



February 15, 2005

Robert Ochshorn
Editor in Chief, *The Tattler*
1401 North Cayuga Street
Ithaca, NY 14850

Dear Mr. Ochshorn:

Thank you for alerting us to the situation at Ithaca High School. As I understand it, *The IHS Tattler* planned to publish an article on the way sex was being taught in health classes. Accompanying the article was an editorial cartoon depicting a teacher pointing to a pull-down chart that shows tangled-together stick figures in what could be sexual positions. I have received, and have reviewed, a copy of that editorial cartoon. I further understand that when the *Tattler* issue in question was submitted for publication, your adviser declared the cartoon was obscene and censored it. That decision was further upheld by your principal, who added that the cartoon was "not suitable for immature audiences" and "inconsistent with the educational mission and concerns of the district."

It is also my understanding that prior to this incident, *The Tattler's* editors have made the final content decisions during your tenure and, according to your former adviser, for years earlier. *The Tattler* is also extra-curricular, although at some points in the past, various students have received individual credit for their participation.

Based on these facts, the documentation you have provided, and our conversations, you have asked for our opinion regarding the constitutional validity of the university's actions. The Student Press Law Center is the only legal assistance agency in the country devoted exclusively to educating high school and college journalists on the latest developments in the law affecting the student press. Having provided assistance to over 2,000 student journalists and educators last year alone, we are happy to help.

The actions of Ithaca High School appear to be in violation of the First and Fourteenth Amendments. While the *Tinker* standard is applicable to your publication, the school's actions are invalid under either the *Tinker* or *Hazelwood* standard. Additionally, the cartoon is not legally obscene as to minors.

The first question to answer in evaluating the actions of the administrators is whether or not *The Tattler* has been opened as a forum for student expression. Under the United States Supreme Court decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a student publication can become a forum either by policy or by practice. *Id.* at 627 (citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983)); see also *Romano v. Harrington*, 725 F. Supp. 687 (E.D.N.Y. 1989) (recognizing that some high school newspapers are forums entitled to greater First Amendment protection). In your case, *The Tattler* is operated entirely as an extra-curricular activity; one Federal court interpreting New York law found that extracurricular newspapers in New York are considered fora and are subject to a higher standard of constitutional protection articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). *Romano*, 725 F. Supp. at 687.

I understand you have advised your administration of this fact and they have declined to follow *Romano*. Rejecting a particularized court precedent as to the level of rights applicable to student newspapers appears to vitiate any qualified immunity claims the school may have. See *Hope v. Pelzer*, 536 U.S. 730 (2002). Should district officials uphold the decisions of the principal and adviser in light of this fact, the district could be liable for damages under federal civil rights law. 42 U.S.C. § 1983. This would be an especially bizarre choice, considering that the school has satisfied neither the *Tinker* nor the *Hazelwood* standard by its explanation; in effect, the school appears to be violating *Romano* and losing a claim of qualified immunity in order to earn the right to fail the *Hazelwood* standard rather than fail the *Tinker* standard.

The decision to ignore *Romano* is especially bizarre when one considers that *The Tattler* is a forum for student expression under the *Hazelwood* standard alone. As the previous adviser to *The Tattler* has indicated, the publication has operated as a forum for at least ten years, with student editors making the ultimate content decisions. That students have occasionally received credit in the past for participation does not transform the publication itself into one that exists solely for a curricular goal. Schools may choose to give academic credit to students who take courses at a local college, but that does not give the high school control of the college course. Similarly, that students have received credit for participation on *The Tattler* is irrelevant to the publication's purpose. Given

that student editors make the ultimate content decisions and have done so for many years, *Hazelwood's* forum analysis alone indicates *The Tattler* is entitled to the *Tinker* standard. Of course, as *Romano* directly indicates *The Tattler* is entitled to the *Tinker* standard as an extracurricular newspaper in the state of New York, this analysis is primarily illustrative, serving only to show that the rejection of *Romano*, while legally incorrect, does not change the legal landscape.

Under the *Tinker* standard, a school administrator must show that student speech will result in a material and substantial disruption of school activities, or that it invades the rights of others, before the aforementioned speech may be censored or restrained. In interpreting the "material and substantial disruption" standard, a school official's action cannot be based on "undifferentiated fear" or "a mere desire to avoid the unpleasantness that always accompanies an unpopular viewpoint." *Tinker* at 508-09. Lower courts have made it clear that the burden is not met simply upon showing that a story will cause heated controversy, hurt feelings or will "make a school look bad." School officials typically must present demonstrable facts that the material in question will create a serious physical disruption with classroom or other school-related activities. We would add that this is a standard that school officials have rarely been successful in meeting.

In your case, the principal has issued a fiat unilaterally declaring the cartoon in question "obscene," which would be a valid justification for censorship under *Tinker*. He fails to even apply, however, the applicable legal test for obscenity as to minors. Under the test articulated by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 620 (1968), material is obscene when it contains any description or representation of nudity or sexual conduct that:

- (1) predominantly appeals to the prurient, shameful or morbid interest of minors,
- (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, and
- (3) is utterly without redeeming social importance for minors.

All three elements of the test must be met. It is clear that the third portion of the test could never be met; the cartoon is undisputed editorial comment on a state decision (the health class curriculum) that directly impacts minors. Comment on government activity is the "core" speech to be protected under the First Amendment. Even if that were not the case, the cartoon

does not "predominantly appeal to the prurient, shameful, or morbid interest of minors" and is not "patently offensive." It is unsurprising that the principal declined to properly apply the test for obscenity, then, considering that the cartoon met none of the three required elements of that test.

The remaining justifications offered are insufficient under the *Tinker* standard applicable to *The Tattler*; I note, however, that these explanations are insufficient under the *Hazelwood* standard as well. The principal wrote:

"It is our opinion, however, that the cartoons provided sufficient graphic detail, which may potentially force emotionally immature students to be confronted with difficult adult issues prematurely."

This does not even attempt to address the *Hazelwood* standard. To the extent this is true--and there is not a single indication that it is--it is no more likely to "confront" emotionally immature students than either the already published article or the content of the health class itself. The *Hazelwood* standard is not carte blanche to censor whenever, in the principal's "opinion," content has some abstract, unsubstantiated potential to communicate "adult issues;" it permits a school to censor a non-forum newspaper (which this is not) when the school has a justification reasonably related to **legitimate** pedagogical concerns. 484 U.S. at 273. The principal neither alleged nor demonstrated a pedagogical conflict--nor would it help his position if he did so, because *The Tattler* is a forum for student expression, as explained *supra*.

You may wish to make district officials aware of a recent case involving a high school that censored its student newspaper and declared it was subject to the *Hazelwood* standard despite substantial evidence to the contrary. In *Dean v. Utica Community Schools*, 345 F.Supp.2d 799 (E.D. Mich. 2004), Utica High School censored a story on a lawsuit alleging a connection between cancer and diesel fumes from school buses. It was undisputed that the student newspaper in question, *The Arrow*, was curricular and that all participating students received a grade. Nevertheless, the court held not only that *The Arrow* was a limited public forum by practice (just as *The Tattler* is here) but that the school's censorship was equally indefensible under the *Hazelwood* standard. Ithaca High School officials

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should note that Utica High School was not subject to a federal court interpretation of state law that clearly removed any qualified immunity claim, as is the case for Ithaca under the *Romano* case. In effect, Utica lost on a stronger case than the one your principal has put forth.

If school administrators are not aware of these court decisions and the limitations on their ability to censor *The Tattler*, I strongly suggest you share this information with them. We hope that a more thorough understanding of the law will persuade Ithaca High School officials to reconsider their actions, but if the administration refuses to correct its behavior, perhaps a court order will persuade it to do so. Toward that end, the Student Press Law Center will be happy to contact members of our Attorney Referral Network to assist you in finding *pro bono* legal counsel. I can not imagine the school would want to defend a lawsuit that would generate even more media attention for its actions and that the school would inevitably lose.

Please keep the Student Press Law Center updated on any developments in the situation and do not hesitate to contact us if we may be of further assistance.

Yours,

STUDENT PRESS LAW CENTER

A handwritten signature in black ink, appearing to read 'Adam Goldstein', with a long horizontal line extending to the right.

Adam Goldstein, Esq.
New Media Legal Fellow