id.* at 266.

<sup>125</sup> Waldman, *supra* note 77, at 30.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 37.

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

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

current potential for school districts to discipline students in a manner that violates state law, it is incumbent on legislatures to pass more detailed laws that directly address the legality of 24-hour codes and better ensure school district compliance with state law.

*D. 24-Hour Codes Held Unconstitutionally Vague As Enforced*

Besides potentially exceeding state law, student discipline for off-campus conduct can also create an unconstitutional application of state law.<sup>131</sup> In one such instance, high school senior Kyle Packer was pulled over in his local Connecticut town for not wearing a seat belt.<sup>132</sup> During the traffic stop, the police officer arrested Packer for drug possession after spotting a marijuana cigarette, performing a car search, and finding drug paraphernalia along with two ounces of marijuana.<sup>133</sup> After learning of Packer's arrest, the local school board held a hearing and voted to expel Packer for a semester and prohibit him from extracurricular activities for a year.<sup>134</sup>

Packer sued to reverse his expulsion. Under Connecticut state law, a student may only be disciplined for off-campus conduct when the conduct is "seriously disruptive of the educational process."<sup>135</sup> The court reviewed this off-campus discipline statute, applied it to the facts of Packer's case, and said:

"A person of ordinary intelligence, apprised only of the language [of the state law] and our prior interpretation . . . of similar language, could not be reasonably certain whether possession of marijuana in the trunk of a car, off school grounds after school hours, is, *by itself and without some tangible nexus to school operation*, 'seriously disruptive of the educational process' as required by [state law] in order to subject a student to expulsion."<sup>136</sup>

Under the void for vagueness doctrine,<sup>137</sup> the court found

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<sup>131</sup> Packer v. Bd. of Educ. of Thomaston, 717 A.2d 117, 124 (Conn. 1998).

<sup>132</sup> *Id.* at 121.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 122-23.

<sup>135</sup> In Connecticut, state law allows districts to discipline for off-campus conduct if the conduct is (1) violative of a publicized board policy and (2) "seriously disruptive of the educational process." Packer, 717 A.2d at 122 n.7 (Conn. 1998) (citing CONN. GEN. STAT. § 10-233(d)(a)(1)).

<sup>136</sup> Packer, 717 A.2d at 130.

<sup>137</sup> "The void for vagueness is a procedural due process concept that originally was

Connecticut law did not provide Packer with sufficient notice that his marijuana possession would be subject to school discipline, and reversed his expulsion accordingly.<sup>138</sup>

While this decision is only dispositive under the operative facts, it highlights the ways in which school districts can unconstitutionally apply state statutes governing off-campus conduct. In the *Packer* case, the school district made its own determination that Packer's marijuana arrest was "seriously disruptive of the educational process," as required under state law to expel him.<sup>139</sup> But the court rejected this conclusion by the school board, holding that the school's interpretation of state law is "irrelevant" to a void for vagueness claim and that proper constitutional notice must only come from the statute itself and relevant judicial interpretations.<sup>140</sup>

On a void-for-vagueness basis alone, many currently enacted 24-hour codes are potentially unconstitutional applications of state law. For example, in New Jersey, the relevant state law requires that off-campus conduct "materially and substantially" interfere with the school's operation before it can become subject to discipline.<sup>141</sup> Elucidating this statutory phrase, the Superior Court of New Jersey, Appellate Division struck down the Ramapo policy which subjected any criminal offense to school discipline, writing: "[A] student could be suspended from participating in extracurricular activities as the result of receiving a citation for littering on a municipal sidewalk. Nothing in [the state statute] can be read to endorse such a result."<sup>142</sup> Based on this holding,

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derived from the guarantees of due process contained in the fifth and fourteenth amendments to the United States constitution." *Id.* at 125. It requires a statute (1) provide "fair warning . . . in language that the common world would understand, of what the law intends to do if a certain line is passed[.]" and (2) "establish minimum guidelines to govern their enforcement." *Id.*

<sup>138</sup> "To summarize, we conclude that . . . the statute, as drafted, did not provide the plaintiff with constitutionally adequate notice that possession of two ounces of marijuana in the trunk of his car off the school grounds in the town of Morris, after school hours, without any tangible nexus to the operation of Thomaston High School, would subject him to expulsion[.]" *Id.* at 134.

<sup>139</sup> The school district argued the arrest met this standard because (1) the student's brother was present for the arrest, causing his friends at school to become aware of the arrest, (2) a former high school student who is a known drug user was present for the arrest, and (3) teachers had approached the principal with respect to the arrest. *Id.* at 122.

<sup>140</sup> *Id.* at 131, 134.

<sup>141</sup> See N.J. ADMIN. CODE § 6A:16-7.6.

<sup>142</sup> *G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist.*, 427 N.J. Super. 246, 266 (2012).

does an off-campus speeding ticket, which is currently addressed by some New Jersey 24-hour codes, meet this standard, or would it fail under the void-for-vagueness doctrine?<sup>143</sup>

In this light, many 24-hour codes that are currently enforced by school districts have the potential of being unconstitutionally void for vagueness under state law. As a result, legislatures must pass new laws that better address 24-hour codes. Such laws must provide sufficient guidance so that school officials are not left to make discretionary decisions that are unconstitutionally vague as applied under the governing state statute.

*E. Judicial Standards Resulting in 24-Hour Codes Evading Review*

Even when parents or students undertake the effort of challenging a 24-hour code, they face obstacles presented by the judicial standards of review that apply to school disciplinary decisions. In cases where students seek prompt review, legal recourse is typically only available through an emergent relief petition. Such a petition, while heard promptly by a judge, is subject to a heightened standard of review.<sup>144</sup> In the Wayne Hills case, as discussed in the introduction, the suspended student athletes sued seeking emergent relief, as their suspensions jeopardized participation in a state championship football game that was less than one week away.<sup>145</sup> There, the New Jersey Commissioner of Education held that the students were unable to sustain their burden of proof under the state's emergent relief standard.<sup>146</sup> This meant the students could not demonstrate, as required by law, a likelihood of prevailing on the underlying merits of the suit or that the legal right underlying their claim was settled law.<sup>147</sup>

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<sup>143</sup> See *supra* notes 33-35.

<sup>144</sup> In New Jersey, emergent relief may be granted if the judge determines from the proofs that (1) the petitioner will suffer irreparable harm if the requested relief is not granted, (2) the legal right underlying the petitioner's claim is settled, (3) the petitioner has a likelihood of prevailing on the merits of the underlying claim, and (4) when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted. *Crowe v. DeGioia*, 90 N.J. 126, 132-34 (1982).

<sup>145</sup> L.A. *ex rel* R.A. v. Bd. of Educ. of Wayne, EDU 14241-11, Initial Decision (Dec. 1, 2010).

<sup>146</sup> L.A. *ex rel* R.A. v. Bd. of Educ. of Wayne, EDU 14241-11, Final Decision (Dec. 2, 2010).

<sup>147</sup> L.A., *supra* note 145.



On another legal point, the administrative law judge emphasized that the Wayne Township Board of Education's decision to suspend the football players was entitled to deference.<sup>148</sup> Citing case law, the judge held that a school board "has broad discretion to take the actions needed to effectively operate its public schools," and that based on this standard, a court "will not substitute [its] judgment for that of the board of education" unless there is "a finding that the action below was arbitrary, capricious or unreasonable."<sup>149</sup> As a result, the judge said the students "have to demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it."<sup>150</sup> The judge concluded the board "amply demonstrated a nexus" between the alleged incident and school operations, and that "the Board's determination that [the accused students] should not be permitted to participate in extra-curricular activities is entitled to deference by the Commissioner."<sup>151</sup>

As an attorney for the Wayne Hills football players pointed out in an interview, the administrative law judge and the Commissioner of Education never actually reached "a decision on the underlying merits of the case."<sup>152</sup> Rather, the case was dismissed because of the players' inability to overcome the emergent relief and deference standards.<sup>153</sup> With these heightened standards of review applied to school disciplinary decisions, there is effectively no judicial review of school administrative decisions. This is a rather troubling reality, as school administrators are left to interpret state law with effectively no appeal to determine the legality or constitutionality of their decision making. As the Connecticut Supreme Court noted in *Packer*, school administrators are not constitutionally "authorized to construe" state law.<sup>154</sup> Therefore, legislatures should pass new laws that ensure students and parents can obtain some form of due process review under 24-hour codes, thus ensuring that state law is properly interpreted and applied in the school setting.

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<sup>148</sup> *Id.* (citing *Thomas v. Morris Twp. Bd. of Educ.*, 89 N.J. Super. 327, 332 (App. Div. 1965), *aff'd*, 46 N.J. 581).

<sup>149</sup> *Id.*; *Kopera v. W. Orange Bd. of Educ.*, 60 N.J. Super. 288, 294 (App. Div. 1960).

<sup>150</sup> L.A., *supra* note 143.

<sup>151</sup> *Id.*

<sup>152</sup> McGrath, *supra* note 25 (The education commissioner "wrote that lawyers proved the players would suffer irreparable harm by not playing in the championship game, but that lawyers failed to prove that they are likely to win their underlying appeal of the suspensions.").

<sup>153</sup> *Id.*

<sup>154</sup> *Packer v. Bd. of Educ. of Thomaston*, 717 A.2d 117, 131 (Conn. 1998).

*F. Structural Reasons Causing School Districts to Exceed State Law*

Besides legal considerations, there are several structural reasons why state laws governing 24-hour codes are often ignored by school districts. These factors include disincentives for school board members to oppose the implementation of 24-hour codes, incentives for school administrators to support 24-hour codes, as well as disincentives for parents to challenge 24-hour codes. Based on these realities, it is incumbent on state legislatures to create regimes that better ensure school districts comply with the laws they promulgate.

First, there are political disincentives for school board members to oppose 24-hour codes when they are proposed at the local level. For example, the Holmdel, New Jersey Board of Education passed a policy that disciplines students for motor vehicle violations occurring outside of school.<sup>155</sup> Holmdel High School principal William Loughran promoted the policy at a board of education meeting, arguing “it’s one of those things that defines the values of a community . . . [f]rom our perspective we think it’s a good thing.”<sup>156</sup> Despite concerns raised by board members about the policy violating state law, the board majority repeatedly approved the policy over dissent.<sup>157</sup> One board member openly disagreed with the policy, but was persuaded by the principal into supporting the 24-hour code, saying “[i]f [the students] are safer because of something we are doing, then we have to go with that.”<sup>158</sup> As this quote highlights, it is politically challenging to oppose a measure that school administrators argue promotes student safety—even if it likely violates state law.

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<sup>155</sup> See Hlavenka, *supra* note 35.

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

<sup>157</sup> The Holmdel Township Board of Education voted 5-4 to defeat a motion to place a moratorium on the off-campus driving policy. Proponents of the moratorium, including the author of this Note, argued the off-campus policy exceeded the scope of state law: “‘We cannot establish some link as required in the statute,’ Collins said. ‘[The policy] amounts to a blanket authorization . . . that is illegal and in violation of statute.’”

Jacqueline Hlavenka, *Holmdel Board of Education split on off-campus policies*, INDEPENDENT (Monmouth Cty., N.J.), Oct. 7, 2010, [http://ind.gmnews.com/news/2010-10-07/Front\\_Page/Holmdel\\_Board\\_of\\_Education\\_split\\_on\\_offcampus\\_poli.html](http://ind.gmnews.com/news/2010-10-07/Front_Page/Holmdel_Board_of_Education_split_on_offcampus_poli.html).

<sup>158</sup> Hlavenka, *supra* note 35.

The actions in the Ramapo, New Jersey school district further illustrate the political difficulty for school board members to oppose 24-hour codes on legal grounds. In this district, Superintendent Paul Saxton advocated for a 24-hour code after conducting a survey in 2005 that revealed high percentages of high school students consume alcohol at home without parental knowledge.<sup>159</sup> Supposedly in response, Saxton and the board of education passed a 24-hour code meant to be a “deterrent of drug and alcohol abuse” that subjected students to discipline for any off-campus conduct that resulted in an alleged “violation of the New Jersey Code of Criminal Justice, and/or applicable municipal codes or ordinances.”<sup>160</sup> The New Jersey Commissioner of Education struck down this 24-hour code for violating state law.<sup>161</sup> Remarkably, the school board then passed another proposed 24-hour code that made minimal changes—and which was also struck down in a subsequent facial challenge.<sup>162</sup> This back-and-forth reinforces that there are political disincentives for school board members to oppose 24-hour codes when proposed, even if courts have struck down previous iterations of the policy.

Second, there are potential incentives for school administrators to advocate for 24-hour codes, even if they may violate state law. To this point, school boards and school administrators have repeatedly argued they should be able to define state law as it relates to student discipline.<sup>163</sup> With such autonomy to interpret state law, though, school administrators and board members have the potential “to indulge their personal predilections.”<sup>164</sup> For example, some school administrators have

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<sup>159</sup> G.D.M. and T.A.M. o/b/o B.M.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist. (B.M.M. I), EDU 11597-09, Initial Decision (June 11, 2010).

<sup>160</sup> G.D.M. and T.A.M. o/b/o B.M.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist. (B.M.M. II), EDU 11597-09, Final Decision (Sept. 13, 2010).

<sup>161</sup> *Id.*

<sup>162</sup> An administrative law judge held that the newly-written policy suffers from the same infirmity as the original policy. G.D.M. and T.A.M. o/b/o B.M.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist. (B.M.M. I), EDU 11579-09, Initial Decision (June 11, 2010).

<sup>163</sup> The Connecticut Association of Boards of Education argued that school board members should be able to define applicable state law as they see fit, holding “the board members’ knowledge and experience . . . enable[s] them to put a framework to a situation and determine if a situation is serious enough to warrant expulsion.” Brief for Conn. Ass’n of Bds. of Educ. as Amici Curiae Supporting Respondents, *Packer v. Bd. of Educ. of Thomaston*, 717 A.2d 117 (Conn. 1998).

<sup>164</sup> Brief for Conn. Civil Liberties Union Found. as Amici Curiae Supporting Respondents, *Packer v. Bd. of Educ. of Thomaston*, 717 A.2d 117 (Conn. 1998).

personal views that can color the interpretation of the applicable state law. In the Ramapo school district, the superintendent made clear that he personally supported a 24-hour code because he openly believed parents were failing at raising their children.<sup>165</sup> Similarly, Superintendent Barbara Duncan of the Holmdel Township Public Schools advocated for a 24-hour code because she believed the school district properly acted as a student's parent during the school day.<sup>166</sup>

Beyond personal beliefs, there are also educational incentives that weigh on school districts to discipline and remove poorly behaved students.<sup>167</sup> Researchers reviewed school policies intended to increase the number of suspensions and found that schools are incentivized to remove these students because they often score poorly on standardized exams, parents want disruptive students out of their children's classrooms, and teachers can get rid of troublemakers.<sup>168</sup> Overall, there are incentives for school administrators and board members to support 24-hour codes regardless of legal concerns.

Finally, there are also disincentives for parents to challenge 24-hour codes. The Connecticut Civil Liberties Union Foundation stated there is an overall "difficulty in challenging the decisions of school officials."<sup>169</sup> To this end, research has shown that in school matters, "many parents often do not have the mindset, time, or means to pursue redress."<sup>170</sup> Further, when parents actually do have the resources to sue, they often end up feeling "ostracized, frustrated, and unsuccessful" in challenging the school system.<sup>171</sup> With this reduced likelihood that parents will take the time to challenge 24-hour codes in court, there is an increased likelihood that illegal 24-hour codes will evade judicial review.

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("Permitting expulsion for conduct away from school that is deemed to be 'seriously disruptive of the educational process' invites arbitrary and discriminatory enforcement and permits school officials to indulge their personal predilections.").

<sup>165</sup> "If I thought the parents were dealing with them, we wouldn't be doing this," he said in an interview. *G.D.M. and T.A.M. o/b/o B.M.M. v. Bd. of Educ. of the Ramapo Indian Hills Reg'l High Sch. Dist. (B.M.M. I)*, EDU 11579-09, Initial Decision (June 11, 2010).

<sup>166</sup> "I don't see the school being so distant from the family . . . Basically, we are filling the role of being a parent to a student during the day." Hlavenka, *supra* note 83.

<sup>167</sup> Jarboe, *supra* note 88, at 353.

<sup>168</sup> *Id.*

<sup>169</sup> Brief for Conn. Civil Liberties Union Found. as Amici Curiae Supporting Petitioners, *Packer v. Bd. of Educ. of Thomaston*, 717 A.2d 117 (Conn. 1998).

<sup>170</sup> Hanson, *supra* note 80, at 295.

<sup>171</sup> *Id.*

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Overall, as this section discusses, there are several perverse structural reasons that can lead to school district noncompliance with state law. As a result, corrective legislation is needed to ensure that state laws are properly complied with at the local level and that districts do not continually “expose[] students to punishment for off-campus behavior beyond the authority granted by the Legislature.”<sup>172</sup>

#### ***IV. Proposed Legislation and Conclusions***

As explained in the previous sections, 24-hour codes present numerous legal and policy concerns. In many cases, the codes have the potential of violating students’ procedural due process rights and parents’ substantive due process rights.<sup>173</sup> At the same time, they constitute poor public policy for a variety of reasons, including taking at-risk youth away from extra-curricular programs that would help them and otherwise creating a double penalty that supersedes the criminal justice system.<sup>174</sup>

Currently, many states, including New Jersey, have rightfully passed laws that restrict school discipline for off-campus offenses to specific instances.<sup>175</sup> School districts, however, have repeatedly exceeded these state laws,<sup>176</sup> and given the standards of review that apply in such cases, there is little to no judicial review to ensure school district compliance with state law.<sup>177</sup> In this light, states should pass laws that more effectively circumscribe the practice of discipline for off-campus conduct. In order to attain this goal, this Note recommends legislation that takes into account the following considerations.

First, the law should cite the specific criminal offenses that are potentially subject to school discipline for off-campus conduct. This would prevent indecorously broad interpretations of the law by school districts, such as those holding that minor traffic offenses directly affect a school’s operation. This section of the law should also expressly state that school districts cannot discipline for offenses that are not enumerated in the statute.<sup>178</sup>

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<sup>172</sup> Waldman, *supra* note 77, at 37.

<sup>173</sup> See *supra* Part 2A, 2B.

<sup>174</sup> See *supra* notes 78-79.

<sup>175</sup> See *supra* note 110.

<sup>176</sup> See *supra* Part 3C.

<sup>177</sup> See *supra* Part 3E.

<sup>178</sup> Waldman, *supra* note 77, at 31.

Second, the law should create a due process appeal as of right to the local school board whenever discipline for off-campus conduct occurs. This would reduce the likelihood of school administrators potentially making determinations in contradiction of the applicable state law, as in the *Packer* case.<sup>179</sup> Further, this would also create a procedural due process opportunity to receive notice and a hearing, as required by the Fourteenth Amendment when there is a constitutionally-protected liberty interest involved.<sup>180</sup>

Third, the law should establish a more permissive standard of review in case a student files a challenge to off-campus discipline with the New Jersey Department of Education. Currently, between the emergent review and deference standards, the Commissioner of Education cannot reverse a board decision absent bad faith by a school board. This should change so that a student can receive a proper review of a school board's final decision to ensure compliance with state law, rather than being prevented from obtaining review based on applicable judicial standard.

Finally, the law should restrict discipline for off-campus conduct to suspensions that are remedial to ensuring the safety of the school environment. This would allow the criminal justice system to serve its goals of deterrence, incapacitation, and retribution, while the school codes would serve to preserve order in the school environment.<sup>181</sup> This would also ensure that the school discipline does not violate substantive due process by assuming a parental role in the upbringing of a child.<sup>182</sup> Further, it would ensure that students are not counterproductively removed from extracurricular activities that prove beneficial in preventing misconduct.<sup>183</sup>

Although arguably well-intentioned, 24-hour codes create larger problems than the ills they are supposedly intended to address. As discussed in the introduction, in less than one month, the Wayne Hills football players accused of off-campus malfeasance had their eligibility status changed three times. This convoluted process did not make national headlines because of the troublesome allegations against the players, but rather the confusion over whether the school could have or

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<sup>179</sup> See generally *Palmer by Palmer v. Merluzzi*, 868 F.2d 90, 93 (3d Cir. 1989)

<sup>180</sup> *Id.*

<sup>181</sup> See *Peden*, *supra* note 79; *Hanson*, *supra* note 80.

<sup>182</sup> See generally *Hanson*, *supra* note 80.

<sup>183</sup> See *Hanson*, *supra* note 80.

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should have disciplined the students. To this point, according to most accounts, the Wayne Hills school environment never became dangerous because of fallout from the alleged assault, but rather because of the public controversy over the players' status.<sup>184</sup> If state law had defined and limited the school's role regarding this off-campus incident, there would have been no public controversy. But ambiguity in the law led to incredulity among the public.

This Note does not dispute the duty and need of a school district to maintain an orderly school environment. The 24-hour codes that are currently being promulgated by school districts, though, exceed this role and instead extend schools into a troubling area with harsh policy and legal consequences. As a result, states must take affirmative steps to prevent school districts from becoming mired in the adjudication of tangential off-campus misconduct. This can straightforwardly be accomplished through passage of new state laws that are drafted in accordance with this Note's recommendations. With such reform, law enforcement can focus on enforcing the law, teachers can focus on teaching, and students can focus on learning. What is more, administrators can focus on running their schools, such that principals are not, figuratively, driving the cop car.

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<sup>184</sup> Bob Cook, *Wayne Hills Football 9 Who Were Out, Then In, Are Out Again*, FORBES.COM, Nov. 28, 2011, <http://www.forbes.com/sites/bobcook/2011/11/28/wayne-hills-football-9-who-were-out-then-in-are-out-again/> (“[T]he board said things had changed, including the ‘reversal by the high school principals, which now, is that this issue is disrupting the daily operations in the buildings.’”).