IN THE

Supreme Court of Virginia

RECORD NO. _____

ANDREW MIKEL, on his own Behalf
and as Father and Next Friend of
ANDREW MIKEL II,

Petitioner-Appellant,

V.

SCHOOL BOARD OF THE
COUNTY OF SPOTSYLVANIA,

Respondent-Appellee.

PETITION FOR APPEAL

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ASSIGNMENTS OF ERROR

I. The Circuit Court erred in ruling that Andrew's conduct constituted "Violent criminal conduct" within the meaning of Spotsylvania County Schools Student Code of Conduct Section(B)(3). (T. 125-126).

II. The Circuit Court erred in ruling that the use of any object or weapon, coupled with the conduct described in Student Code of Conduct (E)(4), constitutes a violation of (B)(3). (T. 125).

III. Based upon the foregoing erroneous conclusions, the Circuit Court erred in ruling that the Board had not acted arbitrarily, capriciously, or in abuse of its discretion. (T. 125).

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This case involves a challenge to a decision of a local board of education under Va. Code § 22.1-87. On January 18, 2011, the Respondent-Appellee, the School Board of the County of Spotsylvania (hereafter "the Board") issued a decision suspending and barring Andrew Mikel II from Spotsylvania High School for the remainder of the 2010-2011 school year (R., J. Ex. 1 at 2, 16)[1]. On February 9, 2011, the Petitioner-Appellant, Andrew Mikel, as father and next friend of Andrew Mikel II, filed a petition with the Circuit Court of the County of Spotsylvania asking that the decision suspending his son be reversed and his son

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[1] "R." references are to the pages of the Circuit Court record in the case. "T." references are to the pages of the transcript of proceedings in the Circuit Court held on May 24, 2011. "J. Ex." references are to the pages of Joint Exhibit 1 admitted into evidence at the May 24, 2011 proceedings.

reinstated (R. at 1). On May 24, 2011, a trial was held in the matter and on May 31, 2011, the Circuit Court entered its order sustaining the Board's decision and dismissing the petition (R. 16). On June 23, 2011, the Petitioner-Appellant timely filed his notice of appeal from the Circuit Court's May 31 order (R. 18).

STATEMENT OF FACTS

Andrew Mikel II (hereafter "Andrew") entered Spotsylvania High School (hereafter "SHS") as a 9th grade student in August 2010 for the 2010-2011 school year (J. Ex. At 5; T. at 19). On December 10, 2010, Andrew was involved in an incident at SHS during his lunch period. Andrew had brought to school that day several small, hollow plastic balls (J. Ex. at 7; Def. Ex. 1). Using the hollow casing of a writing pen, Andrew blew the balls at other students' backpacks, and some students were struck by the balls (J. Ex. at 8, 13; T. at 29). The

students who were struck reported that they were in the hallway and felt a "pinch" (J. Ex. at 9), a "sting" (J. Ex. at 11), or that they just felt something hit their back (J. Ex. at 10; T. 50-52).

Assistant Principal Lisa Andruss was on lunch duty at the time with Guidance Counselor Smith. They were approached by a student who told them Andrew was shooting pellets (T. 79). Andruss and Smith then went to look for Andrew. Smith found Andrew and took him to Andruss's office (J. Ex. at 12; T. 80). Andrew handed Andruss the black pen tube and a handful of the balls (T. 80). Andrew admitted to her that he had shot the balls at students' backpacks, stating that he did it because he was bored and thought it would be "cool," but he was not trying to hurt anyone (T. 19, 80). Andruss then allowed Andrew to write out a statement of the events. Andrew's written statement was as follows:

> I was at home and I saw these little white balls. I picked up a few because I

> thought they looked cool. I thought it would be cool if I could shoot them out of something like I had in my pocket, so I took out a pencil and took it apart. I tested it, and it worked okay. I took it to school and shot it out a few times at various people. I made sure to aim at their backpacks so nobody would get seriously hurt, and I got caught and sent to the office.

(J. Ex. at 8; T. at 29)

Andruss initially determined that Andrew would be suspended immediately for 10 days. She then consulted with SHS Principal Rusty Davis about the incident, and after speaking with him decided to recommend that a long-term suspension be imposed upon Andrew (T. 84). Andruss drew up the paperwork to begin the process for imposing the long-term suspension, including sending a letter to Andrew's father, Andrew Mikel (hereafter "Mikel") informing Mikel of the suspension and that a long-term suspension or expulsion was being considered (J. Ex. at 27). In support of this discipline, Andruss

cited the Spotsylvania County School Student Code of Conduct B(3)(b) and (g), which provide in relevant parts as follows:

> 3. **Violent criminal conduct,** while on school property, to or from school, or at a school-sponsored activity, including:
>
> a. attempting to kill, shoot, stab, cut, wound, otherwise physically injure or batter another person;
>
> b. killing, shooting, stabbing, cutting, wounding, otherwise physically injuring or battering any person;
>
> * * * * *
>
> g. any student having been found to have in his or her possession anywhere on school property, at a school sponsored event, or on the way to or from school, any item listed below shall be recommended for expulsion from school for a minimum of 365 days (refer to section E(1) for specific consequences). This list is not all-inclusive. Any type of weapon, or object used to intimidate, threaten or harm others, any explosive device or any

dangerous article(s) shall subject the student to a recommendation of expulsion.

* * * * *

Examples of items that will mandate a minimum of a 365-day expulsion are:

(i) Any pistol, revolver, rifle, shotgun, pellet pistol or rifle, B-B gun or air rifle, starter gun, crossbow or any device capable of firing a missile or projectile;

(ii) Any pistol, revolver, or any weapon which will or is designed to or may readily be converted to expel a projectile by action of an explosive, compressed gas, compressed air or other propellant;

(iii) The frame or receiver of any such weapon described in (i) and (ii) above or any firearm muffler or silencer;

(iv) Any explosive, incendiary or poison gas;

(v) Any bomb, grenade, rocket (having an explosive charge of more than four ounces), missile (having an explosive charge of more than one-quarter ounce) mine or other similar device;

(vi) Any combination of parts either designed or intended for use in converting any device into any destructive device listed in (i) through (v) above and from

which such a destructive device may be assembled;

(vii) Any stun weapon or taser;

(viii) Any dirk, dagger, machete, any knife with a metal blade of three (3) inches or longer, bowie knife, switchblade knife, ballistic knife, razor;

(ix) Any slingshot or spring stick;

(x) Any metal knuckles or blackjack;

(xi) Any flailing instrument consisting of two or more rigid parts connected in such a manner as to allow them to swing freely, which may be known as nun chahka, nun chuck, nunchaku, shuriken or fighting chain;

(xii) Any disc, or whatever configuration, having at least two points or pointed blades which is designed to be thrown or propelled and which may be known as a throwing star or oriental dart;

(xiii) Any device or weapon, not specifically described above, of like kind and of appearance as those enumerated above."

(R. at 4-5, 14).

The matter was then referred to John Lynn, the Spotsylvania County Schools' coordinator of student safety, for a hearing (as the school

superintendent's designee) on Andruss' recommendation of either a long-term suspension or expulsion (J. Ex. at 30; T. at 38). After the matter was referred to him, Lynn sent an e-mail message to Andruss and Davis in which he wrote "I'm not at all comfortable expelling or suspending the student for the remainder of the year." (J. Ex. at 72; T. 60). Lynn testified that Andrew's disciplinary recommendation was based upon the provisions of the Code of Conduct which forbid "[k]illing, shooting, stabbing, cutting, wounding, otherwise physically injuring or battering any person," and which forbid possession of "[a]ny type of weapon or object used to intimidate, threaten or harm others[.]" (T. 39).

The hearing before Lynn was held December 22, 2010, and Andrew, his father and grandfather, and Andruss attended. Thereafter, Lynn gave his recommendation to school superintendent Dr. Jerry Hill that Andrew be given a long-term suspension

for the remainder of the school year (T. 45). Dr. Hill accepted that recommendation and in a letter dated January 3, 2011, and informed the Mikels that Andrew would be barred from SHS for the remainder of the 2010-2011 school year (J. Ex. at 31; T. 45). Pursuant to Board policy, the Mikels appealed the superintendent's decision to the Board (J. Ex. at 32-36).

A hearing on the appeal was held before a three-member Board disciplinary committee on January 18, 2011 (T. 46-47). The committee was presented with a packet of evidence concerning the incident (R., J. Ex. 1), which included pictures of the tube, the pellets, Andrew's statement, and statements of students who reported the incident (T. 49-50). Andruss, Andrew, and Mikel also testified before the committee (T. 58).

After deliberating, the committee determined to affirm the long-term suspension of Andrew. The

decision was memorialized in the Board minutes and in a letter to the Mikels dated January 19, 2011 (J. Ex. at 2, 16).

At the circuit court hearing, Lynn indicated in questioning by the court that the small plastic balls Andrew shot were not intrinsically dangerous and that any dangerousness would have to be based upon the manner in which the balls were used (T. 64). However, Lynn admitted that he had done no tests with the items to determine whether or not they were even capable of inflicting injury (T. 64-65).

After the close of the evidence, the circuit court found that there was no evidence that Andrew had engaged in intimidating behavior or had committed a battery (T. 107). The court went on to point out that it was incongruous that, under the Student Code of Conduct, a student would receive a 10-day suspension for punching someone in the eye,

but that expulsion or a long-term suspension could be recommended for "shooting" a plastic ball through a tube (T. 108). However, the court concluded that it could not say that the Board acted "arbitrarily and capriciously" in deciding to punish Andrew under the more serious section (T. 125).

AUTHORITIES AND ARGUMENT

I. INTRODUCTION

Andrew and Mikel seek this Court's review to correct what they submit has been a grave miscarriage of justice that threatens Andrew's future—a future that appeared, by all accounts, to be exceedingly bright[2] up until the Board meted out a draconian and unjust punishment for Andrew's childish prank. Andrew and Mikel submit that the disciplinary action in this case was not merely unwise, but in fact was at odds with the Board's own rules. Under these circumstances, to leave the lower court's ruling and the Board's action in place would be to permit the flagrant violation of Andrew's Fourteenth Amendment due process right to have fair notice of the school's policies and how

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[2] Prior to the events described herein, Andrew was an "A" and "B" student, a participant in Junior ROTC, color guard, and drill team. He had planned to attend the Virginia Military Institute following his high school graduation. (T. 25).

they will be enforced. By definition, the Board's action was arbitrary and capricious and an abuse of discretion, and therefore it must be reversed.

II. STANDARD OF REVIEW

It is within the province of the courts to remedy injustice to students by setting aside actions of school boards that are based upon wrongful applications of governing rules. See Wood v. Henry County Public Schools, 255 Va. 85 (1998) (affirming judgment of trial court setting aside school board's treatment of a pocketknife as a "firearm" under Virginia law).

The Code of Virginia provides that a school board's disciplinary actions may be set aside if "the school board exceeded its authority, acted arbitrarily or capriciously, or abused its discretion." VA. CODE § 22.1-87. Moreover, where the school's action is arbitrary, capricious, and supported by no rational basis, it will be found to

constitute a violation of the student's rights to substantive due process. See Collins v. Prince William Co. Schools, 2004 U.S. Dist. LEXIS 28298, *20 (E.D. Va. 2004) (citing United States v. Salerno, 481 U.S. 739, 746 (1987); Hicks v. Halifax County School Board, 93 F. Supp. 2d 649, 664 (E.D.N.C. 1999)).

By wrongly interpreting and applying the Student Code of Conduct, the Circuit Court below erred in finding that the School Board's decision was not arbitrary, capricious, or an abuse of discretion. Because the Circuit Court's ruling involves questions of law and the application of law to undisputed material facts, the Court should review the ruling *de novo*. Johnson v. Hart, 279 Va. 617, 623 (2010); Virginia College Building Authority v. Lynn, 260 Va. 608, 622 (2000).

III. ARGUMENT

A. Andrew's conduct is not encompassed by the Spotsylvania County Schools Student Code of Conduct Section(B)(3)(b) or (g), dealing with "Violent criminal conduct," so Andrew's long-term suspension thereunder was arbitrary, capricious, and an abuse of discretion.

Both the Board and the Circuit Court below erroneously found that the Board had authority to impose discipline on Andrew under Section (B)(3) of the Student Code of Conduct, entitled "Violent criminal conduct." Because Andrew's conduct is not encompassed by (B)(3), Andrew and Mikel submit that these findings must be reversed.

The provisions upon which Andrew's long-term suspension was based, defining "Violent criminal conduct," are set forth supra. While the Board and the Circuit Court below found that Andrew's conduct could properly be considered "otherwise physically injuring or battering" others within the meaning of (B)(3)(b), established interpretive doctrines—in addition to good common sense—forbid this interpretation (T. 12-13). As this Court explained

in another school discipline case involving an alleged "weapon,"

> Under the rule of *ejusdem generis*, when a particular class of persons or things is enumerated in a statute and general words follow, the general words are to be restricted in their meaning to a sense analogous to the less general, particular words. Likewise, according to the maxim *noscitur a socii* (associated words) when general and specific words are grouped, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words.

Wood, supra, at 94-95 (quoting Martin v. Commonwealth, 224 Va. 298, 301-02, 295 S.E.2d 890, 892-93 (1982)) (citations omitted).

While the phrase "otherwise physically injuring or battering any person" may well have been intended to serve as a catch-all provision, the most fundamental principles of fairness and due process demand that it be subject to some discernable limitation. Absent such limitation,

simple, harmless acts such as tipping the bill of another student's cap or tossing a wad of paper at another student could be classified—at the whim of school officials—as "Violent criminal conduct" and subject to such draconian punishments as long-term suspension or expulsion.

The doctrine of *ejusdem generis* provides the needed limitation, requiring that the general words "otherwise physically injuring or battering any person" be construed to encompass acts analogous to those specifically listed. In this case, the conduct giving rise to Andrew's long-term suspension—the blowing of tiny plastic balls through an ink pen tube toward students' backpacks without any desire or intent to do any physical harm[3]—cannot conceivably be considered analogous to "killing," "shooting," "stabbing," or "cutting" another person.

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[3] J. Ex. 8; T., 29.

Just as Andrew's conduct does not fall within Student Code of Conduct Section (B)(3)(b), so the objects he used in playing his prank do not fall within the classification of items prohibited under Section (B)(3)(g). While this Section does include a general prohibition of "Any type of weapon, or object used to intimidate, threaten or harm others…," the doctrines of *ejusdem generis* and *noscitur a socii* again provide the necessary interpretive limitation.

Under these interpretive doctrines, tiny plastic balls extracted from a child's toy[4] and the hollow barrel of a standard ink pen cannot possibly be classified as "similar in nature" to the extensive list of dangerous weapons given as examples of contraband items. These include, for instance, rifles, explosives, bombs, machetes,

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[4] T. 35.

knives (specifically limited to three inches or longer), and nun chucks.

One obvious indicator of the patent absurdity of the Board's interpretation of this section to include Andrew's items is found in the fact that Section (B)(3)(g)(viii) specifically excludes knives with blades shorter than three inches. Unless Andrew's small plastic balls and hollow ink pen barrel can reasonably be considered more inherently dangerous than an actual knife, the Board's decision must be ruled arbitrary, capricious, and an abuse of discretion.[5]

In short, Andrew's conduct simply cannot be fairly or reasonably classified as the type of "Violent criminal conduct" that would justify a

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[5] Because violation of Section B(3)(g) is based on mere "possession" of the listed items and those of like characteristics, Andrew's actual use of the items is not relevant with regard to the determination of whether or not he violated said provision.

long-term suspension under (B)(3) of the Student Code of Conduct. Therefore, it was arbitrary and capricious, and an abuse of discretion, for the Board to impose discipline upon Andrew for violation of said provisions.

The court below clearly erred in ruling that Andrew's conduct could properly be classified under (B)(3) of the Student Code of Conduct. Moreover, the court incorrectly stated that Andrew's counsel had conceded "that discipline would be warranted under either [Section 3 or Section 4]" of the Student Code of Conduct (T. 124). In fact, Andrew's counsel argued vigorously and at length that the Board could not properly classify Andrew's conduct under Section (B)(3)(b) or (g). (T. 103-110).

> MR. FLUSCHE: I suggest that it was arbitrary and capricious for them to have decided to put this activity under that section.

> THE COURT: Do you have an option? Is it arbitrary and capricious to pick one as opposed to another?
>
> MR. FLUSCHE: Your Honor, but my suggestion is they don't have the option with this activity at hand.

(T. 108).

B. The Circuit Court erred in ruling that the use of any object or weapon in combination with conduct that violates Section (E)(4) of the Student Code of Conduct constitutes a violation of Section (B)(3) of the same.

The court below interpreted the Student Code of Conduct to allow for student discipline under Section (B)(3) any time conduct falling under Section (E)(4) is accompanied by "the presence of an object or a weapon," and deemed Andrew's conduct to have met those criteria.

> It's the plaintiff's position that, to the extent that [Andrew]'s conduct is covered by two sections of the student code, the school board abused its discretion in seeking to proceed under the more severe section.

> By analogy to criminal law, if one can be charged with malicious wounding, for which an assault and battery would be a lesser-included crime, that is to suggest the state must proceed in the lesser and not the greater charge, that's simply not the case.
>
> The distinction is, of course, that malicious wounding requires an additional element, the breaking of the skin, and here, there's an additional element as well, one that requires the presence of an object or a weapon that's required for them to have proceeded under Section 3, and that did occur. So that is not an issue.

(T. 124-25).

There is simply no basis for the court's conclusion that conduct prohibited under Section (E)(4)becomes "Violent criminal conduct" proscribed by Section (B)(3) if it is accompanied by "the presence of an object or a weapon."

If a student possesses an "object" or "weapon" that is legitimately encompassed by Section (B)(3)(g), the possession is clearly punishable

thereunder irrespective of whether the student also engaged in conduct prohibited by (E)(4). This is because all that is required for a violation of Section (B)(3)(g) is mere "possession" of "Any type of weapon, or object used to intimidate, threaten or harm others…" This makes sense, insofar as that provision may only be properly interpreted to encompass weapons and inherently dangerous items comparable to those specifically listed.

Alternatively, a student may legitimately be disciplined under Section (B)(3)(b) for conduct that rises to the same level as killing, shooting, stabbing, cutting, or wounding another person. However, there is simply no formula outlined in the Code of Conduct by which a student's commission of an act that does not fall within (B)(3)(b), coupled with the use of an object that does not fall within (B)(3)(g), may be magically transformed into a violation of either of those provisions.

Rather, such conduct—Andrew's conduct—simply constitutes a violation of two distinct provisions of Section (E)(4)[6]: a physical attack on another where no one receives a physical injury and "possession of knives or items that do not fall under Section (B)(3)(g)." (Student Code of Conduct, Section (E)(4)(a) and (d)). The Circuit Court's interpretation was an erroneous conclusion of law that is unsupported by the Student Code of

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[6] Section E (4) entitled, "Fighting, Physical and/or Intimidating Behavior" provides, in pertinent part: "Such acts may include any conduct, but specifically includes the following:

> (a) any physical attack on another where no one receive s a physical injury;
>
> (b) any attempt or conspiracy to commit a physical attack on another;
>
> (c) mutual combat, without infliction of physical injury;
>
> (d) possession of knives or other items that do not fall under Section B(3)(g) and subject to disciplinary action under E(1)(which could be considered as weapons and prohibited in school)[.]"

Conduct, and it cannot support the court's conclusion that the Board's action was other than arbitrary, capricious, and an abuse of discretion.

C. By imposing discipline on Andrew under provisions of the Student Code of Conduct that do not encompass Andrew's conduct, the Board has violated Andrew's right to due process of law under the Fourteenth Amendment to the United States Constitution.

A student's entitlement to a public education is a property interest that is protected by the Due Process Clause, and it may not be taken away for misconduct without adherence to the minimum procedures required thereunder. Goss v. Lopez, 419 U.S. 565 (1974). Courts have specifically noted that suspension from public school constitutes interference with the student's property interest that brings the Due Process Clause into play. See, e.g., Wood, supra, at 91 (quoting Goss, supra, at 579, 581).

It is well-established that the guarantee of due process under the Fourteenth Amendment forbids

the prosecution or citation of citizens under provisions that fail to provide fair notice of the conduct they prohibit. See Giaccio v. Pennsylvania, 382 U.S. 399, 402-3 (1966); City of Chicago v. Morales, 527 U.S. 41, 56 (1999); United States v. Williams, 553 U.S. 285, 304 (2008). The Due Process Clause also prohibits the imposition of grossly excessive or arbitrary punishments upon a person. Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 433-35 (2001); State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003). As the Supreme Court has explained, "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." BMW of North America, Inc. v. Gore, 517 U.S. 559, 574 (1996).

Other courts have recognized that, even in the special setting of public schools, these

"elementary notions of fairness" serve as limitations on the otherwise broad discretion that schools enjoy with regard to student discipline. See, e.g., Monroe County Bd. of Ed. v. K. B., 62 So. 3d 513, 516 (Al. Civ. App. 2010) ("[R]ules and regulations governing the conduct of students 'must be sufficiently definite to provide notice to reasonable students that they must conform their conduct to its requirements.'") (quoting 67B Am. Jur. 2d *Schools* § 285 (2010)); James P. v. Lemahieu, 84 F.Supp.2d 1113, 1121 (D. Haw. 2000) ("[I]t is clear that the Due Process Clause requires statutes to clearly set forth the type of conduct that is forbidden by its provisions.") (finding Plaintiffs likely to prevail on the merits of their due process claim because wording failed to provide fair notice to students regarding meaning of "possession" of alcohol); Stephenson v. Davenport Comm. Sch. Dist., 110 F.3d 1303, 1310 (8th Cir. 1997) (holding district regulation void

because it failed "to provide adequate notice of prohibited conduct…").

Andrew and Mikel respectfully submit that in this case, fundamental notions of fairness have been transgressed. The draconian discipline meted out to Andrew resulted from the arbitrary and capricious classification of Andrew's conduct under provisions which clearly do not encompass it. Under these circumstances, the taking of Andrew's property interest in a public education for a substantial portion of the 2010 academic year cannot be sustained.

CONCLUSION

Without a doubt, school officials frequently face a task of monumental difficulty as they are, at times, called upon to implement disciplinary consequences that will inevitably have a lasting impact on students. Where student conduct involves dangerous weapons or true violence, it is proper

and fitting for officials to look to the best interest of the school community as a whole, despite the certainty that long-term exclusion from school will work to the offender's detriment. But where the conduct of students—immature young people who are inherently prone to indiscretion—does not rise to the level of real danger and is not accompanied by sinister intent, a measure of restraint is warranted.

The Student Code of Conduct of Spotsylvania County Schools, as written, achieves this balance. It provides an avenue for the Board to impose a significant consequence under Section (E)(4) for Andrew's conduct, while reserving long-term suspension and expulsion for truly dangerous behavior.

In this case, however, the Board has forced a square peg into a round hole, punishing as "Violent criminal conduct" a simple, and basically harmless

schoolboy prank. In so doing, the Board has failed to comply with its own duly-enacted policies. While Andrew's conduct could have and should have been punished under Section (E)(4) of the Student Code of Conduct, it cannot, under any fair or reasonable interpretation, be punished under Section (B)(3).

For the foregoing reasons, the Board's actions were arbitrary and capricious and constituted an abuse of discretion. Moreover, the punishment violates Andrew's fundamental right to due process under the Fourteenth Amendment to the United States Constitution, as he could not possibly have anticipated that the type of behavior he exhibited would be classified as "Violent criminal conduct" and punished by long-term suspension. Andrew and Mr. Mikel respectfully request that the Court grant their Petition, reverse the Circuit Court's ruling, set aside the Board's action, expunge Andrew's academic record of the same, and grant such other

further and general relief as the Court may deem appropriate.

Respectfully submitted,

Andrew Mikel and Andrew Mikel II

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CERTIFICATE REQUIRED BY RULE 5:17(i)

The undersigned counsel for the Appellants hereby certifies as follows:

(1) The names of all appellants and appellees and their counsel are as follows:

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(2) A copy of this petition for appeal has been mailed, postage prepaid, to counsel for the Appellees at the address set forth above on the 31st day of August, 2011.

(3) Counsel for Appellants desires to state orally and in person to a panel of this Court the reasons why the petition for appeal should be granted.

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