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June 1, 2010

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

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

Dear Ms. Waldron:

Layshock alleges that Hermitage waived consideration of the “substantial disruption” standard discussed in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), because it failed to argue that standard before the panel on direct appeal. As a preliminary matter, the waiver doctrine is:

“essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues ... [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have no opportunity to introduce evidence.”

Huber v. Taylor, 469 F.3d 67, 75 (3d Cir. 2006)(citation omitted). Although Hermitage focused its argument on the holding of *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), it did not do so to the exclusion of *Tinker* as demonstrated by the Briefs filed by both parties. (See Second-Step Brief of Appellee and Cross-Appellants at 43-47 (Layshock); Reply Brief Of Appellant/Brief Of Cross-Appellee at 8-9 (fn 2)(Hermitage).) These arguments clearly establish that while Hermitage believed *Fraser* to be more factually analogous, it did not exclude the teachings of *Tinker* in the process.

Moreover, a finding of waiver is discretionary:

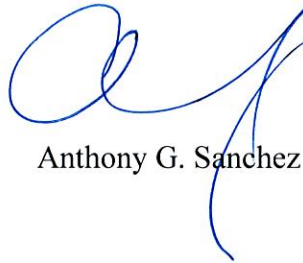
“... even if an issue was not raised, ‘[t]his Court has discretionary power to address issues that have been waived.’ Indeed, we have been reluctant to apply the waiver doctrine when only an issue of law is raised. ‘This court may consider a pure question of law even if not raised below where refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance’.”

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Huber at 74-75 (citations omitted). The applicability of *Tinker* fits precisely within this exception. The applicability of *Tinker* is a question of law and the conflict with *J.S. v. Blue Mountain School District*, No. 08-4138, establishes an issue of public importance, which requires this Court's consideration.

Hermitage respectfully requests that to the extent the *Tinker* issue is not preserved by the arguments within the panel briefs, that this Court exercise its discretion and consider the issue as a matter of public importance.

Very truly yours,



Anthony G. Sanchez

AGS/cew

cc: All Counsel via ECF