

October 2019

DECRIMINALIZING CHILDHOOD

Ending School-Based Arrest for Disorderly Conduct

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Introduction

Virginia’s “disorderly conduct” statute is a vague, overbroad, catch-all law that criminalizes low-level public disruption that does not rise to the level of physical harm, property damage, or even threat. It is levied most acutely against Black Virginians,ⁱ and is often used against people with low incomes and people with disabilities. **Disorderly conduct is, by law and design, the crime the state uses against you when it can’t find any other crime.**

Disorderly conduct laws find their strongest roots in the insidious “vagrancy” and other public order laws that fueled policing in the Jim Crow South. Intentionally designed to be vague in order to facilitate discriminatory enforcement, these laws have been used to control the movement of Black people, break up strikes and protests, and target suspects when no probable cause exists—a shameful legacy Virginia has not yet left behind.ⁱⁱ

The Problem for Youth & Families

Virginia’s disorderly conduct law contains a separate provision that has been used to ensnare children and youth, resulting in unnecessary contact with law enforcement and involvement with the justice system. First enacted in 1990—a time in U.S. history when unfounded and discriminatory fear of Black youth in particular prompted lawmakers in nearly all states to increase laws and penalties against young people—Virginia Code § 18.2-415(C) specifically criminalizesⁱⁱⁱ highly subjective student behavior that often would not be considered “criminal” outside the schoolhouse door. Students can be adjudicated delinquent (found guilty) of disorderly conduct in Virginia if they either intentionally or recklessly create a risk of “public inconvenience, annoyance, or alarm” by creating a disruption that “prevents or interferes with the orderly conduct” of any school or school-sponsored operation or activity.

Black students in particular, and Black girls at a momentously increasing rate, are targeted in school with disorderly conduct criminal charges in disproportionate numbers to their white peers. And the consequences of such charges, whether they proceed before a judge or not, cause cumulative harm that can derail a child’s education and make them more likely to sink deeper into the justice system.

The Solution

Virginia must repeal Section (C) of its disorderly conduct law, Virginia Code § 18.2-415, and stop criminalizing childhood behavior and unnecessarily pushing youth into our criminal legal system.

The Case Against School-Based Disorderly Conduct Charges^{iv}

1. School-Based Disorderly Charges Pose Serious Criminal Consequences for Minor Student Behavior

“Disorderly conduct” is a Class 1 misdemeanor that can be used against adults and children alike, including students of any age or grade. In the school context, Virginia’s law contains a specific section outlawing any disruption deemed to “prevent or interfere with the orderly conduct” of any school or school-sponsored operation or activity. For children and youth adjudicated delinquent of disorderly conduct by a judge, the consequences can be anything but minor. Depending on the circumstances of the case, a judge can order a range of consequences that include but are not limited to: court-ordered programs and treatment; probation with mandatory conditions; curfew; monetary fines; community service; and in some specific—albeit rare—circumstances, if the court deems it appropriate, placement in foster care or confinement in a juvenile detention facility for a period of time.

Students do not even have to *intend* to create such a disruption—they can simply “recklessly create a risk” of “inconvenience, annoyance, or alarm.” Their behavior also doesn’t have to hurt or threaten anyone or damage any property to be criminalized under this law. This section of the statute—which covers only what happens inside schools or at school events—has a much lower threshold for what is considered “disorderly” than other parts of the law that govern non-school spaces, so **students are being criminalized in ways that others outside the schoolhouse are not.**

2. School-Based Disorderly Charges are “Double Punishment”

Schools already use multiple school-level disciplinary offenses to address so-called disruptive conduct. During the 2017-18 school year, schools across the Commonwealth doled out over 76,700 short-term suspensions to over 45,600 students; over 1,530 long-term suspensions to 1,165 students; and 21 expulsions to as many students, all for purely “disorderly”-based conduct violations.^v

Students are already suffering punitive consequences of school removal for disruptive behavior: missed classroom time and educational disruption, lack of access to critical supports like school meals and counselors, and important social interaction with peers and adults outside their homes.

Discipline consequences and criminal proceedings can run concurrently and even undermine each other; for example:

- ◆ Judges may condition dismissal of charges on school attendance, but a suspension may prevent compliance.
- ◆ Schools may require a student's written "confession" and apology for the alleged disruption to avoid a disciplinary suspension, which can then undermine the student's ability to challenge the criminal disorderly conduct charge in court.
- ◆ Court dates, diversion requirements, and other court-related appointments (such as anger management or drug testing) can cause students to miss class and fall further behind.
- ◆ The trauma from arrest or even simply law enforcement intervention in a school setting can cause social and emotional repercussions for students in their relationships with peers, school staff, and the school environment more broadly.

School-based disorderly conduct charges, on top of disciplinary consequences, punish students twice for the same behavior, creating a snowball effect that drives youth deeper into the justice system and further away from educational success and graduation.

3. Subjective Charges Fall Hardest on Black Students

Starting in 2016, the Virginia Department of Juvenile Justice (DJJ) began collecting information about juvenile complaints filed specifically by School Resource Officers (SROs) and school officials. The data on school-based disorderly conduct charges against youth bear striking similarities to decades-old school discipline trends: subjective offenses are used against Black students in disproportionate rates to their white peers.

- ◆ **Between 2016 and 2019, Black students made up approximately 22% of the school population in Virginia but averaged over 62% of the school-based disorderly conduct criminal complaints.**
- ◆ **Over the same time period, the total number of school-based criminal complaints across all categories decreased approximately 15% for Black youth, while remaining flat for white youth.**

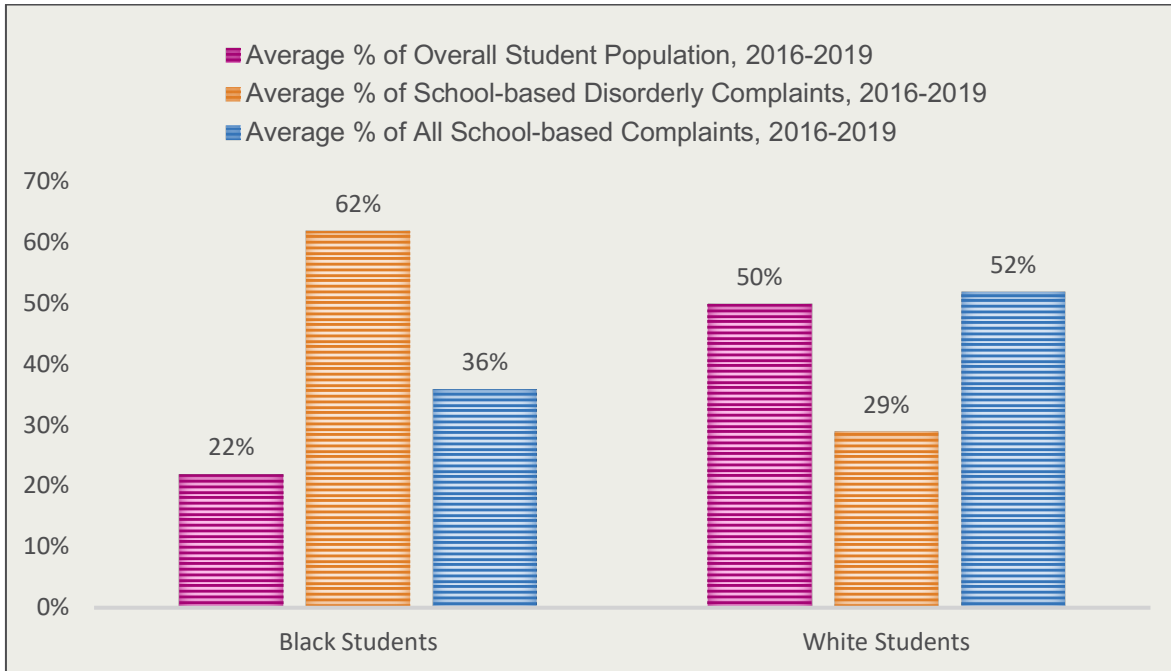


Figure 1. Disorderly Conduct Complaints and All School-based Complaints between 2016-2019.

Source: Va. Dept. of Juvenile Justice and Va. Dept. of Education.

The offense of disorderly conduct itself, when applied in the school setting, only requires that someone—usually a School Resource Officer or school administrator—makes a subjective determination that a student has intentionally caused (or recklessly created a risk of) a disruption. Research has demonstrated in a variety of instances, whether implicitly or explicitly, that Black students are often perceived as more culpable, more "adult," and more deserving of harsher punishment for the same behaviors exhibited by their white peers.

4. Black Girls Are Particularly Vulnerable to These Charges

From 2016 to 2019, Black girls represented approximately 11% of Virginia’s school population but averaged 31% of the school-based disorderly conduct complaints. While school-based disorderly conduct charges are used disproportionately against Black students in general, SROs and school administrators have used such charges against Black girls in startlingly increasing numbers over the last few years.

The total number of disorderly conduct complaints for Black girls has increased 60% from 2016 to 2019, and the percent of such complaints levied against Black girls has pulled even with the percent against Black boys.

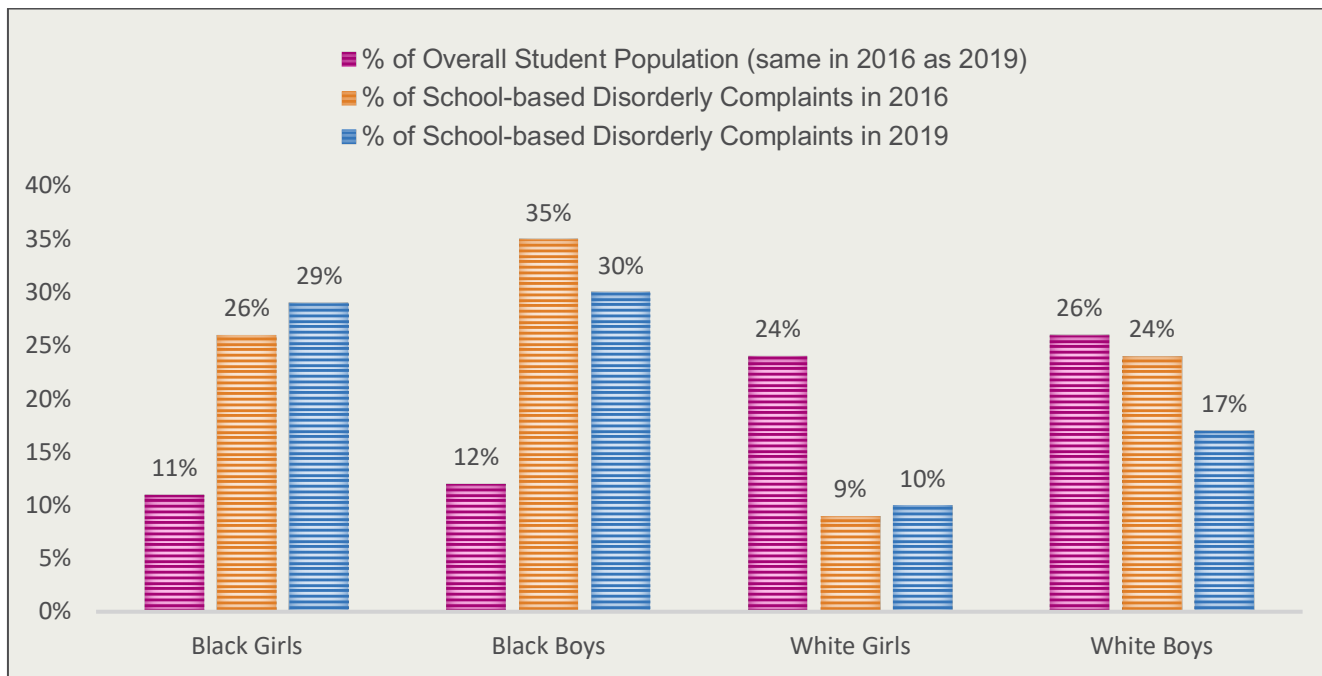


Figure 2. School-Based Disorderly Conduct Complaints in 2016 and 2019.

Source: Va. Dept. of Juvenile Justice and Va. Dept. of Education.

A 2017 study by the Center on Poverty and Inequality at Georgetown Law found that Black girls are viewed as "more adult" and "less innocent" than their white peers at nearly every age, and are more likely to be disciplined than any other demographic group of race and gender, especially for subjective offenses such as "disobedience" and "disruptive behavior."^{vi}

The study found because of this perception, adults viewed Black girls as needing "less nurturing" and "less protection," while also needing to be supported less and comforted less than their white peers. The results of this study, along with the story told by the Virginia data on school-based disorderly conduct, should challenge policymakers, school administrators, and all adults working in school, social services, health, law enforcement, and court systems to examine their own perceptions and biases when responding to Black girls in particular.

5. The Law Creates Conflicts for Students and for SROs

The school-based disorderly conduct law creates a legal conflict for SROs and a practical conflict for students. School Resource Officers, by law,^{vii} are not supposed to be involved in school discipline matters, but are also beholden to the school-based disorderly conduct law, which criminalizes simple school behavior. This conflict can create confusion that defaults to arrest and charges. In turn, the language of the school-based disorderly conduct statute is overly vague, giving students little instruction or guidance on how to avoid committing the offense.

In recent years, public defenders across the Commonwealth have been assigned young K-12 clients criminally charged with school-based Disorderly Conduct for actions such as:

- ◆ Singing a rap song on a school bus;
- ◆ Running and shouting in a cafeteria;
- ◆ Cutting in a lunch line;
- ◆ Pushing past a teacher to get onto a school bus;
- ◆ Yelling or cursing at other students or teachers; and
- ◆ "Flailing" as a result of a schedule change that was difficult for the student to process because of a mental health condition.

Criminally charging young people for these kinds of low-level behaviors flies in the face of recent, critical research on the adolescent brain. Virginia law criminalizes youth for behavior that science tells us is actually normal child and youth development: skewed risk perception, poor ability to consider future consequences, susceptibility to peer influence, and difficulty with self-regulation.^{viii} These qualities might generate behavior in need of redirection, but a response to such normal child development should be instructive and supportive, rather than punitive and derailing.

6. Disorderly Charges Also Ensnare Young Students

In Virginia, there is no minimum age of culpability, meaning children and youth of any age can be charged and convicted of crimes (found delinquent). This broad discretion plays out in the disorderly conduct data, even for very young kids. **Between 2014 and 2019, approximately 19% of all disorderly conduct charges against young people in Virginia (school-based and non-school) were filed against children age 13 or younger.**

These cases play out in headlines across the country, and even right here in Virginia. In 2014, for example, an 11-year-old, sixth-grade boy with autism was arrested at school and charged with Disorderly Conduct for kicking over a trash can in a school hallway.^{ix} This incident made national headlines when it sparked a chain reaction that kept this boy in and out of court for several years, disrupting his education, threatening to leave him with a juvenile record, and placing him under unnecessary court supervision. On another occasion in 2016, a 14-year-old boy was accused by an SRO of stealing a 65-cent carton of milk from his school lunch line, though he was actually entitled to the milk under a free lunch program. The SRO ordered the boy to the principal's office; when the boy claimed his innocence and refused to leave the cafeteria, he was arrested for disorderly conduct.^x

7. Disorderly Charges Lead Directly to Court Involvement

School-based disorderly conduct charges against youth are not just being “tacked on” to more serious charges (and by law are not allowed to be), nor are they always diverted from court. Between 2016 and 2019:

- ◆ Just under half (47%) of school-based disorderly conduct complaints and over 57% of all disorderly conduct complaints (school-based and non-school) against young people were “petitioned,” rather than diverted or dismissed at intake, meaning a formal complaint was filed with the court and a prosecutor took the case before a judge.
- ◆ Disorderly conduct was the sole charge in about two-thirds of all juvenile complaints that included a disorderly charge.

This means students are being sent to court primarily for disruptive school behavior alone, not as a result of a more serious incident. It also means that Intake Officers are deciding to send nearly half of all school-based disorderly conduct cases further down the court pipeline to prosecutors, at which point consequences can become even more serious, including detention, fines, court-ordered requirements like community service, anger management, probation, and more. Further, a delinquency finding means a juvenile record, which can amplify the consequences of any more court involvement by increasing a youth's score on an intake risk assessment and possibly persuading prosecutors to charge more harshly if a young person ends up back before the court for any subsequent reason.

Even receiving diversion at juvenile intake is not a “harmless” result: youth must complete all requirements in their diversion plan to keep the complaint from being formally filed with the court. A diversion plan may include a hearing with an intake officer; supervision by a diversion officer for a period of months (similar to probation); referral to outside counseling and/or substance treatment; community service; victim impact and “values” classes, and more. While diversion technically keeps young people out of the formal court process, it can also create many difficult (and sometimes expensive) hurdles for youth and their families to overcome, all while pending charges hang in the balance.

8. Delinquency Charges Harm the Whole Family

Filing a criminal complaint against a child sets into motion a longer process that can involve multiple court hearings and appointments that can stretch over years, including: consultations with defense attorneys, meetings at the Court Service Unit (Intake and Diversion), appointments with service providers, formal hearings with a judge, and informal hearings with school officials—some of which can also involve financial costs. Depending on the circumstances and the case, a judge can also order parents to participate in court-ordered programs and cooperate in treatment.

Parents who may not have access to transportation or the ability to take time off work become just as ensnared in helping their children to follow onerous diversion or probation requirements. In practical terms, they may also bear the expense of any fines levied if their child is adjudicated delinquent (found guilty) of the charge, and could also be responsible for some costs of necessary services.

At its root, school-based disorderly conduct charges are implements of a punitive system (law enforcement, courts) improperly used to address a school or health system issue (and sometimes to address behavior that is not any issue at all).

Conclusion

Virginia must repeal this harsh vestige of two shameful eras of U.S. history: the Jim Crow laws that sought to target, control, and punish Black people, particularly in Southern states like Virginia, and the punitive juvenile justice era of the early and mid-1990s, when the now-debunked discriminatory myth of “superpredator” youth criminals caused panicked state policymakers across the country to pack their criminal codes with laws aimed at punishing youth behavior with harsh, adult-like carceral sanctions.^{xi}

State policymakers can and should eliminate §18.2-415(C) from the Virginia Code. Schools are learning environments—not simply for gaining academic knowledge, but also for allowing young people to learn the behavioral, social, and conflict resolution skills that form their positive maturity. To do this, we must allow them not just to make mistakes, but to recover from those mistakes without lasting consequences like school dropout, court involvement, and a juvenile record.

ⁱ Dave Ress, *Black Virginians are far more likely to be charged with disorderly conduct*, *Virginian-Pilot*, May 16, 2019, available at https://www.pilotonline.com/news/crime/article_43b6afa6-7752-11e9-806f-5f1987948f28.html (last visited Oct. 10, 2019).

ⁱⁱ Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s*, Oxford University Press, 2016, pps. 9-10, 340-341.

ⁱⁱⁱ When discussing “criminal” juvenile behavior: “charges” mean the criminal statute giving law enforcement authority to arrest or file a complaint against a youth; “complaint” is the charging document filed with the Court Service Unit to begin the court process; and “found delinquent” in the juvenile context is equivalent to “found guilty”/“criminally convicted” in the adult context.

^{iv} Data on juvenile complaints provided by email from Jessica Schneider, Virginia Department of Juvenile Justice, to LAJC Attorney Amy Woolard on Sept. 10, 2018; March 27, 2019; and June 10, 2019 (on file with recipient). Data on Fall membership counts from Virginia public schools accessed via Virginia Department of Education online data reports (last visited Oct. 22, 2019).

^v Data on school discipline provided by email from Allison May, Virginia Department of Education, to LAJC Attorney Amy Woolard on Aug. 8, 2019 (on file with recipient).

^{vi} Rebecca Epstein, et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, Center on Poverty and Inequality at Georgetown Law, 2017, available at <https://endadulthoodbias.org/wp-content/uploads/2019/05/girlhood-interrupted.pdf> (last visited Oct. 16, 2019).

^{vii} Va. Code §§ 9.1-101, 9.1-110. School Resource Officers are certified law-enforcement officers hired by the local law-enforcement agency to provide law-enforcement and security services to public elementary and secondary schools.

^{viii} *Developing Adolescents: A Reference for Professionals*, American Psychological Association, 2002, available at <https://www.apa.org/pi/families/resources/develop.pdf> (last visited Oct. 16, 2019).

^{ix} Susan Ferriss, *How Kicking A Trash Became Criminal for a Sixth Grader*, Center for Public Integrity, April 10, 2015, available at <https://www.pri.org/stories/2015-04-10/how-kicking-trash-can-become-criminal-6th-grader> (last visited Oct. 16, 2019).

^x Victoria St. Martin, *Teen accused of stealing 65-cent carton of milk at middle school to stand trial*, *Washington Post*, available at https://www.washingtonpost.com/local/education/middle-schooler-accused-of-stealing-65-cent-carton-of-milk-at-school-to-face-trial/2016/09/29/1b168478-850f-11e6-a3ef-f35afb41797f_story.html (last visited Oct. 22, 2019).

^{xi} Krista Larson et al., *Juvenile Justice Systems Still Grappling With Legacy of the ‘Superpredator’ Myth*, Vera Institute of Justice, Jan. 24, 2017, available at <https://www.vera.org/blog/juvenile-justice-systems-still-grappling-with-legacy-of-the-superpredator-myth> (last visited Oct. 16, 2019).