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

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

APPELLANT'S MEMORANDUM OF LAW IN SUPPORT
OF HER MOTION FOR SUPERSEDEAS

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I. INTRODUCTION

Appellant, SA., submits this Memorandum of Law in support of her Motion for Supersedeas, pursuant to Pa.R.A.P. 1781 and 42 Pa.C.S.A. § 933(a)(2). S.A. filed a timely Notice of Appeal from an adjudication of Pittsburgh Public School District Board of School Directors ("the Board") expelling her for one (1) year from the Pittsburgh Public School District ("the District"). (Exhibit 1). This Motion seeks an Order of Supersedeas to stay this expulsion and permit her to return and continue her educational program at Pittsburgh Obama High School ("Pittsburgh Obama"), pending the resolution of this Appeal.

II. FACTS

Appellant S.A. is a 15-year-old student at Pittsburgh Obama, a magnet school within the District. S.A. and her family are Somali refugees who were resettled in Pittsburgh in 2008, and are practicing Muslims. Her father's preferred language is Somali and her mother's preferred

language is Mai-Mai. Both parents have limited English proficiency. S.A. was educated as an English Language Learner. Prior to the underlying adjudication, S.A. had no disciplinary history.

On May 12, 2016, S.A. was in a history class supervised by a substitute teacher when a male student threw a bottle cap at her. In an attempt to retrieve the bottle cap, another male student [hereinafter "R.D."] pulled his chair close to S.A., aggressively asked for the cap, and intentionally touched S.A.'s breasts and buttocks. The substitute teacher took no action to protect S.A. from this unwanted touching. The altercation escalated when R.D. pushed S.A. against a cabinet and slammed her onto the classroom floor. During this incident, the pencil S.A. had been holding throughout the altercation scratched R.D.'s neck.

Following this incident, the District sent S.A.'s parents notice – in English only and without translation or interpretation – that an informal hearing would be held on May 17, 2016, pursuant to 22 Pa. Code § 12.8(c). S.A.'s father, whose native language is Somali, attended the hearing. The District provided H.O. with a Swahili translator. Despite H.O.'s objection, the District proceeded with the informal hearing with the use of the Swahili translator, who did not speak Somali.

Pursuant to 22 Pa. Code § 12.8(b), the District sent S.A.'s parents a notice – again, in English only and without translation or interpretation – that a formal expulsion hearing would be held on May 26, 2016.

At the formal expulsion hearing, the District provided the same Swahili translator used at the informal hearing. H.O., through counsel, objected to the Swahili translator. The Hearing Officer agreed that the Swahili translator was inappropriate and allowed the District to use a telephone translation line to provide Somali interpretation. Counsel for S.A. objected and asked that the District locate an appropriate in-person translator. The Hearing Officer overruled the

objection and proceeded with the hearing, with the use of the translation line.

This translation line disconnected multiple times, causing extensive delays, disruptions and confusion. Each time the call disconnected, the Hearing Officer had to call back, re-request a translator, wait for one to be identified and connected, introduce the new translator, explain the proceedings, and then re-convene the hearing. During H.O.'s testimony, one of the translators improperly and prejudicially accused H.O. of not providing relevant testimony and offered her own opinion that he was not responding to counsel's questions.

On June 3, 2016, the Hearing Officer issued a decision to expel S.A. for possessing a pencil. The Hearing Officer concluded that S.A.'s pencil was a weapon and that S.A. had violated 24 P.S. § 13-1317.2 and § 6 of the District's Code of Student Conduct (possession of a weapon on school property) (Exhibit 3).[1] On June 22, 2016, the Board, after seeking advice and information from District counsel and from the Hearing Officer, voted to certify this expulsion recommendation (Exhibit 1).

As a result of her expulsion, S.A. was not permitted to attend school from mid-May through the end of the end of the 2015-16 school year.

Given the District's obligation under 22 Pa. Code § 12.6 to "make provision for the student's education" where a student has been expelled from school, the District is proposing that S.A. attend Clayton Academy ("Clayton"), an alternative education program exclusively for disruptive youth, for the duration of her expulsion. Without a stay of the expulsion order, S.A.'s education at Pittsburgh Obama will be disrupted and she will be assigned to Clayton on August 29, 2016, the first day of school for the 2016-17 school year.

[1] A "weapons offense" under 24 P.S. § 13-1317.2 is the most serious offense available under the Pennsylvania School Code. Unlike with other expellable offenses, such as fighting or inciting a disturbance, charter schools and other school districts can deny a child expelled under § 13-1317.2 access to their regular education program. 24 P.S. § 13-1317(e.1).

III. JURISDICTION

This Court has jurisdiction to hear S.A.'s appeal pursuant to 42 Pa.C.S.A. § 933(a)(2), providing for review of local agency actions. It further has jurisdiction to consider S.A.'s Motion for Supersedeas, pursuant to Pa.R.A.P. 1781, which permits an appellate court to grant an application for stay of an order, where the moving party can show that application to the underlying government unit would not be practicable or that application has been made to the government unit and denied. Pa.R.A.P. 1781(b). Appellant requested a stay from Counsel for the Board and was told that, given summer vacation schedules, she would not be able to respond to this request for several weeks. Given the exigencies of this case and the importance of S.A. continuing her education without disruption, it is not practicable for S.A. to wait for the District's response to her request for a stay. Thus, this Court has jurisdiction to hear S.A.'s motion.

IV. LEGAL ARGUMENT

In *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, the Pennsylvania Supreme Court set forth the criteria under which a Stay or Motion for Supersedeas is warranted. Under *Process Gas*, a court may grant a stay if (a) the petitioner makes a strong showing that he is likely to prevail on the merits, (b) the petitioner has shown that without the requested relief he will suffer irreparable injury, (c) the issuance of a stay will not substantially harm other interested parties in the proceedings, and (d) the issuance of a stay will not adversely affect the public interest. *Process Gas*, 467 A.2d 805, 808-09 (Pa. 1983). Pennsylvania courts have used these criteria to stay expulsion orders. *See Yatron by Yatron v. Hamburg Area Sch. Dist*., 631 A.2d 758, 760 (Pa. Commw. Ct. 1993); *see also Porter v. Bd. of Sch. Directors of Clairton Sch. Dist*., 445 A.2d 1386, 1387 (Pa. Commw. Ct. 1982).

As set forth in detail below, Appellant is likely to succeed on the merits of her

procedural, statutory, and substantive claims on Appeal. She will suffer irreparable and long-term harm if her education is disrupted and she is not able to return to Pittsburgh Obama pending resolution of this Appeal. Moreover, returning S.A. to Pittsburgh Obama will not harm the District or pose any threat to the students at Pittsburgh Obama, nor will her return to Pittsburgh Obama adversely affect the public interest. For these reasons, as set forth in detail below, the Court should grant S.A.'s motion.

A. S.A. will likely prevail on the merits of her Appeal

The first prong of the *Process Gas* test requires the court to examine the merits of the moving party's claims on appeal. In *Process Gas*, the Pennsylvania Supreme Court determined that the appellees were entitled to a stay, *inter alia*, because they raised significant legal issues involving the interpretation of a Public Code. *Process Gas*, 467 A.2d at 554. In this case, Appellant similarly raises significant questions about both the procedural requirements of a Public Code and the scope and extent of statutory language within the code. Specifically, Appellant asserts that the Board violated the Appellant's procedural rights and protections by failing to provide translation and interpretation of critical due process documents and proceedings required by the Pennsylvania School Code. 22 Pa. Code § 12.8; 22 Pa. Code § 4.26. Appellant further challenges the Board's interpretation of the School Code and asserts that the Board improperly concluded that a pencil is a weapon, under 24 P.S. § 13-1317.2.

1. S.A. is likely to prevail on her claim that the District violated her due process and civil rights by failing to translate for her parent the disciplinary notifications and failing to provide appropriate interpretation services at the informal and formal hearings.

S.A. asserts strong procedural claims and is likely to prevail on the merits of these claims, as the District failed to interpret or translate disciplinary notices for S.A.'s parents or to provide

an appropriate Somali speaking translator at the informal and formal hearings. These failures violated Appellant's and her parent's procedural and statutory rights under state and federal law.

Exclusion from school constitutes a deprivation of a clear property right. Accordingly, Pennsylvania law provides specific due process rights and protections for students facing disciplinary exclusions. 22 Pa. Code § 12.8. At a minimum, Districts must provide students and parents with appropriate notices and afford students and parents an opportunity to address the circumstances surrounding the disciplinary proceedings and to present their case, including presenting witnesses and challenging evidence and testimony presented by a district. *See* 22 Pa. Code § 12.8.

The District also has an obligation to communicate with Appellant's Parent in his native or preferred language, and to provide translation services throughout the disciplinary proceedings. This requirement is deeply rooted in state and federal law. Title VI of the Civil Rights Act of 1964 (Title VI) and the Equal Educational Opportunities Act (EEOA) require federally funded recipients, including public schools, to provide language assistance to persons with Limited English Proficiency (LEP) in order to ensure that these individuals have meaningful access to the benefits of the recipient's programs or activities. *See* 42 U.S.C.A. § 2000d (West); 20 U.S.C.A. § 1703 (West). The U.S. Department of Education has long recognized that a denial of such services constitutes national origin discrimination under Title VI and the EEOA.[2]

In addition, § 4.26 of the Pennsylvania School Code, particularly as interpreted by the Pennsylvania Department of Education, also places a duty on schools to communicate with

[2] Catherine E. Lhamon & Vanita Gupta, *Joint "Dear Colleague" Letter: English Learner Students and Limited English Proficient Parents*, U.S. Dep't of Justice & U.S. Dep't of Educ. (2015); *The Provision of an Equal Education Opportunity to Limited English Proficient Students*, U.S. Dep't of Educ. (2000); Michael L. Williams, *Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency*, U.S. Dep't of Educ. (1991); William Smith, *Policy Regarding the Treatment of National Origin Minority Students who are Limited English Proficient*, from U.S. Dep't of Educ. (1990); Stanley J. Pottinger, *DHEW Memo Regarding Language Minority Children*, from U.S. Dep't of Health, Educ., and Welfare (1970).

parents in their native or preferred language, and to provide translation and interpretation services so parents can meaningfully participate in their child's education. *See* 22 Pa. Code § 4.26; *see also Educating Students with Limited English Proficiency (LEP) and English Language Learners (ELL)*, Pennsylvania Department of Education Basic Education Circular (last modified Apr. 14, 2009) at 7. For Appellant and her parent to have access to the procedural protections outlined in the Pennsylvania School Code, it is essential that they receive appropriate translation and interpretation services, as required under state and federal law.

The record demonstrates that the District failed to provide notices for the formal and informal hearings in a language S.A.'s parent could understand. The District also failed to provide appropriate translation services at the formal and informal hearings. The District used a translator who spoke Swahili, rather than Somali, at the informal hearing and used an inferior and inappropriate translation line at the formal hearing. Given the District's failure to provide this fundamental information and opportunity in a language S.A.'s parent could speak and understand, the District deprived Appellant and her parents of their right to meaningfully participate in the proceedings against her.

In the only Pennsylvania Supreme Court case to examine a lower court's decision to grant a stay in an expulsion case, the Court upheld the stay based on the merits of a similar procedural claim. *See Yatron*, 631 A.2d at 760–61 (finding that appellant was likely to succeed on the merits of his claim that appellee District failed to provide proper notice). Appellant is likely to prevail on the merits of her claim that the District violated her due process and civil rights by failing to provide notice of the disciplinary hearings translated for her parent and failing to provide appropriate interpretation services at the hearings required under § 12.8 of the Pennsylvania School Code.

2. S.A. is likely to prevail on her claims that, as a matter of law, a pencil should never be considered a weapon under 24 P.S. § 13-1317.2.

S.A. is likely to prevail on her claims as a matter of law, because the statutory language of 24 P.S. § 13-1317.2 and relevant case law demonstrate that the Board's decision to expel S.A. for possession of a pencil is erroneous.

Under § 13-1317.2(a), "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. . ." 24 P.S. § 13–1317.2. Section 13-1317.2(g) states, "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).

The Board's decision to expel S.A. relies on their contention that a pencil is a "tool, instrument or implement capable of inflicting serious bodily injury" under § 13-1317.2(g). This assertion ignores the larger context of § 13-1317.2(g) and relevant case law. In particular, this interpretation is at odds with *Picone v. Bangor Area School District*; conflicts with standard modes of statutory construction, including *ejusdem generis*; and leads to inconsistent applications and absurd results that the legislature could not have intended.

In *Picone*, the appellant shot another student with a pellet gun on school grounds. 936 A.2d 556, 558 (Pa. Commw. Ct. 2007). In determining whether a pellet gun is a weapon under § 13-1317.2(g), the Commonwealth Court agreed with and quoted the trial court:

> 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.

> While Student may have not intended to harm his girlfriend when he fired the pellet gun in her direction, as pointed out by the trial court, a pellet gun is intended to shoot plastic pellets at a relatively high velocity and is capable of causing serious bodily injury. Accordingly, we conclude that the School Board did not err in finding that the pellet gun was a weapon under the Public School Code.

Id. at 562 (emphasis original) (citation omitted). *Picone* makes clear that the catch-all phrase in § 13-1317.2 does not include *every* tool – it has limitations. One such limitation is that the item must be able to inflict serious bodily injury *"when used as intended." Id*.

Under *Picone*, an item that was not designed for the purpose of inflicting harm can still be considered a weapon under § 13-1317.2 so long as the item can inflict serious bodily injury when used in the way it is intended to be used. This interpretation would include a pellet gun, but also items like nail guns, chemicals, or fireworks – items that are not intended to harm people, but have a high likelihood of inflicting serious injury when used in their normal capacity.

The question, according to the *Picone* court, then, is not whether the item in question can cause serious bodily injury when used in some unusual or forceful manner, but whether the item, can cause serious bodily injury when it is used for the purpose and in the manner intended. When a pencil is used in the manner it is intended to be used – as a writing device – it *cannot* inflict serious bodily injury. Thus, based on the Court's interpretation in *Picone,* a pencil cannot be a weapon under § 13-1317.2.

The District's interpretation of § 13-1317.2 is also at odds with standard modes of statutory construction, most notably the canon of *ejusdem generis*. *Ejusdem generis* is an analytical tool used to interpret the meaning and scope of catchall phrases. As the Pennsylvania Supreme Court has stated:

> where general words follow an enumeration of persons or things . . . 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 (Pa. 1992) (citing Black's Law Dictionary at p. 270 (5th Ed. 1983) citing, Black, *Interpretation of Laws* 141). The Pennsylvania Supreme Court

has consistently applied the canon of *ejusdem generis* to interpret and limit the scope of catchall phrases, finding 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't of Envtl. Prot. v. Cumberland Coal Res., LP*, 102 A.3d 962, 976 (Pa. 2014) (emphasis added); *see, e.g. Indep. Oil & Gas Ass'n of Pennsylvania v. Bd. of Assessment Appeals of Fayette Cty*., 814 A.2d 180, 184 (Pa. 2002); *McClellan v. Health Maint. Org. of Pennsylvania*, 686 A.2d 801, 806 (Pa. 1996); *Com. ex rel. MacElree v. Legree*, 609 A.2d 155, 157 (Pa. 1992); *Summit House Condo. v. Com.*, 523 A.2d 333, 336 (Pa. 1987).

Here, the court should use *ejusdem generis* to determine the scope of § 13-1317.2's catchall language. This analysis requires determining what the items listed in § 13-1317.2(g) have in common. This Section lists knives, cutting instruments, cutting tools, nunchaku, firearms, shotguns, and rifles.[3] These items have two characteristics in common: (a) they are inherently dangerous and (b) the mere possession of these items in a school can serve as a threat to safety and order.

The same cannot be said of a pencil. First, as discussed above, a pencil's intended use is as a writing device. Unlike a gun or knife – or even a pellet gun or fireworks – when a pencil is used in its normal capacity, it is not a dangerous item. Second, a pencil is unlike the other named items, whose mere presence on school grounds can cause chaos and fear. A student who brings a gun or a knife to school is likely to cause a serious disruption to school activity. The power these items have to elicit fear and disorder in the learning environment, even when they are not being used to cause harm, may be one of the reasons the legislature chose to ban the mere *possession*, not just the use, of these items on school grounds. *See* 24 P.S. § 13-1317.2(a) (requiring a

[3] The District's Code of Student Conduct adds explosives and mace to this list. Pittsburgh Public Schs., Code of Student Conduct § 6 (2015-2016).

District to expel a student who has "brought onto or is in possession of a weapon on any school property . . . ."). A pencil is a common and necessary learning tool that does not have the same capacity to instill fear on school campuses.

Given that a pencil is not inherently dangerous when used in its intended capacity, nor is it likely to cause disorder if brought onto school grounds, a pencil is wholly unlike the other items listed in § 13-1317.2 or the District's Code of Student Conduct. As per the canon of *ejusdem generis*, the Court should find that a pencil is not of the same class as the enumerated items in these statutes, and consequently, cannot be considered a weapon under the catchall language.

3. S.A. is likely to prevail on her statutory claims that 24 P.S. § 13-1317.2 and § 6 of the District Code of Student Conduct prohibit possession, not use.

Appellant asserts that § 13-1317.2 is not a *use* statute, but rather is a *possession* statute. § 13-1317.2 mandates expulsion for any student who has "*brought onto* or is in *possession* of a weapon on any school property . . . ." 24 P.S. § 13-1317.2(a) (emphasis added). If the District wants the court to read the catchall language in § 13-1317.2(g) literally – as they are asking the court to do in this case – they must be prepared for the court to read the possession language in § 13-1317.2(a) literally as well. Under the literal reading suggested by the District, where a pencil is considered a weapon, the District would be required to expel any child who *possesses* this weapon at school. This is an absurd result whereby the District would be required to expel every child who brought a pencil to school.[4]

The District will likely argue that they do not expel children for *possessing* everyday items, but rather for *using* these items to inflict bodily injury. However, implementing § 13-

[4] "In ascertaining the intention of the General Assembly in the enactment of a statute, we presume that the General Assembly did not intend a result that is absurd." *Picone*, 936 A.2d at 562 (citing 1 Pa.C.S. § 1922(1)).

1317.2 in this way contradicts the text of the statute as it penalizes *use*, not possession. When a student uses an object to hurt another student, this constitutes a fight, an offense covered elsewhere in the District's Code of Conduct. *See* Pittsburgh Public Schs., Code of Student Conduct (2015-2016). The statute does not allow for an object to become a weapon based on the way it is used or the damage it causes. An object either is or is not a weapon. A gun is a weapon whether or not it is discharged, and a student who possesses it on campus must be expelled, regardless of use or intent. The District's reading contorts the text of § 13-1317.2(a) by equating *possession* with *use*.

Furthermore, the District's interpretation allows for a level of discretion that is at odds with the general framework of this statute. Section 13-1317.2 sets up a *mandatory* expulsion requirement. Districts have little to no discretion when addressing weapons offenses – they "*shall* expel for not less than one year." 24 P.S. § 13-1317.2(a) (emphasis added).[5] If Districts are allowed to decide how and when an ordinary object becomes a weapon, without clear legislative standards, it promotes vagueness and opens the door for unbridled discretion, an outcome directly at odds with the mandatory language of § 13-1317.2. Indeed, such discretion has led to inconsistent, subjective, and racially disproportionate disciplinary responses to student behavior, as documented by public data and academic research.[6]

Given the strengths of S.A.'s substantive and statutory claims, namely that to consider a pencil a weapon under the Pennsylvania School Code is at odds with existing case law, violates

[5] Unlike other consequences for misbehavior, a weapons offense, the most serious school offense, is punishable by a mandatory one-year expulsion. Unlike other expellable offenses, charter schools and other school districts can deny a student who has been expelled for a weapon under § 13-1317.2 access to their regular education program. 24 P.S. § 13-1317(e.1).

[6] *See, e.g.* Russell J. Skiba, et al., *New and Developing Research on Disparities in Discipline* (March 2014), http://www.indiana.edu/~atlantic/wp-content/uploads/2015/01/Disparity_NewResearch_010915.pdf; U.S. Dep't of Educ., Office of Civil Rights, *Civil Rights Data Collection Data Snapshot: School Discipline* (March 2014), http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf; U.S. Dep't of Educ., *Pittsburgh School District Discipline Report*, http://ocrdata.ed.gov/Page?t=d&eid=27033&syk=6&pid=2001 (last visited Jul 25, 2016).

the canon of *ejusdem generis*, and leads to absurd results, S.A. has made a strong showing that she will prevail on the merits of her case on appeal.[7]

B. S.A. will suffer irreparable harm if the stay is not granted

Under the second prong of the *Process Gas* test, the applicant must show that without a stay, they will suffer irreparable harm. Irreparable harm is "potential harm which cannot be redressed by a legal or an equitable remedy following a trial" and is harm "of a peculiar nature, so that compensation in money cannot atone for it. . . ." *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) (citation omitted). In cases involving public education, courts have found that "deprivation of educational rights can produce irreparable harm and establishes a need for prompt and immediate relief." *Oravetz v. West Allegheny Sch. Dist*., 74 Pa. D. & C.2d 733, 737-38 (Pa. Com. Pl. 1975); *see also L.J. ex rel. V.J. v. Audubon Bd. of Educ*., No. CIV. 06-5350 (JBS), 2007 WL 3252240, at *8 (D.N.J. 2007) (finding that there can be "no doubt" that denial of educational services constitutes irreparable harm because "at the rate at which a child develops and changes . . . a few months can make a world of difference in harm to a child's educational development."); *John T. ex rel. Paul T. v. Com. of Pa.*, No. CIV A. 98-5781, 2000 WL 558582, at *8 (E.D. Pa. May 8, 2000) ("Compensation in money can never atone for deprivation of a meaningful education in an appropriate manner at an appropriate time.").

The District is proposing that S.A. attend Clayton Academy ("Clayton") for the duration of her expulsion. Without a stay, S.A. will face irreparable harm both from having her educational

[7] S.A. reserves the right to raise additional claims, as supported by the record, on appeal. These include, but are not limited to, claims that the Board violated S.A.'s procedural rights by creating a conflict of interest and a commingling of prosecutorial and adjudicatory functions when they sought and accepted advice from the same solicitor who represented the District at the hearing, s*ee Pittsburgh Bd. of Pub. Educ. v. MJN by NJN*, 524 A.2d 1385 (Pa. Commw. Ct. 1987); that S.A.'s use of the pencil falls under the exception in § 13-1317.2(d), as the pencil was "used as part of a program approved by a school by an individual who is participating in the program"; that there is not substantial evidence to support a finding that S.A. inflicted serious bodily injury on R.D.; and that there is not substantial evidence to support a finding that S.A. used a pencil to intentionally, knowingly, or recklessly inflict injury.

program at Pittsburgh Obama disrupted and from being educated in an inferior, alternative program for disruptive students. Clayton offers almost none of the educational opportunities and benefits S.A. would receive at Pittsburgh Obama, were the court to grant a stay pending her appeal. Unlike other schools within the District, Clayton does not offer advanced coursework, college credit courses, a range of electives, or interscholastic activities, and upon information and belief Clayton has fewer resources and facilities than other District schools.[8] Clayton also has a dismal academic record. During the 2014-15 school year 6% of students at Clayton scored proficient or advanced on the PSSA Reading exam and 0% scored proficient or advanced on the Math exam.[9] If S.A. is placed at Clayton during the upcoming school year, she will be denied educational opportunities and resources and will no longer experience the challenges and rigors that come with being surrounded by high performing peers. S.A will also face the long-term stigma of being labeled a "disruptive" or "troubled" student.[10]

This placement is particularly harmful as S.A. is a rising junior and there is a substantial likelihood that being placed at Clayton will affect her ability to attend college. Eleventh grade is a significant year in the college admission process. A student in a discipline program is going to be considered very differently than a student attending a high performing magnet school, like Pittsburgh Obama. Students at Obama take International Baccalaureate courses, which are advanced classes that enable them to earn college credit. Obama offers five different languages, upper level math and science classes, a variety of elective courses, and a range of extracurricular

[8] *Clayton Academy: An Alternative Education Program*, http://www.pps.k12.pa.us/cms/lib07/PA01000449/Centricity/domain/19/business_and_finance/2014/02/Clayton%20Academy%20Presentation.pdf (last visited Jul 15, 2016).
[9] Discover PPS, *Clayton Academy*, http://discoverpps.org/clayton (last visited Jul 15, 2016).
[10] It is worth noting that Pennsylvania is currently being investigated by the U.S. Department of Justice for removing Black students and students with disabilities from traditional public schools and placing them at inferior Alternative Education for Disruptive Youth programs at disproportionately high rates, in violation of federal law. *See ELC Alternative Education Complaint to U.S. Department of Justice (August 2013)*, http://www.elc-pa.org/cases/doj-aedy-complaint-8713/ (last visited Jul 17, 2016).

activities and athletic opportunities. Obama has five science labs, two dedicated computer labs, three art labs, two music labs, a gym, a pool, an auditorium, and a library.[11] These resources have a clear effect on student achievement, as evidence by the school's achievement data. During the 2014-2015 school year, 88% of students at Obama scored proficient or advanced on the Keystone Literature exam and 77% scored proficient or advanced on the Algebra exam – in stark contrast to Clayton's failure to foster student achievement.[12]

It is also worth noting, that in *Yatron*, the court granted a stay on the grounds that "failure to grant a stay would have resulted in the student in *Yatron* missing exams and not being able to graduate on to the next grade." *Yatron*, 631 A.2d at 761. S.A.'s harms appear to be of a much greater magnitude than the harms facing the student in *Yatron*. Like him, S.A. is also at risk of being retained due to this expulsion, however, she is also being forced to attend a far inferior educational program *for an entire year*.[13] Disrupting S.A.'s educational program at Pittsburgh Obama will also likely have long-term negative consequences on her academic success, chances of graduating, and post-secondary opportunities. Given the strong possibility that S.A. was expelled inappropriately, this seems like a high price to pay – a price that will cause her long-term irreparable harm.

Additionally, moving S.A. to a new school will cause educational instability. Federal and state legislators have recognized the importance of "school stability" – that is, remaining in the same school with the same peers, teachers, and community – to overall academic success. *See* 42 U.S.C. § 11431; Fostering Connections to Success and Increasing Adoption Act of 2008. These

[11] See Discover PPS, Obama 6-12, http://discoverpps.org/obama (last visited Jul 15, 2016).
[12] *School Required Federal Reporting Measures*, http://eseafedreport.com/Content/reportcards/RC15S102027451000008105.PDF (last visited Jul 15, 2016).
[13] Due to her suspension and expulsion, S.A. missed preparing for and taking her final exams with the rest of her class. As a result, she failed several exams and has been forced to attend summer school. If she does not pass these courses, she will not advance to the next grade.

statutes are designed to protect at risk populations from disruptions in their education by providing them with strong entitlements to "school stability." These protections, and the research and reasoning upon which they are based, apply similarly to S.A., an English Language Learner whose education will be disrupted if she is removed from Pittsburgh Obama pending her Appeal.

Based on the serious and irreversible nature of the harm S.A. will experience absent a stay, the court should find that S.A. has satisfied the second prong of the *Process Gas* test.

C. A stay will not substantially harm the School District or other interested parties

The third prong of the *Process Gas* test requires the court to examine whether issuing a stay will substantially harm the adverse party. The District has provided no evidence that S.A. has a disciplinary record and S.A. has no history of violence at home or in the community. This entire incident occurred because a male student was inappropriately touching S.A.'s breasts and buttocks and the teacher supervising the class took no action to stop this harassment. There is no evidence to support a claim that S.A. will harm other students, teachers, or school personnel.[14]

The District's only potential claim of harm is administrative inconvenience and the expense of revising school placements and course schedules. This inconvenience will not be a great burden and is clearly outweighed by the harm to S.A., especially given that these are functions routinely performed by the District. *See John T.*, 2000 WL 558582, at *8 ("Providing statutorily granted special services to a child does not harm [the District]; doing so is its function under state and federal law.").

Thus, S.A. has satisfied the third prong of the *Process Gas* test, as issuing a stay will not substantially harm the School District or other interested parties.

[14] While we believe S.A. poses no threat to R.D., especially if the District meets its legal obligation to prevent sexual harassment, *see* 20 U.S.C. § 1681, the District could always take additional precautions to prevent future incidents, such as increasing its supervision of S.A. and R.D., separating them, or implementing restorative justice practices.

D. The issuance of a stay in this case will not adversely affect the public interest

There is no reason to believe that allowing a stay in this case will adversely affect the public interest.[15] Returning S.A. to Pittsburgh Obama will place no financial or other burden on the District or the public, as the District would be providing S.A. an educational program, albeit an inferior one, were she to attend Clayton. Additionally, the District can claim no interest in enforcing a potentially unlawful practice and policy.

In fact, rather than adversely affecting the public interest, issuing a stay in this case would *promote* the public interest. It is in the public interest and furthers the purpose of state and federal law to provide all students with access to public education and ensure school stability. *See John T.*, 2000 WL 558582, at *8 ("It is in the public interest to provide benefits to those entitled to them under the law."). It is also in the public interest to ensure disciplinary procedures are followed with integrity and to the letter of the law. *See Hampton Technologies, Inc. v. Dep't of Gen. Servs*., 22 A.3d 238, 244 (Pa. 2011) (McCAFFERY, J. dissenting in an equally divided opinion) (arguing for the issuance of a stay on the grounds that the public has an interest in ensuring public procedures are "pursued with the utmost attention to the overall fairness of the entire process."); *L.J.*, 2007 WL 3252240, at *9 (finding that it is "undeniably in the public interest for providers of public education to comply with the requirements [of federal law].").

As issuing a stay in this case will not adversely affect the public interest, S.A. has satisfied the final prong of the *Process Gas* test.

[15] The Third Circuit has stated that, "[a]s a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff." *American Tel. and Tel. Co. v. Winback and Conserve, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994).

V. CONCLUSION

Because S.A. has made a strong showing that she has a likelihood of succeeding on the merits of her appeal; because she will suffer irreparable harm if her education is disrupted and she is forced to attend an inferior alternative school; because issuing the stay and allowing S.A. to remain in a traditional public school will not harm the District or other interested parties; and because issuing the stay will not adversely affect the public, but rather will promote the public interest, the Court should grant appellant's Motion for Supersedeas and allow S.A. to return to Pittsburgh Obama pending the outcome of her appeal.

Respectfully submitted,

_____

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

S.A., a minor, by her father H.O.	:	
Appellant,	:	No.

OF ALLEGHENY COUNTY – CIVIL DIVISION

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

VERIFICATION OF H.O.

I, H.O., hereby verify that the facts set forth in the foregoing Motion for Supersedeas and supporting memorandum were read to me by my lawyer, through an interpreter in my preferred language. The factual allegations concerning me (and my daughter?) made in the foregoing Motion for Supersedeas and supporting memorandum are true and correct to the best of my knowledge, information and belief. I understand that false statements are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsifications to authorities. This verification does not extend to arguments or points of law raised herein.

July _____, 2016 _____

H.O.

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

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

VERIFICATION OF CHERYL KLEIMAN

I, Cheryl Kleiman, attorney for appellant, hereby verify that the facts set forth in the foregoing Motion for Supersedeas and supporting memorandum are true and correct to the best of my knowledge, information and belief. I understand that false statements are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsifications to authorities. This verification does not extend to arguments or points of law raised herein.

July _____, 2016 _____

Cheryl Kleiman

CERTIFICATE OF SERVICE

I, Cheryl Kleiman, attorney for appellant, certify that on this _____ day of July, 2016, the foregoing Motion for Supersedeas, supporting memorandum, proposed Order, and Verifications were delivered by hand to the following counsel for appellee, Pittsburgh Public School District:

Aimee Rankin Zundel, Esq.
Weiss, Burkardt, Kramer LLC
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_____
Education Law Center

Cheryl Kleiman
Attorney #318043

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ACCEPTANCE OF SERVICE

As counsel for the Pittsburgh Public School District, I agreed to accept service for the appellee, Pittsburgh Public School District, via hand delivery.

_____ _____
Aimee Rankin Zundel, Esq. Date

CERTIFICATE OF SERVICE

I, Cheryl Kleiman, attorney for appellant, certify that on this _____ day of July, 2016, the

foregoing Motion for Supersedeas, supporting memorandum, proposed Order, and Verifications were delivered by hand to the following counsel for the Pittsburgh Public School District Board of School Directors:

Aimee Rankin Zundel, Esq.
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_____
Education Law Center

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Nancy Hubley
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Jacqueline Perlow
Attorney #321594

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(412) 258-2120

ACCEPTANCE OF SERVICE

As counsel for the Pittsburgh Public School District Board of School Directors ('the Board"), I agreed to accept service for the Board via hand delivery.

_____ _____

Aimee Rankin Zundel, Esq.