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September 17, 2020

Via Email (info@wsd3.org)

Scott Campbell, Superintendent
Widefield School District 3
1820 Main Street
Colorado Springs, CO 80911

Re: Middle school student suspended for toy gun at home

Dear Mr. Campbell:

As the nation struggles to safely navigate the COVID-19 pandemic, leaving schools to vacillate between holding classes online, in-person or a hybrid of the two, families are being forced to contend with how best to meet their children’s educational needs while balancing health, safety and privacy concerns. While COVID-19 has undoubtedly introduced significant challenges for the schools, the protocols adopted for navigating these circumstances demand a heightened degree of caution lest government officials heedlessly, needlessly and unlawfully violate key constitutional safeguards established to protect against an invasive and warrantless intrusion into the home by government officials.¹

Because remote learning technologies allow school officials unprecedented and unwarranted visual and auditory access to private homes, The Rutherford Institute² is committed to ensuring that remote learning (by way of online or virtual classes) not be used as a backdoor means of allowing government officials to conduct warrantless surveillance into students’ homes and home environments in violation of the Fourth Amendment to the U.S. Constitution. Nor should remote learning justify the expansion of draconian zero tolerance policies to encompass so-called “violations” that take place in students’ homes and home environments.

Unfortunately, that is exactly what happened to Isaiah Elliott.

A seventh grader at Grand Mountain School, 11-year-old Isaiah was reported to police by school officials for playing with a toy gun in the privacy of his own home during a virtual class.

¹ *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

² The Rutherford Institute is a non-profit civil liberties organization that assists schools and community members in their efforts to balance safety concerns with the constitutional rights of families and students. The Institute also provides legal representation to individuals whose civil rights are threatened or infringed and educates the public about threats to its freedoms.

The protocol followed by Widefield School District 3 (WSD 3) school officials should serve as a cautionary tale for the rest of the nation's public schools on what not to do when similar circumstances arise as they undoubtedly will: overreact, overstep and overreach. Not only was Isaiah suspended for five days for bringing a "facsimile of a firearm to school," but he was also traumatized when a police officer showed up at his home to interrogate him.³

As a national legal organization that works to ensure that students are afforded full constitutional protections under state and federal laws without compromising efforts to keep the schools safe from gun violence, The Rutherford Institute has followed, weighed in on, and litigated numerous cases involving similarly harsh school disciplinary policies that eschew careful reasoning in favor of rash decision-making that results in victimizing and/or injuring students.

We can vouch for the fact that the serious interest administrators and educators have in making schools safe for children is in no way furthered by the draconian response taken in this particular case. Indeed, such a blatant overreaction by school administrators undermines the public's confidence in the ability of school officials to act judiciously, while balancing safety concerns with an understanding of the rights of those involved.

Background

According to numerous media reports and the police report of the incident, on the morning of August 27, Isaiah Elliott and a schoolmate were taking a Grand Mountain School art class remotely while in Isaiah's bedroom in his home. Because of the current COVID-19 pandemic, Grand Mountain and other WSD 3 schools were then and are currently fully "virtual" with all students in grades 6 through 12 receiving instruction at home. During the course of the class, the teacher saw one of the boys handle a toy pistol that was present in Isaiah's bedroom. The toy pistol has a lime green barrel with an orange tip with "Zombie Hunter" written on the side of the barrel. The art teacher emailed an assistant principal to report that Isaiah was "waving around a toy gun" during the online class.⁴

Before calling Isaiah's parents, school administrators contacted the El Paso County Sheriff's office, and a deputy was dispatched to the school to investigate. The deputy reviewed a video of the art class (which was recorded without the knowledge or consent of students or their parents) and saw the boys playing with the toy pistol. The art teacher had also emailed Isaiah's mother, Dani Elliott, to inform her that the principal had been notified about the incident,

³ Jaclyn Peiser, "A Black seventh-grader played with a toy gun during a virtual class. His school called the police.," *The Washington Post* (Sept. 8, 2020), <https://www.washingtonpost.com/nation/2020/09/08/black-student-suspended-police-toy-gun/#comments-wrapper>.

⁴ <https://drive.google.com/file/d/1s3KGXZAqYBGtbgkMuwB-x-C9rW1mbPTn/view>.

namely, that Isaiah was distracted during art class by a toy gun. Mrs. Elliott informed the teacher that she would instruct Isaiah to remove the toy during class time.⁵

Soon thereafter, Mrs. Elliott received a call from the assistant principal informing her that the matter had been referred to the police, who would follow up with a visit to the Elliott residence. Mrs. Elliott was understandably upset that the school had involved the police, especially in light of the growing number of incidents involving the use of excessive force by police against young black men.⁶

When the police officer arrived at the Elliott home, he confronted Isaiah, warning him that it was a serious matter that could potentially lead to criminal charges in the future.⁷ The officer reiterated to Isaiah's father, Curtis Elliott, that if this happened again, it could lead to criminal charges for interference with staff, faculty or students of an educational institution. According to Mrs. Elliott, Isaiah was traumatized by the police visit, crying and afraid that he would be taken to jail.⁸

The Incident Did Not Warrant Police Intervention

In light of the clear indications that what teachers and administrators saw during the virtual class was a toy and not a dangerous firearm, a fact corroborated by Mrs. Elliott, it was wholly unnecessary for school officials to refer the matter to police. A better, wiser and safer course of action would have been for school officials to advise Isaiah's parents of the situation so that they could remove the distracting toy from his room.

Moreover, despite the deputy's warnings that what occurred could lead to criminal charges, this simply was not a law enforcement matter. The offense cited by the officer, i.e., interference with staff, faculty or students of an educational institution, requires conduct on or near an educational institution or some "credible threat" to a person associated with an educational institution.⁹ Nothing Isaiah did even remotely approached the kind of misconduct that is criminal under the interference with educational institutions statute. However, school administrators treated his inattentiveness and childish play as a criminal matter.

⁵ Jaclyn Peiser, "A Black seventh-grader played with a toy gun during a virtual class. His school called the police.," *The Washington Post* (Sept. 8, 2020), <https://www.washingtonpost.com/nation/2020/09/08/black-student-suspended-police-toy-gun/#comments-wrapper>.

⁶ For instance, 12-year-old Tamir Rice was gunned down by a police officer who saw the youngster playing with a BB gun. *As reported by: Elahe Izadi and Peter Holley, "Video shows Cleveland officer shooting 12-year-old Tamir Rice within seconds," The Washington Post* (Nov. 26, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/>.

⁷ <https://drive.google.com/file/d/1s3KGXZAqYBGTbgkMuwB-x-C9rW1mbPTn/view>.

⁸ Jaclyn Peiser, "A Black seventh-grader played with a toy gun during a virtual class. His school called the police.," *The Washington Post* (Sept. 8, 2020), <https://www.washingtonpost.com/nation/2020/09/08/black-student-suspended-police-toy-gun/#comments-wrapper>.

⁹ Colo. Rev. Stat. § 18-8-10.

The School Violated the Fourth Amendment

Although this was not a criminal matter, school officials escalated it into one by using virtual learning technology to conduct unconstitutional surveillance within the Elliott home. While meant as a limited measure to allow children to learn during the pandemic, remote learning platforms are allowing school officials to conduct surveillance into the homes of students and obtain information to turn over to law enforcement agencies.

The core and essential protection of the Fourth Amendment to the U.S. Constitution is the right of persons to be free from unreasonable government intrusion into their homes.¹⁰ Yet homes throughout WSD 3 and the nation have been made vulnerable to government search and surveillance as a result of virtual learning technologies. More families will face unwelcome police visits such as the Elliott family experienced, if not worse, if school officials are allowed to use the virtual classroom setting as a platform to pry and conduct surveillance on private residences.

This rampant violation of the constitutional rights of families cannot be justified as the result of students and parents willingly allowing school officials in their homes. Families have been compelled to allow virtual classroom learning by the decisions of school officials and have not voluntarily consented to surveillance of their homes in the course of that learning.

The government should not be leveraging the current public health situation to further erode the privacy of American citizens. At a minimum, schools must not use virtual learning platforms to conduct unwarranted surveillance of students' homes nor use observations made from within the home as a basis for alleging a crime has been or is being committed.

The Discipline Imposed Was Unwarranted

Not only were Isaiah's actions *not* criminal, but they should also not have resulted in the disciplinary action taken by the school. The District policy regarding weapons in schools prohibits using or displaying a firearm facsimile that could reasonably be mistaken for an actual firearm on district property, in school vehicles or during a school-sponsored or district-sponsored activity. While the policy also states that it applies off school property, the conduct must have a reasonable connection to school or any district curricular or noncurricular event."¹¹

Clearly, Isaiah did not possess the toy gun on school property, and the idea that what is present in his home during a remote class has a sufficient connection to the school to allow the imposition of discipline is wholly unreasonable. It is well-established that the schoolyard is not without boundaries and that the reach of school authorities is not without limits; school officials

¹⁰ *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

¹¹ Widefield School District 3, Policy JICI.

may not reach into a child's home and control the child's actions to the same extent that it can while a child is on school grounds or at a school-sponsored event.¹²

This limit on school authority has not been annulled by the current pandemic-related remote learning protocols. If schools require students to attend class remotely, they cannot simultaneously assume authority over the home and what is present in the home. That would be a gross arrogation of authority, a violation of families' rights to privacy, and an improper intrusion upon parents' rights to control the upbringing of their children.

Because the school's rules on possession of facsimile weapons cannot be extended into the homes of students and their families, Isaiah should not have been cited or suspended for violating that rule. If that suspension is allowed to remain on his record, there is little doubt it will prejudice his academic future.

Unfortunately, this draconian overreaction from school officials within the virtual educational forum is far from isolated, as shown by incidents from around the country:

- Police descended on the home of an 11-year-old Maryland boy after a school official saw a BB gun on the boy's bedroom wall during a Google Meet class and reported this to a school resource officer;¹³
- A sixth grader in Edgewater, N.J., was suspended and reported to police after playing with a toy Nerf gun on video during his virtual learning class;¹⁴
- Another sixth grader in Golden, Colorado, who fidgeted with his Airsoft gun during a Zoom school session was suspended for four days and had police dispatched to his home. The teacher reportedly didn't notice the boy playing with the gun until hours later when she was reviewing the recorded session.¹⁵

These incidents are indicative of a nationwide phenomenon in which students are treated like criminals by public schools. It used to be that if you talked back to a teacher, or played a prank on a classmate, or just failed to do your homework, you might find yourself in detention or doing an extra writing assignment after school. Nowadays, students are not only punished for transgressions more minor than those—such as playing cops and robbers on the playground, bringing LEGOs to school, or having a food fight—but they are punished with suspension, expulsion, and even arrest.

¹² *Layshock v. Hermitage School District*, 650 F.3d 205, 216 (3d Cir. 2011).

¹³ Chris Papst, "'I FELT VIOLATED'|Police Search Baltimore County House Over BB Gun in Virtual Class," *FOX Baltimore* (Jun. 10, 2020), <https://foxbaltimore.com/news/project-baltimore/police-search-baltimore-county-house-over-bb-gun-in-virtual-class>.

¹⁴ Kristie Cattafi, "Edgewater school called police after sixth-grader had Nerf gun during Zoom class," *North Jersey* (Sept. 11, 2020), <https://www.northjersey.com/story/news/bergen/edgewater/2020/09/11/edgewater-nj-police-called-after-student-had-nerf-gun-during-zoom-class/3468499001/>.

¹⁵ Lori Jane Gliha, "Jefferson County 11-year-old suspended for handling an Airsoft gun during online school," *FOX 31* (Sept. 3, 2020), <https://kdvr.com/news/problem-solvers/jefferson-county-11-year-old-suspended-for-handling-an-airsoft-gun-during-online-school/>.

When school officials react in an overly-punitive manner, the school becomes an oppressive environment for children that is not conducive to learning or to fostering healthy self-esteem. Strict application of school conduct policies and meting out severe punishment has been found to result in higher rates of repeat offenders and dropout rates without making schools safer.¹⁶ Indeed, a 2014 U.S. Department of Education report found that subjecting a student to overly harsh discipline counteracts the goals of American schools in educating young people and actually may harm the child for the rest of their life.¹⁷

Extreme application of strict discipline policies contributes to a “school-to-prison pipeline,” where the criminalization of children pushes them out of schools and into situations that lead to more arrests and involvement in the criminal justice system.¹⁸ When school policies purportedly intended to make schools safer are administered in an unreasonable and arbitrary manner, they actually result in the inhumane treatment of students.

This unequal application of discipline undermines student respect for school administrators and the rules they enforce, and must be something schools fight against and not promote.¹⁹ The more often these policies are used to criminalize what everyone would consider childish behavior, the less the school becomes a place of education. Students instead see schools as police states or prisons and view teachers and administrators as police and guards walking the halls. Additionally, it has been found that school resource officers assigned to schools with the intent of increasing safety, often lack sufficient training. This leads to more arrests for innocent acts on school campuses, even for such minor offenses as dress code violations or pointing a “finger gun.”²⁰

This Overreach and Overreaction Must Be Rectified

The school’s decision to suspend Isaiah Elliott is particularly draconian: he was harshly penalized for entirely harmless activity that occurred within his own home and that had no effect whatsoever on his school. It is inconceivable that administrators could conclude that the

¹⁶ Stephanie Francis Ward, “Schools start to rethink zero tolerance policies,” ABA Journal (Aug. 2014), http://www.abajournal.com/magazine/article/schools_start_to_rethink_zero_tolerance_policies?icn=most_read.

¹⁷ : U.S. Department of Education, Guiding Principles: A Resource Guide for Improving School Climate and Discipline, Washington, D.C., 2014.

¹⁸ Mary Ellen Flannery, “The School-to-Prison Pipeline: Time to Shut It Down,” NEA Today (NEA Today, January 5, 2015), <http://neatoday.org/2015/01/05/school-prison-pipeline-time-shut/>.

¹⁹ Allie Bidwell, “Report: Schools Should Reduce Use of ‘Zero Tolerance’ Discipline Policies,” U.S. News & World Report (U.S. News & World Report, June 3, 2014), <https://www.usnews.com/news/articles/2014/06/03/report-schools-should-reduce-use-of-zero-tolerance-discipline-policies>.

²⁰ Susan Ferriss, “Controversy over Cops in Schools Flares Anew,” Center for Public Integrity (Center for Public Integrity, May 19, 2014), <https://publicintegrity.org/education/controversy-over-cops-in-schools-flares-anew/>. A police officer noting that the unclear guidelines and training for these school police officers, leads to their involvement even in minor incidents and the less involvement actually drives incidents in a school down.

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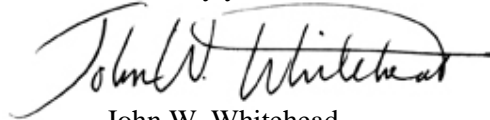
momentary presence of an obvious toy gun during a virtual class violates school rules meant to prevent the presence of dangerous weapons on school property or at school events.

Unfortunately, Isaiah must deal with the trauma and stigma associated with having a weapons charge on his permanent record, a charge that will follow him throughout his school years and possibly the rest of his life. Thus, as a result of school officials overreacting to nonviolent, childish behavior, this young man's educational and career opportunities could be jeopardized.

We urge you and others within the school district and community to work to mitigate the harm already done to this student by the mishandling of a small incident. At a minimum, this would include expunging Isaiah's record to remove any indication of the suspension or the basis for that suspension.

It is our hope that you would avail yourself of The Rutherford Institute's offer to advise Widefield School District 3 in how best to adopt policies and practices ensuring that student disciplinary matters are handled in a more appropriate, constructive manner going forward.

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