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VIA Electronic Filing

Hon. Norman A. Mordue
USDC - Northern District of New York
100 S. Clinton Street
Syracuse, NY 13261-7396

Re: Ochshorn, et al. v. Ithaca City S.D., et al.
Civil Case No.: 5:05-cv-695 NAM/GDB

Dear Judge Mordue:

This Court presently has before it Defendants' Motion for Summary Judgment which has been fully briefed and submitted for judicial resolution. The recent decision by the United States Supreme Court in *Frederick v. Morse*, 2007 WL 1804317 (2007) is instructive on the arguments put forth by Defendants in their motion. Accordingly, Defendants offer this brief letter to bring that case to the Court's attention.

Frederick concerned the First Amendment rights of students during a public gathering outside of a school to celebrate the passing of the Olympic torch through the City of Juneau, Alaska, which the Supreme Court described as a "school-sanctioned and school-supervised event." Students were permitted to participate in the Torch Relay as an approved "social event or class trip" by leaving class and standing on each side of a public road, while teachers and school administrators monitored their conduct. Ultimately, *Frederick*, an eighteen-year-old student who was standing on the side of the road with friends, unfurled a banner that contained the now-famous statement "BONG HiTS 4 JESUS." When Principal Morse demanded that *Frederick* take down the banner and *Frederick* refused, it was confiscated and *Frederick* was suspended from school for insubordination.

In reaching the conclusion that *Frederick's* First Amendment rights were not violated by Principal Morse's conduct, the Supreme Court focused on the same three cases, *Tinker*, *Fraser*, and *Hazelwood*, that the parties in this action relied upon to support their respective positions. Defendants here continue to assert that *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S.

Ct. 3159, 92 L. Ed. 2d 549 (1986) provides the Ithaca City School District (“ICSD”) with authority to limit the dissemination of content that is lewd, vulgar, indecent, or obscene through the Ithaca High School’s newspaper, *The Tattler*, and through the dissemination of independent student publications. The Court in *Frederick* distilled two basic principles from *Fraser* which support Defendants’ position: (1) that the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings; and (2) that the mode of analysis set forth in *Tinker* is not absolute. *Frederick*, 2007 WL 1804317, *7 (citations omitted). *Frederick* informs the Court that the rights of students with respect to *The Tattler* are not concomitant with the rights of adults working on a private newspaper. *Frederick* further instructs that Plaintiffs’ unfettered reliance upon *Tinker v. Des Moines*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) as the applicable standard of review is misplaced, for *Fraser* governs the content at issue, which is lewd, vulgar, indecent, or obscene.

Alternatively, Defendants argued that even if *Fraser* were not dispositive, *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) provides the applicable standard to adjudge the ICSD’s actions, as *The Tattler* “bears the imprimatur” of the ICSD. (Defs.’ Mem. at 13.) Plaintiffs argued in response that *Hazelwood* requires evidence of school sponsorship before a court may proceed to determine whether the activity “bears the imprimatur” of the school. (Pls.’ Opp. at 10.) While Defendants demonstrated significant school sponsorship for *The Tattler*, Plaintiff argued that because a portion of *The Tattler* is funded, in part, by advertising revenue, it is not school-sponsored speech and therefore *Hazelwood* did not apply. (Pls.’ Opp. at 10.) *Frederick* resolves this question, as the Court’s decision demonstrates that school sponsorship is not a prerequisite to the application of the *Hazelwood* standard. The Supreme Court in *Frederick* identified *Hazelwood v. Kuhlmeier* as its most recent student speech case which concerned “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” *Frederick*, at 8 citing *Hazelwood*, 484 U.S. at 271, 108 S. Ct. 562. In noting that *Hazelwood* did not apply to the facts before it, the Supreme Court did not focus on whether *Frederick*’s banner was school sponsored, for there could be no argument that it was. Rather, the Court stated that “*Kuhlmeier* does not control this case because no one would reasonably believe that *Frederick*’s banner bore the school’s imprimatur.” *Id.* It is readily apparent from *Frederick* that the linchpin of *Hazelwood*’s applicability is whether the activity, regardless of whether it is school sponsored or entirely independent speech, would lead a reasonable person to attribute that speech to the school. While the Court found that a reasonable person standing across the street from *Frederick*, or watching the torch relay on television, would not believe that a banner stating “BONG HiTS 4 JESUS” was approved, sanctioned, or sponsored by his school, there are aspects of *The Tattler* which would lead any student, parent, or member of the public reading it to believe that *The Tattler* is the Ithaca High School’s newspaper, and therefore attribute its content to the District. While *Frederick* does not speak precisely on the issue, support for Defendants’ position that school sponsorship is not a prerequisite to the *Hazelwood* imprimatur analysis is found within this decision.

Accordingly, the most recent and visible Supreme Court decision concerning the breadth of students’ First Amendment rights supports the ICSD’s right to limit the dissemination of lewd,

vulgar, indecent, or obscene material through a publication that any reader would believe the District has approved and stands behind, and through the dissemination of independent students newspapers.

Respectfully submitted,

GIRVIN & FERLAZZO, P.C.

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SPQ:lmg

Attachment

cc: Schlather, Geldenhuys, Stumbar & Salk (via electronic filing)
(via 1st class mail)
Dr. Judith C. Pastel, Superintendent of Schools
William Russell, Assistant Superintendent
Joseph M. Wilson, High School Principal
Leonard Rosenbaum, Esq.