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

LLOYD GOLDSMITH, JR. by and through his next friend LLOYD GOLDSMITH, SR. and EDWARD ALEXANDER MORGAN by and through his next friend EDWARD THOMAS MORGAN, Plaintiffs, vs. 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.	Civil Action File No.:______________

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs hereby move this Court for a preliminary injunction against the enforcement of Gwinnett County Board of Education's policies, practices and actions that unconstitutionally regulate lawful off-campus student speech, as well as the expungement of Plaintiffs' school records reflecting disciplinary actions based on these unconstitutional practices and policies. Lloyd Goldsmith, Jr. ("L.E.") and

Edward Morgan ("Edward") were suspended from school for 27 and 8 days respectively for sending messages to an off-campus internet website from their homes. They were also forced to perform 60 hours of community service, left behind in their classes, humiliated, placed on "probation," and emotionally harmed for expressing their opinions of a teacher along with a host of other critical voices off-campus. The Defendants punished these students in violation of their rights to free speech and due process as guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution and the Georgia Constitution.[1]

FACTUAL BACKGROUND

The Website

Both Student Plaintiffs are academically advanced and, with minor exceptions, have unblemished disciplinary records. L.E. is an intellectually curious, bright young man who has always maintained a 'B' plus grade average in school. Goldsmith Sch. Records; P. Goldsmith Aff. ¶4. He plays the cello in the school orchestra and is an active member of the Boy Scouts. P. Goldsmith Aff. ¶4. Early in the second semester of his junior year, L.E. began to experience academic frustration

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[1] Although Plaintiffs contend that the Defendants violated the equal protection guarantees of the federal and state constitutions, they reserve their argument on this issue until discovery is completed, if necessary.

in Dr Benjamin's English class, which he attributed to her poor teaching methods. L. Goldsmith, Jr. Aff. ¶5.

L.E. was not alone in his dissatisfaction, as many students complained about Dr. Benjamin. L. Goldsmith, Jr. Aff. ¶ 5. In fact, sometime in February, L.E. heard about a website for Dr. Benjamin's disgruntled students. Id., at ¶ 4. The website included a number of links to help with homework and a message board. Id., at ¶ 4. He visited the site several times from his home computer as a passive observer. ¶5,6. Examples of student postings include: "I hate her sooooo much! She is such a bitch!"; "I am seriously fed up with the shit this woman calls teaching...not only doesn't she teach, but she bitches about how we never work hard enough...what a nazi!?!".[2] Anti-Benjamin.com Postings by "pissed," and"Wretched." Sometime in March 2003, L.E. posted a few messages under the screen name "Twitchy." Id., at ¶6. In accordance with the overall tone of other student postings, L.E. used sarcasm,

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[2] Many of the student messages also contained hyperbole including, "Probably not a good sign when one sits in class - - freezing, of course - - imagining ice pick lobotomies, with pencil lead..."; "SOOO MANY TIMES HAVE I WANTED TO TAKE HER CHEAP-ASS WIG AND BEAT HER WITH IT!!!"; "she has issues with my sentence. . .she can take my sentence and all of our sentences and shove them all the way up her ass until she throws them up"; and " I swear on (sic) day i am gonna flip out and jump up and tear her wig off!." Anti-Benjamin.com Postings by "Wretched," "FED UP," "Pissed," "WigHater."

hyperbole and fantasy in expressing his frustrations.[3] However, **none** of his message contained threats, nor did they encourage unlawfulness. See Anti-Benjamin.com Postings by "Twitchy" ("Anywho. No more hyper-violence."); L. Goldsmith, Jr. Aff. ¶9. The teenager viewed the message board as a harmless off-campus conversation between students and never thought Dr. Benjamin would see his postings or the website. Id., at ¶6, 9; Anti-Benjamin.com Postings by "Twitchy"

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[3] The content of L.E's sarcastic postings containing hyperbolic expressions or images were, "Of course, we have to take notes and turn them in... but we can't do notes the way that ~we~ want to – oh, no, we have to take notes her way! It doesn't matter that ~WE~ have to use them – that would make too much sense!We have to take notes her way and get GRADED on how many notes we take! Filthy whore's gotta die! *twitch*" and, in response to another students asking about her relationship with a janitor, L.E. wrote the fiction, "I can just see it now, The janitor will walk into class one day...throw the whore on the ground, and ram his mop straight through her head and then sell the wig to head hunters.". As distasteful as these messages are, they are protected speech. See NAACP v. Clairborne Hardware, 458 U.S. 886 (1982) (where threat of "we're gonna break your damn neck" held not to "transcend the bounds of protected speech"); see also Watts v. United States, 394 U.S. 705 (1969 (where the statement "if they ever make me carry a rifle, the first man I want in my sights is LBJ" was protected speech); United States v. Baker, 890 F. Supp 1375 (E.D. Mi. 1995), aff'd, 104 F.3d 1492 (6th Cir. 1997) (e-mail stories that "graphically described the torture, rape and murder of a woman who was given the name of a classmate" were held protected speech); Cooley v. State, 219 Ga. App. 619 (1995) (parent's threat that "I'll protect my child against physical abuse if I have to kill you to do it!" was protected speech); K. Gordon Murray Productions, Inc. v. Floyd, 217 Ga. 784, 798 (1962) (according constitutional protection to offensive expression); Christensen v. State, 468 S.E.2d 188 (Ga. 1996) ("That this case involves personally offensive facts cannot dissuade us from fulfilling our duty to obey the Constitution. To say that an act is entitled to constitutional protection in no way condones the act itself.") (J. Sears dissenting).

("If she ever saw this site, she'd probably just yell, OH, MY GAWWWD!" and ask for everyone to be transferred out of her class.").

Edward is also a bright and popular student who has received primarily A's and B's in school. Morgan Sch. Records; E. T. Morgan Aff. ¶ 4,5. In early February of 2003, Edward learned about the website and visited it from his home computer a few times. E. T. Morgan Aff. ¶5. He posted a few messages under the screen name "AngryStudent," similar in tone and language to the other student postings. Id. Although one message contained a fantasy that included distasteful imagery, **no** message contained threats, nor did they encourage unlawfulness. Id., at ¶7; Anti-Benjamin.com Postings by AngryStudent ("This damn term paper is the HIGHLIGHT of my wanting-to-impale-Dr-Benjamin-with-a-fencepost phase. First she gives us this list of books to choose from, and all of them are about the same 'minorities or women struggling for acceptance in an uncaring white society' crap.") None of the postings made by Edward were intended to intimidate or threaten Dr. Benjamin, or encourage others to do so. See Anti-Benjamin.com Postings by "AngryStudent" ("sorry about the fencepost thing, that was meant to be sarcasm"; "...keep the threats to yourself" and suggesting that"you can use the wwwToolz service to delete any threatening posts."). Dr. Benjamin was not the intended

recipient of his internet speech and Edward never actually believed she would see the website. E. T. Morgan Aff. ¶7.

The Rules

Gwinnett County School District ("GPSD") Rule 4A prohibits students from using profanity and making any negative verbal or non-verbal expression "to or about a school employee . . . on or off campus including the internet." March 7, 2003 Letter from GCPS to Mr. and Mrs. Morgan. In particular, Rule 4Am prohibits any verbal or non-verbal expression "which could have the effect of or the potential of undermining the authority of the school employee or distracting staff and/or students . . . including posting on or off campus." Id.; see also Hearing Transcript at p. 15-16.

Rule 1D prohibits students from causing, or attempting to cause "directly or indirectly disruption or interference with school by any means." Id. Rule 11 prohibits actions that are "subversive to good order and discipline" and includes violating school rules as one of the prohibited actions.[4] Id.

The School's Involvement

The website apparently was created on a student's home computer in December, 2002. Hearing Transcript at p. 14. Neither Edward nor L.E. were

[4] L.E. and Edward were found guilty of violating Rule 11 because they were found guilty of Rules 4A and or 1D.

involved in its creation. Id. The school was unaware of its existence until a parent called the school at the end of February, 2003. Id., at p. 20. Before the school informed Dr. Benjamin about the website in March, she was unaware of it and experienced no classroom disturbances as a result of either the website or the Student Plaintiffs. Id., at p. 39-40. In fact, Dr. Benjamin testified that she enjoyed a good relationship with L.E. Id., at p. 40 ("Lee is in my third period class and I've *never* had a problem with him."). She considered Edward one of her better students. Id. Her classes, like all other classes at Brookwood High School, went on without incident or problems. Id. ("[T]here has never been a problem that I can recall"); E.A. Morgan Aff. ¶8.

Neither did Assistant Principal Dees witness any disruption as a result of Plaintiffs' speech, nor did any other administrator or teacher. Id., at p. 20, 21, 58. School officials, with the assistance of the technology department, tried to locate the website for a week after first learning of it from the parent. Id., at p. 21. They were unsuccessful, and did not bother interviewing students for more information about it. Id. On February 28, 2003, two students approached Defendant Dees and provided her with the website address. Id.

The administration began an investigation which included interviews with the Student Plaintiffs. Id., at. p. 22. Both readily admitted their participation and were

summarily suspended pending a disciplinary hearing on March 7, 2003. Id. Although approximately 26 students posted messages to the website, only the website creator and the Student Plaintiffs were prosecuted. Id., at p. 99. The school found the Student Plaintiffs guilty of violating Rules 4A, 1Da, 11A. Id., at p. 88; Letter from GCPS to Morgans dated March 18, 2003. L.E. was suspended for the remainder of the school year – until January 7, 2003. Id., at p.105. Edward was given a three day in-school suspension and required to perform 20 hours of community service. E.A. Morgan Aff. ¶9.

The Aftermath

While appealing the decision, L.E.'s parents were forced to enroll him in the assigned "alternative school." P. Goldsmith Aff. ¶6. However, the alternative school was full and denied L.E.'s enrollment. Id., at ¶7. In an effort to keep L.E. occupied, his parents paid to enroll him in a Driver's Education Course. Id., at ¶8. His mom was forced to reduce her hours at work in order to supervise him. Id., at ¶14. His parents eventually discovered a private school willing to accept L.E. and paid to enroll him. Id., at ¶8. On April 17, 2003 the Goldsmiths were informed that their son could return to school the following day as long as he served a three day in-school suspension and completed 40 hours of community service by June 1, 2003. Id. at

¶10. L.E. managed to complete the service, while attempting to catch-up on his missed assignments and keep up with current work. Id., at ¶12.

Both boys' grades suffered as a result of their suspension from school. L. Goldsmith, Jr. Aff. ¶12; L. Goldsmith, Sr. Aff. ¶12; E.A. Morgan Aff. ¶10. Both suffered, and continue to suffer, stress and depression as a result of the schools' actions, and both fear retaliation and the release of their school records. E.A. Morgan Aff. 11, 12; L. Goldsmith, Jr. ¶13, 14 . L.E. no longer feels comfortable at Brookwood, and the bulk of his senior year in high school is now spent at a community college. L. Goldsmith, Jr. Aff. ¶15. Both intend to go on to college, and fear that the release of their school records, or further disciplinary action as a "probationer," will impede their ability to attend the college of their choice. Id. at ¶14; E.A. Morgan¶ 12.

ARGUMENT AND AUTHORITY

A preliminary injunction is appropriate when the movant establishes: (1) a substantial likelihood of success on the merits; (2) a threat of irreparable injury; (3) that Plaintiff's injury outweighs any harm an injunction may cause Defendants; and that granting the injunction would not disserve the public interest. Teper v. Miller, 82 F.3d 989, 992 n.3 (11th Cir. 1996). Plaintiffs satisfy each of these requirements.

I. Plaintiffs Are Substantially Likely to Prevail on the Merits.

Preliminary relief is warranted here because Plaintiffs are likely to prevail on the merits. The actions of the Defendants in punishing L.E. and Edward for their

internet speech off school grounds was unlawful, and the rules under which they were punished are unconstitutionally vague and overbroad. Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988). **A nearly unbroken string of five cases have rejected schools attempts to punish students for offensive off-campus internet speech.** Flaherty v. Keystone Oaks Sch. Dist. , 247 F. Supp. 2d 698 (W.D. Pa. 2003) ; Mahaffey ex rel. Mahaffey v. Aldrich, 236 F. Supp. 2d 779 (E.D .Mich. 2002); Killion v. Franklin Reg'l Sch. Dist., 136 F.Supp.2d 446 (W.D. Pa. 2001); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998); but see J.S., a Minor v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Cmwlth. 2000).

A. The School Board Cannot Punish Students' Off-campus Internet Speech.

Although school officials have limited authority to regulate speech *on-campus*, their authority should not extend beyond the school house gates. Tinker, 393 U.S. at 506, 508 (limiting the scope of the school's authority to regulate speech "in class, in the lunchroom, or on the campus"); see also Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986) (affirming the power of school officials to determine "what manner of speech *in the classroom or in school assembly* is inappropriate") (emphasis added); Burch, 861 F.2d at 1157 (holding school policies violated the First Amendment

because control over the content of speech cannot be justified "for communication among students which is not part of the educational program").

Several lower court decisions expressly recognize the distinction between in-school and out-of-school speech, and the need to restrict school officials' authority over the latter. Thomas v. Bd. of Educ., Granville Centr. Sch. Dist., 607 F.2d 1043, 1046 (2nd Cir. 1979); Klein v. Smith, 635 F. Supp. 1440, 1442 (D. Me. 1986). This Circuit circumscribed schools attempt to punish speech authored "during out-of-school hours, and without using any materials or facilities owned or operated by the school system":

> It should have come as a shock to the parents of five high school seniors . . . that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts. We trust that it will come as no shock whatsoever to the school board that their assumption of authority is an unconstitutional usurpation of the First Amendment. Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 964 (5th Cir. 1972)

In Thomas, the court vacated sanctions imposed by a school on student publishers of a satirical newspaper and cautioned against the dangers to the First Amendment of limiting expression with only "de minimis" contact with the school. 607 F.2d at 1050; see also id. at 1045 ("[The courts] willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure,

upon the supposition that the arm of authority does not reach beyond the schoolhouse gate.")

Accordingly, GCSD may not punish student plaintiffs for communication that took place outside of school, without school resources, and that is not part of the educational program.[5] This court should enjoin the school rules purporting to grant Defendants this unconstitutional authority to regulate student speech, anywhere and anytime.

B. Gwinnett County School Board Has Not Proved a Compelling State Interest in Censoring Plaintiffs' Off-campus Speech.

Even if this Court finds that school officials have some ability to sanction the speech of students off-campus, the decision to punish L.E. and Edward based on the school's disapproval of their message is presumptively unconstitutional. United States v. Playboy Ent. Grp, 529 U.S. 803, 817 (citing R.A.V. v. St. Paul, 505 U.S. 377 (1992)) ("Content-based regulations are presumptively invalid."); see also Papish v. Board of Curators of the Univ. of Missouri, 410 U.S. 667 (1973) (holding that school disciplinary action may not be based on the disapproved content of protected

[5] See also Klein v. Smith, 635 F. Supp. 1440, 1442 (D. Me. 1986) where the court enjoined punishment of a student for making an obscene gesture to a teacher off school premises because "[a]ny possible connection between his act of 'giving the finger' to a person who happens to be one of his teachers and the proper and orderly operation of the school's activities is . . . far too attenuated to support discipline for violating the rule prohibiting vulgar or discourteous conduct toward a teacher." 635 F. Supp. at 1042.

speech). School officials "do not possess absolute authority over their students" and may not punish student speech that they find bothersome or provoking, even when the speech finds its way into school.[6] Tinker 393 U.S. at 509 (school must show "more than mere desire to avoid the discomfort and unpleasantness that accompany an unpopular viewpoint").

In Tinker, 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 v. Byars, 363 F.2d. 744, 749 (5th Cir. 1966)). Additionally, "[a]s subsequent federal cases have made clear, Tinker requires a specific and

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[6] Although the Eleventh Circuit recently upheld a policy of suspending students 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 display of the Confederate flag occurred during school hours, on school grounds, where 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, the students' website postings occurred off campus and did not disrupt the school environment nor provoke feelings of hatred or ill will similar to racially-based provocations.

significant fear of disruption, not just some remote apprehension of disturbance." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001) .

Contributing off-campus comments to a website does not alter this analysis. In fact, the Supreme Court has recently and unequivocally affirmed that web content, as a medium, enjoys the highest level of First Amendment protection. See Reno v. ACLU, 521 U.S. 844, 897 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium"). Moreover, the Internet is "the most participatory form of mass speech yet developed," id., at 863, and there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." Id., at 870.

Courts have also routinely held that student speech via the internet requires – *at a minimum* – the same showing of material and substantial interference with the operation of the school as on-campus speech. In Flaherty v. Keystone Oaks Sch. Dist., 247 F. Supp. 2d 698 (W.D. Pa. 2003), a student was punished for posting internet messages that were uncomplimentary to the school. The court ruled in favor of the student because the school policies were "not linked within the text to speech that substantially disrupts school operations." Flaherty 247 F. Supp. 2d at 704. In Mahaffey ex rel. Mahaffey v. Aldrich, 236 F. Supp. 2d 779 (E.D .Mich. 2002), a student created a website entitled "Satan's web page" that included, "SATAN'S

MISSION FOR YOU THIS WEEK: Stab someone for no reason then set them on fire throw them off of a cliff. . . ." 236 F. Supp. 2d at 782. Although the court acknowledged that the speech found its way onto campus and was "upsetting," it ruled in favor of the student because there was no "evidence that the website interfered with the work of the school." Id., at 784.

Likewise, in Killion v. Franklin Reg'l Sch. Dist., 136 F.Supp.2d 446 (W.D. Pa. 2001), where a student created a "Top Ten List" website that disparaged a teacher, the court held that the school's actions in punishing the web creator was unconstitutional because "[t]here is no evidence that teachers were incapable of teaching or controlling their classes [as a result of website]." 136 F. Supp. 2d. at 455. In Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp .2d 1088 (W.D. Wash. 2000), where a student posted mock obituaries of classmates and invited website visitors to vote on who would be the next victim to "die," the court enjoined the school from punishing the student because the internet speech was "entirely outside of the school's supervision or control." 92 F. Supp. 2d. at 1090. The court reaffirmed that "student distribution of non-school-sponsored material cannot be prohibited 'on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials.'" Id. (quoting Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988)).

Finally, in Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998), school officials again punished a student for the content of his off-campus internet speech. Just as is the case here, the student contributed to a website that used vulgar language to describe its teachers, the principal, and the school. However, the court enjoined the school's disciplinary actions because they were not "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[7] 30 F. Supp. 2d. at 1180. The court affirmed that "disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under Tinker." Id.

Here, there is **no** evidence that either of the Student Plaintiffs' particular postings created **any** disruption or interfered with the learning process – much less

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[7] The only case which upheld punishment for student internet speech, J.S., a Minor v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Cmwlth. 2000), is easily distinguishable. In a state constitutional challenge, , the court affirmed a student's expulsion for creating a website that featured a picture of a teacher's "severed head dripping with blood, a picture of her face morphing into Adolph Hitler, and a solicitation (whether serious or otherwise) for funds to cover the cost of a hit man for the teacher's execution." The court found a material disruption of the school because the teacher was unable to complete the school year and took a medical leave of absence for the following school year. Id.; see also Mahaffey, 236 F. Supp. 2d at 785 (distinguishing J.S. from the facts at bar: "The [J.S.] court found that the website had interfered with the educational process. There is no such evidence of disruption on the record before this Court."). Here, the teacher was merely "disappointed" after finding out about the website from school officials, but returned to work within minutes. See Hearing Transcript at p. 40-41.

a "substantial and material" disruption. See Hearing Transcript at p. 17, 21, 23-25 (admitting that the sole evidence of disruption was a hearsay statement by an unknown student that "the *website* . . . had been talked about in several of their classes and in the commons area at lunch that day."). The particular speech of the Student Plaintiffs did not create *any* disruption, even in the class that was the center of the website's attacks. Id., at p. 58 ("the schools position on the school disruption is that the *website* became the talk of the school"); see also id., at p.40-41 (where Dr. Benjamin admits that "there has never been a problem that I can recall" and was "shocked" when she learned about the website from the administration.). The only evidence of disruption related to the website itself – *not* Edward and L.E.'s postings – and amounts to **one** hearsay statement that the *website* was "pretty much the talk of the school." Id., at p. 58. This is contradicted by the fact that the school found out about the website – not because it was causing a disturbance – but by a parent and, one week later, a student who mentioned it to an administrator because his real name had been used as a screen name. Id., at p. 21. The website was so obscure that the technology experts at the school could not even find it. Id.

Here, it is undisputed that the school punished L.E. and Edward for contributing to a website that, arguably, was a topic of conversation among some students – not misbehaving at school or disrupting any classroom. Id., at p. 85, 86

(where school admits to Mr. Morgan that there was no direct evidence of Edward's postings leading to disruption). This court should release these teenagers from the cloud of conviction that hangs over them and return the parents to their proper role as disciplinarians for their children's off-campus activities.

C. Defendants' Rules are Unconstitutionally Vague and Overbroad.

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined or "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." City of Chicago v. Morales, 527 U.S. 41, 56 (1999); accord Georgia Pacific Corp. v. Occupational Safety and Health Review Com'n, 25 F.3d 999, 1004 (11th Cir. 1994) ("To pass constitutional muster a regulation must provide a fair and reasonable warning of what it prohibited."). The degree of specificity required in regulations affecting First Amendment rights is even greater. NAACP v. Button, 371 U.S. 415 (1963); Smith v. California, 361 U.S. 147 (1959).

Although school disciplinary regulations need not be drawn with the same precision as are criminal codes, the approach adopted by this federal circuit is to examine whether students would have any "difficulty in understanding what conduct the regulations allow and what conduct they prohibit." Shamloo v. Mississippi State Bd. of Trustees, 620 F.2d 516, (5th Cir. 1980) (striking down

"requirement that a [school] activity be 'wholesome' before it is subject to approval as unconstitutionally vague") (quoting Jenkins v. Lousiana State Bd of Educ., 506 F.2d 992, 1004 (5th Cir. 1975)). Thus, school rules that punish student speech are unconstitutionally vague where they "fail[] to give a person adequate warning that his conduct is prohibited" and they "fail[] to set out adequate standards to prevent arbitrary and discriminatory enforcement." Flaherty, 247 F. Supp. 2d at 703 (quoting Killion, 136 F. Supp. 2d at 459). In Flaherty, the court struck down school rules as unconstitutionally vague because the terms "abuse, offend, harassment, and inappropriate" were not defined in "any significant manner" and, thus did "not provide students with adequate warnings of the conduct that is prohibited." Id. (finding that school officials could arbitrarily enforce the rules and policies, providing their own subjective meanings to undefined terms).

Here, GCPS rules are unconstitutionally vague because they include, but are not limited to, "disrespectful" and "insulting" speech or conduct that is "subversive to good order" or might "undermine authority." Rule 4A, 4Am, and 11. The words describing the prohibited speech are not defined in "any significant manner" and do "not provide students with adequate warnings of the conduct that is prohibited." Flaherty, 247 F. Supp. 2d at 704. Thus, the rules here invite arbitrary application and enforcement, allowing school officials to subjectively determine what types of

speech they deem "insulting" or that have "the potential" to undermine "the authority of the school employee" or "distract[] staff and/or students."

The overbreadth doctrine permits the facial invalidation of rules that inhibit the exercise of First Amendment rights. Morales, 527 U.S. at 60; see also Smith v. Avino, 91 F.3d 105 (11th Cir. 1996); Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393 (1996) (holding ban on immoral signs vague and overbroad). Controlling or preventing activities constitutionally subject to state regulation, such as schools, may not be achieved by means that sweep unnecessarily broadly and thereby invade area of protected freedoms. Zwickler v. Koota, 389 U.S. 241 (1967).

In the context of a school, overbroad rules are those that "prohibit[] speech that is protected by the First Amendment in violation of Tinker." Flaherty, 247 F. Supp. 2d at 703-704 (where a student was punished for internet speech that violated school rule against "abusive, offending, harassing, or inappropriate" expressions and the court held the rule overbroad because it was "not limited to those circumstances that cause a substantial disruption to school operations"). Additionally, school rules that lack geographical limitations "limit[ing] a school official's authority to discipline expressions that occur on school premises or at school related activities" are unconstitutionally overbroad because they provide

"unrestricted power to school officials." Id. at 705; see also Killion, 136 F. Supp. 2d at 459.

The rules enforced by the GCPS which prohibit expression that *might* cause disruption, is "subversive to good order" or *might* undermine authority, Rules 4A, 4Am, and 11, are unconstitutionally overbroad because they are "not limited to those circumstances that cause a substantial disruption to school operations." Flaherty, 247 F. Supp. 2d at 704. The rules here also expressly state that they govern off-campus and out of school behaviors and communications, and thus are explicitly overbroad because their lack of geographical limitation gives school officials unrestricted power to discipline speech and conduct in violation of Tinker's constitutional parameters.

The GCSD rules are both unconstitutionally overbroad and vague because they prohibit and punish speech that does not materially and substantially disrupt the school; allow for arbitrary enforcement by school officials; and are not geographically limited to the school premises or school related activities.

D. Defendants Have Violated the Georgia Constitution.

The Georgia Constitution prevents interference with free speech, freedom of conscience, and the freedom to protest "those vested with the powers of government for redress of grievances." GA. CONST. Art. I Sec. I Para. IX, II, and V. Defendants

have violated each of these guarantees in the Georgia Bill of Rights by punishing Plaintiff Students for expressing their beliefs as to an education curriculum and method as well as a government official.

The Georgia Constitution of 1983 provides that "No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that liberty." GA. CONST. 1983, Art. I, Sec. I, Par. V. Indeed, under the Georgia Constitution "all interference"with free speech is "absolutely interdicted." K. Gordon Murray Productions v. Floyd, 217 Ga. 784 (1962); see also Hirsh v. City of Atlanta, 261 Ga. 22, 27 (1991) ("The State constitutional guarantee of freedom of speech is absolute in what it protects.").

The freedom of speech protected by the Georgia Constitution is fortified by the Constitution's special protection of our citizens' "freedom of conscience" and "inherent rights." Ga. Const., Art. I, Sect. I, Pars. III, XXV; see also Green v. State, 260 Ga. 625, 627 (1990); Denton v. Con-Way Southern Express, Inc., 261 Ga. 41, 45 (1991), overruled on other grounds, 262 Ga. 374 (1992); Fields v. Rockdale County, 785 F.2d 1558, 1561 (11th Cir.1986). This state constitutional guarantee means that, "[i]n Georgia, a man may think as he pleases upon any subject, religious, philosophical or political, and is not, for that, under any civil or political disability." Maxey v. Bell,

41 Ga. 183 (1870)(interpreting the Georgia Constitution: "No person shall be molested for his *opinions*, or be subject to any civil or political incapacity, or acquire any civil or political advantage in consequence of such opinions.")

The school's punitive actions toward these students for the expression of their beliefs, directed at protesting a governmental entity and officials through the vehicle of the internet violates Georgia's strong guarantees of individual liberties.

II. Plaintiffs Have Demonstrated Irreparable Harm

An injunction is further warranted because the Plaintiffs have demonstrated irreparable harm from the quashing of their First Amendment right to freedom of speech. "The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable harm." Elrod v. Burns, 427 U.S. 347, 373 (1976). As the Eleventh Circuit has repeatedly held, "[b]ecause chilled speech cannot be compensated by monetary damages, an ongoing violation of the First Amendment constitutes irreparable injury." See e.g., Northeastern Fla. Chapter of Ass'n of Gen Contractors v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990).

Moreover, both of the Student Plaintiffs are seniors who had bright futures that will certainly be dimmed by the release of their school records, that now reveal serious disciplinary actions resulting from mere words spoken off school grounds. These academically advanced and well-behaved youths were not only kept out of

school, subjected to humiliation, caused to suffer emotional distress, but they continue to suffer harm for simply having contributed their adolescent thoughts to an off-campus public forum where their speech is protected. Instead of enjoying their senior year of high school, each carries the burden of a probationer, with the knowledge that one wrong step will result in long-term suspension or expulsion.

III. The Balance of Hardships Weights in Plaintiff's Favor and Granting Preliminary Relief Serves the Public Interest.

The First Amendment is a fundamental component of American democracy, and its very essence is the principle that government may not avoid controversy by silencing speakers. The "protection of constitutional rights is always in the public interest." Int'l Soc. for Krishna Consciousness v. Kearnes, 454 F. Supp. 116, 125 (E.D. Cal. 1978). As the Supreme Court has observed, in matters involving "First Amendment rights . . . which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate . . . ." Elrod, 427 U.S. at 373.

The equities tip decisively in Plaintiffs' favor. Preliminary relief is essential to safeguard Plaintiffs' constitutional rights during the pendency of these proceedings. Defendants will not be harmed by enjoining the release of the disciplinary actions taken against these students, yet L.E. and Edward could be permanently harmed. If a preliminary injunction is not granted, the student

Plaintiffs will be irreparably harmed because negative information will be transmitted to colleges, adversely affecting their chances of acceptance into the colleges of their choice. Further, the policy at issue, which extends school reach beyond school grounds, and without material school disruption will not harm the school if its is enjoined from enforcing it, but will remove the chill that is cast over students ability to discuss their lives, thoughts and frustrations off-campus.

A preliminary injunction serves the public interest. Regardless of the merits of any individual's view of students' rights, targeting their off-campus speech for censorship is not an approach that serves the public interest or satisfies the mandates of the Constitution. Georgia citizens need to rest assured that the Georgia judiciary will not condone the government's overzealous attempt to control opinion, silence controversial speech, or trample upon the constitutional rights of minors.

CONCLUSION

For the foregoing reasons, a preliminary injunction should be entered against the Defendants as set forth in Plaintiffs' Motion for a Preliminary Injunction.

This the ___ day of October, 2003.

Respectfully submitted,

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

LLOYD GOLDSMITH, JR. by and through his next friend LLOYD GOLDSMITH, SR. and EDWARD ALEXANDER MORGAN by and through his next friend EDWARD THOMAS MORGAN,	)	
Plaintiffs,	)	
vs.	)	Civil Action File No.:______________
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.	)	

Certificate of Service

I hereby certify that I have this date served a copy of the within and foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION on the following party by U.S. Mail:

Jane Stegall, Prinicipal
Brookwood High School

1255 Dogwood Road
Snellville, GA 30078

J. Alvin Wilbanks, Superintendent
Gwinnett County Board of Education
P.O. Box 343
Lawrenceville, GA 30046-0343

This __ day of _______, 2003.

____
Beth Littrell
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