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May 28, 2010

Delivered via ECF

Marcia M. Waldron
Clerk of Court
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

RE: Fed. R. App. P. 28(j) letter in *Layshock v. Hermitage School District*, No. 07-4465.

Dear Ms. Waldron:

Justin Layshock submits this citation of supplemental authority, under Fed. R. App. P. 28(j), to establish that an appellant waives arguments not raised in its appeal brief, and that an appellant may not raise them subsequently in a petition for rehearing *en banc*. Hermitage School District argued in its Petition for Rehearing that the panel's opinion conflicted with another panel's decision in *J.S. v. Blue Mountain School District*, No. 08-4138, and suggested that the *en banc* Court in this case should apply the "substantial disruption" standard of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Hermitage concedes, however, that it did not present this argument to the panel on direct appeal. See Pet. for Rehr'g at 9-10; *Layshock v. Hermitage Sch. Dist.*, No. 07-4465, slip op. at 38 (3d Cir. Feb. 4, 2010); Appellee's Response to Pet. for Rehr'g at 10-13. Consequently, Hermitage has waived the argument and cannot belatedly resurrect it in the *en banc* proceeding.

In *United States v. Vazquez*, 271 F.3d 93, 107 (3d Cir. 2001), *cert. denied*, 536 U.S. 963 (2002), the *en banc* Court held that an appellant waived issues not raised before the panel that considered the appeal. The court relied on the proposition that "[w]hen an issue is not pursued in the argument section of the brief, the appellant has abandoned and waived the issue on appeal." *Id.* (quoting *Travitz v. Northeast Dep't ILGWU Health & Welfare Fund*, 13 F.3d 704, 711 (3d Cir. 1994)); see also *United States v. McCarrin*,

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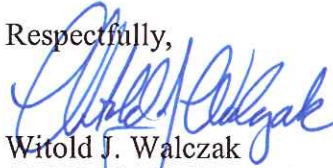
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54 Fed. App'x 90, 94, 2002 WL 31819761, at *3 (3d Cir. 2002) (“raising an issue for the first time in a petition for rehearing *en banc* fails to preserve the issue for subsequent review”) (citing *United States v. Cross*, 308 F.3d 308, 314 (3d Cir. 2002)), *cert. denied*, 540 U.S. 855 (2003).

The *en banc* Court's review therefore should be limited to issues raised in Hermitage's opening brief to the panel.

Respectfully,



Witold J. Walczak

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FOUNDATION OF PENNSYLVANIA

313 Atwood Street

Pittsburgh, PA 15213

Telephone: (412) 681.7864

Counsel for Appellee

cc: All counsel via ECF