

**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 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,

**5:05-CV-695
(NAM/GJD)**

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.

APPEARANCES:

OF COUNSEL:

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Norman A. Mordue, Chief U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

Plaintiffs, former students of Ithaca High School (“IHS”), commenced this action against the Ithaca City School District (“ICSD”), the School’s Superintendent Judith C. Pastel, the Assistant Superintendent William Russell and the Principal of IHS, Joseph Wilson (collectively “defendants”) pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. The action stems from defendants’ decisions with regard to the IHS newspaper, *The Tattler* and an independent student newspaper, *The March Issue*. Specifically, plaintiffs claim that defendants’ decision to interfere with the publication of certain material in *The Tattler*, defendants’ decision to apply guidelines to *The Tattler* and defendants’ decision to prohibit the distribution of *The March Issue* on ICSD grounds violated plaintiffs’ First Amendment rights.¹ In the complaint, plaintiffs allege that:

(A) Defendants have not shown that the censored material would have resulted in a material and substantial disruption of school activities or was otherwise subject to censorship within the constraints of the First and Fourteenth Amendments to the United States Constitution. (First Cause of Action).

(B) Defendants’ requirement that plaintiffs submit articles to a faculty advisor for final approval is an unconstitutional prior restraint of plaintiffs’ rights under the First Amendment. (Second Cause of Action).

(C) Defendants’ actions in preventing the distribution of the independent newspaper produced by plaintiffs in March 2005 constituted an unconstitutional prior restraint on freedom of the press. (Third Cause of Action).

(D) Plaintiffs seek a declaration that the 2005 Guidelines’ content restrictions are facially unconstitutional as overbroad, vague, ambiguous and repugnant to the First Amendment. (Fourth Cause of Action).

¹ In January 2005, defendants implemented Guidelines for *The Tattler* Advisors and Editors (“2005 Guidelines”).

(E) Plaintiffs seek to enjoin defendants from implementing the 2005 Guidelines. (Fifth Cause of Action).

On April 13, 2007, defendants filed a motion seeking summary judgment and dismissal of plaintiffs' complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure. On March 24, 2009, this Court issued a Memorandum-Decision and Order awarding defendants partial summary judgment. This Court dismissed plaintiffs' first, second and third causes of action but denied defendants' motion with regard to plaintiffs' fourth and fifth causes of action. The Court also denied defendants' motion for summary judgment on the issue of qualified immunity.

The Court is now presented with two motions. Plaintiffs move to certify this Court's prior decision as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (Dkt. No. 61). In response to plaintiffs' motion, defendants filed an unidentified motion seeking dispositive relief. Defendants failed to adhere to the Local Rules and procedural standards but request that this Court dismiss plaintiffs' fourth and fifth causes of action "as moot".² Upon review of defendants' submission, the Court deems defendants' application as one for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.³ Defendants also argue, in the alternative, that the matter is not ripe for Rule 54(b) certification. (Dkt. No. 63).

² Local Rule 7.1(a)(3) states:

Summary Judgment Motions

Any motion for summary judgment shall contain a Statement of Material Facts. The Statement of Material Facts shall set forth, in numbered paragraphs, each material fact about which the moving party contends there exists no genuine issue. Each fact listed shall set forth a specific citation to the record where the fact is established. The record for purposes of the Statement of Material Facts includes the pleadings, depositions, answers to interrogatories, admissions and affidavits. It does not, however, include attorney's affidavits. Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion.

³ Defendants have filed an answer, therefore a motion under Rule 12(b) is not available. *See* Fed. R. Civ. P. 12(b); *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126-27 (2d Cir. 2001).

BACKGROUND⁴

Familiarity with the facts of this case is assumed based on this Court's previous Memorandum-Decision and Order. *R.O. v. Ithaca City School District*, 05-CV-695, Dkt. No. 52 (Mar. 24, 2009). For the purposes of this motion, the Court briefly addresses the relevant facts and recent developments regarding the issues at hand.

The ICSD School Conduct Manual (A Guide to Student Rights, Responsibilities, and Discipline) for the 2004-2005 academic year provided, in pertinent parts, as follows:

B. First Amendment Rights

The School District has the right to establish reasonable regulations for the exercise of [First Amendment] rights by its students. Some of the specific rights that students have under this amendment and the conditions under which they may exercise these rights are as follows:

6. School Newspapers and Student Publications: Newspaper staff members, contributors, or editors and students have a responsibility to observe the rules for responsible journalism, and, in particular to refrain from libel and obscenity. 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.

School newspapers in the Ithaca City Schools must also permit students who are not members of their staff to have the ability to have their work to be submitted and considered for publication in the school newspapers, particularly in those instances where non-editorial staff opinions differ from those of the editor.

Students in the District have the right to publish and distribute unofficial or non-school-sponsored newspapers on their own and with their own resources. Such publication and distribution does not indicate that the paper is representative of the school. The newspaper staff members have sole responsibility for any statement(s) published, and such publications have moral and legal obligations to observe the normal rules of responsible

⁴ The facts are taken from defendants' submission. Plaintiffs were given an opportunity to reply to defendants' request for dismissal. In that reply, plaintiffs did not contest defendants' factual assertions and further, plaintiffs did not submit any evidence to the contrary.

journalism. Distribution of such papers on school property is subject to the procedures established for literature distribution.

In late December 2004 or early January 2005, *The Tattler* faculty advisor, Stephenie Vinch, reviewed a proof set which included a cartoon created to accompany an article written by a former IHS student entitled “Alumni Advice: Sex is fun!” After reviewing the cartoon, Ms. Vinch deemed the drawing to be obscene and inappropriate for high school students. Ms. Vinch “crossed out” the article and drawing on the proof set and the January 2005 issue of *The Tattler* was printed without the cartoon and article.

On January 21, 2005, Assistant Superintendent William Russell (“Russell”) and IHS Principal Joseph Wilson (“Wilson”) met with Ms. Vinch and the editors of *The Tattler* and provided copies of a one-page document entitled Guidelines for *The Tattler* Advisor and Editors (“the 2005 Guidelines”) (dated January 19, 2005). The relevant sections of the 2005 Guidelines provided as follows:

- *The Tattler* is an Ithaca High School-sponsored publication of the Ithaca City School District (“the District”). *The Tattler* is published to inform the school community about matters of news and interest, to serve as a forum for student views and opinion, and to impart journalist skills to Ithaca High School Students.
- The advisor to *The Tattler* shall read, edit and approve all articles prior to publication. No issue of *The Tattler* may be sent to the printer without final approval of the advisor.
- In a manner that is consistent with the standards established by the Supreme Court in *Tinker* and *Hazelwood*, the advisor has the right to change, edit or remove content that:
 - would substantially interfere with the District’s work or impinge upon the rights of other students; or
 - is inconsistent with the legitimate pedagogical concerns of the District (for example, content that is

ungrammatical, poorly written, inadequately researched, inaccurate, libelous, biased or prejudiced, unethical, vulgar or profane, or is not suitable for immature audiences).

In late January 2005, *The Tattler* editors sought to publish the same cartoon in the February 2005 edition. The staff intended to print the cartoon to accompany a serious article entitled "How is Sex Being Taught In Our Health Class?" Ms. Vinch refused to allow the cartoon to be published in the February 2005 issue. In June 2005, plaintiffs commenced this action.

In July 2008, Deborah Lynn was appointed as the Faculty Advisor for *The Tattler*. Ms. Lynn was reappointed to that position in July 2009 and is expected to serve as the Faculty Advisor through the end of the 2009-2010 school year. Upon receipt of this Court's March 24, 2009 decision, Superintendent Judith Pastel ("Pastel") discussed the findings with the Board of Education. As a result, Pastel decided to implement a new set of Guidelines with the assistance of the attorneys for the Board of Education. The 2009 Guidelines for *The Tattler* provide, in pertinent part:

The Tattler is a school-sponsored student newspaper of the Ithaca High School, and bears the imprimatur of the District.

The Tattler is supervised by a faculty advisor.

The faculty advisor may exercise editorial control of *The Tattler* as set forth in these guidelines.

No issue of *The Tattler* may be sent to the printer without the final approval of the faculty advisor.

The faculty advisor may refuse to approve the following material for publication in *The Tattler*:

1. Material that is obscene.
2. Material that is potentially libelous.

3. Vulgar and lewd speech that would undermine the High School's basic educational mission.
4. Material that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order.
5. Material that the faculty advisor reasonably believes will substantially and materially interfere with school work or discipline.

If the editor-in-chief of *The Tattler* disagrees with any determination of the faculty advisor, the editor-in-chief may present the material to the Superintendent of Schools or his or her designee for review. The Superintendent will complete a review of the article within two school days of its submission and make a determination about whether the content is appropriate for publication under these guidelines.

On July 1, 2009, Donald Mills was hired as the IHS Principal. Pastel provided Mr. Mills with a copy of the 2009 Guidelines and asked him to coordinate the implementation of the 2009 Guidelines and the elimination of the 2005 Guidelines with the Faculty Advisor and all eight members of *The Tattler's* 2009-2010 Editorial Board. On August 21, 2009, Mr. Mills met with Ms. Lynn and *The Tattler* Editorial Board. Mr. Mills distributed the 2009 Guidelines and explained to the Editorial Board that the 2005 Guidelines had been replaced with the 2009 Guidelines.

DISCUSSION

I. Judgment on the Pleadings

In response to plaintiffs' motion for Rule 54(b) certification, defendants argue that plaintiffs' claims for injunctive relief or declaratory relief are moot and therefore, defendants claim that following the dismissal of such claims, this Court's March 24, 2009 Decision and Order would be "final". Therefore, the Court will first address defendants' motion for judgment on the pleadings.

Pursuant to Rule 12(c), judgment on the pleadings is appropriate ‘where material facts are undisputed and where judgment on the merits is possible merely by considering the contents of the pleadings.’ ” *Brown v. Costello*, 1993 WL 276750, at *2 (N.D.N.Y. 1993) (citation omitted). After the pleadings are closed, a motion to dismiss for failure to state a claim is properly brought as a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). *Nieves v. Aldrich*, 2009 WL 3063051, at *1 (N.D.N.Y. 2009) (citing *Magette v. Dalsheim*, 709 F.2d 800, 801 (2d Cir.1983)) (citations omitted); *see also* Fed.R.Civ.P. 12(b), 12(c) and 12(h)(2). The standard for a motion for judgment on the pleadings is identical to that applied to a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). *King v. Am. Airlines, Inc.*, 284 F.3d 352, 356 (2d Cir. 2002). Therefore, the Court accepts as true all of the factual allegations in the complaint and draws inferences from those allegations in the light most favorable to the plaintiff. *See Albright v. Oliver*, 510 U.S. 266, 268 (1994); *see also McEvoy v. Spencer*, 124 F.3d 92, 95 (2d Cir. 1997). Dismissal is proper only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of h[er] claim which would entitle h[er] to relief." *Valmonte v. Bane*, 18 F.3d 992, 998 (2d Cir. 1994) (citation omitted). The Court's role on a motion for judgment on the pleadings “is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof”. *Scott v. J. Anthony Cambece Law Office, P.C.*, 600 F.Supp.2d 479, 483 (E.D.N.Y. 2009) (citing *Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (3d Cir. 1983)). The issue is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims. *Maloney v. Cuomo*, 470 F.Supp.2d 205, 210-11 (E.D.N.Y. 2007) (citing *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995)).

Defendants argue that as a result of the implementation of the 2009 Guidelines and elimination of the 2005 Guidelines, plaintiffs' fourth cause of action for declaratory judgment and plaintiffs' fifth causes of action for injunctive relief have been rendered moot. Defendants have attempted to persuade this Court, via affidavits and a copy of the 2009 Guidelines, that the 2009 Guidelines have been implemented and supersede the 2005 Guidelines. However, the within motion is one for judgment on the pleadings, not summary judgment. Thus, none of the factual or evidentiary submissions by defendants are relevant to the present legal inquiry.⁵ *See Allen v. W.Point-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991) (in adjudicating Rule 12(b)(6) motion, district court must confine its consideration "to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken."). The Court accepts all of plaintiffs' factual allegations as true and draws all inferences in plaintiffs' favor. It is neither necessary nor appropriate for this Court to determine the merits of plaintiffs' claims as the issue on this motion is whether plaintiffs' factual allegations, if established on the trial, would entitle them to some measure of relief. *See Diaz v. Ward*, 437 F.Supp. 678, 682 (D.C.N.Y. 1977). With that principle in mind, defendants' motion for dismissal is denied.

Even if the Court were to address the merits of defendants' motion, defendants incur a heavy burden of persuading the court that the controversy is moot. *See U.S. v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968). The voluntary cessation of allegedly illegal activities will usually render a case moot "if the defendant can demonstrate that: (1) there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events

⁵ The Court, within its discretion, has not opted to convert defendants' motion to dismiss to an application for summary judgment. *See Maloney v. County of Nassau*, 623 F.Supp.2d 277, 287 (E.D.N.Y. 2007).

have completely and irrevocably eradicated the effects of the alleged violation.” *Granite State Outdoor Adver., Inc. v. Town of Orange, Conn.*, 303 F.3d 450, 451-52 (2d Cir. 2002). The Second Circuit has held that a claim for injunctive relief is mooted when, “it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur’ ”. *Tawwab v. Metz*, 554 F.2d 22, 24 (2d Cir. 1977) (during oral argument, the defendant’s attorney provided an official prison document which embodied a change in prison policy) (quoting *Concentrated Phosphate Export Ass’n, Inc.*, 393 U.S. at 203). Constitutional challenges to statutes are routinely found moot when a statute is amended. *Lamar Adver. of Penn, LLC. v. Town of Orchard Park, N.Y.*, 356 F.3d 365, 376 (2d Cir. 2004). However, the Second Circuit has held that a plaintiff’s claim would not be moot if amendments are merely superficial or suffer from similar infirmities. *Lamar Adver. of Penn, LLC.*, 356 F.3d at 378 (the Court reasoned that it must be satisfied that the amendments to the ordinance were sufficiently altered so as to present a substantially different controversy from the one that existed when the suit was filed).

Moreover, a voluntary repeal of a constitutionally repugnant law does not necessarily moot challenges because without a judicial determination of constitutionality, a governing body remains free to reinstate the law at a later date. *Nat’l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 554, n. 2 (2d Cir. 1990) (citations omitted); *see also Ne. Fl. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993) (holding that the plaintiff’s case was not moot because the defendants were not precluded from re-enacting precisely the same provision if the District Court’s judgment was vacated). There are two factors significant in evaluating whether there is a “reasonable expectation” that a defendant will reimplement previous regulations or guidelines: (1) the timing of the amendments; and (2)

whether or not the defendant continues to defend the constitutionality of the former policy. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (the court held that it was left with no assurance that the university would not reimplement its prior policy as the university did not change its sexual harassment policy for more than a year after the commencement of litigation, at the end of discovery, and the university continued to defend the constitutionality of the prior policy); *see also Miller ex rel. Miller v. Penn Manor Sch. Dist.*, 588 F.Supp.2d 606, 628 (E.D. Pa. 2008) (district changed their policy on student expression to delete offending language but would be free to reinstate language absent injunctive relief).

Plaintiffs contend that the enactment of the 2009 Guidelines does not moot plaintiffs' claims that their constitutional rights were violated by the 2005 Guidelines. In the prior Memorandum-Decision and Order, this Court made no findings with regard to the constitutionality of the 2005 Guidelines. This Court held that defendants failed to provide evidence that the 2005 Guidelines were narrowly tailored to serve defendants' interests and pedagogical concerns. Thus, the Court concluded that there were genuine issues of fact with respect to the 2005 Guidelines precluding summary judgment and dismissal of plaintiffs' fourth and fifth causes of action.

The within litigation was commenced by plaintiffs in June 2005. Upon the completion of discovery, defendants filed their dispositive motion in April 2007. The 2009 Guidelines were drafted in late Spring 2009. Although defendants claim that the 2009 Guidelines were developed with, "the express purpose of complying with this Court's March 23, 2009 Decision", defendants do not concede that the 2005 Guidelines were unconstitutional. *Cf. Lamar Advertising of Penn*, 356 F.3d at 377 (the defendants disclaimed, in open court, any intention to ever change the

ordinance back). Based upon the timing of the enactment of the 2009 Guidelines and the fact that defendants do not denounce the 2005 Guidelines, the Court is constrained to find that the alleged violation will not recur absent injunctive relief. The record does not contain sufficient evidence for this Court to “reasonably expect” that defendants would not attempt to re-enact provisions in the 2005 Guidelines.⁶ Based upon the record, defendants have not met the heavy burden of establishing that plaintiffs’ claims are moot. Therefore, defendants’ motion for dismissal is denied.⁷

II. Rule 54(b)

Plaintiffs argue that the decision awarding partial summary judgment to defendants is ripe for an immediate appeal and request certification pursuant to Rule 54(b). Defendants set forth only a cursory argument in opposition to plaintiffs’ application for certification but contend that certification is inappropriate while plaintiffs’ declaratory judgment and injunctive claims are pending.

Rule 54(b) of the Federal Rules of Civil Procedure states as follows:

When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as

⁶ Plaintiffs also claim that the 2009 Guidelines suffer from the same constitutional infirmities as the 2005 Guidelines. Defendants do not assert that the 2009 Guidelines are constitutional but request dismissal based solely upon the fact that the 2009 Guidelines have replaced the 2005 Guidelines. As plaintiffs’ complaint does not challenge the 2009 Guidelines, and plaintiffs do not seek to amend the complaint, an analysis and determination of whether or not the 2009 Guidelines are merely superficial or if they do, in fact, suffer from similar constitutional infirmities, is not properly before this Court. The sole issue before this Court is whether or not plaintiffs’ claims have been mooted by the enactment of the 2009 Guidelines.

⁷ Defendants also argue that plaintiffs’ claims are moot as plaintiffs are no longer students at IHS and thus, they will not be subject to the 2009 Guidelines. However, in the prior Memorandum-Decision and Order, this Court specifically addressed and rejected the same argument. Defendants have not presented any new evidence in furtherance of this claim and therefore, the Court again rejects defendants’ argument and reiterates the prior holding that plaintiffs should be considered as acting on behalf of members of *The Tattler* staff who have a continuing stake in this litigation.

to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

The rule requires that: “(1) multiple claims or multiple parties must be present; (2) at least one claim, or the rights and liabilities of at least one party, must be finally decided within the meaning of 28 U.S.C. § 1291; and (3) the district court must make ‘an express determination that there is no just reason for delay’ and expressly direct the clerk to enter judgment.” *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1091 (2d Cir. 1992). Claims are inappropriate for certification under Rule 54(b) if they are “inherently inseparable” from each other or “inextricably intertwined.” *Ginett*, 962 F.2d at 1096 (internal quotations omitted). The term “inextricably intertwined” refers to claims that are so similar that: (1) the appellate court would necessarily have to reach the merits of one or more of the claims not appealed and/or; (2) the district court’s disposition of one or more of the remaining claims could render the appellate opinion moot. *Id.* (citations omitted).

Notwithstanding the “historic federal policy against piecemeal appeals,” judicial efficiency may require certification in the “infrequent harsh case [where] there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal.” *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002) (citing *Hogan v. Consol. Rail Corp.*, 961 F.2d 1021, 1025 (2d Cir. 1992)). Rule 54(b) “attempts to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in a multiple-party or multiple-claim situations at a time that best serves the needs of the

litigants.” *Cayuga Indian Nation of N.Y. v. Pataki*, 188 F.Supp.2d 223, 237-38 (N.D.N.Y. 2002) (citing *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1241 (10th Cir. 2001)). If the district court certifies a matter ripe for immediate appeal, the certification must be accompanied by a reasoned, even if brief, explanation of its conclusions. *Topps Co. v. Cadbury Stani, S.A.I.C.*, 2006 WL 3247360, at *1 (S.D.N.Y. 2006) (citing *O’Bert v. Vargo*, 331 F.3d 29, 41 (2d Cir. 2003)).

A. Multiple Claims

Plaintiffs claim that the dismissed causes of action (first, second and third) involve factual and legal considerations separate from the remaining two causes of action (fourth and fifth). Plaintiffs argue that the first, second and third causes of action concern defendants’ authority, under the Constitution, to censor the contents and distribution of *The Tattler*. In contrast, plaintiffs claim that the fourth and fifth causes of action focus on the constitutionality of the 2005 Guidelines, assuming that defendants had the requisite authority to impose the 2005 Guidelines. Defendants argue that plaintiffs’ surviving claims are factually related to the tort claims because they are based, in part, on the 2005 Guidelines.

When multiple claims are involved, “a court should consider the degree to which the adjudicated claim is separable from the claims remaining in the case”. *Petrello v. White*, 2008 WL 5432230, at *2 (E.D.N.Y. 2008). A claim is “separable” if it embraces “at least some different questions of fact and law and could be separately enforced or ‘if different sorts of relief are sought’ ”. *Id.* (citing *Cullen v. Margiotta*, 811 F.2d 698, 711 (2d Cir. 1987), *cert. denied*, 483 U.S. 1021 (1987), *overruled on other grounds, Agency Holding Corp. v. Malley Duff & Assoc.*, 483 U.S. 143 (1987)). Claims that are merely “interrelated” may be appropriate for certification. *See Bowne of N.Y. City, Inc. v. AmBase Corp.* 161 F.R.D. 270, 272 (S.D.N.Y. 1995) (certification

was proper as a determination of issues would not be duplicated in matter where the plaintiff raised claims of breach of contract, *inter alia*, for eight different printing jobs thus requiring the court to examine the facts of each print job individually). As the Second Circuit noted, there is always an underlying “interrelatedness” of the claims between the parties in a multi-party civil action. *See Ginett*, 962 F.2d at 1091 (holding that the garden-variety civil complaint often involves multiple claims and/or multiple parties as Rule 20(a) permits joinder only if the asserted claims for relief arise out of the same occurrences). However, this “interrelatedness” cannot preclude appellate review otherwise every multi-party and multi-claim case would be exempt from Rule 54(b) rendering the rule meaningless. *Id.*

Further, certification is preferable where the final disposition of one issue may alleviate the need for adjudication of another issue. *See U.S. v. Am. Soc. of Composers, Authors and Publishers*, 782 F.Supp. 778, 819 (S.D.N.Y. 1991) (holding that the final disposition of licensing issues may render fee-setting issues moot). By example, if the district court moves forward to resolve the remaining causes of action, the efforts of the parties and the court could be wasted if the Circuit Court makes an ultimate determination that negates or otherwise affects the resolution of the remaining causes of action. *See id.* The district court’s determination of whether or not claims are separable is entitled to “substantial deference” as the district court is most familiar with the case. *Ginett*, 962 F.2d at 1096.

1. First Cause of Action

Plaintiffs’ first cause of action challenges defendants’ decisions with regard to the cartoon submitted for publication in *The Tattler*. Plaintiffs claim that defendants’ decision to censor the cartoon violated plaintiffs’ First and Fourteenth Amendment rights as defendants did not

demonstrate that publication of the cartoon would have resulted in a material and substantial disruption of school activities or that the cartoon was otherwise subject to censorship. Plaintiffs seek damages for, “loss of constitutional rights, economic loss, non-economic loss, inconvenience, mental anguish and other damages”. When presented with these issues in the context of the dispositive motion, this Court to engaged in an analysis that included: the nature of the forum; the nature of the speech; defendants’ pedagogical concerns; imprimatur; and viewpoint and content neutrality. The Court specifically examined defendants’ decisions with respect to the cartoon and whether or not the cartoon was lewd, vulgar or obscene. Accordingly, appellate review of the decision to award defendants’ summary judgment will involve similar scrutiny.

In the context of defendants’ motion for summary judgment and dismissal of the first cause of action, this Court did not analyze, consider or make any determination with respect to the constitutionality of the 2005 Guidelines. Indeed, in the first cause of action, plaintiffs do not challenge the constitutionality of the 2005 Guidelines. In fact, defendants were first presented with the cartoon in late December 2004 or early January 2005, **prior** to the enactment of the 2005 Guidelines. Before the promulgation of the 2005 Guidelines, the ICSD School Conduct Manual provided defendants with editorial authority over content in *The Tattler*.

The remaining causes of action (fourth and fifth), involve a demand for equitable relief on behalf of plaintiffs and “others”. To wit, plaintiffs seek to enjoin defendants from implementing the 2005 Guidelines and request a declaration from this Court that the 2005 Guidelines are unconstitutional. Clearly, there is an underlying “interrelatedness” of claims presented in the first cause of action and the remaining causes of action as all three claims involve defendants’ regulation of *The Tattler*. However, an analysis of the fourth and fifth causes of action involves

an examination of the 2005 Guidelines. As noted by this Court in the prior Memorandum-Decision and Order, an analysis of whether or not the 2005 Guidelines withstand constitutional scrutiny includes an examination of the content of the 2005 Guidelines, the breadth of the 2005 Guidelines and whether or not there are alternate channels of expression. *See Deegan v. City of Ithaca*, 444 F.3d 135, 142 (2d Cir. 2006). Such an analysis is not necessary in the context of the first cause of action. Moreover, the fourth and fifth causes of action request equitable relief in the form of declaratory judgment and injunctive relief. Even though the claims arise from similar facts, the legal issues on appeal are unlikely to overlap. *See Fed. Deposit Ins. Corp. v. Bernstein*, 944 F.2d 101, 109 (2d Cir. 1991) (finding that district court properly granted certification as to the claims on which judgment was entered were distinct as to theories of liability from remaining claims). Therefore, the Court finds that the first cause of action is not “inextricably interrelated” to the remaining causes of action.

2. Second Cause of Action

In the second cause of action, plaintiffs allege that the “requirement” that plaintiffs submit articles to the Faculty Advisor for “final approval” is an unconstitutional prior restraint of plaintiffs’ rights. Plaintiffs seek damages for, “loss of constitutional rights, economic loss, non-economic loss, inconvenience, mental anguish and other damages”. As noted in the prior Memorandum-Decision and Order, plaintiffs did not specify what “requirement” was being challenged. This “requirement” arguably involves the clause in the 2005 Guidelines which reads, “[t]he advisor to *The Tattler* shall read, edit and approve all articles prior to publication. No issue of *The Tattler* may be sent to the printer without final approval of the advisor”. However, the ICSD Student Conduct Manual also provided defendants with the authority to halt

the distribution of materials that would materially and substantially interrupt the educational process or intrude upon the rights of others. Based upon the record, the Court finds that due to the vague and overbroad allegations contained in the second cause of action, there are a sufficient number of different questions of fact dissimilar to the remaining causes of action. Appellate review of the second cause of action could arguably involve a limited analysis of the relevant section of the 2005 Guidelines. In contrast, further proceedings with respect to the fourth and fifth causes of action would encompass a more detailed and extensive examination of the 2005 Guidelines, as a whole. Moreover, the second cause of action and remaining claims involve different requests for relief. Therefore, the claims are not inextricably intertwined.

3. Third Cause of Action

Plaintiffs' third cause of action concerns the distribution of *The March Issue*. As noted in the prior Memorandum-Decision and Order, the rules and regulations regarding defendants' decisions with regard to the distribution of *The March Issue* did not involve the 2005 Guidelines for *The Tattler*. To the contrary, the ICSD Student Conduct Manual provided that the school may regulate the distribution of literature and non-school sponsored newspapers. Accordingly, the Circuit Court will have no occasion to examine the 2005 Guidelines in the context of a review of the district court's decision to award summary judgment dismissing the third cause of action. Thus, the Court finds that plaintiffs' third cause of action is separable and distinct from the remaining causes of action.

B. Final Decision

If a decision "ends the litigation [of that claim] on the merits and leaves nothing for the court to do but execute the judgment" entered on that claim, then the decision is final. *Ginnett*, 962

F.2d at 1092 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)). This Court's order granting summary judgment in favor of defendants is a final order for purposes of Rule 54(b). See *D'Jamoos v. Griffith*, 368 F.Supp.2d 200, 207 (E.D.N.Y. 2005)

C. No Just Reason for Delay

This analysis involves a balancing of often competing equitable and practical considerations. *Ke v. Saigon Grill, Inc.*, 2008 WL 5330458, at *1 (S.D.N.Y. 2008) (citing *Curtiss-Wright Corp. v. Gen. Elec.*, 446 U.S. 1, 8 (1980)). The court must consider factors such as: the possibility that review may obviate the need for future district court action; the likelihood that appellate resolution would facilitate settlement of the remaining actions; the efficiency of court administration; the interests of the parties; and the burdens that may be imposed on the parties requiring some duplication in appellate work. *Id.*; see also *Barker v. Goldberg*, 1987 WL 14084, at * 4 (E.D.N.Y. 1987). Immediate appeal should be permitted when it eliminates unnecessary evidence, confines the issues, shortens the trial or expedites the work of the district court. See *Adrian R. ex rel. Esther D. v. N.Y. City Bd. of Educ.*, 2001 WL 34043432, at *2 (S.D.N.Y. 2001).

The Second Circuit has explained that “[w]here the court has directed the entry of final judgment as to claims that are separable from and independent of the unresolved claims, and has provided an informative explanation, its conclusion that there is no just reason for delay is entitled to ‘substantial deference.’” *Cayuga Indian Nation of N.Y.*, 188 F.Supp.2d at 239 (quoting *L.B. Foster Co. v. Am. Piles, Inc.*, 138 F.3d 81, 86 (2d Cir. 1998)). Moreover, “[i]f the question of whether certification should have been granted is a close one, [the Second Circuit] will

normally accept it if that course 'will make possible a more expeditious and just result for all parties.' ” *Id.* (citations omitted).

In this matter, defendants do not articulate any just reason for the delay in entering final judgment on the first, second and third causes of action. Based upon the record, the Court finds that an immediate appeal of the March 24, 2009 Order is in the interest of sound judicial administration. A resolution of the first, second and third causes of action by the Circuit Court would confine and clarify the issues at trial and reduce the burden and expense of a trial for both the Court and the parties. If the Circuit Court affirms the judgment, any trial of the remaining causes of action will not involve an analysis of defendants’ censorship of the cartoon, defendants’ requirement that articles be submitted to a faculty advisor for prior approval, or the distribution of *The March Issue*. Rather, additional proceedings would be limited to the fourth and fifth causes of action only and confined to an examination of the 2005 Guidelines. Conversely, if the Circuit Court concludes that defendants’ actions were constitutionally repugnant, based upon defendants’ assertion, it may be unnecessary for this court to expend any further resources to resolve the remaining causes of action involving the constitutionality of the 2005 Guidelines. Defendants have averred to this Court that the 2005 Guidelines have been revoked. Therefore, an immediate appeal could facilitate a settlement or discontinuance of the remaining causes of action.

Based upon the aforementioned, this Court finds that the March 24, 2009 Order is ripe for an immediate appeal to the Circuit Court.

III. Stay of District Court Proceedings

In their moving papers, plaintiffs contend, “this Court has already granted defendants’ motion, joined in by plaintiffs, to delay the trial of the remaining claims pending resolution of plaintiffs’ appeal from this Court’s order granting summary judgment”.

On April 17, 2009, the parties submitted a joint request to stay any trial pending the resolution of plaintiffs’ appeal. (Dkt. No. 20). On May 6, 2009, the Court issued an Order denying the application for a stay of the trial as moot based upon the filing of the Notice of Appeal.⁸ Although the parties have not formally moved for a stay of proceedings, the Court is compelled to address the issue.

The district court has the power to stay any proceeding to promote its fair and efficient adjudication. *Stadler v. McCulloch*, 882 F.Supp. 1524, 1526 (E.D.Pa. 1995) (citing *U.S. v. Breyer*, 41 F.3d 884, 893 (3d Cir. 1994)). A court is not required to stay a trial pending a Rule 54(b) appeal, *see Geneva Pharm. Tech. Corp. v. Barr Lab., Inc.*, 2002 WL 31159048, at *4 (S.D.N.Y. 2002), however, a stay is appropriate if the interests of efficiency and fairness would be served. *See Doe v. Univ. of Cal.*, 1993 WL 361540, at *2 (N.D.Cal. 1993). In determining whether or not to stay proceedings, the Court looks to five factors: “(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.” *Grand River Enter. Six Nations, Ltd. v. Pryor*, 2004 WL 2480433, at *3 (S.D.N.Y. 2004) (citations omitted).

⁸ As a general rule, “[o]nce a notice of appeal is filed, the district court is divested of jurisdiction over the matters being appealed.” *Nat’l Ass’n of Home Builders v. Norton*, 325 F.3d 1165, 1167 (9th Cir. 2003)

In this case, neither party has objected to a stay of the district court proceedings. Clearly, a stay of the trial and any further proceedings pending the appeal will avoid the need to conduct two separate trials. Based upon the record and the previous joint application, the Court orders a stay of the trial of the remaining causes of action pending the disposition of plaintiffs' appeal.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendants' motion for judgment on the pleadings is **DENIED**; and it is further

ORDERED that plaintiffs' motion for certification pursuant to Fed.R.Civ.P. 54(b) is **GRANTED**; and it is further

ORDERED that the Court's March 24, 2009 Order is amended to include the following:

The Clerk of the Court is directed to enter judgment in favor of defendants on plaintiffs' first, second and third causes of action pursuant to Federal Rules of Civil Procedure 54(b); and it is further

ORDERED that the trial of this action and any further district court proceedings are stayed pending the outcome of the appeal and further Order of this Court.

IT IS SO ORDERED.

Date: January 26, 2010


Norman A. Mordue
Chief United States District Court Judge