UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

R.H., by and through his parent and next friend, CHANTELL HOSIER,

Plaintiff,

v.

SCHENECTADY CITY SCHOOL DISTRICT; et al.,

Defendants.

Civil Action No. 1:10-CV-640 (LEK/DRH)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND/OR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff R.H. seeks a temporary restraining order and/or a preliminary injunction against defendants, who have unconstitutionally prohibited him from wearing a rosary on the outside of his shirt to Oneida Middle School.

The facts of this case demonstrate that R.H. has suffered and continues to suffer irreparable harm as a result of defendants' actions. A temporary restraining order and/or a preliminary injunction is warranted because R.H. will continue to remain under suspension, and thus deprived of an education, so long as he chooses to exercise his clearly established constitutional rights by publicly wearing his rosary to school.

FACTS

R.H. is thirteen years old and is a seventh grader at Oneida Middle School in Schenectady, New York. He and his family are Christians. Since September 2009, R.H has worn each day to Oneida Middle School a plastic rosary that has light-colored purple beads and a white crucifix. He wears the rosary on the outside of his shirt. He wears the rosary at all times except when he takes a shower, or plays sports (so it does not break), or sleeps, since his mother does not want him to choke. (R.H. Decl. ¶¶ 1-2; C. Hosier Decl. ¶¶ 1-2.)[1]/

R.H. is not a member of a criminal gang. He does not have friends who are gang members. He does not dress as a gang member; for example, he wears his pants at his waist and does not wear bandanas on his head or hanging from his pockets. (R.H. Decl. ¶ 3; C. Hosier Decl. ¶¶ 3, 16.)

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[1]/ Submitted in support of this memorandum are the declarations of R.H. and his mother, Chantell Hosier. The declaration for R.H. is submitted pursuant to Local R. 8.1. Should the court wish a copy of the declaration with R.H.'s complete name, one will be submitted under seal. Defendants are aware of the identity of R.H.

R.H. wears the purple rosary to express his faith in God. He also wears it out of love for his deceased brother and uncle. When he wears the rosary he feels protected by God and by his deceased brother and uncle. He also wears the rosary to show people that he is a Christian. (R.H. Decl. ¶ 4; C. Hosier Decl. ¶ 4.)

In 2005, R.H.'s brother, Joey, was eleven years old. After he fixed R.H.'s bicycle, Joey test road it and was hit by a SUV. R.H. saw Joey get hit. While Joey was in intensive care, the family placed the same purple rosary in his hand as they prayed for his recovery. Joey died soon thereafter and right before his twelfth birthday. (R.H. Decl. ¶ 5; C. Hosier Decl. ¶ 5.)

Although R.H is not a Catholic, his Uncle Tom Stewart was Catholic. R.H. was very close to his uncle, who was a former United States Marine. His Uncle Tom prayed the rosary during his life and taught R.H. about it. His Uncle Tom died of cancer within the past month. Uncle Tom taught R.H. to fight for what he believes in. R.H. wears the rosary for him, as well as for his brother, Joey. (R.H. Decl. ¶ 6; C. Hosier Decl. ¶ 6.)

Since R.H. has been wearing the rosary on the outside of his shirt to Oneida Middle School, he has not been approached by anyone who identified themselves as a gang member because of the rosary. R.H.'s wearing of the rosary has not caused any disruption in the school. (R.H. Decl. ¶ 7; C. Hosier Decl. ¶ 7.)

As far as is known to R.H. and his mother, there are no gang members who attend Oneida Middle School or who wear purple rosaries as a gang symbol. R.H. does not wear the rosary to support gang membership or gang violence. R.H. does not approve of gang membership or gang violence. (R.H. Decl. ¶ 8; C. Hosier Decl. ¶¶ 8, 16.)

The student dress code policy states in relevant part that "A student's dress, grooming and appearance, including hair, jewelry, make-up and nails, shall … [n]ot denote, represent or be

deemed to be gang related, included but not limited to bandanas, colors, flags or beads…." The dress code does not mention rosaries. The dress code does not define "gang" or "gang related." (C. Hosier Decl. ¶ 10; Ex. A, hereto, Excerpt of Oneida Middle School Dress Code Policy.)

Other than the incidents with school officials during the week of May 17, 2010, R.H. has never been told that he looks like a gang member when he is wearing the rosary. (R.H. Decl. ¶ 9; C. Hosier Decl. ¶ 9.)

On Monday, May 17, 2010, defendants Assistant Principal Lee Satterlee and Dean Mark Brooks told R.H. that he could not wear the rosary outside his shirt because it was made of beads and was gang related according to the student dress code policy. They told R.H. to take it off or tuck it into his shirt. If R.H. tucks the rosary into his shirt the rosary beads are still visible but the crucifix is not. R.H. said that he wanted to continue to wear his rosary outside his shirt because of his religious faith and because of his deceased family members. They told him they would call his mother and send him home, which they did. (R.H. Decl. ¶ 10.)

On May 17, 2010, defendant Principal Karmen McEvoy called R.H.'s mother Chantell Hosier and told her she was sending R.H. home because he would not take off his rosary or tuck it into his shirt. Defendant Principal McEvoy said the rosary was against the student dress code policy because it is made of beads and is considered gang related. (C. Hosier Decl. ¶ 9.)

On Tuesday, May 18, 2010, R.H. returned to Oneida Middle School and wore his rosary outside his shirt. No school officials came up to him that day and told him that he could not wear his rosary outside his shirt. (R.H. Decl. ¶ 11; C. Hosier Decl. ¶ 11.)

On Wednesday, May 19, 2010, R.H. went back to school. He wore his rosary outside his shirt, as he has since September 2009. Defendant Principal McEvoy came up to him and said that he was violating the student dress code policy by wearing beads and that the rosary was

gang related. R.H. told her he wore the rosary to show his faith in God and love for his deceased brother and uncle. Defendant Principal McEvoy called Chantell Hosier and told her she was suspending R.H. for wearing his rosary and for refusing to remove it or tuck it inside his shirt. Chantell Hosier asked defendant Principal McEvoy whether R.H. had done anything else to be suspended and the principal said no. Defendant Principal McEvoy said it was against the school's dress code for R.H. to wear his rosary. Defendant Principal McEvoy suspended R.H. from Wednesday, May 19, 2010, through Friday, May 21, 2010. (R.H. Decl. ¶ 12; C. Hosier Decl. ¶ 12.)

After taking R.H. home, Chantell Hosier called the Superintendent's office for the Schenectady City School District and asked to speak with defendant Superintendent Eric Ely. She was told that no one was available, but that Mr. Ely would meet with her the next day. (C. Hosier Decl. ¶ 13.)

On Thursday, May 20, 2010, R.H. turned thirteen. On that day, R.H. and Chantell Hosier went to the Superintendent's office to meet with Mr. Ely, but were told that they would meet instead with defendant Assistant Superintendent for Operations, William Roberts. Defendant Assistant Superintendent Roberts gave Chantell Hosier a copy of the student dress code policy and said that R.H. cannot wear the rosary to school. Defendant Assistant Superintendent Roberts said that he knew that the rosary is not a gang related symbol but R.H. cannot wear it because it is made of beads, which the student dress code policy does not permit. Defendant Assistant Superintendent Roberts asked R.H. whether he would take off the rosary or tuck it inside his shirt and R.H. said no. Defendant Assistant Superintendent Roberts told Chantell Hosier there was nothing the Superintendent's office would do for her and that they would leave the matter in the hands of defendant Principal Karmen McEvoy whether to discipline R.H. further. Defendant

Assistant Superintendent Roberts told Chantell Hosier she could complain to the members of the school board. (R.H. Decl. ¶ 13; C. Hosier Decl. ¶ 14.)

Chantell Hosier subsequently left telephone messages with the school board members. On May 20, 2010, school board Vice President Diane Herrmann called back and identified herself also as an attorney. Vice President Herrmann told Chantell Hosier that R.H. could not wear his rosary because it was against the student dress code policy. (C. Hosier Decl. ¶ 15.)

On Friday, May 21, 2010, school board President Maxine Brisport called Chantell Hosier. President Brisport agreed that the student dress code policy did not specifically prevent the wearing of rosary beads. She said that she would try to organize a school board meeting by Sunday, May 23, 2010, to discuss the matter. She said she was aware that R.H. is not a gang member. She said she was aware that purple rosaries are not a gang symbol. President Brisport never called Chantell Hosier back about the Sunday school board meeting. (C. Hosier Decl. ¶ 16.)

On Sunday, May 23, 2010, R.H.'s attorney sent Principal McEvoy and other school officials a letter by email requesting that the school no longer prevent R.H. from wearing his rosary to school. The letter was also faxed. (R.H. Decl. ¶ 14; C. Hosier Decl. ¶ 17; E. White Decl. ¶ 4.)

On Monday, May 24, 2010, R.H. went to school and wore his rosary on the outside of his shirt. As he entered the school, defendant Dean Brooks and a hall monitor took him to defendant Principal McEvoy. Defendant Principal McEvoy handed R.H. his assignments and told him he was suspended again for wearing the rosary to school in violation of the student dress code policy that prevents the wearing of beads. Chantell Hosier was outside the school and came in after getting a call from the school. Defendant Principal McEvoy told her that R.H. was being

suspended for wearing the rosary and for insubordination because he would not remove it or tuck it inside his shirt. Chantell Hosier asked defendant Principal McEvoy how long R.H. was suspended and the principal would not tell her. (R.H. Decl. ¶ 15; C. Hosier Decl. ¶ 18.)

From Tuesday, May 25, 2010, through Thursday, May 27, 2010, R.H. and his family were out of state on a trip. There was no school on Friday, May 28, 2010. (R.H. Decl. ¶ 16; C. Hosier Decl. ¶ 19.)

During this past school year at Oneida Middle School, R.H. has often seen other students wearing bandanas on their heads or hanging out of their pockets while in school. He has never seen a school official tell them they cannot wear bandanas, even though wearing bandanas is against the school's dress code and wearing bandanas that way is commonly considered gang-related. Also, R.H. has seen Muslim girls wearing scarves over their heads and has not seen a school official tell them to remove their scarves, which he understands they wear because of their religion. (R.H. Decl. ¶ 18; C. Hosier Decl. ¶ 10; Ex. A, hereto.)

The last school day this year is June 24, 2010. R.H. wants to go back to school in the Schenectady City School District as soon as possible and wants to wear his rosary on the outside of his shirt to school to express his Christian faith and for personal reasons without further interference and denial of his rights by defendants. (R.H. Decl. ¶¶ 16-17; C. Hosier Decl. ¶¶ 19-20.)

ARGUMENT

I.
<u>R.H. Satisfies The Standard For Preliminary Relief</u>

Under the well-established law of the United States Court of Appeals for the Second Circuit, to secure preliminary relief a plaintiff must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to

make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (citations omitted).

As demonstrated herein, plaintiff R.H. satisfies each of these elements and is therefore entitled to the preliminary relief he seeks. Specifically, as described more fully below, R.H. has suffered, currently suffers, and will continue to suffer, irreparable harm from the loss of his free speech rights by defendants. R.H. is also likely to succeed on the merits of his case, or in the alternative, there are serious questions going to the merits of the case and the balance of hardship tips unquestionably in R.H.'s favor. While the defendants would suffer no harm from the grant of a temporary restraining order and/or a preliminary injunction, the denial thereof would result in R.H.'s continuing loss of his constitutional freedoms, which harm is irreparable, as shown below.

A.
R.H. Will Continue To Suffer Irreparable Harm If Preliminary Relief Is Denied

R.H. cannot wear his rosary on the outside of his shirt to school in the absence of a temporary restraining order and/or a preliminary injunction. Indeed, R.H. is currently under school suspension, and has been suspended before, because of his choice to wear his rosary to school.

As the Supreme Court of the United States has observed: "the loss of first amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns,* 427 U.S. 347, 373 (1976). The Second Circuit has made it clear that a public school student meets the burden of showing irreparable harm if the school has deprived him or her of First Amendment rights. *See Hsu v. Roslyn Union Free Sch. Dist. No.3,* 85 F.3d 839, 853 (2d Cir. 1996). *See also Paulsen v. County of Nassau,* 925 F.2d 65, 68 (2d Cir. 1991) (statement

from *Elrod* is justified by "our historical commitment to expressive liberties").

Moreover, if this court does not enjoin defendants from continuing to suppress R.H.'s right to wear a rosary to Oneida Middle School, R.H. will remain under suspension until the resolution of this litigation, and thus deprived of an education. This clearly constitutes irreparable harm. *See, e.g., Johnson v. Collins*, 233 F. Supp. 2d 241, 251 (D. N.H. 2002) (finding that student will suffer irreparable harm absent injunctive relief "if [the student] continues to be deprived of an education during the pendency of this lawsuit"); *Ross v. Disare*, 500 F. Supp. 928, 934 (S.D. N.Y. 1977) (holding that the "interruption of a child's schooling causing a hiatus not only in the student's education but also in other social and psychological developmental processes that take place during the child's schooling, raises a strong possibility of irreparable injury").

B.
R.H. Is Likely To Succeed On The Merits Of His Constitutional Claim

According to prevailing case law, R.H.'s wearing of a rosary on the outside of his shirt to school is protected First Amendment speech. In the absence of any substantial and material disruption caused by R.H.'s rosary (either actual or reasonably foreseeable), R.H. has the right to wear his rosary and the ongoing suppression of this right by defendants is a clear violation of R.H.'s First Amendment right to free speech. In addition, the policy applied to R.H. by defendant school officials, prohibiting jewelry which is deemed to be gang related, is unconstitutionally vague and overbroad. Finally, defendants' policies and actions have impermissibly burdened R.H.'s religious practice of wearing a rosary and thus have violated his First Amendment right to the free exercise of his religion. As described below, R.H. is likely to prevail on the merits of his constitutional claims.

1.
R.H.'s Public Wearing Of A Rosary Is Protected Symbolic Speech

As an initial matter, there can be no dispute that R.H.'s wearing of a rosary constitutes symbolic speech protected under the First Amendment. *See, e.g.*, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (student's wearing of armband to protest Vietnam War constitutes symbolic speech protected under the First Amendment). With specific respect to R.H.'s rosary, one federal court, in a case almost identical to the one at bar, held that students wearing a rosary as a necklace is "symbolic speech" and "a form of religious expression protected under the First Amendment." *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 665 (S.D. Tx. 1997) (holding that a public school's prohibition on wearing rosaries violated the First Amendment free speech and free exercise rights of students). *See also Draper v. Logan County Pub. Library*, 403 F. Supp. 2d 608, 613 (W.D. Ky. 2003) (holding that a librarian's "outward display of her cross pendant falls within the purview of expressive conduct" protected by the First Amendment); *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 557 (W.D. Pa. 2003) ("the visible wearing of a cross or star of David is symbolic or expressive speech by the wearer which conveys her personal religious beliefs or affiliations"); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1164 (6th Cir. 1993) ("At this late date it cannot be argued that the display of such an object as a menorah or a cross is not 'symbolic speech' that is protected by the free speech provisions of the First Amendment").

R.H.'s outward display of a rosary is symbolic speech fully protected by the First Amendment.

2.
The *Tinker* Standard Applies To This Case,
And R.H.'s Right To Free Speech Has Been Violated

Having established the fact that the speech in question is protected speech, the next step

is to apply the relevant legal standard for student speech in public schools. It is a long held principle of First Amendment law that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

In the recent case, *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), the Second Circuit distilled the trilogy of Supreme Court student free speech cases — *Tinker, v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) — as follows:

> (1) schools have wide discretion to prohibit speech that is less than obscene — to wit, vulgar, lewd, indecent or plainly offensive speech, *Fraser*, 478 U.S. at 683-85; *Hazelwood*, 484 U.S. at 272 n. 4;
>
> (2) if the speech at issue is "school-sponsored," educators may censor student speech so long as the censorship is "reasonably related to legitimate pedagogical concerns," *Hazelwood*, 484 U.S. at 273; and
>
> (3) for all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, nor school-sponsored under *Hazelwood*, the rule of *Tinker* applies. Schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school. *See Tinker*, 393 U.S. at 513.

Id. at 325.[2]/

Now Justice Alito offered a similar summary of the trilogy in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001):

> Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these

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[2]/ *Morse v. Frederick*, 551 U.S. 393 (2007), the Supreme Court's most recent student speech case, added another exception to *Tinker*: a school may censor speech that is "reasonably viewed as promoting illegal drug use." *Id.* at 403. *See Depinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 639 (D. N.J. 2007) (noting that *Morse* did not alter the basic framework or applicable analyses of the Supreme Court cases described by the *Guiles* court, but simply added a third exception). Needless to say, R.H.'s rosary, which he wears to express his religious beliefs and for personal reasons, does not promote illegal drug use.

> categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.

Id. at 214.

R.H.'s speech of wearing his rosary outside his shirt is not "vulgar, lewd, indecent or plainly offensive speech," as in *Fraser*, nor is it "school-sponsored speech," as in *Hazelwood*. R.H.'s rosary is private, passive, protected speech taking place on public school grounds and therefore falls squarely within the *Tinker* framework. Under *Tinker*, as just described, "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Morse*, 551 U.S. at 403 (quoting *Tinker*, 393 U.S. at 513). As further elaborated by the Second Circuit, "[t]he question is not whether there has been actual disruption, but whether school officials 'might reasonably portend disruption' from the student expression at issue." *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008) (quoting *LaVine v. Blaine Sch. Dist*., 257 F.3d 981, 989 (9th Cir. 2001)). A reasonable belief of future disruption, however, is markedly different than "undifferentiated fear or apprehension of disturbance," which "is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508.

It is difficult to fathom what disruption defendants think would or could arise out of R.H.'s personal and religious act and expression of wearing a rosary. R.H. has worn his rosary to Oneida Middle School every day since September 2009. Not once during this eight month period was R.H. or his mother contacted by school officials to express any concern regarding any disruption on account of R.H.'s rosary. Moreover, R.H. is not a member of any gang, has never been asked whether he is a member of a gang, and R.H. and his mother are unaware of any gang at Oneida Middle School or elsewhere which uses a rosary similar to R.H.'s as a gang symbol. (R.H. Decl. ¶¶ 3-9; C. Hosier Decl. ¶¶ 2-9, 14, 16.)

These facts alone are sufficient to demonstrate that R.H.'s rosary has not created, or is reasonably likely to create, a material and substantial disruption of the work and discipline at Oneida Middle School. *See Chalifoux*, 976 F. Supp. at 667 (noting that because the student plaintiffs who publicly wore their rosaries were "never misidentified as gang members nor approached by gang members," and there was no "evidence of hostility from students at [the school] or any other threat of interference with school safety," there was insufficient evidence to justify the infringement on the right of students to wear rosaries at school). *See also M.B. v. Liverpool Cent. Sch. Dist.*, 487 F. Supp. 2d 117, 137 (N.D. N.Y. 2007) (where school district adduced no evidence that a fourth grade student's distribution of flyers would "disrupt the elementary classroom, cause substantial disorder, or invade the rights of others," the student's First Amendment rights were violated); *Depinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 645 (D. N.J. 2007) (fifth grade students awarded preliminary injunction to wear buttons with photograph of Hitler Youth in protest of school district mandatory uniform policy where button did not cause any disruption and school district failed to demonstrate a "specific and significant fear of disruption, not just some remote apprehension of disturbance") (quoting *Saxe*, 240 F.3d at 211).

3.
The Student Dress Code Policy Is Unconstitutionally Vague And
Overbroad In Violation Of The Fourteenth Amendment

A governmental rule or regulation is void for vagueness, and does not comport with due process, when it does not provide a person of ordinary intelligence fair notice of what is prohibited or if it is an unrestricted delegation of power that in practice invites arbitrary and discriminatory enforcement. *See Kolender v. Lawson,* 461 U.S. 352, 357-60 (1983). Whenever

a "vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned v. Rockford*, 408 U.S. 104, 109 (1972).

The student dress code policy provides that a "student's dress, grooming and appearance, including hair, jewelry, make-up and nails, shall . . . [n]ot denote, represent or be deemed to be gang related, included but not limited to bandanas, colors, flags or beads." (C. Hosier Decl. ¶ 20; Ex. A, hereto.)

In the absence of any definition of the term "gang," the pivotal word in this provision of the student dress code policy, it is void for vagueness and gives too much discretion to school officials in violation of the right to due process. In *Stephenson v. Davenport Community Sch. Dist.*, 110 F.3d 1303 (8th Cir. 1997), the United States Court of Appeals for the Eighth Circuit struck down a school district policy as impermissibly vague which provided that

> Gang related activities such as display of "colors", symbols, signals, signs, etc., will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the Board for expulsion.

Id. at 1308.

The court held that the school "regulation fails to provide adequate notice of prohibited conduct because the term 'gang,' without more, is fatally vague." *Id*. at 1310. Indeed, the court observed that the term "gang" was held to be unconstitutionally vague as far back as 1939. *Id*. at 1309 (citing *Lanzetta v. State of New Jersey*, 306 U.S. 451 (1939)). Moreover, the court noted that the policy gave school officials unfettered discretion in enforcing the rule, and thus violated "a central purpose of the vagueness doctrine that if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Id*. at 1311 (citation and quotation marks omitted). *See also Lopez v. Bay Shore Union Free Sch. Dist*., 668 F. Supp. 2d 406, 420-21 (E.D. N.Y. 2009) (citing and discussing *Stephenson* with approval);

Chalifoux, 976 F. Supp. at 667-669 (holding that a school's prohibition on "gang-related apparel . . . in school or at any school-related function" was void for vagueness).

The student dress code policy at issue here is fundamentally no different than the policies at issue in these other cases. Like the policy in *Stephenson*, Oneida's policy does not define the term "gang," and thus gives school officials unbridled discretion to enforce this vague term. For example, in the absence of any definition of "gang," especially one which references criminal activity, the policy could be used against any group of law-abiding students who wear similar apparel or symbols. A group of Oneida students who wear pro-life t-shirts to school, for example, could be viewed as members of a "gang," and their t-shirts deemed to be "gang related." A group or "gang" of Christian students wearing a cross pendant on a necklace could be told to tuck them into their shirt or remove them completely. Even a group of students who wear clothing to school in support of the New York Mets could be viewed as members of a "gang," and their clothing deemed to be "gang related."

In R.H.'s case, the situation is even more extreme than the foregoing examples. R.H. is not a member of any "gang" of students who wear purple beaded rosaries around their neck. If there is such a gang, R.H. is not familiar with them. (R.H. Decl. ¶¶ 7-8; C. Hosier Decl. ¶¶ 3, 7-8, 14, 16.)

In addition to being unconstitutionally vague, the student dress code policy is overbroad on its face, as the above-cited examples also show:

> A regulation is unconstitutional on its face on overbreadth grounds where there is a "a likelihood that the statute's very existence will inhibit free expression" by "inhibiting the speech of third parties who are not before the Court."

Saxe, 240 F.3d at 214 (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984)).

If wearing beads automatically denotes, represents, or is deemed to be gang related, as in defendants' application of the student dress code policy to R.H.'s rosary, then so must bandanas, colors, and flags.[3]/ Accordingly, under the terms of the student dress code policy, an Oneida Middle School student cannot outwardly display a pin of the American flag, to show patriotic support of the Nation, or wear colors to school, including red, white, and blue, in honor of United States troops serving overseas. This is not speculation. In 2005, a twelve year old student brought suit against the Schenectady City School District (the same district in the present case), Eric Ely (a defendant in the present case) and others, for prohibiting her from wearing a red, white, and blue beaded necklace she made and wore in honor of soldiers serving in Iraq (including members of her family). *See Grzywna v. Schenectady Central School District, et al.*, 489 F. Supp. 2d 139 (N.D. N.Y. 2006).[4]/

In fact, under the student dress code policy, there would be nothing to stop school officials from ordering a group (or "gang") of Oneida Middle School students passively wearing black armbands to protest the ongoing conflict in Afghanistan to remove them or face suspension — as in *Tinker*.

While defendants have the right, indeed the obligation, to keep Oneida Middle School and its students free from *criminal* gang activity, the student dress code policy sweeps too wide, prohibiting protected forms of symbolic speech. *See Hsu*, 85 F.3d at 872, n.32 ("the fact that a school's suppression of student expression is well-intentioned does not make the suppression

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[3]/ According to one news account, when defendant Ely was asked whether a rosary and beads are the same thing, he replied, "***Beads are beads*** . . . Many, many students wear beads every day. They just don't display them." <<http://www.wten.com/Global/story.asp?S= 12517774>> (emphasis supplied).

[4]/ In this decision, the court denied defendants' motion to dismiss the complaint and the case was eventually settled and dismissed. *Id.*, 05-CV-0187, case filed Feb. 10, 2005, Doc. 27.

permissible") (citing *Tinker*, 393 U.S. at 508).

In sum, plaintiff R.H. enjoys a strong likelihood of success on the merits of his constitutional claims against the defendants' actions and defendants' student dress code policy.

4.
Defendants' Have Violated R.H.'s Right To Free Exercise Of Religion

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. It applies to the States by incorporation into the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). While the right to the free exercise of religion does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)," it is nevertheless the case that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879, 884 (1990) (citations omitted).

While the "gang related" provision of the student dress code policy may be neutral and generally applicable — albeit unconstitutionally vague and overbroad — elsewhere in the student dress code policy is found the following provision: "A student's dress, grooming and appearance . . . shall . . . [n]ot include the wearing or displaying of hats/headgear inside the school ***except for a medical or religious purpose***, or for approved activities." (Ex. A, hereto) (emphasis supplied.) In other words, when the student dress code policy is considered as a whole, R.H. may wear a hat or headgear to school for a religious purpose, but he cannot wear a rosary to school, despite his religious purpose in doing so. There is no rational basis, let alone a compelling reason, which supports granting a religious exemption for wearing hats or headgear,

but not for granting R.H. a religious exemption for wearing his rosary. (R.H. Decl. ¶ 18.)

R.H. wears his rosary for religious reasons, as part of his Christian beliefs, and according to his own religious practice. Defendants' policies and actions have burdened R.H.'s religious exercise without a compelling reason and have thus violated his constitutionally protected free exercise right.

C.
R.H.'s Case Presents Serious Legal Questions,
And The Balance Of Hardship Tips Decidedly In His Favor

Plaintiff R.H. has shown that he is likely to succeed on the merits of his legal claims, and R.H. should be permitted to wear his rosary on the outside of his shirt to school — as he has done since September 2009 — during the pendency of this litigation. For these same reasons, R.H. has presented "sufficiently serious questions going to the merits to make them a fair ground for litigation." *Citigroup*, 598 F.3d at 35.

Moreover, the balance of hardships tips decidedly toward R.H., the party requesting the preliminary relief. As a direct result of R.H.'s constitutionally protected choice to wear his rosary to school, R.H. has been suspended from attending classes at Oneida Middle School, an obvious hardship. On the other hand, to allow R.H. to wear his rosary would impose no hardship at all on Oneida Middle School or its supervision of faculty and students. R.H. is not a member of any gang, has never been asked whether he is a member of a gang, and R.H. and his mother are unaware of any gang at Oneida Middle School or elsewhere which uses the rosary R.H. wears as a gang symbol (as defendant Assistant Superintendent Roberts and school board President Brisport have acknowledged to Chantell Hosier). Most importantly, R.H. has been wearing his rosary on the outside of his shirt to Oneida Middle School for eight months without incident. (R.H. Decl. ¶¶ 2-9; C. Hosier Decl. ¶¶ 2-9, 14, 16.)

II.
No Bond Should Be Imposed

No bond should be imposed if R.H. is awarded the injunctive relief he seeks. Any bond requirement would harm his constitutional rights by causing him to pay to assert and defend his rights. Defendants will suffer no foreseeable costs or damages should this court issue an injunction. Fed. R. Civ. P. 65(c). As the Second Circuit has held, "Rule 65(c) gives the district court wide discretion to set the amount of a bond, and even to dispense with the bond requirement where there has been no proof of likelihood of harm." *Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126, 136 (2nd Cir.1997) (citation omitted).

CONCLUSION

For the foregoing reasons, plaintiff R.H.'s application for a temporary restraining order and/or a preliminary injunction should be granted. This court should enjoin each and every defendant and their agents, servants, employees, attorneys, officers, and successors in office, and all those persons in active concert or participation with them, from enforcing the student dress code policy against R.H. by preventing him from attending public school in the Schenectady City School District while wearing a rosary outside his shirt.

Respectfully submitted,

Dated: June 1, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing and supporting declarations and Exhibit A were sent from Syracuse, New York, by electronic mail and U.S. Mail, first class postage prepaid, on June 1, 2010, to the following:

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