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**.**

PLAINTIFF'S AFFIDAVIT

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

STATE OF MASSACHUSETTS)
COUNTY OF MIDDLESEX) ss:

ROBERT OCHSHORN, being duly sworn, deposes and says:

1. I am Robert Ochshorn, one of the plaintiffs in this case, who is identified by the initials “R.O.” I am an adult.

2. I make this affidavit in support of plaintiffs' opposition to the motion of the defendants for summary judgment and related relief.

3. At the time of the events giving rise to this lawsuit, I was the Editor-in-Chief of The Tattler.

4. The sources of such information and bases for such belief being my review of records, including available archival records, my conversations with other knowledgeable persons, and my own personal experience, the following are relevant facts pertaining to The Tattler:

(a) The Tattler is a newspaper staffed and published by students at Ithaca High School. It was first published on December 1, 1892, and has been published almost continuously since then. Historically, it has been produced largely by Ithaca High School students with occasional contributions and support from Ithaca High School Alumni, other non-IHS students and non-high school community members in the Ithaca area and beyond.

(b) The Tattler is an independent, student run newspaper that has functioned as an open forum for students and others. Historically, the paper has invited all members of the community to submit opinion pieces and letters to its Student Editorial Board, responsibly noting that “These submissions do not necessarily reflect the views of The Tattler editorial staff.” Indeed, the editorial page historically has contained one or another version of the following: "The IHS Tattler, as an open forum, invites submissions of opinion pieces and letters to the editor from all members of the community." (Vinch Affidavit, Exhibit D, p. 3 of 24; Schlather Affidavit, Exhibit I.)

(c) Traditionally, decisions concerning publication and content of The Tattler have been made by the Student Editorial Board of The Tattler in consultation with the faculty advisor. The student editors of The Tattler, with the advice of the faculty advisor, have exercised final control over editorial and content decisions, including the selection and editing of articles, cartoons and other submissions.

(d) Over the past 15 years, especially during the period when Ms. Eileen Bach was the faculty advisor (1992-2003), The Tattler has increased from 2-4 issues per year to 8-10 issues per year. In 2004-2005 there were approximately 3000 copies of each issue published, with roughly one-half of those copies distributed throughout the Ithaca area community (other than on ICSD grounds). These distribution outlets include grocery stores, convenience stores, coffee shops, news stands, and other places generally frequented by the public in the Ithaca area. Typically, the paper’s content includes stories about Ithaca High School, stories about the Ithaca City School District and its Board of Education, stories about and reviews of local restaurants and other entertainment venues, stories about local events and news, and stories and articles about other matters not directly related to Ithaca High School.

(e) The Tattler is not produced as part of the educational curriculum at Ithaca High School. It is a volunteer extracurricular activity. Typically, student staff work on the paper during non-school hours, during school hours other than class time, and extensively during evening and weekend hours. Typically, student staff use their own computers and their own internet access and resources in investigating, writing and otherwise creating the stories and articles for the paper.

(f) Prior to the instant controversy involving the guidelines at issue herein, The Tattler has published controversial articles on difficult issues and has taken controversial stances over the years, with no substantial objection by the Ithaca City School District (ICSD) administration or the Ithaca High School (IHS) administration.

(g) On or about January 19, 2005, Joseph Wilson, as new principal of Ithaca High School, and the ICSD, imposed the guidelines at issue herein on The Tattler and its staff. Among other things, these guidelines provide for pre-publication review, approval and censorship by the faculty advisor, regardless of the judgment and determination of the editorial board of the paper. These guidelines dramatically restrict the independent and open forum nature of The Tattler. These guidelines attempt to change the essential nature of The Tattler from an independent instrument of free journalistic expression protected by the First Amendment to an "Ithaca High School sponsored publication of the Ithaca City School District" existing for pedagogical purposes only and bereft of all constitutional protections.

(h) The guidelines at issue apparently were generated during a two week period in January 2005. The first draft of the guidelines was produced by Stephenie Vinch, then faculty advisor to the paper. According to administration officials (Dr. Russell, Principal Wilson and Stephenie Vinch), that draft later was revised by these same administrators, with some claimed input from the district's attorneys, during the ten-day period January 7, 2005 through January 17, 2005. No students were consulted with respect to the preparation of these guidelines. No guidelines were reviewed from other schools or sources. No research was conducted by any administrator in the ICSD in connection with the writing of these guidelines. No prior faculty advisor (e.g. Eileen Bach) was consulted. The Student Press Law Center (the only national organization dedicated to student media) was not consulted. The guidelines are dated January 19, 2005 and were distributed to The Tattler Editorial Board and staff on January 21, 2005. They did not reflect the past and then current practices and procedures of The Tattler operation.

(i) Prior to the creation of these guidelines, The Tattler had published journalistically sound articles that were controversial and/or critical of

Principal Wilson, including: one, published under the headline “Wilson’s “Food Nazi” Remark Draws Ire, Eating Remains Controversial,” describing an incident in which Wilson addressed the issue of students eating in class, employing such locution as “Food Nazi”, “Food Gas Chambers”, and “Mini Nazis”; two, a review of a local restaurant entitled “Ralph’s Ribs: Meh", employing the words "Colla Greens” and “Pimpin 'Cane”; three, a group of three articles published under the header “Academic Dishonesty at IHS”; four, an article reporting the results of a student survey to the effect that two-thirds of the student body was not happy with Wilson’s performance as principal; and five, an October editorial and related cartoon critical of Wilson.

(j) The 2004-2005 School Conduct Manual sets forth in one sentence the duty of students to "observe the normal rules of journalism" and "in particular refrain from use of libelous statements and obscenities" in publishing The Tattler (Exhibit H, p. 32 [Section IV(D) 218]). The guidelines at issue herein substantially change and diminish the student rights that are incorporated in this long-standing policy (Deposition Exhibit 33 [Schlather Affidavit, Exhibit L]).

(k) After the guidelines were imposed, The Tattler editorial board decided to resist and to appeal the same. Further, the editorial board decided to continue publishing an independent newspaper which it entitled "The March Issue, The April Issue, and The May Issue." Though these issues were written and produced by The Tattler's editors and staff, the issues contained journalistically sound articles and commentary that would not have been permissible under the newly imposed guidelines. Indeed, the Superintendent refused to allow distribution of The March Issue on school grounds because it contained material that she deemed "obscene", without apparent legal justification for that determination.

5. It is respectfully submitted that the guidelines were created and imposed in direct response to these articles. Indeed, Principal Wilson has testified that he "didn't feel good" about the articles that were critical of him (Schlather Affidavit, Exhibit C, pp. 128-130). Further, he wrote that had the guidelines been in place, he could have “censored” the articles and could have “disciplined” the editorial board of The Tattler (Deposition Exhibit 91 and related Wilson testimony, pages 82-85 [Schlather Affidavit, Exhibit R and Exhibit C, pp. 82-85])..

6. Attached hereto and incorporated herein by reference as Exhibit A are excerpts from the deposition testimony that I provided in this case. These excerpts address many of the

defendants' proposed Statement of Material Facts and are referred to in Plaintiffs' Response to Defendants' Statement of Material Facts submitted herewith.

7. Attached hereto and incorporated herein by reference as designated exhibits are copies of the following several deposition exhibits and discovery documents. These deposition exhibits and discovery documents also are relevant to and respond to the Defendants' Statement of Material Facts, and are referenced accordingly in the Plaintiffs' Response to Defendants' Statement of Material Facts.

Exhibit B	Deposition Exhibit 21 - first McKee cartoon (not used)
Exhibit C	Deposition Exhibit 25 (excerpts) -- The March Issue
Exhibit D	Deposition Exhibit 29 – letter from Ochshorn to Pastel (3/8/05)
Exhibit E	Deposition Exhibit 31—letter from Pastel to Ochshorn (3/9/05)
Exhibit F	E-mail excerpts from Jarrah O'Neill (2/3/07)
Exhibit G	Ochshorn appeal letter to Principal Wilson (1/31/05)
Exhibit H	2004-2005 School Conduct Manual for the ICSD (excerpts)
Exhibit I	Deposition Exhibit 6 - "Personales. . ." ad

8. Though I am no longer a student at Ithaca High School, I still have a relationship with The Tattler. In this regard, I have taken photographs for The Tattler and had one published recently. I also have worked on its website. Further, Andrew Alexander, another plaintiff, has contributed two items to The Tattler since leaving Ithaca High School, including one article and one letter to the editor. And, Trevor Sorrells another adult plaintiff, also has contributed to The Tattler since leaving Ithaca High School, including a published article. I intend to continue my ongoing relationship with The Tattler in the future. I intend to submit to The Tattler for publication in the future articles and opinion pieces about this case and the issues, the cartoon,

and other data giving rise to this case. I am advised by certain of the plaintiffs, and therefore believe it to be true, that they too intend to make further written contributions to The Tattler, including articles and opinion pieces about this case and the underlying issues and cartoon.

9. The money provided to The Tattler by the ICSD covers 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. For example, in 2004-2005, The Tattler published seven issues (not including The March Issue, The April Issue and The May Issue). The printing costs alone for these seven issues totaled $4,882.00. The Tattler staff sold ads to local merchants and generated $4,579.00 in advertising revenue for those seven issues. The ICSD contributed $1,000.00 for the entire year, approximately $300.00 of which was used for outstanding printing bills from 2003. (Exhibit A, pages 47-48.)

10. Similarly, the ICSD has provided only partial support for the attendance of The Tattler's staff and faculty advisor at the Columbia Scholastic Press Association's annual convention at Columbia University in New York City. In 2003-2004, the students paid for their hotel and registration fees; the ICSD paid for the bus transportation. In 2004-2005, the students paid for their own hotel, registration and food expenses; the ICSD again paid for the transportation. This is roughly a 50-50 split of the costs. With respect to later and prior years, I am not aware of the ICSD providing any funding for attendance at any conferences.

11. During the period February-May, 2005, The Tattler did not have a faculty advisor.

12. Approximately one-half of the office furnishings were donated by Tattler staff. All office supplies were bought with Tattler funds, primarily advertising revenue. One of the two computers, dating from circa 2000, had a broken monitor. For the most part, students used their own computers, their own internet access, their own telephones, and their own supplies. The

refrigerator was donated by a local appliance dealership in lieu of an ad sale; the answering machine was donated by the parent of a student editor; a camera was purchased with Tattler funds raised primarily through ad sales, as were two printers and the computer; and numerous other incidental items and furnishings were brought in by staff. Moreover, The Tattler web page is hosted off ICSD grounds by Light Link Internet through a deal arranged by student editors.

13. With respect to the "personales * * * " ad, I refer the court to the ad itself (Exhibit I) and my related deposition testimony (Exhibit A, pp. 138-142).

14. In connection with the article entitled "Alumni Advice: Sex is Fun!", then scheduled for the January 5, 2005 issue of The Tattler, Mr. McKee submitted the proposed cartoon at issue in this case. After discussion with the faculty advisor, Stephenie Vinch, I decided to withhold both the article and the cartoon from the January 5, 2005 issue. Thereafter, the same cartoon was scheduled to be printed as part of a center spread coverage of love and sex education at Ithaca High School in the February 2005 issue. Only after this action was commenced did the ICSD learn that Mr. McKee had submitted an earlier cartoon to accompany the proposed "Alumni Advice: Sex is Fun!" article. That earlier cartoon never made it to the proof set that was reviewed by Stephenie Vinch. The decision to not publish the earlier cartoon was made by me after consultation with some of the other student editors. I refer the court to the earlier cartoon itself and my related deposition testimony (Exhibit A, pp. 233-235; Exhibit B).

15. With respect to the submission of proofs to the faculty advisor, including Stephenie Vinch, prior to publication, the markings by Ms. Vinch and other faculty advisors were advisory and not determinative. Specifically, as noted above, I made the final decision that the article entitled "Alumni Advice: Sex is Fun!" and related cartoon would not be included in the January 5, 2005 issue of The Tattler. Before that decision, Ms. Vinch and I discussed the issue, including

her opposition to the article and cartoon. However, her opposition was not a prohibition. Because February was Valentine's Day month, and because we had enough other interesting articles in the January issue, I decided that the cartoon and perhaps the article would be more appropriate in the February center spread on love. So, I decided that we would just revisit the whole thing the following month and so advised Ms. Vinch (Exhibit A, pp. 228-232; Vinch Affidavit, Exhibit D, pp. 2 of 24 and 12 of 24).

16. With respect to the article on academic dishonesty, the following is relevant:

> At a November meeting for the December 2004 Tattler, I mentioned that the January edition's center spread would be about cheating. The editors and I discussed a few article ideas, including one in which a writer would submit a plagiarized assignment, hopefully taken from the internet. The writer also honestly would do the same assignment on his/her own and postmark the honest version on the due date, thereby ultimately mitigating a claim of cheating. Jarrah O'Neill agreed to take the assignment and has given a full account of his actions in Exhibit F.

This investigation was conducted in accordance with the Code of Ethics of the Society of Professional Journalists. It was (a) an investigation of the quality of on-line story plagiarizing sites, a topic that has been covered extensively in the mainstream press; and (b) an investigation of the ability of teachers to detect plagiarism -- an indicator of teacher quality and not as a "how to" guide. Moreover, the assigned journalist was/is an extremely good student, with no need or desire to plagiarize. Mr. O'Neill confirms the foregoing account (Exhibit F).

17. As noted in my appeal letter to Principal Wilson dated January 31, 2005, the appeal to Principal Wilson was based on two grounds, to wit: (1) the student editors had the right to print the cartoon at issue under any standard because it was not obscene and there were no other legal grounds for its disqualification; and (2) the guidelines under which the cartoon had been censored were illegal. (Exhibit A, pp. 243-244; Exhibit G.)

18. A copy of excerpts of The March Issue is attached hereto and incorporated herein by reference as Exhibit C. My prior testimony concerning the genesis of The March Issue, its content and related matters, is set forth in Exhibit A, pp. 249-254, all of which is incorporated herein by reference. When we sought to distribute The March Issue on ICSD grounds, Superintendent Pastel denied the same on two grounds, to wit: (1) because it contained the same cartoon that had been banned from the February issue of The Tattler that Superintendent Pastel had determined was "obscene"; and (2) that The March Issue, as proposed, contained "personal health information" about a teacher. I caused the immediate removal of the personal health information prior to any significant distribution of the paper, and caused the paper to be reprinted. Nevertheless, Superintendent Pastel persisted in denying permission to distribute The March Issue on ICSD grounds because of her claim that the cartoon was "obscene". (Exhibit A, pp. 257-262; Vinch Affidavit, Exhibit D, p. 12 of 24; also, see Deposition Exhibit 31 [Schlather Affidavit, Exhibit K] and my related deposition testimony at Exhibit A, p. 263.)

19. With respect to my contacts with successor editors of The Tattler in connection with getting involved in this lawsuit, I refer the court to my deposition testimony at Exhibit A, pp. 66, 70-78. Some students had expressed interest in joining the lawsuit; but, as it turned out, their parents declined to allow them to become parties because the parents apparently were concerned about possible retaliation on the part of the ICSD administration.

20. The guidelines for The Tattler were not revised in May of 2005. Indeed, as shown in the testimony of Roselyn Teukolsky, the guidelines that were attached to her appointment letter dated May 10, 2005 and signed May 11, 2005 were the same guidelines that were imposed on The Tattler staff by the ICSD administration in January of 2005 (Schlather Affidavit, Exhibits P, Q and E, pp. 42-55). I believe that the version of the guidelines that are dated May 19, 2005 and

referred to in the affidavits of Wilson and Russell represent a proposed version of the guidelines prepared by counsel at Bond, Schoeneck & King in connection with their negotiations with our attorney, Raymond M. Schlather, prior to the commencement of this litigation. The Bond, Schoeneck & King guidelines were developed in response to guidelines that the student editors had proposed based on suggestions made by the Student Press Law Center. Neither the students' proposed guidelines, nor the Bond, Schoeneck & King guidelines, ever were adopted by the ICSD administration (also, see Schlather Affidavit, paragraph 5 and Exhibit X).

21. Submitted herewith as part of the plaintiffs' opposition to the within motion are the Plaintiffs' Responses to the Defendants' Statement of Material Facts, including Plaintiffs' Statement of Additional Disputed Facts. As is evident from that submission and related documentation and testimony, there are numerous issues of material fact that require a trial of this action. The plaintiffs oppose defendants' motion in all respects. It is respectfully submitted that the motion should be denied.

WHEREFORE, the plaintiffs respectfully pray that this court deny the defendants' motion in all respects and grant such other and further relief which to the court is just and proper, including costs and counsel fees.

_____
s/ROBERT OCHSHORN

Sworn to before me this_____
day of May, 2007.

_____
Notary Public