

**IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY – CIVIL DIVISION**

S.A., a minor, by her	:	
father H.O.	:	
	:	
Appellant,	:	No. SA-16-000569
	:	
v.	:	
	:	
PITTSBURGH PUBLIC SCHOOL DISTRICT	:	
	:	
	:	
Appellee.	:	

**APPELLANT’S BRIEF IN SUPPORT OF ITS POSITION THAT
A PENCIL IS NOT A WEAPON UNDER 24 P.S. §13-1317.2**

Appellant, S.A., a minor, by her father, H.O., through their attorneys, Nancy A. Hubley and Cheryl Kleiman and the Education Law Center, respectfully submits the following Brief in support of its Appeal of the Pittsburgh School Board’s decision to expel S.A. for the possession of a pencil.¹

I. Introduction

S.A. cannot be expelled for possessing a pencil under the weapons possession statute, 24 P.S. §13-1317.2. School districts do not have unbridled discretion to claim ordinary objects are weapons or to expel a student for possessing a pencil. As discussed below, by its own terms, 24 P.S. §13-1317.2 is a weapons possession statute; neither use nor intent are relevant to its application. As discussed further below, a pencil does not meet the definition of a weapon in the statute or as it has been further clarified by Pennsylvania courts.

¹ At the Court’s request, Appellant submits this Brief solely on its position that a pencil is not a weapon under 24 P.S. §13-1317.2, and reserves all her other claims challenging the expulsion, including violations of due process.

II. Facts

The facts of this case are set forth in the Memorandum of Law in support of the Appellant's Motion for Supersedes and are hereby incorporated by reference.

III. Summary of Legal Arguments

A. 24 P.S. §13-1317.2 specifically prohibits *possession* of a weapon in school. A student's intent, use or the nature of an injury are irrelevant.

B. The definition of a weapon set forth in 24 P.S. §13-1317.2(g) has been limited by Pennsylvania courts to include a list of items traditionally considered to be weapons, and other such items that are "*designed to inflict serious bodily injury, but also 'other' items, that even when used as intended, can inflict serious bodily injury.*" *Picone v. Bangor Area School District*, 936 A.2nd 556, 562 (Commw Ct. 2007)(emphasis in original).

IV. Legal Argument

A. 24 P.S. §13-1317.2 Prohibits *Possession* of a Weapon in School

Section 13-1317.2(a) specifically prohibits *possession*:

... a school district . . . shall expel, for a period of not less than one year, any student who is determined *to have brought onto or is in possession* of a weapon on any school property. (emphasis added).

Contrary to the District's assertion, neither use nor intent is relevant. In *Picone v. Bangor Area School District*, 936 A.2nd 556, 562 (Commw. Ct. 2007), the Court held that the statute was one governing possession. The Court, in *Picone*, states that it was the fact of the student's possession of a pellet gun--even without intent to use or to inflict serious bodily harm—that violated §13-1317.2.

In its Response to Appellant's Motion for a Supersedeas, the District cites a criminal statute, 18 Pa. C.S.A. §2301, and tries to argue that "intent" and "use" are relevant. However, unlike §13-1317.2, this criminal statute explicitly includes the terms "intent" and "use" stating:

[A]ny other device or instrumentality which, *in the manner in which it is used or intended to be used*, is calculated or likely to produce death or serious bodily injury.” (emphasis added).

The District’s argument improperly attempts to legislate the terms “use” and “intent” into §13-1317.2.

Pennsylvania courts reject the District’s argument. To the contrary, Pennsylvania courts hold that a statute must be read strictly and terms cannot be added to broaden its scope. In *Commonwealth v. Booth*, 564 Pa.228, 766 A.2d 843 (2001), the Court held:

Moreover, penal statutes are to be strictly construed. *See* 1 Pa.C.S. §1928(b)(1); *Commonwealth v. Wooten*, 519 Pa. 45, 53, 545 A.2d 876, 879 (1988)

* * *

More specifically, where doubt exists concerning the proper scope of a penal statute, it is the accused who should receive the benefit of such doubt. *See Commonwealth v. Allsup*, 481 Pa. 313, 317, 392 A.2d 1309, 1311 (1978)

* * *

Significantly, a court may not achieve an acceptable construction of a penal statute by *reading into the statute terms that broaden its scope*. *See [Commonwealth v.] Fisher*, 485 Pa.[8] at 13, 400 A.2d 1284] at 1287 [(1979)].

Id. 766 A.2d at 846 (emphasis and bracketed material added). *See also: Commonwealth v. Graeff*, 2011 Pa. Super. 19,13 A3d 516, 518-19.

There is no dispute that the weapons possession statute is a penal statute. It mandates that when a student possesses a weapon, the District, “*shall expel for not less than one year*” (emphasis added)—the most severe and *mandatory* punishment a school can impose.²

The District’s emphasis on these two factors – use and intent – suggest that the District is so accustomed to expelling children for “using” everyday objects, that they are either unaware

² Unlike other consequences a school can impose for misbehavior, a weapons possession offense has the most serious penalty, punishable not only by a mandatory one-year expulsion, but also giving other school districts and charter schools the right to deny a student who has been expelled under §13-1317.2 access to their regular education programs. 24 P.S. § 13-1317.2(e.1). The only exception is that “the superintendent of a school district... may recommend modification of such expulsion requirements (i.e. the one-year expulsion requirement) on a case-by-case basis. 24 P.S. §13-1317(2)(c). *See: e.g. Picone, supra.* (Superintendent modifies one-year expulsion to one marking period.). The record will reflect that S.A.’s request to the Superintendent to invoke this exception was denied.

or unwilling to recognize that the Pennsylvania School Code does not permit this. Rather, the Code penalizes students not for how they *use* a weapon, but only for *possession*.

The District’s focus on S.A.’s use and intent is evidence of their attempt to contort the text of §13-1317.2(a) in order to equate *possession* with *use*. Once the District’s argument is stripped of the added terms, “use” and “intent,” a pencil – a common classroom instrument – cannot be a weapon under §13-1317.2.

B. Pennsylvania Courts limit the definition of a weapon in 24 P.S. §13-1317.2.

A pencil is not a weapon pursuant to 24 P.S. §13-1317.2(g). “As used in this section, the term ‘weapon’ shall include, but not be limited to, any knife, cutting instrument, cutting tool, nunchaku, firearm, shotgun, rifle and *any other tool, instrument or implement capable of inflicting serious bodily injury.*” *Id.* (emphasis added).

Not only does the District’s assertion that a pencil falls within the definition of “any other tool, instrument, or implement capable of inflicting serious bodily injury” lead to inconsistent and potentially discriminatory applications, it is at odds with *Picone v. Bangor Area School District*, 936 A.2nd 556, 562 (Commw Ct. 2007). Further, it conflicts with Pennsylvania courts’ standard modes of statutory construction, including *ejusdem generis*.

The *Picone* Court interpreted this clause consistent with long-standing, judicial rules of statutory construction:

In reviewing the definition of “weapon” in the School Code, it is clear that the [General Assembly] listed several items that are traditionally considered to be weapons and that can inflict serious bodily harm when used in the manner intended (knife, cutting instrument, cutting tool, nanchaku, firearm, shotgun, and rifle). The [General Assembly] then included the term “capable” in the catch-all language “any other tool, instrument or implement *capable* of inflicting serious bodily injury,” suggesting the [General Assembly’s] intent to include not only “other” items *designed* to inflict serious bodily injury, but also “other” items, that *even when used as intended*, can inflict serious bodily injury.

Id. at 562 (emphasis in original)(internal citations omitted).

According to *Picone*, the question a District must answer is not whether an item *can* inflict serious bodily injury when used in some unusual or forceful manner, but whether the item is “*designed*” (e.g. mace, stun guns, brass knuckles) to inflict serious bodily injury or when “*used as intended*” (e.g. nail guns, fireworks) can inflict serious bodily injury. Items such as the pellet gun at issue in *Picone* meet the criteria because it is designed to - or when used in the manner intended can - inflict serious bodily injury. Under *Picone*, a pencil cannot be a weapon as defined in §13-1317.2(g) because it is not *designed* to inflict serious bodily injury, nor can a pencil inflict serious bodily injury when used *in the manner it is intended* – as a writing device.

As well, the canon of *ejusdem generis* contradicts the District’s interpretation of §13-1317.2. *Ejusdem generis* is an analytical tool for interpreting the meaning and scope of catchall phrases adopted by the Pennsylvania Supreme Court, which stated,

“[W]here general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to the persons or things of the same general kind or class as those specifically mentioned.”

Steele v. Statesman Ins. Co., 607 A.2d 742, 743 (1992)(citing Black's Law Dictionary at p. 270 (5th Ed. 1983) citing, Black, *Interpretation of Laws* 141). *See, e.g. Indep. Oil & Gas Ass'n of Pennsylvania v. Bd. of Assessment Appeals of Fayette Cty.*, 814 A.2d 180, 184 (2002); *McClellan v. Health Maint. Org. of Pennsylvania*, 686 A.2d 801, 806 (1996); *Com. ex rel. MacElree v. Legree*, 609 A.2d 155, 157 (1992); *Summit House Condo. v. Com.*, 523 A.2d 333, 336 (1987).

Specifically concerning lists using the words “including” or “including but not limited to,” Pennsylvania courts admonish that “any additional matters purportedly falling within the definition, but that are not express, *must be similar to those listed by the legislature and of the same general class or nature.*” *DEP. v. Cumberland Coal Res., LP*, 102 A.3d 962, 976 (2014)

(emphasis added)(internal citations omitted).

Using *ejusdem generis* to determine the scope of §13-1317.2(g)'s catchall phrase requires an analysis of what the items listed in §13-1317.2(g) have in common. The statute lists knives, cutting instruments, cutting tools, nunchaku, firearms, shotguns, and rifles. These items all have two characteristics in common: (1) inherently dangerous, and (2) the mere possession of these items at school serves to elicit chaos and fear.

A pencil is not inherently dangerous. Additionally, unlike the other named items whose mere presence on school grounds can elicit chaos and fear, a pencil is a common learning tool found in schools. A student who brings a weapon under the definition provided in §13-1317.2(g) is likely to cause a serious disruption to school activity by its mere presence. A student in possession of a pencil is not.

In this case, the District argues it has the discretion to insert the terms “use” or “intent” into the General Assembly’s definition of a weapon, improperly expanding the scope and application of §13-1317.2. The District’s interpretation of §13-1317.2 is contrary to the holding in *Picone* and illustrates the very unbridled discretion³ Pennsylvania courts seek to prevent by requiring statutes be clearly written and strictly construed.

Here, the District expelled S.A. for the possession of a pencil as a weapon, rather than responding to the alleged misbehavior⁴ with a more measured and legislatively permissible response. An expulsion is the most serious charge available to the District (*See* fn.2). It deprives S.A. of her constitutionally and statutorily protected right to education. Appellant does

³ The inconsistent application of this statute gives rise to claims of race, gender, and disability discrimination. Such discrimination is reflected in the District’s own discipline data, as reported to the state and federal government. *See* www.safeschools.state.pa.us and <http://ocrdata.ed.gov>.

⁴ The record will reflect that the alleged misbehavior resulted in an injury that was resolved by a visit to the school nurse and a band aid.

not contend that schools can never penalize students. Rather, Appellant asserts that it must be done with proper legal authority.

In conclusion, based on existing case law, the statutory canon of *ejusdem generis*, and the plain text of the statute, it is clear that expelling S.A. for possessing a pencil is beyond the scope of §13-1317.2

S.A. cannot be expelled for possessing a pencil.

WHEREFORE, Appellant respectfully requests the Court find that a pencil cannot be considered a weapon under §13-1317.2 of the Pennsylvania School Code and reverse the Pittsburgh Public School District Board of School Directors' decision to expel S.A.

Respectfully submitted,

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I, Cheryl Kleiman, attorney for Appellant, hereby certify that on _____ day of _____, a true and correct copy of the foregoing Brief has been delivered by first class mail to the following counsel for the Appellee, Pittsburgh Public School District.

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I, Cheryl Kleiman, attorney for Appellant, hereby certify that on _____ day of _____, a true and correct copy of the foregoing Brief has been delivered by first class mail to the following counsel for the Pittsburgh Public School District Board of School

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