IN THE COURT OF APPEALS FOR THE
STATE OF GEORGIA

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *Appellant*, v. ELIJAH D. DRAKE, *Appellee.*	Appeal Case No. A24A0321

BRIEF OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other

INTRODUCTION

Appellant the Board of Regents of the University of Georgia (the "Board") seeks the reversal of the Superior Court of Athens-Clarke County's May 10, 2023 Order (the "Order"). However, its Brief of Appellant (the "Brief") fails to establish any reversible errors made in the Order, and in fact, articulates a strong argument for why the Order must stand by admitting the violations of Georgia law and constitutional principles that the Order was based upon. The Board appears to seek absolute authority, free from judicial review, over student disciplinary issues. The Board argues that student disciplinary issues are administrative decisions and thus unreviewable.[1] The Board argues that sovereign immunity bars this Court from reversing the sanctions ordered by a properly reviewed and reversed decision.[2] Finally, the Board argues that the Board operates with absolute discretion in student disciplinary issues, unbound by any rules or law.[3] Fortunately, this is not the law in Georgia, and by affirming the Order, this Court will ensure that it never is.

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[1] Brief at 16-19.

[2] Brief at 19-20, 27-28.

[3] Brief at 24.

STATEMENT OF THE CASE

I. Factual Background

This case arises out of a University of Georgia ("UGA") Judiciary Hearing Panel's (the "Panel") decision on March 23, 2022, that resulted in, *inter alia*, Drake's suspension from the university. While the specific facts related to the underlying incident are not directly relevant to this appeal, the inaccurate portrayal of the incident set forth in Appellant's Brief warrants a brief response to concisely address those inaccuracies before turning to the key facts and procedural history necessary to address Drake's claims.

A. The Incident

Despite the Board's claim that Drake's accounts of the incident have been inconsistent, the Board failed to point to even a single instance of inconsistency in the record.[4] While the Board points to "other witnesses" to the incident, it fails to mention that the other witnesses were Bargouti's two friends, Kaylie Henderson and Madeline Flathmann, both of whom were directly involved in the incident. (V2-380-382, 393-394, 399).[5]

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[4] Brief at 4.

[5] The record contains duplicate copies of key documents. For the Court's convenience, whenever referencing documents that were included as exhibits to Drake's First Amended Petition for Writ of Certiorari, this Request shall refer to the location in the record where those documents appear as exhibits to the First Amended Petition.

Contrary to the Board's allegation of inconsistency, Drake has consistently claimed that his conduct was motivated by self-defense, and the independent evidence and the uncontested facts support his claim.[6] The undisputed facts set forth below, as evidenced by the record, tell a different story than the Board's characterization of the events in its Brief. Drake and the three other students involved, Bargouti, Henderson, and Flathmann were *all* under the age of 21 and had *all* consumed alcohol leading up to the incident (presumably using fake IDs to do so). (V2-399). Bargouti, Henderson, and Flathmann are all friends and went to the Silver Dollar (the bar where the incident occurred) together. (V2-380). Drake did not know the three other students before he encountered them in the men's restroom during the incident. (V3-409). The incident began playfully and Flathmann consented to Drake taking her hat. (V3-408). When Bargouti and Henderson approached and confronted Drake, he was outnumbered and cornered by two intoxicated strangers (Bargouti and Henderson), who initiated physical contact with him, and only after and in response to Drake's glasses coming off, Drake restrained Bargouti. (V2-380-381; V2-384; V3-409). The investigation

[6] Drake's glasses were damaged to the point he had to get them replaced. (V3-483-484); A Polygraph Examination showed Drake was not deceptive when he answered the following questions affirmatively: 1. "Did that girl grab your glasses." 2. "Did that girl throw your glasses in the men's room?" 3. "Did that girl threaten to strike you in the face?" 4. "Did you restrain that girl to keep her from striking you in the face?" (V3-534-538).

report further confirms this version of the incident, as Bargouti stated that she believed that Drake's "act of pulling her to the ground resulted from him losing his glasses." (V2-384).

B. The Panel Decision

After providing Drake with written notice in advance and holding a formal hearing on March 1, 2022, on March 23, 2022, the Panel issued its decision which determined that Drake's conduct during the incident violated the UGA Code of Conduct ("COC"). (V3-508-517). No one reviewed, approved, or altered the Panel's decision before it was issued. (V3-432-434). The Panel found that Drake violated Conduct Regulations (hereafter, "CR") 3.3 and 4.3, which provide:

> CR 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.
>
> CR 4.3: Disruptive or disorderly conduct caused by the influence of alcohol and/or other drugs.[7]

When addressing Drake's claims that he had acted in self-defense, the Panel stated:

> While Mr. Drake stated in his interview with Mr. Pritchett that his actions were motivated by self-defense with the intention of restraining rather than hurting Ms. Bargouti, the Panel concluded that ***self-defense was insufficient*** for Mr. Drake's actions towards Ms. Bargouti ***since the Code of Conduct does not include verbiage related to self[-]defense***. ***Regardless of the intent*** Mr. Drake had for his action of taking Ms. Bargouti to the ground and restraining her, the

[7] The Panel additionally found that Drake had violated CR 2.2 and CR 4.1, however, neither are relevant to this appeal. (V3-510-512).

> Panel found the physical act towards Ms. Bargouti constituted conduct that threatened her health and safety.

(V3-511) (emphasis added). After the Panel's decision was issued, if Drake had not appealed the Panel's decision to suspend him, there would have been no further review of Drake's case and the Panel's decision would be the decision of UGA. (V3-432-436).

C. The Appeals

i. Vice President Victor Wilson

Drake followed the administrative procedure under the COC and on March 28, 2022, appealed the Panel's decision to Vice President of Student Affairs Victor K. Wilson. (V3-518-541). By appealing the Panel's decision, the sanctions previously ordered were stayed until the resolution of Drake's administrative appeal within UGA. (V3-435). On April 14, 2022, Vice President Wilson upheld the Panel's decision stating that:

> Your claims of self-defense, dependency on glasses, and past or future risk may be considered as ***potential mitigating factors*** but ***do not excuse your actions*** in any way under our Code of Conduct. Even to accept your new evidence as additional support of your account of events, ***your actions were still inexcusable***, acting in a strongly physical way against peers.

(V3-543) (emphasis added).

ii. President Morehead

On April 19, 2022, Drake followed the administrative procedure under the COC and appealed the Panel's decision to President Jere W. Morehead. (V3-544-626). On June 15, 2022, President Morehead upheld the Panel's decision. (V3-627). On the same date, UGA altered Drake's academic records, removed the grades that Drake had *already earned* for the completed Spring 2022 semester, and replaced each grade with "W," indicating those grades were administratively withdrawn. (V3-434; V2-7).

iii. The Board of Regents

On July 11, 2022, Drake followed the administrative procedure under the Code of Conduct and appealed the Panel's decision to the Board. (V4-1166). On September 14, 2022, the Board voted to affirm the Panel's decision. (V3-637).

II. The Superior Court Action

On October 14, 2022, Drake filed his Petition for Writ of Certiorari, and on November 16, 2022, filed his First Amended Petition for Writ of Certiorari (the "Petition"). On December 2, 2022, the Board of Regents filed its Answer and Affirmative Defenses to Petition for Writ of Certiorari, and contemporaneously filed a Motion to Dismiss Petition for Writ of Certiorari. After notice to the parties, a hearing was held before the superior court on February 17, 2023, on the Petition and the Board's Motion to Dismiss. On May 10, 2023, the superior court issued its

Order which granted Drake's Petition, held that the court had jurisdiction and that the COC violated O.C.G.A. § 16-3-21, and reversed the Board's decisions and sanctions against Drake. (V2-5-18.)

STANDARD OF REVIEW

In reviewing a petition for writ of certiorari to the superior court, this Court reviews questions of law de novo. *Barrett v. Sanders*, 262 Ga. App. 63, 65 (2003). The Board expressly acknowledges that the Order did not find that any conclusions of the Panel were unsupported or make any finding as to whether the underlying facts and evidence satisfied the self-defense standard.[8] As discussed in more detail below, the superior court ruled as a matter of law – not based on consideration or evaluation of underlying facts – that the COC Conduct Regulations in question were null and void and of no force and effect, and thus, no factual determination of whether Drake was acting in self-defense during the incident was necessary – or appropriate – for the superior court's resolution of the case. (V2-16-17).

On appeal to this Court, the Board is correct in stating that the review to be performed is of the initial decision of the Panel – as the superior court previously did. However, here, the any evidence standard is only applicable should this Court disagree with the legal determination made by the superior court. Because the superior court was correct in its ruling that the rules were null and void as a matter

[8] Brief at 13.

of law, there are no issues of fact for this Court to review under the any evidence standard.

SUMMARY OF ARGUMENT

In its first and second enumeration of error, the Board seeks to dramatically restrict Georgia courts' ability to review its decisions. To accept the Board's position would require not only overturning long established precedent, but significantly undermining the General Assembly's express intent in adopting the "Superior and State Court Appellate Practice Act" to reverse the trend of "many appeals from a lower judicatory to a superior or state court result[ing] in dismissal on complex procedural grounds and not a decision on the merits." O.C.G.A. § 5-3-2; *see generally,* O.C.G.A. § 5-3-1, *et seq.*

Existing precedent clearly establishes that Drake's case was properly brought via petition for writ of certiorari to superior court and that the controversy in issue – whether the Board was in violation of state law – is reviewable by the Courts. None of Drake's claims or the remedies sought are barred by sovereign immunity. The General Assembly consented, through the adoption of the certiorari statutes, to judicial review of quasi-judicial agency decisions and judicial reversal of improper decisions. To hold otherwise would only exacerbate the already significant substantive and procedural due process concerns underlying this case

by allowing the Board to violate Drake's constitutional and statutory rights with impunity.

The Board's third enumeration of error states that the superior court erred in declaring portions of the COC void for conflicting with O.C.G.A. § 16-3-21. The record – as well as the Board's Brief – leaves no doubt that not only does the COC conflict with the requirements of the self-defense statute, but the Board clearly does not understand what the law requires. Throughout Drake's disciplinary process and the subsequent litigation, the Board and UGA consistently aver that Drake's self-defense claim can only be "a mitigating factor" to his alleged violations of CR 3.3 and CR 4.3. In other words, to the Board, Drake's case was decided the moment he admitted to acting in a physically violent manner because the COC mandatorily prohibits *all* physical violence.

However, the law does not limit self-defense claims to being a mitigating factor which may lessen the sanction leveled upon the accused; the law requires that self-defense claims provide the accused the opportunity to justify their conduct so that they may be entirely exonerated. The Order correctly held that the COC mandatorily prohibits self-defense conduct in all cases and thus fails to provide the protections mandated by O.C.G.A. § 16-3-21, and as a result, was null, void, and of no force and effect. Because the COC provisions that Drake was found to have violated are void, his suspension must be reversed.

ARGUMENT

I. The Superior Court Properly Exercised Jurisdiction Because Drake Suffered a Deprivation of Major Proportion.

The Board of Regents attempts to characterize the Petition as non-judiciable for seeking judicial review of an "academic decision."[9] While this case originated out of a disciplinary decision, which under certain circumstances can be a non-judiciable academic decision, here, Drake suffered a deprivation of major proportion sufficient to invoke the jurisdiction of the superior court. *Bd. of Regents of Univ. Sys. of Georgia v. Houston*, 282 Ga. App. 412, 414 (2006) (quoting *Woodruff v. Ga. State Univ.,* 251 Ga. 232, 234 (1983)).

The Board relies almost exclusively on *Bd. of Regents of Univ. Sys. of Georgia v. Houston* to support its position that the superior court lacked jurisdiction. However, *Houston* is distinguishable. Unlike in this case, in *Houston*, the student admitted to the alleged conduct which violated the university rules and was only challenging the severity of the sanctions against him, specifically, his temporary suspension and the prohibition on his participation in extracurricular sports. 282 Ga. App. at 415. The Court did hold that "[i]t is well settled that disputes concerning academic decisions made by public institutions of learning present no justiciable controversy." *Id.* at 414 (quoting *Woodruff v. Ga. State*

[9] Brief at 16-19.

Univ., 251 Ga. 232, 234 (1983). However, it went on to explain that typically, an "academic decision" is one that evaluates the grade assigned to a student's work or whether a student would be able to participate in sports. *Id.* at 414-415.[10]

In contrast, like in this case, courts have jurisdiction over decisions that otherwise might be considered "academic" when "impelled by a deprivation of major proportion." *Id.* (quoting *Woodruff v. Ga. State Univ.,* 251 Ga. 232, 234 (1983)). Examples of deprivations of major proportion include a decision that was "clearly erroneous or arbitrary and capricious for lack of supporting evidence" or caused a student to suffer a "deprivation of constitutional or statutory rights." *Id.* The *Houston* Court specifically found that it did not have jurisdiction because the student failed to allege that he had suffered any deprivation of his constitutional or statutory rights, because he did not have a right to participate in extracurricular sports. *Id.*

In contrast, Drake's Petition clearly alleged – and the Order held that – a deprivation of major proportion occurred because the COC conflicted with state law, and as a result, violated Drake's Due Process rights. (V2-11-12). Here, the

[10] The present case's challenge related to Drake's grades is distinguishable from typical academic decision involving grades. Drake does not contest the integrity of the grades he earned; instead, the Petition sought the *restoration* of Drake's Spring 2022 grades which were administratively removed from his transcript after President Morehead denied Drake's appeal. Fully reversing Drake's suspension requires the restoration of his Spring 2022 grades.

Panel's decision, *inter alia,* (1) violated Drake's statutory rights by basing his suspension on COC Conduct Regulations which prohibited mandatorily protected self-defense conduct, (2) violated Drake's protected liberty interest in his reputation by failing to provide him with the ability to justify his conduct through establishing that he had acted in self-defense as mandated by state law, and (3) unreasonably interfered with Drake's pursuit of the profession of his choice through basing his suspension on rules that conflict with state law. *Allen v. City of Atlanta*, 235 Ga. App. 516 (1998); *Goss v. Lopez*, 419 U.S. 565 (1975); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573–74 (1972) (holding that liberty interests are implicated when the State imposes a stigma on an individual such that it harms an individual's "good name, reputation, honor, or integrity"); *Raffensperger v. Jackson*, 316 Ga. 383, 388-391 (2023) ("We have 'long recognized' that [the Georgia Constitution's Due Process Clause] 'entitles Georgians to pursue a lawful occupation of their choosing free from unreasonable government interference.' We discerned this right not merely from precedent, but also as a 'consistent and definitive' understanding of Georgia's Due Process Clause.") (quoting *Jackson v. Raffensperger*, 308 Ga. 736, 740 (2020)).

Here, as properly held by the superior court, Drake's allegation that his statutory and constitutional rights were violated by the COC's conflict with

O.C.G.A. § 16-3-21 was sufficient to establish a justiciable controversy that this Court can address on the merits.

II. The Trial Court was not Barred from Jurisdiction by the Doctrine of Sovereign Immunity

"The doctrine of sovereign immunity bars suits against the State to which the State has not consented." *Lathrop v. Deal*, 301 Ga. 408, 425 (2017). The legislature adopted the certiorari statutes to provide a mechanism for aggrieved parties to obtain judicial review of, *inter alia,* an agency's decision. Drake's Petition sought, and the Order ultimately granted, the proper reversal of the Panel's decision and the associated sanctions against him.

A. The Panel's Decision was a Quasi-Judicial Decision Subject to Certiorari Review.

The Order held that the "UGA Judiciary Hearing Panel's decision was a quasi-judicial decision and a petition for writ of certiorari was the proper mechanism for Drake to bring his claim." (V2-9-10). The Georgia Supreme Court has acknowledged that the "determination of what is a ministerial or administrative duty and what is a judicial function is often a matter of extreme difficulty." *Hous. Auth. of City of Augusta v. Gould*, 305 Ga. 545, 551 (2019) (quoting *City Council of Augusta v. Loftis*, 156 Ga. 77, 82 (1932)). However, it has also provided guidance to make that determination, and has set forth "three essential characteristics of a quasi-judicial act."

> First, a quasi-judicial act occurs in situations when "all parties are as a matter of right entitled to notice and to a hearing, with the opportunity afforded to present evidence under judicial forms of procedure." Second, a quasi-judicial act requires "a decisional process that is judicial in nature, involving an ascertainment of the relevant facts from evidence presented and an application of preexisting legal standards to those facts." Third, a quasi-judicial act reviewable by writ of certiorari is one that is "final, binding, and conclusive of the rights of the interested parties."

Riverdale Land Grp., LLC v. Clayton Cnty., 354 Ga. App. 1, 3–4 (2020) (quoting *Hous. Auth. of City of Augusta v. Gould*, 305 Ga. 545, 551-52 (2019)); *see also, Laskar v. Bd. of Regents of Univ. Sys. of Georgia*, 320 Ga. App. 414, 416 (2013). Here, all three essential characteristics are present in the COC's student disciplinary procedures.

The Board does not attack the first characteristic; the COC required and UGA clearly provided Drake with notice prior to the hearing of the allegations against him, the hearing date, and that he would be allowed to present evidence at the hearing. (V3-449-451, 631-635); Brief at 22. While the Board now argues the second characteristic was not met, before the superior court Order was issued, the Board conceded that the Panel's decision met the second characteristics of a quasi-judicial decision. (V8-9, 33) ("There are three factors that courts look at, and as Mr. Boggs correctly pointed out, we do not take the position that the first two factors are really at issue. There is a fairly robust proceeding."); (V2-9). Thus, the Board waived this argument below as this Court does not consider "an argument

raised on appeal [which] is entirely different from an argument made" in the trial court. *Ware v. State*, 258 Ga. App. 706, 707 (2002); *Sharpe v. Dep't of Transp.*, 270 Ga. 101, 102–03 (1998).

Even had the Board not waived its argument on the second characteristic, its argument fails. To attack the sufficiency of the second characteristic, the Board heavily relies on *Laskar v. Bd. of Regents of Univ. Sys. of Georgia*, 320 Ga. App. 414 (2013). While *Laskar* provides a useful framework for a court's analysis to determine if a decision was quasi-judicial or administrative, Judge McFadden's concurrence clearly states that litigants and courts should be wary of relying on the case's holding alone to determine if a future decision was quasi-judicial, and as he explained:

> the available procedure turns on a close—and costly—examination of the institution's procedures. Such an examination will need to be performed anew of the procedures at each public institution where such a dispute arises. Indeed if Georgia Tech has revised its procedures when it next faces such a dispute, its procedures will then need to be reexamined.

Id. at 422. An examination and comparison of the relevant policies of the Georgia Institute of Technology ("Georgia Tech") at issue in *Laskar* and UGA's relevant policies at issue here shows distinguishing factors fatal to the Board's position.

In *Laskar,* the Georgia Court of Appeals addressed whether the disciplinary procedures against faculty members used by Georgia Tech met the requirements

for a quasi-judicial decision.[11] Georgia Tech's policies provided faculty members accused of misconduct the right to request a formal hearing before a faculty hearing committee. *Id.* at 417-418. The hearing committee was responsible for holding a hearing, reviewing the evidence related to the accusation, and applying Georgia Tech's rules and regulations to the evidence submitted to make its recommendation. *Id.* at 416-421. The Court of Appeals determined that while the hearing committee *met the requirements of the first and second characteristic* of a quasi-judicial decision, because the committee only submitted a report with a *non-binding* recommendation to the President of Georgia Tech who then made the final decision, the hearing committee failed to meet the third characteristic because it "did not render a binding decision." *Id.* at 418-419. A petition for writ of certiorari therefore was inappropriate because it was the president, not the hearing committee, that had the authority to make a decision that could bind the university. *Id.*

Here, as it relates to the second characteristic, the disciplinary process at UGA is analogous to that of Georgia Tech in *Laskar*, despite the Board's attempts to substantially narrow that scope. Georgia law provides that if the Panel was

[11] *Id.* While *Laskar* involved disciplinary proceedings against a faculty member instead of a student, the analysis required for the Court and the procedures employed by the respective universities are comparable for determining whether the Panel acted in a quasi-judicial capacity.

"engaged in a decision-making process, which required [it] to examine evidence and apply legal standards, then [it] made a quasi-judicial decision." *Scott v. Atlanta Indep. Sch. Sys.*, No. 1:14-CV-01949-TWT-WEJ, 2014 WL 12621230, at *8 (N.D. Ga. Nov. 19, 2014), *report and recommendation adopted,* No. 1:14-CV-01949-ELR, 2015 WL 12844305 (N.D. Ga. Sept. 14, 2015). Similarly, courts "must look to the particular function performed at the hearing in determining whether it was judicial or quasi-judicial in nature" rather than focus solely on the label a proceeding is given. *Mack II v. City of Atlanta*, 227 Ga. App. 305, 309 (1997).

Quasi-judicial proceedings require only "an informal hearing, not strict adherence to the rules of evidence." *Bulloch Cnty. Bd. of Comm'rs v. Williams*, 332 Ga. App. 815, 817 (2015); *Hous. Auth. Of City of Augusta v. Gould*, 305 Ga. 545, 552–55 (2019); *see also, Mack II v. City of Atlanta*, 227 Ga. App. at 308 ("The law does not so narrowly define a "judicial proceeding" as one requiring application of the Civil Practice Act."). The Board's attempt to describe the disciplinary process in this case as outside of the definition of a "judicial proceeding" is misguided.

Here, the Panel – defined in the COC as made up of "Justices" from "University Judiciary" and referred to as a "Judicial body" authorized to conduct hearings, hear and weigh evidence, and ultimately make determinations as to violations of conduct regulations and imposition of sanctions – clearly acted in a judicial capacity and performed judicial functions. (V3-419). The COC defines its

purpose stating, "These procedures have been established *to ensure due process* and fundamental fairness to all involved in the University's conduct process." (V3-417) (emphasis added).

The Board itself characterized the hearing as "robust," and Drake was allowed to make an opening and closing statement, present evidence, and request witnesses to attend. (V8-9; V3-427, 429-432). Further, by considering "the information presented at the hearing," the Panel ascertained the relevant facts and by applying a standard of evidence to the question of whether Drake violated the COC, the Panel applied preexisting legal standards to the information presented at the hearing. *Riverdale Land Grp., LLC v. Clayton Cnty.*, 354 Ga. App. 1, 3–4 (2020); (V3-406, 419, 428, 432). The Panel was not expressing its subjective opinion of whether Drake's conduct warranted suspension;[12] rather, the Panel explicitly applied facts surrounding his conduct to the COC, and the determination of sanctions was authorized by and strictly controlled by the COC's provisions regarding sanctions. (V3-432-434).

The Board primarily attacks the third characteristic by contesting the finality of the Panel's decision, namely because the COC provides an administrative appeals process. In support of this position, the Board relies on *Hous. Auth. Of City of Augusta v. Gould*, 305 Ga. 545 (2019) and *Laskar*, both of which are

[12] Brief at 24.

distinguishable from the present case for the same reason: unlike the Panel here, the hearing panels in those cases were not the final decision-maker.

In *Hous. Auth. Of City of Augusta v. Gould*, the Georgia Supreme Court held that the Housing Authority of the City of Augusta (the "Authority") hearing officer's decision was not sufficiently final, binding, and conclusive of the parties' rights to be a quasi-judicial decision. 305 Ga. 545 (2019). The Georgia Supreme Court focused on three characteristics of the Authority's policies to determine that the hearing officer's decision was only advisory. *Id* at 555-557. First, the Authority was not bound by the hearing officer's decision if the Authority determined that the decision was contrary to the Authority's hearing procedures or federal, state, or local law. *Id.* Second, the Authority's regulations left it "to the agency itself" to determine whether it would be bound by the decision. *Id.* If the Authority was considering whether it was bound or not, the Authority was not required to notify the applicant or provide the applicant the opportunity to be heard. *Id.* Third, the Authority's regulations provided no time limit for the Authority to determine whether it would be bound by the hearing officer's decision. *Id.* While the Authority would have to provide notice if it decided it was going to override the hearing officer's decision, the Authority had no obligation to provide notice to the applicant if it decided it was bound by the hearing officer's decision. *Id.* These

policies provided applicants with no practical way to know if a decision had been made and when a decision became final.

Similarly, in *Laskar,* under Georgia Tech's rules, the President, not the faculty hearing committee, had the final decision-making authority to dismiss or otherwise sanction an accused faculty member. *Laskar v. Bd. of Regents of Univ. Sys. of Georgia*, 320 Ga. App. at 418. The President did not participate in the hearing and was not bound by either the hearing committee's report or even the evidence presented at the hearing in making his decision *Id.* Because the president decided the faculty member's fate instead of the faculty hearing committee, this Court determined that the hearing committee's decision was not final and thus, not quasi-judicial.

In contrast, the COC at issue in this case leaves the final decision with the Panel and expressly authorizes the Panel, as a "Judicial body", to make determinations as to the violation of regulations and sanctions imposed. (V3-432, "Decisions for Formal Resolution"). Unlike in *Gould*, here, absent an affirmative appeal by Drake, the decision of the Panel would become binding – without additional approval, oversight, or review – five (5) business days after it was made, and no official is unilaterally empowered to overturn or even review the Panel's decision. (V3-434). In other words, had Drake taken no action, the Panel's March 23, 2022 decision would have been the final decision of UGA and, by extension,

the Board. Thus, the Panel's decision was final, binding, and conclusive of Drake's rights, and the Panel was the decider of Drake's fate.

The inclusion in the COC for an appellate process following the Panel's decision does not change this determination. Indeed, the "appellate officer[s]" involved in that process are defined as "any person authorized to consider an appeal submitted by a student…in regard to a ***judicial body's decision***" and only perform the traditional role of review of the judicial body's decision – the final decision that has already been made and is thus, subject to review. (V3-418) (emphasis added). The COC provision related to Drake's further appeal to President Morehead categorizes the Panel's decision and the resulting "sanction(s)" as "***issued*** by the ***original judicial body***" and invoking this procedure "is not intended to grant a new hearing at a higher level" (V3-435) (emphasis added). An administrative review process that could potentially overturn that binding decision only upon the invocation by Drake of the review process does not change the final, binding, and conclusive nature of the Panel's decision.

The Board's attempt to characterize the appellate remedies set forth in the COC as somehow limiting the authority of the Panel to make a final and binding decision, and in turn, recharacterize an otherwise judicial or quasi-judicial decision as an administrative decision, would require the Court to overturn clear precedent. Petitions for certiorari are routinely decided on the merits even though an initial

quasi-judicial decision was subsequently reviewed administratively. *Allen v. City of Atlanta*, 235 Ga. App. 516 (1998).

The Panel's procedures are comparable to the Atlanta Board of Education's procedures in *Scott v. Atlanta Indep. Sch. Sys.*, No. 1:14-CV-01949-TWT-WEJ, 2014 WL 12621230, at *11–12 (N.D. Ga. Nov. 19, 2014), *report and recommendation adopted,* No. 1:14-CV-01949-ELR, 2015 WL 12844305 (N.D. Ga. Sept. 14, 2015). In *Scott,* the Board of Education's procedures included "Hearing Rules" that a hearing officer must follow when reviewing disputes *Id.* at 9-10. The Hearing Rules included rules for submitting documents, calling witnesses, and opening and closing statements from both parties. *Id*. The hearing officer's decision was "not a recommendation, but [was] final and binding on the parties," absent a party convincing the Board of Education to hear an appeal. *Id.* at 11.

The District Court compared this case to *Laskar*, holding that because the hearing officer's decision was binding a petition for writ of certiorari was the appropriate procedure. *Id.* Like *Scott*, this fundamental difference from *Laskar* is present in the COC; the Panel's decision is final absent an appeal. Only *after* the Panel formally issues its decision and the aggrieved party requests an appeal can the decision be altered. Because the Panel's decision was final, binding, and conclusive of Drake's rights, the Panel's decision met the third characteristic of a

quasi-judicial decision. Therefore, for the reasons discussed above, the Order properly held that the Panel's decision met all three characteristics of a quasi-judicial proceeding and that Drake's petition for writ of certiorari was the appropriate procedure to bring this case before the superior court.

B. Sovereign Immunity Did Not Bar the Superior Court from Reversing the Panel's Illegal Decision.

The Board argues that the relief ordered by the Superior Court is barred by sovereign immunity because the remedies ordered exceeded the scope of the remedies available under O.C.G.A. § 5-4-14. Specifically, the Board posits that the Order provided declaratory relief, which it opines is not allowed under the certiorari statutes.[13] This position lacks merit, and the order of the superior court was well within its statutory powers to grant relief.

In its Order for Relief, the Order provided:

> it is HEREBY ORDERED that Conduct Regulations 3.3 and 4.3 of the University of Georgia's Code of Conduct prohibit statutorily permitted self-defense conduct and as a result, are null void, and of no force and effect. As such, the University Judiciary Hearing Panel's decision against Elijah D. Drake reversed. As a result, it is further ORDERED that Drake's suspension is reversed.

[13] The Board additionally argued that the petition was barred by sovereign immunity because while O.C.G.A. § 5-4-1 *et. seq.* provides the statutory authorization required to waive sovereign immunity, Drake's petition was improper and thus barred. *See,* Brief at 19-20, 27-28. As explained above, Drake's petition was properly brought under O.C.G.A. § 5-4-1 *et. seq.*

(V2-17). The Order's relief is comparable to the relief granted in *Allen v. City of Atlanta* when an Atlanta police officer brought a petition of certiorari to reverse the Atlanta Police Department's (the "Department") decision and associated sanctions. 235 Ga. App. 516 (1998). Like the present case, the officer's petition required this Court to assess whether the Department's policy conflicted with O.C.G.A. § 16-3-21. *Id.* As will be discussed further below, O.C.G.A. § 16-3-21(c) establishes that agency rules that conflict with the statute are void. *Id.* In *Allen,* this Court found that the Department's policy conflicted with O.C.G.A. § 16-3-21 and thus was void, which required the reversal of the Department's decision and of the sanctions against the officer. *Id.* at 517-518. Sovereign immunity did not bar the *Allen* suit, or the relief sought and granted, because the state's consent was clear and explicit in the certiorari statutes.

As in *Allen*, here, sovereign immunity did not bar the superior court from reviewing and reversing the Panel's illegal decision and its associated sanctions. Rather, the superior court properly found that UGA's policy conflicted with § 16-3-21 and as a result, was void – a decision that necessarily required the reversal of the decision and the sanctions against Drake that flowed from the rules declared void.

III. The Superior Court Properly Concluded that UGA's Conduct Regulations 3.3 and 4.3 were Void.

The Order held that (1) the Board of Regents is a state agency; (2) O.C.G.A. § 16-3-21 applied to the Board, and (3) because CR 3.3 and 4.3 were mandatory prohibitions of self-defense conduct, those provisions of the COC were void. (V2-13-17). In the proceedings below, the Board of Regents cited *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 676 (1986) in support of its position that because academic institutions "need to be able to impose disciplinary sanctions for a wide range of *unanticipated* conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions" and that as a result, the COC can punish self-defense conduct. (V7-2023-2024; V8-17-19) (emphasis added). This argument, and its similar reliance on *Henry Cnty. Bd. of Educ. v. S.G.*, 301 Ga. 794, 799–800 (2017) on appeal, is without merit.

The General Assembly anticipated that citizens, including students, might use physical violence to defend themselves. In those circumstances, O.C.G.A. § 16-3-21(a) is unambiguous that reasonable self-defense conduct must be justified. O.C.G.A. § 16-3-21(c) mandates that any agency rules that punish someone for physically violent conduct motivated by self-defense are void. Nothing in Georgia's self-defense statute would suggest that the Board of Regents – or any other academic institution – is exempt. In fact, to Drake's knowledge, every other

academic institution that Georgia courts have examined has been held to be required to comply with the self-defense statute. *Henry Cnty. Bd. of Educ. v. S.G.*, 301 Ga. 794, 799–800 (2017) (acknowledging that the Georgia Supreme Court has previously held that the State Board of Education and local school boards must allow students facing disciplinary action to claim self-defense to justify their conduct). The Order properly held that CR 3.3 and 4.3 were in violation of the self-defense statute for being mandatory prohibitions of self-defense conduct.

A. The Board of Regents is a State Agency

"The Board of Regents is a state agency that governs and manages the University System of Georgia and its member institutions," including UGA. *Bd. of Regents of the Univ. Sys. of Georgia v. Doe*, 278 Ga. App. 878 (2006); *see also,* Ga. Const. Art. VIII, Sec. IV, Par. I(b)). The "Board of Regents is vested with the power to manage and control the University System." *Id.* at 885–886. The Board's "powers are plenary" except "by such restraints of law as are directly expressed, or necessarily implied…Limited only by their proper discretion and by the Constitution and the law of this State." *Id.* Therefore, as a state agency, its rules, regulations, and policies must comply with state law, including O.C.G.A. § 16-3-21.

B. O.C.G.A. § 16-3-21 Prohibits Punishment of Conduct That Was Reasonably Motivated by Self-Defense.

The Georgia Supreme Court has been clear that courts "must presume that the General Assembly meant what it said and said what it meant." *Deal v. Coleman* 294 Ga. 170, 172–73 (2013). Through its passage of O.C.G.A. § 16-3-21, the Generally Assembly stated: (1) the standard that must be used to analyze self-defense claims, (2) the effect a successful claim must have on an allegation against a person, and (3) how to handle a conflict between an agency rule with the code section. O.C.G.A. § 16-3-21(a) addresses the first and second items providing, "A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself…against such other's imminent use of unlawful force." In the present case, this means that the Panel's determination of Drake's self-defense claim must have focused on whether Drake reasonably believed that force was necessary to defend himself, and if the Panel found that Drake's belief was reasonable, then Drake's conduct must be justified. O.C.G.A. § 16-3-21(c) addresses the third item providing that:

> Any rule, regulation, or policy of any agency of the state or any ordinance, resolution, rule, regulation, or policy of any county, municipality, or other political subdivision of the state which is in conflict with this Code section shall be null, void, and of no force and effect.

Therefore, if any provision of the COC conflicts with the application of the statutory self-defense standard to Drake's conduct or with Drake's ability to justify his conduct by proving he met that standard, then that provision of the COC is null, void, and of no force and effect.

C. UGA's Conduct Regulations 3.3 and 4.3 are Void Because They are Mandatory Prohibitions of Self-Defense Conduct in Violation of O.C.G.A. § 16-3-21.

The explicit terms of CR 3.3 and 4.3 conflict with both the statutory self-defense standard and with the justification effect mandated by O.C.G.A. § 16-3-21. Throughout the litigation, the Board has attempted to frame Drake's argument as claiming that state agencies are required to "affirmatively adopt self-defense provisions expressly incorporating O.C.G.A. § 16-3-21's standards into codes of conduct."[14] However, this is not and has never been Drake's position; instead, Drake has argued that the COC conflicts with O.C.G.A. § 16-3-21 because it contains mandatory prohibitions on physically violent conduct. While the Board is not required to explicitly adopt the requirements of O.C.G.A. § 16-3-21, it also cannot adopt rules which mandatorily prohibit physical violence as, under certain circumstances, physical violence is justified.

In *Allen v. City of Atlanta,* the Georgia Court of Appeals reviewed whether the Atlanta Police Department's decision to suspend an officer for violating the

[14] Brief at 29.

Department's rule that provided that a "firearm *shall* not be discharged if the lives of innocent persons may be in danger" conflicted with O.C.G.A. § 16-3-21. *Id.* at 517-18. After the Atlanta Civil Service Board upheld the officer's suspension, the officer appealed via a petition for writ of certiorari to superior court. *Id.* at 516. The Court of Appeals focused its analysis on the policy's use of "shall." The Court of Appeals held that this language created a mandatory prohibition that prevented an officer from discharging their weapon if the lives of innocent people might be in danger. *Id.* at 517. The Court of Appeals reversed the decision and associated sanctions against the officer, holding that the Department's policy conflicted with O.C.G.A. § 16-3-21 because the policy prohibited the firing of a weapon in circumstances that would be allowed under the self-defense statute. *Id.* at 517–18. Key to the Court's decision was that the mandatory nature of the policy removed officers' ability to use their judgment regarding what measures were necessary to defend themselves and others. *Id.* at 518. While the Department argued that the policy, as written, allowed for officers to use their judgment, the *text* of the policy provided no basis for this balancing. It strictly prohibited certain conduct.

In the present case, the Panel found that Drake violated certain COC Conduct Regulations which contained a similar strict prohibition, and provides that certain "actions are prohibited and constitute a violation of the Code of Conduct." (V3-421). Specifically, it found violations based on CR 3.3 and 4.3 which prohibit:

> CR 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.
>
> CR 4.3: Disruptive or disorderly conduct caused by the influence of alcohol and/or other drugs.

(V3-511-512).

Like *Allen,* the plain text of both CRs – read individually and in conjunction with the entire COC – strictly prohibit certain conduct. CR 3.3 prohibits "conduct that threatens or endangers the health or safety of another person." By its very nature, any threat or use of force, even if taken in self-defense, will "threaten or endanger the health or safety of another person." Neither CR 3.3 nor the COC provides any exceptions or limiting language to this prohibition. While the COC does not directly contradict O.C.G.A. § 16-3-21 by explicitly disallowing self-defense, by prohibiting physical violence under all circumstances the COC prohibits self-defense.

In *Allen,* this Court rejected the Department's attempts to argue, like the position the Board has taken in this case, that its rules provided for self-defense or a balancing test in the absence of corresponding language in the text of the rules. *Allen v. City of Atlanta*, 235 Ga. App. at 517-518; *see also, Palmyra Park Hosp., Inc. v. Phoebe Sumter Med. Ctr.,* 310 Ga. App. 487, 491 (2011) ("While reviewing courts defer to agency interpretations of the statutes they are charged with

administering, that deference applies only as far as the agency interpretation is consistent with the statute.")

Under a plain reading of the COC, once Drake admitted to restraining Bargouti, because of the strict prohibition on conduct, the Panel's only option was to find that Drake's conduct violated CR 3.3 and 4.3, and that his conduct was unjustifiable as a result. Therefore, the COC conflicts with O.C.G.A. § 16-3-21.

This interpretation of the text is supported by the University's statements explaining its decisions. There is no evidence in the record that the Panel considered the statutory standard; rather, there is affirmative evidence that they failed to consider it. The Panel's statement that *"*the Code of Conduct does not *include verbiage related to self[-]defense"* unambiguously demonstrates that the COC provided no standard or guidance whatsoever instructing the Panel how to analyze a self-defense claim. (V3-511). This alone does not violate O.C.G.A. § 16-3-21; the Panel's violation is based on its failure to apply the proper standard. The Panel's response to Drake's self-defense claim not only illustrates that it did not ask whether Drake restrained Bargouti because he reasonably believed Bargouti was about to harm him, but it explicitly *rejected* that framing to its decision:

> ***Regardless of the intent*** Mr. Drake had for his action of taking Ms. Bargouti to the ground and restraining her, the Panel found the ***physical act*** towards Ms. Bargouti constituted conduct that threatened her health and safety.

(V3-511) (emphasis added). Drake never denied that he restrained Bargouti, therefore, the Panel's sole inquiry was whether Drake's conduct violated the COC. By only focusing on whether Drake threatened Bargouti's health and safety, the Panel failed to analyze – and under the COC, could not analyze – whether Drake's use of force was based on his reasonable belief that Bargouti was about to harm him as the standard mandated by O.C.G.A. § 16-3-21.

Even if the Panel had applied the proper self-defense standard, its failure to recognize that a successful self-defense claim must justify Drake's conduct was an independent conflict with O.C.G.A. § 16-3-21. By its statement that "self-defense was insufficient," the Panel explicitly states its understanding that even if Drake had acted in self-defense, Drake's conduct was still a violation of the COC and was therefore, punishable. (V3-511). Vice President Wilson's statement that Drake's "claims of self-defense, dependency on glasses…may be considered as potential *mitigating factors* but do not *excuse* your actions in any way under our Code of Conduct" leaves no doubt that UGA interprets self-defense claims under the COC to be irrelevant to culpability determinations in student disciplinary hearings, even if they may be considered in relation to the sanctions resulting from the violation. (V3-543, V5-1533) (emphasis added).

O.C.G.A. § 16-3-21 requires self-defense to be considered as a justification for the conduct, rather than just a mitigating factor. Contrary to the Board's argument, these are not the same – the "fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct…If you decide the Defendant's actions were justified, then it would be your duty to find the Defendant not guilty." *Perry v. State*, 366 Ga. App. 341, 344-345 (2023) Black's Law Dictionary describes a mitigating defense as a claim "that if true, *reduces* the severity of the offense without *eliminating* criminal liability." DEFENSE, Black's Law Dictionary (11th ed. 2019) (emphasis added). Similarly, a mitigating circumstance is defined as a "fact or situation that does not *justify* or *excuse* a wrongful act or offense but that reduces the degree of culpability and thus *may reduce* the damages (in a civil case) or the punishment (in a criminal case)." CIRCUMSTANCE, Black's Law Dictionary (11th ed. 2019) (emphasis added). By repeatedly describing Drake's self-defense claim as a "mitigating factor," the Board irrefutably admits that it failed to acknowledge O.C.G.A. § 16-3-21's justification effect because a mitigating factor, by definition, cannot justify conduct. Vice President Wilson's explicit statement that Drake's claim of self-defense did not "excuse his conduct" removes all possibility that the Board believed that Drake's claims were a potential justification. (V3-543).

The mandate of O.C.G.A. § 16-3-21(c) is unequivocal; CR 3.3 and 4.3 cannot be rewritten by this Court, their interpretation cannot be bent to avoid the conflict, and the Board is not granted the opportunity to rewrite its rules to comply – CR 3.3 and 4.3 are void and must have no effect. O.C.G.A. § 16-3-21(c); *Allen v. City of Atlanta*, 235 Ga. App. at 517-518; *see also, Groover v. Johnson Controls World Serv.*, 241 Ga. App. 791, 793 (2000). To do otherwise would usurp the General Assembly's legislative authority by creating an exception to Georgia's self-defense statute where none exists. The Georgia Supreme Court has previously held, "when a rule of an administrative agency conflicts with a law of general application, the rule cannot stand." *Georgia Hosp. Assoc. v. Ledbetter*, 260 Ga. 477, 479 (1990). Here, the decision of the superior court was not only proper, but necessary under the circumstances, and should be upheld.

D. Because Conduct Regulations 3.3 and 4.3 Are Void, the Superior Court Had the Duty to Make the Final Decision by O.C.G.A. § 5-4-14.

The Order held that because:

> the errors complained of in this case are errors of law and that the mandatory prohibitions unambiguously set forth on the face of CR 3.3 and CR 4.3 are in violation of O.C.G.A. § 16-3-21, and as such, are null, void, and of no force and effect. Under this framework, this Court has the duty to make a final decision on this case.

(V2-17). The Order based its holding on O.C.G.A. § 5-4-14(b) which provides:

> In all cases when 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 of the superior court to make a final decision in the case without sending it back to the tribunal below.

The Order's holding that CR 3.3 and CR 4.3 conflicted with O.C.G.A. § 16-3-21 was a question of law. Because the court held that the Conduct Regulations, which were the basis of the Panel's sanctions against Drake, were invalid and void due to their contravention of state law, the Panel's decision to suspend Drake based on those conduct regulations cannot stand. *Allen v. City of Atlanta*, 235 Ga. App. at 518. Therefore, regardless of whether Drake was acting in self-defense – and the evidence suggests he was – the Order properly held that the Panel's decision must be reversed without remand because no question of fact remained to be determined.

CONCLUSION

By mandatorily prohibiting self-defense claims from justifying a student's conduct, the Board of Regents denies every public university student protection mandated by state law. The self-defense statute mandates that if an agency's rule conflicts with it, by either failing to apply the proper self-defense standard to its analysis or failing to recognize that a proven self-defense claim must justify the accused conduct, that agency rule is void. Because UGA's COC failed to apply the proper self-defense standard and failed to offer Drake the opportunity to justify his conduct, the conflicting provisions are void. The Order properly determined that

there were no remaining issues of fact, which under the certiorari statutes, mandated that the superior court had the obligation to make the final determination that Drake's suspension and the associated sanctions had to be reversed. This Court should affirm the Order and deny the Board's appeal to ensure that Drake, and all university students, receive the protections that the General Assembly intended when passing O.C.G.A. § 16-3-21.

Respectfully submitted, this 3rd day November, 2023.

Counsel certifies that this submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I hereby certify that I have, this day, served a true and correct copy of the foregoing **Brief of Appellee** upon all parties by transmitting a copy of the same via email contemporaneously with the filing of the same, and addressed as follows below. I certify that there is a prior agreement with the Board of Regents of the University System of Georgia to allow documents in a PDF format sent via email to suffice for service.

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