

THE RUTHERFORD INSTITUTE

Post Office Box 7482
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD
Founder and President

TELEPHONE 434 / 978 - 3888
FACSIMILE 434/ 978 - 1789
www.rutherford.org

February 21, 2011

Dr. Jack D. Dale, Superintendent
Fairfax County Public Schools
8115 Gatehouse Road
Falls Church, Virginia 22042

Re: Nick Stuban and Fairfax County Public Schools Disciplinary Process

Dear Dr. Dale:

As president of The Rutherford Institute,¹ I am writing to you on behalf of Steve and Sandy Stuban, the parents of Nicholas L. "Nick" Stuban, a sophomore at Woodson High School who took his life on January 20, 2011.

Nick's tragic death, which followed in the wake of his being subjected to disciplinary action by Fairfax County Public School (FCPS) officials, has raised concerns about the disciplinary process and procedures used by school officials nationwide, and at FCPS in particular.² Many are concerned that the process subjects students and their families to inhumane, impersonal and overly harsh administrative hearings where the Fourteenth Amendment requirements of due process are neglected. The punitive tone of these proceedings appears to result in the meting out of draconian punishments with little consideration of their long-term impact or rehabilitative potential.³

I would ask you to carefully consider whether FCPS's zero tolerance response to certain student behaviors is conducive to a healthy and supportive educational environment. From an objective standpoint, this rigid approach to student indiscretions contradicts FCPS's own mission.

¹ The Rutherford Institute is a civil liberties organization that provides free legal representation to those whose civil rights are threatened or infringed. The Institute has long been an advocate for parents.

² Even Martina A. Hone, a member of the FCPS school board, admits that FCPS is "too punitive in the tone of our disciplinary process." As quoted in "Student death stirs up Fairfax," *The Washington Post*, January 23, 2011 (available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012203873.html>).

³ Some concerned individuals have actually started a website to serve as a clearinghouse and report on the problems in the FCPS disciplinary system. See www.FairfaxZeroToleranceReform.org.

statement,⁴ which includes a commitment to nurturing its students, providing them with an educational experience best suited to their individual needs, and helping young adults prepare for the emotional and intellectual challenges awaiting them as adults.

Descriptions of the hearing process (e.g., “They treat you like a criminal. I remember my situation. It was so degrading”⁵ and “The way these hearings are run, it’s not a nurturing environment where they lecture the kids.... They treat them like the Una-bomber”⁶) paint an unflattering picture of the manner in which our nation’s schools (and FCPS in particular) mete out justice (or more accurately, fail to mete out justice). This picture reveals that schools are failing to teach students by example about the principles of due process and simple fairness—principles that are the hallmarks of a just government.

Learning from Nick’s Case

The recent tragic death of Nick Stuban should prompt your administration to engage in a careful review of its disciplinary policies and procedures.

On November 4, 2010, Nick was suspended for ten days with a recommendation for expulsion after allegedly committing a first-time infraction. After being subjected to what his parents characterized as an “unconscionable” hearing by FCPS officials on November 16, 2010, Nick, a member of the junior varsity football team, was given a disciplinary transfer to Fairfax High School with an effective start date of January 3, 2011. Less than three weeks later, Nick committed suicide.

Nick is, unfortunately, not the only Fairfax County student to resort to the desperate act of suicide after being subjected to FCPS’s brand of discipline. Josh Anderson, a junior at South Lakes High in Reston, killed himself right before his own disciplinary hearing, one that was likely to result in an expulsion from the Fairfax County school system.⁷ According to the *Washington Post*, Josh’s parents “were told that Josh would be barred from any regular Fairfax high school and might be tossed out of the system entirely.”⁸ Faced with such a prospect, Josh’s suicide note, containing one stark question—“Why does it have to be like this?”⁹—speaks volumes about his state of mind in regards to the school disciplinary process.

⁴ FCPS Beliefs, Vision, Mission (available at <http://www.fcps.edu/schlbld/sg/bmv.htm#>).

⁵ Dante Verme, as quoted in “Student death stirs up Fairfax,” *The Washington Post* (January 23, 2011). Available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012203873.html>).

⁶ Janet Otersen, a Fairfax parent and activist, as quoted in “Student death stirs up Fairfax,” *The Washington Post* (January 23, 2011). Available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012203873.html>).

⁷ “Unbending Rules on Drugs in Schools Drive One Teen to the Breaking Point,” *The Washington Post* April 5, 2009 (available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/04/AR2009040402596.html>).

⁸ *Ibid.*

⁹ *Ibid.*

While school officials contend that FCPS's disciplinary policies are appropriate and in line with state law,¹⁰ they have clearly failed to take into account the far-reaching impact on the students themselves and their families—a fact driven home most painfully with the deaths of Nick Stuban and Josh Anderson. As reporter Marc Fisher observed, “Zero-tolerance rules make life easier for bureaucrats and lawyers, but they make no sense in the jumbled world of teenagers. Some kids are poisonous to their peers and need to be removed for the good of all. Others need an individualized blend of punishment, counseling and connection with the people who know them best—in some cases, at their own school.”¹¹

Unfortunately, the hearing officers and school officials gave little consideration to the Stuban family's unique circumstances—e.g., Sandy Stuban's many years of being afflicted with ALS—visually evident by her presence at the hearing and described by Nick in a statement he read during the hearing itself. Nick had attended Fairfax County neighborhood schools since kindergarten, and his extra-curricular activities and his daily support structure were almost exclusively tied to the school community from which he was suddenly banned until the age of 22. For Nick, being an only child, the FCPS community was in essence his extended family.

It is well accepted that school officials act *in loco parentis*—like a guardian in the parents' absence. It is also a given that when school children are in the functional custody of teachers and administrators, certain duties apply to the actions of these professionals. The usual standard is that school officials must employ reasonable measures in guiding and disciplining students—i.e., the standard of what an average and prudent parent would have done in the same or a similar circumstance. Unfortunately, in Nick's situation, school administrators arguably did not act fairly and reasonably.

Moreover, in student discipline cases where school officials recommend long-term suspensions or expulsions, students are entitled to full procedural and substantive protections under the Due Process Clause of the Fourteenth Amendment. Thus, a student who is accused of an infraction that may result in removal from school is entitled to an impartial hearing and a fair, unbiased judgment. The minimum protections for cases involving expulsions or long term suspensions that exceed ten days are: notice of charges, a right to legal counsel, a right to confrontation and cross-examination of witnesses, a privilege against self-incrimination, a right to a written transcript of the proceedings, and a right to appellate review.

In Nick's case, many of these protections appear to have been discouraged or not provided, in whole or in part. According to Nick's parents, he was disciplined for allegedly *possessing* a substance with which school officials initially were unfamiliar and then arbitrarily

¹⁰ Donna St. George, “Student death stirs up Fairfax,” *The Washington Post* (January 23, 2011). Available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012203873.html>.

¹¹ *Ibid.*

categorized as an “other drug.” Upon investigation, however, it was determined that the substance in question was neither illegal nor among the list of offenses requiring expulsion.¹² At the time of Nick’s alleged offense, the substance was also not prohibited under the controlling school rules. Nevertheless, rather than constructively working through their concerns with Nick and his family, school officials opted for a more stringent, punitive course of action, charging Nick instead with possession of an “imitation controlled substance.”

In their seeming rush to judgment, school officials appear to have violated a fundamental tenet of our legal system, that of due process of law, which requires the government to give adequate and comprehensible notice that a particular conduct is prohibited before persons are punished for said conduct.¹³ As case history makes clear, a person is deprived of the right to fair warning that his conduct will be subject to punishment when the rule itself is not clear or does not cover the conduct at issue and when government officials enforce the rule in an unforeseen manner.¹⁴ In Nick’s case, not only was the substance in question not prohibited under the school’s rules, but school officials themselves allegedly expressed confusion over it.

The Stubans’ right to have the assistance of legal counsel was also greatly impaired in the course of the disciplinary process. After a discussion with school officials, Steve Stuban was left with the impression that obtaining legal representation during the hearing process would be viewed as an adversarial action by the hearing officers that, in turn, would make them more adversarial. Clearly, the Stubans had a constitutional right to have professional legal assistance in connection with the obviously adversarial disciplinary process, and the discouragement of the Stubans’ exercise of this right is constitutionally problematic.¹⁵

Another defect brought to light by the Stubans’ case is the lack of a proper written record of disciplinary proceedings. Under Virginia law, students and parents have a right to a school hearing and ultimately have the courts review the bona fides of a school disciplinary action.¹⁶ However, we are informed that only informal notes of the proceedings were taken in Nick’s case, and even these notes abruptly ended once the hearing assumed a decidedly unprofessional tone. The lack of a proper written record precludes both meaningful substantive review of the hearing and the accountability to the public, which would otherwise serve as an important check on the system.

¹² The substance was the chemical JWH-018, which at the time of Nick’s possession was neither a controlled substance nor an item the possession of which was illegal under federal or state law. On November 24, 2010, the Drug Enforcement Administration issued a notice of a proposed order to include JWH-018 as a controlled substance. See 75 Fed. Reg. 71635-01 (Nov. 24, 2010). However, to date the proposed order has not been finally adopted by the DEA.

¹³ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010).

¹⁴ *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001).

¹⁵ See *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (“To punish a person because he has done what the law plainly allows him to do is a due process violation ‘of the most basic sort.’”).

¹⁶ Va. Code § 22.1-87.

Finally, the disciplinary system itself and delays in the appeal process discourage students and parents from exercising their legal right of review. Under the current system, the prospect of appealing a disciplinary sentence offers little more than a false hope to students and their families. A student's right to appellate review is essentially nullified when, as a consequence of filing an appeal, the student is kept in a suspended status, thereby forcing him or her into an educational limbo, unable to attend classes or transfer to a designated school. In Nick's case, he was forced to be absent from school for two full months, a scenario that most would be hard-pressed to defend as being "in the best interests of the child."

The Best Interests of the Student – A Common Sense Approach

In order to effectively manage student behavior and to provide a safe learning environment in public schools, it is imperative that school officials, teachers, parents and the community at large work cooperatively and collaboratively. Compassionate reform is needed not only in the manner in which the disciplinary process is handled, but in the ultimate results of the disciplinary process as well. Expulsion should be reserved only for the most egregious disciplinary infractions and for those cases where that punishment is mandated by Virginia law. Most importantly, sanctions should be tailored to the individual circumstances of each student and not imputed in an artificial, "one-size-fits-all" approach.

In general, the use of disciplinary transfers—removing students from the school where they may have significant support structures in place—should be reconsidered. This is, at best, a dubious method for seeking to correct student behavior. For an adolescent to be uprooted from a familiar social environment and placed in a new environment under stigmatizing circumstances is an extremely alienating and stressful experience. Furthermore, it is entirely unclear how the transfer of a student from one FCPS to another addresses the underlying problem of a student's conduct. According to one source, there apparently is no data supporting the efficacy of this "solution."¹⁷ Removing a student from his or her support structure, which has taken years to develop, at a time when the student and family are addressing a crisis, only adds to the stress and hinders the student's ability to get back on track. Moreover, as board member Martina A Hone points out, the transfers ignore the impact on students and families: "This comes out of the same era as corporal punishment. It was not to rehabilitate the child. It was to punish."¹⁸

In light of the foregoing considerations, I implore you to begin immediately to address the glaring deficiencies in FCPS's disciplinary policies and procedures. Specifically, I ask that you review said policies and procedures and amend them as necessary to ensure:

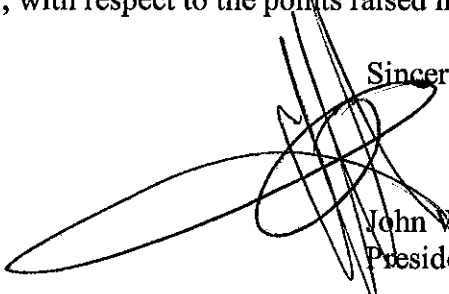
¹⁷ See n. 3, *supra* (citing Caroline Hemenway of FairfaxZeroToleranceReform.org).

¹⁸ As quoted in Donna St. George, "Suicide turns attention to Fairfax discipline procedures," *The Washington Post* (Feb. 20, 2011). Available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/19/AR2011021904528.html>.

- that policies make clear what constitutes an infraction and what does not;
- that parents are not implicitly or explicitly discouraged from obtaining legal counsel during the disciplinary process;
- that the tone of disciplinary hearings be compassionate and caring rather than punitive and demeaning;
- that all hearings are recorded to facilitate substantive review and public accountability;
- that a decision is made by the hearing officer(s) within the first ten-days of suspension;
- that the School Board be required to decide appeals within a set expeditious deadline;
- that remedies be proportionate to the nature of the alleged infractions;
- that disciplinary measures take into consideration the long-term best interests of the individual student and the potential for rehabilitation;
- that students not be subjected to punitive disciplinary transfers, particularly in non-violent, non-criminal cases such as Nick's, where students have developed significant support structures within the school community; and
- that students who are subjected to disciplinary transfers are provided with suitable emotional support / counseling that is coordinated with and draws upon the other support services that the County already has established.

In recognition of the gravity of the concerns raised herein and in an effort to circumvent another tragic and premature loss of life, I ask that you respond to me in writing, not later than Monday, March 7, 2011, with respect to the points raised in this letter.

Sincerely yours,



John W. Whitehead
President

cc: Fairfax County Board of Supervisors (FCBS)
Fairfax County Public Schools (FCPS) School Board
Mr. Jeff Yost, Principal, Woodson High School
Mr. Thomas Maher, Assistant Principal, Woodson High School