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JOHN W. WHITEHEAD
Founder and President

February 17, 2022

By Electronic Mail

Fairfax County School Board
8115 Gatehouse Rd, Suite 5400
Falls Church, VA 22042

Re: FCPS Social Media Monitoring Program

Dear School Board Members:

As an organization that has helped public schools strike a sound balance between the need for security and the constitutional rights of students, community members and teachers, The Rutherford Institute¹ is particularly concerned about a plan by Fairfax County Public Schools (“FCPS”) to monitor social media threats, harassment, hate speech and bullying² and its potential for chilling lawful First Amendment activity and usurping parents’ rights by monitoring and disciplining students for social media activity that takes place away from school.

While FCPS’ intent to “detect [and] help deter any negative actions or consequences coming from social media which may be directed to racial groups or any student or teacher” appears commendable at first glance,³ a closer review of the proposed Social Media Monitoring Program is problematic on multiple fronts, not the least of which is the message it would send students that they have no rights: to privacy, free speech, or the freedom to explore different ideas and think for themselves. Indeed, this program is tantamount to an Orwellian precrime program complete with thought police.

Moreover, by reportedly subjecting students, parents, and other community members to constant surveillance, “visually identify[ing] relationships and connections between persons,” “set[ting] alerts for active listening,” “automatically classify[ing] aliases, usernames, emails [and] websites,” and retaining saved data,⁴ the Social Media Monitoring Program lays the groundwork for a broad range of constitutional violations that could expose FCPS to legal jeopardy.

¹ The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals’ constitutional rights and educate the public about threats to their freedoms.

² https://www.fairfaxtimes.com/articles/fairfax_county/fcps-spends-tax-dollars-on-pr-firm-proposes-social-media-surveillance/article_b56fad90-8aab-11ec-94a3-fb373c5ddd15.html

³ Id.

⁴ FCPS Informal Request for Proposal 3100000481, Special Provisions 7.

Social media comments are protected by the First Amendment.

The courts have consistently made clear that online social media comments are protected by the First Amendment. In *Liverman v. City of Petersburg*, the Fourth Circuit Court of Appeals held that a police department's social networking policy, which prohibited employees from making negative comments online about the department and staff, was unconstitutional and that disciplinary measures taken pursuant to that policy against officers who expressed criticism on social media about department practices were impermissible and not protected by qualified immunity.⁵

More to the point, the U.S. Supreme Court ruled 8-1 last year in *Mahanoy Area Sch. Dist. v. B.L.* that a public high school's disciplinary action against a 14-year-old cheerleader for expressing adolescent angst on social media about not making the varsity cheer squad or getting her preferred softball position violated the student's First Amendment rights.⁶ As Justice Breyer explained in the Supreme Court's decision: "For the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."⁷

School surveillance of off-campus social media activity undermines parents' rights.

Although the Supreme Court's ruling in *Mahanoy Area Sch. Dist. v. B.L.* left open the possibility that schools might be able to discipline some off-campus student speech, such as bullying and threats, it warned that schools have a diminished leeway to restrict the rights of students when they are not on school grounds and not under the supervision or control of school officials.⁸

Recognizing that fundamental rights of free expression and parental authority would be threatened if schools were given a green light to monitor and punish student speech that takes place when students are not under the authority and control of the school, the Supreme Court ruled that off-campus speech falls within the zone of parental, rather than school-related, responsibility.⁹ As such, parents have a right to determine how best to monitor, regulate and discipline their children for social media activity that takes place away from school. Public school monitoring and punishment of students' social media activity off-campus also extends government surveillance to an intolerable level.

Surveillance for critical comments on social media could lead to viewpoint discrimination and a troubling expansion of zero tolerance policies.

⁵ *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016).

⁶ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

⁷ *Id.* at 2048 (quoting *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 509 (1969)).

⁸ *Id.* at 2046.

⁹ *Id.*

By monitoring and collecting social media activity, identifying connections between persons, retaining that data for high-level summary reports, and creating special categories of “watched” people (those whose expressive activities online could potentially be interpreted as negative or unacceptable by school officials) versus those whose expressive activities online are interpreted as acceptable by school officials, FCPS’ Social Media Monitoring Program could give rise to viewpoint discrimination in violation of the First Amendment.¹⁰

Moreover, there is the possibility that such a program could be used as a pretext to document and deter those who simply express criticism of FCPS. At a minimum, the nature of the Program would create an incredibly broad surveillance dragnet, which is far from the least restrictive means of protecting the school community.

Zero tolerance policies, which were intended to make schools safer by discouraging the use of actual drugs and weapons by students, have been regularly misinterpreted and misapplied, turning students into suspects while criminalizing childish behavior. Thus, there is ample reason to be concerned that this Social Media Monitoring Program could give rise to similar one-size-fits-all zero tolerance policies regarding expressive activity that is construed as negative, critical or hateful.

Constant surveillance of lawful speech may exceed the scope of the Board’s statutory authority.

Seeking to prevent potential threats by constantly surveilling lawful speech might also exceed the scope of the Board’s statutory authority. While it might be understandable in certain situations to review social media posts of a particular individual *after* a valid report concerning an actual threat is made, it is not justifiable to broadly monitor the online speech and activity of everyone discussing FCPS actions and policies.

As the Fourth Circuit noted in *Liverman v. City of Petersburg*, while the police department sought to avoid divisiveness, “the *speculative ills* targeted by the social networking policy are not sufficient to justify such sweeping restrictions on officers’ freedom to debate matters of public concern.”¹¹ Similarly, the sweeping scope of the FCPS Monitoring Program and the chilling effect it could have on free speech to prevent speculative ills is concerning.

Precrime, thought crimes and thought police programs are antithetical to the First Amendment.

With its threat of constant surveillance and the stated goal of detecting and deterring negative actions arising from expressive activity online, the FCPS Monitoring Program is a precrime program straight out of the realm of dystopian science fiction. Precrime aims to prevent crimes (or as it relates to the FCPS program, disapproved behavior) before they happen by combining widespread surveillance, behavior prediction technologies, data mining, precognitive

¹⁰ See *Davison v. Loudoun Cnty. Bd. of Supervisors*, 227 F.Supp.3d 605, 614 (E.D. Va. 2017).

¹¹ *Liverman*, 844 F.3d at 408-09 (emphasis added).

technology, and neighborhood and family snitch programs to enable police (in this case, school officials who may potentially be working with the police) to capture would-be criminals or rule-breakers before they can do any damage. The intent, of course, is for school officials to be all-seeing, all-knowing and all-powerful in their preemptive efforts to combat social media threats, harassment, hate speech and bullying.

Where such an endeavor runs into trouble is when those overseeing this kind of pre-crime program get overzealous and overreach, targeting students for engaging in lawful behavior that triggers the school's precrime sensors. In such an environment, students learn to self-censor, critical thinking dissipates, and the schools become breeding grounds for compliant citizens, rather than raising up a generation of individuals with a robust respect for the First Amendment and a dynamic understanding of what freedom and tolerance truly mean.

Public schools are the nurseries of democracy.

As Justice Breyer recognized in the Supreme Court's ruling in *Mahanoy*, "America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.' . . . That protection must include the protection of unpopular ideas."¹²

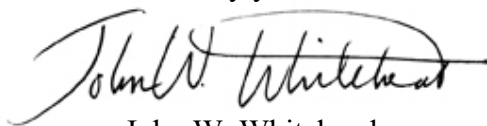
As a public body entrusted with the care and education of America's young citizens, FCPS has a constitutional duty to run the schools like freedom forums and teach by example what it means to have a government that operates with justice, fairness, accountability and equality.

Thus, for the many reasons outlined herein, it is our hope that the Fairfax County School Board will reconsider this ill-advised plan to adopt a Social Media Monitoring Program.

Should you need any guidance in how to better balance the need for school safety while respecting the rights of students and parents, please do not hesitate to call upon us.

The Rutherford Institute would be happy to assist and advise.

Sincerely yours,

A handwritten signature in black ink, reading "John W. Whitehead". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John W. Whitehead
President

¹² *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046.