

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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R.O., a Minor, by his  
parent and guardian JONATHAN  
OCHSHORN; T.S., a Minor,  
by his parent and guardian MARK E.  
SORRELLS; ANDREW M.H. ALEXANDER;  
HARRY T. STINSON; L.F., a Minor,  
by her parent and guardian  
ELIZABETH A. FATTARUSO; A.H., a Minor,  
by his parent and guardian TERESA  
HALPERT DESCHANES; BRYAN ELLERBROCK;  
and P.P., a Minor, by his parent  
and guardian RAMESH RAJ POKHAREL,

Plaintiffs,

- vs -

ITHACA CITY SCHOOL DISTRICT; JUDITH C.  
PASTEL, Superintendent, in her official  
and individual capacities; WILLIAM  
RUSSELL, Assistant Superintendent, in  
his official and individual capacities;  
and JOSEPH WILSON, Ithaca High School  
Principal, in his official and  
individual capacities,

Defendants.

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Civ No.  
5:05-cv-695(NAM/GJD)

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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION  
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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### **PRELIMINARY STATEMENT**

This Memorandum of Law is submitted on behalf of plaintiffs in opposition to defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The facts underlying this Memorandum of Law are set out in the Affidavit of Raymond M. Schlather, Esq., and its Exhibits; the Affidavit of Robert Ochshorn, and its Exhibits; the Affidavit of Eileen Bach, and its Exhibits; and in the Defendants' Statement of Material Facts and Plaintiffs' Response thereto. They will not be repeated here, only referenced as necessary.

### **ARGUMENT**

#### **SUMMARY JUDGMENT STANDARD**

Summary judgment should be granted only when the pleadings, depositions, affidavits, admissions and answers to interrogatories show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). A "material" fact is one that might affect the outcome of the case. Id. at 248. Facts, and the inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmovant. Matsushita Electric Industry Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

POINT ONE  
THE ITHACA CITY SCHOOL DISTRICT VIOLATED PLAINTIFFS'  
FIRST AMENDMENT RIGHTS WHEN IT CENSORED THE CONTENT OF  
THE TATTLER AND IMPOSED THE GUIDELINES AT ISSUE HERE.

.

Defendants' argument is based on a flawed analytical paradigm, implying that there is only one framework applicable to resolving questions of the scope of the First Amendment rights of high school students and, specifically, the extent of the Ithaca School District's authority to regulate the content of The Tattler. In fact, the decisions of the Supreme Court have made it clear that there are two separate and distinct approaches available, that of Tinker v Des Moines Independent Community School District, 393 U.S. 503 (1969), and that of Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

In Tinker, the Supreme Court held that "in the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." The Court emphasized that, as it had held for almost 50 years, "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Accordingly, any regulation of a student's exercise of his First Amendment rights would violate the Constitution unless it could be "justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." Id. at 513.

Subsequently, in Hazelwood, the Supreme Court considered whether a school administration's censorship of articles in a high school newspaper violated the First Amendment rights of the student staff members. The key to the Court's conclusion that student rights were not violated was its determination that a

school paper published by students as part of a journalism class did not qualify as a public forum; accordingly, the school retained the right to impose "reasonable restrictions" on student speech in the paper. Citing to its previous decisions, the Court held that a school facility may be deemed a public forum "only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' (citation omitted) or by some segment of the public, such as student organizations." Id. at 267. Because a School Board Policy and Curriculum Guide provided that "school sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities," and because students received grades and academic credit for their performance in the journalism course that produced the paper, the paper was not a public forum. Id. at 268-269. See also, Silano v. Sag Harbor Free School District Board of Education (42 F.3d 719 [2d Cir. 1994] [where classroom not a public forum, educators may limit classroom speech if reasonably related to a legitimate pedagogical concern]).

Subsequent to Hazelwood, neither the Supreme Court nor the Second Circuit has directly addressed the issue of student First Amendment rights in connection with a school newspaper. Two decisions, however, have addressed the issue of other forms of student speech, the Supreme Court's decision in Bethel School District v. Fraser, 478 U.S. 675 (1986), which preceded Hazelwood, and the Second Circuit's decision in Guiles v. Marineau (461 F.3d 320 [2d Cir. 2006]). Neither case broke new ground, but merely affirmed the rule that if student speech is disruptive of the school's educational mission, a student may be reprimanded without the reprimand constituting a First Amendment

violation. Both cases also affirmed the continuing viability of the Tinker analysis in appropriate circumstances.

In Fraser, a student was reprimanded for delivering a nominating speech to an assembly of approximately 600 students, many of whom were 14-year-olds, in which the student described his candidate "in terms of an elaborate, graphic, and explicit sexual metaphor." In response, some of the students "hooted and yelled during the speech, some mimicked the sexual activities alluded to in the speech, and others appeared to be bewildered and embarrassed." Fraser, 478 U.S. at 675. The school subsequently disciplined the student by suspending him for three days and removing his name from list of candidates for graduation speaker.

Although reversing the lower courts that had found a First Amendment violation in Fraser, the Court nevertheless stated that the student's speech "may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty." Id. at 688-689. The Court particularly affirmed the viability of Tinker and explicitly stated that its holding in Fraser "concerns only the authority that high school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly." Id. at 689. In Hazelwood, the Court reiterated that its holding in Fraser was directed solely at the character of speech delivered at a school assembly. Hazelwood, 484 U.S. at 271, FN4.

In Guiles, the Second Circuit reviewed the district court's application of Fraser to a school's censorship of images of drugs and alcohol on a student's shirt. The court concluded that Fraser permits schools to censor

student speech that is "'lewd,' 'vulgar,' 'indecent,' or 'plainly offensive.'" In doing so, the court appears to have disregarded the Supreme Court's explicit limitation of its Fraser holding to "disruptive language in a speech given to a high school assembly." Having determined that the images were neither lewd, vulgar, or indecent, the court addressed the sole remaining issue, whether the images were "plainly offensive," and concluded that the "plainly offensive" under Fraser is confined to speech that is "something less than obscene but related to that concept." Guiles, 461 F.3d at 327-328.

Despite what is, arguably, an error in finding Fraser applicable to the Guiles scenario, the Second Circuit did point out that Fraser itself indicated that its rule applies "'to the manner of speech,' i.e., the offensiveness of its form, but not the speech's content," and that Fraser itself was grounded in "'the interest in protecting minors from exposure to vulgar and offensive spoken language.'" Id. at 328. Finally, the Guiles court explicitly refused to adopt the position taken by the Sixth Circuit in Boroff v. Van Wert City Board of Education, 220 F.3d 465, 470 (6th Cir. 2000), that a school "has broad authority under Fraser to prohibit speech that is 'inconsistent with its basic educational mission.'"

These four cases (Tinker, Hazelwood, Fraser and Guiles) provide the analytic tools available for determining whether defendants here violated the First Amendment rights of the student editors who are the plaintiffs in this case.

**A. THE TATTLER IS A "TINKER" PAPER,  
NOT A "HAZELWOOD" PAPER.**

The key question here is whether The Tattler is governed by the standards set out in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), or those set out in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). As a preliminary matter, the Supreme Court has indicated that although Tinker itself involved political speech, the rule of Tinker is not confined to political speech but is generally applicable to all those student-speech cases that fall within its ambit. Hazelwood, 484 U.S. at 270-273.

In Hazelwood, the Supreme Court considered whether a school administration's censorship of articles in a high school newspaper violated the First Amendment rights of the student staff members. The key to the Court's conclusion that student rights were not violated was its determination that a school paper published by students as part of a journalism class did not qualify as a public forum; accordingly, the school retained the right to impose "reasonable restrictions" on the content of the paper.

As this Court has recently noted, the level of First Amendment protection afforded to speech depends on the nature of the forum in which the speech occurs. M.B. ex rel. Martin v. Liverpool Central School District, 2007 WL 963285 (N.D.N.Y.), at \*8. Although it is clear that a public school is not a "traditional public forum," it may nevertheless be a "designated public forum," that is, a place not traditionally open to public speech but which the government has "taken affirmative steps to open for general public discourse," or a "limited public forum," which is created when the government "'opens a non-public forum but limits the expressive activity to certain kinds of

speakers or to the discussion of certain subjects' (citation omitted)". Peck v. Baldwinsville Central School District, 426 F.3d 617, 625-626 (2d Cir. 2005).

The Court in Hazelwood held that a school facility may be deemed a public forum "only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public (citations omitted) or by some segment of the public, such as student organizations." Id. at 267. Because the School Board Policy and Curriculum Guide provided that "school sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities," and because students received grades and academic credit for their performance in the journalism course that produced the paper, the paper was not a public forum. Id. at 268.

At the core of the decision in Hazelwood that the paper (called Spectrum) was not a forum for public expression was the Court's observation that the school officials there "did not deviate from their policy that production of Spectrum was to be part of the educational curriculum and a 'regular classroom activity'", with the journalism teacher's controlling "almost every aspect of the production and publication of Spectrum, including its content," and, even after the teacher's approval, each issue was still subject to review by the principal prior to publication. Id. at 269-270. The Tattler cannot be so characterized.

The Tattler is a newspaper staffed and published by Ithaca High School students (Bach Aff. ¶6). Although it has a faculty advisor, it is not produced as part of the educational curriculum, nor as a regular classroom activity, but as a volunteer extracurricular activity (Ochs Aff. ¶4[e]; Bach Aff. ¶11). The faculty advisor does not "control almost every aspect of the paper's

publication;" instead, the faculty advisor has traditionally worked alongside the student editors, offering suggestions and advice, with the final decisions as to content resting with the student editors (Ochshorn Aff. ¶4[e]; Bach Aff. ¶8).

Although defendants here assert that The Tattler is "a teacher guided learning activity," The Tattler's status as an extracurricular activity makes this assertion, even if true, relatively unimportant. Despite defendants' contention that "students are permitted to work on The Tattler during school hours ((Def's SMF No. 28), in reality students may work on The Tattler during the school day only during their free periods and, in fact, the majority of the writing and production takes place after school hours, on weekends, and during vacations (Ochshorn Aff. ¶4[e]; Bach Aff. ¶11). As the Court noted in Hazelwood, the teaching of "leadership skills in the context of a classroom activity" is not inconsistent with retaining control over that activity; however, the production of The Tattler is not a classroom activity and does not constitute "a supervised learning experience for journalism students." Hazelwood, 484 U.S. at 270. Despite defendants' reliance on an alleged "historical link" between The Tattler and a journalism elective at Ithaca High School, the fact remains that The Tattler is not, and never has been, a curricular activity (Bach Aff. ¶11). That on rare occasions a student has received some credit for work on The Tattler (id.) does not transform it into one. That acting as The Tattler's advisor is viewed as the equivalent of teaching a class for purposes of calculating faculty workload and compensation does not transform The Tattler into a classroom or curricular activity.

For at least the last decade, The Tattler has described itself on its masthead as "the student-run newspaper of Ithaca High School," and its editorial page, explicitly identifying the paper as "an open forum," has invited all members of the community to submit pieces and letters to its editorial board (Ochshorn Aff. ¶ 4[b]; Bach Aff. Ex. A). The Tattler Staff Handbook, drafted in approximately 1996, to reflect current and prior practice, states that The Tattler "functions as an open forum" (Bach Aff. ¶5). The Ithaca City School District has never attempted to challenge any of these statements, and thus its continued practice has conceded The Tattler's open forum status. As well, the District's policy concerning The Tattler, as reflected in its Conduct Manual, recites only that the student staff is expected to exercise reasonable journalism and to "refrain from libel and obscenity," and that the school has the right "to halt distribution of materials that would materially and substantially interrupt the educational process or intrude upon the rights of others" (Ochshorn Aff. Ex. H., pg. 32). In short, even the School District, through both its "policy and practice" has recognized The Tattler as an open forum, subject only to Tinker-based regulation.

Defendants argue that The Tattler is nevertheless to be considered part of the curriculum because it constitutes an "expressive activit[y] that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Such activities may be characterized as part of the school curriculum, whether in a traditional classroom or not, "so long as they are supervised by faculty members and designed to import particular knowledge or skills to student participants and audiences." Hazelwood, 484

U.S. at 270-271. However, these words do not stand alone, and in context it is clear that what the Supreme Court in Hazelwood means by faculty supervision is faculty control.

Before the question of whether members of the public might view the student speech as bearing the "imprimatur of the school" can even be reached, however, the activity at issue first must be determined to be school-sponsored. Hazelwood itself defines school-sponsored speech as student speech that a school affirmatively promotes as opposed to student speech that it merely tolerates. Id. at 270-271.

Defendants attempt to depict The Tattler as school-sponsored based on the level of material support provided by the school district to The Tattler. Not only, as discussed below, is this sort of support essentially irrelevant to a determination of school sponsorship under Hazelwood, that material support is far less than that set out by defendants. Defs Mem of Law, at 1-2. The reality is that the funds provided to The Tattler by ICSD cover less than 25% of the annual costs of postage, printing and publication. Approximately 75% of those costs are paid for out of advertising revenue generated by The Tattler student staff. Approximately one-half of the office furnishings were donated to The Tattler by its student staff. All office supplies were bought with The Tattler's funds, primarily from its advertising revenue. ICSD provided two computers, one of which (circa 2000) had a broken monitor. For the most part, the student staff used their own computers, their own internet access, their own telephones, and their own supplies in producing The Tattler. The refrigerator was donated by a local appliance dealership in lieu of an ad sale; the answering machine was donated by a parent of a student editor; a camera was

purchased with Tattler funds raised through ad sales, as were two printers and a computer; and numerous other furnishings and items were purchased by the student staff (Ochshorn Aff. ¶ 9-12; Bach Aff. ¶10).

In any event, the level of funding is not significant in determining the question of school sponsorship. In Romano v. Harrington (725 F. Supp. 687 [E.D.N.Y. 1989]), which appears to be the only case directly to address this question, the paper's faculty advisor had been discharged following the publication of a controversial student article. The District Court concluded, post-Hazelwood, that "educators may exercise greater editorial control over what students write for class than what they voluntarily submit to an extra-curricular, albeit school-funded, publication." Id. at 690.

Contrary to defendants' assertion, the Supreme Court in Hazelwood did not set out 'six 'intent factors'" to be used in determining whether a school has converted a school-sponsored newspaper into a public forum;<sup>1</sup> this list of six factors was promulgated not by the Supreme Court but by the district court in Dean v. Utica Community Schools, 345 F. Supp. 2d 799, 807 (E.D. Mich 2004) and, as such, has no controlling precedential value in this Court's analysis. Accordingly, whether the Ithaca City School District provided an office for The Tattler's use (an office which was also used for publication of the school's yearbook, another extracurricular activity) or utilities and some equipment is not significant, and certainly not determinative, in evaluating whether The Tattler is either school-sponsored or a public forum.

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<sup>1</sup> In any event, the question is irrelevant here. As discussed above, The Tattler has never been a school-sponsored paper under the Hazelwood definition; it has always been a public forum.

In fact, under Hazelwood, a determination that an activity is school-sponsored results entirely from the level of authority and control the school exerts over the activity. In Hazelwood itself, the determinative factors in the Court's conclusion that Spectrum was part of the educational curriculum were that the journalism teacher "selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company," and it was clear that he was "the final authority with respect to almost every aspect of the production and publication of Spectrum, including its content." Moreover, even after the journalism teacher had approved an issue, it still was subject to review by the principal prior to publication. Id. at 268-269. None of these things was true with respect to The Tattler at the time the disputed guidelines were imposed. Indeed, it was the student editors themselves who made the determination not to publish the "Alumni Advice: Sex is Fun!" article and its accompanying cartoon (Ochshorn Aff. ¶ 4[a]-[e]; 14-15).

Defendants disingenuously assert that there is "no need to delineate exactly who had final editorial control over the content of The Tattler" (Defs Mem of Law, at 17), when, in fact, that question goes to the heart of the inquiry into the extent of The Tattler's First Amendment protections. Eileen Bach, The Tattler's advisor from 1992-2003, stated that the faculty advisor worked alongside the students, and made suggestions, with the aim of reaching a mutually agreeable decision. However, the final decisions about the content of The Tattler were made by the editorial staff and, ultimately, the editor-in-

chief (Bach Aff. ¶8). Only in cases involving articles that were libelous or obscene within the meaning of the law did the faculty advisor, subject to review by the principal, have the final say (*id.*). Stephenie Vinch, The Tattler's advisor at the time the disputed guidelines were promulgated, testified that she "felt" that she had the right to make final decisions with respect to The Tattler's content (Schlather Aff. Ex. D, at 45). The fact that she "felt" that she had the right to prevent the publication of the last Tattler issue of the 2003-2004 school year, and the cartoon intended for the February issue does not make it so and, in fact, is the very reason that this action is now before this Court.

**B. EVEN IF THE TATTLER WERE A "HAZELWOOD" PAPER, DEFENDANTS' ACTIONS WOULD NEVERTHELESS HAVE VIOLATED THE FIRST AMENDMENT.**

Under Hazelwood, a school may regulate student speech only to the extent that such regulation serves a legitimate pedagogical concern; however, Hazelwood does not define what constitutes such a legitimate pedagogical concern, stating only that "when the decision to censor a school-sponsored publication \* \* \* has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' ibid., as to require judicial intervention to protect students' constitutional rights." Hazelwood, 484 U.S. at 273. In Hazelwood, the "legitimate pedagogical concern" appear to have been the principal's conclusion that the students who had written the censored articles "had not sufficiently mastered those portions of the Journalism II

curriculum that pertained to the treatment of controversial issues and personal attacks." Id. at 276. Such concerns of curriculum mastery are not implicated in the case before this Court.

Instead, defendants contend that publication of the cartoon at issue, accompanying an article about the ICSD's health education program, would have given the impression "that sex was not a serious subject in ICSD schools and that the District was promoting recreational or irresponsible sex among school-aged children." This assertion is baseless. The accompanying article (Schlather Aff. Ex. I, at 6) is a serious examination of the sex education curriculum, referencing the statement of an IHS health teacher that sex education is "designed to inform the students of the risks associated with certain behaviors" and to "encourage the students to make decisions that are in the best interest of their health." The article concludes with a statement that "[t]he overall societal effort to reduce teen sexual activity seems to be paying off." Id. Defendant Pastel's statement in her affidavit that The Tattler was thereby sending an "inconsistent" message about sex that "would interfere with the District's health curriculum which educates students that sexual relations are to be taken seriously" has no reasonable basis and appears to have been crafted for the express purpose of articulating, after the fact, an allegedly legitimate pedagogical concern to justify its constitutionally offensive conduct.

Defendants make the further assertion that ICSD's view that "the Faculty Advisor must have final editorial control over The Tattler" constitutes a legitimate pedagogical concern is entirely unsupported, either in fact or law.

The final pedagogical concern mooted by defendants is the need to protect the students from "lewd, vulgar and obscene" material. As discussed supra, the Second Circuit in Guiles arguably erred in applying the analysis of Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986), to images and printed words, where Fraser explicitly restricts its holding to "the authority that high school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly," stemming from the Court's prior recognition of "an interest in protecting minors from exposure to vulgar and offensive spoken language." Id. at 684. Moreover, even Guiles reiterated that Fraser itself indicated that its rule applies "'to the manner of speech,' i.e., the offensiveness of its form, but not the speech's content." Guiles, 461 F.3d at 328. Because what is at issue here is the content of The Tattler, Fraser and Guiles are inapplicable, and defendants invoke no other authority.

However, because the Supreme Court has elsewhere recognized the legitimacy of regulations protecting minors from certain sexually oriented materials, including the written word (see, e.g., Ginsberg v. New York, 390 U.S. 629, 639-641 [1968] [upholding state statute banning sale to minors of sexually oriented materials]), even though defendants do not make this argument, the question must be addressed whether the cartoon at issue was, in fact, obscene.

To begin, school officials "do [not] have limitless discretion to apply their own notions of indecency" to student speech. Thomas v Board of Education, Granville Central School District, 607 F.2d 1043, 1057 (2d Cir. 1979). Whether Stephenie Vinch, or defendants Pastel and Wilson, viewed the

cartoon at issue as "obscene," or "lewd" or "indecent" does not make it so. Indeed, "obscene" has a particularized legal definition, and nothing offered by defendants remotely allows that definition to be applied to the cartoon at issue.

If it were assumed that the Fraser standards were applicable -- although they are not -- the cartoon must be assessed to determine whether it was lewd, vulgar, or indecent. In Guiles, the Second Circuit referenced the definitions given in Merriam Webster's Third New International Dictionary, defining "(a) 'lewd' as 'inciting to sensual desire or imagination,' (b) 'vulgar' as 'lewd, obscene, or profane in expression,' and '(c) 'indecent' as 'being or tending to be obscene.'" Guiles, 461 F.3d at 327. A review of the cartoon at issue, with its abstract stick figures, leads to the conclusion that it is none of these things. At the most, defendants' assertion that it is creates an unresolved issue of material fact.

Fraser also permits the regulation of speech that is "plainly offensive," again without defining the term. The Second Circuit in Guiles concluded, after a review of the court decisions that have implemented Fraser, that the term is synonymous with and "part and parcel of speech that is lewd, vulgar, and indecent-meaning speech that is something less than obscene but related to that concept." Id. at 328. Again, nothing offered by defendants supports the conclusion that the cartoon at issue is "plainly offensive." As the Second Circuit also noted, that phrase "cannot be so broad as to be triggered whenever a school decides a student's expression conflicts with its 'educational mission' or claims a legitimate pedagogical concern." Id. at 330. Such a "decision" is the sum total of what defendants offer here.

There is no constitutionally acceptable basis for defendants' censorship of The Tattler's content.

**POINT TWO**  
**DEFENDANTS ADDITIONALLY VIOLATED PLAINTIFFS' FIRST**  
**AMENDMENT RIGHTS BY DENYING THEM PERMISSION TO DISTRIBUTE**  
**"THE MARCH ISSUE" AT THE HIGH SCHOOL.**

When plaintiffs were prevented from producing the planned March issue because of the lack of a faculty advisor, they produced and financed the publication of an independent newspaper, called "The March Issue" (Ochshorn Aff. ¶4[k]). Although the District's policy allows for the distribution of such publications, providing that

[s]tudents in the District have a right to publish and distribute unofficial or non-school-sponsored newspapers at their own expense and with their own resources \* \* \* The newspaper staff members have sole responsibility for any statements published, and such publications have moral and legal obligations to observe the normal rules for responsible journalism

the school refused to allow plaintiffs to distribute "The March Issue" because it contained the cartoon at issue in this action (Ochshorn Aff. ¶18).

Defendants concede that the District's rules for responsible journalism explicitly prohibit only "the use of libelous statements and obscenities." As discussed above, defendants do not have unlimited discretion to apply their own definition of obscenity to student speech, and their refusal to allow the distribution of "The March Issue" on the basis that it contained the cartoon at

issue raises the same unresolved issue of material fact as did their original censure of that cartoon.

(  
**POINT THREE**

**DEFENDANTS PASTEL, RUSSELL AND WILSON ARE NOT  
ENTITLED TO QUALIFIED IMMUNITY.**

The doctrine of qualified immunity gives government employees a shield from personal liability for damages incurred through their performance of discretionary official functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (Harlow v. Fitzgerald, 457 U.S. 800, 818-819 [1982]), or if it were objectively reasonable for them to believe that their acts did not violate those rights. Oliveira v. Mayer, 23 F.3d 642, 648 (2d Cir. 1994), cert. denied 513 U.S. 1076 (1995).

The Second Circuit has frequently reiterated those considerations particularly involved in assessing a claim of qualified immunity:

(1) whether the right in question was defined with "reasonable specificity;" (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant would have understood that his or her acts were unlawful.

Back v. Hastings-on-Hudson Union Free School District, 365 F.3d 107, 129-130 (2d Cir. 2004). Unlike the the first two criteria, the third consideration "has its principal focus on the particular facts of the case." Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987). And, the availability of the defense

"generally turns on the objective legal reasonableness of the action."  
Anderson v. Creighton, 483 U.S. 635 (1986).

The constitutional right of high school students to the protections of the First Amendment is well-established under both Supreme Court and Second Circuit precedent. See, e.g., Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Guiles v. Marineau, 461 F.3d 320, 324 (2d Cir. 2006). It is also well-established that the right of students to free expression in a public forum may not be regulated unless that free expression would lead to "substantial disruption of or material interference with school activities." Tinker, supra, at 513-514.

Accordingly, what is at issue here is the reasonableness of defendants' actions. Defendants point to the statement of the Second Circuit in Johnson v. Newburgh Enlarged School District, 239 F.3d 246, 252 (2d Cir. 2001) that, in considering whether a right is clearly established, the court should consider not what "a lawyer would learn or intuit from researching case law, but what a reasonable person in [the government actor's] position should know about the appropriateness of his conduct under federal law." Here, however, defendants themselves concede that they had consulted their legal counsel when drawing up the guidelines -- and have waived any question of privilege by releasing to plaintiffs and their counsel a set of the proposed guidelines (Schlather Aff. ¶5) -- and therefore a question of material fact exists whether defendants were aware of the distinction between a "Tinker newspaper" and a "Hazelwood newspaper" and whether it was reasonable for them to have concluded, under the existing circumstances, that The Tattler was not entitled to Tinker status. Accordingly, defendants are not entitled to qualified immunity as a matter of

law, because of these unresolved factual questions concerning the reasonableness of their conduct. See, e.g., Kontokosta v. Village of Greenports, 1991 WL 206296 (S.D.N.Y. 1991).

Finally, even if the Court were to conclude that these defendants were entitled to qualified immunity, qualified immunity "shields the defendants only from claims for monetary damages and does not bar actions for declaratory and injunctive relief." Adler v Pataki, 185 F.3d 35, 48 (2d Cir. 1999). Plaintiffs' equitable causes of actions would in any event remain against these defendants.

**POINT FOUR**  
**PLAINTIFFS' CLAIMS FOR INJUNCTIVE AND DECLARATORY**  
**RELIEF SHOULD NOT BE DISMISSED ON A MOOTNESS GROUND.**

Defendants, in arguing that plaintiffs' claims for injunctive and declaratory relief must be dismissed as moot, as plaintiffs have all graduated from Ithaca High School, conveniently ignore the well-established exception to the mootness doctrine, applicable to claims that are "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911); Roe v. Wade, 410 U.S. 113, 125 (1973). This exception is available where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam).

In federal jurisprudence, an action must be dismissed even if it only becomes moot while appellate review is pending. The editor-in chief of The Tattler is almost invariably a senior, and the editorial board consists primarily of seniors, with some juniors (Bach Aff. ¶6). Thus, the time period available for completing an action challenging the application of the guidelines, including appellate review, would be at most two years. As the course of this litigation has amply demonstrated, this period is far too short to allow for complete litigation of such a complex and contested case, in which the party losing at the trial level is almost certain to seek appellate review.

Thus, plaintiffs' claims for declaratory and injunctive relief meet the first prong of the test.

With respect to the second prong, the practice of The Tattler has been to print articles written by alumni of its editorial board (Ochshorn Aff. ¶4[a]) -- indeed, such an article ("Alumni Advice -- Sex is Fun!" by Jacob Schiffirin) is one of the blocks on which defendants attempt to build their case. Plaintiff Robert Ochshorn, who has already written about this case in The Tattler, has stated his intention to write future articles and opinion pieces for The Tattler about this case, the cartoon, and other aspects of the matter. Since graduation, Ochshorn has taken photographs for The Tattler and has worked on its website. Plaintiff Andrew Alexander has contributed two items to The Tattler since graduating, including one article and one letter to the editor. Plaintiff Trevor Sorrells also has contributed to The Tattler since graduation, including a published article (Ochshorn Aff. ¶8). Apparently, the Ithaca City School District has not sought to censor any additional Tattler material since the conduct underlying this litigation. However, a long line of cases holds

that an action for injunctive relief does not become moot merely because the conduct complained of has terminated, if there is a sufficient possibility of a recurrence that would be barred if an appropriate decree were issued. See, United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 202-204 (1968). In such circumstances, the defendant has the "heavy burden" of making it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Id. at 203.

Such circumstances did not exist in the cases on which defendants rely. In Fox v Board of Trustees of the State Univ. of New York, 42 F.3d 135 (2d Cir. 1994), cert. denied 515 U.S. 1169 (1995), there existed no reasonable possibility that the students, having graduated, would again seek to engage in sales demonstrations in their dormitory rooms. In Cook v. Colgate University, 992 F.2d 17 (2d Cir. 1993), there existed no reasonable possibility that the students who had graduated would again seek to be members of the student women's hockey club. In Board of School Commissioners of Indianapolis v. Jacobs, 420 U.S. 128 (1975), there was no indication that the students, once graduated, could or would attempt to publish in the newspaper of their former school.

Here, however, there exists a reasonable possibility that at least plaintiff Ochshorn, and perhaps other of the plaintiffs, may be subjected to application of the challenged guidelines. See, Doe v. Honig, 484 U.S. 305, 318-321 (1988). A case (or, as here, a cause of action) is not moot where a litigant "faces some likelihood of becoming involved in the same controversy in the future." United States Parole Commission v. Geraghty, 445 U.S. 388, 398 (1982). Defendants here cannot meet the heavy burden imposed by Concentrated

Phosphate and related cases, and plaintiffs' causes of action for declarative and injunctive relief remain viable under the exception to the mootness doctrine.

#### CONCLUSION

For all the foregoing reasons, this Court should issue an Order denying defendants' motion in all respects and granting such other and further relief as to the Court seems just and proper.

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