

M E M O R A N D U M

TO: The School Board presiding over Lincoln High School
FROM: Attorney
DATE: February 22, 2019
SUBJECT: **Preventing School Violence vs. Respecting Constitutional Rights Incident Assessment**

I. Background & Purpose

This assessment report observes Attachment A “Jumping the Gun – Preventing School Violence” to examine how Lincoln High School handled the suspension of Jessie, a freshmen student. Jessie, featured in a video on several social media platforms, is seen shooting a firearm at a gun range. Parents, aware of the video, began calling Lincoln High School demanding effort that would keep their students safe. Lincoln High School administration viewed the video. Jessie’s locker was then searched while he was informed of his immediate suspension. Jack, Jessie’s older brother, an 11th grade student, is witnessed participating in the same activity on the video, because the two brothers go to the firing range on Saturdays to shoot with their father. Jack was not suspended. The school board is seeking legal counsel to probe whether Lincoln High School’s actions serve to prevent school violence and to determine the appropriateness of the suspension.

II. Review Summary

Under Section 10-233c of the Connecticut General Statutes, school administrators can suspend students only if the conduct: 1) violates publicized policy of the local or regional board of education; 2) seriously disrupts the educational process; or 3) endangers persons or property.¹ Had Jessie’s conduct occurred on school grounds, then the district would need to prove that any one of these conditions was met. Yet, Jessie is being suspended for an activity that occurred off-campus,

¹ Conn. Gen. Stat § 10-233c.

so a suspension is enforceable if it can be proven that Jessie’s misbehavior violates “publicized policy” and “seriously disrupts the educational process.”²

Many schools are incorporating social media tracking as intelligence for violence prevention.³ Yet, this is a gray area for discipline.⁴ “Privacy guardrails” must be established for students’ rights to be protected. The Department of Education’s Privacy Technical Assistance Center (PTAC) has been integral in helping schools navigate how this impacts The Family Educational Rights and Privacy Act of 1974 (FERPA) student privacy law. The Future of Privacy Forum has testified that PTAC should offer more guidance. Schools need to develop monitoring policies and to articulate guidelines about what constitutes a threat to health or safety.⁵ Parents are entitled to school expectations and conduct policies.⁶ The Connecticut General Assembly authorizes local or regional boards of education to detail these in school handbooks for transparency.⁷

Jessie is not being suspended for possessing a firearm in school which would be in violation of the school handbook and an expellable offense in accordance with Connecticut’s zero tolerance policies.⁸ Rather, state law allows the temporary transfer of handguns to people, like Jessie, under the age of 21 for target or shooting practice, as long as the minor is under the immediate supervision of someone eligible to possess handguns.⁹

² Conn. Gen. Stat § 10-233c(a).

³ Leibowitz, Aaron. “Could Monitoring Students on Social Media Stop the Next School Shooting?” *The New York Times*, The New York Times, 6 Sept. 2018. Accessed February 17, 2019, www.nytimes.com/2018/09/06/us/social-media-monitoring-school-shootings.html.

⁴ Mikelionis, Lukas. “Uproar after New Jersey High School Allegedly Suspends Students over Gun-Range Photo.” *Fox News*, FOX News Network, Accessed February 16, 2019, www.foxnews.com/us/uproar-after-new-jersey-high-school-allegedly-suspends-students-over-gun-range-photo.

⁵ Ferpa|Sherpa.” *Educator’s Guide to Student Privacy – Ferpa|Sherpa*, Accessed February 15, 2019, ferpasherpa.org/schoolsafety1/.

⁶ *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970).

⁷ Conn. Gen. Stat. § 10-233e.

⁸ Conn. Gen. Stat § 10-233d.

⁹ Conn. Gen. Stat § 29-34 (b).

Yet, even if district handbook language prohibits the use of weapon of any type for any reason or purpose on or off school grounds, the school board must prove a rational relationship contingent with its intended purpose in suspending Jessie. Otherwise, characterizing by student appearance and legal firearm activity, is unfair profiling that leads to “ideological mythmaking” and broad assumptions.¹⁰ To have searched Jessie’s locker with no basis or reasonable suspicion, violates Jessie’s Fourth Amendment Right.¹¹ Schools are unique environments. To search, schools need reasonable suspicion, “a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life.”¹² A student owning “Guns and Ammo magazines” is only being targeted for “predictive violence.”¹³ There is no rational way to defend that a minor’s exposure, to responsible firearm use, is a precursor to that of a minor’s participation in school violence. Concrete evidence must serve to not “cast suspicion on students who show no signs of violent behavior, and fail to promptly identify individuals who pose genuine threats to school safety.”¹⁴ “The most consistent and powerful predictor of future violence is a history of violent behavior.”¹⁵ Jessie is not described as having a violent history.¹⁶ Regardless of a minor’s impressive skill, or parental outcry, it is hard to prove the nexus of safe, responsible and legal firearm use to the endangerment of persons or property, particularly when no specific threat was reported or made by Jessie.¹⁷ To forbid students from handling a weapon of any type for any

¹⁰Civil Rights Imperiled: Discussions Must Focus On Practical Solutions To School Violence Civil Rights Roundtable.” National Disability Rights Network, 2 Apr. 2018. Accessed February 19, 2019, https://www.ndrn.org/images/Documents/publicpolicy/Education/CRRT_White_Paper_Misinformation_Campaign_Final_for_Distribution.pdf

¹¹ “The Constitution of the United States,” Amendment 4.

¹² *Ornelas v. United States*, 1996, at 695.

¹³ “Jumping the Gun—Preventing School Violence” (Attachment A).

¹⁴ Ferpa|Sherpa.” *Educator's Guide to Student Privacy – Ferpa|Sherpa*, Accessed February 15, 2019, ferpasherpa.org/schoolsafety1/.

¹⁵ *American Psychological Association*, American Psychological Association. Accessed February 20, 2019, www.apa.org/pubs/info/reports/gun-violence-prevention.

¹⁶ Jumping the Gun—Preventing School Violence” (Attachment A).

¹⁷ *Id.*

reason or purpose off school grounds is to violate an individual's Second Amendment right. Advocacy and legal use of firearms are constitutionally protected.¹⁸

The school board must qualify Jessie's behavior as a "serious disruption of the educational process" but has not offered specific interferences.¹⁹ Guidelines also suggest observing the frequency, number and severity of offenses.²⁰ It does not appear that Jessie has any record of discipline. However, Jack, who is not being suspended, is cited for previously "teasing and physically assaulting his kid brother, "poking" and "kicking" him in the "hallway."²¹

For conduct that occurs off school grounds, the Connecticut Supreme Court has decided that there has to be a concrete relationship between the off-campus conduct and the school's operation.²² "Indicators," which are not explicated, might reference Jessie's "stiff, stoic and weird" personality or his choice to wear "black make up."²³ There is discrimination liability if makeup is not wholly banned in the school handbook.²⁴ Federal laws protect against discrimination in education through Title IX and the Constitution's equal protection guarantee.²⁵ The National Education Association believes students need mediation programs and character education to respect diversity in order to minimize conflict and harmful behavior with each other.²⁶

Both brothers are featured in the video, so if the school does not uniformly administer its suspension and searches to both boys, it defies contending that the behavior is correlative to either

¹⁸ "The Constitution of the United States," Amendment 2.

¹⁹ CT State Department of Education, *Guidelines for In-School and Out-of-School Suspensions*, at 11.

²⁰ *Id.*

²¹ "Jumping the Gun—Preventing School Violence" (Attachment A).

²² *Packer v. Thomason Bd. of Educ.*, 246 Conn. 89, 110 (1998).

²³ "Jumping the Gun—Preventing School Violence" (Attachment A).

²⁴ Title IX of the Education Amendments Act of 1972.

²⁵ Sherwin, Galen. "5 Things Public Schools Can and Can't Do When It Comes to Dress Codes." *American Civil Liberties Union*, Aclu, 18 Apr. 2018. Accessed February 19, 2019, www.aclu.org/blog/womens-rights/womens-rights-education/5-things-public-schools-can-and-cant-do-when-it-comes

²⁶ "Three Keys to School Safety and Gun Violence Prevention." *NEA*, Accessed February 19, 2019, www.nea.org/home/54092.htm.

policy violations or disruptions. Also, zero tolerance laws prohibit individual school boards from engaging in a case-by-case analysis and applying leniency in cases where mitigating circumstances may warrant a less severe punishment.²⁷

Moreover, the U.S. Supreme Court has ruled that students are guaranteed “due process” rights regarding any suspension from school. The Court views students as “persons” under the Constitution who have rights which the State must respect through the due process clause of the Fourteenth Amendment.²⁸ In *Goss v. Lopez*, the U.S. Supreme Court established procedural legal rights before a student can be suspended²⁹ The school must provide twenty-four hour notice.³⁰ Then, an “informal hearing” is held to offer “reasons for the disciplinary action” and give Jessie an “opportunity to explain the situation.”³¹ “Jack and Jessie’s parents are stunned.”³² This indicates no notice and that Dr. Tubaya did not offer an explanation on how Jessie’s actions affected the educational process. With no violation, difficulty proving disruptiveness and disregard of due process, the suspension may violate Jessie’s constitutional rights even if Lincoln High School acted with intentions to prevent school violence.

III. Recommendations

1) If pursuing suspension, the school board must codify disruptiveness and clarify how they consider the conversation in Dr. Tubaya’s office to delineate if that time was oral notification or an informal hearing; distinction affects escorting Jessie from the building to engage suspension, legally.³³ 2) Otherwise, consider adverse impact of suspension to students as harmful.³⁴ 3) Send

²⁷ Sanneh, Sia, and Samantha Jacobs. *Dignity Denied: The Effect of "Zero Tolerance" Policies on Students' Human Rights*.

Allard K. Lowenstein International Human Rights Clinic at Yale Law School, Nov. 2008. Accessed February 18, 2019.

https://law.yale.edu/system/files/area/center/schell/zero_tolerance.pdf

²⁸ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969).

²⁹ *Goss v. Lopez*, 419 U.S. 565 (1975).

³⁰ Conn. Gen. Stat § 10-233e.

³¹ Conn. Gen. Stat § 10-233c.

³² “Jumping the Gun—Preventing School Violence” (Attachment A).

³³ Conn. Gen. Stat § 10-233e.

³⁴ CT State Department of Education, *Guidelines for In-School and Out-of-School Suspensions*, at 12.

written notification to entire the entire school district, to acknowledge the video and to confirm that officials act on and investigate all potential threats to maintain safety.³⁵ 4) Increase gun safety programs that include parental consent.³⁶ 5) Consult for facilities assessment to identify design solutions that improve visibility and consider structural and technological updates to improve safety.³⁷ 6) Invest in school personnel to provide diagnostic and counseling services, such as counselors, school psychologists and nurses.³⁸

³⁵ Maccar, David. "Student Suspended for Liking Gun Photo on Instagram." *Range365*, 8 May 2017. Accessed February 16, 2019, <https://www.range365.com/student-suspended-for-liking-gun-photo-on-instagram>

³⁶ Conn. Gen. Stat § 10-18c (2015).

³⁷ Beci, Donald L. School Violence: Protecting Our Children and the Fourth Amendment, 41 *Cath. U. L. Rev.* 817 (1992). Accessed February 20, 2019, <http://scholarship.law.edu/lawreview/vol41/iss4/2>

³⁸ "Three Keys to School Safety and Gun Violence Prevention." *NEA*, Accessed February 19, 2019, www.nea.org/home/54092.htm.

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Ornelas v. United States, 1996, at 695

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Title IX of the Education Amendments Act of 1972