

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

**MARLYN TILLMAN, individually and )  
as next friend of her minor son )  
JOHN DOE, )**

**Plaintiff, )**

**vs. )**

**Civil Action File  
No.: 1:04-CV-01180-BBM**

**GWINNETT COUNTY SCHOOL )  
DISTRICT d/b/a GWINNETT COUNTY )  
PUBLIC SCHOOLS, and J. ALVIN )  
WILBANKS, as Superintendent of )  
Gwinnett County Board of Education, )  
And JANE STEGALL, as Principal of )  
Brookwood High School, in their )  
individual and official capacities, )**

**Defendants. )**

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**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF HER  
MOTION FOR SUMMARY JUDGMENT**

Plaintiff files this Memorandum of Law in Support of her Motion for Summary Judgment and shows this Court that Gwinnett County School District policies, rules and actions violated her son’s rights as guaranteed by the United States and Georgia constitutions, and that there no material issues of fact that remain to be decided.

## **I. Introduction.**

This is a civil rights action that challenges Defendants' broad and ambiguous policies prohibiting "gang-related activity" and their application to student dress. The Plaintiff in this case is Marlyn Tillman who appears on her own behalf and on behalf of her minor son, who is designated "John Doe" for purposes of this litigation. John Doe (referred to as "Doe" herein) is currently in the 11<sup>th</sup> Grade at Brookwood High School in Snellville, Georgia. Doe is a college bound student who is enrolled in honors and advanced placement classes. Through this case, Plaintiff does not question whether there is a need for addressing criminal gang activity in the schools or whether student dress codes may serve some legitimate purposes. This case has been brought, however, because at the times relevant to this suit, Defendants never made any attempt to put its students and their parents, including Plaintiff and her son, on notice of what items of clothing are considered to be "gang-related" under Rule 11C of the school district's discipline policies. Moreover, the challenged policies and rules provide absolutely no guidelines for school officials in determining what clothing or conduct will subject students to punishment, up to and including expulsion. Indeed, the policy is determined and punishment is applied on an ad hoc basis without prior warning.

As is set out in detail below, Plaintiff is entitled to judgement as a matter of law in this case as to all of their claims because:

- The undisputed evidence demonstrates that her son was punished, in violation of his free speech rights, for wearing clothing intended to express messages which did not disrupt the school environment at all, let alone materially and substantially. *See, e.g., Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004).
- The undisputed evidence reveals that the challenged policies are 1) unconstitutionally vague (its prohibitions are not clearly defined and students are held responsible for wearing banned clothing without prior notice); and 2) that the rule upon which Defendants relied in punishing John Doe leaves unbridled discretion to government officials. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41 (1999); *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F.Supp. 659 (S.D.Tex. 1997).
- The evidence reveals that the challenged policies are overbroad and sweep in substantial amounts of protected speech, that are neither disruptive nor gang-related.<sup>4</sup> *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003).
- The evidence shows that Defendants cannot establish a rational relationship between the application of their anti-gang clothing rule--banning everything from wristbands to the number '13'--and creating a school environment free of gang activity. *See, e.g., Hodge v. Lynde*, 88 F. Supp. 2d 1234, 1244 (N.M. 2000); *Lansdale v. Tyler Junior College*, 470 F.2d 659, 663 (5th Cir. 1972)(en banc).
- The evidence demonstrates that on several occasions Plaintiff's son was summarily punished for his clothing, which Defendants determined was "gang-related," without providing the evidence upon which they based their conclusion, and, on all but one occasion, without an opportunity to rebut the erroneous determinations. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975); *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3rd Cir. 2001).

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<sup>4</sup> Including, according to Defendants' documents given Plaintiff *after* John Doe had been punished: certain red and blue clothing; Nike shoes; Members Only jackets; Converse tennis shoes; certain collegiate jerseys; all expressive statements if added after purchase; patches, badges and numbers added to clothing after purchase; athletic sweatbands worn on the wrist; and untold other examples of clothing.

Accordingly, Plaintiff is entitled to judgment as a matter of law as to all of her claims and her motion should be granted in its entirety.

## **II. Factual Background.**

John Doe, who is African American, has been a student at defendant Gwinnett County School District (“GCSD” herein) since the 2001 – 2002 school year. (Verified Complaint, ¶ 13.<sup>5</sup>) Doe is currently enrolled in honors and advanced placement classes and intends to attend college following his graduation from high school in 2006.

(Defendants’ Responses to Plaintiff’s First Request for Admission of Facts, No. 96<sup>6</sup>; V. Comp., ¶ 16.). Doe is not now, nor has he ever been, affiliated with gangs or gang activity. (V. Comp., ¶ 32). Since he has been repeatedly disciplined for violating the challenged policies, and as a result has been labeled a “Chronic Disciplinary Problem,” he is now, and will continue to be, subject to serious punitive consequences, including suspension or expulsion, for any subsequent violation.

### **A. Defendants’ Discipline of John Doe for “Gang Related Activity.”**

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<sup>5</sup> Referred to herein as “V. Comp., ¶ \_\_\_\_.” Plaintiff Tillman verified the factual allegations contained in the Complaint under oath.

<sup>6</sup> Citations to Defendants’ Responses to Plaintiff’s First Request for Admission of Facts to Defendants are abbreviated as “Defs. Admis. no. \_\_\_\_,” herein. In her deposition, Defendant Stegall verified the truth of all of the factual statements made in said responses as well as Defendants’ Responses to Plaintiff’s First Interrogatories. (Stegall dep., pg. 44.)

This action arises from three instances in which Plaintiff's son received discipline as a student of GCSD for alleged "Gang Related Activity" based on clothing that he wore to school.<sup>7</sup> The last of these three incidents resulted in a short term suspension, which is the most severe punishment that a school principal may impose without resort to a disciplinary panel. (Harrison dep., pgs. 11 – 12.)

On January 16, 2002, Doe was disciplined for "Gang Related Activity" because he had rolled up a pants leg on the school bus and arrived at school wearing a University of North Carolina ("UNC") blue shirt, headband, and carrying a UNC hat. (Harrison dep., Ex. 8.) Although Defendants now deny that the blue clothing was related to the discipline imposed on this occasion (e.g., Defs. Admis. Nos., 3, 9), contemporaneous documentation regarding this incident shows that the color was the primary, if not sole, concern:

I saw [Doe] this a.m. wearing a Carolina blue headband when he was getting off the bus. He was carrying a C[arolina] hat and his shirt is related to the whole color thing because of a band of blue along the bottom.

(email memorandum from Susan Gaddis to Christine Dailey, dated January 16, 2002, included herein as Roberts Dec., Ex. 3.; Harrison dep., Ex. 8.) ) At that time, Defendants' dress policies had never listed wearing Carolina blue clothing or rolling

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<sup>7</sup> In addition to these formal disciplinary actions, Doe received an informal warning in January 2002 for having a pocket watch on a chain at school based on Defendants' assertion that this chain was "gang-related." This warning was given despite the fact that the watch chain was not the sort that is described as being prohibited by Defendants' policies. (Defs. Admis. nos. 1, 18, 19, 20; V. Comp., ¶ 26, 27.)

up one pants leg as being prohibited. (Defs. Admis. Nos. 23, 24.) Neither Plaintiff nor her son had notice that wearing this manner of clothing could be punished as “Gang Related Activity.” (V. Compl. ¶¶ 26, 27.)

The following school year, on April 26, 2003, Plaintiff was again disciplined for “Gang Related Activity” for wearing a red shirt, a wrist band on his left arm, and having a “doo-rag” hanging out of a rear pants pocket. (Robinson dep., Ex. 16.) He was punished with “Saturday school” for this incident. Neither Plaintiff nor her son had ever received notice that wearing this manner of clothing was prohibited as being “Gang Related Activity.” (V. Comp., ¶¶ 26, 27.) Defendants claim that these items in combination presented a gang-related message that justified Plaintiff’s discipline for Gang Related Activity for this incident: red (the color of his shirt) and black (the color of the wrist band<sup>8</sup> and the “doo-rag”) are the colors of the Bloods gang. (Answer of Defendants (Doc. 3) at ¶ 15, Defendants’ Initial Disclosures at ¶ 3.) As is set out below, however, Plaintiff had no notice prior to this that this type of clothing or manner of dress would be considered “gang-related.”

Early in the following school year, Doe was again disciplined for “Gang Related Activity,” when he wore a shirt of his own design to school on August 22, 2003. This was a black t-shirt on which Doe had drawn the number 13 on the front and back

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<sup>8</sup> The wrist band in question is actually navy blue. Plaintiff does not dispute, however, that it is dark in color.

(representing his birth date, February 13.) On the front, he had affixed red and white iron-on letters spelling out “Silver Spring,” (representing his hometown of Silver Spring Maryland) and on the rear, he had similarly affixed the word “Kmatikc,” (his nickname.) Finally, Doe had sewn a cloth patch that said “Espana” to the front of the shirt (Doe and his mother had traveled to Spain and Doe had studied Spanish from a young age.) (Defs. Admis. nos. 58 – 62; Reproductions of the shirt are found at Harrison dep., Exs. 1, 2 and 3.) Neither Plaintiff nor her son had ever received notice that wearing this manner of clothing to school was prohibited as “Gang Related Activity.” (V. Comp. ¶¶ 26, 27.) Despite this, Plaintiff was suspended from school for three days and deemed to be a “Chronic Disciplinary Problem” as a result of his wearing this shirt to school. (Harrison dep., Ex. 7.) Though Jodi Robinson entered the final decision to suspend Doe, she asserts that it was a group decision and that Defendant Stegall concurred in that discipline. (Stegall dep., pg. 11; Robinson dep, pgs. 38 - 39; Smith dep., pg. 18.)

Defendants assert that reasons for determining that Doe had violated the rule against “Gang Related Activity” and, thus imposed discipline, were as follows:

- The first and last letters in “Kmatikc” were white, and thus indicated “Crip Killer, ” that is, someone who kills members of the Crips gang. (Answer, ¶ 15, Defendants’ Initial Disclosures, ¶ 3; Robinson dep., pg. 35; Harrison dep., Ex. 6.)
- The letters I, V, E, R, S, I, and N in “Silver Spring” were white, thus indicating Allen Iverson, whom Defendants claim to be a “icon to the

Crips Gang according to the Gwinnett County Gang Task Force and internet sources.” (Answer, ¶ 15, Defendants’ Initial Disclosures, ¶ 3; Robinson dep., pg. 35; Harrison dep., Ex. 6.); and

- The number 13 represents the letters “A” and “C”, which defendants claim means “a crip,” that is that the wearer is a member of the Crips gang. (Harrison dep., Ex. 6; Robinson dep., pg. 35.)

Defendant’s reasoning is confusing at best. First, there is the obvious conflict between these items. One indicates a dislike for Crips (“Crip Killer”) while the other two, Defendants claim, indicate allegiance to the Crips (Allen Iverson and “A Crip.”) Add to this the fact that the shirt is predominately black and red, which Defendants have identified as being the colors of the Bloods gang, the alleged rivals of the Crips. (Harrison dep., Exs. 1, 2, 3; Robinson Dep., Ex. 15; Defs. Admis. nos. 78, 80.) Faced with this, Defendants admit that the shirt does not send a clear message of gang affiliation of any type.<sup>9</sup> (Robinson dep., pg. 49; Smith dep., pgs. 55 – 57.)

Defendants’ explanation regarding the Allen Iverson reference is similarly specious. First, Robinson, whose zeal led to Doe’s suspension, admits that she incorrectly asserted that the Gwinnett County Gang Task Force was a source of information for the alleged connection between Allen Iverson and gangs, and that she failed to consult with the task force about this incident at all. (Robinson dep., pg. 43.) The only documents on which Defendants based their conclusion that Allen Iverson

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<sup>9</sup> Defendants offer no explanation as to how an incorrectly spelled name, “Iversin,” equates with idolatry for Iverson.

had any relation to any gang were print-outs of two web sites found as a result of an internet search. (Defs. Admis. no. 71.) However, these documents belie any connection between Iverson and gangs.<sup>10</sup>

The record is clear: Plaintiff's son's clothing never caused **any** disruption at school and Defendants never received any complaints from teachers or students regarding disruption caused by Doe's clothing. (Defs. Admis. no. 84.; Stegall dep., pg. 96 – 97; Robinson dep., pgs 95; Smith dep., pg. 50.) Further, Defendants admit that it has no evidence that Doe is in a gang or has ever engaged in gang-related activities and that they were simply speculating that he was in a gang when they disciplined him. (Robinson dep. pgs. 49, 77; Harrison dep., pgs. 118, 119; Defs. Admis. nos. 82, 83, 89.) Gang activity was not a significant problem at Brookwood at the time of Doe's suspension and is not a problem today. (RTA No. 119; Robinson dep., pgs. 77 – 78.) Given these circumstances, it is clear that Defendants had no reasonable basis to discipline Doe for alleged "Gang Related Activity" and it is equally clear that

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<sup>10</sup> One of these sites is the personal home page of an anonymous 16 year-old young woman ("AIversonzboo") from California who happens to express an affinity for both Iverson and the crips. (Harrison dep., Ex. 4.) The second is a transcript of a speech by Dr. Carl Taylor, a professor of Family and Child Ecology at Michigan State University. (Harrison dep., Ex. 5.) Nowhere in this document does Dr. Taylor draw any connection between Allen Iverson and gangs. The only mention of Iverson comes on the last page of the speech, where Dr. Taylor says that Iverson could be "the poster boy for hip hop." (Harrison dep., Ex. 5, pg. 3.) Based on this crabbed reading of two documents grabbed seemingly randomly off of the internet, Defendants concluded that Doe was engaged in gang-related activity and punished him accordingly.

Defendants at no time put Plaintiff on notice that Doe's manner of dress could be considered gang-related.

**B. Defendants' Policies.**

In the three incidents set out above, Plaintiff Doe was disciplined pursuant to Gwinnett County Student Code of Conduct Rule 11C. (Harrison dep., pg. 84, Exs. 6, 10, 16; Robinson dep., pg. 47; Smith Dep., pgs. 29, 42 - 43.) For school year 2003 – 2004, that rule read as follows:

Rule 11 – Other Conduct Which is Subversive to Good Order . . . .  
The prohibited behaviors include, but are not limited to the following:

- . . . . .
- 11C. Gang related activity, hazing or behavior such as:
- 1.) conduct on behalf of any gang or group;
  - 2.) conduct that perpetuates the existence of any gang or group;
  - 3.) conduct to promote the common purpose and design of any gang or group;
  - 4.) conduct to represent a gang or group affiliation, loyalty or membership.

(Stegell dep., Ex. 34.)

Pursuant to this general anti-gang rule, individual school principals in the School District are empowered to implement school-specific policies, including dress code policies, to attempt to curb gang-related activities. (Stegall dep., pgs. 27, 30 - 31; Wilbanks dep., pg. 9 – 10, 12, 25; Defs. Admis. nos. 114, 115.) Principal Stegall likened this District-wide Rule to an “umbrella” under which she could create policies for Brookwood banning gang-related dress. (Stegall dep. pg. 27.) Accordingly,

Brookwood's dress code policy for the 2002-2003 and 2003-2004 schools year included the following provision:

No student clothing should display words or symbols that are inflammatory, derogatory, insulting to other students, or in reference to gangs.

(Harrison dep., Exs. 10, 12.) Principal Stegall was responsible for this policy and had the authority to adopt, implement and enforce it without approval of her superiors in the School District. (Stegall dep., pg. 79.) In turn, the Principal grants the school's Assistant Principals broad discretion to enforce school policies and impose discipline. (Stegall dep., pgs. 59 – 50; Harrison dep., pgs. 9 – 10.)

Defendants have asserted that it is their policy to warn students first about particular types of clothing before any formal discipline is imposed. (Harrison dep., pgs. 104 – 105; Stegall dep., pgs. 60 – 61.) Their practice, however, reflects no such warning. Defendants had developed a form for giving out such informal warnings, called "Dress Code Concerns." (Robinson dep., pgs. 91 – 92, Ex. 20.) Despite this, Plaintiff was given no such warning before any of the instances for which he was disciplined for wearing "gang-related" clothing. (Robinson dep., pg. 91.) Further, at the times relevant to this case, Defendants had no mechanism for communicating to students or parents what clothing was considered "gang-related" once the administration identified it as such. (Harrison dep., pg. 81.)

Defendants amended the Brookwood policy implementing GCSD Rule 11D in 2004-2005 to prohibit the clothing for which it had previously punished Plaintiff's son without warning. The current policy states:

Students are not allowed to display clothing or symbols that have been identified by the Gwinnett County Police Gang Taskforce as being commonly identified with gangs. Garments, jewelry, body art and tattoos that communicate gang allegiance are not allowed to be worn at school, and no item may be worn in a manner that communicates gang affiliation.

- Gang related attire includes, but is not limited to the following: students rolling up one pant leg, long, bulky chains and necklaces, gang-style belt buckles (belt buckles which have Old English script letters and designs), large oversized pendants on necklaces and chains, bandanas, altering clothing from its original form to change the names and/or intended marking on the clothing, sweatbands and/or headbands, and draping articles of clothing, towels or other objects out of pants pockets or over the shoulder or neck area.
- This rule is subject to updates as additional wearing apparel becomes identified as gang affiliated or disruptive. You should consult the BHS web site frequently to be informed about additions or changes.

(Roberts Dec., Ex. 4.)

The current policy suffers from many of the same infirmities as the prior policy. Importantly, Defendants acknowledge that “gang-related” activity and clothing is still determined on a “case-by-case basis” and determinations often involve some amorphous, unpublished combination of clothes. (Defs. Admis., no. 101; Stegall Dep., pg. 61, 66, 101; Robinson Dep. pgs. 51, 56, 57.)<sup>11</sup>

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<sup>11</sup> Plaintiffs challenge not only Defendants' current policy as unconstitutionally vague and overbroad on its face and therefore requiring prospective relief, but also specifically challenge the prior policy as applied to Plaintiff's son for past damages.

**C. Lack of Prior Notice to Students and Parents Regarding Dress Policies.**

Although Defendant Stegall readily admits that with “[a]ny dress policy, the purpose is to let the kids know what they can and cannot wear” (Stegall dep., pg. 31), Defendants did nothing to let Plaintiff or her son know ahead of time that Doe could be disciplined for gang-related activity for the inoffensive and undisruptive dress at issue here. Some time ago, Defendant Stegall attempted to draft a document to give to parents regarding gang activity, but it “didn’t have good information about it . . . [and] turned out not to be that useful,” and she abandoned this effort. (Stegall dep., pg. 59.) Apparently, the school instead adopted the “shoot first; ask questions later” approach seen here.

On its face, the 2003-2004 Brookwood anti-gang clothing policy provided no guidance for a reasonable person to determine what clothing was prohibited. No specific information was supplied other than the vague language that clothing cannot display “words or symbols that are inflammatory, insulting to other students, or in

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*See Reich v. Occupational Safety and Health Review Comm’n*, 102 F.3d 1200, 1202 (11<sup>th</sup> Cir. 1997) (“Courts have traditionally treated monetary relief claims differently than injunctive relief claims for the purposes of mootness challenges.”); *see also McKinnon v. Talladega Cty., Ala.*, 745 F.2d 1360, 1362-63 (11<sup>th</sup> Cir. 1984) (“A claim for damages does not expire upon the termination of the wrongful conduct.”) Nominal damages are available even in the absence of any showing of actual injury where there is a finding that a constitutional right has been violated. *See Carey v. Piphus*, 435 U.S. 247, 266-267 (1978) (nominal damages); *see also Memphis Community School District v. Stachura*, 477 U.S. 299, 308 (1986) (damages available for loss of First Amendment rights based upon particularized loss.)

reference to gangs.” Nor does the 2004-2005 Brookwood anti-gang clothing policy, which prohibits, without further guidance, “clothing or symbols that have been identified by the Gwinnett County Police Gang Taskforce as being commonly identified with gangs” as well as “[g]arments . . . that communicate gang allegiance” provide fair warning to students of banned clothing. Defendants do not publish or otherwise make available to their student body a list of Taskforce identified items or otherwise provide adequate guidance that would enable a reasonable person to know what clothing, or combination of clothing, will be deemed “gang related.” Finally, the GCPS rule for which John Doe was punished and which girds the application of Brookwood’s anti-gang clothing policies, Rule 11C, also fails to provide adequate guidance. It simply prohibits “conduct to represent a gang or group affiliation” or that “perpetuates the existence of any gang or group,” without listing the types of conduct or clothing prohibited.

Importantly, Defendants readily admit that their policies failed to identify as prohibited any of the clothing for which Plaintiff was disciplined. (Defs. Admis. Nos. 20(red shirts not listed); 23 (rolling up one pants leg not listed); 24 (Carolina Blue clothing); 45 (sports outfits); 63 (self designed shirts); 64 (clothing with nickname or birth date); 65 (black shirt with contrasting letters); 21 - 22 (wearing wrist band on one arm not listed prior to 2004 – 2005 school year); Smith dep., pg. 59 (asymmetrical

clothing, including rolling one pants leg up, not listed prior to 2004 – 2005 school year); Harrison Dep., pg. 87 (asymmetrical clothing not listed); Robinson dep., pgs. 58, 105 (References to Allen Iverson not listed.))

After Doe’s second “gang-related” offense in April of 2003, Jodi Robinson gave Plaintiff a document titled “Gang Indicators (Seen in Gwinnett).” (Robinson dep., pgs. 59 – 60, Ex. 15.) None of the items for which Doe was subsequently disciplined appear on that list.<sup>12</sup> Further, Defendants admit that other than a rolled up pants leg, none of the items of clothing for which Doe was disciplined appeared on that, or any other, list. (Defs. Admis. no. 106.) Prior to August 2003, the Brookwood administration had made no formal efforts to inform students or parents that wearing a shirt such as Doe’s would be considered a potential problem. (Harrison dep., pg. 81.) Indeed, Doe had worn this shirt to school the previous year on several occasions without incident. (V. Comp. ¶23.) Defendants have never made any attempt to provide this “Gang Indicators” document to other parents or students prior to a violation. (Defs. Admis. no. 105.) Even if this information had been provided to Plaintiff beforehand, it

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<sup>12</sup> Robinson argues that listing of the letters, “CK” as meaning “crip killer” somehow put Plaintiff and Doe on notice that Doe’s “Kmatike” shirt was gang related because the first and last letters were white while the rest were red. (Robinson dep., pg. 16.) Robinson, however, testified that she had told Doe not to wear clothing that said CK. (Robinson dep., pg. 59.) She did not indicate anything to him about including the letters K and C in a word on his clothing. The imprecision of Defendants policies is highlighted by the testimony of teacher Allen Prince, who said that his understanding is that “CK” means “Calvin Klein” and was not a gang-related message. (Prince dep., pg. 17.)

would be of no use since it lists such innocuous everyday things as Nike and Converse shoes; stars; gloves; red, black and blue clothing; and Chicago Bulls sportswear as being gang indicators. (Robinson dep., Ex. 15.) Defendant insists that combinations of these types of items, not individual items, are what can trigger the anti-gang provisions of the dress code. (E.g., Robinson dep., pg. 101.) However, there is nothing on this document that would indicate this to a student or their parent. (Robinson dep., pg. 102, Ex. 15.) In short, Defendant never provided Plaintiff or her son with advance notice of what it considered to be gang-related dress.<sup>13</sup>

**D. Defendants' Lack of Standards for Enforcement of its Anti-Gang Dress Code Policies.**

Defendants have no set standards for the enforcement of its anti-gang dress code policies and interpretation of those vague policies is not uniform among Defendants' teachers and administrators. Defendants admit that enforcement of the anti-gang clothing policies is done on a case-by-case basis. (Defs. Admis. no. 101; Stegall dep., pgs. 60 – 62; Robinson dep., pgs. 51, 76, 99, 106.)

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<sup>13</sup> Although the record as it now exists clearly shows this, Plaintiff notes that in discovery they served interrogatories on Defendants that sought specific information regarding when and how they communicated to Plaintiff and her son and other students and parents that wearing the clothing for which Doe was disciplined violated their dress policies. (Pl.'s First Interrogatories, No. 7.) Despite the obvious relevance of this information, Defendants did not provide a complete response and simply stated that it had produced unspecified documents on this topic. This item and many of Defendant's other inadequate responses are currently the subject of Plaintiff's pending Motion to Compel Discovery.

With respect to the clothing for which Plaintiff was disciplined, it is clear that Defendants have no set standards that determine whether the clothing was gang-related. The administrators involved in this decision all gave varying testimony regarding whether Doe's clothing in the August 2003 incident even was gang-related. For example, Jodi Robinson testified that she did not initially conclude that the shirt was gang-related, but later concluded that it was gang-related and suspended him for it. (Robinson dep., pgs. 16 – 17, 42, 47.) David Smith apparently accepted Ms. Robinson's conclusions uncritically. (Smith dep. pgs. 19 – 21.) Principal Stegall, on the other hand, denies that the shirt had any bearing on the discipline at all and asserts that she "was not dealing with a gang thing." (Stegall dep., pg. 40.) Given that these administrators were all over the map as to whether or not Doe's shirt conveyed a gang-related message or why, it is astounding that Defendants took the drastic action of labeling Plaintiff with "Gang-Related Activity" and suspending him.

Further, depositions revealed that administrators and teachers at Brookwood High School cannot, and do not, uniformly enforce or interpret the policy. When asked whether sample clothing violated GCPS or Brookwood's anti-gang policy, faculty could not even agree:

	<b>David Smith</b>	<b>Dan Bowles</b>	<b>Allen Prince</b>	<b>Marcus Hall</b>	<b>Ken Simpson</b>	<b>Libby Atwell</b>
	Assistant Principal at Brookwood	Teacher -- 19 yrs at Brookwood, 20 yrs total teaching experience	Teacher -- 7 yrs with GCPS	Teacher -- 5 yrs at Brookwood	Teacher -- 12 yrs at Brookwood, 22 yrs. teaching	Teacher -- 13 yrs at Brookwood, 37 yrs teaching
Dep. Ex. 21 (Puerto Rican Flag in a sun - - possible identifier of the Neta gang)	<b>No.</b> (Smith dep., p. 45)	<b>"I wouldn't know."</b> (Bowles dep., p. 26)	<b>Yes.</b> (Prince dep., p. 14)	<b>No.</b> (Hall dep. p.)	<b>No.</b> (Simpson dep., p. 20)	<b>"I would not know."</b> (Atwell dep., p. 23)
Dep. Ex. 22 ("New Orleans Seekers" -- 50s style gang jacket)	<b>No.</b> (Smith dep., p.46)	<b>No.</b> (Bowles dep., p. 28)	<b>"Might be."</b> (Prince dep., p. 14)	<b>Maybe.</b> (Hall dep., p. 21)	<b>No.</b> (Simpson dep., p. 20)	<b>"I do not know."</b> (Atwell dep., p. 23)
Dep. Ex. 23 (picture of hip hop celebrity "Ludacris" flashing peace signs)	<b>No.</b> (Smith dep., p. 47)	<b>Yes.</b> (Bowles dep., p. 29)	<b>No.</b> (Prince dep., p. 15)	<b>No.</b> (Hall dep. p. 22)	<b>No.</b> (Simpson dep., p. 20)	<b>No.</b> (Atwell dep., p. 24)
Dep. Ex. 24 ("Gang of Four" t-shirt)	<b>No.</b> (Smith dep., p.47)	<b>Yes.</b> (Bowles dep., p. 29)	<b>Yes.</b> (Prince dep., p. 16)	<b>Maybe.</b> (Hall dep., p. 22-23)	<b>No.</b> (Simpson dep., p. 21)	<b>"I would not know."</b> (Atwell dep., p. 24)
Dep. Ex. 25 (t-shirt w/ picture of a gang member with a gang tatoo)	<b>"I don't know."</b> (Smith dep., p. 48)	<b>No.</b> (Bowles dep., p. 30-31)	<b>Yes.</b> (Prince dep., p. 16)	<b>Maybe.</b> (Hall dep., p. 23.)	<b>No.</b> (Simpson dep., p. 23)	<b>"I would not know."</b> (Atwell dep., p. 25)
Dep. Ex. 26 (tshirt w/ initials "BK" & line thru B)	<b>"It certainly could."</b> (Smith dep., p. 48)	<b>No.</b> (Bowles dep., p. 31)	<b>Yes.</b> (Prince dep., p. 16)	<b>No.</b> (Hall dep. p. 23)	<b>No.</b> (Simpson dep., p. 23)	<b>"I would not know."</b> (Atwell dep., p. 26)
Ex. 27 (tshirt w/ Celtic Cross and "White Pride World Wide")	<b>No.</b> (Smith dep., p. 49)	<b>"Possibly...I don't know."</b> (Bowles dep., p.31-32)	<b>Yes.</b> (Prince dep., p.)	<b>No.</b> (Hall dep. p. 24)	<b>No.</b> (Simpson dep., p. 23)	<b>"I do not know."</b> (Atwell dep., p. 28)
Ex. 28 (t-shirt w/ Confederate flag)	<b>No.</b> (Smith dep., p. 49)	<b>No.</b> (Bowles dep., p. 32)	<b>Yes.</b> (Prince dep., p.)	<b>No.</b> (Hall dep. p. 25)	<b>No.</b> (Simpson dep., p. 23)	<b>"I do not know."</b> (Atwell dep., p. 29)

Ex. 30 (two color jersey)	No. (Smith dep., p. 51)	No. (Bowles dep., p. 34)	Yes. (Prince dep., p. 17)	Yes. (Hall dep., p. 26)	No. (Simpson dep., p. 24)	No. (Atwell dep., p. 30)
Ex. 31 (outfit with the letter B on left side)	No. (Smith dep., p. 51)	No. (Bowles dep., p. 35)	No. (Prince dep., p. 17)	No. (Hall dep. p. 27)	No. (Simpson dep., p. 24)	"I do not know." (Atwell dep., p. 31)

Depositions also revealed that GCPS faculty, charged with enforcing GCPS rules and recognizing violations of dress code and student conduct codes, would not have known that the clothing worn by Plaintiff’s son would be considered “gang-related.” (Bowles dep., pgs. 16-18, 23, 25; Prince dep., pgs. 13-14, 20; Hall dep., p. 13, 18-21; Simpson dep. p. 17, 19, 21; Atwell dep. pgs. 19-21, 32).

### **III. Argument and Citation of Authority.**

#### **A. Summary Judgment is Warranted Because No Issue of Material Fact Remains that Requires Determination.**

Under the Federal Rules of Civil Procedure, Rule 56(c), summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Roe v. Aware Woman Center for Choice, Inc.* 357 F.3d 1226, 1228 (11<sup>th</sup> Cir. 2004), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The undisputed facts establish that no issues of material fact remain for trial in this action and Plaintiff

should be granted judgment as a matter of law. *See Bank of America, N.A. v. Sorrell*, 248 F.Supp.2d 1196, 1198 (N.D.Ga. 2002).

**B. Defendants' Anti-gang Regulations Violated Doe's First Amendment Right to Free Expression.**

Plaintiff brings this suit individually and on her son's behalf under 42 U.S.C. §1983, alleging that Defendants' anti-gang policies, on their face and as applied, violate students constitutional rights to free speech and due process.<sup>14</sup>

It is beyond debate that public school students have a right to freedom of speech which is not shed at the schoolhouse gates. *See Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969); *see also Burnside v. Byers*, 363 F.2d 744, 747-748 (5<sup>th</sup> Cir. 1966)("[T]he Fourteenth Amendment protects the First Amendment rights of school children against unreasonable rules and regulations imposed by school authorities."); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264-1265 (11<sup>th</sup> Cir. 2004) ("The Speech Clause of the First Amendment protects ... the right to freedom of expression ... [which] unquestionably exist[s] in public schools."). In *Hollomon*, the Eleventh Circuit reiterated that the "Constitution guarantees students

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<sup>14</sup> The Georgia Constitution "provides even broader protection of speech than the first amendment" and the "least restrictive means" of regulating speech must be employed. *Statesboro Publ'g Co. v. City of Sylvania*, 271 Ga. 92, 95 (1999)(citing *State v. Miller*, 260 Ga. 669, 671 (1990)). Furthermore, "our state constitution [requires] the city to narrowly draw its regulations to suppress no more speech than is necessary to achieve the city's goals." *Statesboro* 271 Ga. at 95.

(and all people) the right to engage not only in ‘pure speech,’ but ‘expressive conduct,’ as well.” *Id.* at 1270. Moreover, this recent ruling on school speech from the Eleventh Circuit stressed that “[i]n assessing the reasonableness of regulations that tread upon expression, we cannot simply defer to the specter of disruption or the mere theoretical possibility of discord, or even some *de minimis*, insubstantial impact on classroom decorum.” *Id.* at 1271.

The key Supreme Court case is *Tinker* – the only decision from the Supreme Court involving non-school sponsored student speech. There, several students were suspended for wearing black armbands in protest of the Vietnam War. The Court found in favor of the students, holding that “where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.” *Id.* at 509, quoting *Burnside*, 363 F.2d at 749. Likewise, in *Burnside*, this court held that high school regulations prohibiting students from wearing ‘freedom buttons’ and which did not appear to hamper school in carrying out its regular schedule of activities, was arbitrary and unreasonable and an unnecessary infringement on students’ protected right of free expression. *Burnside*, 363 F.2d at 748-749. Finally, in *Hollomon*, where a student was punished for raising his fist during the pledge of allegiance, this court reiterated the obligation for school

officials to refrain from punishing students where no facts suggest a material and substantial disruption will occur. 370 F.3d at 1265.

Here, Doe was twice punished for exercising his freedom of expression. In January, 2002, Doe wore an outfit that expressed his support for the University of North Carolina Tarheels, a college basketball team. *See Jeglin v. San Jacinto Unified School Dist.*, 827 F.Supp. 1459 (C.D.Cal. 1993)(“[freedom of speech] encompasses the wearing of clothing that displays a student’s support of a college or university or a professional sport team.”); *see also Castorina ex rel. Rewt v. Madison County School Bd.*, 246 F.3d 536, 539 (6th Cir. 2001)(wearing Hank Williams, Jr. T-shirts qualified as speech.) In August, 2003, Doe wore a self-designed shirt that reflected a number of things about himself: 1) his hometown of Silver Springs, Maryland; 2) his birth date and 3) his nickname, “Kmatikc.” *See Hollomon*, 370 F.3d at 1270 (In determining whether a message is protected, the test is “whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message.”)(emphasis added.)

Defendants **admit** that no disruption occurred as a result of the wearing of these expressive shirts. (Defs. Admis. no. 84; Robinson Dep., pg. 95; Stegall Dep., pg. 96-97.) The only justification for infringing on Doe’s expression is presumably premised on a general desire to avoid gang-related activity. However, “undifferentiated fear or

apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Tinker*, 393 U.S. at 508; *see also Sypniewski v. Warren Hills Reg. B.O.E.*, 307 F. 3d 243, 253 (3rd Cir. 2002) (In the context of schools, restrictions on freedom of expression are unconstitutional absent a showing of a specific and significant fear of disruption of the educational process.) Defendants even admit that they do not think Doe is involved with gangs or gang activity. (Defs. Admis., nos. 82, 83, 89; Robinson Dep., pg. 49, 77; Harrison Dep., pg. 118, 119.) Nonetheless, they disciplined Doe for each of these violations, without prior warning and without notice that his clothing could be considered prohibited. This discipline resulted in forced school attendance on a Saturday, three days suspension, lost opportunities for school work, a permanent stain on his school record reflecting the serious charge of “gang-related activity,” a “Chronic Disciplinary Problem” notice, and elevation of punishment for minor infractions, including long-term suspension or expulsion.

In *Jeglin*, where students were prohibited from wearing sport team clothing because of its presumed association with gangs, the court pointed out that in order to “impose discipline resulting from a public school student’s use of free speech under the First Amendment school officials have the burden to show justification for their actions.” 827 F.Supp. at 1461. Just as is the case here, where no evidence of disruption due to gang activity was produced, Defs. Admis., no. 119, the school regulations in

*Jeglin* were held unconstitutional. *Id.* at 1461-1462 (“As for the elementary school population ..., defendants have offered no proof at all of any gang presence at those schools or of any actual or threatened disruption or material interference with school activities.”) Where only “some evidence of gang presence is offered” showing “only a negligible presence and no actual or threatened disruption of school activities,” regulations that summarily prohibit sport team or other expressive clothing was also held unconstitutional. *Jeglin*, 827 F.Supp. at 1462; *see also Hollomon*, 370 F.3d at 1274 (“where students’ expressive activity does not materially interfere with school’s vital educational mission, and does not raise realistic chance of doing so, it may not be prohibited simply because it conceivably might have such an effect.”) Only where defendants can carry “their burden of showing both a gang presence ... and activity resulting in intimidation of students and faculty that could lead to disruption or disturbance of school activities” are restrictions on speech constitutional.<sup>15</sup> *Jeglin*, 827 F.Supp. at 1462.

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<sup>15</sup> Although the Eleventh Circuit upheld a policy of suspending students specifically for their display of a Confederate flag on school premises, *Scott v. Sch. Bd. of Alachua Co.*, 324 F.3d 1246 (11th Cir. 2003), is easily distinguishable. In *Scott*, the school had a history of racially charged tensions and fights. *Id.*, at 1247, 1249. In addition, the court agreed “that the display of certain symbols that have become associated with racial prejudice are so likely to provoke feelings of hatred and ill will in others that they are inappropriate in the school context.” *Id.*, at 1249. Here, there is no suggestion that a home-made jersey or UNC outfit has a broad impact of provoking a class of persons or that such clothing disrupted the school environment.

Here, Defendants have admitted that there was never disruption from Doe's clothing and that it never received complaints from teachers or students regarding the clothing for which he was disciplined. *See* Defs. Admis., no. 84; Stegall dep., pg. 96 – 97; Robinson dep., pgs 95; Smith dep., pg. 50. Moreover, the undisputed evidence shows that there is no disruption caused by gang activity at Brookwood. (Robinson Dep. pg. 77; Defs. Answer ¶ 35; Bowles Dep., pg. 38; Defs. Admis. no. 119.) Their actions are an arbitrary and unjustifiable infringement on Doe's free expression rights. Accordingly, this Court should grant Plaintiff's motion for summary judgment on Plaintiff's First Amendment claims.

**C. Defendants' Anti-gang Policies are Unconstitutional on Their Face.**

Defendants' anti-gang policies are vague, overbroad, and give unbridled discretion to government officials and therefore violate the First and Fourteenth Amendments to the United States Constitution and Article I, section I, paragraphs 1-3, 5, 7, and 9 of the Georgia Constitution.

**1. Defendants' Anti-gang Policies are Unconstitutionally Vague.**

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992). This principle is significant because “vague laws offend several important

values,” namely, providing fair warning to law-abiding citizens, avoiding arbitrary and discriminatory enforcement of the law, and not chilling free speech. *Grayned* at 108-09. Due process “requires that an individual be informed as to what actions a governmental authority prohibits with such clarity that he is not forced to speculate at the meaning of the law.” *Armstrong v. Mayor & Aldermen of Savannah*, 250 Ga. 121, 123 (1982) (citing *Monroe v. State*, 250 Ga. 30 (1982)).

High school students are likewise guaranteed due process. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975); *Sheck v. Baileyville School Committee*, 530 F.Supp. 679, 690 (D.C. Me. 1982), *citing Tinker* at 511 (“The protections of the fourteenth amendment extend to all ‘persons,’ including secondary school students.”) Thus, dress codes which infringe on students’ liberty or property interests must satisfy due process requirements.<sup>16</sup>

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<sup>16</sup> *See Goss*, 419 U.S. at 574 (recognizing “a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause....”); *see also Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F.Supp. 659 (S.D.Tex. 1997)(void for vagueness doctrine applied to students’ constitutional challenge to dress code because it implicated students’ property interest in attending public school where students faced suspension or expulsion for repeated violations); *Killion v. Franklin Regional School Dist.*, 136 F.Supp.2d 446, 459 (W.D.Pa. 2001)(holding school policy that allowed school officials to impose discipline on students for “abuse” directed towards a teacher or administrator void for vagueness because this “unrestricted delegation of power” leads to “the danger that school officials will interpret the policy arbitrarily.”)

The Supreme Court has identified two types of governmental regulations which are unconstitutionally vague: 1) regulations that lack adequate notice to citizens of prohibited conduct and 2) regulations that fail to provide standards for enforcement. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (anti-gang ordinance held unconstitutional noting that vague regulations are those that “fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.”); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966).

In effectuating the GCPS policy banning gang-related clothing or conduct, Defendants rely upon Rule 11C, which prohibits “gang-related activity” or “behavior,” and dress codes which prohibit clothing “in reference to gangs.” (Stegall Dep., pgs. 30, 31, 26, 79; Defs. Answer par. 33 (“Defendants admit that the disciplinary actions taken towards Plaintiff John Doe were undertaken in accordance with the policies of the Gwinnett County School District and the Rules of Student Conduct.”)).

These amorphous policies, which attach punishment including suspension or expulsion as well as a marred student record and the stigma associated with being identified and accused of being in gang member, completely fail to specify which kinds of clothing, activity or behavior is prohibited. Students and parents are not given additional information as to the definition of these terms, or a list of prohibited items.

(Defs. Admis., no. 14; Stegall Dep., pg. 58-59; Harrison Dep. pg. 34.) Indeed, Defendants admit that they apply the rules only on a “case by case basis.” (Defs. Admis., no. 101; Stegall Dep., pg. 61, 66, 101; Robinson Dep. pgs. 51, 56, 57.) The school officials charged with enforcing these rules are not given standards to assist them. Harrison Dep. pg. 29. Indeed, a random sampling of five teachers were all over the map as to whether 10 different examples of clothing and conduct, or the specific clothing Doe was disciplined for, could be considered to violate the policies on “gang-related” clothing. *See supra* at p. 17.

Although school disciplinary rules need not be as detailed as a criminal code, where, as here, a policy “reaches First Amendment free speech and free exercise rights, ‘the doctrine demands a greater degree of specificity than in other contexts.’” *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *see also Chalifoux*, 976 F. Supp. at 668 (holding that school ban on “gang-related apparel” was void for vagueness after acknowledging that “the need for flexibility” in a school context is tempered “where, as here, the District’s regulation reaches First Amendment free speech” rights. ); *Stephenson v. Davenport Comm. Sch. Dist.*, 110 F.3d 1303, 1310 (8th Cir.1997) (“Accordingly, while a lesser standard of scrutiny is appropriate because of the public school setting, a proportionately greater level of scrutiny is required because the regulation reaches the exercise of free speech.”); *Killion* 136 F.Supp.2d at 459 (where

the court acknowledged the U.S. Supreme Court rule that school disciplinary rules do not need to meet criminal sanction standards, “[h]owever, the Court did not hold that school rules could be devoid of any detail, as here.”); *Melton v. Young*, 328 F. Supp. 88, 97 (E.D. Tenn. 1971) (striking down school policy banning “provocative symbols”), *aff’d on other grounds*, 465 F.2d 1332 (6th Cir. 1972).

School regulations such as the policies at issue here, which ban undefined clothing or conduct “in reference to gangs” without describing the types of clothing or conduct prohibited, simply do not withstand constitutional scrutiny. *See Stephenson*, 110 F.3d at 1307 (school district's regulation prohibiting gang symbols without providing any definition of “gang” is void for vagueness); *see also Chalifoux*, 976 F.Supp. at 669 (holding public high school dress code that prohibited the wearing of any “gang-related apparel” void for vagueness because it “lacks a sufficient definition for ‘gang-related apparel,’” and because the lack of a list of prohibited items “failed to provide adequate notice to Plaintiffs regarding the prohibited conduct” and because the school “provided excessive discretion to law enforcement officials in defining the parameters of its ban on gang-related apparel.”); *compare Long v. Board of Educ. of Jefferson County, Ky.*, 121 F.Supp.2d 621 (W.D. Ky. 2000)(upholding school dress because it was “quite comprehensive” and specifically prohibited “shorts; cargo pants; jeans; and other specified fabrics.”).

The Supreme Court specifically recognizes that premising punishment on the phrase “gang” is inherently problematic. Anti-gang regulations in other contexts which fail to list with specificity the conduct or clothing prohibited, or provide standards which reign in arbitrary enforcement, rarely survive constitutional scrutiny. *See, e.g., Morales*, 527 U.S. at 56 (city ordinance banning gang members from loitering held unconstitutionally vague); *Hodge v. Lynde*, 88 F. Supp. 2d 1234, 1244 (N.M. 2000) (noting that “dress codes that generally ban ‘gang-related apparel,’ or are phrased in similar general anti-gang terms, have not received approval from the courts” in ruling that dress code was unconstitutionally vague); *Gatto v. County of Sonoma* 120 Cal.Rptr.2d 550, 573-574 (Cal. App. 2002)(dress code prohibiting “apparel or accessories intended to provoke, offend or intimidate others ..., including offensive slogans, insignia or ‘gang colors’” held unconstitutionally vague).

Indeed, even in the prison context, an anti-gang regulation which does not define the terms or prohibited conduct with specificity is unconstitutionally vague. *See Rios v. Lane*, 812 F.2d 1032, 1034 -1038 (7th Cir. 1987). In *Rios*, the court struck down a prison rule which defined “‘Gang Activity’ as ‘engaging or pressuring others to engage in gang activities or meetings, displaying, wearing or using gang insignia, or giving gang signals,’” because the prison rule, as applied to the plaintiff, “failed to approximate the parameters of fairness.” *Id.*

Although Defendants’ policies and actions clearly infringed on Doe’s expressive rights, as discussed *supra*, a vagueness claim rests on the asserted inadequate notice of proscribed behavior, which is “completely distinguishable from and not dependent upon any free speech considerations.” *Rios*, 812 F.2d at 1039; *accord*, *Stephenson* 110 F.3d at 1307; *see also Goguen* 415 U.S. at 582 (holding statute void for vagueness without determining whether the plaintiff’s actions constituted protected speech.) Here, Defendants’ anti-gang policies, on their face and as applied to Doe, provide no guidance as to types of prohibited clothing or activities. *See* Defs. Admis., nos., 23, 24, 45, 63, 64, 65. School officials admit that there are no guiding standards to determine what actions or clothing is gang-related. *See* Bowles Dep. pg. 15 (“I can’t think of a word or a symbol that would tell me they were in a gang.”); Prince Dep. pg. 10 (no training on identifying gang clothing); Atwell Dep. at 17 (“I do not know the wording of gang attire or symbols or particular clothing that would definitely say this is gang related.”); Simpson Dep. at pg. 12 (“I don’t know that [the provision in the dress code policy that says no gang-related clothing has] necessarily been described by the school.”); Hall Dep. at pg. 16 (the school provided no information “that would clearly define gang-related clothing or words.”). Indeed, Defendants admit that they relied on speculation, suspicions, and anonymous internet postings in determining that Doe’s clothing was gang-related. *See* Robinson Dep. pgs. 11 (“something about the

lettering jumped out at me”), 29-32, 37-40; Harrison Dep., pg. 51 (“I wasn’t operating on any formal source of information”); *id.* at 52 (“You hear things, you read newspaper articles.”); *id.* at pgs. 37-40, 50; Harrison. Dep. Ex. 6 (anonymous internet postings as only “evidence” that Doe’s clothing was gang-related.)

The undisputed evidence shows that Doe was originally disciplined in January of 2002, April and August of 2003 for “gang-related activity” based on his clothing without prior warning that his conduct or clothing could potentially violate school rules. Additionally, he was verbally reprimanded and prohibited from wearing a pocket watch in January of 2002 because the district considered it “gang-related” without prior warning that pocket watches were forbidden. (Defs. Admis. nos. 1, 18, 19, 20; V. Comp., ¶ 26, 27.) As a matter of law, these policies, and the actions taken pursuant to these policies, violate basic constitutional principals regarding due process, and the court should grant Plaintiff’s motion for summary judgment on this issue.

## **2. Defendants’ Anti-gang Policies are Unconstitutionally Overbroad.**

Where a government regulation sweeps within its parameters constitutionally protected speech, it is unconstitutionally overbroad. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) (“[B]ecause of the potential chilling effect on the protected activities of others, a defendant who is prosecuted for speech or expressive conduct may challenge a law on its face, whether or not his activities are protected by the first

amendment.”); *Saxe v. State College Area School Dist.*, 240 F.3d 200, 216 (3<sup>rd</sup> Cir. 2001) (striking down anti-harassment policy that did not contain “contextual limitations.”) Courts must determine whether the regulation prohibits a substantial amount of constitutionally-protected freedoms, when judged in relation to the regulation’s legitimate sweep. *Id.*

In *City of Harvard v. Gaut*, where an ordinance criminalized “‘gang colors’ and ‘gang clothing,’” the court held that the ordinance was unconstitutionally overbroad because the colors and clothing banned “are often worn by nongang members as a form of symbolic speech intended to convey a message unrelated to the promotion of gangs.” 660 N.E. 2d 259, 263 (Ill. 1996) (“The subject matter of the law’s prohibitions is not merely broad, but open-ended and potentially limitless” because it “does not define, list, or otherwise explain what constitutes a ‘gang symbol’ or ‘gang colors.’”) The dress codes at issue here, like the anti-gang clothing ordinance in *Gaut*, sweeps in too much protected expression to survive overbreadth analysis.

In *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003), where the court held that a school dress code regulation that forbade clothing containing messages that relate to weapons was overbroad, the court ruled that “in the absence of any cogent limiting construction” of the dress code, it swept in too much protected speech. 354 F.3d at 260. The *Newsom* court began the overbreadth analysis,

as this court should, “by noting that there simply is no evidence in the record ... demonstrating that [prohibited clothing worn by students ... ever substantially disrupted school operations or interfered with the rights of others” and reasoned that the “lack of evidence strongly suggests that the ban on messages related to weapons was not necessary to maintain order and discipline.” *Id.*; *see also Coy ex rel. Coy v. Board of Educ. of North Canton City Schools*, 205 F.Supp.2d 791, 801-802 (N.D. Ohio 2002)(holding school policy that “allows the school to discipline a student for ‘[a]ny action or behavior judged by school officials to be inappropriate in a school setting’” unconstitutionally overbroad reasoning that “there can be no dispute that [policy’s] language reaches a great deal of protected speech. Many actions a school official might find inappropriate are still protected by the First Amendment.”); *compare Phillips v. Anderson County School Dist. Five*, 987 F.Supp. 488, 494 (D.S.C. 1997)(dress code not overbroad where school officials provided warning that Confederate flag clothing violated dress code and where student was not suspended until after he refused officials’ request to remove jacket and was repeatedly told that he could return to classes if he did not wear Confederate flag clothing.)

Here, Defendants’ policy for the school years 2002-2003 and 2003-2004, which prohibits clothing that is “in reference to gangs” and is sweeping enough to include innocuous clothing such as a sweatband, sports jersey and a self-created t-shirt, is

unconstitutionally overbroad. The Brookwood High School dress code policy for the school year 2004-2005, which was amended to include the exact types of clothing that Doe had been disciplined for the previous year *without* prior warning, and which now specifically excludes “altered clothing,” “sweatbands” and still allows post-hoc determinations as to all clothing that is interpreted to “be worn in a manner that communicates gang affiliation,” should fare no better under the appropriate constitutional scrutiny. Just as in *Newsom*, there is no evidence here that sweatbands, college jerseys, or self-expressive shirts have caused *any* disruption or led to any gang activity.

Defendants’ prior and current dress codes, on their face and as applied to Plaintiff Doe, appear to ban a limitless number of items of clothing: collegiate wear; shirts that have been “altered,” for example, to add a number, or a first or last name (such as a personalized t-shirt or team jerseys); shirts that express a political statement or particular viewpoint, if the lettering or image is added after purchase; shirts with patches, such as boy scout shirts; and ordinary athletic sweatbands, routinely worn by athletes and sports enthusiasts. Because Defendants’ policies unconstitutionally sweep in untold amounts of protected speech, the Court should grant Plaintiff’s motion for summary judgment on this issue, as well.

**D. Defendants’ Anti-gang Policies Violate Substantive Due Process On Their Face and as Applied to John Doe.**

Substantive due process is also implicated where a school fails to show a rational relationship between the government's interest and the application of its dress code.<sup>17</sup> Here, Defendants' actions lack any rational relationship to the governmental interest of preventing gang violence. *See Hodge*, 88 F. Supp. 2d at 1241 (holding that government's actions in banning anti-gang clothing at county fair violated due process because the clothing restrictions were not rationally related to its purpose.); *see also Axtell v. LaPenna*, 323 F.Supp. 1077, 1080 (W.D.Pa. 1971) ("In the absence of a clear showing that school regulations are necessary to prevent disruption of the educational process, recent case law recognizes that an individual's hair and personal appearance

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<sup>17</sup> In *C.B. by & Through Breeding v. Driscoll*, 82 F.3d 383 (11th Cir. 1996), the Eleventh Circuit dismissed students' substantive due process claims based on a determination that the Principal's action was an executive act as opposed to a legislative one. 82 F.3d at 387. The court relied on *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994), which held that due process does not apply to Executive Acts, acts that "characteristically apply to a limited number of persons (and often to only one person)" but does apply to Legislative Acts, which generally apply to a larger segment of--if not all of--society." *Id.* at n. 9. The *McKinney* court cited *Harrah Ind. Sch Dist. v. Martin*, 440 U.S. 194 (1979), which found substantive due process applicable where a teacher was fired for violating a school rule, to illustrate the distinction. Thus, substantive due process does apply, the *McKinney* court announced, when a broadly applicable rule is invoked to deny a claim of a liberty or property right. *Id.* ("Even though the School Board had applied its rule only to Martin, the Supreme Court examined the case as one involving a legislative act; hence, the Court analyzed the rule itself, not the School Board's application of the rule to Martin."). Here, Plaintiff's claim is premised on the application of the broadly applicable rule against "gang clothing" and gang-related acts and is therefore a clearly cognizable substantive due process claim.

are entitled to protection from action by the State, or its agents, under the due process clause.”)<sup>18</sup>

Students’ rights to their personal appearance is subject to regulation only where there is a legitimate governmental interest. *See Richards v. Thurston*, 424 F.2d 1281, 1284 (1st Cir. 1970) (“[Due Process Clause] establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state [only] in furtherance of legitimate state interests.”); *see also Arnold v. Carpenter*, 459 F.2d 939, 944 (7<sup>th</sup> Cir. 1972)(upholding the district court finding that student “had a constitutional right to wear his hair at any length or in any style; that the [Board] bore the burden of justification of the hair provision, and that they failed to satisfy that burden.”); *Hodge* 88 F. Supp. 2d at 1241(analyzing governmental interest in preventing fair patrons from wearing gang-related clothing.)

Here, just as in *Hodge*, where the court found the interest in preventing gang activity legitimate but held that the dress code was not rationally related to that

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<sup>18</sup> Several courts, including the former Fifth Circuit, which is binding authority in this jurisdiction, have explicitly held that students possess a liberty interest in their appearance protected by the due process clause. *See Lansdale v. Tyler Junior College*, 470 F.2d 659, 663 (5<sup>th</sup> Cir. 1972) (reaffirming that *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972)(en banc), held that “the right of students to go into the world as they please is a constitutionally protected one,” though not absolute); *Stephenson*, 110 F.3d at 1307 (“District regulation implicated Stephenson's liberty interests in governing her personal appearance.”); *Miller v. Dist. No. 167*, 495 F.2d 658, 663 (7th Cir. 1974) (“[I]ndividual choice in matters of how style, dress, and overall appearance can reasonably be characterized as an aspect of freedom or liberty.”); *accord Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971).

interest, Defendants' anti-gang policies do not rationally relate to preventing gang activity. *See Id.* at 1244 (ban on wearing backward hats based on "'intelligence reports' that the style 'could' be indicative of gang activity" not rationally related to government's legitimate goal because facts revealed "no reason a rival gang-member would have wanted to confront or attack" nor any reason "a typical non-gang Fair patron would have feared him or been intimidated because he wore his hat backward.") Because Defendants can produce **no** evidence in which a rational trier of fact could conclude that preventing students from wearing a college sport jersey, a blue wristband and or a home-made jersey reflecting personal information is rationally related to preventing gang activity, the Court should grant Plaintiff's request for summary judgment on this issue.

#### **E. Defendants' Actions Violated Doe's Procedural Due Process**

The Due Process Clause forbids arbitrary deprivations of liberty. *See Goss v. Lopez*, 419 U.S. 565, 574-575 (1975)(where students' were suspended up to 10 days, the court noted that "[i]f sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.")

At a minimum, a student must be given "notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an

opportunity to present his side of the story.” *Goss* 419 U.S. at 58 (“The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.”); *see also Hatch v. Goerke*, 502 F.2d 1189, 1195 (10th Cir. 1974) (holding that students are entitled to an opportunity to appear and argue for leniency or special consideration absent some extraordinary situation requiring immediate action before a hearing.)

Here, Doe was disciplined for gang-related acts and clothing several times without notice that his clothes were considered to violate the rule against gang-related activity. He was never provided the evidence against him on which the school relied in assessing that his clothing was related to gangs. *See Pegram v. Nelson*, 469 F.Supp. 1134 (M.D. N.C. 1979) (where the court held adequate due process where “the principal told plaintiff what he was accused of doing and showed him the evidence against him.”) Only in the August, 2003 incident was he provided **any** opportunity to contest the allegation that his shirt was gang-related, but he was not provided evidence of the charges against him -- indeed the evidence was admittedly gathered after the meeting. (Robinson dep., pgs. 30, 33); *see United States v. Abilene & S.R. Co.*, 265 U.S. 274, 289 (1924) (finding that use of information not presented at the hearing leaves accused without any means of rebutting or seeking to mitigate the evidence against him.)

Although it is inherently unfair to force a citizen to prove a negative, Doe was nevertheless prevented from an opportunity to prove that he was **not** involved in gangs, and that his actions and clothing were **not** related to gangs or gang activity. Instead, in each case Defendants summarily announced their conclusion that he had violated the rule prohibiting gang-related activity and imposed discipline. The conclusion that Doe's clothes or actions were gang-related were *in every case* based on either mere speculation, (e.g., Defs. Admis. no. 89; Harrison dep., pg. 66 ("at this time we didn't have any confirmation about the nature of this shirt,") vague, outdated, unknown sources, (Stegall dep., pgs. 33 – 34) and, at most, anonymous hearsay from the internet. (Defs. Admis. no. 71; Harrison Dep., Exs. 4, 5.) As Defendants violated Does' procedural due process by arbitrarily judging him in violation of school rules without providing notice, an opportunity to be heard or the evidence against him, Doe was prevented from a meaningful hearing regarding the innocent nature of his clothing. For this reason, Plaintiff should be granted summary judgment on this issue.

#### **IV. Conclusion.**

For all the forgoing reasons, Plaintiff submits that she is entitled to judgment as a matter of law as to all of her claims in this action and requests that the Court grant her Motion for Summary Judgment in its entirety.

Respectfully submitted, this 8<sup>th</sup> day of April, 2005.

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