

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

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 TO. 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.

**PLAINTIFFS' RESPONSE
TO DEFENDANTS'
STATEMENT OF
MATERIAL FACTS
MADE PURSUANT TO
LOCAL RULE 7.1(a)(3)**

**CIV. NO. 5:05-CV-695
(NAM/GDB)**

Pursuant to Local Rule 7.1(a)(3), the plaintiffs respond to the defendants' Statement of Material Facts, setting forth numbered responses in Part I, and setting forth additional disputed material facts in Part II, as follows:

PART I.

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. Admit.

6. Admit.

7. Admit.

8. Admit.

9. Admit.

10. Admit.

11. Admit.

12. Admit.

13. Admit that The Tattler is a newspaper that has been staffed and published by students attending the IHS since 1892, but deny that it is the newspaper of the Ithaca High School to the extent the same implies editorial control by Ithaca High School (Complaint, paragraph 17; Bach Affidavit, paragraphs 2, 3, 4, 5 and 6).

14. Deny (Ochshorn deposition, page 273 [Ochshorn Affidavit, Exhibit A]; Pastel deposition, pages 5-6; [Schlather Affidavit, Exhibit A]; Russell deposition, page 38 [Schlather Affidavit, Exhibit B]; Bach Affidavit, paragraphs 2, 3, 4, 5, 6 and 11).

15. Deny (Ochshorn deposition, pages 47-48, 154 [Ochshorn Affidavit, Exhibit A]; Ochshorn Affidavit, paragraph 9; Bach Affidavit, paragraph 10 and 11; deposition exhibit 96, question 7 [Schlather Affidavit, Exhibit T]).

16. Admit that The Tattler has had a faculty advisor generally since at least 1979, but deny that it had a faculty advisor between February and May of 2005 (Ochshorn Affidavit, paragraph 11; Complaint, paragraphs 34 and 36).

17. Admit that a teacher at the IHS traditionally serves as faculty advisor to The Tattler, but deny that the faculty advisor oversees production and provides teaching and guidance beyond

general advice (Teukolsky deposition, pages 20-24 [Schlather Affidavit, Exhibit E]; Vinch e-mail Discovery Document #D00599 [Schlather Affidavit, Exhibit W]).

18. Admit.

19. Admit.

20. Admit.

21. Admit.

22. Admit.

23. Admit that Eileen Bach served as The Tattler's faculty advisor until June, 2003, but deny that she started in 1993; she started in 1992 (Bach Affidavit, paragraph 2).

24. Admit that the ICSD has provided some funding for attendance at student journalism conferences, but deny that the ICSD has provided anything more than partial funding for some of such conferences (Bach Affidavit, paragraph 10; Ochshorn Affidavit, paragraph 10).

25. Admit.

26. Admit.

27. Admit that the ICSD provides The Tattler office with some computer equipment, a phone, a free phone line, internet access, an access code to a district photocopier, and some office supplies and furniture, but otherwise deny the same (Ochshorn Affidavit, paragraphs 4[d] and 9 ; Alexander deposition, page 27 [Schlather Affidavit, Exhibit E]).

28. Admit that students are permitted to work on The Tattler during some school hours, provided that the same does not conflict with other school commitments (e.g. attending classes), and therefore deny to that extent (Ochshorn Affidavit, paragraphs 4[e] and 12; Alexander deposition, page 15 [Schlather Affidavit, Exhibit G]).

29. Admit.

30. Admit.
31. Deny (Deposition Exhibit 6 [Ochshorn Affidavit, Exhibit I]; Ochshorn Deposition, pages 138-142 [Ochshorn Affidavit, Exhibit A]).
32. Deny as not a relevant, material fact.
33. Admit that Vinch cancelled the June, 2004 issue of The Tattler, but deny the balance as not a material fact.
34. Admit, though subject to correction of the typographical error (June, 2004).
35. Admit.
36. Admit.
37. Admit.
38. Admit.
39. Admit.
40. Admit.
41. Deny (Discovery Document #00440-441 [Schlather Affidavit, Exhibit V]).
42. Deny (Discovery Document #00440-441 [Schlather Affidavit, Exhibit V]).
43. Admit that The Tattler submitted a climate survey for approval, but deny that the same was a "revised survey" (Discovery Document #00440-441 [Schlather Affidavit, Exhibit V]).
44. Admit that The Tattler was granted permission to administer a climate survey, but deny that the same was a "revised faculty survey" (Discovery Document #00440-441 [Schlather Affidavit, Exhibit V]).

45. Admit that the results of the climate survey of the faculty were published in the December 8, 2004 issue of the The Tattler, denying that the same was a "revised survey" (Discovery Document #00440-441 [Schlather Affidavit, Exhibit V]).

46. Deny (Ochshorn Affidavit, paragraphs 4[g], 4[h], 4[i], 4[j], 5).

47. Admit.

48. Admit that for each relevant issue of The Tattler, Ms. Vinch was given a proof set for her comment prior to the publication, but deny the balance. (Vinch Deposition, page 54 [Schlather Affidavit, Exhibit D]; Discovery Document # D00599 [Schlather Affidavit, Exhibit W]; Deposition Exhibit 62 and related deposition of Vinch, pages 79-80 [Schlather Affidavit, Exhibit M and Exhibit D]).

49. Admit that upon reviewing the proof set of the January 5, 2005 issue of The Tattler, Ms. Vinch saw a cartoon depicting content more fully set forth in the cartoon itself, but deny the balance (Deposition Exhibit 20, page 11 and related deposition of Vinch, pages 54, 65-67 [Schlather Affidavit, Exhibit H and Exhibit D]).

50. Admit that the cartoon included in the proof set of the January 5, 2005 issue of The Tattler was not the first cartoon created for the article, but deny the balance (Ochshorn Affidavit, paragraph 14).

51. Admit that the first cartoon created for the article depicted content more fully set forth in the cartoon itself, but deny the balance. (Deposition Exhibit 21 and related Ochshorn deposition, pages 233-235 [Ochshorn Affidavit, Exhibits A and B]).

52. Admit.

53. Admit.

54. Admit.

55. Admit.

56. Deny. (compare Deposition Exhibit 21 to Deposition Exhibit 20[page11], see above).

57. Admit, subject to correction that Shiffrin was a college sophomore.

58. Admit.

59. Deny. (Vinch Deposition, pages 69-70, 96-97 [Schlather Affidavit, Exhibit D]; Ochshorn Deposition, pages 228-232 [Ochshorn Affidavit, Exhibit A]).

60. Admit that Ms. Vinch crossed out the article “Alumni Advice: Sex is Fun!” and the cartoon on her proof set but deny the balance of the statement as self-serving and not a material fact, and also as inaccurate both in fact and in law. (Deposition Exhibit 20, page 11 and related Vinch deposition, pages 61, 65-66, 69, 106-110 [Schlather Affidavit, Exhibits H and D]).

61. Admit.

62. Admit.

63. Admit.

64. Admit.

65. Admit that on January 10, 2005, ICSD became aware that two student reporters were conducting an investigation of academic dishonesty and plagiarism for a future article, but otherwise deny. (Ochshorn Affidavit, paragraph 16 and related Exhibit F; Deposition Exhibit 92 and related Wilson deposition, pages 93-97 [Schlather Affidavit, Exhibits S and C]).

66. Deny. (Ochshorn Affidavit, paragraph 16 and attached Exhibit F).

67. Admit subject to explanation (Ochshorn Affidavit, paragraph 16 and Exhibit F).

68. Deny. (Ochshorn Affidavit, paragraph 16 and Exhibit F).

69. Admit that a student apparently was disciplined but deny the balance (Ochshorn Affidavit, paragraph 16 and Exhibit F).

70. Admit.

71. Admit.

72. Admit.

73. Admit.

74. Admit.

75. Deny. (Vinch Deposition, pages 21-24, 27 [Schlather Affidavit, Exhibit D]; Russell Deposition, pages 6-7 [Schlather Affidavit, Exhibit B]).

76. Admit that Ms. Vinch provided a draft of guidelines, the content of which is set forth in the draft itself, but otherwise denies the statement as inaccurate or not a material fact.

77. Admit that ICSD's counsel Bond, Schoeneck & King, PLLC was involved at some level in creating the written guidelines, but deny the balance as incomplete or not a material fact. (Russell Deposition, pages 14-17, 31-32, 36-37, 127-132 [Schlather Affidavit, Exhibit B]).

78. Deny. (Teukolsky Deposition, pages 18-20, 60-61 [Schlather Affidavit, Exhibit E]; Vinch Deposition, pages 48-50 [Schlather Affidavit, Exhibit D]; Deposition Exhibit 91 and related Wilson deposition, pages 82-85 [Schlather Affidavit, Exhibits R and C]).

79. Admit.

80. Admit that in late January 2005, The Tattler's editors sought to publish the cartoon in the February 2005 issue of The Tattler (Deposition Exhibit 20, page 11) that the editors previously had withdrawn from publication (Deposition Exhibit 21 and related Ochshorn deposition testimony, pages 233-235 [Ochshorn Affidavit, Exhibit B and Exhibit A]; Vinch Deposition 69-70 [Schlather Affidavit, Exhibit D]).

81. Admit.

82. Admit.

83. Admit.

84. Admit, but deny that the appeal was limited only to Vinch's decision (Ochshorn Deposition, pages 243-244 [Ochshorn Affidavit, paragraph 17 and Exhibit A and G]).

85. Admit that the February 2, 2005 issue of The Tattler was printed without the cartoon but deny the balance (Deposition Exhibit 22, page 15 [Schlather Affidavit, Exhibit I]).

86. Admit.

87. Admit.

88. Admit.

89. Admit that under the then recently imposed guidelines, The Tattler could not publish another issue because it did not have a faculty advisor, but deny the balance. Also, note that the ICSD School Conduct Manual, Section III (A)(1) applies to "extracurricular activities and clubs", which supports plaintiffs' position in this action. (Deposition Exhibit 33 and related Wilson deposition, pages 54-58 [Schlather Affidavit, Exhibit L and Exhibit C]).

90. Admit with the further correction that it was the student editors of The Tattler.

91. Admit that the March issue contained articles written by The Tattler's editors and staff, but deny the balance. (Deposition Exhibit 25 and related Ochshorn deposition, pages 249-254 [Ochshorn Affidavit, Exhibit C and Exhibit A]; Ochshorn Affidavit, paragraph 4[k]).

92. Admit.

93. Admit.

94. Admit.

95. Admit that Pastel at first denied permission on this additional ground; however, prior to distribution, the editors removed the disputed information and Pastel withdrew her denial on

this basis, maintaining only the basis for denial asserted in paragraph 94. (Ochshorn Deposition, pages 257-262 [Ochshorn Affidavit, Exhibit A]).

96. Admit to the extent set forth in letter itself (Deposition Exhibit 29 and related Ochshorn deposition, pages 259-261 [Ochshorn Affidavit, Exhibit D and Exhibit A]).

97. Admit.

98. Admit.

99. Admit that on March 9, 2005, Pastel sent a letter denying The Tattler's appeal on both grounds as more fully set forth in the letter (Deposition Exhibit 31 and related Ochshorn deposition, page 263); [Ochshorn Affidavit, Exhibits E and A; Schlather Affidavit, Exhibit K]).

100. Admit.

101. Admit.

102. Admit.

103. Admit.

104. Admit.

105. Admit.

106. Admit.

107. Admit.

108. Admit.

109. Admit.

110. Admit.

111. Deny. Though the guidelines were in place, Teukolsky chose not to enforce them as written (Teukolsky Deposition, pages 18-24 [Schlather Affidavit, Exhibit E]).

112. Admit.

113. Admit.

114. Admit.

115. Deny as stated and as not a material fact. (Ochshorn Deposition, pages 66 and 70-78 [Ochshorn Affidavit, Exhibit A]).

116. Deny. (Ochshorn Deposition, page 66, 70-78 [Ochshorn Affidavit, Exhibit A]).

117. Admit that the parents of the minor members of the 2005-2006 Tattler Editorial Board declined to allow their agreeable students to join as plaintiffs (Ochshorn Deposition, pages 66 and 70-78 [Ochshorn Affidavit, Exhibit A]).

118. Agree that Ms. Vinch spoke by telephone with Ms. Bach but deny the balance (Vinch Deposition, pages 67-68, 114 [Schlather Affidavit, Exhibit D]).

119. Deny. (Vinch Deposition, page 114 [Schlather Affidavit, Exhibit D]).

120. Deny both factually and as not a material fact (Deposition Exhibit 31 and related Pastel deposition, page 43 [Schlather Affidavit, Exhibits A and K]).

121. Deny both factually and as not a material fact (Deposition Exhibit 31 and related Pastel deposition, page 43 [Schlather Affidavit, Exhibits A and K]).

122. Deny both factually and as not a material fact (Deposition Exhibit 31 and related Pastel deposition, page 43 [Schlather Affidavit, Exhibits A and K]).

123. Deny. This is hearsay and not a statement of material fact.

124. Deny. This is hearsay and not a statement of material fact.

125. Deny. This is hearsay and not a statement of material fact.

126. Deny. This is hearsay and not a statement of material fact.

127. Admit, noting that www.ihstattler.com is a web page not an email address that was hosted off ICSD grounds by Light Link Internet through a deal arranged by student editors (Ochshorn Affidavit, paragraphs 4[e] and 12).

128. Deny (Bach Affidavit, paragraphs 3, 4 and 5; Ochshorn Affidavit, paragraph 4[b]).

129. Admit.

130. Admit as a partial quote.

131. Admit.

132. Deny as out of context and not a material fact (Bach Affidavit, paragraph 9).

133. Deny as out of context and not a material fact (Bach Affidavit, paragraphs 9 and 11).

134. Admit that very occasionally some editors of The Tattler have been given credit for their work on The Tattler, but deny the balance. (Bach Affidavit, paragraph 11; Deposition Exhibit 76 [Schlather Affidavit, Exhibit O]).

135. Admit.

136. Admit that The Tattler has had a faculty advisor generally since at least 1979 (see response to number 16 above), but deny the balance. (see response to number 17 above).

137. Admit that The Tattler provides students at the IHS with an opportunity to be journalistic, but deny the balance (Teukolsky Deposition, pages 18-24 [Schlather Affidavit, Exhibit E]).

138. Deny. The faculty advisor advises (Teukolsky Deposition, pages 18-24 [Schlather Affidavit, Exhibit E]; Bach Affidavit, paragraphs 2, 3, 4, 5, 6, 8, 9 and 11).

139. Deny. This is not a statement of material fact.

140. Deny as out of context and not a material fact (Bach Affidavit, paragraphs 3, 4, 5, 6, 8, 9 and 11).

141. Deny as out of context and not a material fact (Bach Affidavit, paragraphs 3, 4, 5, 6, 8, 9 and 11).

142. Deny as out of context and not a material fact (Bach Affidavit, paragraph 9).

143. Deny as out of context and not a material fact (Bach Affidavit, paragraph 9).

144. Deny. This is not a statement of material fact.

145. Admit.

146. Admit that Ms. Vinch denied publication of the cartoon because she found that the cartoon was obscene and was inappropriate for high school students, but deny the balance (Vinch deposition, pages 65-66 [Schlather Affidavit, Exhibit D]).

147. Admit, but refer to the letter of Wilson for completeness (Deposition Exhibit 23 [Schlather Affidavit, Exhibit J]).

148. Deny as not a statement of material fact; see Wilson letter (Deposition Exhibit 23 [Schlather Affidavit, Exhibit J]).

149. Admit that Superintendent Pastel upheld the decision of Wilson and found the cartoon obscene, but deny the balance referring to Pastel's letter itself, most of which does not constitute material fact (Deposition Exhibit 31 [Schlather Affidavit, Exhibit K]).

150. Deny as not a statement of material fact (see letter, Deposition Exhibit 31 [Schlather Affidavit, Exhibit K]).

151. Deny (Deposition Exhibits 23 and 31 [Schlather Affidavit, Exhibits J and K]; Wilson Deposition, pages 107, 112 [Schlather Affidavit, Exhibit C]; Deposition Exhibit 91 and related Wilson Deposition, pages 82-85 [Schlather Affidavit, Exhibits R and C]; Russell

Deposition, pages 78-79, 148 [Schlather Affidavit, Exhibit B]; Pastel Deposition, pages 50-51 [Schlather Affidavit, Exhibit A]; Deposition Exhibit 66 and discovery document #D-00433 [Schlather Affidavit, Exhibits N and U]).

152. Deny (Deposition Exhibits 78 and 80, and related Teukolsky Deposition, pages 42-55 [Schlather Affidavit, Exhibits P, Q and E]; Ochshorn Affidavit, paragraph 20).

153. Deny (Deposition Exhibits 78 and 80, and related Teukolsky Deposition, pages 42-55 [Schlather Affidavit, Exhibits P, Q and Ed]; Ochshorn Affidavit, paragraph 20).

154. Admit.

155. Admit that the 2004-2005 School Conduct Manual in Section IV(D) 2.18 sets forth in one sentence the duty of students to "observe the normal rules of journalism", but deny the balance, noting that the guidelines at issue herein substantially diminish the student rights incorporated in this policy (Deposition Exhibit 33 [Schlather Affidavit, Exhibit L]; Ochshorn Affidavit, paragraph 4[[j] and Exhibit H).

156. Admit, but deny any implication that this was the extent of the distribution of the paper, noting that it was distributed all over Tompkins County, and further noting that the copies delivered to the Board of Education mailboxes of each middle school and elementary school were for the teachers in those schools (Ellerbrock Deposition, pages 18-21 [Schlather Affidavit, Exhibit F]; Teukolsky Deposition, pages 33-37 [Schlather Affidavit, Exhibit E]; Vinch Deposition, pages 77-78 [Schlather Affidavit, Exhibit D]).

157. Admit.

158. Admit.

159. Admit.

160. Admit.

161. Admit.

162. Admit.

162. (Duplicate) Admit.

163. Admit.

PART II

DISPUTED FACTS

Plaintiffs contend that the following additional material facts are in dispute:

164. The guidelines at issue changed the policy of the School District with respect to student publications, going from the normal rules of journalism ("refrain from use of libelous statements and obscenities") to a system of prior restraint and censorship (Ochshorn Affidavit, paragraph 4[j] and Exhibit H; Deposition Exhibit 33 [Schlather Affidavit, Exhibit L]).

165. The guidelines on their face change the role of the faculty advisor from that of advisor to that of censor, backed by the full power and authority of the Ithaca City School District administration (Ochshorn Affidavit, paragraphs 4[g], 4[j] and 5). Until the guidelines at issue herein were imposed by the Ithaca City School District administration, The Tattler was an independent, open forum newspaper that was widely disseminated and read throughout Tompkins County for over 100 years (Ochshorn Affidavit, paragraphs 4[a], 4[b], 4[c], 4[d], 4[e], 4[f] and 4[i]; Teukolsky Deposition, pages 17-24 [Schlather Affidavit, Exhibit E]).

166. The guidelines at issue herein were imposed by the Ithaca City School District administration in direct response to published articles and editorial opinions that were critical of High School Principal Joseph Wilson, that exposed Principal Wilson to public scrutiny for offensive "Nazi" comments that he had made in a classroom, and that satirized the teaching of sex education in the high school (Ochshorn Affidavit, paragraph 4[i] and 5; Deposition Exhibit

91 and related Wilson Deposition, pages 82-85 [Schlather Affidavit, Exhibits R and C]; Vinch Deposition, pages 65-66 [Schlather Affidavit, Exhibit D]).

167. Because of the defendants' violation of the plaintiffs' constitutional rights, the plaintiffs have been damaged, including loss of constitutional rights, economic loss, non-economic loss, and other damages (Complaint, paragraphs 41, 45, 49; Answer, paragraphs 41, 45, 49).

168. As a result of the defendants' violation of the plaintiffs' constitutional rights herein, the plaintiffs and others will suffer a direct, immediate and ongoing injury to their rights to free speech (Complaint, paragraphs 54 and 57; Answer, paragraphs 54 and 57).

DATED: Ithaca, New York

May 18, 2007

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