

No. A24A0321

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In the  
Court of Appeals of Georgia

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Board of Regents of the University System of Georgia,  
*Appellant,*

v.

Elijah D. Drake,  
*Appellee.*

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On Appeal from the Superior Court of Athens-Clarke County  
Superior Court Case No. SUCV0512

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**BRIEF OF APPELLANT**

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## INTRODUCTION

This appeal arises from an order of the Superior Court of Athens-Clarke County (i) reversing the University of Georgia's decision to suspend Petitioner Elijah Drake after Drake was arrested for battering another UGA student, Caitlyn Bargouti, and (ii) declaring null and void two long-standing provisions of UGA's Code of Conduct that prohibit students from engaging in conduct that threatens the health or safety of another person, or is disruptive and disorderly and caused by the influence of alcohol.

In so doing, the superior court improperly exercised jurisdiction over the decision of the University as to how to discipline its students, the type of academic decision that this Court has already held presents no justiciable controversy. The superior court violated the sovereign immunity afforded the State of Georgia and Board of Regents by engaging in certiorari review over a decision that was administrative in nature and not quasi-judicial and, in doing so, awarding relief that far exceeds the limited forms of relief authorized by the legislature upon the grant of a writ of certiorari. Finally, the superior court erroneously concluded that Georgia's criminal self-defense provision (O.C.G.A. § 16-3-21) required UGA to expressly incorporate language adopting the standards of self-defense applied in criminal cases

despite the fact that student disciplinary proceedings are in the nature of civil proceedings and that nothing in UGA's Code of Conduct precludes the assertion of self-defense claims.

The superior court's order comes only after the completion of an administrative process that included an investigation conducted by UGA's Office of Student Conduct ("the Office"), a hearing before a hearing panel, and further review by a UGA Vice President, UGA's President, and the Board of Regents. Both UGA and the Board of Regents considered all evidence and arguments presented by Drake, including his assertion of self-defense as an exculpatory or mitigating factor, and determined at each and every level that Drake's conduct nevertheless violated UGA's Code of Conduct.

Upon Ms. Bargouti's notification to UGA's Office of Student Conduct that she had been injured by Drake, UGA began disciplinary proceedings pursuant to procedures outlined in its Code of Conduct. These proceedings resulted in the decision of a hearing panel (comprised of two students and a Hearing Administrator employed by the Office of Student Conduct) to suspend Drake from March 2022 through the end of the Fall 2022 semester. Both UGA's Vice President for Student Affairs and UGA's President reviewed the hearing panel's decision and agreed

that suspension was appropriate. UGA's Vice President for Student Affairs expressly considered Drake's assertion of self-defense and found it unavailing considering the evidence. Following the President's final decision imposing the suspension, Drake filed an application for discretionary review with the Board of Regents, which voted to affirm UGA's decision.

Drake filed a petition for writ of certiorari with the Superior Court of Athens-Clarke County challenging the hearing panel's initial decision. The superior court denied the Board of Regents' motion to dismiss the petition and granted Drake's petition, reversing Drake's suspension. The superior court's decision was in error from beginning to end and establishes a precedent that, if uncorrected, materially impacts the internal disciplinary processes of the state's public institutions of learning.

### **JURISDICTION**

The superior court entered its ruling on May 10, 2023. This Court granted the Board of Regents' Application for Discretionary Review on June 29, 2023 (case no. A23D0351). This Court has jurisdiction under O.C.G.A. § 5-6-35 because this is not a case reserved to the Supreme Court's exclusive jurisdiction, *see* Ga. Const. Art. VI, § VI, Par. III; O.C.G.A. § 15-3-3.1(a).



## **ENUMERATION OF ERRORS**

1. The superior court erred in exercising jurisdiction over a case that presented a nonjusticiable controversy.
2. The superior court erred in holding that Drake's claim and the remedies he sought are not barred by sovereign immunity.
3. The superior court erred in declaring portions of UGA's Code of Conduct null and void due to a purported conflict with Georgia's criminal code provision for the use of justifiable force in defense of self or others (O.C.G.A. § 16-3-21).

## **STATEMENT**

### **A. Factual Background**

Petitioner Elijah Drake enrolled at the University of Georgia in August 2021. V2-21. On October 7, 2021, Drake admits that he went to a bar in downtown Athens and consumed alcohol despite being underage. He further admits using a fake ID to gain entry to the bar.

While at the bar, Drake encountered a group of female UGA students in the bar's men's room, including a student named Caitlin Bargouti. V2-21–22. Drake's accounts of what happened during this encounter have been inconsistent and differ greatly from the accounts of Bargouti and other witnesses to the events.

Drake claimed that that Bargouti threatened to punch him, then grabbed his glasses off his face and threw them and that this bothered him because his glasses were “very personal and necessary to see.” V2-62. He told a UGA investigator that “his reaction was inappropriate, that he “was bothered by having a woman in the men’s bathroom who overreacted to him taking [her friend’s] hat,” and that “intoxication may have played a role in his own reaction. V2-62.

Though Drake denied hitting Bargouti, he admitted that he “pulled Bargouti by her hair to the ground” and “restrained her on the floor.” V2-62. He acknowledged that he may have called her a “bitch” while restraining her face down on the men’s room floor and asking her where his glasses were. V2-71.

Bargouti sustained injuries during the altercation. Photographs of Bargouti showed that she had a black eye, a large contusion on her forehead, a scrape on her left elbow, and bruises on both arms.V2-150–154. Bargouti received treatment from a neurologist following the incident for symptoms including headaches, dizziness, neck pain and sensitivity to light. V2-155.

## **B. Administrative Proceedings**

On October 18, 2021, Bargouti reported the incident with Drake to the University of Georgia Office of Student Conduct. V2-

114. Bargouti reported that Drake grabbed her, threw her on the tile floor and held her there for approximately sixty seconds while she “begged to be let go.” V2-114. She reported suffering two bumps on her head, bruises on her body, a black eye and a concussion. V2-114. She stated that Drake had been arrested and provided a copy of the arrest report, which indicated that Drake was charged with battery, possession of alcoholic beverages while under 21 years of age, possession/display/use of any false/fraudulent/altered ID, and simple battery. V2-114–120.

UGA has adopted conduct regulations applicable to students and organizations and has established a process for resolving alleged violation of those regulations in its Code of Conduct. V2-93–113. Upon receipt of Bargouti’s complaint and the arrest report, the Office began proceedings in accordance with the University of Georgia’s conduct process outlined in the Code of Conduct. V2-121–124. Drake was provided with written notice that he had violated the following conduct regulations:

- **Conduct Regulation 2.2** — Forgery, alteration, or misuse of any document, record, or instrument of identification, or possession of any false identification or identification belonging to another person with dishonest intent.
- **Conduct Regulation 3.3** — Conduct that threatens or endangers the health or safety of another person, including

but not limited to physical violence, abuse, intimidation, and/or coercion; or violation of a legal protective order.

- **Conduct Regulation 4.1** — Use or possession of alcoholic beverages except as permitted by law and University Alcohol and Other Drug Policies.

- **Conduct Regulation 4.3** — Disruptive or disorderly conduct caused by the influence of alcohol and/or other drugs.

V2-121.

After initial efforts to reach an informal resolution failed, the Office of Student Conduct began formal proceedings and sent a notice of investigation to Drake. V2-125–127. Drake then contacted the Office, stating that he wished to file his own complaint against Bargouti, alleging that she was the one that initiated the altercation and broke his glasses. V2-131–34. The Office then sent Bargouti a notice alleging that she had violated Conduct Regulation 3.3 (Disorderly Conduct; see p. 6, *infra*) and Conduct Regulation 5.2 (“Malicious or unwarranted damage or destruction, or attempted damage or destruction, of any property or item, including but not limited to any tangible possession, information, or account.”). V2-138–141.

The Office’s staff investigator conducted an investigation, including interviews with Bargouti, Drake and several witnesses, summarizing his findings in a detailed report. V2-46–171. The

Office then issued a notice setting a joint hearing for both Drake and Bargouti on Mar. 1, 2022. V2-307.

The hearing was conducted by a panel consisting of two members of UGA's University Judiciary and an administrative officer, as set out in the procedures for such hearings set forth in the UGA Code of Conduct. V2-193; V2-94. Drake was present at the hearing, and he was able to present evidence and testimony and question testifying witnesses. V2-186; V2-106. Drake made an opening and closing statement and was permitted to have an advisor of his choosing (in this case, his attorney) who was able to advise Drake but not participate directly in the proceedings. V2-103.

At the conclusion of the hearing, the panel held deliberations with respect to each charge against Drake and Bargouti. V2-186. The panel issued a "Formal Hearing Decision Form" reflecting its conclusions. V2-184–193. The panel found that Drake had violated each of the four conduct regulations listed in the notice of allegation. V2-186–188. The panel also found that Bargouti had not violated the two conduct regulations listed in her notice. V2-188–190.

The panel's decision acknowledged that Drake had made a claim for self-defense but nevertheless found him liable of

violating Conduct Regulation 3.3 (conduct threatening the health/safety of another person), stating:

While Drake stated in his interview ... that his actions were motivated by self-defense with the intention of restraining rather than hurting Bargouti, the Panel concluded that self-defense was insufficient for Drake's actions towards Bargouti since the Code of Conduct does not include verbiage related to self defense.

V2-187.

In finding that Drake violated Conduct Regulation (disorderly conduct), the panel noted that Drake had claimed self-defense, but rejected the claim, noting the severity of Bargouti's injuries and also that:

[Drake] said that intoxication may have played a role in his own reaction" as he admitted he "was bothered by having a woman ... who overreacted to him taking the hat ..." which supports the conclusion that alcohol was present and did impact his reaction that night.

V2-188.

As to Bargouti, the panel rejected Drake's claims that Bargouti had threatened his safety. V2-188. The panel noted that although Drake claimed Bargouti had threatened to punch him in the face and grabbed his glasses, numerous other witnesses offered contradictory testimony. V2-188. The panel concluded with the finding that "there was not enough evidence to support that

Bargouti did threaten the safety of Drake through physical violence or intimidation.” V2-188.

The panel applied the following sanctions to Drake: suspension through Fall 2022; probation for the remainder of his academic career; alcohol and drug education; restitution (in an amount to be determined by the Athens-Clarke County Court system); and a no-contact directive restricting Drake from any contact with Bargouti and two other UGA students. V2-191–192. The panel’s decision included information about Drake’s right to appeal and the process for doing so. V2-192–193.

Drake appealed the hearing panel’s decision to UGA’s Vice President of Student Affairs, Victor K. Wilson. V2-194–217. Drake raised a variety of objections to the hearing panel’s decision, the fourth of which was to allege that his self-defense claim had not been given adequate consideration. V2-197. He stated that “[t]he Hearing Panel refused to take my claimed ‘self-defense’ into account because the Panel stated there is no “verbiage” in the Code of Conduct for same. This is manifestly unfair and all mitigating circumstances should be taken into account when determining violations and sanctions.” V2-197.

On April 14, 2022, Vice President Wilson upheld the decision of the hearing panel, stating that the panel “did faithfully consider

your account of events, but ultimately made its decision based on its view of the balance of the evidence.” V2-218. Vice President Wilson expressly considered Drake’s self-defense claim, stating that it could be considered as a mitigating factor, but found that Drake’s possession of false identification, drinking and acting under the influence of alcohol, and his instigation of the conflict by taking a hat from Bargouti’s friend and engaging physically with Bargouti and her friends when they tried to retrieve the hat meant that Drake’s actions were “still inexcusable.” V2-219. Vice President Wilson therefore upheld the findings as provided by the hearing panel. V2-219.

Drake appealed this decision to UGA President Jere W. Morehead. V2-220–302. Drake again argued that his self-defense claims had not been properly considered, arguing that UGA was required to apply the criminal self-defense standards set forth in O.C.G.A. § 16-3-21(a), which provide that a person is justified in using force against another “when and to the extent that he or she reasonably believes that such [force] is necessary to defend himself ... against such other’s imminent use of unlawful force.” V2-224–228.

On June 15, 2022, President Morehead advised Drake by letter that “after carefully reviewing the record, I have decided to



uphold the decision of the Hearing Panel.” V2-303. President Morehead stated that “[m]y decision is final at the institutional level.” V2-303. President Morehead’s decision resulted in the sanctions that had been recommended by the hearing panel taking effect, which in part resulted in Drake’s administrative withdrawal from his Spring 2022 classes. V2-303; V2-27.

Drake filed a request for discretionary review with the Board of Regents. V2-33–305. On September 14, 2022, the Board of Regents upheld the decision of UGA. V2-313.

### **C. Judicial Review**

Drake filed a petition for writ of certiorari with the Superior Court of Athens-Clarke County on October 14, 2022, seeking a writ of certiorari, an order directing the Board of Regents to reinstate Drake’s Spring 2022 grades, remove his probation and clear his UGA record of all disciplinary charges, or in the alternative, that the Court reverse the decision to suspend Drake and remand the matter “for further proceedings in accordance with O.C.G.A. § 16-3-21 and all due process.” V2-32. The Board of Regents filed a motion to dismiss Drake’s petition. V3-277. After a hearing, the superior court denied the motion and granted the petition for certiorari. V2-5.

The superior court concluded that UGA's Conduct Regulations 3.3 and 4.3 are "null, void, and of no force and effect" because the court believed they conflicted with the provisions for self-defense found in Georgia's criminal code—O.C.G.A. § 16-3-21. V2-18. The superior court reversed the decision of the hearing panel without making any finding that the conclusions of the hearing panel were unsupported. V2-18. Nor did the superior court make any finding whatsoever as to whether or not the facts presented to the hearing panel would satisfy O.C.G.A. § 16-3-21's standards for justifiable use of force in self-defense. V2-18. The superior court's order reversed UGA's decision to suspend Drake outright, without either remanding the case for findings on the issue of whether or not Drake's actions met the standards for a self-defense claim or making its own conclusions as to the merits of Drake's self-defense claim. V2-18.

### **STANDARD OF REVIEW**

In reviewing a writ of certiorari to the superior court, this Court reviews questions of law *de novo*. See, e.g. *Barrett v. Sanders*, 262 Ga. App. 63 (2003).

As to issues of fact, the appropriate standard of review to be applied is whether the decision below was supported by "any evidence." *City of Atlanta Gov't v. Smith*, 228 Ga. App. 864, 865

(1997). On appeal to this Court, “our duty is not to review whether the record supports the superior court’s decision but whether the record supports the initial decision of the local governing body or administrative agency.” *Id.* (citing *Emory Univ. v. Levitas*, 260 Ga. App. 894, 898 (1991)). Under the “any evidence” standard of review, the Courts must “view the evidence in the light most favorable to the factfinder’s decision and must affirm [the factfinder’s] decision if there is any evidence to support it, even when the party challenging the factfinder’s conclusions presented evidence during the initial proceedings that conflicted with those conclusions.” *DeKalb Cnty. v. Bull*, 295 Ga. App. 551, 552 (2009).

### SUMMARY OF ARGUMENT

The superior court erred by exercising jurisdiction over an academic decision made by a public institution of learning, disregarding clearly established law holding that disputes regarding such decisions do not present a justiciable controversy. This Court’s precedents establish that student disciplinary proceedings are exercises of administrative power by public institutions of learning and are therefore nonjusticiable controversies.

The superior court further erred by improperly exercising jurisdiction over this matter in violation of the grant of sovereign

immunity to the Board of Regents as an agency of the State of Georgia found in Ga. Const. Art. I, § II, ¶IX. The superior court erred in finding that statutory provisions providing for certiorari review by superior courts of decisions of inferior judicatories operated as a waiver of sovereign immunity as to the Board of Regents. Though the provision for certiorari review might operate as a waiver of sovereign immunity in appropriate cases, this case is not one of them. UGA's hearing panel is not an "inferior judicatory" subject to certiorari review. And, even if the hearing panel's decision were subject to certiorari review, the superior court exceeded the bounds of sovereign immunity waiver that may be found in the certiorari statutes by impermissibly awarding relief that is not available to superior courts issuing writs of certiorari.

Finally, the superior court erred in declaring portions of the UGA Code of Conduct void for a purported conflict with the provisions of O.C.G.A. § 16-3-21. This criminal statute has no applicability to a student disciplinary proceeding, which is in the nature of a civil action. No court has ever interpreted O.C.G.A. § 16-3-21's anti-conflict provisions to require that state agencies expressly adopt language mirroring O.C.G.A. § 16-3-21's provisions for justifiable use of force. Instead, the Georgia

Supreme Court has *rejected* the notion that schools must expressly incorporate provisions for affirmative defenses such as self-defense into their disciplinary rules. *Henry County Bd. of Educ. v. S.G.*, 301 Ga. 794, 797–98 (2017). Where, as here, the student is actually given the opportunity to present such defense, and the record makes clear that defense is duly considered prior to imposition of discipline, the school’s disciplinary rules need not expressly set forth the standards found in Georgia’s criminal code.

## ARGUMENT

### **I. The superior court erred by exercising jurisdiction over a nonjusticiable controversy.**

The superior court improperly exercised its jurisdiction in this case because Drake’s suspension is a dispute concerning an academic decision made by a public institution of learning and therefore presents no justiciable controversy. Disciplinary actions are encompassed within the range of administrative decisions that are not subject to judicial intervention in the absence of plain necessity compelled by a “deprivation of major proportion.” See *Bd. of Regents of the Univ. Sys. of Ga. v. Houston*, 282 Ga. App. 412 (2006); *Blaine v. Savannah Country Day Sch.*, 228 Ga. App. 224, 224—225 (1997). Because Drake’s suspension was not a

deprivation of major proportion, the superior court's exercise of jurisdiction was error.

This Court has already held that university student discipline proceedings are encompassed within the realm of academic decisions made by public institutions of learning that present no justiciable controversy. In *Bd. of Regents of the Univ. Sys. of Ga. v. Houston*, 282 Ga. App. 412 (2006), the Court held that the superior court's order reversing a student's suspension and requiring his reinstatement was in error for lack of a justiciable controversy.

Just like this case, *Houston* involved discipline affecting the student's academic pathway that was premised on a violation of a student conduct code, specifically the student's suspension for two academic semesters following the student's arrest on federal criminal charges of conspiracy to distribute marijuana. *Houston*, 282 Ga. App. at 413. In *Houston*, a Georgia Tech student was suspended after a hearing before an undergraduate judiciary cabinet, and appeals to Georgia Tech's Student Grievance and Appeals Committee and to the Vice President for Student Affairs were unsuccessful. *Houston*, 282 Ga. App. 412 (2006). In holding that disputes concerning academic decisions – including matters of student discipline – did not present justiciable controversies,

the Court emphasized that such judicial restraint is necessary to shield the courts from an incalculable potential for lawsuits, to protect teachers from parents who would rely upon the legal process rather than the learning process, and to protect school systems from an added and unbearable burden of continuous legal turmoil as they labor under pressures including matters of student discipline. 282 Ga. App. at 414. *Houston* makes clear that student disciplinary decisions, such as Drake's here, are not reviewable by courts in the absence of "plain necessity impelled by a deprivation of major proportion." *Id.*

*Houston* further emphasized that a decision to suspend a university student is not a deprivation of major proportion in the absence of a showing that the suspension is clearly erroneous or arbitrary and capricious for lack of supporting evidence. *Id.* at 415. Houston's suspension, like Drake's, was "tailored to permit [his] eventual re-enrollment to complete his degree requirements" and therefore "cannot be deemed a 'deprivation of major proportion' warranting judicial intervention." *Id.*

The superior court here did not conclude that the hearing panel's factual conclusions were arbitrary and capricious or that Drake's actions actually constituted self-defense under the standards set forth in O.C.G.A. § 16-3-21. Instead, it held that the

Board of Regents “violated Drake’s substantive due process rights by unreasonably interfering with Drake’s pursuit of profession and his protected liberty interest in his reputation.” V2-13.

However, any claim for violation of Drake’s substantive due process rights would be “properly a civil rights action for denial of [substantive due process rights], a claim not raised below.”

*Houston*, 282 Ga. App. at 415.

*Houston* controls here, and the superior court contradicted it in ruling that Drake had alleged (but not proven) a “deprivation of major proportion.” V2-7. *Houston* expressly held that a disciplinary suspension that allows a university student to eventually re-enroll and complete degree requirements “cannot be deemed a ‘deprivation of major proportion’ warranting judicial intervention.” 282 Ga. App. at 415. Therefore, as in *Houston*, the superior court’s exercise of jurisdiction was erroneous and should be reversed.

## **II. Sovereign immunity barred the trial court from weighing in on a student disciplinary proceeding.**

The Georgia Constitution provides that sovereign immunity extends to the State and all of its departments and agencies, and that this immunity may only be waived by a constitutional provision or an act of the General Assembly that specifically



provides for waiver. Ga. Const. Art. I, Sec. II, Par. IX (e). The Board of Regents of the University System of Georgia is the state agency vested with the governance, control and management of the University System of Georgia and is therefore entitled to immunity from suit unless the legislature has waived its immunity. *See, e.g., Bd. of Regents of the Univ. Sys. of Ga. v. Brooks*, 324 Ga. App. 15, 17 (2013).

The superior court erred in holding that Georgia's certiorari statutes operated as a waiver of sovereign immunity because it lacked jurisdiction to adjudicate this case under the certiorari statutes, and because the remedies it ordered are not permitted by the certiorari statutes. Although O.C.G.A. § 5-4-1 et seq. provides statutory authorization for writs of certiorari in appropriate cases, this case is not within the superior court's certiorari jurisdiction for the reasons outlined below.

Further, any waiver of immunity in the certiorari statutes extends only to the specific and limited remedies provided by O.C.G.A. § 5-4-14. Because the superior court improperly exercised certiorari jurisdiction over this case, and because in doing so, the superior court ordered remedies that exceed the scope of remedies available to the court on certiorari, the court erred in denying the Board of Regents' motion to dismiss.

**A. The hearing panel’s decision was not a “final, quasi-judicial decision” subject to certiorari review.**

The superior court erred in ruling that the hearing panel’s decision form was a “final, quasi-judicial decision” subject to certiorari review. The writ of certiorari “shall lie for the correction of errors committed by any inferior judicatory or any person exercising judicial powers ....” O.C.G.A. § 5-4-1(a). Thus, the first step in weighing whether a trial court can properly hear a petition for certiorari is to determine whether the petition is seeking review of a judicial or quasi-judicial action or merely an administrative one. *Laskar v. Bd. of Regents of the Univ. Sys. of Ga.*, 320 Ga. App. 414, 416 (2013). As noted above, this Court has expressly characterized university student disciplinary decisions as “administrative decisions” to which the trial court is required to defer. *Houston*, 282 Ga. App. at 414 (“[T]he trial court was required to defer to Georgia Tech’s *administrative* decision, unless a deprivation of major proportion is at issue.”) (emphasis added). The superior court erred in concluding that UGA’s student disciplinary proceedings are quasi-judicial rather than administrative in nature.

Though the determination of what is an administrative act and what is a judicial function is “often a matter of extreme

difficulty,” *Hous. Auth. of Augusta v. Gould*, 305 Ga. 545, 551 (2019), the “basic distinction” between an administrative act and a quasi-judicial one is that a quasi-judicial act depends upon the rights given to the parties involved. “The test is whether the parties at interest had a right under the law to demand a trial in accordance with judicial procedure.” *Laskar v. Bd. of Regents of the Univ. Sys. of Ga.*, 320 Ga. App. 414, 416 (2013). UGA’s Code of Conduct expressly provides that students involved in disciplinary proceedings do *not* have the right to demand a trial in accordance with judicial procedure. V2-112. Although the UGA Code of Conduct provides a formal hearing process with notice and opportunity to be heard (*see* V2-104–106), it does not apply laws or legal standards to students, nor does it not afford students the right to demand review of decisions in accordance with judicial procedure.

UGA’s Code of Conduct sets forth 14 categories of conduct regulations describing prohibited forms of conduct. V2-97–99. None of these conduct regulations are “laws”; they reflect codes of general conduct promulgated under the Board of Regents’ inherent general power to maintain order and enforce reasonable rules of student conduct. The UGA Code of Conduct expressly states that, “[a]s would be expected, standards for University

students and organizations are higher than those of communities not engaged solely in scholarly pursuits .... [S]tudents and organizations are expected to act in a manner that demonstrates integrity and respect for others and the campus environment.” V2-93.

In *Laskar*, this Court recognized that for a dispute to amount to a judicial action, there must be a number of indicia. “There must generally be two or more litigants.” *Laskar*, 320 Ga. App. at 417 (emphasis in original). There must be an “issue of law or fact,” that is “within the jurisdiction of the tribunal, with respect to property or some personal right in which the litigants are interested.” *Id.* And the tribunal’s “conclusion must be binding upon the parties until reversed or set aside in the manner provided by law for opening up judgments of courts.” *Id.* Lastly, a proceeding is administrative if the result is dependent on the view of the decider rather than the law, per se: “It is one thing to provide that a thing may be done if it is made to appear that under the law a certain situation exists; it is another thing to provide that a thing may be done if in the *opinion of a named party* a certain situation exists. The one is justiciable; the other is administrative.” *Id.* at 419.

This case does not constitute a judicial action within these standards. Although the UGA Code of Conduct afforded Drake with notice and a hearing at which he had the ability to present testimony and evidence and to argue that his conduct did not violate the conduct regulations, the hearing panel did not apply any “law” to the evidence presented at the hearing. Formal judicial rules of evidence expressly did not apply to the investigatory or hearing processes. V2-104. The initial decision of the hearing panel, as well as the subsequent decisions of the UGA Vice President and President, amounted to the opinion of each decisionmaker that a “certain situation” exists—that this student’s conduct in battering another student was sufficiently severe to violate the Code of Conduct and warrant the sanctions imposed, including suspension. These decisionmakers did not conclude that Drake should be suspended under any form of law; the decision instead was that in the opinion of the named parties, Drake’s conduct failed to live up to the standards that the University of Georgia expects of its students. Therefore, like the decision to terminate a tenured faculty member in *Laskar*, the ascertainment of the facts and the conclusion that Drake’s conduct violated UGA’s conduct regulations was “entirely proper in the

exercise of executive or legislative, as [opposed to] judicial, powers.” *Id.* at 420.

The superior court misconstrued both the holding of *Laskar* and the application of UGA’s conduct procedures. It held *Laskar* to be distinguishable because “absent Drake’s appeal, the Panel’s decision would have immediately become the final decision of the University.” V2-11. But it is not enough that the panel’s decision might have been a final one had Drake chosen not to appeal. A petition for writ of certiorari is meant for review of proceedings that purport to bind the agency to the hearing decision, and not to those in which the agency is “the ultimate decision-maker with authority to overturn the [hearing officer]’s determination if it was contrary to [federal] regulations, federal, state or local law.” *Gould*, 305 Ga. at 557.

Under the UGA Code of Conduct, the hearing panel’s decision is not final — either the Vice President or the President has the authority to overturn the hearing panel’s determination. Either the Vice President or the President may reverse or modify the hearing panel’s decision in a number of ways: by reducing or increasing the sanctions imposed, by remanding the matter to the hearing panel with direction to correct a procedural or factual defect, or to reverse the panel’s findings or dismiss the action if a

defect cannot be remedied by remand. V2-110-111. The Board of Regents has discretion to review the President's decision upon application for review. V2-111. If the application is granted, the Board's reviewing committee may "take any action that it deems appropriate." Board of Regents Policy Manual, § 6.26<sup>1</sup>. Drake even avers in his Petition that the decision of the Board of Regents, not the hearing panel, was the "final determination of the case." V2-28. Therefore, as in *Gould*, the decision of the hearing panel was not sufficiently final, binding, and conclusive of the rights of the parties to be properly characterized as a quasi-judicial decision for the purposes of Georgia certiorari law.

Because the decision to suspend Drake was an administrative act, not a quasi-judicial decision, the superior court lacked jurisdiction to review that decision pursuant to a writ of certiorari. As an administrative act, UGA's disciplinary action falls outside the scope of any waiver of sovereign immunity granted by O.C.G.A. § 5-4-3, and judicial review of that decision is therefore barred. The decision of the superior court should therefore be reversed.

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<sup>1</sup> <https://www.usg.edu/policymanual/section6/C2714/>

**B. The superior court erred in imposing remedies that are not within the court’s power in granting a writ of certiorari.**

The superior court further erred in holding that the relief requested by Drake and ultimately ordered by the court was not barred by sovereign immunity. The superior court held that O.C.G.A. § 5-4-3 operated as a waiver of sovereign immunity because the legislature adopted the certiorari statutes to provide a mechanism for aggrieved parties to bring suit to review an agency’s decision. V2-13–14. Although O.C.G.A. § 5-4-1 *et seq.* provides statutory authorization for writs of certiorari in *appropriate* cases, such waiver extends only to the specific remedies provided by O.C.G.A. § 5-4-14.

Following a hearing on a writ of certiorari, “the superior court may order the same to be dismissed or return the same to the court from which it came with instructions.” O.C.G.A. § 5-4-14(a). If the error complained of is “an error in law which must finally govern the case, and the court is satisfied that there is no question of fact involved which makes it necessary to send the case back for a new hearing before the tribunal below, it shall be the duty of the judge to make a final decision in the case without sending it back to the tribunal below.” O.C.G.A. § 5-4-14(b). Any waiver of sovereign immunity that may be found in the legislature’s



authorization of petitions for certiorari extends only as far as these remedies provide.

Section 5-4-14 does not authorize the superior court to enter a sweeping declaratory judgment holding UGA's Conduct Regulations to be entirely null, void, and of no force and effect. Nor does it authorize the superior court to order reinstatement of a student accused of battering another student based solely on a *claim* of self-defense and without any actual factual finding that his actions were in fact taken in self-defense. *See also S.G.*, 301 Ga. at 802–03 (remand, not reversal, is appropriate remedy for failure to properly apply correct self-defense standards to evidence presented in disciplinary proceedings). Because the superior court's order afforded relief that far exceeds the scope of that contemplated by the legislature's authorization of limited remedies upon the grant of a writ of certiorari, and because the superior court's decision to enter a final judgment rather than remand was incorrect under *S.G.*, this Court should reverse the decision of the superior court.

**III. The superior court erred in concluding that UGA's Conduct Regulations 3.3 and 4.3 are in conflict with O.C.G.A. § 16-3-21.**

The superior court held that UGA's Conduct Regulations 3.3 and 4.3 were in conflict with Georgia's criminal code provision

providing for the justifiable use of force in defense of self or others. Section § 16-3-21(a) sets forth the circumstances under which a person may be justified in threatening or using force in self-defense or defense of others. Although O.C.G.A. § 16-3-21(c) further provides that any rule, regulation or policy of any agency that “is in conflict with” its provisions regarding use of force in defense of self or others “shall be null, void, and of no force and effect,” no court has ever held that this requires state agencies to affirmatively adopt self-defense provisions expressly incorporating O.C.G.A. § 16-3-21’s standards into codes of conduct. It cannot be the case that an elementary school’s rule that students cannot hit each other must incorporate an explicit to self-defense to survive the requirements of O.C.G.A. § 16-3-21. Nevertheless, the superior court held that by generally prohibiting students from engaging in physical violence or disorderly conduct, UGA’s conduct regulations were void for failing to also include “guidance on how to consider a self-defense claim or what effect that finding Drake was acting in self-defense would have on the allegations against him.” V2-17.

This is not the law. As the Supreme Court of Georgia has expressly recognized, a school disciplinary proceeding “is a civil, and not a criminal, proceeding.” *Henry County Bd. of Educ. v. S. G.*, 301 Ga. 794, 796 (2017). Though the Court recognized that

O.C.G.A. § 16-3-21(c) did apply to local boards of education and would require consideration of claims of self-defense in disciplinary proceedings, it did not require that the local boards affirmatively adopt written policies mirroring O.C.G.A. § 16-3-21's standards. Even though the school handbook rules prohibited "being involved in a fight on school grounds," the omission of an express reference to self-defense within those rules did not render those rules void. Rather, the local board was simply required to allow the student to present claims of self-defense and to consider whether the evidence supported such a claim. *Id.* at 802. Because the record it did not appear that the local board had done so, the Supreme Court held that the matter should be remanded to the local board for further findings and conclusions after applying the appropriate law to the evidence – but it did not void the school handbook's fighting prohibition in the process. *Id.* at 802–03. Here, Drake's self-defense claim was considered, but was rejected by UGA at every level of review.

So even if the superior court had jurisdiction over this matter, its conclusion that UGA's Conduct Regulations were invalid for failure to expressly incorporate self-defense standards mirroring those set forth in O.C.G.A. § 16-3-21 would still mandate reversal. The record shows that Drake *was* permitted to introduce evidence

and make arguments that he acted in self-defense. The record also shows that the factual findings of the hearing panel are sufficient to support the hearing panel's decision under the "any evidence" standard applicable to certiorari review. Viewing the evidence in the light most favorable to the hearing panel's decision, there is ample evidence to support that decision despite Drake's presentation of a self-defense claim, and the superior court was therefore bound to affirm the hearing panel's decision under the "any evidence" standard. *See, e.g. DeKalb Cnty. v. Bull*, 295 Ga. App. 551, 552 (2009)(courts must view evidence in light most favorable to factfinder's decision and affirm decision if there is any evidence to support it, even if the party challenging the decision presented evidence during the proceeding that conflicted with the factfinder's conclusions).

Even if this Court were to conclude that the Board of Regents could not prevail on its motion to dismiss the Petition for failure to state a claim, the Board of Regents should at minimum have the opportunity to argue in a motion for summary judgment or evidentiary hearing before the superior court that the evidence presented by Drake was insufficient to meet his burden of proof of self-defense as a matter of law. And should these arguments fail, the proper remedy would be remand of the matter for rehearing

with instructions to apply the standards set forth in *S.G.*, rather than voiding long-standing provisions of UGA's Code of Conduct and reversing Drake's suspension without any regard for whether his use of physical violence against Bargouti was in fact a justifiable use of force due to a reasonable belief that such force was necessary to defend himself. Because the superior court erred in finding UGA's Code of Conduct to conflict with O.C.G.A. § 16-3-21 and reversing Drake's suspension without any actual finding that his conduct amounted to what that Code section defines as a justifiable use of force, this Court should reverse the superior court's decision.

## CONCLUSION

For the reasons set out above, this Court should reverse the judgment of the superior court.

Respectfully submitted.

*This submission does not exceed the word count limit imposed by Rule 24.*

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## **CERTIFICATE OF SERVICE**

I certify that on October 5, 2023, I served a copy of this brief by email, per prior agreement of the parties, to the following recipients:

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