IN THE COMMONWEALTH COURT OF PENNSYLVANIA

APPELLATE DOCKET NO. 444 C.D. 2004

W.G., S.P., T.V.,
APPELLANTS,
v.

School District of Philadelphia,

APPELLEES.

APPEAL OF D.C., K.J., AND K.C.

Appeal from the Order of the Philadelphia Court of Common Pleas. Entered January 30, 2004 in Civil Action No. 03675 in the September Term of 2002

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF CITATIONS iii

STATEMENT OF APPELLATE JURISDICTION 1

SCOPE & STANDARD OF REVIEW 1

ORDER IN QUESTION 2

STATEMENT OF THE QUESTIONS INVOLVED 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 13

ARGUMENT 16

PRELIMINARY STATEMENT 16

I. THE LOWER COURT ERRED IN HOLDING SECTION 2134 DOES NOT VIOLATE THE DUE PROCESS CLAUSES OF THE U.S. AND PENNSYLVANIA CONSTITUTIONS 17

A. The Lower Court Erred in Relying on the Procedural Protections Afforded Appellants at Their Adjudicatory Hearings as a Substitute for Due Process Under the Federal and State Constitutions 20

B. The Due Process Clause of the U.S. Constitution Requires That, When a Child Is Removed from the Regular Educational Environment for Disciplinary Reasons, Procedural Protections Be Provided 27

C. The Due Process Clause Is Implicated When, as Here, State Action Results in Stigma 31

D. The Due Process Clause Prohibits the Creation of an Irrebuttable Presumption 33

E. Section 2134 Violates the Due Process Clause of the Pennsylvania Constitution 38

II. THE LOWER COURT'S REJECTION OF APPELLANTS' CHALLENGE TO SECTION 2134 AS VIOLATIVE OF ARTICLE III, SEC. 32 OF THE PENNSYLVANIA CONSTITUTION RESTED ON A FUNDAMENTAL MISUNDERSTANDING OF THE PRECISE CLASSIFICATION AT ISSUE 42

III. APPELLANTS ESTABLISHED THAT SECTION 2134 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE PENNSYLVANIA CONSTITUTION 46

A. The Lower Court Erred in Failing to Apply Heightened Scrutiny to Section 2134 47

B. The Lower Court Erred in Holding That Section 2134 is Constitutional Under the Rational Basis Test 50

CONCLUSION 51

APPENDIX 1a

A. Relevant Statutory Provisions

24 Pa. Stat. § 21-2134 and 22 Pa. Code § 12.8

B. Order & Opinion of the Philadelphia Court of Common Pleas, January 30, 2004

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

FEDERAL CASES

Bell v. Burson, 402 U.S. 535 (1971) 23, 24, 34

Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102 (E.D. Wis. 2001) 30

City of Chicago v. Morales, 527 U.S. 41 (1999) 30

Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) 34

U.S. Dep't. Agric. v. Murray, 413 U.S. 508 (1973) 34

Everett v. Marcase, 426 F. Supp. 397 (E.D. Pa. 1977) 12, 20, 22, 27, 29

In re Gault, 387 U.S. 1 (1967) 17, 18, 19, 25

Goss v. Lopez, 419 U.S. 565 (1974) 27, 29, 33

Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977) 35

Jordan v. School District of Erie Pennsylvania, 583 F.2d 91 (3d Cir. 1978) 27, 29

Malmed v. Thornburgh, 621 F.2d 565 (3d Cir. 1980) 35

Morgan v. United States, 298 U.S. 468 (1936) 29

Paul v. Davis, 424 U.S. 693 (1976); 31, 32

Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975) 30

Stanley v. Illinois, 405 U.S. 645 (1972) 34

Vlandis v. Kline, 412 U.S. 441 (1973) 34, 37, 38

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 31

STATE CASES

Allegheny County v. Monzo, 500 A.2d 1096 (Pa. 1985),
776 A.2d 311 (Pa. Commw. 2001) 45

Berg v. Kozloff, 712 A.2d 340 (Pa. Commw. 1998) 48

Borough of Riegelsville v. Miller, 639 A.2d 1258 (Pa. Commw. 1994) 1

Brown v. Philadelphia Tribune Co., 668 A.2d 159 (Pa. Super. 1995) 1

Estate of Cavill v. Mitchell, 329 A.2d 503 (Pa. 1974) 48, 49

Cook v. Highland Water and Sewer Auth.,
530 A.2d 499 (Pa. Commw. 1987) 10

DeFazio v. Civil Service Commission of Allegheny County,
756 A.2d 1103 (Pa. 2000) 45, 46

Dep't. of Transp. v. Clayton, 684 A.2d 1060 (Pa. 1996), citing Soja v. Pa. State Police,
455 A.2d 613 (Pa. 1982) 23, 35, 36

Fiore v. Pa. Bd. of Fin. & Revenue, 633 A.2d 1111 (Pa. 1993) 23, 24

Foust v. Southeastern Pa. Transp. Auth., 756 A.2d 112 (Pa. Commw. 2000) 9

Griffin v. Southeastern Pa. Transp. Auth.,
757 A.2d 448 (Pa. Commw. 2000) 47

Klebenoff v. McMonagle, 552 A.2d 677 (Pa. Super. Ct. 1988) 48

Nixon v. Commonwealth of Pa., 839 A.2d 277 (Pa. 2003) 41, 42

Pa. Bar Ass'n v. Commonwealth, 607 A.2d 850 (Pa. Commw. 1992) 38

Phillips v. A-Best Products Co., 665 A.2d 1167 (Pa. 1995) 1

R. v. Commonwealth, Dept. Of Pub. Welfare,
636 A.2d 142 (Pa. 1994) 38, 48

In re R.A., 761 A.2d 1220 (Pa. Super. 2000) 25

Klein v. Commonwealth of Pennsylvania, 555 A.2d 1216 (Pa. 1989) 48

Pennsylvania v. Aziz, 724 A.2d 371 (Pa. Super. 1999) 36

Simon v. Commonwealth, 659 A.2d 631 (Pa. Commw. 1995) 38

Smith v. City of Philadelphia, 516 A.2d 306 (Pa. 1986) 47

Soja v. Pa. State Police, 455 A.2d 613 (Pa. 1982) 23, 24, 26

Tomaskevitch v. Speciality Records Corp.,
717 A.2d 30 (Pa. Cmmw. 1998) 1

Warren Cty. Human Servs. v. State Civil Serv. Comm'n,
844 A.2d 70 (Pa. Commw. 2004) 40

Wings Field Preservation Associates v. Commonwealth,
776 A.2d at 319 46

Wolfe v. Beal, 384 A.2d 1187 (Pa. 1978) 38

DOCKETED CASES

Dunmore v. School District of Philadelphia,
No. 72-43 (E.D. Pa, Feb. 14, 1973) 12

FEDERAL STATUTES

42 U.S.C. § 1983 31

STATE STATUTES

Pa. Const. Art. 1, §§ 1 and 11 . . . . 7, 14, 38

Pa. Const. Art. 1, § 26 . . . . 7, 14, 46, 48

Pa. Const. Art 3, § 32 . . . . 3, 7, 14, 46

22 Pa. Code § 12.3 11

22 Pa. Code §§ 12.6(b)(1), 12.7(a) 10, 11

22 Pa. Code § 12.8(c) 3, 11, 12, 28

24 Pa. Stat. § 17-1701-A et seq. 5, 6, 9, 10, 11, 28, 39

35 Pa. Stat. §§ 780- 113(a)(31) 9

42 Pa. Cons. Stat. Ch. 63 . . . . 1, 2, 8, 25

42 Pa. Cons. Stat. § 762(a)(4) 1

42 Pa. Cons. Stat. § 931 1

42 Pa. Cons. Stat. §§ 6302, 6341 8

42 Pa. Cons. Stat. § 6336 25

42 Pa. Cons. Stat. § 6341 . . . . 6, 25

42 Pa. Cons. Stat. § 6341(b.1) 2, 26

42 Pa. Cons. Stat. § 6352 . . . . 8, 26

MISCELLANEOUS

Pa. Dept. Of Ed., Basic Education Circular, "Alternative Education for Disruptive Youth," at 2 28

STATEMENT OF JURISDICTION

This Court has jurisdiction to review final orders of the courts of common pleas pursuant to 42 Pa. Cons. Stat. § 762(a)(4). The Court of Common Pleas for the First Judicial District had jurisdiction under 42 Pa. Cons. Stat. § 931 to hear this matter. Appellants timely filed a notice of appeal on February 26, 2004. (R.R. at 37a).

SCOPE & STANDARD OF REVIEW

This Court's scope of review of the court of common pleas' decision denying appellants' motion for summary judgment is abuse of discretion. Borough of Riegelsville v. Miller, 639 A.2d 1258, 1261 (Pa. Commw. 1994). In addition to exercising an abuse of discretion standard for a denial of summary judgment, this Court exercises plenary review over the trial court's conclusions of law, Tomaskevitch v. Speciality Records Corp., 717 A.2d 30, 32 (Pa. Cmmw. 1998); Phillips v. A-Best Products Co., 665 A.2d 1167, 1170 (Pa. 1995), and has an obligation to make an independent examination of the entire record in determining whether a constitutional right has been violated, Brown v. Philadelphia Tribune Co., 668 A.2d 159 (Pa. Super. 1995). Where, as here, the essential findings of fact are conceded or are undisputed and the trial court's decision rests on an interpretation and application of the law rather than on the facts, this Court's review is broad.

ORDER IN QUESTION

COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

AND NOW, this 30th day of January, 2004, upon consideration of the Motion for Summary Judgment and Preliminary Objections of the School District of Philadelphia, the response in opposition filed by D.C., K.J. and K.C. (collectively the "Plaintiffs"), the Motion for Summary Judgment of the Plaintiffs, the responses filed in opposition thereto, the parties respective memorandum and all matters of record and in accord with the contemporaneous Opinion in support of this Order, it is hereby

ORDERED and **DECREED**, that the Motion for Summary Judgment and Preliminary Objections of the School District of Philadelphia is **GRANTED**, it is further

ORDERED and **DECREED** that the Plaintiffs' Motion for Summary Judgment is **DENIED**, it is further

ORDERED and **DECREED** that the Plaintiffs' Amended Class Action Complaint is **DISMISSED**.

BY THE COURT:

____

C. DARNELL JONES, J.

The Memorandum Opinion of the Honorable C. Darnell Jones is attached as Appendix B

STATEMENT OF QUESTIONS INVOLVED

1. Whether the trial court's order must be reversed because appellants are denied enrollment in regular public schools and stigmatized, in the absence of due process, in violation of the United States and Pennsylvania Constitutions?

   Suggested Answer: Yes

2. Whether the trial court's grant of summary judgment to the defendant school district must be reversed because Section 2134 of the Pennsylvania School Code constitutes special legislation in violation of Article III, Section 32 of the Pennsylvania Constitution, in that the legislation targets only children attending schools operated by school districts of the first class, when these children have no special characteristics justifying such distinctive and discriminatory treatment?

   Suggested Answer: Yes

3. Whether the trial court's order must be reversed because Section 2134 violates the Equal Protection Clause of the Pennsylvania Constitution where appellants are treated differently from all other Philadelphia school children and children in all other public school districts and charter schools, with respect to their right to due process prior to assignment to alternative schools for disruptive children, and such classification bears no rational relationship to any legitimate state objective?

   Suggested Answer: Yes

STATEMENT OF THE CASE

Nature of the Action

This civil rights class action challenges the constitutionality of 24 Pa. Stat. § 21-2134[1] (Section 2134), a provision of the Pennsylvania School Code (School Code) that excludes all Philadelphia adjudicated delinquent youth returning from delinquency placements from enrolling in regular day schools[2] operated by the School District of Philadelphia (the District). Instead these youth are assigned to a transition center, and then to alternative schools for disruptive students for an indefinite period of time. These assignments are not the result of a determination, subject to challenge at an impartial hearing process, that the student has violated school rules and should be removed from regular school. Rather, the assignments result from the operation of Section 2134 and apply only to a discrete class of students within the School District of Philadelphia. By contrast, no other children in the Commonwealth can be assigned to such schools unless they are provided an impartial hearing to determine whether, in fact, a violation of school rules occurred <u>and</u> whether a transfer is warranted.

Appellants do not, through this lawsuit, challenge the authority of the School District of Philadelphia – or any other school district in the Commonwealth – to remove violent or disruptive students from the regular classroom setting. Indeed, all school districts in Pennsylvania have the authority under existing provisions of the School Code to remove such children. To the contrary, this lawsuit is about treating Philadelphia students fairly, and about

[1] Act 187 of December 9, 2002, No. 187, § 12, 2002 Pa. Laws 1472 (amending the Pennsylvania School Code, 24 Pa. Stat. § 21-2134) (full text attached in Appendix A).

[2] References to "regular school" or "regular classroom" refer to a comprehensive middle or high school operated during traditional daytime hours by the School District of Philadelphia.

not treating a small group of

Philadelphia students less fairly than other Philadelphia students and all other students in Pennsylvania.

Course of Proceedings

Section 2134 was created by Act 88[3] of June 29, 2002, and subsequently amended six months later by Act 187. Act 88 provided that students returning from a juvenile delinquency placement or on probation for juvenile delinquency, could not enroll in the regular day schools of the School District of Philadelphia. Act 88 applied only to students seeking to attend the public schools of the District; it did not extend to delinquent youth returning to any of the Commonwealth's other 500 school districts, or even to any of Philadelphia's public charter schools.[4]

The initial complaint in this action was filed on September 25, 2002, by two students who fell within the coverage of Act 88, on their own behalf and on behalf of others similarly situated. The complaint challenged Act 88 as unconstitutional under several provisions of the Pennsylvania and United States Constitutions.

Six months after the filing of the original complaint, the Pennsylvania General Assembly

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[3] Act 88 of June 29, 2002, No. 88, § 19, 2002 Pa. Laws 524 (amending the Pennsylvania School Code and creating 24 Pa. Stat. § 21- 2134).

[4] As a result of Pennsylvania's charter school law, enacted in 1997, the public school population of Philadelphia now consists of two groups – those who attend schools operated by the School District of Philadelphia, and those who attend public "charter schools" located in the city. See 24 Pa. Stat. § 17-1701-A et seq. Children in the latter group, even if returning from delinquency placements, are exempt from Section 2134.

passed Act 187[5] of December 9, 2002, which altered Section 2134 in some respects. First, children who were on probation were removed from the scope of the statute. Second, the statute was amended to provide that while certain students – defined in terms of their underlying juvenile offense – would still be mandatorily placed in alternative schools or other alternative programs, others could, in the District's discretion, be referred from the transition center to a regular school program. Finally, children assigned to day treatment programs were explicitly included within the statute. See 24 Pa. Stat. § 21-2134(E)(1); See also Appendix A for current and full text of Section 2134.

Plaintiffs filed an amended complaint in this matter on January 17, 2003, naming three additional plaintiffs: D.C., K.J. and K.C.[6]; all minors residing in the School District of Philadelphia and eligible to attend its public schools. (R.R. at 7a). Each plaintiff was previously adjudicated delinquent on a single, non-violent offense pursuant to 42 Pa. Cons. Stat. § 6341 and completed a residential placement that was ordered as a result of his juvenile court adjudication. After successful completion of their delinquency placement and return home, each plaintiff sought to return to class in a regular day school program operated by the School District of Philadelphia. After attempting to enroll in their regular schools, plaintiffs were summarily barred from returning and ordered to report to a transition center established and operated by the School District. Following their referral to the transition center, the plaintiffs were assigned to either an

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[5] Act 187 of December 9, 2002, No. 187, § 12, 2002 Pa. Laws 1472 (amending the Pennsylvania School Code, 24 Pa. Stat. § 21-2134) (full text attached in Appendix A).

[6] Appellants herein adopt the trial court's articulation of the individual circumstances of each plaintiff. Op. at 2-5; But see footnote 9, infra (discussing the lower court's erroneous conclusion of law regarding appellants' class standing). Appellant, the School District of Philadelphia, does not contest any of the facts alleged in the amended complaint. Op. at 2-5.

alternative education program for disruptive students or a non-traditional school program.

In their amended complaint, plaintiffs eliminated several of the counts they originally asserted. (R.R. at 7a). The amended complaint contains four counts upon which Section 2134 is alleged to be unconstitutional. Specifically, plaintiffs alleged that in passing Section 2134, the General Assembly violated:

- The Due Process Clause of the United States Constitution, in that plaintiffs are removed from regular classes, and stigmatized, in the absence of due process and on the basis of an irrebuttable presumption. (R.R. at 31a);

- Article I, §§ 1 and 11, of the Pennsylvania Constitution, in that plaintiffs' reputations are damaged in the absence of compliance with due process and equal protection guarantees. (R.R. at 30a) ;

- The Special Legislation Clause of the Pennsylvania Constitution, Article III, § 32, in that the legislation targets only children attending schools operated by school districts of the first class, when those children have no special characteristics justifying such treatment. (R.R. at 29a); and

- The Equal Protection Clause of the Pennsylvania Constitution, Article I, § 26, in that plaintiffs are treated differently from children attending schools operated by other public school districts, as well as charter schools, without any rational basis. (R.R. at 30a).

Plaintiffs and the School District of Philadelphia filed cross-motions for summary judgment. In both motions, the parties agreed there were no material issues of fact in dispute, and discovery would not provide any benefit or further bring facts to light which the trial court should consider concerning issues raised in their motions. On January 30, 2004, the court of common pleas granted the motion and preliminary objections of the District, and denied plaintiffs' motion for summary judgment. Plaintiffs timely filed a notice of appeal.

Effect of 24 Pa. Stat. § 21-2134

Over one thousand Philadelphia school children are subject to the requirements of Section 2134, in that they have been adjudicated delinquent and placed in a residential or day treatment facility, and then seek to enroll or re-enroll in the School District of Philadelphia. ¶¶ 6, 51 of Plaintiffs' Amended Complaint, (R.R. at 10a, 16a-17a). In order to fall within the ambit of the statute, a student must meet the following criteria:

> (i) Live in a school district of the first class;
>
> (ii) Be adjudicated delinquent under Title 42 Pa. Cons. Stat. § 6301 et seq. or have been adjudged to have committed a crime under an adult criminal proceeding;[7]
>
> (iii) Be returning from "placement" as a result of being adjudicated delinquent or adjudged to have committed a crime under the adult criminal code.[8]

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[7] A child is adjudicated delinquent when a court determines beyond a reasonable doubt that the child committed the alleged act and is in need of treatment, supervision or rehabilitation. See 42 Pa. Cons. Stat. §§ 6302, 6341 (defining a delinquent act and noting important exclusions).

The fact that an adjudicated juvenile belongs to the plaintiff class does not necessarily mean that he or she has violated school rules or committed a violent offense. Most delinquency adjudications – including those of the named plaintiffs–involve events occurring outside the school setting. Moreover, the majority of the children adjudicated delinquent in Philadelphia – including the named plaintiffs – have not committed crimes against persons. ¶ 52 of Plaintiffs' Amended Complaint (R.R. at 17a).

[8] If a child is found delinquent, the court will hold a disposition hearing to determine the most appropriate treatment. 42 Pa. Cons. Stat. § 6352. The Juvenile Act allows judges to choose from a range of treatment alternatives, including placement. A child may be assigned to a juvenile placement for a period of months or years following the commission of an offense. Children are placed for many different reasons, some relating to their treatment needs, some relating to their offense. In the case of any given class member, the offense at issue may have taken place a year or more earlier.

The fact that a child is favorably discharged from a juvenile placement typically means that, in the judgment of the court, the child's behavior has improved and he or she is ready to

Any student meeting the aforementioned criteria is barred immediately from entering a regular school. Instead, Section 2134 requires that the student be placed in a transition center operated by the District for a period of time not to exceed four weeks. Id. During this time the School District of Philadelphia evaluates the student and prepares a transition plan that contains the "terms and conditions" the student must meet in order to return to a regular classroom. Id.

Section 2134 provides officials at the transition center who are developing the transition plan with several options for assigning youth. Students whose underlying offenses involved one or more of the offenses listed in Section 2134(c) – crimes dealing with weapons, controlled substances and violence – are barred from returning directly to a regular school from the transition center. For students whose underlying offenses did not involve the specified crimes listed in Section 2134(c), the administrators have the option of returning them to a regular school directly from the transition center.[9]

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return to his or her family and community.

[9] The trial court erroneously concluded from the uncontested facts that "[n]one of the Plaintiffs' underlying offenses involved the criteria set forth in sub-section (c) and, therefore, the Plaintiffs do not have standing to challenge the constitutionality of this specific provision of the Transition Statute." Op. at 8 n.7. Section 2134(c) prohibits a student from returning to a regular classroom if that student's underlying offense falls into any of four categories including, "Possession, use or sale of controlled substances." 24 Pa. Stat. § 21-2134(c)(ii).

However, named plaintiff K.C. was adjudicated delinquent on the charge of possession of marijuana. Op. at 4; See ¶ 36 of Plaintiffs' Amended Complaint (R.R. at 14A). Possession is a misdemeanor, but expressly classified as a prohibited act in the Controlled Substance Act, 35 Pa. Stat. §§ 780- 113(a)(31). The trial court thus erred in concluding that plaintiffs do not have standing to challenge the constitutionality of Section 2134(c) in its entirety.

Furthermore, even if none of the named plaintiffs met the criteria of Section 2134(c), they would still constitute a class that has standing to challenge that particular sub-section. Including students whose underlying offenses fall into those listed in Section 2134(c) in the class still conforms to the requirements of Pa. R. Civ. P. 1702. Plaintiffs have satisfied the requirements of

Students who are not permitted to return directly to a regular school pursuant to Section 2134(c), or who are otherwise deemed "not ready" by the transition center to return to a regular school, may be sent to one of the following programs: (1) a public or private alternative education program pursuant to 24 Pa. Stat. §§ 19-1901-C et seq.;[10] (2) a general education development (GED) program; or (3) a program operating after the traditional school day.

Theoretically, under Section 2134, a student who successfully meets the conditions and goals of the transition plan should return to a regular school environment. However, every one of the 617 students – including named plaintiffs – who had entered the transition center, as of January 22, 2003, has been sent to an alternative educational school. Op. at 9 n.9.

Rules Governing the Removal of Public School Students

Pennsylvania has rules that govern suspensions, transfers and expulsions of all public school students, including students in public charter schools. Prior to the passage of Section

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commonality. The requirement of demonstrating common questions of fact and law is satisfied when a plaintiff can show that "the class members' legal grievances arise out of the 'same practice or course of conduct' on the part of the class opponent." Foust v. Southeastern Pa. Transp. Auth., 756 A.2d 112, 118 (Pa. Commw. 2000) (citations omitted). Here, plaintiffs are denied hearings before transfer to the an alternative school. Moreover, the school district conceded it makes no distinction between members of Section 2134(c) since all of the 617 students who had entered the transition center had been sent to an alternate educational school. Op. at 9 n.9.

The requirement of typicality is also satisfied where "the class representatives' overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that pursuit of their interests will advance those of the proposed class members." Cook v. Highland Water and Sewer Auth., 530 A.2d 499, 506 n.8 (Pa. Commw. 1987). Again, the interest of members of both groups is a transfer hearing before school officials. The class' claims are similar and not in conflict with each other. For these additional reasons, plaintiffs have standing to challenge the constitutionality of Section 2134(c) in its entirety.

[10] Section 19-1903-C concerns alternative education grants for schools operating under Article XIX-C of the Pennsylvania School Code (Disruptive Student Programs).

2134, Pennsylvania law provided – and indeed still provides – that students throughout the Commonwealth may not be removed for disciplinary reasons from their regular classroom absent notice, 22 Pa. Code §§ 12.6(b)(1), 12.7(a), and a finding that the student has violated a school rule. 24 Pa. Stat. § 19-1902-C(2). Except in cases in which Section 2134 comes into play, all sanctions imposed by school districts must be premised upon an allegation that the student has committed a specific violation of a school's code of student conduct.[11]

In the present matter, the procedures for transfers to alternative education programs for disruptive students are most relevant.[12] The Pennsylvania School Code provides, 24 Pa. Stat. § 19-1902-C(2), that the placement of a student in an alternative school for disruptive students "will comply with the informal hearing procedures set forth in 22 Pa. Code § 12.8(c) (relating to hearings)."[13] That regulation, 22 Pa. Code § 12.8(c), in turn provides:

> (c) The purpose of the informal hearing is to enable the student to meet with the appropriate school official to explain the circumstances surrounding the event for which the student is being suspended or to show why the student should not be suspended.
>
>> (1) The informal hearing is meant to encourage the student's parents or guardian to meet with the principal to discuss ways by which future offenses can be avoided.

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[11] The school board in each school district is required to adopt a code of student conduct which includes the district's policies on student discipline and explains students' rights. The code must be made available to students and families and kept in the school library. These rules must be fair and reasonable. 22 Pa. Code § 12.3.

[12] Due process requirements relative to suspensions and expulsions are found at 22 Pa. Code §§ 12.6 - 12.8.

[13] Identical language appears at 24 Pa. Stat. § 19-1902-E(2), which applies in situations where the alternative school for disruptive students is operated by a private contractor.

> (2) The following due process requirements are to be observed in regard to the informal hearing:
>
>> (i) Notification of the reasons for the suspension shall be given in writing to the parents or guardian and to the student.
>>
>> (ii) Sufficient notice of the time and place of the informal hearing shall be given.
>>
>> (iii) A student has the right to question any witnesses present at the hearing.
>>
>> (iv) A student has the right to speak and produce witnesses on his own behalf.
>>
>> (v) The district shall offer to hold the informal hearing within the first 5 days of the suspension.

22 Pa. Code § 12.8(c). As a result of these statutory and regulatory requirements, every student in Pennsylvania (apart from members of the plaintiff class in this case) has the right, before being transferred to an alternative education program for disruptive students, to a hearing on whether he or she has violated school rules.

In addition to this over-arching legal mandate, the School District of Philadelphia is bound by other legal arguments regarding school discipline and school transfers, including transfers to disciplinary schools, set forth in two separate decrees, Everett v. Marcase, 426 F. Supp. 397 (E.D. Pa. 1977) and Dunmore v. School District of Philadelphia, No. 72-43 (E.D. Pa, Feb. 14, 1973, amended April 29, 1974). These decrees further enforce the pre-Section 2134 requirement that in Philadelphia no transfer may be accomplished without a predicate finding that a student has committed a violation for which a transfer to another regular school or to a

disciplinary school is the appropriate solution.[14]

However, in following Section 2134, the School District does not condition its transfer of plaintiffs on a determination that they violated a school rule, nor are such transfers conditioned upon a findings that the student is unfit to return to the regular classroom. Thus, while every other returning juvenile delinquent in Pennsylvania has the right to return to regular school unless he or she is determined, through notice and a hearing, to have violated school rules, Section 2134 denies this protection to the members of the plaintiff class.

SUMMARY OF ARGUMENT

Appellants seek reversal of the lower court's denial of its motion for summary judgment, in which appellants sought to enjoin the enforcement of Section 2134, an amendment to the Pennsylvania School Code that excludes all Philadelphia adjudicated delinquent youth returning from delinquency placements from enrollment and instruction in regular day schools operated by the School District of Philadelphia. Section 2134 declares that appellants alone, as compared to all other school-aged youth in the Commonwealth and non-adjudicated youth in Philadelphia, shall be assigned to alternative schools for disruptive students for an indefinite period of time, without a hearing to determine whether, in fact, a violation of school rules occurred and whether a transfer is warranted.

As a general rule, a public school student in Pennsylvania – whether she or he attends a Philadelphia public school, a public school operated by some other county, or a public charter school within or outside of Philadelphia – can be transferred to an alternative school for

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[14] Though the terms of the Everett and Dunmore decrees were renegotiated in early 2004, they continue to mandate a predicate finding before transfer may be accomplished.

disruptive students only upon a determination, following a hearing, that she or he has violated school rules and is, in fact, disruptive. Section 2134 creates a single exception to this general rule, for students returning from juvenile placements who seek to attend the regular public schools of the Philadelphia School District. Appellants challenged this exception as violative of their rights under the following four provisions of the federal and state constitutions:

- The Due Process Clause of the United States Constitution, in that plaintiffs are removed from regular classes, and stigmatized, in the absence of due process and on the basis of an irrebuttable presumption;

- Article I, §§ 1 and 11, of the Pennsylvania Constitution, in that plaintiffs' reputations are damaged in the absence of compliance with due process and equal protection guarantees;

- The Special Legislation Clause of the Pennsylvania Constitution, Article III, § 32, in that the legislation targets only children attending schools operated by school districts of the first class, when those children have no special characteristics justifying such treatment; and

- The Equal Protection Clause of the Pennsylvania Constitution, Article I, § 26, in that plaintiffs are treated differently from children attending schools operated by other public school districts, as well as charter schools, without any rational basis.

The lower court disagreed and denied appellants' motion.

Appellants submit that the lower court erred in several key respects. First, the lower court erroneously concluded that appellants' adjudicatory hearings in juvenile court act as a due process check that provides sufficient inquiry on education issues. Because these hearings, by operation of law, do not address educational issues and school assignment upon the youth's return from placement, they fail to meet the minimum due process requirements of notice and opportunity to be heard in a proceeding adapted to the nature of the case and before a tribunal having jurisdiction of the cause. Because the lower court erroneously viewed the delinquency

hearing as satisfying due process, the court also wrongly denied appellants' claims under the irrebuttable presumption doctrine and Article I, Sections 1 and 11 of the Pennsylvania Constitution.

Additionally, the lower court erred in denying appellants' claim that Section 2134 constitutes special legislation in violation of Article III, Section 32 of the Pennsylvania Constitution. The court incorrectly upheld the law as a valid classification with respect to the Philadelphia School District; appellants submit that the classification is a classification of a small, discrete class of Philadelphia public school students, that it does not apply uniformly to the Philadelphia School District, and consequently is unconstitutional special legislation.

Finally, appellants content that the lower court wrongly denied appellants' claims under the Equal Protection Clause. Contrary to the court's holding, there is no rational basis for denying Philadelphia adjudicated youth returning from placement the same due process protections afforded all other youth in Philadelphia and throughout Pennsylvania prior to assigning them to alternative schools for disruptive students.

ARGUMENT

PRELIMINARY STATEMENT

In rejecting appellants' due process and equal protection challenges to Section 2134 of the Pennsylvania School Code, the lower court incorrectly described appellants' assignment to alternative schools for disruptive students as simply an administrative process by which appellants are evaluated and sent to an "appropriate educational setting." Op. at 42. To reach this conclusion, the lower court determined that any disciplinary school transfer that appellants suffered occurred at their delinquency adjudication hearing, as much as eighteen months prior to their assignment to the alternative school,[15] and that Section 2134 merely operated as an administrative mechanism to determine where appellants should attend school upon their return from their delinquency placements. Op. at 34, 36. According to the lower court, because the "disciplinary transfer" occurred at the juvenile court delinquency proceeding, due process requirements were met by that proceeding. As appellants argue below, the lower court's holding is a house of cards, because at the time of the delinquency proceeding, the juvenile court did not directly consider or order appellants' disciplinary transfer out of their regular schools upon their return from completion of their delinquency disposition.

Similarly, the lower court's rejection of appellants' challenge to Section 2134 as violative of the Pennsylvania Constitution's special legislation provisions also rested on a fundamental misunderstanding of the precise classification at issue. Relying on the general principle that the

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[15] Eighteen months elapsed between named plaintiff K.J.'s delinquency adjudication and his assignment by the District to an alternative school. ¶¶ 24-25 of Plaintiffs' Amended Complaint (R.R. at 13a); eleven months elapsed between named plaintiff K.C.'s delinquency adjudication and his assignment by the District to an alternative school. ¶¶ 36-37 of Plaintiffs' Amended Complaint (R.R. at 14a).

General Assembly may pass laws affecting only one county or one school district based on population alone, the lower court looked no further. But as appellants also argue herein, Section 2134 does not apply uniformly to all Philadelphia students. Rather, the legislation is directed at a particular, small subset of Philadelphia students who are indistinguishable from such youth residing and attending public schools in the remaining 500 school districts in the Commonwealth. Because nothing about the size of the Philadelphia School District renders appellants individually distinct from their similarly situated peers elsewhere, Section 2134 cannot withstand constitutional scrutiny.

I. THE LOWER COURT ERRED IN HOLDING SECTION 2134 DOES NOT VIOLATE THE DUE PROCESS CLAUSES OF THE U.S. AND PENNSYLVANIA CONSTITUTIONS

Over three decades ago, in In re Gault, 387 U.S. 1 (1967), the United States Supreme Court rejected the notion that good intentions by the state can justify arbitrary process.[16] Confronting the broken promises of the juvenile justice system, the Court held that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." Id. at 18. Declining to leave the system free any longer from "constitutional grief," id. at 16, the Court noted that "[t]he absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment....Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." Id. at 18-19. Persuaded more by reality than labels, the Court in Gault extended procedural due process protections to juveniles charged with crimes in juvenile court.

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[16] The state in Gault argued that the benefits of juvenile court offset the need for procedural protections. 387 U.S. at 21-28. The Supreme Court rejected this argument.

In considering the constitutionality of Section 2134 of the Pennsylvania School Code, this Court is confronted with a similar challenge. Extolling the virtues of a statute described self-servingly – but without any support in the text or history – by appellees as designed to give adjudicated delinquent youth in Philadelphia a "second chance," and declaring it *ipse dixit* an "administrative" rather than disciplinary statute, the lower court ignored the language of the statute itself. Instead, it chose to trust the School District's purported benevolent motivations. The public record belies the School District's claim that Section 2134 was enacted for the "good" of appellants.[17] Wishful labels cannot hide constitutional shortcomings. In Gault, neither the

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[17] As appellants asserted below, the public record behind Section 2134 reveals the legislature's intent to remove adjudicated delinquent youth from regular classrooms because of their delinquent past, not to better serve their educational needs:

> "The fact that we're letting 40 children a week out of Pennsylvania prisons, and sending them back to the Philadelphia Schools is an absolute disgrace," said [House Majority Leader John] Perzel, who sponsored the legislation. . . . "It's not right that my son Sam, who is in a seventh grade classroom in a regular school, has to sit there with somebody who got out of prison [sic] with an ankle bracelet," Perzel said. "What we need to do is make sure they're separated out from the general school students.". . . Perzel said yesterday the legislation is just one piece of a plan to address school safety in Philadelphia.

Ovetta Wiggins, *Bill Takes Aim at Student Offenders*, Philadelphia Inquirer, June 28, 2002.

Subsequent public comments by state and local officials in August and September 2002 also repeatedly referred to Section 2134 as a tool to remove violent offenders from the regular classroom. See, e.g., Susan Snyder, *Vallas: No Shuffling of Violent Students*, The Philadelphia Inquirer, Aug. 22, 2002, at A01 (focusing on statistics outlining violent offenses occurring in schools despite the actual reach of Act 88); Susan Snyder, *Philadelphia Vows Tougher Discipline in Schools*, The Philadelphia Inquirer, Sept. 4, 2002 (quoting School District Chief Executive Paul Vallas, "In addition to cracking down and dealing with violent offenders, we have to deal with the students who are the victims of violence."); Mensah M. Dean, *Vallas Lowers Boom on Violence*, Philadelphia Daily News, Sept. 4, 2002 ("The new anti-violence plan unveiled . . could rid the district of more than 400 violent students."). Official Record, Plaintiffs' Memorandum of Law in Further Support of Their Motion for Summary Judgement," at 2-3 n.1, filed in the lower court Feb. 26, 2003.

civil label ascribed to delinquency proceedings nor the euphemistic names attached to juvenile institutions could justify their infringement of constitutionally protected liberty interests.[18] This same principle applies in this case. Appellants' assignment to alternative schools for disruptive students, under any guise, deprives them of protected interests that cannot be infringed without due process.

By mis-characterizing appellants' transfers to alternative schools for disruptive students as "an administrative mechanism that evaluates and places the students in the appropriate educational setting based upon their particular needs and abilities" Op. at 34, the lower court incorrectly viewed the earlier delinquency adjudicatory hearing as a one-stop-determination of the fate of the child, both at the time of the adjudication and months or years later when the child returns from placement. This holding is not supported by law.

As a matter of law, Section 2134 violates both state and federal due process requirements for at least three reasons. First, due process requires that a disciplinary transfer out of the regular school environment be based on a determination, subject to challenge in an impartial hearing procedure, that the student has violated the applicable school rules and that the transfer is warranted. Second, due process prohibits official actors from characterizing an individual in a manner that is capable of being proved false and that results in a burden on his rights (the "stigma plus" doctrine). Third, due process prohibits the creation of an irrebuttable presumption.

Finally, in its characterization of the delinquency adjudication (trial) and disposition (sentencing) hearings in juvenile court, the lower court ascribed a series of determinations to

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[18] The Court wrote, "[T]he highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is – to say the least – debatable." 387 U.S. at 17.

juvenile court judges that they are not empowered by Pennsylvania's Juvenile Act to make.

A. The Lower Court Erred in Relying on the Procedural Protections Afforded Appellants at Their Adjudicatory Hearings as a Substitute for Due Process Under the Federal and State Constitutions

The lower court's rejection of appellants' due process claims rested on the view that the disciplinary transfer to the alternative school actually took place at the earlier juvenile court adjudicatory hearing, where due process was provided, and that the placement of the appellants in alternative schools for disruptive students at the time of their return from placement was an administrative step for which no further due process was required. But the court and the School District's characterization of the alternative school placement upon appellants' return as "administrative," rather than disciplinary, is belied by both the text of the statute itself, judicial precedent, and administrative interpretations. Consequently, such an assignment, absent due process, is unconstitutional.

On its face, Section 2134 mandates or permits the assignment of students returning from juvenile placements to alternative schools for disruptive students. The General Assembly built upon and "specifically cross-referenced" Act 30 of 1997, which created a series of programs for students throughout the Commonwealth who violate the School Code, and was enacted to give school districts additional assistance to address disruptive students. Whether called disciplinary schools or "schools for disruptive students," these schools have been created for students whose behavior disqualifies them from attending their regular school, or any other regular school in their district.

This characterization is also refuted by the reasoning of Everett v. Marcase, 426 F. Supp. 397 (E.D. Pa. 1977). In Everett, students threatened with involuntary transfers from one

Philadelphia school to another for disciplinary purposes sued under the Due Process Clause. Following the filing of the complaint, the parties in Everett reached agreement on some points. Id. at 399. But the parties were unable to reach a complete agreement, and the disputed issues were submitted to the federal district court for resolution. In holding that these involuntary transfers implicated the due process clause, the court discussed the challenged assignments:

> The School District has throughout this litigation taken the legal position that the lateral transfers require no due process procedural protections because the transfer deprives a pupil of no constitutionally cognizable property right and does not amount to punishment....
>
> Before this court may enter any order beyond that of the consent decree, specifying lateral transfer procedures [i.e., procedures for disciplinary transfers from one school to another], a determination must be made that some type of due process procedures are constitutionally required in lateral transfers. I conclude that such transfers involve protected property interests of the pupils and are of sufficient significance as to warrant the shelter of due process protection, and my reasoning follows.
>
> In theory a transfer from one school to another within the same school district does not reduce the educational opportunities of the transferred pupil. All schools are intended to be approximately equal as to educational quality and physical facilities offered. Subject to statutory and constitutional limitations, not presently applicable, a school district may assign pupils among its various schools as it deems appropriate, and may for purely administrative purposes, assign pupils from one school to another. There is no inherent right of the pupil to attend the school of his or her choice, or the choice of the parents, within the school district.
>
> An administrative transfer is vastly different from a disciplinary transfer. As shown by the evidence taken during hearings, a transfer during the school year has, at least to many pupils, a serious adverse impact upon their educational progress. The terminology of a "disciplinary" transfer suggests punishment. Even though such transfers may in certain specific instances be for the good of the pupil as well as the transferring school, it nonetheless bears the stigma of punishment.

426 F. Supp. at 399-400.

As in Everett, even if the assignment is "for the good of the pupil as well as the transferring school," the assignment to an alternative school for disruptive students carries with it "the stigma of punishment." 426 F. Supp. at 400. Indeed, Everett did not turn on whether the school itself was a disciplinary school - but rather that the student was subjected to an involuntary transfer for disciplinary purposes. Appellants here are arguably subjected to a greater infringement – they are involuntarily assigned to schools that suggest a disciplinary purpose by their very name, and which are designated by statute to serve disruptive students.

Finally, the Pennsylvania Department of Education (PDE) requires that any student assigned to an alternative school, as defined in Act 30, must be provided an informal due process hearing. See Pa. Dept. Of Ed., Basic Education Circular, "Alternative Education for Disruptive Youth," Re-issued July 1, 2002.[19] This policy supports appellants' argument that no such due process hearing would be required for a purely administrative lateral transfer from one regular public school to another. It is precisely the due process hearing afforded students under Act 30 – required because of the characteristics and nature of the school to which the student is being transferred – that appellants assert is their due here. The assertion by the District that these transfers are not disciplinary upon the appellants' return from placement – and the lower court's acceptance of that assertion – defies logic and the language of the challenged statute.

Indeed, by declaring that the delinquency adjudication hearing provided all the due process necessary to effectuate appellants' disciplinary transfers out of their regular schools, the

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[19] Basic Education Circulars are issued by the Pennsylvania Department of Education and available at www.pde.state.pa.us.

lower conceded that these assignments of appellants to the alternative schools implicated due process. Op. at 34. But it is precisely here that the lower court's analysis is fundamentally flawed. Appellants' constitutional challenge is not cured by the fact that they were afforded due process in their delinquency adjudicatory hearings, when the juvenile court cannot know how the youth will fare in placement or what post-placement options will be available or most appropriate. While procedural due process is a flexible notion which calls for such protections as demanded by the individual situation, the essential requisites are notice and meaningful opportunity to be heard. As the Pennsylvania Supreme Court has expressly held, "'the essential elements of due process are notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.'" Dep't. of Transp. v. Clayton, 684 A.2d 1060, 1064 (Pa. 1996) (emphasis added), citing Soja v. Pa. State Police, 455 A.2d 613, 615 (Pa. 1982); See also Bell v. Burson, 402 U.S. 535 (1971). Due process requires not just any hearing, but rather an "appropriate" hearing. Fiore v. Pa. Bd. of Fin. & Revenue, 633 A.2d 1111, 1114 (Pa. 1993).[20] With respect to the nature of procedural due

[20] In Fiore, the Pennsylvania Supreme Court examined the orderliness and appropriateness of a commonwealth court hearing and found that appellant's procedural due process rights were infringed because the issues litigated in that forum differed from the issues litigated before the Commonwealth's administrative agencies. In Fiore's commonwealth court hearing there was to little "procedural flexibility," leaving him ill prepared to address new legal theories advanced by the Commonwealth. Id. at 1113. The Fiore Court recognized that "[a]lthough this case does not deal with lack of actual notice or the total absence of a hearing, we note that due process requires an appropriate hearing." Id. at 1114 (emphasis in original).

Similarly in Soja v. Pa. State Police, 455 A.2d 613 (Pa. 1982), the Supreme Court critiqued and demanded the redesign of discipline procedures against state police officers which allowed investigation and reports to be forwarded to the State Police Commissioner. A plurality of the Court was troubled by the separate adjudicatory forums and the denial of the subject's right of review and confrontation. "The essential elements of due process are 'notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case

process required, the Supreme Court in Bell stated:

> "The hearing required by the Due Process Clause must be "meaningful" and "appropriate to the nature of the case." It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision ... involved ... does not meet this standard.

Bell, 402 U.S. at 541-542 (citations omitted).

This fundamental principal of due process is plainly violated by substituting the delinquency hearing, which addresses one set of issues, for the statutorily and constitutionally required school transfer hearing, which addresses a completely different set of issues. The issue in adjudicatory hearings is the youth's responsibility for the crime(s) he or she is alleged to have committed and, if adjudicated delinquent, the appropriate disposition. No aspect of an adjudicatory hearing considers or addresses the youth's fitness to attend regular school or whether the youth is a disruptive student within the meaning of the School Code.

A determination of the youth's responsibility for a delinquent act, even on proof beyond a

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before a tribunal having jurisdiction of the cause.'" Soja, 455 A.2d at 615 (emphasis added) (citations omitted).

In both Fiore and Soja, the Court articulates a requirement that should govern the result here: procedural due process calls for an individual determination about the merits of school transfer before a tribunal governed by the Pennsylvania School Code. The matters addressed at a juvenile delinquency adjudicatory hearing – whether the accused youth committed all the elements of the act beyond a reasonable doubt – is a wholly separate inquiry from whether that adjudicated youth, if placed, should return to a regular school classroom when released. In none of the cases cited above did the Court suggest that the Commonwealth could avoid the Due Process Clause by doing what Section 2134 does – selecting a class of children for assignment to an alternative school on a categorical basis and denying members of that class any chance to dispute the necessity of the transfer. Appellants subject to transfer are entitled to the full panoply of relevant protections which due process guarantees. They must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine adverse witnesses that testify to appellants' unfitness in a regular classroom.

reasonable doubt, has no bearing whatsoever on whether the youth is also a disruptive student who must, either immediately or upon return from placement, be assigned to an alternative school. To fold such a determination into the finding of delinquency would violate due process, with no notice whatsoever to the youth that his or her fitness to attend regular school was at issue, and consequently with no opportunity to defend such a claim. See Gault, 387 U.S. 1 (1967). By holding that the adjudicatory hearing provides due process with respect to this disciplinary transfer, the lower court misreads the Juvenile Act, 42 Pa. Stat. Ann. § 6301 et seq., in particular the purpose and scope of a delinquency proceeding under that Act, and fails to heed these essential mandates of due process.

The juvenile court and the school system, by design, do not act in tandem. Rather, the role of juvenile court judges is tailored to their expertise and is strictly confined. See In re R.A., 761 A.2d 1220 (Pa. Super. 2000) (limiting the authority of the juvenile court to issue orders beyond its statutory authority). The Juvenile Act directs that, at adjudication, the judge focus upon whether the alleged delinquent act occurred, and, depending upon the gradation of the offense, whether the child is in need of treatment or rehabilitation. 42 Pa. Cons. Stat. § 6341. The Juvenile Act has no requirement that a school district representative be present at the hearing nor, unless the school district is a party, would it have a role in either the determination of guilt or innocence or in the determination whether an adjudication will result in placement at disposition. 42 Pa. Cons. Stat. § 6336. Because Section 2134 only applies to adjudicated youth returning from placement, the adjudication hearing always occurs months, if not a year or more, before appellants seek enrollment in their regular school. Even if the adjudicatory hearing did provide an opportunity for speculation about post-placement education, appellants would be

unable to address school assignment following placement: treatment and rehabilitation, the cornerstones of juvenile placement, would not yet have occurred. Moreover, juvenile court judges have no power to determine public school assignment, do not dictate the manner in which the child will be educated, and are limited in their ability to "place" the child by the options expressly set forth in the Juvenile Act. 42 Pa. Cons. Stat. § 6352.

Finally, the dissemination of juvenile court records to school officials is delimited by the Juvenile Act, and the Juvenile Act specifically provides that they may not be used for punishment purposes. 42 Pa. Cons. Stat. § 6341(b.1)(4). This statutory scheme provides schools with the opportunity to exclude disruptive children while protecting the educational rights of those children whose delinquent behavior is not relevant to their educational growth or achievement. The provisions recognize that delinquent behavior is often unrelated to a child's educational experience, and that to draw further conclusions from such behavior without due process would deprive the child of an appropriate education.

As the state supreme court has ruled, due process requires "notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause." Soja, 455 A.2d at 615. Because the delinquency hearing by law does not address school assignment, it cannot be deemed a substitute for the due process protections constitutionally required at the time of appellants' transfer to alternative schools for disruptive students under Section 2134.

B. The Due Process Clause of the U.S. Constitution Requires That, When a Child Is Removed from the Regular Educational Environment for Disciplinary Reasons, Procedural Protections Be Provided

Federal and state law provide that when a state has a public education system, a child may not be deprived of an education without a hearing to determine whether, in fact, he committed a violation of school rules for which a deprivation (e.g., transfer) is appropriate. See Goss v. Lopez, 419 U.S. 565 (1974) (the students cannot be suspended from school without due process); Everett v. Marcase, 426 F. Supp. 397 (E.D. Pa. 1977)[21] (students subject to lateral transfers for disciplinary purposes are entitled to due process protection); Jordan v. School District of Erie Pennsylvania, 583 F.2d 91, 96 n.3 (3d Cir. 1978) (a consent decree relating to expulsion, suspension, or transfer must meet constitutional due process requirements.). Accordingly, Appellants submit that Section 2134 fails to provide them with due process of law. Section 2134 strips Appellants of previously available procedural protections, while adding nothing to the District's ability to assist these returning students, or promote school safety.

Schools have always had the means to keep disruptive youth out of the public schools. Prior to the passage of Section 2134, Pennsylvania school districts had authority to remove

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[21] In Everett v. Marcase, 426 F. Supp. 397 (E.D. Pa. 1997), the court said that excluding a child from their school for disciplinary purposes can not be tolerated without an opportunity for the child to be heard. The lower court attempts to narrow the Everett decision by claiming that it protects only children who are being immediately transferred from a neighborhood school to a disciplinary school and not children returning from placement. This narrowing is illogical and fails to recognize the underlying justification for the due process order of the decision. In Everett, the court focused upon the fact that youth were being excluded from attending their neighborhood school for disciplinary reasons, a punishment depriving them of educational opportunity without the chance to be heard on the exclusion. This deprivation is no less present for the appellants, who, but for their placement, would be allowed to remain or re-enroll in a regular school and instead are sent to alternative schools for disruptive students.

disruptive students from the classroom. Indeed, Act 30[22] of 1997 added Article XIX-C to the School Code to give the Pennsylvania Department of Education authority to approve alternative education programs for disruptive students, 24 Pa. Stat. §§ 19-1901-C, 19-1902-C, and to give school districts additional assistance to address disruptive student behavior. Act 30's applicability to students returning from placement as a result of being adjudicated delinquent is clear: as interpreted by PDE, the alternative education programs authorized by Act 30 "may also include services for students returning from placement or who are on probation resulting from being adjudicated delinquent or who have been convicted of committing a crime in adult criminal proceedings." Pa. Dept. Of Ed., Basic Education Circular, "Alternative Education for Disruptive Youth," at 2, Re-issued July 1, 2002. In that same bulletin, PDE also directed that "students assigned to any disruptive youth program must be provided with due process in the form of an informal hearing in accord with 22 Pa. Code § 12.8(c)." Id.

Thus, the School District of Philadelphia, and every other district in Pennsylvania, can transfer and assign students to alternative schools for disruptive youth, including students returning from delinquency placements, without regard to Section 2134, as they have been able to do for years. All of the tools currently available to "assist" the returning delinquent were either already available and in place in Philadelphia before Section 2134, or could have been.

In other words, the status quo ante was exactly like the present – with one glaring exception. Today, adjudicated youth in Philadelphia returning from placement and wishing to return to their regular school will not be provided with the same due process all other students

[22] Act 30 of June 25, 1997, No. 30, § 11, 1997 Pa. Laws 297 (creating 24 Pa. Stat. §§ 19-1901-C & 19-1902-C).

assigned to "any disruptive youth program" must be provided, according to state law – and which they would have been provided before Section 2134 was enacted. Section 2134 has done nothing to ease the plight of these students, but it *has* eased the task of school administrators in Philadelphia, who can assign appellants directly to alternative schools for disruptive students without stopping at the due process door.

Nor can there be any doubt that this was the legislature's intention. On its face, Section 2134 is offense based, not offender based. Students targeted for mandatory referral to an alternative school are identified not by their individual needs, but by their crimes. For students not subject to mandatory assignment, nothing in the statute requires that discretionary assignment turn on whether they are disruptive, or particularly in need of an additional period of adjustment. Administrators are given no standards at all by which to assess the need for placement in an alternative school. The discretion provided to the transition center employee in determining when and if a child will return to a non-disciplinary educational setting is unfettered, without statutory standards and completely devoid of avenues for challenge. See id. This unguided "process" that leaves a mere possibility of return to a regular public school, subject entirely to the discretion of an unnamed party at the transition center, is inadequate in protecting the students' rights and violates the due process mandates of Goss, Everett, and Jordan discussed above.

Due process commands that a decision made regarding a property right must be based on a measured consideration of the evidence. "To give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them." Morgan v. United States, 298 U.S. 468, 481-482 (1936). This "measured consideration" must be made by a neutral and detached

decision-maker; those who function in judicial or quasi-judicial capacities must be impartial. See Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102 (E.D. Wis. 2001) (decision to suspend student from athletic participation amounted to a deprivation of a defined interest and required a hearing before an impartial decision maker.) Due process requires that the property right of the appellants may not be ignored, subject only to the unfettered discretionary decision of an unguided school official. See, e.g., Butler, 172 F.Supp. 2d at 1119 (requiring that officials hold a hearing and apply a legal standard of proof before suspending a child from athletic participation); Smyth v. Lubbers, 398 F. Supp. 777, 796-97 (W.D. Mich. 1975) (requiring that before school disciplinary action was taken against college students the students be afforded an impartial hearing applying a "clear and convincing" evidence standard). Section 2134 not only fails to identify the standard that will be used in assessing which of the "discretionary" students will be assigned to an alternative school, it fails to provide any criteria whatsoever to guide the decision maker in reaching the decision. This is the very type of discretion that cannot be exercised without significant likelihood of uneven application and selective enforcement, violating the constitutional principle of due process by failing to guard against the arbitrary deprivation of protected interests. See, e.g., City of Chicago v. Morales, 527 U.S. 41 (1999) (holding that even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may violate the constitution by failing to establish standards for decision-makers sufficient to guard against arbitrary enforcement.)

Section 2134 meets none of the due process requirements set forth above for those students who fall within the 'discretionary' class of students who may or may not be permitted to attend regular public school. The provision has little if anything to do with helping returning

delinquents, and everything to do with ensuring the removal of these children from the regular classroom with as little constitutional fuss as possible.

C. The Due Process Clause Is Implicated When, as Here, State Action Results in Stigma

Section 2134 violates the Due Process Clause of the United States and Pennsylvania Constitutions because it imposes a stigma on appellants that changes their legal status as compared to all other youth in the Commonwealth and non-adjudicated youth in Philadelphia: appellants cannot receive instruction in a regular school. By providing for the transfer of adjudicated youth from the regular classroom to one of several alternative placements intended specifically or primarily for disruptive students, Section 2134 labels these youth disruptive students, whether or not they are. Under the stigma plus doctrine, the lower court's holding must be reversed.

The connection between state action that stigmatizes an individual and the Due Process Clause of the Fourteenth Amendment to the United States Constitution has been elaborated in numerous cases. Paul v. Davis, 424 U.S. 693 (1976); see also, Wisconsin v. Constantineau, 400 U.S. 433 (1971). In Paul, then-Justice Rehnquist, writing for the majority, held that stigma, or defamation, by state actors violates the Due Process Clause when, "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished." 424 U.S. at 711. In Paul, the Supreme Court held that in order to state a claim under 42 U.S.C. § 1983 for a violation of the Due Process Clause, a plaintiff who complains of governmental defamation must show (1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and

that he or she claims is false and (2) some material and state-imposed burden or alteration of his or her status or of a right in addition to the stigmatizing statement. Paul, 424 U.S. at 701-702, 710-711. This requirement is known as the "stigma plus" test. Many federal and Pennsylvania courts have found due process violations when persons did not have the opportunity to rebut a legal characterization that stigmatized them and deprived them of a cognizable liberty or property interest.

Section 2134 likewise imposes an unlawful stigma on appellants that cannot withstand scrutiny under the "stigma-plus" test of Paul v. Davis. It brands Philadelphia youth who have been adjudicated delinquent for a wide array of delinquent offenses as disruptive and unfit to attend regular school – irrespective of whether they are. Importantly, under Paul, appellants need only allege, not prove, that the reputation-tarnishing statement is false, and capable of being proven false, in order to establish a violation of due process. Here, where students adjudicated for violent and non-violent offenses alike are subject to the provisions of Section 2134, and where the majority of appellants' delinquent behavior occurred away from school grounds, the risk of error is manifest, not speculative. See Official Record, Appellants' Memorandum of Law in Support of Their Motion for Summary Judgement, at 26, filed Jan 24, 2003 in the lower court, citing, Pennsylvania Juvenile Court Dispositions 2000, p. 34 (Pa. Juvenile Court Judges' Commission).

Section 2134 also meets the "plus" factor required under Paul: Section 2134 alters the plaintiff's legal status and is governmental in nature. The mandatory assignment to a transition center for all students returning from placement, and mandatory referral of certain of these students to alternative education programs for disruptive students, plainly implicates a property

interest as recognized by the Court in Goss, 419 U.S. 565, 574 (1974), could not be imposed by a private actor in a position analogous to the school district defendants, and therefore differentiates this claim from a traditional claim for defamation brought under state tort law.

D. The Due Process Clause Prohibits the Creation of an Irrebuttable Presumption

Appellants also challenge Section 2134 as creating an unconstitutional irrebuttable presumption that all Philadelphia students who are returning from delinquency placements must be assigned to a transition center, and that certain of these students must then be referred to an alternative education program for disruptive students, regardless of the individual student's academic or disciplinary record. Section 2134 thus creates an irrebuttable presumption that these students cannot be placed in a regular school environment merely on the basis of their involvement with the delinquency system. The Act thus relies on a basic fact – that these students have committed a delinquent offense – and uses this to justify the presumed fact – that these students are dangerous or disruptive, and therefore unsuitable for the regular school environment. While not disagreeing that such irrebuttable presumptions have been held to violate due process under both the state and federal constitutions, Op. at 37, the lower court denied appellants' challenge on the ground that appellants' removal from the regular classroom took place at the time of the adjudication hearing, and thus any protected interest or entitlement appellants had was implicated then, and not at the time of the actual assignment. See Op. at 36-38. However, because the adjudicatory hearing could not and did not address appellants' transfer to an alternative school so as to satisfy the requirements of due process, as discussed above, the lower court's ruling on this claim is in error.

In a series of opinions going back three decades, the U.S. Supreme Court developed the irrebuttable presumption doctrine under the Due Process Clause of the Fifth and Fourteenth Amendments. See Bell, 402 U.S. 535 (invalidating Georgia statute that applied a general presumption that uninsured drivers who are involved in auto accidents will be deemed negligent and held liable for those accidents, even when there was no reasonable possibility of a judgment being rendered against the licensee); Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating statutory presumption under Illinois law that unmarried fathers were unsuitable and neglectful parents as violative of due process); Vlandis v. Kline, 412 U.S. 441 (1973) (invalidating Connecticut statute that presumed students to be non-residents at time of admission to state university, and afforded student no opportunity to challenge that designation throughout their attendance); U.S. Dep't. Agric. v. Murray, 413 U.S. 508 (1973)(finding irrebuttable presumption regarding food stamp eligibility invalid for lacking critical ingredients of due process by failing to allow recipients a right to challenge); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) (invalidating regulations requiring mandatory maternity leave for school teachers).

Together, these cases imposed a new constitutional requirement upon certain statutory classifications. The statutory classifications at issue in each of these cases either denied a benefit, or placed a burden, on all individuals possessing a certain characteristic. Under the irrebuttable presumption doctrine, the Court criticized each classification as being employed only to effect a second classification, which was more directly tied to the perceived statutory purpose. As the Court held in Vlandis, for example, if it is not "necessarily or universally true in fact" that the basic fact implies the presumed fact, then the statute's irrebuttable presumption denies due process of law. 412 U.S. at 452.

Moreover, the presumed fact must be based on reason, and if a plaintiff demonstrates that the inference is not "rationally related" to a legitimate legislative classification, the inference will not pass constitutional muster. Malmed v. Thornburgh, 621 F.2d 565, 574 (3d Cir. 1980). See also, Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977); Clayton, 684 A.2d 1060 (Pa. 1996) (affirming trial court and Commonwealth Court decisions invalidating a statute on the grounds that it created an irrebuttable presumption in violation of due process).

In Pa. Dep't of Transp. v. Clayton, the Pennsylvania Supreme Court held that a regulation providing for suspension of a driver's license for a period of one year following a single epileptic seizure, without giving the licensee the opportunity to present medical evidence to establish his or her competency to drive, also created an irrebuttable presumption in violation of due process. 684 A.2d at 1064. Significantly, although the licensee had a hearing before a trial court, the Court deemed such a hearing "meaningless" because under the regulation, the licensee was irrebuttably incompetent as result of having epilepsy. Id. at 1064. Even though the Court recognized the state's interest in precluding unsafe drivers – even potentially unsafe drivers – from continuing to drive, it concluded that this interest did not outweigh " a person's interest in retaining his or her license so as to justify the recall of that license without first affording the licensee the process to which he is due. Indeed, since competency to drive is the paramount factor behind the instant regulations, any hearing which eliminates consideration of that very factor is violative of procedural due process." Id. at 1065.

Like the cases cited above, Section 2134 creates an irrebuttable presumption violative of the Due Process Clause. Not all Philadelphia students who have been adjudicated delinquent and are returning from placement also have characteristics that would make them disruptive or even

dangerous in the regular classroom. Like the named appellants themselves, the majority of class members will likely have been adjudicated for non-violent offenses. Some have good academic and school discipline records, some do not. Many of those who have been in placement and have been discharged by the juvenile court have successfully completed the conditions of their commitment, all have attended an educational program, and many have performed well in that educational setting. These appellants returning from placement have effectively already been through a "transitional" and "alternative" education placement that, in most cases, included a behavior management component, and have been discharged in order to return home and to their local schools. Moreover, under Section 2134, appellants are not afforded any type of hearing preceding their exclusion from regular school and assignment to an alternative school. Thus, neither the initial delinquency hearing nor Section 2134 affords the student a forum in which to challenge his referral to an alternative school for disruptive students. Yet under the due process clause, the students have the right to rebut the presumption that they are disruptive students. See Pennsylvania v. Aziz, 724 A.2d 371, 375 n.2 (Pa. Super. 1999) (noting that there is a right to reject the presumption asserted).

Section 2134 abandons the principle that school discipline should be related to misbehavior in school. Just as the driver in Clayton was entitled under the due process clause to a hearing which permitted consideration of the very factor motivating the license suspension regulation, so too must appellants be afforded a hearing at which they may challenge the state's presumption of disruptive behavior, the characteristic purportedly warranting their removal from school. See Clayton, 684 A.2d 1060 (Pa. 1996). Yet, like the regulation struck in Clayton, Section 2134 eliminates from consideration the very factor that is paramount in deciding whether

to transfer a student out of the regular school environment into an alternative school for disruptive students – *whether or not the student is in fact disruptive as defined under the School Code*.

Moreover, while the student's fundamental interest in reputation under the Pennsylvania Constitution might warrant heightened scrutiny of this statutory classification, Section 2134 cannot withstand scrutiny even under a rational basis test. Section 2134 identifies a class of persons by a single trait – their status as delinquents returning from placement – and then assigns everyone in this group to a transition center, and places a subset of this group in alternative education, irrespective of their individual needs, current behavior, or school performance. This presumption is comparable to the classification at issue in Vlandis v. Kline, where the Court invalidated a Connecticut statute which created, for tuition purposes, the status of state university students as 'non-residents' at time of application for admission. 412 U.S. at 442-43. The statute made the non-resident status irreversible since a student could not rebut his or her status while attending the university. Id. at 443. In striking down the statute the Court held that "it is forbidden by the Due Process Clause to deny an individual the resident [tuition] rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true, in fact, and when the State has reasonable alternative means of making the crucial determination." Id. at 452.

In the case at bar, while Pennsylvania unquestionably has a legitimate interest in maintaining a safe and appropriate learning environment in its public schools, the appellants' past delinquency adjudication and placement is an unreliable and improper proxy for current disruptive behavior to warrant circumventing the requirements of due process. Like the Supreme

Court admonition in Vlandis, where it is not "necessarily or universally true, in fact" that the basic fact of prior delinquency implies the presumed fact of current unfitness for regular school enrollment, and the state has "reasonable alternative means of making the crucial determination," then the statute's irrebuttable presumption denies due process of law. Id.

E. Section 2134 Violates the Due Process Clause of the Pennsylvania Constitution

As discussed above, injury to reputation violates the United States Constitution when there is also a deprivation of a property interest created by state law. The Pennsylvania Constitution affords reputation even more protection:

> [I]n Pennsylvania, reputation is an interest that is recognized and protected by our highest state law: our Constitution. Sections 1 and 11 of Article I make explicit reference to "reputation," providing the basis for this Court to regard it as a fundamental interest which cannot be abridged without compliance with constitutional standards of due process and equal protection.

R. v. Commonwealth, Dept. Of Pub. Welfare, 636 A.2d 142, 149 (Pa. 1994)(citing Hatchard v. Westinghouse Broadcasting Co., 532 A.2d 346, 350 (Pa. 1987)(emphasis added). See also, Simon v. Commonwealth, 659 A.2d 631 (Pa. Commw. 1995)(declaratory and injunctive relief appropriate when petitioners' names were included in a report on organized crime without notice or an opportunity to be heard); Pa. Bar Ass'n v. Commonwealth, 607 A.2d 850 (Pa. Commw. 1992) (bar association successfully challenges statute requiring insurers to report suspected fraudulent claims along with the names of claimants' attorneys); Wolfe v. Beal, 384 A.2d 1187 (Pa. 1978) (individual committed to state mental hospital in violation of due process rights entitled to destruction of hospital records to protect reputation).

The lower court denied appellants' claims under the Pennsylvania Constitution by concluding that any harm to appellants' reputations occurred as a result of their delinquency adjudication, and that appellants' assignment to alternative schools for disruptive students did not inflict a "separate and distinct harm" to appellants' reputations. Op. at 42. The lower court erred in reaching this conclusion.

On its face, Section 2134 does injury to appellants' reputation and violates the Pennsylvania Constitution. First, the law only applies to youth who have been adjudicated delinquent for an offense committed sometime in the past. The law has targeted a population that the public will already think of as "bad," and says that they are "still bad," without regard to how well any particular youth actually did in placement or whether they have in fact been "rehabilitated" following placement, without regard to the particular offense for which the youth was adjudicated, and irrespective of how long ago the delinquent offense was committed.

Second, no matter what the transition center's assessment concludes regarding those students adjudicated delinquent for one of the four enumerated offense categories, the student cannot return to regular class; rather, the student must go to an alternative education program for disruptive students as defined in 24 Pa. Stat. §§ 19-1901-C et seq. (Disruptive Student Programs), or to a private alternative education institution as defined in 24 Pa. Stat. §§ 19-1901-E et seq. (Private Alternative Education Institutions for Disruptive Students), or a GED or twilight program. Additionally, for those students who "may" be returned to the regular classroom following the transition center assessment, the statute provides no standards against which this selection among and between students is to be made, and affords these students no opportunity to challenge a referral to an alternative school or other non-regular school placement.

Moreover, the lower court's description of the appellants' assignment to alternative schools as "just another step in the rehabilitative journey of the plaintiffs that began with the original juvenile adjudication," Op. at 42, is at odds with this Court's most recent ruling in Warren Cty. Human Servs. v. State Civil Serv. Comm'n, 844 A.2d 70 (Pa. Commw. 2004). In Warren County, this court struck down a provision of the Child Protective Services Law that prohibited the hiring of applicants previously convicted of certain enumerated crimes; however, the law did not ban existing employees from continuing to work in the child care field, despite having similar convictions. This Court found that if convicted criminals who had been already working at covered facilities were capable of rehabilitating themselves so as to qualify them to continue working, "there should be no reason why other convicted criminals were not, and are not, also capable of doing the same." Id. at 74 (quoting Nixon, 839 A.2d at 289). In finding the employment restriction unconstitutional, this court wrote:

> Such a ban "runs afoul of the deeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders....To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation."

Id. at 74 (citations omitted). As in Warren County, where appellants here have completed their juvenile court "sentences" and been returned home to their communities by the juvenile court that first adjudicated them delinquent, imposing new and additional restrictions on appellants' return to their regular public schools, based on a past act of delinquency, undermines, rather than furthers, the youth's rehabilitation, and imposes an "unwarranted stigmatization" on these youth.

Furthermore, Nixon v. Commonwealth of Pa., 839 A.2d 277 (Pa. 2003), where the Supreme Court affirmed this court's striking down of a similar employment restriction on prior offenders under the Older Adults Protective Services Act, lends additional support to appellants' due process claims under the Pennsylvania Constitution. The Court reiterated in Nixon that substantive due process challenges under the Pennsylvania Constitution are subject to a more rigorous rational relationship test than under the U.S. Constitution. 839 A.2d at 287-288, n.15. According to that test, a law "must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." Id. at 287-288, quoting Gambone v. Commonwealth, 101 A.2d 634, 637 (Pa. 1954).

While conceding the General Assembly is free to distinguish among ex-criminals, the Court in Nixon nevertheless held the restriction invalid for failing to meet the "real and substantial relationship" test of Gambone. Nixon, 839 A.2d at 289. In Nixon, the Court found no plausible distinction between caretakers with prior convictions based solely on their employment history in the industry, and the Commonwealth's stated goal to protect older vulnerable citizens from those deemed incapable of safely providing for them. As the Court noted, "if convicted criminals who had been working at a covered facility for more than one year as of July 1, 1998, were capable of essentially rehabilitating themselves so as to qualify them to continue working in a covered facility, there should be no reason why other convicted criminals were not, and are not, also capable of doing the same." Id.

The same constitutional infirmity is present here. Whether the Commonwealth's goal is benign – to give adjudicated delinquents a second chance – or, as is obvious from the face of the

statute, intended to remove disruptive students from regular classrooms, there is no plausible distinction between Philadelphia adjudicated youth returning from placement and all other adjudicated youth returning from placement in the remaining 500 school districts in Pennsylvania. As in Nixon, if adjudicated delinquent youth returning from placement in other school districts are capable of returning immediately to regular classrooms, there is no reason why such youth in Philadelphia are not also capable of returning immediately to the regular classroom. And as in Nixon, it is the "absolute" exclusion of these Philadelphia students from regular public schools, with no opportunity for individual determinations of fitness to enroll in regular schools, that runs afoul of the rational relationship test. See id. at 291-292 (concurring opinion of J. Castille). Likewise, there is no real and substantial relationship between the possible goals of the statute and the General Assembly's denial of procedural due process protections to all but one small group of students subject to placement in alternative schools for disruptive students.

Accordingly, Section 2134 violates appellants' due process rights under the Pennsylvania Constitution.

II. THE LOWER COURT'S REJECTION OF APPELLANTS' CHALLENGE TO SECTION 2134 AS VIOLATIVE OF ARTICLE III, SEC. 32 OF THE PENNSYLVANIA CONSTITUTION RESTED ON A FUNDAMENTAL MISUNDERSTANDING OF THE PRECISE CLASSIFICATION AT ISSUE

Relying on the general principle that the General Assembly may pass laws affecting only one county or one school district based on population alone, the lower court dismissed appellants' challenge under the Special Legislation Clause of the Pennsylvania Constitution. Op. at 13-27. The lower court held "the record reflects the classification herein, enabled the General

Assembly to employ some measure of flexibility in dealing with the unique needs of this city of the first class." Op. at 18.

Appellants have never disputed that targeted legislation under appropriate circumstances is permissible under the Pennsylvania Constitution, but argued Section 2134 creates a sub-classification – adjudicated youth returning from placement in a school district of the first class – without any substantial relationship between the goals of the legislation and the General Assembly's decision to apply it to these students only. The lower court plainly failed to acknowledge Section 2134's disparate, and impermissible, treatment of school children. The uncontested record in this matter merits a different conclusion of law, that there is no difference between Philadelphia children returning from placement for a delinquent offense, and their peers in Philadelphia and other counties, sufficient to justify the different treatment accorded them by Section 2134.

A child attending school in the Philadelphia School District who commits a delinquent act is no less deserving of legal protections with respect to his removal from the regular classroom than a child from another county who commits the same offense. Likewise, a Philadelphia child who commits an delinquent act does not, by virtue of his residence in Philadelphia, have different educational needs from a child who commits the same offense elsewhere. And Philadelphia is surely no less capable of identifying disruptive students in its midst, and removing them from the regular classroom in accordance with exiting statutory provisions, than any other school district in the Commonwealth.

It is true, of course, that more children are adjudicated delinquent in Philadelphia than in

any other county. This is not surprising, given Philadelphia's population. However, Philadelphia does not have the highest rate of delinquency adjudication per 100,000 juveniles; by that measure, three counties are ahead of Philadelphia.[23] But the more important point is that Philadelphia's size bears no logical relationship to the question of whether returning delinquent youth should be denied discipline hearings extended to delinquent youth returning to any of the Commonwealth's other 500 school districts, or even to any of Philadelphia's charter schools.

The General Assembly impermissibly targets individual children, not merely a county of the first class; and when we look at those children, it is impossible to see how their interest in receiving instruction in the regular schools of the District distinguishes them from other school children in the Commonwealth or Philadelphia.

Likewise, the fact that Philadelphia schools have a serious safety problem does not warrant disparate treatment. Many, if not most Pennsylvania schools, rural, urban, and suburban – as well as many of the city's public charter schools – have serious safety problems. The state's official statistics show, in fact, that the rate of acts of violence and/or weapons possession in the School District is near the state average.[24] Moreover, even if Philadelphia's safety problem

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[23] For the year 2000, Northumberland County had the highest rate of delinquency dispositions per 100,000 juvenile population (6.4%). Next came Dauphin (5.7%), and then Philadelphia (5.0%). Juvenile Court Judges' Commission, Pennsylvania Juvenile Court Dispositions 2000, at 2000-5. Official Record, Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgement, at 17 n.6, filed in the lower court Feb. 26, 2003.

[24] For example, the figures for school year 2000-2001 show a rate of 17.4 incidents of violence and/or weapons possession per 1000 students in Philadelphia. This is a moderately lower rate than that for all students in all counties (20.12 per 1000). Some counties have significantly higher rates than Philadelphia's (e.g., Allegheny [36.15 incidents per 1000 students], Cameron [33.87], Luzerne [19.44]); others show significantly lower rates (e.g., Lebanon [8.36], Perry [10.25]. Office of Safe Schools, Commonwealth of Pennsylvania, 2000-2001 School Year

exceeded that of other districts, there would still be no reason to remove the Philadelphia child from classes without a determination that he or she poses a safety risk - while requiring such a determination for a child living in any other district.

The fact that a statute is written in “class” terminology does not insulate it from review. The admonition of the Pennsylvania Supreme Court is clear: “Classification is allowed because of necessity that [springs] from manifest peculiarities clearly distinguishing those of one class from each of the other classes and imperatively demanding legislation for each class that would be useless and detrimental to others.” Allegheny County v. Monzo, 500 A. 2d 1096, 1105 (Pa. 1985), quoted in Wings Field Preservation Associates v. Commonwealth, Dept. Of Transportation, 776 A. 2d 311, 317 (Pa. Commw. 2001). As illustrated above, the record in this matter reflects no “manifest peculiarities” between the students in Philadelphia and students in all other school districts that warrant targeting these students for completely different treatment when transferring or assigning them to alternative schools.

Indeed, DeFazio v. Civil Service Commission of Allegheny County, 756 A. 2d 1103 (Pa. 2000), speaks directly to this flaw in Section 2134. The peculiar procedures and limitations applied exclusively to sheriffs in Allegheny County failed the constitutional test because nothing about sheriffs in Allegheny County made them different in any pertinent way from sheriffs in other counties or from other employees in Allegheny County. The Supreme Court explained, “[T]he legislation in question goes beyond merely singling out Allegheny County as a class to be

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Annual Violence and Weapons Possession Report, Table 2 (available at www.safeschools.state.pa.us). Official Record, Plaintiffs’ Memorandum of Law in Support of Their Motion for Summary Judgement, at 17 n.7, filed in the lower court Feb. 26, 2003.

treated differently and in essence has created a new sub-classification, that of the sheriffs of second class counties. . . While the legislature can treat different classes of counties differently, that is not what has occurred here. One particular county officer may not be treated differently from the other similar officers throughout the Commonwealth merely because that officer is within a certain class of county." 756 A.2d at 1108. Section 2134 likewise creates a new sub-classification.

Simply put there are no "articulable manifest peculiarities" about Philadelphia children, Wings Field Preservation Associates v. Commonwealth, 776 A.2d at 319, that could justify applying the policy to them alone. Just as Allegheny's status as a second-class county did not bear on whether civil service requirements should apply to its sheriff's department (DeFazio v. Allegheny County), the fact that the children at issue here cannot be denied the protections afforded all other children before removal and referral to an alternative program for disruptive students, or other alternative education program. Accordingly, the statute constitutes special legislation in violation of Article III, Section 32.

III. APPELLANTS ESTABLISHED THAT SECTION 2134 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE PENNSYLVANIA CONSTITUTION

Article 1, Section 26 of the Pennsylvania Constitution commands that the Commonwealth shall not "deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Pa. Const. Art. 1, § 26. While this commitment to treating alike similarly situated persons is not absolute, its promise – that no person shall be denied equal protection of the laws – is the bedrock principle against which Section 2134 must be measured.

In analyzing equal protection arguments brought under the provisions of the Pennsylvania Constitution, this Court must determine which of the three levels of scrutiny to apply to the challenged statute: strict, intermediate, or rational basis. See Griffin v. Southeastern Pennsylvania Transp. Auth., 757 A.2d 448, 451 (Pa. Commw. 2000) (explaining the court's duty to choose the proper level of scrutiny based upon the nature of the plaintiff's claim.) The proper level of scrutiny is determined by the nature of the right asserted by the plaintiff. Id. As explained by the Pennsylvania Supreme Court:

> [t]he types of classifications are: (1) classifications which implicate a "suspect" class or fundamental right; (2) classifications implicating an "important" though not fundamental right of a "sensitive" classification; and (3) classifications which involve none of these. Should the statutory classification fall into the first category, the statute is strictly construed in light of a "compelling" governmental purpose; if the classification falls into the second category, a heightened standard of scrutiny is applied to an "important" governmental purpose; and if the statutory scheme falls into the third category, the statute is upheld if there is any rational basis for the classification.

Smith v. City of Philadelphia, 516 A.2d 306 (Pa. 1986) (internal citations omitted.)

In analyzing appellants' challenge to Section 2134, the lower court ruled that appellants failed to demonstrate that heightened scrutiny should apply. Applying the rational relationship test to the classification, the lower court found the statute constitutional. Op. at 23. The decision of the lower court must be reversed.

A. The Lower Court Erred in Failing to Apply Heightened Scrutiny to Section 2134

In declining to apply heightened scrutiny to Section 2134, the lower court erred because it failed to follow state law precedent recognizing that one's right to reputation is a fundamental

interest, and must fulfill a "compelling governmental purpose" in order to withstand an equal protection challenge. See R. v. Commonwealth, Dept. Of Pub. Welfare, 636 A.2d at 149 (explaining that the Pennsylvania Constitution guarantees fundamental reputation rights). Section 26 of the Constitution demands that legislation infringing on this right must be both necessary and narrowly tailored to meet the compelling interest. See Klein v. Commonwealth of Pennsylvania, 555 A.2d 1216 (Pa. 1989) (holding that a tiered retirement compensation system for judges failed to meet the demands of a strict scrutiny analysis); Berg v. Kozloff, 712 A.2d 340, 342 (Pa. Commw. 1998) ("Under a strict scrutiny analysis, the burden is on the government to demonstrate that the law is narrowly tailored to achieve a compelling governmental interest.").

Government action is narrowly tailored when its scope does not exceed that which is necessary to protect the articulated compelling interest. See Klebenoff v. McMonagle, 552 A.2d 677, 680 (Pa. Super. Ct. 1988) (evaluating the scope of a government injunction preventing pro-life movement members from picketing). Accordingly, when a statute is over-inclusive in its reach, a compelling government interest alone is not sufficient to uphold the legitimacy of the un-equal treatment under the law that the legislation imposes. See Estate of Cavill v. Mitchell, 329 A.2d 503, 506 (Pa. 1974) (invalidating inheritance statute, under a rational basis standard of review, for a substantially over-inclusive and under-inclusive effect).

Section 2134 cannot withstand such strict scrutiny. Pennsylvania can demonstrate no compelling interest in mandating the removal of Philadelphia adjudicated delinquent youth returning from placement from the regular school environment without any procedural safeguards. Assuming arguendo that a compelling interest has been properly articulated by the Commonwealth, i.e., protecting schools from disruptive youth, Section 2134 draws broad strokes

in its misguided attempt to address that interest and is not narrowly tailored to achieve the state's interest. Absent individualized determinations regarding the necessity of stigmatizing and then removing Philadelphia students from regular schools based on behavior that warrants such removal, Section 2134 is dramatically over-inclusive. By requiring the removal of adjudicated youth returning from placement in Philadelphia, Section 2134 in fact targets many non-violent youth, and applies regardless of whether the student is a "disruptive" student under the Pennsylvania School Code. The scope of Section 2134 thus far exceeds that which is necessary to protect the articulated compelling interest – removing disruptive youth from the regular classroom.

Further, even if the classification did work to remedy the articulated interest, it still fails constitutional muster for violating the reputation rights of Philadelphia students alone, rendering the statute under-inclusive by leaving "violent youth" in public schools elsewhere throughout the state. See Cavill, 329 A.2d at 506 (invalidating an inheritance statute that used categorizations that while they were both over and under-inclusive, were more targeted toward the actual focus of the government interest than those made in the instant case.) Given the fundamental interests at stake, there is no basis for discriminating against Philadelphia adjudicated delinquents only with regard to their eligibility to return to the regular classroom. As noted above, there is nothing distinctive, unusual or noteworthy about adjudicated youth in Philadelphia, as compared to adjudicated youth elsewhere in Pennsylvania. The Commonwealth has simply failed to meet the burden it must overcome when drafting legislation that infringes upon the fundamental rights of Pennsylvania citizens.

B. The Lower Court Erred in Holding That Section 2134 is Constitutional Under the Rational Basis Test

The lower court held that Section 2134 passes constitutional muster under rational basis review. Here too, the court's holding is in error and must be reversed. The court found that the statute bears a reasonable relationship to a legitimate state purpose. Op. at 22; see also Op. at 30-31. For the reasons outlined above, Section II (discussing special legislative violations), the lower court's holding is unwarranted. It abdicated its responsibility to ascertain either the actual rationality of the purported basis for the classification or the sufficiency of the link between the rationales and the classifications. As demonstrated above, the record reflects that appellants established inconsistencies that brought into question the legitimacy and impartiality of the classification. Legislation directed at such a particular, small subset of Philadelphia students who are indistinguishable from such youth residing and attending school in the remaining 500 school districts in the Commonwealth cannot withstand even rational scrutiny.

CONCLUSION

For the reasons set forth above, appellants respectfully request that the court of common pleas' denial of appellants' motion for summary judgment be reversed.

Respectfully submitted,

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July 9, 2004

RELEVANT STATUTORY PROVISIONS

Act 187 of December 9, 2002, No. 187, § 12, 2002 Pa. Laws 1472 (amending the Pennsylvania Public School Code, 24 Pa. Stat. § 21-2134)

§ 21-2134. Placement of Certain Adjudicated Students

(a) No student returning from placement as a result of being adjudicated delinquent under 42 Pa. Cons. Stat. Ch. 63 (relating to juvenile matters) or who has been adjudged to have committed a crime under an adult criminal proceeding shall be returned directly to the regular classroom.

(b) Prior to returning such student to the regular classroom, the school district shall:

(1) Place the student in a transition center operated by the school district for a period not to exceed four (4) weeks.

(2) Develop a transition plan for the student that includes academic goals, identifies school and community services appropriate to the needs of the student and establishes terms and conditions the student must meet prior to returning to the regular classroom.

(c) The transition plan developed under subsection (b)(2) may provide for the student's direct return to a regular classroom where the underlying offense did not involve any of the following:

(i) Possession of a weapon.

(ii) Possession, use or sale of controlled substances as defined in the act of April 14, 1972 (P.L.233, No.64), known as "The Controlled Substance, Drug, Device and Cosmetic Act."

(iii) Possession, use or sale of alcohol or tobacco by any person on school property.

(iv) An act of violence as defined in Section 1310-A(H).

(d) In the case of a student whose transition plan does not include immediate return to the regular classroom the student shall be placed in one of the following as provided for in the student's transition plan:

(1) An alternative education program as defined in Article XIX-C.

(2) A private alternative education institution as defined in Article XIX-E.

(3) A general education development program.

(4) A program operating after the traditional school day.

(e) (1) Prior to the release of a student subject to this section from a residential or day treatment placement as a result of being adjudicated delinquent under 42 Pa. Cons. Stat. Ch. 63 (relating to juvenile matters) or returning from incarceration as a result of having been adjudged to have committed a crime under an adult criminal proceeding, the court shall provide to the person designated in charge of the school district's transition center the information required in the school notification provision under 42 Pa. Cons. Stat. § 6341(b.1) (relating to adjudication).

(2) The information shall be updated by the court with information pertaining to treatment reports and supervision plans or any other information deemed necessary by the transition plan and assure appropriate placement of the student.

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Title 22 (Education) of the Pennsylvania Code, State Board of Education, Chapter 12 (Student Rights And Responsibilities)

<u>22 Pa. Code § 12.8 (Hearings)</u>

(c) The purpose of the informal hearing is to enable the student to meet with the appropriate school official to explain the circumstances surrounding the event for which the student is being suspended or to show why the student should not be suspended.

(1) The informal hearing is meant to encourage the student's parents or guardian to meet with the principal to discuss ways by which future offenses can be avoided.

(2) The following due process requirements are to be observed in regard to the informal hearing:

(i) Notification of the reasons for the suspension shall be given in writing to the parents or guardian and to the student.

(ii) Sufficient notice of the time and place of the informal hearing shall be given.

> (iii) A student has the right to question any witnesses present at the hearing.
>
> (iv) A student has the right to speak and produce witnesses on his own behalf.
>
> (v) The district shall offer to hold the informal hearing within the first 5 days of the suspension.

22 Pa. Code § 12.8(c).