

COMMONWEALTH COURT OF PENNSYLVANIA

No. 1590 CD 2016

S.A., a minor, by her father H. O.,

Appellees,

v.

PITTSBURGH PUBLIC SCHOOL DISTRICT,

Appellant.

Appeal from the Order of Court of Common Pleas of Allegheny County,
Pennsylvania dated August 29, 2016 at Docket No. SA 16-000569

BRIEF OF APPELLEES

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COUNTER STATEMENT OF JURISDICTION

The Commonwealth Court has exclusive jurisdiction of appeals from final orders of the Court of Common Pleas in all actions covering enforcement of a statute regulating the affairs of public schools pursuant to the Judicial Code, 42 Pa.C.S. § 762(a)(4)(i). This matter comes before the Court on appeal from the August 29, 2016 final order of the Court of Common Pleas pursuant to 42 Pa.C.S. § 933(a)(2). The Order reverses a final adjudication of the Board of Directors of the Pittsburgh Public Schools, dated June 22, 2016, entered pursuant to 24 P.S. § 13-1318.

COUNTER STATEMENT OF STANDARD AND SCOPE OF REVIEW

This Honorable Court’s scope of review on appeal is limited to determining “whether the trial court abused its discretion, committed an error of law, or violated constitutional rights.” *Yatron by Yatron v. Hamburg Area Sch. Dist.*, 631 A.2d 758, 760 (Pa. Commw. Ct. 1993). In this case, Appellant has raised no constitutional challenge. Moreover, the lower court made no findings of fact, but rather relied on undisputed facts to determine whether possession of a pencil violated 24 P.S. § 13-1317.2. In the absence of discretionary findings regarding evidence, this Court’s review is limited to whether the lower court committed an error of law or otherwise abused its discretion.

COUNTER STATEMENT OF QUESTIONS INVOLVED

1. Did the lower court commit an error of law by reversing the administrative decision of the Board of Directors of the Pittsburgh Public Schools to expel S.A. for possession of a pencil?

Suggested Answer: No

2. In the alternative, if this Court concludes that use and intent are proper considerations in determining whether a pencil is a weapon under 24 P.S. § 13-1317.2, must this case be remanded?

Suggested Answer: Yes

COUNTER STATEMENT OF THE CASE

This matter comes before this Court on appeal by the Pittsburgh Public School District (hereinafter “School District”), seeking review of the Order by Judge McCarthy of the Court of Common Pleas, dated August 29, 2016, which granted the summary appeal of S.A. (hereinafter “S.A.”) and reversed the decision of the Board of School Directors of Pittsburgh Public School (hereinafter “School Board”) to expel S.A. for possession of a pencil.

A. Procedural History

Pursuant to 22 Pa. Code § 12.6(b)(2), an expulsion hearing was held on May 26, 2016. At the hearing, both parties presented evidence and the testimony of witnesses. Subsequently, the Hearing Officer issued a decision on June 3, 2016 that recommended to the School Board that S.A. receive the mandatory one-year expulsion for possession of a weapon in violation of Section 6 of the School District’s Code of Student Conduct.¹ (R. 92a).

On June 16, 2016, S.A., through counsel, exercised her right under 24 P.S. § 13-1317.2(c), to request review of the expulsion order by the Superintendent of the Pittsburgh Public Schools and sought a modification of the one-year expulsion order. On June 22, 2016, the request was denied.

¹ As explained *infra* note 7, 24 P.S. § 13-1317.2 is mirrored in the School District’s own Code of Student Conduct in Section 6.

On July 20, 2016, S.A. filed a timely notice of appeal with the Court of Common Pleas pursuant to 42 Pa.C.S. § 933(a)(2), and filed a subsequent Motion for Supersedeas on July 28, 2016.

A status conference was held on August 15, 2016 before Judge McCarthy. During the conference, counsel for S.A. identified multiple claims she intended to raise on appeal. In addition to the error of law in question, she raised additional due process claims including: the School District's failure to create a full, fair and complete record of the expulsion hearing;² claims that counsel for the School District "comingled" its role in advising both the Board and the School District;³ and other violations related to the School District's failure to provide adequate translation and interpretation services in compliance with state and federal law.⁴ These additional claims were raised and reserved by S.A. in the lower court. However, because the lower court reversed the decision as a matter of law, these issues were not presented or resolved by the lower court, and are not presented on appeal. S.A. continues to reserve these rights.

²This occurred in violation of its obligations pursuant to 22 Pa. Code §12.8(b)(8).

³This commingling of roles violated S.A.'s due process rights. *See Pittsburgh Board of Pub. Educ. v. M.J.N.*, 524 A.2d 1385, 1389 (Pa. Commw. Ct. 1987).

⁴Because S.A. and her father have limited English proficiency, counsel for S.A. requested that appropriate interpretation and translation services be provided at the expulsion hearing, pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 200d, 34 C.F.R., Part 100, which has been interpreted by the U.S. Department of Education to require schools to provide non-English speaking parents and students with appropriate translations concerning school programs and activities, including matters of school discipline. *See also*, PENNSYLVANIA DEPARTMENT OF EDUCATION BASIC EDUCATION CIRCULAR, EDUCATING STUDENTS WITH LIMITED ENGLISH PROFICIENCY, section titled, "Communication with Parents". (July 20, 2009).

On August 15, 2016, the lower court granted S.A's Motion for Supersedeas. The Court further ordered the parties to submit briefs on the single issue of whether a pencil falls within the scope of the definition of a weapon, under Section 13-1317.2. The parties submitted briefs on August 19, 2016.

On August 29, 2016, the lower court issued a Memorandum and Order (hereinafter "Mem. and Order"), reversing the School District's decision to expel S.A. *See* Appellant Ex. 1 (providing full text of Court of Common Pleas Memorandum and Order, dated August 29, 2016).

Judge McCarthy found:

Of course, an individual might deliberately utilize any object as an instrument of harm. Nonetheless, the scope of the rule cited by the District cannot reasonably be construed any more broadly than as a prohibition of possession by a student of weapons that are of the same kind as set forth in the list stated in the District's rule.

That there was an intent for that scope to encompass a pencil within the definition of weapons proscribed the Code of Student Conduct is not plausible and, certainly, would not have afforded notice to S-A- that possession of a pencil placed her at risk of expulsion.

Mem. and Order at 5.

The Court further concluded:

Inasmuch as the sole basis on which the District has proceeded is that of possession of a "weapon" as that term is used and defined by legislation and pertinent case law, the Court is constrained to agree with counsel for S-A- that the District, rather than responding to the actual misbehavior, expelled the student for the possession of a weapon.

Mem. and Order at 5.

On September 20, 2016, the School District appealed the Order to this Court. On December 13, 2016, the School District submitted its brief in support of its appeal.

B. Factual Background

The School District expelled S.A. on the sole basis of possession of a weapon – in this case, a pencil. Mem. and Order at 5.

At the hearing, both parties presented evidence and the testimony of witnesses. Although the transcript of the expulsion hearing in this case is partial and incomplete (as explained *infra* note 6) the record shows that S.A. is a 15-year-old female student, who has been enrolled in the Pittsburgh Public Schools since she arrived in Pittsburgh with her family as a Somali refugee. S.A. is identified as an English Language learner. (R. 85a). Her parents also have limited English proficiency.⁵ (R. 109a).

On the date of the incident giving rise to this dispute, S.A. was in tenth grade at Barack Obama International Academy, a magnet program in Pittsburgh Public School District. (R. 106a). The School District's high school discipline records for S.A. show she has no prior disciplinary actions. (R. 106a).

Furthermore, if the hearing had been fully recorded, this Court would hear

⁵ The School District's records state erroneously that the language S.A. and her family speak at home is Swahili. (R. 85a). The home language is Kizigua.

S.A.'s testimony that during her high school history class, supervised by a substitute teacher, a male student threw a bottle cap at her. (R. 127a). Another male student, R.D., pulled his chair beside her and aggressively tried to retrieve the bottle cap (R. 129a). With his hands, he intentionally touched her breasts and buttocks. When she resisted, the altercation escalated. (R. 129a). He pushed her into a cabinet and slammed her to the floor. (R. 127a). During the course of this altercation and S.A.'s struggle to resist him, S.A. scraped his neck with a pencil. His superficial scratch was treated with a band aid. (R. 88a). The testimony of S.A. would further show that the substitute teacher did nothing to protect S.A.

Although the sole basis on which the School District expelled S.A. was for possession of a weapon, the School District also filed charges against S.A. in Juvenile Court. (R. 89a). Counsel for the School District notes these charges against S.A. in its brief on page 6, but fails to advise the Court that all charges were summarily dismissed by the Juvenile Court – without adjudication or disposition - as unsubstantiated. The record of these charges has been expunged.

Given the supersedeas currently in place, S.A. has been attending school, with appropriate English language learner supports, and is progressing academically. She has positive relationships with her peers and is engaged in extra-curricular school activities.

C. Incomplete Record

The Reproduced Record the School District submitted to the lower court, and similarly submitted to this Court, pursuant to Pa.R.A.P. 1911, is incomplete.

The Reproduced Record includes only a partial transcript of the expulsion hearing. As part of the record, the School District submits two Affidavits, one from the Hearing Officer (R. 62a) and another from Mr. David Skalniak, the Media Services Manager for the School District (R. 64a). These Affidavits seek to explain the mechanical error that resulted in the failure to record the full and complete administrative hearing. (R. 62a and 64a). The incomplete transcript of the expulsion hearing presents only the School District's version of the facts as the recording ends prior to the presentation of S.A.'s case and cross-examination of the School District's only witness. (R. 2a through 61a).⁶

Even without the presentation of S.A.'s case and her testimony and evidence that challenge the School District's statement of the facts, the lower court was still

⁶The School District's Affidavits state that the recording of the hearing started at 10:04 a.m. and stopped at 1:22 p.m. (R. 63a). Yet, the hearing continued for approximately three more hours. The transcript submitted by the School District in this case includes only its case in chief. (R. 52a). There is no recording of any of S.A.'s case. There is also no recording or transcript of S.A.'s counsel's cross-examination of the School District's only witness. Nor does it include the detailed testimony of both S.A. and her father. The School District's cross examination of each of these witnesses is also missing. In the Affidavit of the Hearing Officer, she avers, "I had no knowledge during the proceedings that the hard drive of the recorder had reached capacity, causing the latter part of the hearing to fail to record..." (R. 63a). S.A. objects to any reference by the School District to facts presented in the partial transcript as misleading, incomplete and prejudicial.

able to rule on the question of law presented. Similarly, the incomplete transcript should not prevent this Court from determining whether the lower court properly ruled, as a matter of law, that a pencil is not a weapon within the scope of Section 13-1317.2.

S.A. urges this Court to affirm the lower court's decision as a matter of law for the reasons set forth in the Argument below.

SUMMARY OF ARGUMENT

As the court below held, a pencil is not a weapon.

In this case, two students – a boy and a girl - were part of an altercation at school. Both were injured. The boy was scratched. The girl, S.A., was inappropriately touched on her breast and buttocks, and thrown on the ground after resisting his unwanted touching. One student was helped; the other was punished.

The boy was sent to the school nurse, who treated his injury with a band aid. The girl was expelled. The School District expelled S.A. on the sole grounds that she was violated Section 13-1317.2 by possessing a weapon – a pencil.

S.A. does not contend that the School District could not have disciplined her. Indeed, school districts have broad discretion to discipline students in countless ways. However, S.A. maintains that the School District's response must be within the bounds of this broad discretion - and with proper legal authority.

Here, the School District chose to expel S.A. using the most extreme and punitive discipline statute available under the law – a statutorily mandated one-year expulsion, reserved exclusively for students who possess a weapon in school. The expulsion imposed for this offense is unique. It is the only provision in the Public School Code for which a student can also be denied enrollment in regular education programs in other school districts and charter schools.

In reviewing the decision to expel S.A. for possession of a pencil, the lower court committed no error of law when it properly applied governing Pennsylvania precedent, well-established rules of statutory construction, and the plain language of 24 P.S. §13-1317.2 to reverse the expulsion. The lower court also properly rejected the School District's reliance on differently worded criminal statutes and cases involving adult criminals to re-write and broaden the scope of 24 P.S. §13-1317.2.

For these reasons, the lower court's ruling must be upheld.

ARGUMENT

It is undisputed that the sole basis for the School District's expulsion of S.A. was possession of a weapon in violation of Section 6 of the School District's Code of Student Conduct. The lower court properly reversed the decision of the School Board to expel S.A. for possession of a weapon, concluding that a pencil did not fall within the scope of the definition provided in the statute and corresponding Code of Student Conduct.

Resting its decision on this Court's precedential case law and long-standing rules of statutory construction, the lower court properly interpreted 24 P.S. § 13-1317.2 (hereinafter "Section 13-1317.2") as a statute that governs possession and held: "[t]hat there was an intent for the scope to encompass a pencil within the definition of weapons proscribed in Code of Student Conduct is not plausible..." Mem. and Order at 5.

- I. The lower court committed no error of law when it reversed the administrative decision of the Board of Directors of the Pittsburgh Public Schools to expel S.A. for possession of a pencil.**
 - A. The lower court properly interpreted Section 13-1317.2 to prohibit possession of a weapon in school.**
 - 1. *Section 13-1317.2 is a possession statute.*

The plain reading of Section 13-1317.2 supports the findings of the lower court that this provision governs possession, and that neither intent nor use are relevant.

This provision explicitly states:

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

Section 13-1317.2(a) (emphasis added).

In interpreting Section 13-1317.2, the lower court also referenced the relevant section of the School District's Code of Student Conduct⁷, Part I, Section 6, which similarly states:

A student shall not *possess, handle or transmit* a weapon while on school property... The term "weapon," as used in this Code of Student Conduct shall include but shall not be limited to any knife, cutting instrument, cutting tool, explosive, mace, nunchaku, firearm, shotgun, rifle and any other tool, instrument or implement capable of inflicting serious bodily injury.

See PITTSBURGH PUBLIC SCHOOLS, THE CODE OF STUDENT CONDUCT: UPDATED FOR 2015-16 (emphasis added). (R. 95a).

Each of these code sections governs possession. Both are strict liability, zero tolerance provisions that impose a mandatory and severe penalty—a one year expulsion—on the sole basis of possession of a weapon, without reference to the student's use of the object or intent to cause harm.

It is undisputed that Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §§ 1-101 – 27-2702 (2016), provides school districts

⁷State law requires that school boards "adopt a code of student conduct which shall include policies governing student discipline and a listing of students' rights and responsibilities as outlined in this chapter." 22 Pa. Code § 12.3(c).

with broad discretion to regulate student conduct.⁸ However, in enacting Section 13-1317.2, the General Assembly created a narrow exception to that discretion specifically to address concerns about guns in schools.⁹

Unlike other provisions in the Public School Code, Section 13-1317.2 statutorily mandates a school district impose the most severe disciplinary response available – a one year expulsion - when a student *possesses* a weapon in school.¹⁰ The lone exception to this mandatory punishment is that “the superintendent of a school district... may recommend modification of such expulsion requirements for a student on a case-by-case basis.” 24 P.S. §13-1317.2(c). *See Lyons v. Penn Hills Sch. Dist.*, 723 A.2d 1073, 1076 (Pa. Commw. Ct. 1999). S.A. sought to exercise this right, however, as noted *supra* p. 4, S.A.’s request to modify the one-year expulsion was denied.

⁸School districts have broad authority to impose discipline on student conduct, including the imposition of a wide array of consequences and interventions, from restorative justice practices to more severe penalties, such as suspension, transfer to alternative placements, and in the most serious cases, expulsion. *See* 24 P.S. §§ 5-510, §13-1317, §13-1318, § 19-1901(C). State regulations, particularly Chapter 12, codified at 22 Pa. Code. § 12, further enumerate the types of discipline that can be imposed, with accompanying due process protections. *See also Hamilton v. Unionville-Chadds Ford Sch. Dist.*, 714 A.2d 1012, 1014 (Pa. 1998).

⁹The Pennsylvania General Assembly enacted Section 13-1317.2 in response to the federal Gun Free Schools Act, which required states to adopt similar laws to ban the possession of firearms in schools. 20 U.S.C. § 7961. *See also* JOINT STATE GOVERNMENT COMMISSION OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, DISCIPLINE POLICIES IN PENNSYLVANIA’S PUBLIC SCHOOLS: REPORT ON THE ADVISORY COMMITTEE ON ZERO TOLERANCE SCHOOL DISCIPLINE POLICIES - OCTOBER 2016.

¹⁰This section further gives other school districts and charter schools the right to deny a student who has been expelled under Section 13-1317.2 access to their regular education programs. 24 P.S. § 13-1317.2(e.1).

Nowhere in the School District’s arguments does it challenge the scope of Section 13-1317.2 as governing *possession* of a weapon in school. Nevertheless, without legal authority, the School District now asks this Court to expand the scope of Section 13-1317.2(g) beyond mere possession to focus on a student’s intent and use of the object—in this case, a pencil.

2. *Section 13-1317.2 must be narrowly construed.*

The lower court’s holding is supported by Pennsylvania precedent that a penal statute must be read strictly and terms cannot be added to broaden its scope. *See Commonwealth v. Booth*, 766 A.2d 843, 846 (Pa. 2001). There is no dispute that Section 13-1317.2 is punitive and imposes a potentially life-altering punishment of depriving S.A. of her right to public education. Thus, this statute must be carefully and strictly construed. The School District may not contort the text or read words into the statute to broaden its scope. The School District’s attempts to insert considerations of “use” or “intent” to expand the definition of a “weapon” beyond what is set forth in the statute must be rejected.

A plain reading of the statute supports the lower court’s conclusion that both Section 13-1317.2 and Section 6 of the School District’s Code of Student Conduct govern *possession only*: “[i]n this matter, the pertinent rule of conduct prohibits possession of a weapon...”. Mem. and Order at 5.

B. The lower court properly concluded that a pencil does not meet the definition of a weapon under 24 P.S. § 13-1317.2(g).

The language of Section 13-1317.2(g) provides:

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.

24 P.S. §13-1317.2(g).

1. *The lower court’s conclusion that a pencil is not a weapon is supported by governing case law.*

The lower court properly relied on pertinent case law to hold, “[t]hat there was an intent for the scope to encompass a pencil within the definition of weapons proscribed the Code of the Conduct is not plausible.” Mem. and Order at 5.

This Court’s decision in *Picone v. Bangor Area Sch. Dist.*, 936 A.2d 556, 562 (Pa. Commw. Ct. 2007) is controlling. In *Picone*, this Court addressed whether a pellet gun constituted a weapon pursuant Section 13-1317.2(g). *Id.* The *Picone* court made clear that Section 13-1317.2 is a statute governing possession only. *Id.* at 561. The Court held that the pellet gun is a weapon within the scope of the statutory definition in Section 13-1317.2, based on a clear reading of the statute and long-standing, judicial rules of statutory construction. *Id.* at 561-622.

Specifically, the Court examined the clear legislative intent to find that:

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).

The *Picone* Court makes clear that the question is *not*, as the School District frames it, how the student may use the object or intend (or not) to cause harm -- but rather whether an item is “**designed**” to inflict serious bodily injury (*e.g.* mace, stun guns, brass knuckles) or when “**used as intended**” can inflict serious bodily injury (*e.g.* nail guns, fireworks). *Id.*

As the School District notes on page 17 of its Brief, “[t]he student in *Picone* apologized to his girlfriend after the pellet gun incident and testified that shooting her was intended as a joke and “maybe to scare her.” *Picone* at 558. However, this Court concluded that the student’s “intent” to harm anyone or the use of the object were irrelevant. Instead, the focus was on whether the student *possessed* the gun and whether the pellet gun fell within the scope of the definition of a “weapon” as defined by statute in Section 13-1317.2(g). The Court held that the pellet gun was a weapon pursuant to Section 13-1317.2(g) because it met the criteria as a “weapon” - it is *designed* to inflict serious bodily injury, *even when used as intended*. *Id.* at 562. *See also Zahorchak v. Neshannock Twp. Sch. Dist.*, No. 70066, 2006 WL

5347778 (Pa. Com. Pl. 2006) (finding that flammable liquid, believed to be napalm, to be a “weapon” pursuant to Section 13-1317.2(g), given its design, and despite the fact it was not ignited.)

The School District ignores the limits set forth in *Picone*. The School District’s position is essentially that there are no limits – that *any* object a school district deems “capable” of causing serious bodily injury falls within the scope of the definition of a weapon in Section 13-1317.2. The lower court rejected this argument, stating:

Of course, an individual might deliberately utilize *any* object as an instrument of harm. Nonetheless, the scope of the rule cited by the District cannot reasonably be construed any more broadly than as a prohibition of possession by a student of weapons that are of the same kind as set forth in the list stated in the District’s rule.

Mem. and Order at 5 (emphasis added).

The lower court goes on to point out that:

In fact, because that rule is careful to list not merely “any knife” but also cutting instruments and cutting tools and not merely any “firearm”, but also shot guns and rifles, it is apparent that the drafters of the rule *were aware of the method by which to ensure a broadened scope of the prohibition of weapons*.

Mem. and Order at 5 (emphasis added).

Under *Picone*, this Court must affirm the decision of the lower court that a pencil does not meet the definition of a weapon in Section 13-1317.2(g). A pencil is not *designed* to inflict serious bodily injury, nor can a pencil inflict serious

bodily injury *when it is used as it is intended* – as a writing device.

2. *The School District's position that a pencil qualifies as a weapon contravenes the principle of statutory construction known as ejusdem generis.*

Not only is the School District's position that a pencil falls within the definition of "any other tool, instrument, or implement capable of inflicting serious bodily injury" at odds with controlling case law, it further conflicts with Pennsylvania courts' standard modes of statutory construction, including *ejusdem generis*— in English, "of the same kind".

The School District argues that *ejusdem generis* should only be used as an analytical tool in the event words in a statute are ambiguous. Appellant Br. at 27. Neither party asserts that Section 13-1317.2 is ambiguous. S.A. agrees with the School District's citation to the Court's finding in *Picone*, that no court has interpreted the definition of a weapon in this strict liability, zero tolerance possession statute as vague, ambiguous or non-explicit. Appellant Br. at 28 (citing *Picone* at 561-562).

This Court is not being asked to use *ejusdem generis* to interpret an ambiguous term in the statute. Rather, S.A. submits it is the analytical tool used to interpret the meaning and scope of catchall phrases. In this case, the phrase in Section 13-1317.2(g) that states: "...and any other tool, instrument or implement capable of inflicting serious bodily injury." § 13-1317.2(g).

The Pennsylvania Supreme Court makes clear that *ejusdem generis* is an accepted analytical tool for interpreting the meaning and scope of catchall phrases.

[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 (Pa. 1992) (citing Black's Law Dictionary at 270 (5th Ed. 1983) (citing, Black, *Interpretation of Laws* 141)). *See also, e.g., Indep. Oil & Gas Ass'n of Pennsylvania v. Bd. of Assessment Appeals of Fayette Cty.*, 814 A.2d 180, 184 (Pa. 2002).

Pennsylvania courts have further admonished that:

[A]ny 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 (Pa. 2014) (emphasis added) (internal citations omitted).

Using *ejusdem generis* to determine the scope of Section 13-1317.2(g)'s catchall phrase – “any other tool or instrument” requires an analysis of what the items listed in Section 13-1317.2(g) have in common. Immediately preceding the catchall phrase, the statute lists as weapons: knives, cutting instruments, cutting tools, nunchaku, firearms, shotguns, and rifles. § 13-1317.2(g). S.A. submits that these items all have two characteristics in common: they are (1) inherently dangerous, and (2) the mere possession of these items at school serves to elicit

fear.

In contrast, a pencil is not inherently dangerous. Additionally, unlike the other enumerated items in the statute whose mere presence on school grounds would elicit fear, a pencil is a common learning tool found in schools. A student who brings one of the items named as a weapon under in Section 13-1317.2(g) is likely to elicit fear in others and cause a serious disruption to school activity by its mere presence. A student in possession of a pencil is not.

In reading the code's language, the lower court agreed and found that:

[T]he scope of the rule cited by the District cannot reasonably be construed any more broadly than as a prohibition of possession by a student of weapons that are of the same kind as set forth in the list stated in the District's rule.

Mem. and Order at 5.

Therefore, the lower court properly held:

That there was an intent for that scope to encompass a pencil within the definition of weapons proscribed the Code of the Conduct is not plausible[.]

Mem. and Order at 5.

The lower court committed no error of law, nor did the lower court abuse its discretion by relying on *eiusdem generis* to inform its reading of the Code's catchall phrase.

3. *The lower court properly held that the School District's position is not plausible.*

The School District attempts to argue that the lower court's decision would lead to absurd results. This argument is confounding, considering that its own position is that under Section 13-1317.2(g) a school district can impose a mandatory expulsion of a student for one year by possessing *any* object. This is not what the statute or controlling case law permit, nor what the legislature intended. *See* discussion of Gun Free Schools Act, *supra* note 9. If the legislature truly intended to give school districts unbridled discretion to discipline students who possess *any* item or implement capable of causing an injury, why provide a list at all?

Taken to its logical conclusion, the School District's position would further lead to the absurd result that would require every student who possesses a pencil in school to be found in possession of weapon. More importantly, such a reading of the statute would give school districts a level of discretion that is clearly at odds with basic due process and the statutorily mandated provisions of Section 13-1317.2.

The lower court properly rejected the School District's attempt to legislate "use and intent" into Section 13-1317.2. The School District's position illustrates the very unbridled discretion Pennsylvania courts seek to prevent by requiring

statutes be clearly written and strictly construed.¹¹

Despite the plethora of other developmentally appropriate and legally permissible disciplinary responses and options available to the School District¹², the School District chose to discipline S.A. solely for possession of a weapon. As the lower court properly observed:

Inasmuch as the *sole* basis on which the District has proceeded is that of possession of a “weapon” as that term is used and defined by legislation and pertinent case law, the Court is constrained to agree with counsel for S-A- that the District, rather than responding to the actual misbehavior, expelled the student for the *possession* of a weapon.

Mem. and Order at 5 (emphasis added).

C. The lower court properly rejected the School District’s reliance on criminal codes and cases to recast a Public School Code statute.

1. *The lower court made no error of law nor abused its discretion in rejecting the School District’s reliance on criminal codes and statutes.*

The lower court properly ignored the School District’s arguments that rely on criminal statutes in an attempt to argue that “intent” and “use” are relevant to Section 13-1317.2. For example, the School District argues that this Court should

¹¹The inconsistent application of this statute gives rise to potential claims of race, gender, and disability discrimination. The School District’s own discipline data, as reported to the state and federal government, shows that the School District disciplines a disproportionate number of students with disabilities and students of color. *See* SAFE SCHOOLS ONLINE, PA. DEPARTMENT OF EDUCATION, www.safeschools.state.pa.us (last visited Feb. 14, 2017). *See also* CIVIL RIGHTS DATA COLLECTION, U.S. DEPT. OF EDUCATION OFFICE OF CIVIL RIGHTS, ocrdata.ed.gov (last visited Feb. 14, 2017).

¹²*See* PITTSBURGH PUBLIC SCHOOLS, THE CODE OF STUDENT CONDUCT: UPDATED FOR 2015-16, <https://pittsburghscitech.files.wordpress.com/2014/10/pps-code-of-student-conduct-2015-2016.pdf> (last visited Feb. 14, 2017).

look to the definition of a deadly weapon in the criminal code, 18 Pa.C.S. § 2301, to interpret the Public School Code provision at issue here. Unlike Section 13-1317.2, this criminal statute explicitly includes the terms “intent” and “use”.

A side by side comparison of the two distinct definitions is illustrative:

<p><u>Definition of “weapon” in Section 13-1317.2(g):</u></p> <p>“... any other tool, instrument or implement capable of inflicting serious bodily injury.”</p>	<p><u>Definition of “deadly weapon” in 18 Pa.C.S. § 2301 (emphasis added):</u></p> <p>“... any other device or instrumentality which, <i>in the manner in which it is used or intended to be used</i>, is calculated or likely to produce death or serious bodily injury.”</p>
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The words “used” or “intended to be used” do not appear in the Public School Code provision, Section 13-1317.2. The School District’s argument rest solely on asking this Court to disregard the *actual* language the legislature used in Section 13-1317.2 and to recast it to insert the elements of “use” and “intent” from an adult criminal statute into the Public School Code.

Similarly, the School District argues that the statute should be construed *in pari materia* with 18 Pa.C.S. § 912, which criminalizes possession of a weapon on school property with essentially the same language, relying on *In re M.H.M.*, 864 A.2d 1251(Pa. Super. Ct. 2004).¹³ Appellant Br. at 19.

¹³The School District argues that the paintball gun in *M.H.M.* was found to be a weapon because it was capable of causing serious bodily injury. However, the School District’s argument ignores the *M.H.M.* court’s analysis of a paintball gun’s *design* and *intended use*, consistent with this Court’s holding in *Picone. M.H.M.* at 1256. The School District further ignores the Court’s language that Section 912, like Section 13-1317.2, governs possession – not use: “[t]he offense

Under the criminal cases and statutes cited by the School District, including § 912 and § 2301, a bedroom slipper¹⁴ and even an egg¹⁵ were found to be deadly weapons when used with extreme force and the intent to cause injury. But in this case, *Picone* is controlling and requires an examination of whether an object is “... *designed to inflict serious bodily injury*” or “... *when used as intended, can inflict serious bodily injury.*” *Picone* at 562 (emphasis in original).

Under Section 13-1317.2(g), neither a bedroom slipper nor an egg meet the definition of a weapon. A slipper, by design and when used as intended, provides comfort to one’s feet. Similarly, an egg cannot be a weapon under Section 13-1317.2 because, when used as designed and intended, an egg is meant to be a meal – or a chicken.

Accordingly, in applying *Picone*, the lower court properly ignored the School District’s arguments that rely on criminal statutes and cases with different legal standards.

2. *The School District’s analogies to the criminal justice system are improper given that S.A. is alleged to have violated a provision of the Public School Code.*

Furthermore, all of the School District’s criminal code and case references are embedded within a criminal justice system that is laden with extensive due

of possession of weapon on school property has no additional incriminating circumstance aside from bare possession.” *Id.* at 1257.

¹⁴*Commonwealth v. Pepperman*, 45 A.2d 35 (Pa. 1946).

¹⁵*Commonwealth v. Roman*, 714 A.2d 440 (Pa.Super. 1998).

process rights and notice requirements, well beyond the scope of a school code violation. Unlike criminal statutes, Section 13-1317.2 falls squarely within the Public School Code and governs behavior of children in school. It is not a criminal statute. It does not come with criminal penalties or protections.

Unlike the level of due process protections and rights afforded to criminal defendants, a student accused of violating Section 13-1317.2 of the Public School Code does not have a right to counsel.¹⁶ Nor does the student have the benefit of robust evidentiary rules (*e.g.* hearsay is admissible in an expulsion hearing, and evidence is not “tagged” or required to be maintained through a clear chain of custody).¹⁷ As the lower court noted, criminal statutes require a high level of notice, and the School District’s position “certainly, would not have afforded notice to S.A. that possession of a pencil placed her at risk of expulsion.” Mem. and Order at 5. Finally, as courts have previously observed, the “level of proof required to prove a case before a School Board is by the preponderance of the evidence, rather than proof beyond a reasonable doubt”. *See In re D.J.G.*, No. 1562 EDA 2013, 2014 WL 10965164, at *3 (Pa. Super. Ct. Mar. 18, 2014) (citing *A.B. v. Slippery Rock Area Sch. Dist.*, 906 A.2d 674, 677 n. 5 (Pa. Cmmw. Ct. 2006)).

¹⁶ 22 Pa. Code § 12.8(4).

¹⁷ 2 Pa.C.S. § 554.

Accordingly, this Court must reject the criminal cases relied on by the School District and uphold the lower court's finding that a pencil does not fall within the scope of the definition of a weapon as set forth in the Public School Code provision Section 13-1317.2(g).

II. In the alternative, if this Court concludes that use and intent are proper considerations in determining whether a pencil is a weapon under Section 13-1317.2, this case must be remanded.

In its Memorandum and Order, the lower court held as a matter of law that a pencil does not fall within the scope of the definition of a "weapon" in Section 13-1317.2. The lower court's decision was not predicated on any factual findings in the record below, and thus, the absence of a complete record was irrelevant to the disposition. Similarly, on appeal, S.A. urges this Court to affirm the lower court's ruling as a matter of law for the reasons set forth above and without regard to the factual record in this case.

Should this Honorable Court be inclined to reverse the lower court's decision, this matter must be remanded to the lower court for a full and fair recorded hearing that comports with due process.

As discussed *supra* note 6, due to the School District's mechanical error that caused the recording device to stop recording in the middle of the hearing, a complete factual record of the administrative hearing does not exist. As a result, there is no full and fair hearing transcript available for review upon which the court

could render a decision regarding sufficiency of the evidence.

Additionally, any remand of this matter should also include instructions that provide S.A. the opportunity to re-assert the additional claims she has raised and reserved throughout this case. These include the School District's failure to provide appropriate interpretation and translation services, as well as significant concerns about the School District's counsel's comingling of its attorney-client relationships with the School District and the Board of School Directors in the same disciplinary matter. *See supra* note 2, 3, and 4. These issues were briefed by S.A. in her Motion and Memorandum for Supersedeas, which was granted by the lower court and remains in effect.

Thus, in the alternative, if this Court concludes that factual issues are to be considered in interpreting Section 13-1317.2, this case must be remanded to the lower court.

CONCLUSION

The lower court properly rejected the School District's argument that a pencil is a weapon. The lower court's decision is in accordance with the plain language of Section 13-1317.2, controlling case law, and well-established principles of statutory construction.

S.A. does not contend that the School District cannot penalize her. Rather, she asserts that it must be done with proper legal authority. Given that the sole basis for the School District's expulsion was for violation of Section 13-1317.2 – possession of a weapon, this Court should uphold the decision of the lower court, finding that a pencil is not within the scope of the definition of a weapon in Section 13-1317.2(g).

Respectfully submitted,

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PROOF OF SERVICE

I, Cheryl Kleiman, attorney for Appellees, hereby certify that on 15th day of February, 2017 a true and correct copy of the foregoing Brief for Appellees has been served by first class mail to the following counsel for the Appellant, Pittsburgh Public School District.

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