

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**DANA DELOUTH, and  
ESPERANZA ELLIS and KENNETH ELLIS,  
as parents and next friends of  
DONOVAN DELOUTH, a minor,**

**Plaintiffs,**

**v.**

**GLORIA GARZA and ALBERTA CRESPIN,  
Vice Principals of Valley High School, and  
ANTHONY GRIEGO,  
Principal of Valley High School,  
all in their individual and official capacities,  
and ALBUQUERQUE PUBLIC SCHOOLS  
BOARD OF EDUCATION, in its official capacity,**

**JURY TRIAL DEMANDED**

**Defendants.**

**VERIFIED COMPLAINT**

**INTRODUCTION**

Plaintiffs, Dana Delouth, and Esperanza Ellis and Kenneth Ellis as parents and next friends of Donovan Delouth, a minor, by undersigned Counsel, state:

1. This is a civil action for injunctive relief and monetary damages arising under 42 U.S.C. § 1983, the First and Fourteenth Amendments to the United States Constitution.
2. Plaintiffs and brothers Dana Delouth (Dana) and Donovan Delouth (Donovan) are students at Valley High School (VHS) in Albuquerque. After a high school football game on Friday, August 28, 2009, Plaintiffs casually directed two hand signs to their friends: Donovan made a “V” peace sign with his first two fingers, and Dana gestured with what is commonly called a “hook-em Longhorns” hand sign. An Albuquerque Public Schools Campus Service

Aide (CSA) and an Albuquerque Police Department (APD) officer assigned to APS reported the gestures to administrators at VHS. When Plaintiffs arrived at school with their mother, Esperanza Ellis, on early Monday morning, August 31, 2009, Defendant Gloria Garza summarily suspended them because of allegedly “throwing gang signs.” Plaintiffs are Black. Two days later, Plaintiffs learned of additional false allegations against them. On Friday, September 4, Plaintiffs learned that Defendant Garza recommends long-term suspension of Dana for “Assault/Aggravated”; “Defiance of School Personnel/Authorities”; “Gang Related Activity”; and “General Disruptive Conduct.” Defendant Alberta Crespin recommends long-term suspension of Donovan for “Defiance of School Personnel/Authorities”; Gang Related Activity”; and “General Disruptive Conduct.” However, first, as this case so vividly illustrates, APS’s definition of “gang-related activity” is vague and allows school personnel unfettered discretion in enforcing the prohibition of “gang-related activity.” Second, the hand gestures that Plaintiffs made to their friends were not intended as, and do not constitute, gang signs; similarly, Plaintiffs’ alleged conduct does not meet APS’s definitions of Assault/Aggravated, Defiance of School Personnel/Authorities, or General Disruptive Conduct.

### **JURISDICTION AND VENUE**

3. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1342, and venue in this Court is proper under 28 U.S.C. § 1391. All of the parties reside or do business in New Mexico and the acts complained of occurred exclusively within Bernalillo County, New Mexico.

### **PARTIES**

4. Plaintiff Dana Delouth was at all relevant times and is currently a student at VHS, a school within APS. Dana Delouth is African American. His date of birth is December 4, 1990. Dana Delouth is a resident of Bernalillo County.

5. The minor Plaintiff, Donovan Delouth, was at all relevant times and is currently a student at VHS. Donovan is African American. His date of birth is September 23, 1992. Donovan Delouth is a resident of Bernalillo County. Esperanza Ellis is Donovan's mother and Kenneth Ellis is Donovan's step-father. Ms. and Mr. Ellis bring this lawsuit on Donovan's behalf. Mr. and Ms. Ellis are residents of Bernalillo County.

6. Defendant Gloria Garza was at all relevant times and is currently a vice-principal of VHS, and is currently an employee of APS. On information and belief, Defendant Garza is a resident of the State of New Mexico.

7. Defendant Alberta Crespín was at all relevant times and is currently a vice-principal of VHS, and is currently an employee of APS. On information and belief, Defendant Crespín is a resident of the State of New Mexico.

8. Defendant Anthony Griego was at all relevant times and is currently the principal of VHS, and is currently an employee of APS. On information and belief, Defendant Griego is a resident of the State of New Mexico.

9. Defendant Albuquerque Public Schools Board of Education (hereinafter "Defendant Board") is a governmental entity created pursuant to NMSA 1978, § 22-5-1 et seq., and is charged with, among other things, the duty to formally promulgate written student discipline policies with specific prohibited acts detailed, and to supervise and control activities conducted at public schools within its district. Defendant Board is a political subdivision of the State of New Mexico and a person under 42 U.S.C. § 1983.

10. At all relevant times, the individual Defendants acted under color of state law and in the course and scope of their employment with APS, and are sued in their individual and official

capacities for damages and for injunctive relief; Defendant Board is sued for injunctive relief only.

### **FACTS**

11. Dana is currently a senior at VHS.

12. Donovan is currently a junior at VHS.

13. Pursuant to NMSA 1978, § 22-5-4.3, the Defendant Board is responsible for establishing written school discipline policies which must “detail specific prohibited acts and activities and enumerate possible disciplinary sanctions.”

14. On the evening of August 28, 2009, Plaintiffs Dana and Donovan attended a high school football game between VHS and West Mesa High School at Milne Stadium in Albuquerque.

15. CSA Lee Espinosa and APS police officer Sergeant Martin Martinez were on duty at the game. CSAs assist APS police officers.

16. Soon after the school year started, approximately 10 days before August 28, 2009, CSA Espinosa approached Dana in the hallway at VHS about a dress code violation. Dana respectfully asked CSA Espinosa why female students were allowed to break the dress code with certain types of shirts.

17. CSA Espinosa then told a group of students standing nearby, “Guys like this don’t last long around here.” Dana asked CSA Espinosa if he would accompany him to the principal’s office to discuss this comment. CSA Espinosa declined to go.

18. Dana was not disciplined for a dress code violation. CSA Espinosa did not report a dress code violation until August 31, 2009.

19. After the game on August 28, 2009, CSA Espinosa and Sergeant Martinez told Dana and a friend that they could not smoke tobacco in the Milne Stadium parking lot; they extinguished their cigarettes.

20. Soon after that conversation, Dana and Donovan entered the friend's car and proceeded to leave the parking lot. Due to the large crowds, there was a line of cars waiting to exit the parking lot.

21. CSA Espinosa and Sergeant Martinez pointed at the car in which Plaintiffs sat.

22. Moments later, when the car was pulling out of the parking lot and into the street, all three young men in the car, including Dana and Donovan, saw a small group of friends who were in the parking lot and near CSA Lee and Sergeant Martinez.

23. When Dana and Donovan saw their friends they both made hand gestures as a way of saying "peace" and "good-bye." Although Dana and Donovan used different hand signals, they both intended to send the same message of "good-bye" and "peace" or wishes of goodwill.

24. Dana made what is commonly referred to as the "hook 'em horns" or "longhorn" sign. The hand sign is used by many people in many circumstances; for example when he was President, George W. Bush gave the sign during a photograph session with Laura Bush and the Queen and King of England. See <http://www.prisonplanet.com/Pictures/may07/100507Diablo.jpg>

25. Donovan gestured with a V shape of the index and middle finger, commonly referred to as the "peace sign" and universally accepted as a gesture of peace, good-will, and non-violence.

26. Dana and Donovan's friend and the driver of the car, who is a student at another APS High School, also directed the peace sign with his hand towards the group.

27. When they made these hand gestures, others in the parking lot responded by making the identical peace sign that Donovan used. These individuals understood the message that Dana and Donovan intended to send.

28. None of the other individuals who responded with the peace sign were Black. The friend who was driving the car and made a peace sign is not black.

29. To Plaintiffs' knowledge, none of these individuals who responded with hand signals who are also students at Valley High School have been disciplined for making peace signs.

30. The friend driving the car in which Dana and Donovan were riding attends another APS high school and he has not been disciplined.

31. On Monday, August 31, 2009, Ms. Ellis drove her sons, Dana and Donovan, to VHS between 7:30 and 8:00 am. Dana and Donovan got out of the car on the South side of Candelaria Avenue, to cross the street in the cross walk to VHS. CSA Edwin Telles was standing there, and told Dana and Donovan that they needed to speak with CSA Espinosa, who was on the North side of Candelaria, approximately 20 yards away.

32. Ms. Ellis was still parked next to them, and Dana told her to stay; she proceeded to park her car.

33. Dana and Donovan, Ms. Ellis, and Sergeant Martinez proceeded to the security office.

34. Sergeant Martinez said to Dana and Donovan, in the presence of Ms. Ellis, that they "threw gang signs at me" and that he was angry about it.

35. Neither Dana nor Donovan are, or have ever been, a gang member.

36. Dana and Donovan tried to explain that they had not made gang signs, but Sergeant Martinez did not give them a chance to explain.

37. Sergeant Martinez would not listen to Ms. Ellis when she tried to speak.

38. Sergeant Martinez would not give Ms. Ellis the name of his supervisor when she asked him for it.

39. Sergeant Martinez told Dana and Donovan and Ms. Ellis to go speak to the administration.

40. Dana and Donovan and Ms. Ellis first spoke to Defendant Crespín, who is in charge of students in the 11<sup>th</sup> grade and the vice-principal for Donovan.

41. Defendant Crespín informed the family that Donovan would receive lunch time detention for smoking tobacco.

42. Dana then told Defendant Ms. Crespín that he had smoked, but that Donovan had not, and that Donovan should not receive the detention. Defendant Crespín appeared to agree, but informed Dana that he would have to speak with the vice-principal for the 12<sup>th</sup> grade, Defendant Garza.

43. Dana and Donovan and Ms. Ellis went to Defendant Garza's office.

44. The first thing that Defendant Garza told the family was that the Dana and Donovan were suspended long-term suspension for using gang signs.

45. Defendant Garza said that she considered the peace sign and the Texas Longhorn sign a "severe offense."

46. Kenneth Ellis arrived at the office after Ms. Ellis had called him and informed that he needed to come to VHS.

47. When Mr. Ellis walked into Defendant Garza's office, he calmly asked, "What's going on?"

48. Immediately after Mr. Ellis, who is Black, entered the office, Defendant Garza picked up a walkie-talkie, pressed the talk button, and said, "I need security in my office right now."

49. Dana and Donovan were upset over the allegations and the long term suspension. Crying, Donovan left the office; Dana and Mr. Ellis followed him.

50. The family then reunited in the parking lot outside VHS. CSAs followed the family to the parking lot but kept a reasonable distance away. Dana was upset and angry and was venting his emotions to his step-father.

51. When the Plaintiffs returned home, Dana asked his mother to report the matter to the media because he felt that the Defendants' actions were unjustified and a violation of his rights; Ms. Ellis did so. That evening, on the 10:00 pm news, two local television stations, KOAT and KOB, aired reports about the incident.

52. On September 2, 2009, Plaintiffs' counsel called APS counsel to ask that Dana and Donovan be reinstated to school because smoking a cigarette after a football game and gesturing the peace and Longhorn sign were not grounds for severe discipline. At APS counsel's suggestion, Plaintiff's counsel called the Director of APS's "Student, School and Community Service Center." The Director agreed that smoking a cigarette after a football game and gesturing the peace and Longhorn sign would not be enough for a suspension, but that he understood there was "more" to it. The Director said he would have the VHS principal or assistant principal call the mother to tell her what the "more" was.

53. On September 2, 2009, Defendant Garza called Ms. Ellis, and told her that Dana and Donovan were being charged with "verbal assault."

54. Although Dana and Donovan were suspended early on August 31, 2009, and they spoke with various school personnel that morning, and were at the school for over 30 minutes, no one mentioned anything to them about "verbal assault" or "threats" or anything similar until Defendants Garza called Ms. Ellis on September 2, 2009.



55. On September 1, 2009, APS provided Natalie Swaby, a KOAT-TV reporter, with a copy of the Incident Report.

56. On September 1, 2009, Plaintiffs learned from television news that the Albuquerque Police Department had filed an Incident Report, alleging that Dana assaulted school personnel in violation of NMSA 1978, § 30-3-9 and interfered with education process in violation of NMSA 1978, § 30-20-13.

57. Plaintiffs did not receive a copy of the Incident Report until September 3, 2009, when Plaintiff's counsel obtained it from APS along with written statements from CSA Telles and CSA Espinosa. The two CSAs' written statements are dated "8/31/09" at "0800," and reference the Incident Report number.

58. CSA Telles's entire statement is, verbatim:

On Monday, August, 31 [*sic*] about 0720 I was working the traffic signals in front of Valley H.S. on Candelaria. Dana Delough and Donovan Delouth were dropped off on Candelaria. As they approached me I advised data that CSA Espinosa needed to talk with him. At this point Dana became upset and said, "That guy has picked on me since the start of school. I'm going to beat his ass." Donovan said, "They're picking on us because we're Black." I told Donovan "That's a sorry excuse." Donovan became upset and said "You're sorry you rent a cop." They crossed Candelaria and were escorted to the APS police office, due to the threats that appeared to be credible.

59. CSA Espinosa's entire statement is, verbatim:

During the first week of school in B-hall Jerry Chavez the athletic director told Dana Delouth he was out of dress code. Dana gave Mr. Chavez a hard time so I told him to put his shirt on. He gave me a hard time also but he put his shirt back on. I did not write him up. [Underlining in original]

60. The Incident Report, which was dated 8/31/09 at 0740, contains CSA Telles's allegations about Dana. Additionally, the Incident Report alleges that CSA Veronica Gurule "was outside between A and B building when Dana yelled that it was Lee's [CSA Espinosa] fault that they got long term suspended, and Dana said 'Lee better not show his face here in front[]', and then

repeated it as a threat.” The Incident Report does not state when CSA Gurule allegedly heard the statement.

61. The alleged statements in the Incident Report cannot possibly be construed as criminal conduct, including under either § 30-3-9 or § 30-20-13.

62. Dana did not say either, “I’m going to beat his ass” or “Lee better not show his face here in front.”

63. On Friday, September 4, Plaintiffs’ counsel received from Defendants’ counsel the Notices of Hearing for the proposed long-term suspensions. Plaintiffs have not yet received them from APS although Defendant Garza informed them on September 2, 2009, that they are being sent by certified mail.

64. As set forth in Dana’s Notice of Hearing, which is dated September 2, 2009 and signed by Defendant Garza, Dana is charged with “Assault/Aggravated”; “Defiance of School Personnel/Authorities”; “Gang Related Activity”; and “General Disruptive Conduct.”

65. As set forth in Donovan’s Notice of Hearing, which is dated September 3, 2009 and signed by Defendant Crespín, Donovan is charged with “Defiance of School Personnel/Authorities”; “Gang Related Activity”; and “General Disruptive Conduct.”

66. The APS “Student Behavior Handbook,” which is an “an official policy statement of the APS Board of Education,” defines these charges as follows:

**Defiance of School Personnel/Authorities:** Refusing to comply with any reasonable demand or request by any school official or sponsor at places and times where school personnel have jurisdiction.

**Gang-Related Activity:** Gang-related activity can be intimidating to students, faculty and staff and is disruptive to the educational process. Although this list is not all-inclusive, examples of inappropriate and unacceptable behaviors are such things as gang graffiti on school property, intimidation of others, gang fights and/or initiation rituals, wearing gang attire or “colors.” A “gang” can be any group of students and/or non-students whose group behavior is threatening, delinquent or criminal. Since gang

behavior, markers and colors are variable and subject to rapid change, school administrators and staff must exercise judgment and their individual discretion based upon current circumstances in their neighborhood schools when evaluating gang-related activity. Gang-related indicators which will be considered should include:

- The student associating with admitted or known gang members.
- The student wearing attire consistent with gang dress.
- The student displaying gang logos, graffiti and/or symbols on personal possessions.
- The student displaying gang hand signs or signals to others.
- The student talking about gang activities to others.
- Hostile contact with others in which two or more students have contributed to a situation causing bodily harm on another.

**General Disruptive Conduct:** Willful conduct which materially and in fact disrupts or interferes with the operation of the public schools and the orderly conduct of any public school activity, including individual classes; or leads an administrative authority reasonably to forecast that such an interruption or interference is likely to occur unless preventive action is taken. For example:

- Failing to provide/surrender school identification to any public school personnel or activity sponsor upon demand.
- Knowingly and deliberately failing to comply with any legal and/or official rule or regulation designed by or provided by a teacher, principal, faculty member or other public school official at any time, whether the rule is designed for the classroom, the campus in general or any other location or facility involving a school-related activity.
- Being dressed in a manner which is disruptive to the educational process.
- Inappropriate display of affection, i.e. a display of affection which has the potential to disrupt the educational process.
- Cheating.
- Gambling.
- Use of pagers and/or cell phones, and all electronic devices, during instructional time or at a time that would be disruptive to the educational process.
- Misuse of cell phones and other forms of technology that could include, but not be limited to the unauthorized taking of pictures, cheating, invading privacy, etc.
- Making false accusations regarding staff or students.

**Assault, Aggravated:** Intending or performing assault and battery with a weapon, instrument or any means of force likely to produce bodily injury. This category includes sexual assault and/or offenses.

67. VHS's disciplinary code, also referred to as the "Norse Code," does not define gang-related activity but does contain this terse section listed as No. 12 in the VHS 2009-2010 Student Handbook:

GANG-RELATED ACTIVITY/VIOLENCE (SEVERE OFFENSE)

1st [Offense] Long-term suspension or expulsion referral, possible legal action.

68. None of the charges set forth in the Notices of Hearing describe Plaintiffs' actual or alleged conduct.

69. Plaintiffs did not engage in any "gang-related" behavior. Defendants have no evidence to show that Plaintiffs engaged in any "gang-related" behavior.

70. Plaintiffs did not refuse to comply with any reasonable demand or request by any school official. Defendants have no evidence to show that Plaintiffs refused to comply with a reasonable demand or request by a school official.

71. Plaintiffs did not engage in any activity or conduct that materially disrupted or interfered with the operation of VHS. Defendants have no evidence to show that they did or that Defendants had a reasonable basis to forecast that such an interruption or interference might occur.

72. Dana neither intended to nor actually did "perform[ ] assault and battery with a weapon, instrument or any means of force likely to produce bodily injury." Defendants have no evidence to show that Dana did intend to or actually did perform assault and battery with a weapon, instrument or any means of force likely to produce bodily injury.

73. The Student Behavior Handbook contains a chart which lists the "minimum mandatory consequences" for violations of the policies, and states that "Administrators may impose consequences beyond minimum mandatory in order to maintain the safety and security of the school population."

74. Plaintiffs present no threat to the safety and security of the school population. Defendants have no evidence that Plaintiffs present a threat to the safety and security of the school population.

75. The minimum mandatory consequence for the 1<sup>st</sup> offense of the charges of Gang-Related Activity, Assault/Aggravated, and Defiance of School Personnel/Authorities is Administrative/Parent Contact. For a 1<sup>st</sup> offense of the charge of General Disruptive Conduct the minimum mandatory consequence is Administrative/Student Contact.

76. As a direct and proximate result of the acts of Defendants, Dana and Donovan have suffered and will continue to suffer injuries and damages, including but not limited to deprivation of education and educational opportunities, emotional distress, and costs and attorneys' fees.

77. The unconstitutional actions of the individual Defendants were intentional, willful, and in reckless disregard of Plaintiffs' rights, warranting punitive damages to be decided by the trier of fact.

#### **VIOLATION OF THE FIRST AMENDMENT FREEDOM OF SPEECH**

78. Plaintiffs incorporate by reference all preceding allegations as if fully set forth herein.

79. Dana and Donovan Delouth have a First Amendment right to communicate with fellow students and friends through hand signals that do not interfere with the educational purpose of a high school.

80. Plaintiffs intended the hand signs at issue as communications of good will and also simply to say "good-bye" and are reasonably understood as such.

81. The application of APS's and VHS's policy prohibiting "gang related activity," and specifically APS's policy of "displaying gang hand signs or signals to others" to Plaintiffs is

unconstitutionally vague in that these policies prohibit protected speech, such as Plaintiffs hand signs of goodwill, and fail to give Plaintiffs reasonable notice that such speech is prohibited.

82. Plaintiffs have a First Amendment right to use these specific hand signals as means to communicate a message of goodwill on school property when the signals do not interfere with the educational process, such as outside of Milne stadium or in any other space and time when students are allowed to socialize amongst themselves.

83. All of the actions taken by Defendants and referred to herein have deprived, and continue to deprive, Dana and Donovan Delouth of the right to freedom of speech as guaranteed by the First Amendment to the United States Constitution.

**DUE PROCESS AND LIBERTY INTEREST  
FIRST AND FOURTEENTH AMENDMENT CLAIMS**

84. Plaintiffs incorporate by reference all preceding allegations as if fully set forth herein.

85. Plaintiffs Dana and Donovan Delouth had and have a clearly-established property interest in the right to attend public school, protected by the Fourteenth Amendment to the U.S. Constitution.

86. The application of APS's and VHS's policy prohibiting "gang related activity," and specifically "displaying gang hand signs or signals to others" to Plaintiffs is unconstitutionally vague in that it fails to give reasonable notice of the proscribed conduct, and allows unfettered discretion in disciplinary actions by APS personnel, in violation of the First Amendment and the procedural due process clause of the Fourteenth Amendment.

87. Defendants' suspension of Dana and Donovan Delouth from school has no rational relationship to any legitimate state interest, in violation of Dana and Donovan Delouth's well-established substantive rights and liberty interests under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

88. Defendants' actions against Dana and Donovan Delouth were motivated, at least in part, because Dana and Donovan Delouth are African American.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request the following relief:

1. A judgment that Defendants violated Plaintiffs' constitutional rights as alleged herein;
2. A preliminary and permanent injunction prohibiting Defendants, their subordinates, agents, employees and all others acting in concert with them, from taking disciplinary action against Plaintiffs Dana and Donovan Delouth for the events of August 28 and 31, 2009, and ordering that Plaintiffs Dana and Donovan Delouth be immediately reinstated at Valley High School;
4. Expungement of Plaintiffs' disciplinary records arising from the events of August 28 and August 31, 2009;
5. Compensatory damages from all Defendants in an amount to be determined at the trial of this cause;
6. Punitive damages against the individual Defendants in their individual capacities;
7. Plaintiffs' reasonable attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988; and
8. Such other relief as the Court considers just and proper.

Respectfully submitted,

/s/ Jane Gagne 9/8/2009

`Jane Gagne, Co-Legal Director  
ACLU of New Mexico  
102 Granite NW  
Albuquerque, NM 87102  
(505) 243-1002  
Facsimile (505) 243-2750  
[jgagne@qwestoffice.net](mailto:jgagne@qwestoffice.net)

Brendan Egan  
ACLU of New Mexico  
Staff Attorney  
P.O. Box 566  
Albuquerque, NM 87103-0566  
(505) 243-0046  
Facsimile (505) 266-5916  
[began@aclu-nm.org](mailto:began@aclu-nm.org)