IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Shelby L. Jones, a Minor, by her Parent and Natural Guardian, David Jones	:	
v.	:	No. 2139 C.D. 2008
Gateway School District and Gateway School District Board of School Directors, Appellants	:	Argued: October 15, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: March 26, 2010

The Gateway School District (District) and the Gateway School District Board of School Directors (Board) appeal the order of the Court of Common Pleas of Allegheny County (trial court) sustaining the appeal of Shelby L. Jones, a minor (Student), by her parent and natural guardian, David Jones (Parent), and reversing the decision of the Board permanently expelling Student from the District. We reverse.

In the 2007-2008 school year, Student was an eighth grade student at Gateway Middle School (School) in the District. On March 11, 2008, a personal care aide in the School was approached by three students at lunch. The students told the aide that another student, Kyrsten McHenry, had created a "hit list" in her

notebook that they had seen which contained the names of about twenty students. The aide passed this information on to a teacher who, in turn, asked the students about the list. The students indicated that they had seen the list, and that other students had seen the list as well. The teacher then passed this information on to the School's principal.

During his investigation of the "hit list" created by Kyrsten McHenry, the principal learned that Student was also in possession of a "hit list". The principal pulled Student from class to discuss the "hit list", and Student was cooperative and indicated that it had been created with another student. Ultimately, three different lists were found in three of Student's notebooks. The first list was entitled "People to Kill!", and contained the name of one teacher and six students. Reproduced Record (RR) at 22. The second list was entitled "People I Need to Kill", with the word "Kill" scratched out, and contained a list of four names. Id. at 23. The third list was untitled, and contained the names of forty-eight students. Id. at 24.

In a letter dated March 11, 2008, the School's administration notified Parent of the grounds for Student's three-day suspension. The administration also immediately contacted the parents of the six students listed on the "People to Kill!" list to inform them of the situation. The administration did not reveal Student's identity. The police were also notified, and criminal charges were pending as a result of the incident.

Following the incident, Student presented the principal with a letter of apology. RR at 125-126. In the letter, Student indicated that "[t]he main thing I would like to apologize for is me writing the list…. The matter is not to be held lightly because of what has happened in the past and at other schools. I understand." Id. at 125. In addition, Student acknowledged that "[t]his wasn't the

smartest venting tool. You are right. There are many others but I just wrote names down. I'm sorry for using this method. It's not healthy and stable. I will use other more healthy methods next time I am angry with a person at school." Id. at 125-126. Finally, Student noted that "I don't feel as if anyone else should be blamed for the list. I will take the blame for this because I am the one who started this mess. And no, I'm not covering for my peers. I see, if you did the crime you do the time. It was childish on my part and it will never happen again." Id. at 126.

On March 17, 2008, an informal hearing was conducted with the School's principal, Student and Parent in attendance. Following the hearing, the School's principal notified Parent that Student's suspension had been extended for an additional seven school days for violating Level IV of the District's Discipline Code. See RR at 128.[1]

By letter dated March 19, 2008, the District's assistant superintendent informed Parent that a formal hearing regarding Student's suspension would be conducted before the Board on March 27, 2008. See RR at 130-131. The letter notified Parent that "[t]he hearing will determine whether or not the exclusion from school should be continued; and, if so, for what period of time, or whether [Student] should be expelled from the [District] on a permanent basis." Id. at 130. In addition, the letter notified Parent that "[t]he following charges concerning

[1] Level IV offenses are described, in pertinent part, as "[a]cts which result in violence to another person(s) or property which pose a direct threat to the safety of others in the school. These acts are clearly criminal in nature and are so serious that they always require administrative action resulting in the immediate removal of the student from the school." RR at 144 (emphasis in original). Examples of Level IV offenses are "[e]ngaging in conduct so disruptive as to interfere with the orderly operation of the school or which create a clear and present danger to the health, safety or welfare of students, staff and the school community", and "[t]erroristic threats to students or school personnel". Id. A disciplinary option for a Level IV violation is expulsion. Id.

[Student]'s conduct will be considered and evaluated by the [Board]: … [that o]n or about March 17 – [Student] was assigned 10 days out-of-school suspension for terroristic threats to students and staff." Id. Further, the letter notified Parent that "[t]his conduct constitutes disobedience or misconduct within the meaning of [Section 1318 of] the Public School Code [of 1949 (School Code)[2]]", and that "[i]t also represents acts that seriously disrupt the educational process of the [District]". Id.

On March 27, 2008, a formal hearing was conducted before the Board. At the conclusion of the hearing, the Board permanently expelled Student from the District. See RR at 114. In its Adjudication, the Board made the following relevant conclusions:

> 6. The [District] Discipline Code lists terroristic threats against students or school personnel as a Level IV violation.
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> 7. The [District] Discipline Code lists engaging in conduct so disruptive as to interfere with the orderly operation of the school or which creates a clear and present danger to the health, safety or welfare of students, staff, and school community as a Level IV violation.
>
> 8. On the basis of the testimony and evidence presented at the formal hearing, and after full, fair and

[2] Act of March 10, 1949, P.L. 30, as amended, 24 P.S. § 13-1318. Section 1318 of the School Code provides, in pertinent part:

> Every principal or teacher in charge of a public school may temporarily suspend any pupil on account of disobedience or misconduct, and any principal or teacher suspending any pupil shall promptly notify the district superintendent or secretary of the board of school directors. The board may, after a proper hearing, suspend such child for such time as it may determine, or may permanently expel him….

> impartial consideration thereof, the Board concluded that the charges of Level IV misconduct against the Student were sustained by the clear weight of the evidence.
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> 9. In light of the totality of the circumstances present, the possession of a "People to Kill!" list on school grounds is a serious expression of intent to inflict harm, and furthermore, the Student's list caused actual and substantial disruption of the work of the school.

RR at 14-15. As a result, Student was permanently expelled from the District. Id. at 16.

On May 14, 2008, Parent filed an appeal from the Board's Adjudication in the trial court. On October 10, 2008, following the submission of briefs, the trial court entered an order sustaining the appeal, and vacating the District's expulsion on the basis that there was not sufficient evidence to support this determination. The District and the Board filed the instant appeal from the trial court's order.[3]

In this appeal, the District and the Board claim[4]: (1) the trial court erred in determining that there is not sufficient evidence to support Student's

[3] In reviewing the Board's decision in this case, the trial court was limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact were supported by substantial evidence. Section 754(b) of the Administrative Agency Law, 2 Pa.C.S. § 754(b); Yatron v. Hamburg Area School District, 631 A.2d 758 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 538 Pa. 652, 647 A.2d 906 (1994). In turn, this Court's scope of review of the trial court's decision is limited to determining whether the trial court abused its discretion, committed an error of law, or violated constitutional rights. Id. Substantial evidence is such relevant evidence that a reasonable mind might accept to support a conclusion. Haas v. West Shore School District, 915 A.2d 1254 (Pa. Cmwlth. 2007). Thus, "'[i]t is irrelevant whether the record contains evidence to support findings other than those made by the factfinder; the critical inquiry is whether there is evidence to support the findings actually made.'" Id., 915 A.2d at 1259 (citation omitted).

[4] In the interest of clarity, we consolidate and reorder the claims raised in this appeal.

permanent expulsion for a Level IV violation of the District's Discipline Code by "[e]ngaging in conduct so disruptive as to interfere with the orderly operation of the school or which create a clear and present danger to the health, safety or welfare of students, staff and the school community"; (2) the trial court erred in determining that there is not sufficient evidence to support Student's permanent expulsion for a Level IV violation of the District's Discipline Code by engaging in conduct constituting "[t]erroristic threats to students or school personnel"; and (3) the trial court erred in substituting its own judgment for that of the Board.

The District and the Board first claim that the trial court erred in determining that there is not sufficient evidence to support Student's permanent expulsion for a Level IV violation of the District's Discipline Code by "[e]ngaging in conduct so disruptive as to interfere with the orderly operation of the school or which create a clear and present danger to the health, safety or welfare of students, staff and the school community". We agree.

We initially note that local school boards have broad discretion for determining school disciplinary policies. Hamilton v. Unionville-Chadds Ford School District, 552 Pa. 245, 714 A.2d 1012 (1998). This Court has stated that "[S]ection 510 of the [School] Code provides a school board in any school district broad discretion to adopt and enforce rules and regulations regarding student conduct during the time that the students are under school supervision, including time spent on school buses and school sponsored field trips.[5]" Giles v. Brookville

[5] Section 510 of the School Code provides, in pertinent part:

> The board of school directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and … the conduct and deportment of all pupils attending

(Continued....)

Area School District, 669 A.2d 1079, 1081 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 544 Pa. 686, 679 A.2d 231 (1996) (citation omitted).

In addition, as noted above, Section 1318 of the School Code provides, in pertinent part, that "[e]very principal or teacher in charge of a public school may temporarily suspend any pupil on account of disobedience or misconduct, and … [t]he board may, after a proper hearing, suspend such child for such time as it may determine, or may permanently expel him…." 24 P.S. § 13-1318.[6] This Court has recognized that "[S]ection 1318 of the [School] Code provides a school board with broad discretion to expel a student if the board determines that such a penalty is warranted under the particular circumstances so long as the board first conducted a proper hearing…." Giles, 669 A.2d at 1082 (citation and footnote omitted). Further, this Court has stated that:

> the public schools in the district, during such time as they are under the supervision of the board of school directors and teachers, including the time necessarily spent in coming to and returning from school….

24 P.S. § 5-510.

[6] See also Section 12.6 of the State Board of Education's regulations which provides, in pertinent part:

> (a) The governing board shall define and publish the types of offenses that would lead to exclusion from school….
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> * * *
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> (b) Exclusion from school may take the form of suspension or expulsion.
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> * * *
>
> (2) Expulsion is exclusion from school by the governing board for a period exceeding 10 days and may be permanent expulsion from the school rolls. Expulsions require a prior formal hearing under § 12.8.

22 Pa. Code § 12.6(a), (b)(2).

> "'[W]hen one attacks the action of a school board concerning matters committed by law to its discretion, he has a heavy burden as the courts are not prone to disturb a school board's decision. Indeed, they are without jurisdiction to interfere therewith unless it is apparent that the school board's conduct is arbitrary, capricious and to the prejudice of public interest. Lack of wisdom or mistaken judgment is insufficient.'"

Id. (citation omitted).

In this case, Student was permanently expelled from the District for her purported Level IV violation of the District's Discipline Code by "[e]ngaging in conduct so disruptive as to interfere with the orderly operation of the school…." RR at 144. More specifically, following a hearing, the Board issued its Adjudication permanently expelling Student in which it determined, inter alia, that "[i]n light of the totality of the circumstances present, the possession of a "People to Kill!" list on school grounds is a serious expression of intent to inflict harm, and furthermore, the Student's list caused actual and substantial disruption of the work of the school." Id. at 15.

In the opinion filed in support of its order reversing the Board's Adjudication, the trial court stated that "[t]he evidence *of record* was undisputed and was that the actions complained of – causing disruption in the school – were not those of [Student], but rather, those of [the School]…." Trial Court Opinion at 5-6 (emphasis in original). More specifically, the court stated:

> [*Student*]*'s* actions – writing a "hit list" in her personal notebook, and keeping the list private – were a barely tangible evidence of a thought in her mind. She did not act on those thoughts nor did she threaten others…. [E]ven th[e] flawed [hearsay] testimony indicated that [Student] had no apparent plans or means to carry out the "threat". It was [the School] who published the list, creating the disruption complained of. There was no evidence that [Student] had any propensity for violence.

> The "threats" were not communicated to anyone. By using [Student]'s "bad thoughts" as a reason for permanent expulsion, [the Board] abused its discretion, and the hearing officer had *no* basis for upholding the decision of [the School] to blame [Student] for its own actions.

Id. at 6 (emphasis in original).

Thus, the trial court determined that it was not Student's possession of the three different hit lists on school grounds that caused the "actual and substantial disruption of the work of the school." Rather, the trial court found that it was the remedial actions taken by the School in response to Student's possession of the three different hit lists that caused the disruption, and that Student should not be disciplined for the School's actions. However, contrary to the trial court's determination in this regard, it is clear that the Board properly disciplined Student for the disruption to the orderly operation of the school which flowed from her possession of the hit lists, including any such disruption that was caused by the remedial steps taken by the School as a result of her possession of those lists on school grounds.

In J.S. v. Bethlehem Area School District, 569 Pa. 638, 807 A.2d 847 (2002), an eighth grade student created a web site on his home computer that consisted of a number of pages containing derogatory and profane comments about his algebra teacher and the school principal, a picture of his teacher's severed head, dripping in blood, that morphed into a picture of Adolph Hitler, and that listed a number of reasons why the teacher should die with a solicitation for money hire a hit man. Subsequently, students, faculty and administrators of the school district viewed the web site, including the principal who was the subject of the web site. The principal, taking the threats seriously, informed local police officers, the Federal Bureau of Investigation, and the teacher who was also the subject of the

web site. After viewing the web site, the teacher experienced a number of physical and mental maladies which precluded her from teaching for the remainder of that school year and for the next school year. In addition, the web site caused the school to be at a low point, and the effect on the morale of the students and staff at the school was comparable to the death of a student or staff member.

Ultimately, the student was expelled from the school district on the basis that: (1) the reasons why the teacher should die and the solicitation for money to hire a hit man constituted a threat to a teacher and was perceived as a threat by the teacher; (2) the statements regarding the principal and the teacher constituted harassment of a teacher and a principal; (3) the statements constituted disrespect to a teacher and a principal resulting in actual harm to the health, safety, and welfare of the school community; (4) the school district's code of conduct prohibited such student conduct and could result in expulsion; and (5) the statements caused actual harm to the teacher, as well as to other students and teachers. On appeal, the student argued that the expulsion violated his First Amendment rights, but the expulsion was affirmed by the trial court and this Court.

On further appeal, the Pennsylvania Supreme Court affirmed. As an initial matter, in examining whether the student's statements were outside First Amendment protection as a "true threat", the Court stated:

> Cognizant of the narrowness of the exceptions to the right of free speech, and the criminal nature of a true threat analysis, we conclude that the statements made by [the student] did not constitute a true threat, in light of the totality of the circumstances present here. We believe that the web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of an intent to commit harm….

* * *

> By our determination regarding this issue, however, we do not belittle the harm that [the teacher] has suffered. Moreover, the Court of Appeals for the Ninth Circuit has specifically noted that school officials are justified, given the modern rash of violent crimes in school settings, in taking very seriously student threats against faculty or other students. *Lovell* [*by Lovell v. Poway Unified School District*, 90 F.3d 367, 372 (9th Cir. 1996)]. We too appreciate that in schools today violence is unfortunately too common and the horrific events at Columbine High School, Colorado remain fresh in the country's mind. However, we find that the speech at issue does not rise to the level of a true threat. Distasteful and even highly offensive communication does not necessarily fall from First Amendment protection as a true threat simply because of its objectionable nature.

Id. at 658, 659, 807 A.2d at 859, 860.[7]

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[7] The unique safety concerns with respect to school violence expressed by our Supreme Court has been acknowledged by members of the United States Supreme Court as well:

> For these reasons, any argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant to this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.

(Continued....)

The Court then turned to consider whether the student's expulsion ran afoul of his rights as guaranteed by the First Amendment. The Court noted the seminal case of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) which dealt "[w]ith the collision between a student's constitutional right to free speech and a school district's mandate to maintain an educational environment conducive to learning…." Id. at 660, 807 A.2d at 860. The Court noted:

> In sum, the [United States Supreme Court] in *Tinker* established that although a student does not shed his or her constitutional right to free speech in the school setting, a school district might, within constitutional bounds, prohibit speech and punish a student for speech, if the school sustains its burden of establishing that the student speech materially disrupts class work, creates substantial disorder, invades the rights of others or it is reasonably foreseeable that the speech will do so.

Id. at 662, 807 A.2d at 861-862.

The Court then analyzed whether the student's web site caused such an actual or foreseeable substantial disruption as required by Tinker. In this regard, the Court determined:

> The web site posted by [the student] in this case disrupted the entire school community—teachers,

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Morse v. Frederick, 551 U.S. 393, 424 (2007) (Concurring Opinion by Alito, J.). See also Ponce v. Socorro Independent School District, 508 F.3d 765, 772 (5th Cir. 2007) ("Of course, we do not remotely suggest that 'schools can [] expel students just because they are "loners", wear black and play video games.' We do hold, however, that when a student threatens violence against a student body, his words are as much beyond the constitutional pale as yelling 'fire' in a crowded theater, and such specific threatening speech to a school or its population is unprotected by the First Amendment. School Administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed was a real risk of substantial disturbance.") (citations omitted).

> students and parents. The most significant disruption caused by the posting of the web site to the school environment was direct and indirect impact of the emotional and physical injuries to [the teacher]. The direct effects of the web site on [the teacher]'s physical and mental health are noted above. Aside from the immediate effects of the site on [the teacher], [she] was unable to complete the school year and took a medical leave of absence for the next year. [The teacher]'s absence for over twenty days at the end of the school year necessitated the use of three substitute teachers that unquestionably disrupted the delivery of instruction to the students and adversely impacted the education environment.
>
> Students were also adversely impacted. Certain students expressed anxiety about the web site and for their safety. Some students visited counselors. The web site was a "hot" topic of conversation even prior to faculty discovery. Finally, among the staff and students, there was a feeling of helplessness and low morale. The atmosphere of the entire school community was described as that as if a student had died.
>
> Finally, the disruption also involved parents. Certain parents understandably voiced concern for school safety and questioned the delivery of instruction by substitute teachers.
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> In sum, the web site created disorder and significantly and adversely impacted the delivery of instruction. Indeed, it was specifically aimed at this particular school district and seemed designed to create precisely this sort of upheaval. Based upon these facts, we are satisfied that the School District has demonstrated that [the student]'s web site created an actual and substantial interference with the work of the school to a magnitude that satisfies the requirements of *Tinker*….

Id. at 674-675, 807 A.2d at 869.

Likewise, in the instant case, Student was permanently expelled from the District for her purported Level IV violation of the District's Discipline Code by "[e]ngaging in conduct so disruptive as to interfere with the orderly operation of the school…", based upon the Board's determination "[t]he Student's list caused actual and substantial disruption of the work of the school." RR at 15, 144. There is clearly substantial evidence in the record of this case which supports the Board's determination in this regard.

More specifically, the District's Assistant Superintendent testified at the hearing before the Board, in pertinent part, as follows:

> Q. Okay. Specifically, what was the specific serious disruption that you are referring to?
>
> A. Well, the disruption, actually by creating the list it created a disruption in that along with the suspension of the students that created the list. All of the students that were listed, their parents were contacted, informed that they were on the list. Subsequently we also sent a letter to all the parents of the students in the school indicating that lists were created. It created a sense of fear and anxiety by especially the parents that were contacted by phone to tell them they existed on the list. And also by the parents of other students who awaited the letter or awaited some kind of information.
>
> In addition, I would tell you that the fear was exacerbated, if you will, because we could not tell the students that were contacted which students created the list, how many lists they were on. We could simply indicate to them that they were in fact named on a list.
>
> So there is still uncertainty that remains for those students and their parents as to who or which students, why they would be on a list and which student would put their name on a list.

> Q. Of the students that are named in the three pages of the lists, how many of those students have not come to school since the list was, or since they were notified?
>
> A. That I can't answer. I can say, however, that we received calls from parents, both parents of students who were called and whose names were on the lists and also calls from parents of the students whose names were not on the list that they were concerned about sending their students to school. I cannot say whether, and there were obviously students that have been absent. I can't say whether any of those absences were because of those students or their parents' fears.
>
> * * *
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> Q. So the disruption, other than the fear, would be the letters that were sent to the families and phone calls that you received, is that accurate?
>
> A. That's right. It also created, as far as a disruption for the administration and the extreme amount of time to make those calls and to contact those parents to try to inform them. So we had quite a bit of time that we lost faced with that particular task.

RR at 85-88.

Thus, although Student's hit lists may not constitute a "true threat" of harm to the safety of the students at the School, their presence on the school grounds certainly resulted in a substantial disruption to the orderly operation of the School. As outlined above, and contrary to the trial court's determination, there is clearly substantial evidence supporting the Board's decision to permanently expel Student from the District on the basis that her conduct constituted a Level IV violation of the District's Discipline Code.

Moreover, as the Supreme Court noted in J.S.:

> We reject the argument offered by [the student] and his parents, that it was the viewing of the web site by

> the faculty and the students on their own that served as the genesis of the disruption. According to [the student] and his parents, it was not [the student]'s importation of the contents of the web site onto the school campus that caused the disruption; rather it was the faculty, after viewing the site which caused any disorder. We find that it was [the student] that accessed his web site at school, told other students about the site and was the source of the disruption. The site was not aimed at a random audience but at the specific audience of students and others in the School District. Thus, it was inevitable that the site would pass from students to teachers and have an impact upon the school environment. The web site was directly aimed at disrupting the school environment and did so in a concrete fashion.

J.S., 569 Pa. at 673-674 n. 14, 807 A.2d at 869 n. 14.

Likewise, in the instant case, we reject Student's assertion that it was not the hit lists that caused the disruption but, rather, the remedial actions taken by the District in response to the lists which caused the disruption. It is undisputed that Student physically possessed the hit lists on school grounds. RR at 70, 121-123. In addition, other students in the School were aware of the lists created by both Student and Kyrsten McHenry and informed the faculty of their existence. Id. at 69-70. Further, the hit lists were not aimed at a random audience but, rather, contained lists of specific names of teachers and students in the School. Id. at 121-123. Thus, contrary to Student's assertion, "[i]t was inevitable that the [hit lists] would pass from students to teachers and have an impact upon the school environment … [and the hit lists were] directly aimed at disrupting the school environment and did so in a concrete fashion." J.S., 569 Pa. at 674 n. 14, 807 A.2d at 869 n. 14.

In short, there is clearly substantial evidence in the record to support the Board's determination that Student's conduct constituted a Level IV violation

of the District's Discipline Code, and it is clear that the Board's actions were not "arbitrary, capricious and to the prejudice of public interest." Giles, 669 A.2d at 1082 (citation omitted). As a result, the trial court erred in reversing the Board's Adjudication.

Accordingly, the order of the trial court is reversed.[8]

JAMES R. KELLEY, Senior Judge

Judge McGinley dissents.

[8] In light of our disposition of this issue, we will not address the other claims raised in this appeal.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Shelby L. Jones, a Minor, by her Parent and Natural Guardian, David Jones	:	
v.	:	No. 2139 C.D. 2008
Gateway School District and Gateway School District Board of School Directors, Appellants	:	

O R D E R

AND NOW, this 26th day of March, 2010, the order of the Court of Common Pleas of Allegheny County, dated October 10, 2008 at No. SA 08-545, is REVERSED.

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JAMES R. KELLEY, Senior Judge