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Is The Principal Driving the Cop Car? The Problematic Nature of School Discipline for Off-Campus Conduct

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IS THE PRINCIPAL DRIVING THE COP CAR? THE PROBLEMATIC NATURE OF SCHOOL DISCIPLINE FOR OFF-CAMPUS CONDUCT

By: Michael L. Collins

PART ONE: Introduction

On October 29, 2011, an altercation took place among high school students at a party off-school grounds.[1] According to police, two victims were attacked, with one knocked unconscious.[2] Approximately one week later, police charged nine teenagers with aggravated assault.[3] After criminal charges were filed, a local 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.[4]

On November 11, 2011 Interim School Superintendent Michael Roth decided not to suspend the football players.[5] The Superintendent cited legal precedent and a New Jersey administrative statute restricting school discipline for off-campus offenses.[6] As a result, the students participated in the playoff football game.[7] However, on November 16, 2011, Roth reversed his earlier decision and suspended the players, banning them from participating in the upcoming playoff games.[8] School board members mostly remained silent, although some told the press that they supported the reversal by Roth.[9]

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[1] 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.
[2] *Id.*
[3] *Id.*
[4] 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.
[5] *Id.*
[6] *Id.*; *see infra* Part 1B.
[7] 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.
[8] 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_barred_from_football.html
[9] *Id.*

Thereafter, the Board of Education held meetings on November 16, 2011 and November 17, 2011 to discuss Roth's new decision to suspend the players.[10] Wayne Hills football players packed the public portion of the school board meeting in protest of the suspensions.[11] Chris Olsen, the district's athletic director and football coach, called the suspensions a "rush to justice."[12] 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'?"[13] 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.[14]

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," which then "created doubt in the board's mind" about suspending the players.[15] Based on this new information, the Board stayed Roth's suspension and scheduled another hearing.[16] Consequently, the accused players were allowed to play in a November 18 playoff football game, which the team won.[17]

At this point, the football controversy "made national headlines," with the Board conceding that "a 'majority of people' were upset with its handing of the matter."[18] In this light,

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[10] *Id.*
[11] 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_barred_from_football.html.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Matthew McGrath, *Wayne Hills football team plays after week of controversy*, THE RECORD (Nov. 18, 2011), http://www.northjersey.com/sports/WAYNEHILLS.html.
[16] *Id.*
[17] Matthew McGrath and Patricia Alex, *Assault case puts Wayne Hills football dynasty in tough spot*, THE RECORD (Nov. 26, 2011), http://www.northjersey.com/news/112711_Assault_case_puts_Wayne_Hills_football_dynasty_in_tough_spot.html.
[18] *Id.*

on November 25, the Board lifted its stay on Roth's suspension, rendering the players ineligible for a December 3 championship game.[19]

In response, attorneys for the players filed suits seeking emergent relief with the Commissioner of Education on November 28, 2011 and the Superior Court on November 29, 2011.[20] On November 30, Superior Court Judge Thomas Brogan met with attorneys for the Board and players but did not make a ruling.[21] Brogan instead deferred to the Commissioner of Education, saying "it's a policy of the state that when an issue arises under school laws that the Commissioner of Education should have primary jurisdiction."[22]Accordingly, both sides met with administrative law judge Ellen Bass on December 1, 2011.[23] That day, Bass heard arguments and subsequently denied the players' request for emergent relief.[24] Bass's decision was affirmed by the Commissioner of Education on December 2, and the players were ultimately suspended for the championship game on December 3.[25]

The Wayne Hills Board of Education, in its ultimate action upheld by the New Jersey Commissioner of Education, punished students for their alleged conduct that occurred entirely off school grounds. This punishment follows a new trend in New Jersey and around the country, where school districts are increasingly involving themselves in discipline for matters that occur

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[19] *Id.*
[20] 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.
[21] 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.
[22] *Id.*
[23] Mike Vorkunov, *Judge denies Wayne Hills football players' appeal to play in state final*, THE 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.
[24] *Id.*
[25] *Id.*

outside of the school environment.[26] In response to the Wayne Hills controversy and other similar situations, a national debate has grown on whether school districts should be assuming this role of disciplining students for their misdeeds outside of school.[27] There is passion on both sides of this 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.[28] Critics charge this type of school involvement goes too far and infringes on parental rights.[29]

This Note will first provide background for this new trend of disciplining students for off-campus conduct under "24-hour codes," so named because they govern student conduct at all times. Next, this Note will review how 24-hour codes have the potential to violate state law and evade judicial review. Then, this Note will discuss how 24-hour codes create potential constitutional violations and public policy problems. Finally, this Note will reach conclusions about the merits of 24-hour codes and suggest legislation to protect students and prevent disputes such as the Wayne Hills football controversy from occurring in the future.

PART TWO: Background

A. History and Standards in Disciplining for Off-Campus Conduct

School discipline for off-campus conduct has historically been sanctioned in specific instances where the "poses a threat or danger to the safety of other students, staff or school property or disrupts the educational program of the school."[30] In New Jersey, a 1970 case laid the

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[26] Laura Bruno, *Schools enforce year-round conduct rules*, USA TODAY (Oct. 12, 2010), http://www.usatoday.com/news/education/2010-10-11-school-discipline_N.htm.
[27] 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.
[28] *Id.*
[29] *Id.*
[30] Ronald D. Wenkart, *Discipline of K-12 Students for Conduct Off School Grounds*, 201 ED. LAW REP. 531, 531 (2006).

groundwork for the present state restrictions on off-campus discipline.[31] In *R.R. v. Board of Ed. of Shore Regional High School Dist.*, the court reviewed a student's suspension based on an out-of-school altercation.[32] 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.[33] 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 students, teachers or public school property."[34]

Many state laws follow this court's approach, and to this end, there is a national trend of limiting 24-hour codes to a "reasonableness" standard that reaches only certain conduct that directly affects the school environment.[35] 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 operations of a school."[36] 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."[37] Similarly in Georgia, legislators restricted off-campus discipline to specific offenses where a student "could be charged" with a felony.[38] The law also contains a second requirement that the conduct "makes the student's continued presence at the school a

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[31] R.R. v. Board of Ed. Of Shore Regional High School Dist., 263 A.2d 180 (N.J. Super. 1970).
[32] *Id.* at 182
[33] *Id.* at 184.
[34] *Id.* at 184; *See* N.J. ADMIN. CODE § 6A:16-7.6 (quoted language adopted in administrative code)
[35] 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).
[36] Packer v. Board of Educ. of the Town of Thomaston, 717 A.2d 117, 133 (Conn. 1998)
[37] *Id.*
[38] Randee J. Waldman and Stephen M. Reba, *Suspending Reason: An Analysis of Georgia's Off-Campus Suspension Statute*, 1 J. MARSHALL L.J. 1, 33 (2008)

potential danger," which the bill's sponsor said is "key" to avoid having school districts disciplining students for off-campus offenses that do not affect the school environment.[39]

B. State Law Governing 24-Hour Codes in New Jersey

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."[40] Therefore, to establish disciplinary authority, the state must statutorily authorize the student discipline.[41] In New Jersey, the state board of education has administrative rulemaking power and promulgates rules addressing 24-hour codes.[42] The relevant New Jersey State Board of Education 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.
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> 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.
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> 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.
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> 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.

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[39] *Id.*

[40] G.D.M. and T.A.M. o/b/o B.M.M. v. Ramapo Indian Hills Reg'l Sch. Dist. BOE (B.M.M. III), EDU 13033-10, Initial Decision (July 6, 2011).

[41] Waldman, supra note X, 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.").

[42] 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 the 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.").

N.J. ADMIN. CODE § 6A:16-7.6.

After the state provides school districts with the authority to discipline for off-campus conduct, the school district may then sanction off-campus discipline by enacting 24-hour codes at the local level. The codes are subject to the limits set forth in state law.[43] 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.[44]

C. Current 24-Hour Codes in New Jersey

Most New Jersey 24-hour codes 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.[45] Similarly in Haddonfield, New Jersey, student athletes and parents are required to sign a policy disciplining students for possession or use of tobacco, alcohol, illegal drugs, and anabolic steroids.[46] Finally, in Ramapo, New Jersey, the Board of Education passed a regulation that held any violation of the New Jersey criminal code or municipal code as a student violation subject to discipline.[47]

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[43] Waldman, *supra* note 38, at 32.

[44] N.J. ADMIN. CODE § 6A:16-7.1 (New Jersey requires that "[e]ach 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...").

[45] 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).

[46] 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).

[47] 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."

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 to an agreement with police, under which the school district receives a list of students who receive traffic citations from the local police department.[48] The district then suspends a student's campus parking permit for 30 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 legal system determines student to be innocent of charges."[49] Similarly in Holmdel, New Jersey, the Board of Education passed a policy that revokes a student's on-campus parking privilege for 30 days after two reported traffic offenses.[50]

Part Three: 24-Hour Codes Violate State Law and Evade Review

A: Statutory Conflict

Despite state laws explicitly defining when school districts may discipline students for off-campus conduct,[51] there is evidence that school districts enact policies that violate state law. For example, a Ramapo, New Jersey high school parent successfully challenged a 24-hour code for exceeding New Jersey law.[52] The school district policy in question established any violation of the New Jersey criminal code or relevant municipal codes outside of school as a school conduct violation.[53] The New Jersey Commissioner of Education struck this 24-hour code, finding it "encompasses too many potential conduct violations that would not meet the elements"

G.D.M. and T.A.M. o/b/o B.M.M. v. Ramapo Indian Hills Reg'l Sch. Dist. BOE (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).

[48] Freehold Regional High School District, *Senior Driving Privileges/Campus Vehicle Procedures* (Mar. 2011), http://www.frhsd.com/district/files/Application-Rules.pdf.

[49] *Id.*

[50] Jacqueline Hlavenka, *Holmdel BOE keeps student driving policy*, INDEPENDENT (Monmouth Cty., N.J.), July 15, 2010.

[51] *See* N.J. ADMIN. CODE § 6A:16-7.6.

[52] G.D.M. and T.A.M. o/b/o B.M.M. v. Ramapo Indian Hills Reg'l Sch. Dist. BOE (B.M.M. II), EDU 11597-09, Final Decision (Sept. 13, 2010).

[53] *Id.*

required under state law before disciplining.[54] The Commissioner further held the state law governing off-campus discipline "emphasizes the notion that there must be some link between the conduct and the school environment" for discipline to be sanctioned.[55]

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 state law.[56] Georgia 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) "the 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.'"[57] The researchers found that Georgia school districts have regularly "gone beyond the command" of this law.[58] They found a "majority of districts" maintained policies that deviated from these state law requirements.[59] The school district policies were inconsistent with Georgia 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

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[54] *Id.*
[55] *Id.*, *citing* N.J. ADMIN. CODE § 6A:16-7.6 ("School authorities have the right to impose a consequence on a student for conduct away from school grounds . . . that is consistent with the district board of education's code of student conduct . . . 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 the safety, security and well-being of other students, staff or school grounds . . . [and] 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.")
[56] Waldman, *supra* note 38, at 30.
[57] *Id.* (emphasis added).
[58] *Id.* at 37.
[59] *Id.*

the two-part test into an either/or test, or (4) adding broadening language to the list of acts subject to punishment.[60]

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."[61] Given this current potential for school districts to discipline students in a manner that violates state law, it is incumbent on legislatures to pass new laws that directly address the legality of 24-hour codes and ensure future compliance with state law.

B: Void for Vagueness

Aside a school district's 24-hour code exceeding state law, in at least one case an expulsion for off-campus conduct was held to be an unconstitutional application of state law.[62] In this case, high school senior Kyle Packer was pulled over in his local Connecticut town for not wearing a seat belt.[63] During the traffic stop, the police officer arrested Packer after spotting a marijuana cigarette, performing a car search, and finding drug paraphernalia and two ounces of marijuana.[64] After learning of the arrest, the local school board held a hearing and voted to expel Packer for a semester and to prohibit him from extracurricular activities for a year.[65]

Packer then sued to reverse his expulsion.[66] Under Connecticut state law, a student may only be disciplined for off-campus conduct when the conduct is "seriously disruptive of the

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[60] *Id.*
[61] *Id.*
[62] Packer v. Board of Educ. of the Town of Thomaston, 717 A.2d 117 (Conn. 1998).
[63] *Id.* at 121.
[64] *Id.*
[65] *Id.* at 122-23.
[66] *Id.*

educational process."[67] The court reviewed the relevant state statute for off-campus discipline, applied it to the facts in his case, and concluded:

> A person of reasonable 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.
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> Packer, *supra*, 717 A.2d at 130.

The court concluded that under the void for vagueness doctrine,[68] state law did not provide Packer with sufficient notice that his marijuana possession would be subject to school discipline, and accordingly reversed his expulsion.[69]

While this decision is only dispositive over the operative facts, it highlights how school districts can unconstitutionally apply state statutes governing off-campus conduct. In the *Packer* case, the school district decided on its own that Packer's marijuana arrest was "seriously disruptive of the educational process," as required under state law to expel him.[70] But the court

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[67] 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 v. Board of Educ. of the Town of Thomaston, 717 A.2d 117, 122-23 (Conn. 1998), *citing* CONN. GEN. STAT. § 10-233(d)(a)(1).

[68] "The void for vagueness is a procedural due process concept that originally was derived from the guarantees of due process contained in the fifth and fourteenth amendments to the United States constitution." 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.* at 98-100

[69] "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

[70] 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

refuted this conclusion, holding that the school's interpretation of state law is "irrelevant" and that proper notice must only come from the statute itself and relevant judicial interpretations.[71]

On a void-for-vagueness basis alone, many 24-hour codes that are currently enacted are potentially unconstitutional applications of state law. For example, in New Jersey the relevant state law requires that off-campus conduct subject to discipline "materially and substantially" interfere with the school's operation.[72] Does the misdeed of an off-campus traffic offense meet this standard, or would it fail under the void-for-vagueness doctrine?[73] In light of the Connecticut Supreme Court approach, many 24-hour codes that are currently passed have the potential of being void-for-vagueness under the applicable state law. As a result, legislatures should pass new laws that better address 24-hour codes and ensure that school districts are not unconstitutionally applying state law against students.

C: Judicial Standards Allow 24-Hour Codes to Evade Review

If a parent or student challenges a 24-hour code, they face obstacles based on 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 in order to prevail.[74] In the Wayne Hills case, as discussed in the introduction, the student athletes sued seeking emergent relief, as their suspensions jeopardized participation in a state

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[71] *Id.* at 113

[72] *See* N.J. ADMIN. CODE § 6A:16-7.6

[73] *See supra* notes 48-50.

[74] The judge may order emergent relief . . . 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, 102 N.J. 50, 132-35 (1986).

championship football game that was less than one week away.[75] In the case, the New Jersey Commissioner of Education held the students were unable to sustain their burden of proof under the emergent relief standard.[76] This meant the students could not legally demonstrate, as required, a likelihood of prevailing on the underlying merits of their suit or that the legal right underlying their claim was settled law.[77]

Also in this case, the administrative law judge emphasized the school board's decision to suspend the football players was entitled to judicial deference.[78] Citing case law, the judge held the school board "has broad discretion to take the actions needed to effectively operate its public schools," and based on this deference standard, courts "will not substitute his judgment for that of the board of education" unless there is "a finding that the action below was arbitrary, capricious or unreasonable."[79] 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."[80] 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."[81]

As an attorney for the Wayne Hills football players pointed out in an interview, the administrative law judge and the Commissioner of Education never reached "a decision on the

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[75] L.A. on behalf of R.A. v. Board of Education of the Township of Wayne, EDU 14241-11, Initial Decision (Dec. 1, 2011).
[76] L.A. on behalf of R.A. v. Board of Education of the Township of Wayne, EDU 14241-11, Final Decision (Dec. 2, 2010)
[77] L.A., *supra* note 75.
[78] *Id.*, *citing* Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), *aff'd*, 46 N.J. 581.
[79] *Id.*, *citing* Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966); Kopera v. W. Orange Bd. of Educ., 60 N.J. Supr. 288, 294 (App. Div. 1960).
[80] *Id.*
[81] *Id.*

underlying merits of the case."[82] Rather, the case was dismissed because of the players' inability to overcome the applicable emergent relief and deference standards.[83] With emergent relief and deference applied to the review of school disciplinary decisions, there is effectively limited-to-no judicial review of school administrative decisions. This is a rather troubling reality, as school administrators thus effectively interpret state law without any judicial review to their decision making. As the Connecticut Supreme Court held in *Packer*, school administrators are not constitutionally "authorized to construe" state law.[84] Therefore, legislatures should pass new laws to ensure that students and parents can obtain some form of judicial review under 24-hour codes, ensuring that courts and not school administrators are the final arbiters of state law.

D: Policy Reasons Why State Law is Ignored

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

First, there are disincentives for school board members to oppose 24-hour codes when they are proposed at the local level. In Holmdel, New Jersey, the Board of Education passed a policy that disciplined students for motor vehicle violations outside of school.[85] The principal promoted the policy at a board of education meeting, arguing "it's one of those things that

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[82] Vorkunov, *supra* note 23.
[83] *Id.*
[84] Packer, *supra* note 36, at 113.
[85] *See supra* note 50.

defines the values of a community . . . from our perspective it's a good thing."[86] Despite concerns about the policy violating state law, the board majority repeatedly approved the policy over dissent.[87] One board member openly disagreed with the policy, but was persuaded by the principal's comments into supporting the 24-hour code, saying "if the [students] are safer because of something we are doing, then we have to go with that."[88] 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.

The actions in Ramapo, N.J. further illustrate the political difficulty for school board members to oppose 24-hour codes for violating state law. In this district, school superintendent Paul Saxton advocated for a 24-hour code after a 2005 survey that revealed high percentages of high school students consuming alcohol at home without parental knowledge.[89] Saxton and the board of education passed a 24-hour code "meant to be a deterrent to illegal activities" 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 ordinance provisions."[90] The New Jersey Commissioner of Education struck the 24-hour policy for violating state law.[91] Immediately thereafter, the board of education passed another proposed 24-hour policy that made minimal changes – and that was also struck in a facial challenge.[92] As this

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[86] Jacqueline Hlavenka, *Holmdel BOE keeps student driving policy*, INDEPENDENT (Monmouth Cty., N.J.), July 15, 2010.
[87] *Id.*; Jacqueline Hlavenka, *Holmdel Board of Education spit on off-campus policies*, INDEPENDENT (Monmouth Cty., N.J.), Oct. 7, 2010.
[88] Hlavenka, *supra* note 86
[89] G.D.M. and T.A.M. o/b/o B.M.M. v. Ramapo Indian Hills Reg'l Sch. Dist. BOE (B.M.M. I), EDU 11579-09, Initial Decision (June 11, 2010).
[90] G.D.M., *supra* note 47.
[91] *Id.*
[92] An Administrative Law Judge held the newly-written policy "suffers from the same infirmity as the original policy." G.D.M., *supra* note 40.

case highlights, there are political disincentives for school board members to oppose 24-hour codes when proposed, even if they believe the policies could be illegal.

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 argued they should be able to define state law as it relates to student discipline.[93] With such autonomy to interpret state law, however, school administrators and board members have the potential "to indulge in their personal predilections."[94] For example, some school administrators have personal views that can color the interpretation of the applicable state law. In Ramapo, the superintendent made clear that he personally supported a 24-hour code because he believed parents were failing at raising their children.[95] Similarly, the Holmdel superintendent advocated for a 24-hour code because she believed the school district acted as a student's parent during the school day.[96] Beyond personal beliefs, there are also educational incentives for school districts to discipline and remove students who commit poor behavior.[97] Researchers reviewed school policies intended to increase the number of suspensions, and found that schools are incentivized to remove these students because (1) they often score poorly on standardized exams, (2) parents want disruptive students out of their children's classrooms, and (3) teachers can get rid of

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[93] The Connecticut Association of Boards of Education argued that school board members should be able to define the state enabling act 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 Connecticut Association of Boards of Education as Amici Curiae Supporting Respondents, Packer v. Board of Educ. of the Town of Thomaston, 717 A.2d 117 (Conn. 1998).

[94] *Id.*

[95] "If I thought the parents were dealing with them, we wouldn't be doing this," he said in an interview. G.D.M., *supra* note 47.

[96] "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." Jacqueline Hlavenka, *Police will notify school of student traffic tickets*, INDEPENDENT (Monmouth Cty., N.J.), Oct. 8, 2009.

[97] Melanie Riccobene Jarboe, Note, *"Expelled to Nowhere": School Exclusion Laws in Massachusetts*, 31 B.C. Third World L.J. 343, 353

troublemakers.[98] Overall, school administrators and board members have incentives to pass 24-hour codes irrespective of their potential illegality.

Finally, there are disincentives for parents to challenge 24-hour codes. The Connecticut Civil Liberties Union Foundation states there is an overall "difficulty in challenging the decisions of school officials."[99] To this end, research has shown that in school matters, "many parents often do not have the mindset, time, or means to pursue redress."[100] Further, when parents actually do have the resources to sue, they often end up feeling "ostracized, frustrated, and unsuccessful" in challenging the school system.[101] With this reduced likelihood that a parents will take the time to challenge 24-hour codes in court, there is an increased likelihood that 24-hour codes that violate state law will evade judicial review.

Overall, there are several perverse incentives 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."[102]

Part Four: 24-Hour Codes Create Constitutional Violations and Poor Policy

A: Procedural Due Process

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[98] *Id.*

[99] Brief for Connecticut Civil Liberties Union Foundation as Amici Curiae Supporting Petitioners, Packer v. Board of Educ. of the Town of Thomaston, 717 A.2d 117 (Conn. 1998).

[100] 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, 295 (2005).

[101] *Id.*

[102] Waldman, *supra* note 38, at 37.

Students have alleged they are unconstitutionally denied procedural due process during the disciplinary process under 24-hour codes.[103] This student right is derived from *Goss v. Lopez*, where the U.S. Supreme Court concluded that a suspended student is entitled to due process that includes "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."[104] However, the Court "stopped short of requiring" a student be given a formal opportunity to secure counsel, confront witnesses, or call witnesses to satisfy procedural due process.[105]

This procedural due process right is contingent on the school discipline involving the deprivation of a constitutionally protected property interest.[106] In *Goss*, the U.S. Supreme Court held a student's ten-day scholastic suspension triggers a property interest.[107] As a result, suspended students are afforded notice and a hearing.[108] The procedural due process right is more unclear as it pertains to extracurricular activities, which are typically the subject of discipline under 24-hour codes.[109]

In a Third Circuit case, *Palmer by Palmer v. Merluzzi*, a student was caught consuming beer and smoking marijuana inside the school radio station.[110] The student received a procedural due process hearing, and thereafter was suspended from school for 10 days.[111] Later, the superintendent added a 60-day extracurricular activities suspension on top of the academic

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[103] *See* L.A. on Behalf of R.A. v. Board of Education of the Township of Wayne, EDU 14241-11, Initial Decision (Dec. 1, 2011).
[104] Palmer by Palmer v. Merluzzi, 868 F.2d 90, 93 (3d Cir. 1989), *citing* Goss v. Lopez, 419 U.S. 565, 581 (1975).
[105] *Id.* at 93, *citing* Goss, *supra*, 419 U.S. at 584.
[106] "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 (3d Cir. 1989); *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of . . . property . . . without due process of law").
[107] *Id.* at 93, *citing* Goss, *supra*, 419 U.S. at 581.
[108] Lisa L. Swem, Note, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359, 366 (1987).
[109] "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, *supra* note 104, at 97 (Cowen, J., concurring).
[110] *Id.* at 91.
[111] *Id.* at 92.

suspension.[112] The student sued, arguing he did not receive procedural due process when the superintended decided the additional extracurricular suspension.[113] The court found for the school, but overtly avoided the question of whether a 60-day extracurricular suspension comprises a property interest requiring procedural due process.[114]

However, a concurring judge argued the majority "implicitly acknowledges that [the student] has a protected property interest in his continued participation in extracurricular activities."[115] The concurring judge further argues that distinguishing participation in 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 activities."
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> Palmer by Palmer v. Merluzzi, 868 F.2d 90, 98 (1989) (Cowen, J., concurring in part and dissenting in part) (citations omitted).

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[112] *Id.* at 92.

[113] *Id.* at 93.

[114] "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." The court instead reviewed the property interest in the 60-day extracurricular suspension in conjunction with the 10-day suspension that was levied. *Id.* at 93.

[115] Palmer by Palmer, supra *note* 104, at 97 (Cowen, J., concurring).

The concurring judge concluded that the New Jersey Supreme Court would today find "a protected interest in participation in extracurricular activities, assuming eligibility requirements are met."[116]

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, student procedural due process "minimally requires adequate notice, an opportunity for a hearing, and substantial evidence to support the penalty."[117] For student offenses that occur on school grounds, school administrators act on first-hand accounts from school employees and/or students who corroborate and provide evidence relating to the offense. But for offenses that occur off-campus, evidence is at most a police or third-party account that is provided to school administrators. 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.[118] It is difficult to imagine that unsubstantiated online chatter and other third-party sources amount to "substantial evidence," as required under procedural due process.[119] In another example, according to Freehold Regional High School District in New Jersey's guidelines, the school 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."[120] Inherent in this policy, the school district suspends a parking permit before the student has an opportunity to contest his or her traffic citation in municipal court. Thus, the procedures for these 24-hour codes lacks the requisite procedural due process.

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[116] *Id.* at 98 (Cowen, J., concurring).
[117] Swem, *supra* note 108, at 366 (citations omitted).
[118] Terruso, *supra* note 27.
[119] *See supra* note 117.
[120] *See supra* notes 48-49.

While some may argue procedural due process is inappropriate for school discipline, past cases have shown the benefits of procedural due process to a proper adjudication of student discipline. As discussed in the introduction, the Wayne Hills Superintendent suspended nine football players for an alleged off-campus assault pursuant to the police accounts, without granting the players a procedural due process hearing.[121] The students later received a hearing before the school board, and the players produced evidence that "at least three of the accused players weren't present" during the alleged assault.[122] The school board then stayed the suspensions, with the school 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."[123] As the school board president indicates, the procedural due process hearing was the only time the school district considered any facts from the students to contradict the police report.

In creating the student procedural due process right, the U.S. Supreme Court held that notice and a hearing protects 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 with later opportunities for higher education and employment."[124] This notion is keenly applicable to the growing 24-hour code cases, where without procedural due process, school administrators are subjecting students to discipline based on third-party accounts without even hearing the student's side of the story.

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[121] McGrath, *supra* note 8.
[122] McGrath, *supra* note 15.
[123] *Id.*
[124] Goss v. Lopez, 419 U.S. 565, 579, 575 (1975).

As the Wayne Hills case and others show, a due process hearing is essential for students to have an opportunity to share their side of the story. If courts find there is a property interest in extracurricular discipline or parking permits, there is a significant likelihood that the disciplinary process of 24-hour codes would fail to meet procedural due process requirements. As a result, states should consider the fairness of student discipline where school districts know they are not required to afford students notice and a hearing, let alone substantial evidence of off-campus misconduct.

B: Substantive Due Process

Parents have alleged that 24-hour codes violate their federal constitutional rights as parents.[125] 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."[126] In subsequent cases, the Court has re-affirmed 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."[127]

The Third Circuit interpreted this right and its interaction with public schools in *Greunke v. Seip*, where a high school swim coach asked a female swimmer to submit to a pregnancy test.[128] The court concluded "there may be circumstances where 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."[129] However, when "a school's policies might come into conflict with the fundamental right of parents to raise

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[125] *See* Complaint, Bernal-Silva v. The Borough of Mountain Lakes, 2009 WL 1873401 (D.N.J. Apr. 3, 2009).
[126] Troxel v. Granville, 530 U.S. 57 (2000).
[127] *Id.* at 65, *citing* Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923).
[128] Greunke v. Seip, 225 F.3d 290 (3rd Cir. 2000).
[129] Greunke at 304; *See* Veronia Sch. Dist. v. Acton, 515 U.S. 646, 655, 664-65 ("for 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.")

and nurture their children . . . the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a *compelling interest*."[130] To this end, the court found the Fourteenth Amendment's implied parental constitutional right subjects certain school district actions to strict scrutiny analysis.

In a more recent Third Circuit case that addressed school discipline, though, the court rejected a parent's substantive due process claim.[131] In this case, a student was disciplined for online interest speech that "ma[de] fun of her middle school principal."[132] While the court reversed the student's discipline on First Amendment grounds, the court rejected the parent's Fourteenth Amendment substantive due process claim.[133] The court held "the parent's 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.'"[134] 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]."[135] Further, the court held the ten-day suspension in question was insufficient to trigger a Fourteenth Amendment liberty interest.[136]

As it relates to 24-hour codes, the aforementioned Ramapo, New Jersey parents asserted a substantive due process claim in their challenge to the school policy that made any state or

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[130] Greunke at 305 (emphasis added).
[131] J.S. v. Blue Mountain School District, 650 F.3d 915, 920 (3rd Cir. 2011) (en banc).
[132] *Id.*
[133] *Id.*
[134] *Id.* at 934, *citing* C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 184 (3d Cir. 2005).
[135] *Id.*
[136] *Id.* at 934, 922.

municipal offense subject to school discipline.[137] In a preliminary decision, the administrative law judge held that the school district's 24-hour code violated the parent's substantive due process rights.[138] He further 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."[139] Based in part on this constitutional violation, the administrative law judge struck the Ramapo 24-hour code.[140] The Commissioner of Education, however, decided the case on strictly statutory grounds.[141]

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 ruled in favor of a parent in a case concerning student discipline, the growing number of 24-hour codes that govern student conduct at home create the likelihood of a legal challenge on these grounds. If a federal court, similar to the administrative law judge in New Jersey, finds that a 24-hour code implicates a parent's right "to make decisions concerning the care, custody, and control of their children," the 24-hour code will be subject to strict scrutiny review.[142]

While proponents believe the goals of 24-hour codes are laudable, it is difficult to argue that a school disciplinary policy for conduct in the home is narrowly tailored to a compelling government interest. As 24-hour codes grow broader in the amount of conduct they govern, they become less likely to satisfy strict scrutiny analysis. Accordingly, the policies have the potential

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[137] G.D.M. and T.A.M. o/b/o B.M.M. v. Ramapo Indian Hills Reg'l Sch. Dist. BOE (B.M.M. I), EDU 11579-09, Initial Decision (June 11, 2010).
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] In light of the fact that [the district policy] does not comply with the [state law], there is no need to explore the constitutional arguments made by the petitioner and discussed by the ALJ. G.D.M. and T.A.M. o/b/o B.M.M. v. Ramapo Indian Hills Reg'l Sch. Dist. BOE (B.M.M. II), EDU 11597-09, Final Decision (Sept. 13, 2010)
[142] *See* Troxel, *supra* note 126.

of violating substantive due process. Given the possibility that school districts can be violating the federal constitutional rights of parents with these policies, it calls into question the wisdom of passing such codes in the first place.

C. POLICY REASONS AGAINST 24-HOUR CODES

School districts have passed 24-hour codes disciplining students for off-campus traffic offenses, drinking offenses, and other misconduct that is 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 for opposing 24-hour codes.

First, this paper believes that courts are the best venue for adjudging criminal conduct that occurs away from school. As established under state criminal law, proper procedures are in place through the judicial system to ensure the safety concerns of the community are addressed.[143] Further, courts provide a better venue for assessing a student's danger to the community than schools.[144] Considering off-campus misconduct constitutes a violation of criminal law, it is only fitting that the criminal justice system provide the disciplinary regime for the student.

Second, this paper believes that 24-hour codes create a "double penalty" factor that is unfair to students. If a student is charged with an offense outside of school, he or she is subject to the relevant criminal laws and will be prosecuted accordingly. To this end, "criminal statutes are created to maintain order in society."[145] Considering criminal statutes are already written to incorporate the goals of deterrence, incapacitation, and retribution, school discipline simply adds

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[143] Waldman, *supra* note 38, at 67.
[144] *Id.* at 68.
[145] James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 KAN. J.L. & PUB. POL'Y 369, 376 (2001).

an additional penalty on top of the criminal offense.[146] As articulated by others who have written on this subject, 24-hour codes are 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."[147] Since school policies "are adopted to preserve order in the school environment," schools should not play a role in supplementing criminal statutes.[148] As a New Jersey school board member opposing a 24-hour code stated during a public meeting, students "are already being punished if the infraction occurs. . . If it is then "channeled through the school district for a second type of penalty . . . it would be overlegislating."[149]

Third, this paper believes that removing students from extra-curricular activities for off-campus incidents runs counter to the goals of reducing off-campus misconduct. As a matter of 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."[150] Further, "instead of removing students, schools should implement programs designed to train adolescents' still-developing brains to make good decisions."[151] Empirically, studies have shown that students who are suspended or expelled are more likely to drop out of school.[152] Suspended students have the potential to be "psychologically damaged."[153] They also 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

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[146] Hanson, *supra* note 100, at 321
[147] Peden, *supra* note 145, at 370
[148] *Id.* at 376
[149] Hlavenka, *supra* note 96.
[150] Waldman, *supra* note 38, at 12.
[151] *Id.*
[152] Hanson, *supra* note 100, at 330.
[153] *Id.*

society, and commit further offenses.[154] Therefore, it is more beneficial to provide the troubled student an educational environment than leaving a student suspended and apt to commit further off-campus malfeasance.[155]

Similarly, 24-hour codes that discipline students by banning them from extra-curricular activities reduce the major social benefit of extracurricular activities. Empirical studies indicate that participation in extracurricular activities reduces the rates of early school dropout, especially in students at the highest risk of dropping out.[156] If a student receives an extra-curricular 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 which keep at-risk youth in school.

Finally, this paper believes that 24-hour codes unnecessarily expose school districts to potential tort liability. In a Mountain Lakes, New Jersey case, a star high school basketball player was suspended from her team after a police account stated she was leaving the scene of a house party.[157] The parents proffered their daughter lost collegiate scholarship opportunities by virtue of her basketball suspension.[158] As a result the parents sued, alleging numerous torts against the local school district and police department including tortious interference with a prospective economic advantage and defamation.[159] While the merits of these tort claims were not adjudged, the local police department settled for $50,000 and the school district settled for an undisclosed amount.[160]

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[154] *Jarboe*, supra note 97, at 349.
[155] *Id.*
[156] Joseph L. Maloney and Robert B. Carins, *Do Extracurricular Activities Protect Against Early School Dropout?*, 33 DEVELOPMENTAL PSYCHOLOGY 241, 248 (1997).
[157] Bernal-Silva, *supra* note 125
[158] *Id.*
[159] *Id.*
[160] Eugene Paik, *Mountain Lakes pays $50K to settle suit by former basketball standout*, STAR-LEDGER (Feb. 2, 2010).

Given these settlements, one must ask whether a school district should assume the liability of disciplining for off-campus conduct. While the facts in this case are unique, there are likely to be many similar tort claims if 24-hour codes become more prevalent in school districts. Considering school districts are publicly funded, 24-hour codes can recklessly expose taxpayers to liability whenever off-campus discipline is based on an improper third-party account.

Part Five: Conclusions About 24-Hour Codes and Proposed Legislation

A: Conclusion

There are many legal and policy problems with 24-hour codes that discipline students for off-campus conduct. In many cases, the codes have the potential of violating students' procedural due process rights and parents' substantive due process rights.[161] 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 create a double penalty that supersedes the criminal justice system.[162]

Currently, many states including New Jersey have passed laws that restrict school discipline for off-campus offenses to specific instances.[163] School districts, however, have repeatedly exceeded these state laws.[164] Further, parents and students are unable to obtain judicial review when school districts exceed state law, given the standards of review that apply in such cases.[165]

B: Proposed Legislation

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[161] *See supra* Parts 4A, 4B.
[162] *See supra* Part 4C.
[163] *See supra* Part 2B.
[164] *See supra* Part 3A.
[165] *See supra* Part 3C.

In this light, this paper concludes that states should not permit schools to discipline for off-campus conduct except in specific cases where the off-campus conduct that directly effects the operations of the school district. In order to attain this goal, this paper recommends legislation that takes into account the following considerations.

First, the law should cite the specific criminal offenses that are potentially subject to discipline for off-campus conduct. This would prevent improperly broad interpretations of the law by local school districts, such as those that argue minor traffic offenses satisfy the direct effect standard. This section of the law should expressly state that school districts cannot discipline for offenses that are not enumerated in the statute.[166]

Second, the law should create a due process appeal as of right to the local board of education whenever discipline occurs for off-campus conduct. This would reduce the ability of school administrators to discipline pursuant to their own predilections.[167] This would also create a procedural due process opportunity to receive notice and a hearing, as required by the Fourteenth Amendment.[168]

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 Commissioner of Education. Currently, between the emergent review and deference standards, the Commissioner of Education cannot reverse a board decision, absent bad faith by the board. This should change, so that a student can receive a proper review of the school board's decision when made, rather than being kept out of court because of a heightened 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

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[166] Waldman, *supra* note 38, at 69.
[167] *Id.*
[168] *Id.*

system to serve its goals of deterrence, incapacitation, and retribution, while school codes serve to preserve order in the school environment.[169] This would also ensure that the school discipline does not violate substantive due process by assuming a parent's role in the upbringing of their child.[170] Further, it would ensure that students are not unnecessarily removed from extracurricular activities that empirically prove beneficial in preventing further misconduct.[171]

C: Final Thoughts

Over the span of less than a month, the Wayne Hills football players accused of assault had their eligibility status changed three times. This convoluted process made national headlines not because of the allegations against the players, but rather the confusion over whether the school can or should discipline the students for allegations of off-campus misconduct. According to most accounts, the school environment was never in danger because of fallout from the alleged assault, but rather because of the public controversy over the players' status. If state law kept the school out of this off-campus incident, there would have been no public controversy. But ambiguity in the law led to incredulity among the public.

When the public hears of a crime, they look to the criminal justice system to discipline the wrongdoers. The public has faith in the judiciary to punish wrongdoers, but also to provide defendants with a fair trial and the accompanying due process rights. As a society, when an off-campus incident like that in Wayne Hills occurs, we should turn to the court system for justice – and not the school system. This way, educators can focus on educating and prosecutors can focus on prosecuting. And if this happens, students can focus on being students, which should be the goal from the very beginning.

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[169] *See* Peden, *supra* note 145; Hanson, *supra* note 100.
[170] *See* Troxel, *supra* note 126.
[171] See Hanson, *supra* note 100.