

THE RUTHERFORD INSTITUTE

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March 11, 2011

Via E-mail and Facsimile

Dr. Jean Infantino, Principal
Hickory Middle School
1997 Hawk Blvd
Chesapeake, VA 23322

Re: *Suspension of Adam Grass*

Dear Dr. Infantino:

As president of The Rutherford Institute,¹ I am gravely concerned over your administration's questionable suspension of Adam Grass, a seventh grade honors student at Hickory Middle School, over allegations that he was in possession of the Italian herb, oregano. Specifically, Adam has been accused of being in possession of and having the intent to distribute oregano, which the school has classified as "an imitation controlled substance." It is our understanding that Adam, a contender for the National Junior Honors Society, has also been recommended for expulsion over this matter.

As an organization that routinely intervenes to assist families whose children have been unwitting victims of school zero tolerance policies gone awry, it is our belief that school officials have grossly overreacted to a situation in which Adam Grass was little more than an innocent bystander to a schoolboy prank—one lacking any intent whatsoever to deceive or act in a criminal manner.

Moreover, upon further examination of the facts, it appears that the school may not only be misapplying state law in this matter, but that you are also at risk of violating Adam's constitutional rights. Having been contacted by Adam's mother, Rachel Grass, and asked to intervene on his behalf, we therefore request that the suspension be lifted immediately and the recommendation for expulsion denied.

The facts of the situation are undisputed. According to Mrs. Grass, one of Adam's classmates brought a bag containing oregano to school and displayed it to fellow students during

¹ The Rutherford Institute is a civil liberties organization that provides free legal representation to those whose civil rights are threatened or infringed.

their lunch period, saying, "Haha, it looks like pot." Adam immediately backed away. However, another student took possession of the oregano. Encountering Adam in the bathroom later, that student asked him to return the oregano to the classmate who had brought it to school in the first place. Adam initially agreed, only belatedly realizing that the owner was not in his next class. Adam then gave the oregano to someone who did have class with the owner.

At no time, did Adam treat the so-called "substance" as anything other than the Italian herb, oregano. Moreover, when school officials intervened and questioned Adam about the matter, he related exactly what happened, which was corroborated by the other students interviewed by administrators and school officers. Nevertheless, despite the fact that Adam was an unwitting accomplice to this schoolboy prank, he was shown "zero tolerance" by school officials.

While the school's actions constitute a travesty of justice on several fronts, the punishment being applied here—suspension and possible expulsion for possessing an imitation controlled substance with the intent to distribute it—is unwarranted for the following reasons:

First, the oregano does not meet the statutory definition of "imitation controlled substance" as set forth in VA. CODE ANN. § 18.2-247 and adopted by the Chesapeake School Board in Article XIII of its "Expectation of Conduct and Sanctions for Violation." Pursuant to that definition, in order for oregano to be considered an "imitation controlled substance" (with marijuana being the substance allegedly imitated), authorities must be able to demonstrate that marijuana was introduced into commerce *before* the introduction of oregano into commerce.² The intent of the Virginia legislature was to outlaw substances that were actually created for the very purpose of imitating controlled substances. For instance, one Virginia court explained that, "By its nature, an imitated controlled substance has little or no use other than its commercial value in being misrepresented and sold as a controlled substance."³ Oregano simply does not meet this definition, particularly under these circumstances.

Second, Adam did not possess the requisite intent to "give, sell, or distribute" an imitation controlled substance within the meaning of Article XII. Rather, Adam's intent was to give a substance known to be oregano back to its owner. At all times, Adam and his fellow students knew that the so-called "substance" was actually oregano, and at no time did Adam intend for any other person to believe that it was marijuana or make representations to others calculated to create such a belief. Under these circumstances, disciplining Adam for giving the bag of oregano to a fellow student who also knew it was oregano is akin to disciplining a student for passing a packet of sugar to another student at lunchtime simply because someone else happened to mention that the sugar resembled cocaine.

² See *Drain v. State of Florida*, 601 So.2d 256 (Ct of App. 5th Dist. 1992)(holding that Defendant could not be prosecuted for possession of imitation controlled substance because identical language of Florida law required information alleging dates when wax (actual substance) and cocaine (substance wax alleged to be imitating) were introduced into commerce).

³ *Werres v. Commonwealth*, 19 Va. App. 744 (Cir. Ct. Alexandria 1995).

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Courts reviewing prosecutions for possession of imitation controlled substances have made it clear that the person possessing the substance *must possess some intent to deceive others as to the substance's nature*. For instance, a Florida court reviewing a prosecution under the identical definition as Virginia's explained, "[T]he information should clearly allege the defendant's intent to deceive and to cause the imitation substance to be mistaken for some specified controlled substance."⁴ Under these standards, Adam cannot be said to have possessed or to have possessed with intent to distribute an imitation controlled substance.

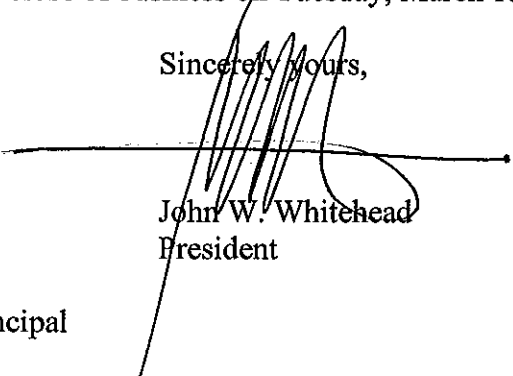
Beyond that, however, surely it is apparent to you that the standards applied to assess the behavior of a 7th grade boy should err toward greater leniency than those applied to adult defendants in the criminal justice system. What is abundantly clear is that Adam had no intent to violate school policy. His intent was merely to convey a harmless bag of oregano back to its rightful owner.

The Rutherford Institute is regularly contacted by concerned citizens who are alarmed by the blind application of "zero-tolerance" policies as a response to student behaviors that are unwise but present no real danger to the school community. We believe that suspension and 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. We hope that you will agree with this perspective and choose to respond with reason, proportionality, and compassion to what was—at worst—the understandable indiscretion of a child. Above all, we hope that you will base your decision on the long-term best interests of the affected students.

Based on these considerations, we hereby request a reversal of the decision to suspend Adam Grass, including, if necessary, a complete expungement of this incident from his academic record. In the event that you choose to sustain the suspension, we will pursue all legal means of appeal and legal redress.

We request your response by the close of business on Tuesday, March 15, 2011.

Sincerely yours,



John W. Whitehead
President

cc: Jill Lee, 8th Grade Assistant Principal
Mrs. Rachel Grass

⁴ *Drain, supra*, at 262.