No. _____

In The Supreme Court of the United States

ANDREW MIKEL,
ON HIS OWN BEHALF AND AS FATHER
AND NEXT FRIEND OF ANDREW MIKEL, II,
Petitioner,

v.

SCHOOL BOARD OF THE COUNTY OF SPOTSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to the
Circuit Court of Spotsylvania County, Virginia

PETITION FOR WRIT OF CERTIORARI

John W. Whitehead
Rita M. Dunaway
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, Virginia 22901
(434) 978-3888
Rita. Dunaway@gmail.com

George A. Somerville
TROUTMAN SANDERS LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
(804) 697-1291

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

The School Board of Spotsylvania County, Virginia, imposed a long-term suspension on Andrew Mikel, II, under a school rule prohibiting "Violent criminal conduct." Andrew's actual conduct was the use of a homemade "pea-shooter" to blow tiny toy pellets at other students' backpacks. Some of the pellets struck other students but caused minimal harm. Petitioner presents the following questions:

I. Does the fundamental Fourteenth Amendment due process requirement that laws provide fair warning and notice of prohibited behavior and corresponding penalties apply in the public school setting?

II. Does a school board act arbitrarily and capriciously, and thus in denial of a student's Fourteenth Amendment due process rights, when it classifies childish behavior that was not intended to harm as "Violent criminal conduct" despite the fact that the school's policy does not clearly delineate the behavior as such?

Parties to the Proceeding

The Petitioner is Andrew Mikel ("Mikel" or "Petitioner"), guardian and next friend of Andrew Mikel II ("Andrew"), whose date of birth is October 19, 1996.

The Respondent is the School Board of the County of Spotsylvania, Virginia.

Rule 29.6 Notation

No party to this proceeding is a non-governmental corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Andrew Mikel, guardian and next friend of Andrew Mikel, II, respectfully petitions for a writ of certiorari to review the final judgment of the Circuit Court for the County of Spotsylvania, Virginia, in this case, following the denial of discretionary review by the Supreme Court of Virginia.

ORDERS BELOW

The Circuit Court's ruling is contained in an order reproduced in the Appendix ("App.") at A1. The Supreme Court of Virginia's order denying Petitioner's petition for appeal is reproduced at App. B1. The Supreme Court of Virginia's order denying Petitioner's petition for rehearing is reproduced at App. C1.

JURISDICTION

This Petition seeks review of a final judgment of the Circuit Court of the County of Spotsylvania, Virginia, the highest State court in which a decision could be had, following the Supreme Court of Virginia's denial of a petition for discretionary review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The Circuit Court entered final judgment on May 31, 2011. Petitioner filed a timely notice of appeal and petition for appeal to the Supreme Court of Virginia on June 23, 2011, and August 30, 2011,

respectively. The Court denied the petition for appeal by order entered October 24, 2011. Petitioner filed a timely petition for rehearing on November 1, 2011, which the Supreme Court of Virginia denied on January 20, 2012.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part: "[N]o state shall . . . deprive any person of life, liberty, or property, without due process of law."

Petitioner challenges the Circuit Court's decision that the School Board's Student Code of Conduct provisions dealing with "Violent criminal conduct" could fairly be said to encompass Andrew's behavior. Sections B(3)(b) and B(3)(g) of the Code of Conduct, which the School Board cited as authorizing Andrew's long-term suspension, state:

> 3. **Violent criminal conduct,** while on school property, to or from school, or at a school-sponsored activity, including:
>
> ...
>
> b. killing, shooting, stabbing, cutting, wounding, otherwise physically injuring or battering any person;
>
> * * * * *
>
> g. any student having been found to have in his or her possession anywhere on school property, at a school sponsored event, or on the way to or

from school, any item listed below shall be recommended for expulsion from school for a minimum of 365 days (refer to section E(1) for specific consequences). This list is not all-inclusive. Any type of weapon, or object used to intimidate, threaten or harm others, any explosive device or any dangerous article(s) shall subject the student to a recommendation of expulsion.

* * * * *

Examples of items that will mandate a minimum of a 365-day expulsion are:

(i) Any pistol, revolver, rifle, shotgun, pellet pistol or rifle, B-B gun or air rifle, starter gun, crossbow or any device capable of firing a missile or projectile;

(ii) Any pistol, revolver, or any weapon which will or is designed to or may readily be converted to expel a projectile by action of an explosive, compressed gas, compressed air or other propellant;

(iii) The frame or receiver of any such weapon described in (i) and (ii) above or any firearm muffler or silencer;

(iv) Any explosive, incendiary or poison gas;

(v) Any bomb, grenade, rocket (having an explosive charge of more than four ounces), missile (having an explosive charge of more than one-quarter ounce) mine or other similar device;

(vi) Any combination of parts either designed or intended for use in converting any device into any destructive device listed in (i) through (v) above and from which such a destructive device may be assembled;

(vii) Any stun weapon or taser;

(viii) Any dirk, dagger, machete, any knife with a metal blade of three (3) inches or longer, bowie knife, switchblade knife, ballistic knife, razor;

(ix) Any slingshot or spring stick;

(x) Any metal knuckles or blackjack;

(xi) Any flailing instrument consisting of two or more rigid parts connected in such a manner as to allow them to swing freely, which may be known as nun chahka, nun chuck, nunchaku, shuriken or fighting chain;

(xii) Any disc, or whatever configuration, having at least two points or pointed blades which is designed to be thrown or propelled and which may be known as a throwing star or oriental dart;

(xiii) Any device or weapon, not specifically described above, of like kind and of appearance as those enumerated above.

These and other pertinent portions of the Student

Code of Conduct are reproduced herein at App. E1.[1]

STATEMENT

A. Factual History

Andrew Mikel, an honor roll student with hopes of attending the U.S. Naval Academy (App. G27), entered Spotsylvania High School as a ninth grade student for the 2010-2011 school year in August 2010 (App. G27). On December 10, 2010, Andrew took to school several small, hollow plastic pellets or balls that he had found at home (App. G5).[2] During Andrew's lunch period, he used the hollow casing of a writing pen to blow the pellets at other students' backpacks, and "at least three" students were struck by the pellets (App. G6, G11).[3] The students who were struck reported that they had felt a "pinch" (App. G7), a "sting" (App. G9), or that they had just felt something hit their backs (App. G9, F12-18). The School's Principal also claims that one student suffered "welts" on her arm, but school officials did not file any medical incident reports (App. G29, G31-34).

One student approached Assistant Principal Lisa Andruss, who was on lunch duty at the time,

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[1] The School Board has relied on Section B(3)(g) as authorization for Andrew's suspension (e.g., App. G17) even though it did not apply the 365 day minimum suspension specified by that section.

[2] Petitioner testified that the pellets were originally part of a toy gun intended for use by children (App. F11).

[3] The School Board has asserted that Andrew may also have used a "long silver tube" (App. G30).

and told her that Andrew was "shooting pellets" (App. F25). When confronted by school officials, Andrew admitted that he had blown the pellets at students' backpacks, stating that he did it because he was bored and thought it would be "cool," but that he was not trying to hurt anyone (App. G6, F8, F27). Andruss then directed Andrew to complete a "Student Incident Report Form," on which he described the events as follows:

> I was at home and I saw these little white balls. I picked up a few because I thought they looked cool. I thought it would be cool if I could shoot them out of something like I had in my pocket, so I took out a pencil and took it apart. I tested it, and it worked okay. I took it to school and shot it out a few times at various people. I made sure to aim at their backpacks so nobody would get seriously hurt, and I got caught and sent to the office.

(App. G6). Andrew also wrote, in a section of the form that asked what he "could have done to avoid this situation," that he "could've thought with half my brain for a second and figured out that behavior like that is really childish and could cause serious harm to other people." *Id.*

Andruss initially determined that Andrew would be suspended immediately for 10 days, but after consulting with Principal Russell Davis she decided to recommend a long-term suspension or expulsion (App. F28). Andruss referred the matter to John Lynn, the Spotsylvania County Schools' coordinator of student safety, for a hearing (as the school superintendent's designee) on Andruss'

recommendation of either a long-term suspension or expulsion (App. F12-13, G15-16).

On December 22, 2010, Andrew, his father, his grandfather, and Andruss attended the hearing before Lynn. Thereafter, Lynn recommended to school superintendent Dr. Jerry Hill that Andrew be given a long-term suspension for the remainder of the school year (App. F13-14). Dr. Hill accepted that recommendation and in a letter dated January 3, 2011, informed the Mikels that Andrew would be barred from Spotsylvania High School (SHS) for the remainder of the 2010-2011 school year (App. G17-18, F14).

The Mikels appealed the superintendent's decision to the Board (G19-20, 22). On January 18, 2011, a three-member disciplinary committee heard the appeal and affirmed the long-term suspension. Its decision was memorialized in the Board's minutes and in a letter to the Mikels dated January 19, 2011 (App. G1-3, 13-14).

B. Proceedings Below

Pursuant to Va. Code § 22.1-87, Mikel filed a Petition for Review of the Board's action with the Circuit Court of the County of Spotsylvania on February 9, 2011. The Circuit Court scheduled a hearing for May 24, 2011.

At the Circuit Court hearing, Lynn testified that the small plastic pellets Andrew had blown were not intrinsically dangerous and that any dangerousness would have to be based upon the manner in which the pellets were used (App. F19-

20). However, Lynn admitted that he had done no tests with the items to determine whether or not they were even capable of inflicting injury (App. F20-21).

Throughout the Circuit Court hearing, Petitioner argued that it was arbitrary, capricious, and an abuse of discretion for the School Board to discipline Andrew under Code of Conduct provisions governing "Violent criminal conduct," because Andrew's conduct could not fairly be said to violate those provisions (App. F1-3, 29-46). Petitioner also pointed out that a student and parent reviewing the Student Code of Conduct would have concluded that conduct such as Andrew's would be treated under a separate, lesser provision encompassing behavior such as fighting. Petitioner's counsel stated:

> And when Andrew Mikel and his dad were reviewing the Code of Conduct, I think any parent would think that something like [Andrew's conduct] would fit in [Section E(4), governing "Fighting, Physical, and/or Intimidating Behavior"], that if your son did something that was horseplay, essentially – it was a very stupid, immature, and somewhat dangerous decision, but no one was actually hurt – this is where it would more accurately fall.

(App. F34).

This should be sufficient to preserve the error. *See Taylor v. Illinois*, 484 U.S. 400, 406, n.9 (1988) ("at trial petitioner merely argued that the trial court erred by not letting his witness testify. On appeal, however, petitioner asserted that the error was

constitutional: 'The trial judge abused his discretion and denied [petitioner] due process by excluding a material defense witness from testifying as a sanction for a discovery violation'"); *Taylor v. Kentucky*, 436 U.S. 478, 482, n.10 (1978) ("Petitioner's contemporaneous objection to the refusal of his request for an instruction on the presumption of innocence invoked 'fundamental principle[s] of judicial fair play' App. 51. This should have sufficed to alert the trial judge to petitioner's reliance on due process principles").

The Circuit Court judge actively engaged counsel for both parties in a discussion of whether the "Violent criminal conduct" provisions could fairly encompass Andrew's conduct (App. F38-54). The court noted that it was incongruous that by the Board's interpretation of the Student Code of Conduct, a student would receive a 10-day suspension for punching someone in the eye, but that expulsion or a long-term suspension could be recommended for "shooting" a plastic ball through a tube (App. F41). The court ultimately concluded, however, that "although reasonable people may reasonably disagree" about whether the pen tube and pellets could be considered a "weapon" within the meaning of Section B(3)(g), the Board's decision was neither arbitrary and capricious nor an abuse of discretion (App. F58-59). The court also appeared to decide that it was because Andrew had used such a "weapon" that his behavior (which would otherwise have to be classified as a lesser offense) rose to the level of "Violent criminal conduct" (App. F58).

In his petition for appeal to the Supreme

Court of Virginia, Petitioner again argued that the cited rules did not fairly encompass Andrew's conduct, clearly articulating his position that the case implicated Andrew's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution (App. D36-39).

Reasons for Granting the Petition

The questions presented have significant implications for students' due process rights in public schools and have not been, but should be, decided by this Court. The issue is whether school officials are bound by fundamental due process notice requirements when they impose discipline that interferes with the students' protected interests in receiving a public education. If the Court fails to identify the irrational application of discipline in this case as being the sort of arbitrary, capricious action that violates the Due Process Clause of the Fourteenth Amendment, then judicial review of student discipline will serve little purpose. If school officials' concededly broad discretion in disciplinary matters is so unbounded that it licenses the branding of childish horseplay as "Violent criminal conduct," then it is, in effect, absolute authority.

In our increasingly fearful society, policies of "zero tolerance" for behaviors that can be in any way perceived as dangerous or threatening have become commonplace. This is particularly true in our nation's public schools. While this development is understandable, inasmuch as our children are our most cherished resources and it is our natural desire to protect them, it is the duty of this Court to

recognize the impact this trend is having on the civil liberties of the very "resources" we seek to protect. Specifically, it is the duty of this Court to ensure that fundamental principles of due process of law are not eroded for the sake of unsubstantiated fears.

The Court should grant this Petition to resolve the important questions raised as to how the due process "notice" requirement applies in the public school context and whether strained, counterintuitive interpretations of disciplinary rules by school officials constitute arbitrary and capricious government action that violates essential due process requirements.

1. This Court should resolve the issue of whether the due process "notice" requirement applies in the special setting of public schools.

A student's entitlement to a public education is a property interest that is protected by the Due Process Clause and thus implicates its requirements. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). *See also Wood v. Henry County Public Sch.*, 255 Va. 85, 495 S.E.2d 255 (1998) (suspension from public school implicates due process requirements).[4]

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[4] Virginia, like Ohio (*see Goss v. Lopez*, 419 U.S. at 573), maintains a system of public elementary and secondary schools which are free to each person of school age who resides within the school division, Va. Code §§ 22.1-2, 22.1-3, and compels attendance at either a public or a private, denominational, or parochial school (with exceptions for home schooling), *id.* § 22.1-254. The State therefore "is constrained to recognize a student's legitimate entitlement

It is well established that the Fourteenth Amendment guarantee of due process forbids the punishment of citizens under rules that fail to provide fair notice of the conduct they prohibit. *See United States v. Williams*, 553 U.S. 285, 304 (2008); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). "[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to punishment ...." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996).

The Court also has noted, however, that the special setting of the public school may diminish due process notice requirements to some extent:

> [G]iven the school's 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.

Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 686 (1986).

Since *Fraser* was decided, the burgeoning application of zero tolerance policies in public schools has resulted in the criminalization (sometimes figuratively, but sometimes quite literally) of

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to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." *Goss*, 419 U.S. at 574. "[T]he liberty interest in reputation ... is also implicated" in this case, as in *Goss*. *Id.*, at 576.

immature behavior that is an inherent characteristic of the children who populate these schools. In many such cases, the allegedly prohibited act is not *malum in se*, but, at worst, *malum prohibitum*.[5] In those scenarios, it is particularly important that a student be clearly informed that the act is prohibited.

The Court has clearly announced that school officials must comply with the basic demands of *procedural* due process prior to interfering with students' protected property interest in public education. *See Goss v. Lopez*, *supra*. However, if the Court means for students to enjoy even a modicum of substantive due process in the public school setting, then students must also be free from unduly harsh discipline exacted pursuant to rules that cannot be reasonably understood to encompass the student's conduct.

Some lower courts have ruled that the due process notice concept prohibits school officials from interpreting terms used in school rules to embrace more conduct than would be commonly understood from the language of the cited rules. *See*, *e.g.*, *Monroe County Bd. of Ed. v. K. B.*, 62 So. 3d 513, 516

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[5] Take, for instance, the countless instances in which students are suspended or expelled for innocently possessing items the school considers to be "weapons." Responding to one such incident, the Maryland State Board of Education recently reversed the actions of a local school board in suspending two lacrosse players for possession of tools commonly used to repair lacrosse equipment under a policy prohibiting possession of "dangerous weapons." *In re: Talbot County Lacrosse Players Suspension Cases*, Opinion No. 12-12, issued April 10, 2012. At the direction of school officials, one of the students was actually arrested.

(Al. Civ. App. 2010) ("rules and regulations governing the conduct of students 'must be sufficiently definite to provide notice to reasonable students that they must conform their conduct to its requirements'") (*quoting* 67B Am. Jur. 2d *Schools* § 285 (2010))[6].

Other courts have been more lenient in their application of Due Process notice requirements to schools. *See, e.g., Kowalski v. Berkeley County Sch.*, 652 F.3d 565, 577 (4th Cir. 2011) (policy prohibiting students from bullying or harassing others sufficient to put student on notice that MySpace post alleging another student had sexually transmitted disease was proscribed).[7] This Court has not addressed the question.

In this case, the "notice" problem is not derived from the sort of lack of detail addressed in the *Fraser* dicta quoted above, but rather from the fact that the Board disciplined Andrew under two *very detailed* rules by construing a few general words out of context.[8] No reasonable person reading the

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[6] *Accord, Stephenson v. Davenport Comm. Sch. Dist.*, 110 F.3d 1303, 1310 (8th Cir. 1997); *James P. v. Lemahieu*, 84 F.Supp.2d 1113, 1121 (D. Haw. 2000); *Packer v. Board of Educ. of Town of Thomaston*, 717 A.2d 117, 124 (Conn. 1998); *Warren Cnty. Bd. of Educ. v. Wilkinson By and Through Wilkinson*, 500 So.2d 455, 456 (Miss. 1986).

[7] *Accord, A. M. ex rel. McAllum v. Cash*, 585 F.3d 214, 217 (5th Cir. 2009); *Fuller ex rel. Fuller v. Decatur Public Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 663 (7th Cir. 2001); *Brian A. ex rel. Arthur A. v. Stroudsburg Area School District*, 141 F.Supp.2d 502, 511 (M.D. Pa. 2001).

[8] Again, the Board relied upon the phrase "otherwise physically injuring or battering any person" (which appears

Student Code of Conduct would have understood that school officials intended to treat Andrew's actions as "Violent criminal conduct" and subject them to the same level of punishment as that imposed for killing, stabbing, and sexual assault. A student and his parent reviewing the Spotsylvania County Student Code of Conduct would have concluded that this type of misbehavior would, at most, be disciplined under Section E(4), which prohibits "Fighting, Physical and/or Intimidating Behavior" (App. E3). A reviewing student and parent would not, on the other hand, have understood Section B(3), prohibiting "Violent Criminal Conduct," as encompassing conduct that is neither intended to nor actually results in meaningful physical harm. Nor would a reasonable student and parent have understood the "weapon[s]" under Section B(3)(g) – exemplified by a lengthy list of inherently deadly objects such as rifles, grenades and machetes – as including the tube of an ink pen and tiny toy balls. A homemade peashooter is not "of like kind and of appearance as those enumerated" in Section B(3)(g) of the Code of Conduct, *id.*

This mislabeling or arbitrary classification of student misconduct under school disciplinary rules is no light matter.[9] As the Court recognized in *Goss v. Lopez*, *supra*, administrative charges by school

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at the end of a list of behaviors such as killing, stabbing and cutting) and on the phrase "[a]ny type of weapon, or object used to intimidate, threaten or harm others" (where every listed example is an inherently dangerous weapon such as a rifle, grenade, or machete) (App. E1-3).

[9] Indeed, the Assistant Principal in this case "push[ed] for expulsion because of the weapon." (App. G28-29)

officials that result in a student's suspension may seriously damage the student's standing with peers and teachers and may well result in future difficulties in pursuing higher education, or even in obtaining employment. 419 U.S. at 574-75.[10] Petitioner respectfully requests that this Court grant his Petition as an opportunity to clarify students' substantive rights under the Due Process Clause to be free from strained, counter-intuitive interpretations of school disciplinary rules.

2. This Court should resolve the issue of whether it is arbitrary and capricious (and therefore a denial of due process) for school officials to classify childish behavior that is not intended to harm as "Violent criminal conduct."

In a large number of states, state courts review appeals of local school boards' disciplinary decisions under the most deferential standards, serving primarily (if not solely) to ensure that the agency has not acted arbitrarily, capriciously, nor abused its discretion. See Addendum. This standard, itself, is basically a guarantee of substantive due process, as the very hallmark of due process of law is the protection of individuals from

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[10] *See also, e.g.*, *Smith v. School City of Hobart*, 811 F.Supp. 391, 394 (N.D. Ind. 1993) ("It is thus clear that a student's academic record has importance not only as to the student's high school or grade school standing, but also affects the student's ability to enter the college of his choice, obtain postgraduate degrees, and eventually affects the student's chances of obtaining a job. Academic records are also routinely examined when applying to the military or other government jobs").

arbitrary, capricious treatment by government officials. *See Nebbia v. People of New York*, 291 U.S. 502, 525 (1934) (the guarantee of due process is that laws not be arbitrary or capricious); *Dent v. State of W.Va.*, 129 U.S. 114, 123-24 (1889) (the purpose of due process is to secure individuals from arbitrary deprivations of rights).

"Zero tolerance" for student conduct viewed as aggressive or threatening is now widely mandated.[11] It is imperative that this Court inform the application of due process standards to student discipline cases by addressing whether improper and unpredictable classification of student misconduct into the same category as truly dangerous, criminal behavior should be considered the sort of "arbitrary and capricious" treatment that transgresses Due Process Clause values.

In an attitude of great deference to school officials, which is generally appropriate, reviewing judges often approach student discipline cases only from the perspective of the school officials

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[11] *See, e.g.*, American Psychological Association Zero Tolerance Task Force, Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations, 63 Am. Psychologist 852 (2008), available at http://www.apa.org/pubs/info/reports/zero-tolerance.pdf (visited April 6, 2012) (reporting that "despite a 20-year history of implementation, there are surprisingly few data that could directly test the assumptions of a zero tolerance approach to school discipline, and the data that are available tend to contradict those assumptions. Moreover, zero tolerance policies may negatively affect the relationship of education with juvenile justice and appear to conflict to some degree with current best knowledge concerning adolescent development") (italics omitted).

themselves, seeking any slender reed of justification for the discipline imposed. While the "abuse of discretion" standard concededly does not permit the reviewing judge to substitute his or her own judgment for that of the decision-maker, it should permit – even require – the reversal of a punishment as "arbitrary and capricious" and/or an "abuse of discretion" where the character of misbehavior is so grossly misclassified that no reasonable student nor his parents could possibly have predicted that school officials would respond in such a way.

Due process demands both that individuals subject to laws and regulations be able to understand their requirements and sanctions and that the "discretion" of government agents to impose those sanctions be bounded in some meaningful way by the same language. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly... Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.") (internal citations omitted); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).[12]

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[12] *See also Soglin v. Kauffman*, 418 F.2d 163, 167 (7th Cir. 1969) ("The proposition that government officers, including school administrators, must act in accord with rules in meting out discipline is so fundamental that its validity tends to be assumed by courts engaged in assessing the propriety of specific regulations.")(citation omitted).

The provisions upon which Andrew's long-term suspension was based, defining "Violent criminal conduct," are set forth *supra*. While the Board and the Circuit Court below found that Andrew's conduct could properly be considered "otherwise physically injuring or battering" others within the meaning of Section B(3)(b), established interpretive doctrines – in addition to good common sense – forbid this interpretation.

For instance, the well-established and common sense rules of *ejusdem generis* and *noscitur a sociis* preclude such an interpretation of the language of the Student Code of Conduct. *See, e.g., Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004); *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384-85 (2003). "[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.*, at 384 (citation and internal quotation marks omitted). (This argument does not "constitutionalize" established interpretive rules. It merely recognizes that lay persons as well as lawyers understand "that a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). *See Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (referring to the maxim *noscitur a sociis* as "an interpretive rule as familiar outside the law as it is within, for words and people are known by their companions").)

While the phrase "otherwise physically

injuring or battering any person" may well have been intended to serve as a catch-all provision, the most fundamental principles of fairness and due process demand that it be subject to some discernible limitation. Absent such limitation, simple, harmless acts such as tipping the bill of another student's cap or tossing a wad of paper at another student could be classified at the whim of school officials as battery, and therefore as "Violent criminal conduct," and subject to such draconian punishments as long-term suspension or expulsion.

The doctrines of *ejusdem generis* and *noscitur a sociis* provide the needed limitation, requiring that the general words "otherwise physically injuring or battering any person" be construed to encompass acts analogous to those specifically listed. In this case, the conduct giving rise to Andrew's long-term suspension – the blowing of tiny plastic pellets through an ink pen tube toward students' backpacks without any desire or intent to do any physical harm – cannot conceivably be considered analogous to "killing," "shooting," "stabbing," or "cutting" another person.

Just as Andrew's conduct does not fall within Student Code of Conduct Section B(3)(b), so the objects he used in playing his prank do not fall within the classification of items prohibited under Section B(3)(g). While this Section does include a general prohibition of "[a]ny type of weapon, or object used to intimidate, threaten or harm others," the doctrines of *ejusdem generis* and *noscitur a sociis* again provide the necessary interpretive limitation.

Under these interpretive doctrines, tiny

plastic pellets extracted from a child's toy[13] and the hollow barrel of a standard ink pen cannot possibly be classified as "similar in nature" to the extensive list of dangerous weapons given as examples of contraband items. These include, for instance, rifles, explosives, bombs, machetes, knives (specifically limited to blades three inches or longer), and nun chucks.

In short, Andrew's conduct simply cannot be fairly or reasonably classified as the type of "Violent criminal conduct" that would justify a long-term suspension under Section B(3) of the Student Code of Conduct. Therefore, the Board's decision was arbitrary and capricious, and deprived Andrew of substantive rights inherent in the concept of due process of law.

CONCLUSION

Fundamental notions of fairness and due process of law demand that the disciplinary authority wielded by government actors be bounded by basic, comprehensible guidelines governing how misconduct will be classified and penalized.

The Court should note that if school officials' discretion empowers them to classify harmless, childish pranks as "Violent criminal conduct," then the result will be a nation of schools teeming with "violent criminals" whose continued attendance lies at the mercy of school officials and their "discretion." Clearly, such a scheme violates the core values of

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[13] App. F10-11.

Fourteenth Amendment due process.

For the reasons set forth hereinabove, Petitioner respectfully requests that this Honorable Court grant his Petition and issue a writ of certiorari to review the issues raised herein.

Respectfully submitted,

John W. Whitehead
Rita M. Dunaway
(Counsel of Record)
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

George A. Somerville
Troutman Sanders LLP
PO Box 1122
Richmond, VA 23218-1122
(804) 697-1291

ADDENDUM

The 20 states that employ some variation of the "arbitrary, capricious, or abuse of discretion" standard of judicial review for decisions of local school boards are **Arizona** (*Hill v. Safford Unified Sch. Dist.*, 952 P.2d 754, 757-58 (Ariz. App. Div. 2 1997)) (abuse of discretion); **Arkansas** (*Springdale Bd. of Educ. v. Bowman by Luker*, 740 S.W.2d 909, 911 (Ark. 1987)) (arbitrary or capricious); **California** (*T.H. v. San Diego Unified Sch. Dist.*, 122 Cal. App. 4th 1267, 1282 (Cal. App. 4 Dist. 2004)) (abuse of discretion); **Colorado** (COLO. REV. STAT. § 22-33-108; C.R.C.P. 106(a)(4)) (abuse of discretion); **Georgia** (*D.B. v. Clarke County Bd. of Educ.*, 469 S.E.2d 438, 440 (Ga. App. 1996) (*citing Bedingfield v. Parkerson*, 94 S.E.2d 714 (1956)) (abuse of discretion); **Indiana** (*Board of Sch. Trustees of Muncie Comm. Schools v. Barnell by Duncan*, 678 N.E.2d 799, 802-805 (Ind. App. 1997)) (arbitrary, capricious, or abuse of discretion); **Kentucky** (*Clark County Bd. of Educ. v. Jones*, 625 S.W.2d 586, 588 (Ky. App. 1981)) (reviewing court's ruling that board had acted "arbitrarily" in expelling students); **Louisiana** (*McCall v. Bossier Parish Sch. Bd.*, 785 So.2d 57, 66 (La. App. 2 Cir. 2001)) (arbitrary or abuse of discretion); **Maryland** (*Board of Educ. of Howard County v. McCrumb*, 450 A.2d 919, 920 (Md. App. 1982)) (arbitrary and capricious standard applied to final decision of State Board of Education on disciplinary appeal); **Massachusetts** (*Doe v. Superintendent of Schools of Stoughton*, 767 N.E.2d 1054, 1057-58 (Mass. 2002)) (arbitrary and

capricious so as to constitute an abuse of discretion); **Michigan** (*Davis v. Hillsdale Community Sch. Dist.*, 573 N.W.2d 77, 79 (Mich. App. 1997)) (arbitrary and capricious); **Minnesota** (MINN. STAT. ANN. §§ 14.63; 14.69) (arbitrary or capricious); **Mississippi** (*Loftin v. George County Bd. of Ed.*, 183 So.2d 621, 622-23 (Miss. 1966)) (arbitrary and capricious); **Missouri** (*Moore ex rel. Moore v. Appleton City R-II Sch. Dist.*, 232 S.W.3d 642, 645 (Mo. App. S.D. 2007)) (arbitrary and capricious or abuse of discretion); **Nebraska** (NEB. REV. STAT. § 79-291(2)(f)) (arbitrary or capricious); **North Carolina** (N.C. GEN. STAT. §§ 115C-392; 115C-45(c)(1)) (arbitrary or capricious); **Ohio** (*Commons v. Westlake City Schools Bd. of Educ.*, 672 N.E.2d 1098, 1102 (Ohio App. 8 Dist. 1996)) (abuse of discretion); **Tennessee** (*Heyne v. Metropolitan Nashville Bd. of Public Ed.*, 2011 WL 1744239, *3 (Tenn. Ct. App. 2011)) (arbitrary); **Virginia** (VA. CODE ANN. § 22.187) (arbitrary, capricious, or abuse of discretion); **Wyoming** (WYO. STAT. ANN. § 21-4-305; § 16-3-114(c)(ii)(A)) (arbitrary, capricious, or abuse of discretion).

No. _____

In The Supreme Court of the United States

ANDREW MIKEL,
ON HIS OWN BEHALF AND AS FATHER
AND NEXT FRIEND OF ANDREW MIKEL, II,
Petitioner,

v.

SCHOOL BOARD OF THE COUNTY OF SPOTSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to the
Circuit Court of Spotsylvania County, Virginia

APPENDIX

John W. Whitehead
Rita M. Dunaway
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, Virginia 22901
(434) 978-3888
Rita. Dunaway@gmail.com

George A. Somerville
TROUTMAN SANDERS LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
(804) 697-1291

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF SPOTSYLVANIA

ANDREW MIKEL, on his own behalf and

as father and next Friend of Andrew Mikel, II,

Petitioner,

v. CASE NO.: CL11000163-00

BOARD OF EDUCATION OF

SPOTSYLVANIA COUNTY,

Respondent.

ORDER

ON MAY 24, 2011, CAME THE PARTIES, by counsel, on Petitioner's Petition for Review of School Board Action pursuant to Virginia Code Section 22.1-87.

WHEREUPON, after opening statements, the Petitioner put on his evidence and rested, after which the Respondent put on its evidence and rested, the parties having submitted the record of the School Board into evidence by stipulation.

IT APPEARING TO THE COURT, upon consideration of the law and the evidence, that the action of the School Board did not exceed its authority, was not arbitrary or capricious and was not an abuse of its discretion, the court hereby

SUSTAINS the action of the School Board and the Petition is hereby DISMISSED WITH PREJUDICE.

ENTERED THIS 31ST DAY OF MAY, 2011

JUDGE

)

I ASK FOR THIS:

_____

Jennifer Lee Parrish
PARRISH, HOUCK & SNEAD, PLC
701 Kenmore Avenue, Suite 100
Post Office Box 7166
Fredericksburg, Virginia 22404
540-373-3500
540-899-6394 – facsimile
Counsel for Respondent, School Board of the County of Spotsylvania

SEEN AND OBJECTED TO:

_____

Andrew Flusche
10500 Wakeman Dr., Suite 103
Fredericksburg, VA 22407
540-318-5824
888-593-8986 – facsimile
Counsel for Petitioner

A COPY TESTE:

Christalyn M. Jett, Clerk

By:_____

Deputy Clerk

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 24th day of October, 2011.

Andrew Mikel, etc. Appellant

against

Record No. 111587

Circuit Court No. CL11000163-00

School Board of the

County of Spotsylvania, Appellee

For the Circuit Court of Spotsylvania County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A copy

Teste:

Patricia L. Harrington, Clerk

By:

Deputy Clerk

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 20th day of January, 2012.

Andrew Mikel, etc. Appellant

against Record No. 111587

Circuit Court No. CL11000163-00

School Board of the

County of Spotsylvania, Appellee

For the Circuit Court of Spotsylvania County

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 24th day of October, 2011 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:

Deputy Clerk

IN THE

SUPREME COURT OF VIRGINIA

Record No. _____

ANDREW MIKEL, on his own Behalf

and as father and next Friend of

ANDREW MIKEL II,

Petitioner-Appellant,

v.

SCHOOL BOARD OF THE

COUNTY OF SPOTSYLVANIA,

Respondent-Appellee.

PETITION FOR APPEAL

Rita M. Dunaway (rita.dunaway@gmail.com)

Virginia State Bar No. 46821
John W. Whitehead (johnw@rutherford.org)
Virginia State Bar No. 20361
Douglas R. McKusick (douglasm@rutherford.org)
Virginia State Bar No. 72201
THE RUTHERFORD INSTITUTE

P.O. Box 7482
Charlottesville, VA 22906-7482
(434) 978-3888
Fax: (434) 978-1789
COUNSEL FOR APPELLANT

ASSIGNMENTS OF ERROR

I. The Circuit Court erred in ruling that Andrew's conduct constituted "Violent criminal conduct" within the meaning of Spotsylvania County Schools Student Code of Conduct Section(B)(3). (T. 125-126).

II. The Circuit Court erred in ruling that the use of any object or weapon, coupled with the conduct described in Student Code of Conduct (E)(4), constitutes a violation of (B)(3). (T. 125).

III. Based upon the foregoing erroneous conclusions, the Circuit Court erred in ruling that the Board had not acted arbitrarily, capriciously, or in abuse of its discretion. (T. 125).

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This case involves a challenge to a decision of a local board of education under Va. Code § 22.1-87. On January 18, 2011, the Respondent-Appellee, the School Board of the County of Spotsylvania (hereafter "the Board") issued a decision suspending and barring Andrew Mikel II from Spotsylvania High School for the remainder of the 2010-2011 school year (R., J. Ex. 1 at 2, 16)[1]. On February 9, 2011, the Petitioner-Appellant, Andrew Mikel, as father and next friend of Andrew Mikel II, filed a petition with the Circuit Court of the County of Spotsylvania asking that the decision suspending his son be reversed and his son reinstated (R. at 1). On May

[1] "R." references are to the pages of the Circuit Court record in the case. "T." references are to the pages of the transcript of proceedings in the Circuit Court held on May 24, 2011. "J. Ex." references are to the pages of Joint Exhibit 1 admitted into evidence at the May 24, 2011 proceedings.

24, 2011, a trial was held in the matter and on May 31, 2011, the Circuit Court entered its order sustaining the Board's decision and dismissing the petition (R. 16). On June 23, 2011, the Petitioner-Appellant timely filed his notice of appeal from the Circuit Court's May 31 order (R. 18).

STATEMENT OF FACTS

Andrew Mikel II (hereafter "Andrew") entered Spotsylvania High School (hereafter "SHS") as a 9th grade student in August 2010 for the 2010-2011 school year (J. Ex. At 5; T. at 19). On December 10, 2010, Andrew was involved in an incident at SHS during his lunch period. Andrew had brought to school that day several small, hollow plastic balls (J. Ex. at 7; Def. Ex. 1). Using the hollow casing of a writing pen, Andrew blew the balls at other students'

backpacks, and some students were struck by the balls (J. Ex. at 8, 13; T. at 29). The students who were struck reported that they were in the hallway and felt a "pinch" (J. Ex. at 9), a "sting" (J. Ex. at 11), or that they just felt something hit their back (J. Ex. at 10; T. 50-52).

Assistant Principal Lisa Andruss was on lunch duty at the time with Guidance Counselor Smith. They were approached by a student who told them Andrew was shooting pellets (T. 79). Andruss and Smith then went to look for Andrew. Smith found Andrew and took him to Andruss's office (J. Ex. at 12; T. 80). Andrew handed Andruss the black pen tube and a handful of the balls (T. 80). Andrew admitted to her that he had shot the balls at students' backpacks, stating that he did it because he was bored and thought it would be "cool," but he was

not trying to hurt anyone (T. 19, 80). Andruss then allowed Andrew to write out a statement of the events. Andrew's written statement was as follows:

> I was at home and I saw these little white balls. I picked up a few because I thought they looked cool. I thought it would be cool if I could shoot them out of something like I had in my pocket, so I took out a pencil and took it apart. I tested it, and it worked okay. I took it to school and shot it out a few times at various people. I made sure to aim at their backpacks so nobody would get seriously hurt, and I got caught and sent to the office.

(J. Ex. at 8; T. at 29)

Andruss initially determined that Andrew would be suspended immediately for 10 days. She then consulted with SHS Principal Rusty Davis about the incident, and after speaking with him decided to recommend that a long-term suspension

be imposed upon Andrew (T. 84). Andruss drew up the paperwork to begin the process for imposing the long-term suspension, including sending a letter to Andrew's father, Andrew Mikel (hereafter "Mikel") informing Mikel of the suspension and that a long-term suspension or expulsion was being considered (J. Ex. at 27). In support of this discipline, Andruss cited the Spotsylvania County School Student Code of Conduct B(3)(b) and (g), which provide in relevant parts as follows:

> 3. **Violent criminal conduct,** while on school property, to or from school, or at a school-sponsored activity, including:
>
> a. attempting to kill, shoot, stab, cut, wound, otherwise physically injure or batter another person;
>
> b. killing, shooting, stabbing, cutting, wounding, otherwise physically injuring

or battering any person;

* * * * *

g. any student having been found to have in his or her possession anywhere on school property, at a school sponsored event, or on the way to or from school, any item listed below shall be recommended for expulsion from school for a minimum of 365 days (refer to section E(1) for specific consequences). This list is not all-inclusive. Any type of weapon, or object used to intimidate, threaten or harm others, any explosive device or any dangerous article(s) shall subject the student to a recommendation of expulsion.

* * * * *

Examples of items that will mandate a minimum of a 365-day expulsion are:

(i) Any pistol, revolver, rifle, shotgun, pellet pistol or rifle, B-B gun or air rifle, starter gun, crossbow or any device capable of firing a missile or projectile;

(ii) Any pistol, revolver, or any weapon which will or is designed to or may readily be converted to expel a projectile by action of an explosive, compressed gas, compressed air or other propellant;

(iii) The frame or receiver of any such weapon described in (i) and (ii) above or any firearm muffler or silencer;

(iv) Any explosive, incendiary or poison gas;

(v) Any bomb, grenade, rocket (having an explosive charge of more than four ounces), missile (having an explosive charge of more than one-quarter ounce) mine or other similar device;

(vi) Any combination of parts either designed or intended for use in converting any device into any destructive device listed in (i) through (v) above and from which such a destructive device may be assembled;

(vii) Any stun weapon or taser;

(viii) Any dirk, dagger, machete, any knife with a metal blade of three (3)

> inches or longer, bowie knife, switchblade knife, ballistic knife, razor;
>
> (ix) Any slingshot or spring stick;
>
> (x) Any metal knuckles or blackjack;
>
> (xi) Any flailing instrument consisting of two or more rigid parts connected in such a manner as to allow them to swing freely, which may be known as nun chahka, nun chuck, nunchaku, shuriken or fighting chain;
>
> (xii) Any disc, or whatever configuration, having at least two points or pointed blades which is designed to be thrown or propelled and which may be known as a throwing star or oriental dart;
>
> (xiii) Any device or weapon, not specifically described above, of like kind and of appearance as those enumerated above."

(R. at 4-5, 14).

The matter was then referred to John Lynn, the Spotsylvania County Schools' coordinator of

student safety, for a hearing (as the school superintendent's designee) on Andruss' recommendation of either a long-term suspension or expulsion (J. Ex. at 30; T. at 38). After the matter was referred to him, Lynn sent an e-mail message to Andruss and Davis in which he wrote "I'm not at all comfortable expelling or suspending the student for the remainder of the year." (J. Ex. at 72; T. 60). Lynn testified that Andrew's disciplinary recommendation was based upon the provisions of the Code of Conduct which forbid "[k]illing, shooting, stabbing, cutting, wounding, otherwise physically injuring or battering any person," and which forbid possession of "[a]ny type of weapon or object used to intimidate, threaten or harm others[.]" (T. 39).

The hearing before Lynn was held December 22, 2010, and Andrew, his father and grandfather,

and Andruss attended. Thereafter, Lynn gave his recommendation to school superintendent Dr. Jerry Hill that Andrew be given a long-term suspension for the remainder of the school year (T. 45). Dr. Hill accepted that recommendation and in a letter dated January 3, 2011, and informed the Mikels that Andrew would be barred from SHS for the remainder of the 2010-2011 school year (J. Ex. at 31; T. 45). Pursuant to Board policy, the Mikels appealed the superintendent's decision to the Board (J. Ex. at 32-36).

A hearing on the appeal was held before a three-member Board disciplinary committee on January 18, 2011 (T. 46-47). The committee was presented with a packet of evidence concerning the incident (R., J. Ex. 1), which included pictures of the tube, the pellets, Andrew's statement, and

statements of students who reported the incident (T. 49-50). Andruss, Andrew, and Mikel also testified before the committee (T. 58).

After deliberating, the committee determined to affirm the long-term suspension of Andrew. The decision was memorialized in the Board minutes and in a letter to the Mikels dated January 19, 2011 (J. Ex. at 2, 16).

At the circuit court hearing, Lynn indicated in questioning by the court that the small plastic balls Andrew shot were not intrinsically dangerous and that any dangerousness would have to be based upon the manner in which the balls were used (T. 64). However, Lynn admitted that he had done no tests with the items to determine whether or not they were even capable of inflicting injury (T. 64-65).

After the close of the evidence, the circuit court found that there was no evidence that Andrew had engaged in intimidating behavior or had committed a battery (T. 107). The court went on to point out that it was incongruous that, under the Student Code of Conduct, a student would receive a 10-day suspension for punching someone in the eye, but that expulsion or a long-term suspension could be recommended for "shooting" a plastic ball through a tube (T. 108). However, the court concluded that it could not say that the Board acted "arbitrarily and capriciously" in deciding to punish Andrew under the more serious section (T. 125).

AUTHORITIES AND ARGUMENT

I. INTRODUCTION

Andrew and Mikel seek this Court's review to correct what they submit has been a grave miscarriage of justice that threatens Andrew's future—a future that appeared, by all accounts, to be exceedingly bright[2] up until the Board meted out a draconian and unjust punishment for Andrew's childish prank. Andrew and Mikel submit that the disciplinary action in this case was not merely unwise, but in fact was at odds with the Board's own rules. Under these circumstances, to leave the lower court's ruling and the Board's action in place would be to permit the flagrant violation of Andrew's Fourteenth

[2] Prior to the events described herein, Andrew was an "A" and "B" student, a participant in Junior ROTC, color guard, and drill team. He had planned to attend the Virginia Military Institute following his high school graduation. (T. 25).

Amendment due process right to have fair notice of the school's policies and how they will be enforced. By definition, the Board's action was arbitrary and capricious and an abuse of discretion, and therefore it must be reversed.

II. STANDARD OF REVIEW

It is within the province of the courts to remedy injustice to students by setting aside actions of school boards that are based upon wrongful applications of governing rules. See Wood v. Henry County Public Schools, 255 Va. 85 (1998) (affirming judgment of trial court setting aside school board's treatment of a pocketknife as a "firearm" under Virginia law).

The Code of Virginia provides that a school board's

disciplinary actions may be set aside if "the school board exceeded its authority, acted arbitrarily or capriciously, or abused its discretion." VA. CODE § 22.1-87. Moreover, where the school's action is arbitrary, capricious, and supported by no rational basis, it will be found to constitute a violation of the student's rights to substantive due process. See Collins v. Prince William Co. Schools, 2004 U.S. Dist. LEXIS 28298, *20 (E.D. Va. 2004) (citing United States v. Salerno, 481 U.S. 739, 746 (1987); Hicks v. Halifax County School Board, 93 F. Supp. 2d 649, 664 (E.D.N.C. 1999)).

By wrongly interpreting and applying the Student Code of Conduct, the Circuit Court below erred in finding that the School Board's decision was not arbitrary, capricious, or an abuse of discretion. Because the Circuit Court's ruling involves questions

of law and the application of law to undisputed material facts, the Court should review the ruling *de novo*. Johnson v. Hart, 279 Va. 617, 623 (2010); Virginia College Building Authority v. Lynn, 260 Va. 608, 622 (2000).

III. ARGUMENT

A. Andrew's conduct is not encompassed by the Spotsylvania County Schools Student Code of Conduct Section(B)(3)(b) or (g), dealing with "Violent criminal conduct," so Andrew's long-term suspension thereunder was arbitrary, capricious, and an abuse of discretion.

Both the Board and the Circuit Court below erroneously found that the Board had authority to impose discipline on Andrew under Section (B)(3) of the Student Code of Conduct, entitled "Violent criminal conduct." Because Andrew's conduct is not encompassed by (B)(3), Andrew and Mikel submit

that these findings must be reversed.

The provisions upon which Andrew's long-term suspension was based, defining "Violent criminal conduct," are set forth supra. While the Board and the Circuit Court below found that Andrew's conduct could properly be considered "otherwise physically injuring or battering" others within the meaning of (B)(3)(b), established interpretive doctrines—in addition to good common sense—forbid this interpretation (T. 12-13). As this Court explained in another school discipline case involving an alleged "weapon,"

> Under the rule of *ejusdem generis*, when a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words. Likewise, according to the

> maxim *noscitur a socii* (associated words) when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words.

Wood, supra, at 94-95 (quoting Martin v. Commonwealth, 224 Va. 298, 301-02, 295 S.E.2d 890, 892-93 (1982)) (citations omitted).

While the phrase "otherwise physically injuring or battering any person" may well have been intended to serve as a catch-all provision, the most fundamental principles of fairness and due process demand that it be subject to some discernable limitation. Absent such limitation, simple, harmless acts such as tipping the bill of another student's cap or tossing a wad of paper at another student could be

classified—at the whim of school officials—as "Violent criminal conduct" and subject to such draconian punishments as long-term suspension or expulsion.

The doctrine of *ejusdem generis* provides the needed limitation, requiring that the general words "otherwise physically injuring or battering any person" be construed to encompass acts analogous to those specifically listed. In this case, the conduct giving rise to Andrew's long-term suspension—the blowing of tiny plastic balls through an ink pen tube toward students' backpacks without any desire or intent to do any physical harm[3]—cannot conceivably be considered analogous to "killing," "shooting," "stabbing," or "cutting" another person.

---

[3] J. Ex. 8; T., 29.

Just as Andrew's conduct does not fall within Student Code of Conduct Section (B)(3)(b), so the objects he used in playing his prank do not fall within the classification of items prohibited under Section (B)(3)(g). While this Section does include a general prohibition of "Any type of weapon, or object used to intimidate, threaten or harm others...," the doctrines of *ejusdem generis* and *noscitur a socii* again provide the necessary interpretive limitation.

Under these interpretive doctrines, tiny plastic balls extracted from a child's toy[4] and the hollow barrel of a standard ink pen cannot possibly be classified as "similar in nature" to the extensive list of dangerous weapons given as examples of contraband items. These include, for instance, rifles, explosives, bombs,

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[4] T. 35.

machetes, knives (specifically limited to three inches or longer), and nun chucks.

One obvious indicator of the patent absurdity of the Board's interpretation of this section to include Andrew's items is found in the fact that Section (B)(3)(g)(viii) specifically excludes knives with blades shorter than three inches. Unless Andrew's small plastic balls and hollow ink pen barrel can reasonably be considered more inherently dangerous than an actual knife, the Board's decision must be ruled arbitrary, capricious, and an abuse of discretion.[5]

In short, Andrew's conduct simply cannot be

---

[5] Because violation of Section B(3)(g) is based on mere "possession" of the listed items and those of like characteristics, Andrew's actual use of the items is not relevant with regard to the determination of whether or not he violated said provision.

fairly or reasonably classified as the type of "Violent criminal conduct" that would justify a long-term suspension under (B)(3) of the Student Code of Conduct. Therefore, it was arbitrary and capricious, and an abuse of discretion, for the Board to impose discipline upon Andrew for violation of said provisions.

The court below clearly erred in ruling that Andrew's conduct could properly be classified under (B)(3) of the Student Code of Conduct. Moreover, the court incorrectly stated that Andrew's counsel had conceded "that discipline would be warranted under either [Section 3 or Section 4]" of the Student Code of Conduct (T. 124). In fact, Andrew's counsel argued vigorously and at length that the Board could not properly classify Andrew's conduct under Section (B)(3)(b) or (g). (T. 103-110).

> MR. FLUSCHE: I suggest that it was arbitrary and capricious for them to have decided to put this activity under that section.
>
> THE COURT: Do you have an option? Is it arbitrary and capricious to pick one as opposed to another?
>
> MR. FLUSCHE: Your Honor, but my suggestion is they don't have the option with this activity at hand.

(T. 108).

B. The Circuit Court erred in ruling that the use of any object or weapon in combination with conduct that violates Section (E)(4) of the Student Code of Conduct constitutes a violation of Section (B)(3) of the same.

The court below interpreted the Student Code

of Conduct to allow for student discipline under Section (B)(3) any time conduct falling under Section (E)(4) is accompanied by "the presence of an object or a weapon," and deemed Andrew's conduct to have met those criteria.

> It's the plaintiff's position that, to the extent that [Andrew]'s conduct is covered by two sections of the student code, the school board abused its discretion in seeking to proceed under the more severe section.

> By analogy to criminal law, if one can be charged with malicious wounding, for which an assault and battery would be a lesser-included crime, that is to suggest the state must proceed in the lesser and not the greater charge, that's simply not the case.

> The distinction is, of course, that malicious wounding requires an additional element, the breaking of the skin, and here, there's an additional element as well, one that requires the presence of an object or a weapon that's required for them to have proceeded under Section 3, and that did occur. So that is not an issue.

(T. 124-25).

There is simply no basis for the court's conclusion that conduct prohibited under Section (E)(4)becomes "Violent criminal conduct" proscribed by Section (B)(3) if it is accompanied by "the presence of an object or a weapon."

If a student possesses an "object" or "weapon" that is legitimately encompassed by Section (B)(3)(g), the possession is clearly punishable thereunder irrespective of whether the student also engaged in conduct prohibited by (E)(4). This is because all that

is required for a violation of Section (B)(3)(g) is mere "possession" of "Any type of weapon, or object used to intimidate, threaten or harm others..." This makes sense, insofar as that provision may only be properly interpreted to encompass weapons and inherently dangerous items comparable to those specifically listed.

Alternatively, a student may legitimately be disciplined under Section (B)(3)(b) for conduct that rises to the same level as killing, shooting, stabbing, cutting, or wounding another person. However, there is simply no formula outlined in the Code of Conduct by which a student's commission of an act that does not fall within (B)(3)(b), coupled with the use of an object that does not fall within (B)(3)(g), may be magically transformed into a violation of either of those provisions.

Rather, such conduct—Andrew's conduct—simply constitutes a violation of two distinct provisions of Section (E)(4)[6]: a physical attack on another where no one receives a physical injury and "possession of knives or items that do not fall under Section (B)(3)(g)." (Student Code of Conduct, Section (E)(4)(a) and (d)). The Circuit Court's interpretation was an erroneous conclusion of law that is unsupported by the Student Code of Conduct, and it cannot support the court's conclusion that the

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[6] Section E (4) entitled, "Fighting, Physical and/or Intimidating Behavior" provides, in pertinent part: "Such acts may include any conduct, but specifically includes the following:

> (a) any physical attack on another where no one receives a physical injury;
>
> (b) any attempt or conspiracy to commit a physical attack on another;
>
> (c) mutual combat, without infliction of physical injury;
>
> (d) possession of knives or other items that do not fall under Section B(3)(g) and subject to disciplinary action under E(1)(which could be considered as weapons and prohibited in school)[.]"

Board's action was other than arbitrary, capricious, and an abuse of discretion.

C. By imposing discipline on Andrew under provisions of the Student Code of Conduct that do not encompass Andrew's conduct, the Board has violated Andrew's right to due process of law under the Fourteenth Amendment to the United States Constitution.

A student's entitlement to a public education is a property interest that is protected by the Due Process Clause, and it may not be taken away for misconduct without adherence to the minimum procedures required thereunder. Goss v. Lopez, 419 U.S. 565 (1974). Courts have specifically noted that suspension from public school constitutes interference with the student's property interest that brings the Due Process Clause into play. See, e.g., Wood, supra, at 91 (quoting Goss, supra, at 579, 581).

It is well-established that the guarantee of due process under the Fourteenth Amendment forbids the prosecution or citation of citizens under provisions that fail to provide fair notice of the conduct they prohibit. See Giaccio v. Pennsylvania, 382 U.S. 399, 402-3 (1966); City of Chicago v. Morales, 527 U.S. 41, 56 (1999); United States v. Williams, 553 U.S. 285, 304 (2008). The Due Process Clause also prohibits the imposition of grossly excessive or arbitrary punishments upon a person. Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 433-35 (2001); State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003). As the Supreme Court has explained, "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may

impose." BMW of North America, Inc. v. Gore, 517 U.S. 559, 574 (1996).

Other courts have recognized that, even in the special setting of public schools, these "elementary notions of fairness" serve as limitations on the otherwise broad discretion that schools enjoy with regard to student discipline. See, e.g., Monroe County Bd. of Ed. v. K. B., 62 So. 3d 513, 516 (Al. Civ. App. 2010) ("[R]ules and regulations governing the conduct of students 'must be sufficiently definite to provide notice to reasonable students that they must conform their conduct to its requirements.'") (quoting 67B Am. Jur. 2d *Schools* § 285 (2010)); James P. v. Lemahieu, 84 F.Supp.2d 1113, 1121 (D. Haw. 2000) ("[I]t is clear that the Due Process Clause requires statutes to clearly set forth the type of conduct that is forbidden by its provisions.") (finding

Plaintiffs likely to prevail on the merits of their due process claim because wording failed to provide fair notice to students regarding meaning of "possession" of alcohol); Stephenson v. Davenport Comm. Sch. Dist., 110 F.3d 1303, 1310 (8th Cir. 1997) (holding district regulation void because it failed "to provide adequate notice of prohibited conduct...").

Andrew and Mikel respectfully submit that in this case, fundamental notions of fairness have been transgressed. The draconian discipline meted out to Andrew resulted from the arbitrary and capricious classification of Andrew's conduct under provisions which clearly do not encompass it. Under these circumstances, the taking of Andrew's property interest in a public education for a substantial portion of the 2010 academic year cannot be sustained.

CONCLUSION

Without a doubt, school officials frequently face a task of monumental difficulty as they are, at times, called upon to implement disciplinary consequences that will inevitably have a lasting impact on students. Where student conduct involves dangerous weapons or true violence, it is proper and fitting for officials to look to the best interest of the school community as a whole, despite the certainty that long-term exclusion from school will work to the offender's detriment. But where the conduct of students—immature young people who are inherently prone to indiscretion—does not rise to the level of real danger and is not accompanied by sinister intent, a measure of restraint is warranted.

The Student Code of Conduct of Spotsylvania

County Schools, as written, achieves this balance. It provides an avenue for the Board to impose a significant consequence under Section (E)(4) for Andrew's conduct, while reserving long-term suspension and expulsion for truly dangerous behavior.

In this case, however, the Board has forced a square peg into a round hole, punishing as "Violent criminal conduct" a simple, and basically harmless schoolboy prank. In so doing, the Board has failed to comply with its own duly-enacted policies. While Andrew's conduct could have and should have been punished under Section (E)(4) of the Student Code of Conduct, it cannot, under any fair or reasonable interpretation, be punished under Section (B)(3).

For the foregoing reasons, the Board's actions

were arbitrary and capricious and constituted an abuse of discretion. Moreover, the punishment violates Andrew's fundamental right to due process under the Fourteenth Amendment to the United States Constitution, as he could not possibly have anticipated that the type of behavior he exhibited would be classified as "Violent criminal conduct" and punished by long-term suspension. Andrew and Mr. Mikel respectfully request that the Court grant their Petition, reverse the Circuit Court's ruling, set aside the Board's action, expunge Andrew's academic record of the same, and grant such other further and general relief as the Court may deem appropriate.

Respectfully submitted,

Andrew Mikel and Andrew Mikel II

By Counsel

Rita M. Dunaway

Rita.dunawawy@gmail.com

Virginia State Bar No. 46821

John W. Whitehead

johnw@rutherford.org

Virginia State Bar No. 20361

Douglas R. McKusick

douglasm@rutherford.org

Virginia State Bar No. 72201

THE RUTHERFORD INSTITUTE

P.O. Box 7482

Charlottesville, VA 22906-7482

(434) 978-3888

Fax: (434) 978-1789

COUNSEL FOR APPELLANT

CERTIFICATE REQUIRED BY RULE 5:17(i)

The undersigned counsel for the Appellants hereby certifies as follows:

(1) The names of all appellants and appellees and their counsel are as follows:

Appellants: Andrew James Mikel, Sr.

Andrew Mikel II

Counsel for Appellants:

Rita M. Dunaway (VSB # 46821)

Rita.dunaway@gmail.com

(434) 978-3888

John W. Whitehead (VSB # 20361)

johnw@rutherford.org

(434) 978-3888 (Ext. 601)

Douglas R. McKusick (VSB # 72201)

douglasm@rutherford.org

(434) 978-3888 (Ext. 603)

THE RUTHERFORD INSTITUTE

P.O. Box 7482

Charlottesville, VA 22906-7482

(434) 978-3888

Fax: (434) 978-1789

Appellee: School Board of the County of Spotsylvania

Attorney for Appellee:

Jennifer Lee Parrish (VSB # 31996)

parrish@phslawfirm.com

Parrish, Houck & Snead, PLC

701 Kenmore Ave., Suite 100

P.O. Box 7166

Fredericksburg, VA 22404

Phone: (540) 373-3500

Fax: (540) 899-6394

(2) A copy of this petition for appeal has been mailed, postage prepaid, to counsel for the Appellees at the address set forth above on the 31st day of August, 2011.

(3) Counsel for Appellants desires to state orally and in person to a panel of this Court the reasons why the petition for appeal should be granted.

Rita M. Dunaway (VSB#46821)

THE RUTHERFORD INSTITUTE

COUNSEL FOR APPELLANT

P.O. Box 7482

Charlottesville, VA 22906-7482

Phone: (434) 978-3888

Fax: (434) 978-1789

E-mail: rita.dunaway@gmail.com

Sections B(3)(b), (g) and E(4) of Spotsylvania Public Schools Student Code of Conduct:

3. **Violent criminal conduct,** while on school property, to or from school, or at a school-sponsored activity, including:

...

b. killing, shooting, stabbing, cutting, wounding, otherwise physically injuring or battering any person;

* * * * *

g. any student having been found to have in his or her possession anywhere on school property, at a school sponsored event, or on the way to or from school, any item listed below shall be recommended for expulsion from school for a minimum of 365 days (refer to section E(1) for specific consequences). This list is not all-inclusive. Any type of weapon, or object used to intimidate, threaten or harm others, any explosive device or any dangerous article(s) shall subject the student to a recommendation of expulsion.

* * * * *

Examples of items that will mandate a minimum of a 365-day expulsion are:

(xiv) Any pistol, revolver, rifle, shotgun, pellet pistol or rifle, B-B gun or air rifle, starter gun, crossbow or any device capable of firing a missile or projectile;

(xv) Any pistol, revolver, or any weapon which will or is designed to or may readily be converted to expel a projectile by action of an explosive, compressed gas,

compressed air or other propellant;

(xvi) The frame or receiver of any such weapon described in (i) and (ii) above or any firearm muffler or silencer;

(xvii) Any explosive, incendiary or poison gas;

(xviii) Any bomb, grenade, rocket (having an explosive charge of more than four ounces), missile (having an explosive charge of more than one-quarter ounce) mine or other similar device;

(xix) Any combination of parts either designed or intended for use in converting any device into any destructive device listed in (i) through (v) above and from which such a destructive device may be assembled;

(xx) Any stun weapon or taser;

(xxi) Any dirk, dagger, machete, any knife with a metal blade of three (3) inches or longer, bowie knife, switchblade knife, ballistic knife, razor;

(xxii) Any slingshot or spring stick;

(xxiii) Any metal knuckles or blackjack

(xxiv) Any flailing instrument consisting of two or more rigid parts connected in such a manner as to allow them to swing freely, which may be known as nun chahka, nun chuck, nunchaku, shuriken or fighting chain;

(xxv) Any disc, or whatever configuration, having at least two points or pointed blades which is designed to be thrown or propelled and which may be known as a throwing star or oriental dart;

(xxvi) Any device or weapon, not specifically described above, of like kind and of appearance as those

enumerated above.

* * * * *

Section E (4) entitled, "Fighting, Physical and/or Intimidating Behavior" provides, in pertinent part: "Such acts may include any conduct, but specifically includes the following:

(a) any physical attack on another where no one receives a physical injury;

(b) any attempt or conspiracy to commit a physical attack on another;

(c) mutual combat, without infliction of physical injury;

(d) possession of knives or other items that do not fall under Section B(3)(g) and subject to disciplinary action under E(1)(which could be considered as weapons and prohibited in school)[.]"

Portions of the Transcript from Proceedings Before the Spotsylvania Circuit Court on May 24, 2011.

P. 6

1 [By Mr. Flusche] have, and it was a very stupid thing to do. And he

2 did blow them through the tube and they did hit at

3 least three students.

4 You will also hear, as I mentioned, that he

5 fully admitted to the involvement. He provided the

6 tube and he provided the pellets to the

7 administration. He has fully cooperated. He is doing

8 everything possible to make amends and serve any

9 punishment regarding that incident.

10 What you'll also hear is that the school

11 board has classified this incident as taking a weapon

12 to school and as violent criminal conduct, and several

13 other provisions in the Code of Conduct they have

14 classified this incident, which some people have

15 called spitballs, and they were plastic pellets. They

16 were not spitballs but they were plastic items that he

17 was blowing -- not firing -- he was blowing them

18 through. They called this a weapon and very dangerous

19 and violent conduct.

20 And you'll hear that that was used, from

21 what any of us can tell, to force or trigger that

22 expulsion. What the Code of Conduct, you will see,

23 says is that anyone bringing a weapon or involved in

24 violent criminal conduct should be expelled for

25 365 days, and the school board or the administration

P. 7

1 and the school board reduced that to a long-term

2 suspension.

3 But you'll also hear that what they could

4 have done was said this was fighting. This was an

incident of fighting or an incident of bringing some other type of weapon -- not a gun, not a knife, some other minor type of weapon -- to school, and that would have triggered a few days of school suspension, and he would have been allowed back to school many months ago. But because of that classification of weapon and violent criminal conduct, this long-term suspension has been triggered, and that's why we're here today.

Your Honor, what we're asking you to do is to reverse the school board's decision to overturn that long-term suspension to clean up Andrew Mikel's records so this suspension does not harm his future. As I said, he's a freshman. He's got a long way to go and a lot of dreams ahead of him, and we're asking you

20 to provide any other relief that you see fit based on

21 the evidence here today.

22 THE COURT: Thank you.

23 Ms. Parrish?

24 MS. PARRISH: May it please the Court, Your

25 Honor, I'm here with Dr. James A. Meyer, who is the

P. 12

1 [By Ms. Parrish] relevant for the Court to see whether the school board

2 was justified and had sufficient factual support to

3 make its decision.

4 The statute talks about Your Honor looking

5 at whether the school board had the legal authority to

6 do what it did, and as part of my opening, I want to

7 go through very briefly what the legal authority was.

8 First, we have Virginia Code Section

9 22.1-277, and that section says, "Pupils may be

10 suspended or expelled from attendance at school for

11 sufficient cause." That's all it says: Sufficient

12 cause.

13 Then we have the Code of Student Conduct,

14 which we will be presenting to Your Honor, and there's

15 a section C-4 there that says, "When a violation of

16 student's standards of conduct has been substantiated,

17 any one or more of the following types of disciplinary

18 action may be utilized." And among that list is

19 long-term suspension. So there's clearly guidance by

20 both the Virginia Code and the Code of Student Conduct

21 for this particular type of punishment.

22 And then there are the two specific sections

23 that Mr. Flusche has referred to that we'll be talking

24 about today that the school board found this conduct

25 fell under. The first is Section B(3)(b), which

P. 13

1 includes a number of things, such as stabbing,

2 cutting, or wounding, but it also includes "otherwise

3 physically injuring or battering any person." So

4 under B(3)(b) of Code of Student Conduct, if one

5 batters another person, which is an offensive

6 touching, including a sting or a welt on the arm of

7 another, that is considered to be a violation of the

8 Code of Student Conduct.

9 The second provision is B(3)(g), which does

10 talk about weapons, but just to clarify for the Court

11 now, the Court may very well be familiar with the

12 mandatory 365 expulsion that school boards are

13 required by state law to impose if a particular item

14 qualifies as a weapon there. That is not the section

15 used by the school board. The school board does not

16 assert that this is a mandatory 365 weapon, but the

17 Code of Student Conduct has the right to regulate

18 other types of weapons that don't qualify under the

19 Virginia 365 expulsion weapon, and that is where this

20 fell, under the Code of Student Conduct, B(3)(g),

21 where it first talks about the 365 weapons in the

22 Virginia Code, and then it says, "Any type of weapon

23 or object used to intimidate, threaten, or harm

24 others, any dangerous article shall subject the

25 student to a recommendation of expulsion."

P. 19

1 DIRECT EXAMINATION

2 BY MR. FLUSCHE:

3 Q Can you please tell everybody your name.

4 A My name is Andrew Mikel.

5 Q And where do you live?

A Spotsylvania, Virginia.

Q How old are you, Andrew?

A Fourteen.

Q Where did you go to school last fall?

A Spotsylvania High School.

Q On December 10th of last year, did you bring anything to school that you shouldn't have?

A Yes, sir. I brought a pen casing and some little plastic balls.

Q Okay. And what did you do with them?

A I used them to blow the balls at other students.

Q Why did you do that?

A Just lunch period was kind of boring.

Q Okay. Were you trying to hurt anyone or do anything like that?

A No, sir.

Q So you were just bored? A bored young man; is that right?

25 A (Witness nods head.)

P. 29

1 handwriting is a little bit difficult to read. If you

2 could please just read that to the Court, what you

3 wrote in your statement?

4 A "I was at home and I saw these little white

5 balls. I picked up a few because I thought they

6 looked cool. I thought it would be cool if I could

7 shoot them out of something like I had in my pocket,

8 so I took out a pencil and took it apart. I tested

9 it, and it worked okay. I took it to school and shot

10 it out a few times at various people. I made sure to

11 aim at their backpacks so nobody would get seriously

12 hurt, and I got caught and sent to the office."

13 Q Thank you.

14 And do you recall discussing this situation

15 with Mr. Andruss in her office?

16 A Yes, ma'am.

17 Q And at any point when you were in her

18 office, do you recall Mr. Rusty Davis, the principal,

19 coming in to say a few words to you?

20 A Yes, ma'am.

21 Q Do you recall telling Mr. Davis, after you

22 admitted what you did, that you knew you were going to

23 be expelled?

24 A Yes, ma'am.

25 MS. PARRISH: Those are all the questions I

P. 35

1 BY MR. FLUSCHE:

2 Q Let's talk about the actual items used,

3 Mr. Mikel. You have seen them when they're in front

4 of the Court and you've heard about them. You saw

5 these little pellets, these little balls. Can you

6 tell us, do you know what they are?

7 A They're from a toy gun that he had at home

8 several years ago, when he found some of these balls

9 left on the floor in his closet.

10 Q Now, you say a toy gun. Can you elaborate

11 to the Court what that is?

12 A I don't recall exactly what it was, but it

13 was something where him and his friends would go out

14 in the woods and play with.

15 Q Are these intended for children or for

16 adults?

17 A Yeah, it's a toy gun for children.

18 Q And have you ever had any of your children

19 or friends get hurt by these little balls?

20 A No.

21 Q Okay. And as far as you -- do you know if

22 their intent -- I mean, is the point so they're able

23 to be safe when the children are using them?

24 A I believe that's the point of the --

25 MS. PARRISH: Objection, Your Honor.

P. 38

1 MS. PARRISH: Your Honor, may I approach the

2 witness?

3 THE COURT: You may.

4 BY MS. PARRISH:

5 Q Mr. Lynn, I'm going to hand you the notebook

6 that has been provided in full to the Court. Before

7 we start going through the notebook, can you describe

8 for the Court what was your initial involvement with

9 Mr. Mikel in your role as the coordinator of school

10 safety?

11 A I was notified by Ms. Andruss and the

12 principal of Spotsylvania High School that they had a

13 disciplinary incident at their school in which they

14 recommended possible long-term suspension or expulsion

15 when I received that notification and it comes to

my

16 attention for the next step in that process.

17 Q And are you the long-term disciplinary

18 hearing officer in any case where there is a

19 recommendation for a long-term suspension or

20 expulsion?

21 A Yes, I am. Part of my job is to serve as

22 the superintendent's designee, specifically as the

23 disciplinary review hearing officer for the division,

24 and it is therefore my responsibility to take to the

25 next step and schedule a hearing to hear that case.

P. 45

1 [By Ms. Parrish] Q And after holding that hearing, what was

2 your recommendation in this case with regard to Andrew

3 Mikel to the superintendent?

4 [By Mr. Lynn]A My decision, when I met personally with the

5 superintendent, was for long-term suspension and be

6 allowed to attend school at the alternative school.

7 Q And then did Dr. Hill do his own review of

8 the information you provided to him?

9 A He did.

10 Q And did he thereafter render a written

11 letter opinion on his decision?

12 A Yes. He gave me a verbal decision and then

13 I prepared the letter for his signature.

14 Q If I can get you to turn, Mr. Lynn, under

15 Tab 2, the fifth page.

16 A Yes, ma'am.

17 Q Is that a true and accurate copy of the

18 opinion by Dr. Hill addressed to Mr. Mikel dated

19 January 3, 2011?

20 A It is.

21 Q And in that letter, he also was notifying

22 Mr. Mikel that he was making a decision to instate the

23 long-term suspension for the rest of the school year;

24 is that correct?

25 A That's correct.

P. 50

1 [By Ms. Parrish] last sentence that he didn't read?

2 [By Mr. Lynn] A Yes. The form has, actually, two parts, and

3 the second part is used by the school to allow the

4 student to explain how they would maybe avoid a repeat

5 occurrence of the behavior. It says, "What could you

6 have done to avoid this situation?" And Andrew's

7 statement was, "I could have thought with half my

8 brain for a second and figure out that behavior like

9 that is really childish and could cause serious harm

10 to other people."

11 Q And if you could turn to the next page, Mr.

12 Lynn, what is that?

13 A The next page -- actually, the next several

14 pages are statements from students that came to the

15 office and reported to Ms. Andruss or other

16 administrators in the office of being struck by

17 pellets, and they actually made written statements

18 concerning that.

19 Q And was that -- the first written statement,

20 is that the one that says -- and I won't read the

21 whole thing -- does it say, "The second time, I felt

22 like this pinch on my neck and then I saw two balls

23 laying next to a trash can"?

24 A That is correct. This first statement has

25 to do with a student that felt a pinch on the neck.

P. 51

1 Q And then the very last sentence there when

2 the student -- this unnamed student is describing what

3 he or she saw, does it state, "A long spitball-type

4 thing" as far as what it's being shot out of?

5 A Yes. That statement -- put in the

6 statement, "I saw Andrew Mikel shoot at another person

7 with a long, ball-type thing," and I'm not sure what

8 spitball or whatever -- it's cut off there on my copy.

9 Q And then the next page, is that also a

10 student statement?

11 A The second statement is from a second

12 student that came to the office and made a written

13 statement. And that student states, "Something hit my

14 back."

15 Q And did the student also write on there that

16 he or she was shot with a BB, at the top of the form?

17 A The student goes on to say, "Something hit

18 my back, and I turned around and there was a white BB

19 bouncing behind me."

20 Q And then above that, where it says, "Reason

21 for using this form," does it say shot with a BB?

22 A It does.

23 Q And is there a third student statement

24 attached?

25 A There is a third statement, made a written

P. 52

1 statement and filled out the reason for using the form

2 was "hit by a BB gun." And the student states, "Was

3 walking down the hall and I felt a sting and saw a

4 small object fly past me."

5 Q And read that last sentence, if you could.

6 You can skip the name.

7 A "Another student saw who it was, and I

8 confronted them. They said 'because we want to'."

9 Q And were all three of those statements you

10 have just identified for the Court presented to the

11 school board as part of their evidence at this

12 hearing?

13 A That is correct.

14 Q And what is the next document?

15 A The next document is an e-mail from a member

16 of the high school staff to Ms. Andruss. And this

17 person, who is a guidance counselor, I believe, stated

18 in the e-mail that she personally observed Andrew

19 putting a tube to his lips and beginning to blow in

20 it, and she's the one that actually told him to put it

21 away and brought him down to the office.

22 Q That was the guidance counselor at

23 Spotsylvania High School?

24 A That is my understanding, yes, ma'am.

25 Q And then the last three pages in the packet,

P. 64

1 [By The Court...]received into evidence and the body of the pen are not

2 inherently or intrinsically dangerous; you would agree

3 with that?

4 THE WITNESS [Mr. Lynn]: I couldn't agree completely,

5 sir, because I guess it would depend on the manner

6 which they're used.

7 THE COURT: But they're not intrinsically

8 dangerous the same way a loaded .45 caliber automatic

9 is or a knife?

10 THE WITNESS: Certainly comparing to a knife

11 or a loaded pistol, I would say it's not in the same

12 category, yes, sir.

13 THE COURT: Okay. So it's the manner in

14 which it's used that would make it a weapon or

15 inherently dangerous or intimidating?

16 THE WITNESS: Yes, sir.

17 THE COURT: We agree?

18 THE WITNESS: Yes, sir.

19 THE COURT: From what distance was Student

20 No. 1 struck?

21 THE WITNESS: I don't know, sir.

22 THE COURT: From what distance was Student

23 No. 2 struck?

24 THE WITNESS: I can't testify to that.

25 THE COURT: From what distance was Student

P. 65

1 No. 3 struck?

2 THE WITNESS: I can't testify to that.

3 THE COURT: What was the range of the

4 projectile from the pen, not the long tube?

5 THE WITNESS: I can't testify to that.

6 THE COURT: Did you test it?

7 THE WITNESS: I did not.

8 THE COURT: Did anyone test it?

9 THE WITNESS: No, sir.

10 THE COURT: If you didn't test it -- and I

11 don't mean any disrespect; I just want to learn,

12 Mr. Lynn. If you didn't test it, how can you evaluate

13 this particular orifice's ability to intimidate? If

14 you don't know the distance, you don't know the terms

15 and circumstances under which it was used or even if

16 the pen was used or the long tube was used, how can

17 one know whether or not it would reasonably intimidate

18 an individual?

19 THE WITNESS: I examined the testimony of

20 the students that were victimized by the balls and

21 their reaction to it.

22 THE COURT: Sure.

23 THE WITNESS: Because we had that direct

24 evidence, I did not feel it was necessary to establish

25 a range or a velocity. The fact that they reported

P. 70

1 [The Court...]haven't read the whole book so you're going to have to

2 help me out. Is this upon every student in the entire

3 Spotsylvania school system?

4 THE WITNESS [Mr. Lynn?]: It does.

5 THE COURT: Kindergarten?

6 THE WITNESS: Absolutely.

7 THE COURT: Senior in high school?

8 THE WITNESS: Yes, sir.

9 THE COURT: And this paragraph, "Any student

10 having been found to have in his or her possession

11 anywhere on school property," etc., "any item listed

12 below shall be recommended for expulsion from school

13 for a minimum of 365 days...for specific consequences.

14 This list is not all-inclusive...weapon or object used

15 to intimidate, threaten, or harm others."

16 So if a kindergartner brought a comb to

17 school in the shape of a switchblade, it would be

18 actionable just as a senior in high school?

19 THE WITNESS: The incident would be

20 reported, but there is specific language in this code

21 that refers to elementary students, giving the

22 principals discretion on how they handle disciplinary

23 actions with the elementary students. And

24 furthermore, there's a further statement giving the

25 superintendent discretion, understanding what the book

P. 79

1 [By Ms. Andruss] principal at Spotsylvania High School.

2 [By Ms. Parrish] Q How long have you served as assistant

3 principal of Spotsylvania High School?

4 A Seven years.

5 Q And were you assistant principal at the time

6 this incident with Andrew Mikel occurred at your

7 school?

8 A I was.

9 Q Let me direct your attention then to

10 December 10, 2010. How did you learn about this

11 incident involving Mr. Mikel?

12 A It was flex time, meaning lunch, and I was

13 on lunch duty and a young man ran up to me and

14 Ms. Smith, the guidance counselor, and said that

15 Andrew Mikel was down the hallway and he was shooting

16 pellets, was his term.

17 We, at that point, then sort of disbursed,

18 Ms. Smith and I, and we started to go look for him. I

19 did report to the other administrators that I needed

20 to see them, to make sure that everyone was looking

21 for him.

22 About simultaneously, two young ladies had

23 actually gone to the other commons area and reported

24 the same thing to, I believe it was Ms. Hart and

25 Mr. Patterson were on that side. So they sort of

had

P. 80

1 [By Ms. Andruss...]all the same information at that time, and we then

2 sort of started searching the halls.

3 Ms. Smith knew Andrew specifically, and she

4 immediately -- you know, she went down the hallway,

5 she saw him. I then got a radio call that Ms. Smith

6 had the student in the office.

7 [By Ms. Parrish]Q And was the student brought to your office?

8 A The student was brought to my office.

9 Q What happened in your office?

10 A He was in the office with Ms. Smith. At

11 that point, Ms. Smith said something to him like, you

12 know, "Give her the things." He handed me the small

13 black tube and a handful of pellets. I then asked

14 him, you know, what he had done, had he been in

the

15 hallway, and he did admit that, yes, he had the

16 pellets and he had brought this from home and he was

17 shooting them at students.

18 Q And to the best of your recollection,

19 describe what he told you about why he was shooting

20 the pellets.

21 A Just that it was cool, that he thought it

22 would be fun to shoot the pellets.

23 Q Did there come a time when you and he were

24 in your office alone doing an interview?

25 A Yes. I did speak with him. I asked him

P. 84

1 [By Ms. Parrish] Q And that's the principal, Rusty Davis?

2 [By Ms. Andruss] A Principal Rusty Davis.

3 Q And did there come a time where it became

4 your role as the principal's designee to make a

5 decision about the initial level of discipline to give

6 Andrew?

7 A My initial -- when I spoke with Andrew and

8 my initial was it's ten days. I did speak with

9 Principal Davis because he does sign off on any

10 recommendations for expulsion or long term. I did

11 consult with him and tell him what I had, the

12 statements. He had actually spoken to the two young

13 ladies who had come into the office.

14 Q Mr. Davis had spoken to those ladies?

15 A He had. So he already knew that these young

16 ladies were very upset about being hit with the

17 pellets. So he was somewhat aware. And when I spoke

18 with him and asked him, Should I proceed with a

19 recommendation for long-term, would he be signing off

20 on that paperwork, he did say, Yes, please complete

21 the paperwork for that.

22 Q And when the long-term hearing was

23 conducted, was that conducted by Mr. Lynn?

24 A It was.

25 Q And did you go to that hearing and provide

P. 101

1 [By Mr. Flusche] what happened. There's two prongs that the school

2 board has said the item fits under. The first is

3 B(3)(b), and that's the killing, shooting, stabbing,

4 or otherwise physically injuring or battering any

5 person, to paraphrase.

6 Andrew didn't kill anyone. There's no claim

7 of that. Didn't shoot someone. Well, perhaps.

8 Perhaps you can call it a peashooter or a blowgun of

9 some kind. But shooting, classically, is talking

10 about firearms. We're talking about shooting with a

11 gun or a firearm. That wasn't the case.

12 So what I would suggest is that really this

13 is simply a -- it doesn't fit under that definition

14 because the other definitions of shooting refer to

15 being hit with a weapon. So that refers to whether or

16 not this is a weapon, so it's kind of circular in that

17 respect.

18 But the key question is, Is it arbitrary to

19 call this item, that is not inherently dangerous, that

20 is simply a plastic ink pen tube that every other kid

21 probably has in school already, and these pellets,

22 putting them together I suppose and using them, is

23 that violent criminal conduct under B(3)(b)?

24 The problem is that under that analysis, if

25 we did that, any student who shoots a rubber band in

P. 102

1 class would be a violent criminal. We would need to

2 suspend them for the long term. This is not like

3 shooting someone with a firearm or other true

weapons.

This is a very far cry from that, and I suggest it's arbitrary to try to shoehorn it in there to try to trigger that long-term suspension.

If we move on, clearly, we have stabbing and cutting; that didn't happen either. And then the question is, Did Andrew wound, injure, or batter someone? There was an offensive touching. I think that's clear from the statement, there was an offensive touching, but no one needed medical attention to speak of. Perhaps someone was seen by the nurse; we're not clear on that. But there was no medical report, no medical attention or ER visits, of course.

But I would suggest that Your Honor needs to consider the entire phrase together. We have a list of things that can trigger a suspension that are

20 considered violent criminal conduct, and I would

21 suggest that that phrase, that list needs to be

22 considered together. And we're clearly looking at

23 serious injuries to students. We're looking at

24 killing, shooting, stabbing, blood and ER visits, and

25 that's not what we have here.

P. 103

1 To highlight that point, another section of

2 the Code of Conduct does cover the activity in

3 question, and I would suggest that it's our position

4 that that's where this activity should have been

5 punished. Punishment was warranted, of course, but it

6 should have been punished on page 21 of the Code of

7 Conduct under Section E.4.

8 This section clearly contemplates that

9 students are going to have offensive touchings.

10 There's going to be fighting. There's going to be

11 things that happen in school because we have lots

of

12 kids together, and it clearly has punishments that are

13 a far cry from a long-term suspension. So that

14 section says, "Such acts may include any conduct, but

15 specifically includes the following: Any physical

16 attack on another where no one receives a physical

17 injury...any attempt or conspiracy to commit a

18 physical attack...mutual combat...possession of

19 knives...that don't fall under B(3)(g)."

20 So if we have an item, a knife that doesn't

21 fall under B(3)(g), it would automatically fall under

22 this section whereas you can see -- now I'm looking

23 down a little further on that page. The first offense

24 is a minimum of five-day out-of-school suspension.

25 Even a third offense is a minimum ten-day

out-of-school suspension.

So, clearly, the Code of Conduct as a whole,

we have a plan for this kind of activity. We have a way to punish it. It's set forth very clearly. And when Andrew Mikel and his dad were reviewing the Code of Conduct, I think any parent would think that something like this would fit in that provision, that if your son did something that was horseplay, essentially -- it was a very stupid, immature, and somewhat dangerous decision, but no one was actually hurt -- this is where it would more accurately fall.

Now, if I may move on to 3(g) where we have the general definition of a weapon. So if we say, well, battery doesn't fit, he used a weapon, we look at that catch-all definition, "Any type of weapon, or object, used to intimidate, threaten, or harm others, any explosive device or dangerous article."

18 Everyone can agree it's not an explosive

19 device, and I would think that everyone can agree this

20 is not, by nature, a dangerous article. The question

21 is, Was it used to intimidate, threaten, or harm

22 others. The question is not what could have happened.

23 The question is what actually happened and how it was

24 used and what happened.

25 If we look back to the student incident

P. 105

1 reports that are in the binder, no written incident

2 reports report any feeling of intimidation or threat,

3 and that was brought on testimony by Mr. Lynn. The

4 students report seeing the balls on the floor. They

5 report a feeling. They felt a sting, a pinch. But we

6 don't have any indication of actual injuries where we

7 need medical attention. We don't have any indication

of "I was scared, I thought I was..." or, you know, anything like that. It's simply not there. The school board did not have any evidence of that before them.

Essentially, Your Honor, this was horseplay. This paragraph here, it has to have some limit, and I suggest that's where the school board has been arbitrary in fitting this activity in that paragraph. If it didn't have some limit, any fighting would be automatic expulsion, or at least an automatic recommendation for expulsion. I luckily wasn't in many fights as a child, but it's hard to fathom where you have mutual combat where someone didn't come away with a pinch, a sting or a red mark. It's just simply hard to fathom. I can fathom, though, where someone would not come away with a broken bone or a serious

24 bruise or lacerations. But if you have mutual combat,

25 as Section B(4) refers to, you're going to have some

P. 106

1 kind of marks on people. So marks, I would suggest,

2 simply aren't enough to be considered serious harm as

3 to be considered as a weapon.

4 If we further illustrate that, Your Honor, I

5 suggest we should look at the examples of weapons, and

6 all the examples, to pick out a few, we're talking

7 about pistols, rifles, explosives, bombs, daggers,

8 slingshots. I mean, and I'm not just cherry-picking.

9 This is exactly what the Code of Conduct says. These

10 are clearly the kinds of things where any parent

11 knows, "Yes, you should not go to school with that or

12 you're going to be in serious trouble, son." But

13 something like Andrew Mikel brought to school is

just

14 simply -- it seems outrageous that it would fit in

15 this definition with all these other items.

16 So then coming back, Your Honor, to where

17 this activity fits, I suggest that it does fit under

18 E(4). It was activity that he should not have done at

19 school, but it is activity --

20 THE COURT: You're referring to C(4)?

21 MR. FLUSCHE: E(4), Your Honor. I

22 apologize. E(4) on page 21. The (E) heading starts

23 on the page before. Look on 21 at the very top.

24 THE COURT: Page 21, I have 4.

25 MR. FLUSCHE: Yes, that's E(4) at the very

P. 107

1 [By Mr. Flusche...]top. It's 4 and then it could be, I would suggest, to

2 see fit either 4(a) or 4 --

3 THE COURT: D.

4 MR. FLUSCHE: Exactly. 4(d) as some type of

other weapon that doesn't fit under (b), (c), or (d). The Code clearly contemplates that things like this are going to happen, and they are by nature of the schools, students are going to do things they shouldn't, and this is where the activity should have been punished.

This section, if it fits under here, does not authorize long-term suspension or expulsion. We have these lesser penalties that should have been imposed.

Your Honor, I would suggest that, basically, we look at, as a whole, things that happen in a school.

THE COURT: There's no question that it couldn't have been. There's no question. I think you're absolutely correct. No evidence described intimidating behavior and no evidence described a battery inasmuch as a physical attack, and the

23 reference in 4(a) suggests that there was a battery,

24 but that's not the question. The question is, Are

25 they compelled to do so? Is it arbitrary and

P. 108

1 capricious for them to have made an election?

2 MR. FLUSCHE: Exactly, Your Honor.

3 THE COURT: Tell me exactly what because I'm

4 not understanding.

5 MR. FLUSCHE: I suggest that it was

6 arbitrary and capricious for them to have decided to

7 put this activity under that section.

8 THE COURT: Do you have an option? Is it

9 arbitrary and capricious to pick one as opposed to

10 another?

11 MR. FLUSCHE: Your Honor, but my suggestion

12 is they don't have the option with this activity at

13 hand.

14 THE COURT: With that instrumentality,

15 that's the difference in the two, and that's the only

16 difference in the two. It comes down to being a tube

17 and a pellet, although it does seem somewhat

18 incongruus that one can walk up to someone and punch

19 them in the eye and that gets you ten days, and if you

20 shoot a plastic ball, you get a long-term suspension.

21 But that's not the issue before this Court today. The

22 issue is was their conduct arbitrary and capricious

23 electing one section over another.

24 MR. FLUSCHE: Exactly, Your Honor.

25 But I would also suggest that the problem

P. 109

1 with the -- what Your Honor just pointed to was the

2 lack of harm, and that's what I think does make this

arbitrary and capricious.

THE COURT: It could be a lack of harm in both.

MR. FLUSCHE: Well, the weapon requires intimidation, fear, or harm. There has to be some kind of -- you have to have the item plus.

THE COURT: Look at the caption on 4. What does it say? "Fighting, physical, and/or intimidating behavior." There's no distinction.

MR. FLUSCHE: Well, 4(a), though, does have a distinction. It says, "Any physical attack."

THE COURT: Which may be intimidating or may be not intimidating. It's the same hypothetical I gave Mr. Lynn, I believe. If you attack a SEAL, it's one thing; if you attack a four-foot, one-inch tall person who weighs 75 pounds, it's quite another.

MR. FLUSCHE: But, Your Honor, what I would suggest is that any physical attack would fit under

21 there, and they don't make a showing of intimidation,

22 because it does say "physical and/or intimidating."

23 So I would suggest that that is where this activity

24 goes in the Code of Conduct, and that's the only

25 place.

P. 110

1 THE COURT: It could, but it makes it

2 required. That's the distinction.

3 MR. FLUSCHE: And that's what I'm

4 suggesting, Your Honor, is that without the harm, the

5 intimidation or the fear, this activity has to go

6 under E(4), that it's arbitrary to try to put it under

7 the B(3)(g).

8 THE COURT: You don't see how the school

9 board could have perceived a student's perception of

10 being struck by a pellet as intimidating? You don't

11 understand that?

12 MR. FLUSCHE: Your Honor, I do understand

13 that that's the argument the school board makes. It's

14 my job, of course, to disagree with that, and I do

15 disagree with that. And the evidence shows that --

16 they weren't given or even have testimony that they

17 were explained how students were intimidated and

18 feared and threatened and all these things. We have

19 these incident reports that Your Honor sees, and they

20 don't show fear and intimidation. They don't show

21 that at all. And so that's why it cannot go under

22 B(3)(g). It needs to go under E(4). So they weren't

23 outside their authority.

24 THE COURT: Arbitrarily, what would they

25 have needed to say? "I was intimidated by the

P. 111

1 presence of a pellet on the left side of my neck at a

2 velocity of some speed" -- I mean, what would they

3 have to say?

MR. FLUSCHE: Your Honor, I would expect some kind of statement that "I was afraid," or "I was scared. I didn't know what was happening." But some kind of indication that there was some kind of apprehension --

THE COURT: As opposed to, I was really angry and wanted to report it to a teacher?

MR. FLUSCHE: Exactly. We don't even have that. We don't even see fear. We see no emotion, that I see, in these statements.

THE COURT: Well, we do have anger, the young lady that reported to Ms. Andruss.

MR. FLUSCHE: Certainly, we have that. But I don't see any statements in the school board, I don't see any emotion. I see, "I felt a pinch, I felt a sting, I saw a BB," and that's it. And I don't think that that's enough to make a showing the school board needs to make to put in this B(3)(g) where

22 they've assigned this to trigger the long-term

23 suspension.

24 THE COURT: Okay. Sir, thank you very much.

25 MR. FLUSCHE: Thank you.

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1 THE COURT: Ms. Parrish?

2 MS. PARRISH: Yes, Your Honor. The question

3 before the Court is not whether or not Mr. Mikel

4 thinks something else is the more appropriate section

5 or whether Mr. Flusche does or even where the Court

6 does.

7 THE COURT: You're correct.

8 MS. PARRISH: The question in this case is

9 simply: Did the school board have legal authority,

10 without abusing its discretion and without acting

11 arbitrarily and capriciously, to find what it found?

12 And we believe the evidence today has clearly shown

13 that it did.

14 What we have shown today is what the school

15 board knew, and what the school board knew is

16 everything that's in that notebook that's been

17 presented before Your Honor. What the school board

18 knew is the oral testimony similar to what Your Honor

19 heard today from Ms. Andruss and what the school board

20 knew, the oral testimony of Mr. Lynn.

21 THE COURT: Ms. Parrish, where you have two

22 sections, either of which could arguably be used in a

23 case like this, the argument by Mr. Flusche is that

24 it's arbitrary and capricious to pick one as opposed

25 to the other where the conduct described seems to be

P. 113

1 more illustrative of what's on page 21 than what's on

2 page 12.

MS. PARRISH: I submit to Your Honor that what the school board found from all this information, including the e-mail from the principal that talks about the welt on the arm of the girl that reported it to him and the information that Ms. Andruss conveyed about these other three students being upset -- very upset and angry when they wrote their statement, is the school board looked at how was the instrument used and was it used in a way that was threatening, intimidating, and harmful to people. There clearly is evidence of those things.

THE COURT: What is the evidence of intimidation?

MS. PARRISH: The fact of the shooting itself. The fact that some student, whether using a

18 pen tube or using this long metal tube, would stand

19 there in the hallway and shoot pellets at other

20 students, who then are upset enough to go and report

21 it. We have one who says there was a sting --

22 THE COURT: That doesn't mean they were

23 intimidated. It means that they were angry.

24 MS. PARRISH: Your Honor, we don't have to

25 prove they were intimidated. If we look at what is

P. 114

1 being asserted against them from the initial level all

2 the way up to the school board, we have 3(b), and that

3 says, we can take it simplistically as battering any

4 person. All the school board had to find to not act

5 arbitrarily and capriciously is that there was a

6 battering.

7 THE COURT: So anything that's covered under

8 page 21, 4(A), is also covered under battering, under

9 3, Violent and Criminal Conduct? So you have two

10 sections.

11 MS. PARRISH: Yes, Your Honor. And the

12 discretion of the school board -- we submit the school

13 board had the authority when looking at all of this

14 evidence to pick which section it goes under.

15 Ironically, not to make it more confusing,

16 but if Your Honor will turn back to page 7 of the Code

17 of Student Conduct, there is another section called,

18 "Conduct violating General Standards of Conduct for

19 Students," and that includes nonviolent criminal

20 conduct.

21 THE COURT: I'm sorry. Where are you?

22 MS. PARRISH: Starting at page 7, Your

23 Honor.

24 THE COURT: Yes.

25 MS. PARRISH: So, again, Section 3 is

P. 115

1 violent criminal conduct. Section 1 includes

2 nonviolent criminal conduct. And one could argue that

3 this could also be disruptive behavior under C or it

4 could be bullying under X. But the significance of

5 that is --

6 THE COURT: Does that section provide for

7 long-term suspension?

8 MS. PARRISH: Yes, Your Honor.

9 And if you go to page 15, No. 4, it says,

10 "Types of disciplinary action," whether it fell under

11 Section 1, nonviolent criminal conduct that includes

12 bullying and disruptive behavior, or whether it falls

13 under Section 3, which the board found in this case,

14 the school board still had the discretion to impose

15 all the things on that list, including (n), which is

16 the long-term suspension that was imposed in

this

17 case.

18 So the school board had the discretion, we

19 submit, to look at this type of conduct, to

20 investigate who it involved, how many students it

21 involved, and all the other issues the school board

22 had before it and determine whether or not there was

23 sufficient evidence to fall under the sections that it

24 found that it did.

25 And certainly, there was the initial

P. 117

1 [By Ms. Parrish...]information goes to the school board.

2 So if we look closely at what these -- the

3 specific language is that constitutes a finding in

4 this case, I disagree with Mr. Flusche's argument that

5 the school board had to find that there was this

horrible injury or there was a killing or a shooting or a stabbing, because they did find and could find that there was a battery, and they could certainly find that this could be qualified as a weapon. Again, we concede that this is not a Virginia Code mandatory gun weapon that requires, under the Virginia law, mandatory 365 days expulsion, but it is something that was used -- we don't have to use the word "intimidate." We don't have to use the word "threatened." We can use the word "harm." And we do have harm. We have welts, we have pinches, and we have stings, and those are reported by the students, so...

THE COURT: So a pinch or a sting is battery?

MS. PARRISH: Absolutely, Your Honor.

22 THE COURT: I can't imagine how many

23 thousands of batteries occur on school property every

24 day in Spotsylvania County, from walking down the hall

25 where you brush shoulders with somebody you don't like

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1 MS. PARRISH: No, Your Honor.

2 THE COURT: All right. Thank you.

3 I think it's important that everyone in this

4 courtroom today understand what the law in this case

5 is. 22.1-87, Judicial Review, of the Code of

6 Virginia, 1950, as amended, says as follows: "Any

7 parent, custodian, or legal guardian of a pupil

8 attending the public schools in a school division who

9 is aggrieved by an action of the school board may,

10 within thirty days after such action, petition the

11 circuit court having jurisdiction in the school

12 division to review the action of the school board.

13 Such review shall proceed upon the petition..." and it

14 goes on.

15 And in conclusion, it says, "The action of

16 the school board shall be sustained unless the school

17 board exceeded its authority, acted arbitrary or

18 capriciously, or abused its discretion."

19 When one first hears the facts of this case,

20 the first thing that crosses one's mind is, What were

21 they thinking? We're talking about a peashooter here.

22 But that doesn't end it. They have to have abused --

23 when I'm saying "they," the school board -- they have

24 to have abused their discretion or acted arbitrarily

25 or capriciously. So the Court asked Mr. Flusche, how

1 did they do that, and asked him to identify the

2 specific manner in which the Spotsylvania School Board

3 abused its discretion or was otherwise arbitrarily and

4 capricious.

5 Mr. Flusche explained that the school board

6 had an obligation to proceed under Section 4(a) or (b)

7 of the Student Code of Conduct rather than Section

8 3(b) or (g).

9 Now, admittedly, the conduct described, a

10 battery, is covered under both sections. There's just

11 no question about that. The difference is that in

12 Section 3, a, quote, "weapon" or object was used to

13 batter or intimidate the victim. And that's not

14 required under Section 4. That leads to some

15 incongruous results, quite frankly.

16 Here, there can be no question that an

17 object was used to inflict the harm of which has been

18 complained. Counsel concedes that discipline would be

19 warranted under either section -- Mr. Flusche does --

20 but there's a wanton disparity between what can be

21 meted out under each.

22 It's the plaintiff's position that, to the

23 extent that Mr. Mikel's conduct is covered by two

24 sections of the student code, the school board abused

25 its discretion in seeking to proceed under the more

P. 125

1 severe section.

2 By analogy to criminal law, if one can be

3 charged with malicious wounding, for which an assault

4 and battery would be a lesser-included crime, that is

5 to suggest the state must proceed in the lesser and

6 not the greater charge, that's simply not the case.

7 The distinction is, of course, that

8 malicious wounding requires an additional element, the

9 breaking of the skin, and here, there's an additional

10 element as well, one that requires the presence of an

11 object or a weapon that's required for them to have

12 proceeded under Section 3, and that did occur. So

13 that is not an issue.

14 What is an issue is whether the school board

15 abused their discretion or acted capriciously in

16 considering the offending tube and plastic balls to be

17 such a weapon or an object. Reasonable people may

18 reasonably disagree about that, but this Court cannot

19 say that the school board arbitrarily or capriciously

20 decided that it was or that it abused its discretion

21 in so deciding.

22 I dare say that if we took a blind poll of

23 the people in this courtroom today, there would be 10

24 or 12 different opinions as to the discipline

25 warranted by Mr. Mikel's behavior. There might be

P. 126

1 more opinions than that. But what each of, including

2 this Court, believed would be appropriate is not the

3 standard. The law, as enacted by the legislature that

4 I read to you just a minute ago, sets the standard,

5 whether the school board's decision was arbitrary or

6 capricious or an abuse of their discretion.

7 Therefore, having found the school board

8 could have elected to proceed under Section 3, and did

9 so properly, the sole remaining question is whether

10 they violated the law and punishment imposed. The

11 record clearly establishes that young Mr. Mikel has

committed a number of other infractions, dealt with by

minor punishments with that effect. To his credit, he

was forthright and honest on the occasion of this

offense, but that alone does not absolve him of

responsibility for his continued conduct.

Mr. Mikel appears to be very bright and very

polite. He appears to be perhaps somewhat bored to

which he admits, and immature. But your conduct,

Mr. Mikel, is not malicious, and it appears to the

Court, upon a review of your record, often intended to

be humorous and playful at best or, at worst, merely

annoying.

Here, the school board took note, I believe,

of this and elected not to impose the maximum

P. 127

punishment that it could have imposed, the most severe

penalty of expulsion, and in doing so, it exercised its power appropriately. In imposing merely a long-term suspension, they exercised their discretion -- and I repeat again -- properly. I will concede it was arguably harsh. I will concede it may be more than I would have done. I would concede it would be more than perhaps many of the people in this courtroom would have done, but that's, again, not the test. The test is whether they were within their authority, whether they abused their discretion, acted capriciously; they didn't. The petition is dismissed.

Mr. Flusche, thank you, sir.

MR. FLUSCHE: Thank you.

MS. PARRISH: Thank you, Your Honor.

THE COURT: Thank you, Ms. Parrish. And thank you for the excellent arguments of counsel.

Mr. Mikel, young Mr. Mikel, I wasn't kidding

19 when I said that you're obviously very bright and

20 you're obviously very talented and you can obviously

21 use a little bit more challenge than perhaps you've

22 met thus far. Don't make the mistake by thinking that

23 this will inextricably change the course of your life.

24 It doesn't have to. The rest of your life is up to

25 you. You have obviously been raised right by your

Excerpts from the Joint Appendix before the Spotsylvania Circuit Court

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3.02 Certification of Closed meeting

On motion by Mrs. Wieland, second by Mr. Seaux, and by unanimous consent of the members present, the following resolution was passed by the committee:

Ayes:	Dr. Martin A. Wilder, Jr, Mr. J. Gilbert Seaux, Mrs. Wieland
Nays:	None

WHEREAS, the Spotsylvania County School Board has convened in a Closed Meeting on the date pursuant to an affirmative recorded vote and in accordance with the provision of The Virginia Freedom of Information Act; and

WHEREAS, Section 2.1-344.1(d) of the Code of Virginia requires a certification by this School Board that such a closed meeting was conducted in conformity with Virginia Law;

NOW, THEREFORE BE IT RESOLVED that the Spotsylvania County School Board hereby certifies that to the best of each member's knowledge, (i) only public business matters lawfully exempted from open meeting requirements under this chapter, and (ii) only such public business matters as were identified in the motion by which

the Closed Meeting was convened were heard, discussed or considered in the meeting.

4. Items from Closed Meeting

4.01 Actions from Closed Meeting

The Discipline Review Committee considered student matter SE-16/10-11 HS and unanimously upheld the superintendent's recommendation for long term suspension through the end of the school year. The student may enroll in the Alternative High School Program at the John J. Wright Educational and Cultural Center and may return to the home school for the start of the 2011-2012 school year as discussed in closed meeting and permitted Section 2.2-3711(A)(2) of the Code of Virginia.

The Discipline Review Committee considered student matter SE-13/10-11 HS and unanimously upheld the superintendent's recommendation for expulsion (365 days). The student may be served at the John J. Wright Educational and Cultural Center with educational services to be determined by the IEP Team as discussed in closed meeting and permitted by Section 2.2-3711(A)(2) of the Code of Virginia.

The Discipline Review Committee considered student matter SE-14/10-11 HS and unanimously upheld the superintendent's recommendation for expulsion (365 days). The student may enroll in the Alternative High School Program at the John J. Wright Educational and Cultural Center and must successfully complete substance abuse counseling and provide proof of same prior to requesting re-

enrollment in Spotsylvania County Schools in January 2011 for the start of the second semester of the 2011-2012 school year as discussed in closed meeting and permitted by Section 2.2-3711(A)(2) of the Code of Virginia.

P.3

4.01 Actions from Closed Meeting (Continued)

The Discipline Review Committee considered student matter SE-15/10-11 HS and unanimously upheld the superintendent's recommendation for expulsion (365 days). The student may enroll in the Alternative High School Program at the John J. Wright Educational and Cultural Center and must successfully complete anger management counseling and provide proof of same prior to requesting re-enrollment in Spotsylvania County Schools in January 2011 for the start of the second semester of the 2011-2012 school year as discussed in closed meeting and permitted by Section 2.2-3711(A)(2) of the Code of Virginia.

The Discipline review Committee considered student matter SE-15/10-11 HS and unanimously allowed the student to return to school for the purpose of pursuing a general Education Diploma through the division's Alternative High School Program as discussed in closed and permitted by Section 2.2-3711(A)(2) of the Code of Virginia.

Adjournment

5.01 Adjournment

With no further matters to discuss, on motion by Mrs. Wieland, second by Mr. Seaux, and by unanimous consent of the members present, the Discipline Review Committee adjourned its meeting on Tuesday, January 18, 2011 at 5:58 p.m.

/s/ /s/

Clerk Chairman

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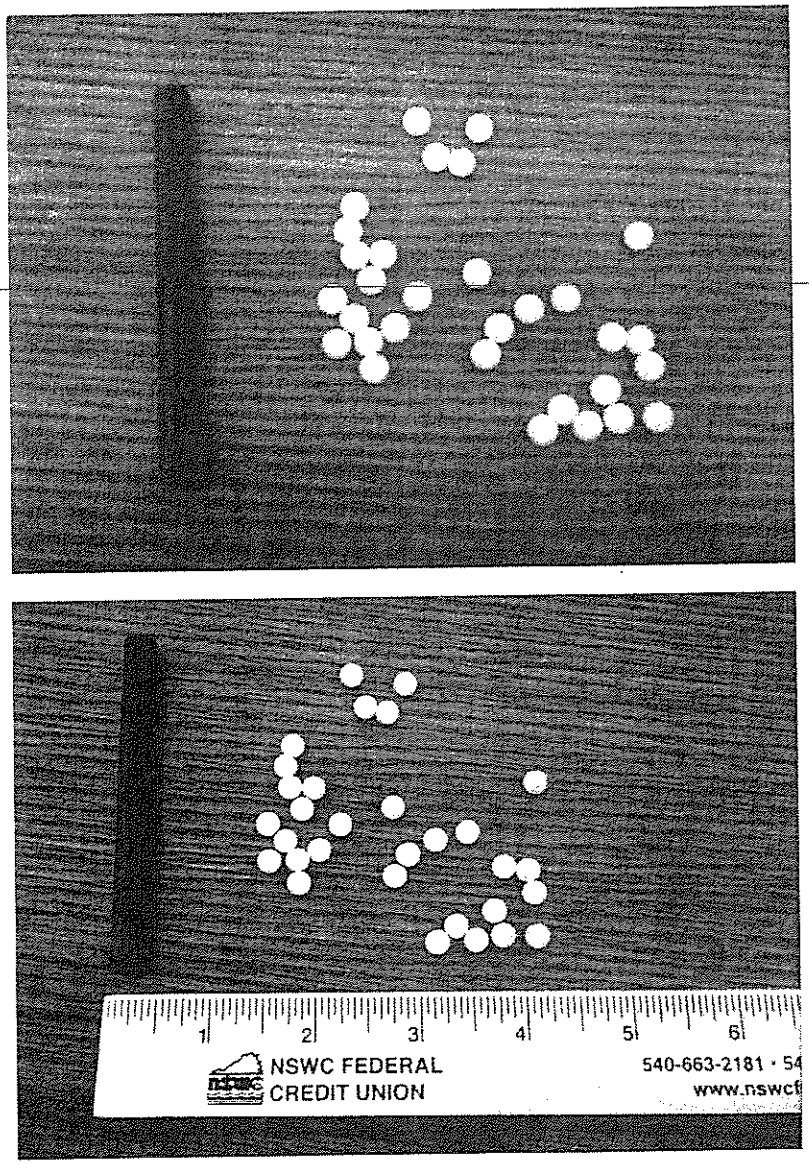

P. 8

STUDENT INCIDENT REPORT FORM

Print Student Name: ___Andrew Mikel_____

School: Spotsylvania High School

Date of Incident__12/10/10 __ Student Grade: __9__

Reason for using this form _____

Explain in your own words what happened. Include all information that you want the administration to know and consider about this situation. Use the back of the page, if necessary.

I was at home and saw these little white balls. I picked a few up because I thought they looked cool. I thought it would be cool if I could shoot them out of something like I had in my pocket. So, I took out my pencil and took it apart. I tested it and it work ok. I took it to school and shot it a few times at various people. I made sure to aim at their backpack so nobody would get seriously hurt. I then got caught and sent to the office.

What could you have done to avoid this situation? Use the back of the page, if necessary.

I could've thought with half my brain for a second and figured out that behavior like that is really childish and could cause serious harm to other people.

THIS STATEMENT IS TRUE AND ACCURATE

/s/	Reviewed by Lisa Andruss 12/10./10
Student Signature and Date	Administrative Signature and Date

P. 9

STUDENT INCIDENT REPORT FORM

Print Student Name: ___#1_____

School: Spotsylvania High School

Date of Incident__12/10/10 __ Student Grade: __9__

Reason for using this form Shot with Bebee [sic]gun/spitball thing

Explain in your own words what happened. Include all information that you want the administration to know and consider about this situation. Use the back of the page, if necessary.

I was walking in the hallway near Mrs. Lohr's room and the first time the ball or object hit a locker than [sic] then second time I felt like this pinch on my neck and then I saw two balls land next to a trashcan then I was walking up the steps with Dustin and I saw Andrew Mikel shoot at another person w/a long spit ball type thing.

What could you have done to avoid this situation?

Use the back of the page, if necessary.

THIS STATEMENT IS TRUE AND ACCURATE

/s/	Reviewed by Lisa Andruss 12/10./10
Student Signature and Date	Administrative Signature and Date

P. 10

STUDENT INCIDENT REPORT FORM

Print Student Name: ___#2_____ School: Spotsylvania High School

Date of Incident__12/10/10 __ Student Grade: __9__

Reason for using this form Shot with a bb

Explain in your own words what happened. Include all information that you want the administration to know and consider about this situation. Use the back of the page, if necessary.

I was in the hallway by the downstairs bathroom, when something hit my back, and I turned around and their [sic] was a white bb bouncing behind me.

What could you have done to avoid this situation? Use the back of the page, if necessary.

THIS STATEMENT IS TRUE AND ACCURATE

/s/	Reviewed by Lisa Andruss 12/10./10
Student Signature and Date	Administrative Signature and Date

P. 11

STUDENT INCIDENT REPORT FORM

Print Student Name: ___#3_____ School: Spotsylvania High School

Date of Incident__12/10/10 __ Student Grade: __9__

Reason for using this form hit by a bee-bee gun

Explain in your own words what happened. Include all information that you want the administration to know and consider about this situation. Use the back of the page, if necessary.

I was walking down the back hallways near Mrs. Lohr's room and I felt a sting and saw a small object fly past me. Dustin saw who it was and I confronted them. They said "because we want to."

What could you have done to avoid this situation? Use the back of the page, if necessary.

THIS STATEMENT IS TRUE AND ACCURATE

/s/	Reviewed by Lisa Andruss 12/10./10
Student Signature and Date	Administrative Signature and Date

P. 13

Prog: DISRPTO10 SCS Spotsylvania County School System Page 1

Date 1/18/11 Student Disciplinary History

To:

RE: Andrew J. Mikel Id: 2043317

Address: 8549 Hancock Rd. Gender: M Class 09

Spotsylvania, VA 22553 Ethnicity: White (Non-Hisp)

DOB: 10/19/96

Date of Incident: 12/10/2010 School: 370

Entered by: ANDRUSS

Primary Offense: WP4 BRINGING OTHR WEAPON TO EXPEL PROJ.AMMO

2ND Offense: BA4 ASSAULT AGAINST STUDENT: NO WEAPON

1ST Action: OSS Out of School Suspension

Discipline Days: 98.00 day(s) beginning on 01/03/2011.

Incident Comments

Andrew had a small plastic tube and a handful of plastic pellets. He used the tube to shoot students in the hallway during lunch. He hit at least 3 students, all of which reported the incident to administration. Several students notified the administrators of what he was doing and was scene [sic] by Mrs. Jackie Smith demonstrating to his friends how to use the device. When he was called into the office he handed me the tube and the pellets. He stated "I thought it would be cool if I could shoot them out of something like I had in my pocket. So I took out my pen and too [sic] it apart. I tested it and it worked ok. It [sic] took it to school and shot it a few times at various people."

Date of Incident: 05/11/2010 School: 220 POST OAK MIDDLE SCHOOL

Entered by: BYRDL Teacher: TREAKL

Primary Offense: HSP HORSEPLAY – NO OSS

1ST Action: ISP In-School Suspension- Partial Day

Discipline Days: 0.50 day(s) beginning on 05/11/2010

Incident Comments

Andrew did not dress out in PE class today. With his free time at the beginning of PE class, Andrew decided to construct "toys" with a ruler, rubber bands, & pencils to shoot at others. He was caught and corrected 3 times by the PE teacher for this behavior.

Andrew will spend his PE block in ISS today & the same for 5/13.

Date of Incident: 10/07/2009

School: 220 POST OAK MIDDLE SCHOOL

Entered by: BYRDL

Teacher: FRENCH POMS-FRENCH

Primary Offense: HSP HORSEPLAY – NO OSS

1ST Action: ISP In-School Suspension- Partial Day

Discipline Days: 0.75 day(s) beginning on 10/07/2009

Incident Comments

Andrew was involved in some unnecessary horseplay in PE class; then at one point he threw sand in another student's face, thinking that it was funny. Andrew will spend the final 2 blocks of 10/7 in ISS & will also report to ISS for his PE block (B2) on 10/9.

Instruction

8020 River Stone Drive – Fredericksburg, VA 22407

540.834.2500 – TDD 540.834.2557

Fax 540.834.2556

January 19, 2011

Mr. Andrew Mikel

8549 Hancock Road.

Spotsylvania, VA 22553

Dear Mr. Mikel:

On January 8, 2011, the School Board Disciplinary committee met to hear your appeal of my action of January 3, 2011 to instate a long term suspension for the 2010-2011 school year of your son, Andrew Mikel, for violating sections B(3)(b) and B(3)(g) or the Code of Student Conduct—assault and possession of a projectile/weapon used to harm. The purpose of this letter is to inform you that the unanimous decision of the Disciplinary Committee was to dent your appeal and to uphold my decision of January 3, 2011. All terms and conditions outlined in my letter on January 3, 3011 continue to apply, including the prohibition against Andrew's participation in any school sponsored activity or being present on any school grounds at any time. If the aforementioned is

violated, Andrew will be subject to a trespassing charge as contained in the Code of Virginia.

I will offer Andrew the opportunity to continue his education by attending the Alternative High School Program. A representative for the Alternative High School Program will be in contact with you regarding Andrew's enrollment. Andrew will remain on assignment coordination until he is enrolled in the Alternative High School Program. If you have any questions, please contact John K. Lynn, School Safety Coordinator/Hearing Officer at (540) 834-2500.

Sincerely,

Jerry W. Hill, Ed.D.

Division Superintendent

JWH / kdz

Cc: Mr. John K. Lynn, School Safety Coordinator/Hearing Officer

Mr. Russell Davis, Principal, Spotsylvania High School

Ms. Lisa Andruss, Assistant Principal, Spotsylvania High School

Spotsylvania County Schools

Instruction

8020 River Stone Drive – Fredericksburg, VA 22407

540.834.2500 – TDD 540.834.2557

Fax 540.834.2556

December 16, 2011

Mr. Andrew Mikel

8549 Hancock Road.

Spotsylvania, VA 22553

Dear Mr. Mikel:

Andrew Mikel has been referred to the Long-Term Suspension/Expulsion Hearing Officer for:

- Assault

- Possession of a projectile/weapon used to harm

The Spotsylvania High School administration will explain the incident and provide the Hearing Officer with a copy of Andrew's grades, along with his discipline and attendance records. At the hearing, you and Andrew will also have the opportunity to present a defense to the charges and

to request clarification of information presented by school officials.

Please call me when you receive this letter so that I may answer any questions you might have regarding the Long-term Suspension/Expulsion Hearing. Should you choose ***not*** to attend the hearing, the Long-Term Suspension/Expulsion Hearing Officer will make a recommendation to the superintendent in your absence. You may reach me at (540) 834-2500, ext. 1119. If you do not confirm this appointment and attend the hearing or contact me to re-schedule this appointment, the Superintendent will act on the Hearing Officer's recommendation without further notice to you and without any subsequent appeal to the School Board.

Sincerely,

John K. Lynn

School Safety Coordinator

Cc: Mr. Russell Davis, Principal, Spotsylvania High School

Ms. Lisa Andruss, Assistant Principal Spotsylvania High School

Instruction

8020 River Stone Drive – Fredericksburg, VA 22407

540.834.2500 – TDD 540.834.2557

Fax 540.834.2556

January 3, 2011

Mr. Andrew Mikel

8549 Hancock Road.

Spotsylvania, VA 22553

Dear Mr. Mikel:

I have been notified by the Long-Term Suspension/Expulsion Hearing Officer that based on the evidence adduced at the hearing on December 21, 2010 for Andrew Mikel; I am instating a long term suspension for the 2010-2011 school year from Spotsylvania County School. The hearing officer found that Andrew violated section B(3)(b) and B(3)(g) of the Code of Student Conduct – assault and possession of a projectile/weapon used to harm

I will offer Andrew the opportunity to continue his education by attending the Alternative High School Program. A representative from the Alternative High School Program will be in contact with you regarding Andrew's enrollment. Until

Andrew is enrolled in the Alternative Program, he will be placed on assignment coordination through Spotsylvania High School. Please contact the guidance department to continue receiving Andrew's assignments.

Andrew's privilege to participate in any school-sponsored activity or to be present on school grounds is suspended. If the aforementioned is violated, Andrew will be subject to a trespassing charge as contained in the Code of Virginia.

You may appeal this decision to the Spotsylvania County School Board. If you wish to do so, you must notify my office within seven (7) calendar days of receipt of this letter. Failure to file a written appeal within the seven-day period will constitute a waiver of your right to appeal.

We sincerely regret that this incident occurred. I hope that Andrew will take advantage of the opportunity to continue his education. Please contact John K. Lynn, School Safety Coordinator, within forty-eight (48) hours to confirm receipt of this letter and discuss any further questions you may have. You may reach him at 834-2500 ext. 1119

Sincerely,

Jerry W. Hill, Ed.D

Division Superintendent

JWH/kdz

Cc: Mr. John K. Lynn, School Safety Coordinator/Hearing Officer

Mr. Russell Davis, Principal, Spotsylvania High School

Ms. Lisa Andruss, Assistant Principal Spotsylvania High School

P. 32

John Lynn – Notice of Appeal

From: Andrew Mikel <amikel930@msn.com>

To: <jlynn@scs.k12.va.us>

Date: 1/5/2011 10:46 AM

Subject: Notice of Appeal

Mr. Lynn,

You stated that email would be an adequate medium for expressing my desire to appeal the decision of the school superintendent, Dr. Jerry Hill. Consider this my notice of appeal. Please send me all information pertaining to the appeal process, links to documents will suffice. Also, please keep me abreast of the

progess [sic] of the appeal process (dates, time, etc.). Please assure me that you have received this notice by responding to this email.

Sincerely,

Andrew J. Mikel

P. 33

John Lynn – Re: Notice of Appeal

From: John Lynn

To: Andrew Mikel

Date: 1/5/2011 6:04 PM

Subject: Re: Notice of Appeal

Mr. Mikel,

I have received your written appeal of dr. Hill's decision of January 4, 2011 regarding your son, Andrew. Your appeal will be heard by the School Board Disciplinary Committee. As soon as I obtain a date and time for that meeting, I will notify you so that you and Andrew may attend.

For purposes of clarification for the Committee, are you appealing the finding concerning some or all of the Code of Conduct violations and the punishment imposed by Dr. Hill, or are you stipulating (agreeing to) the findings, but appealing only the punishment imposed by Dr. Hill?

The description of the process for an appeal of a long-tern suspension is contained in the SCS Policy Manual, "Long=term Suspension and Expulsion," number JFC-R.

You may access the SCS Policy Manual from the SCS website. Click on the "School Board" tab at the top of the home page. A drop down menus will appear—click on "Governance." Then click on "Policy Manual" on the right side of the page. A new page will appear—click on "Policies." It will take a few seconds for the Policy Manual to load, then a table of contents will appear on the left side of the page. Scroll down to "J-Students," then click on that chapter. After a few seconds, a table of contents of Chapter J will appear—scroll down to "JFC-R, Long-Term Suspension and Expulsion" and click. The contents of JFC-R will then appear on the right side of the page. The paragraph regarding "Appeal" is at the bottom of the page.

Sincerely,

John Lynn

John K. Lynn

Coordinator of School Safety

Spotsylvania County School

8020 River Stone Drive

Fredericksburg, VA 22407

1-540-834-2500, Ext. 1119

P. 34

John Lynn – RE: Notice of Appeal

From: Andrew Mikel <amikel930@msn.com>

To: <jlynn@scs.k12.va.us>

Date: 1/5/2011 7:02 PM

Subject: RE: Notice of Appeal

Mr. Lynn.

I disagree with the findings as well as the resulting punishment.

Thanks,

Andrew J. Mikel

Date: Wed, 5 Jan 2011 18:04:00 - 0500

From: jlynn@sptsylvania.k12.va.us

To: amikel930@msn.com

Subject: Re: Notice of Appeal

Mr. Mikel,

I have received your written appeal of dr. Hill's decision of January 4, 2011 regarding your son, Andrew. Your appeal will be heard by the School Board Disciplinary Committee. As soon as I obtain a

date and time for that meeting, I will notify you so that you and Andrew may attend.

For purposes of clarification for the Committee, are you appealing the finding concerning some or all of the Code of Conduct violations and the punishment imposed by Dr. Hill, or are you stipulating (agreeing to) the findings, but appealing only the punishment imposed by Dr. Hill?

The description of the process for an appeal of a long-tern suspension is contained in the SCS Policy Manual, "Long=term Suspension and Expulsion," number JFC-R.

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Sincerely,

John Lynn

John K. Lynn

Coordinator of School Safety

Spotsylvania County School

8020 River Stone Drive

Fredericksburg, VA 22407

1-540-834-2500, Ext. 1119

P. 35

John Lynn – RE: Notice of Appeal

From: John Lynn

To: Mikel , Andrew

Date: 1/6/2011 7:27 AM

Subject: RE: Notice of Appeal

Mr. Mikel,

Thank you for the clarification concerning your appeal.

Please note that the correct date for Dr. Hill's decision and letter was January 3, 2011. I apologize for any confusion that my error in my e-mail of January 5 may have caused.

Sincerely,

John Lynn

John K. Lynn

Coordinator of School Safety

Spotsylvania County School

8020 River Stone Drive

Fredericksburg, VA 22407

1-540-834-2500, Ext. 1119

P. 36

John Lynn – RE: Notice of Appeal

From: John Lynn

To: Mikel , Andrew

Date: 1/7/2011 3:55 PM

Subject: RE: Notice of Appeal

Mr. Mikel,

The School Board Disciplinary Committee will hear your appeal at 5:00 PM on Wednesday, January 12, 2011 at the Spotsylvania County Schools Administrative Services building at 8020 River Stone Drive.

Sincerely,

John Lynn

John K. Lynn

Coordinator of School Safety

Spotsylvania County School

8020 River Stone Drive

Fredericksburg, VA 22407

1-540-834-2500, Ext. 1119

P. 46

Long-Term Suspension/Expulsion Hearing Notes

Student Name: Andrew Mikel	School: Spotsylvania High School
Date: 12/21/10	Time: 8:00
DOB: 10/19/96 Age:14	Grade: 9
Hearing Officer: Mr. John K. Lynn, School Safety Coordinator	
School Administrator(s): Ms. Lisa Andruss, Assistant Principal, Spotsylvania High School **Charges:** B.3.b (assault) B.3.g (projectile/wpn. Used to harm)	
School's Case:	

Grades: Bx4 Ax1 Honor Roll Student

Attendance: Ax0

SOL: V. Good 483-600 8th Grade

Behavior 2010-11 1 0SSx10(1); 2009-10 2 OSSx0 June 2009 lookalike switchblade.

COFC Yes

Charges 3 Counts asslt.-prob. Divert 6" tub w/a lit pellets

Hit 3 students 2 prev. incidents

Student's Defense:

Student denies silver tube

I didn't think about prev. incidents, wrote apology letters to all concerned

Stand by student – student noth. Else

Father – immature, horseplay, very young student (1 yr. behind)

Peashooter premeditated

Was not "firing" p. 12→ unreasonable comp. drill team, color guard

Son left office → dream to go to Annapolis – gone VMI, Citadel gone b/c if charged entire life has changed.

JROTC incentive punishment way too severe Grandfather – absurd – peashooter nerf ball. **School's Closing:** Expulsion **Student's Closing:** Object to severity
Hearing Officer's Recommendations:

P. 68

John Lynn - mikel LT Reassignment-Long term-Expulsion Form

From: Lisa Andruss

To: Lynn, John

Date: 12/10/2010 4:02 PM

Subject: mikel LT Reassignment-Long term-Expulsion Form

Attachments: mikel LT Reassignment-Long term-Expulsion Form, Mikel incident report.doc

John – I'm waiting for Rusty to sign for me to fax, but I wanted to give you a copy as soon as possible I expect we'll have to change it to "with weapon" since I'm pushing for expulsion because of the weapon.

Just let me know what to put. I'll send the letter and signed forms Monday.

Lisa Andruss

Assistant Principal

Spotsylvania High School

(540) 582-3882 ext. 5412

P. 73

John Lynn – Re: Andrew Mikel

From: Russell Davis

To: Andruss, Lisa; Lynn, John

Date 12/21/2010 10:39 PM

Subject: Re: Andrew Mikel

CC: Sovine, David

John,

I believe this is a very clear-cut case. I am not sure what the confusion is of how else to look at it.

Facts of Case: The student was shooting "B-B's" (not spitballs) through 2 separate metal tubes. He struck several students causing welts on the arm of

one female student. One of the tubes was recovered by Ms. Andruss when she confronted the student, the other longer metal tube was found under his chair when he left her office. The longer tube, silver in color was described by two of the victims prior to us finding the object Andrew had hidden under the chair. (obviously he knew he should not have)

When Ms. Andruss ask him why he did it, he said something to the effect that he "thought it would be fun"/ When I ask him if he knew the consequences for doing this he said, "I am going to be expelled" Clearly, he knew what he was doing and was fully aware of the consequences.

Code of Conduct

while on school property, to or from school, or at a school-sponsored activity, including:

Viokillingiminal [sic] conduct b. killing, **shooting**

c. acting in a manner so as to create in the mind of another person a reasonable fear that such person will be killed, shot, stabbed, cut

wounded or physically injured;

g. any student having been found to have in **his or her possession anywhere on school property,** at a school sponsored event, or on the way to or from school, any item listed below shall be recommended for expulsion from school for a minimum of 365 days (refer to section E(1) for specific consequences). This list is not all-inclusive. **Any type of weapon, or object used to intimidate, threaten or harm**

others, any explosive device or any dangerous article(s) shall **subject the student to a recommendation of expulsion**.

Examples of items that will mandate a minimum of a 365-day expulsion are:

(i) Any pistol, revolver, rifle, shotgun, pellet pistol or rifle, B-B gun or air rifle, starter gun, crossbow or any device capable of firing a missile or projectile;

(ii) Any pistol, revolver, or any weapon which will or is designed to or may readily be converted to expel a projectile by action of an explosive, compressed gas, compressed air or other propellant;

(xiii) any device or weapon, not specifically described above, of like kind and of appearance as those enumerated above.

Specific consequences outlines in the Code of Conduct:

P. 88

John Lynn – FOIA Request #2

From: Andrew Mikel <amikel930@msn.com>

To: <jlynn@scs.k12.va.us>

Date: 1/6/2011 11:12 PM

Subject: FOIA Request #2

Dear Mr. Lynn:

I am making a request under the Virginia Freedom of Information Act (s2.2-3700, et seq.).

I would like copies of the following records:

> All records pertaining to my son, Andrew J. Mikel II, to include email correspondence, memorandum, letters, records, etc., generated between 23 December 2010 – Jan 7, 2011.

Pursuant to the Act, I request that within five working days you (a) provide me with all the records I request; (b) if the records are exempt from disclosure, identify which records are going to be withheld pursuant to which specific Code provision; or (c) if the records will be provided in part, identify which records are being withheld pursuant to which specific Code provision, and release the remaining, nonexempt records to me.

If it is not practically possible to provide the records within five working days, please notify me that you will need an additional seven working days, as provided in the Act.

As provided by FOIA, please provide an estimate of the costs of meeting my request before undertaking the task. Also, an acknowledgement of receipt of this request would be appreciated.

If you have questions concerning my request, please contact me at 540-548-2335 so that we can work something out.

Please be advices that I am prepared to pursue whatever legal remedy necessary to obtain access to the requested records. I would note that willful violation of the open records law can result in a fine of up to $2,500, for which you can be held personally liable. Court costs and reasonable attorney fees may also be awarded.

I look forward to your response.

Sincerely,

Andrew J. Mikel.

P. 89

John Lynn – FOIA Request #2

From: John Lynn

To: Mikel, Andrew

Date: 1/7/2011 3:37 PM

Subject: Re: FOIA Request #2

Mr. Mikel,

I have received your FOIA Request #2.

Sincerely,

John Lynn

John K. Lynn

Coordinator of School Safety

Spotsylvania County School

8020 River Stone Drive

Fredericksburg, VA 22407

1-540-834-2500, Ext. 1119