

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

HAYDEN GRIFFITH,	)	
	)	
Plaintiff,	)	
v.	)	No. 15-CV-273-GKF-FHM
	)	
CANEY VALLEY PUBLIC SCHOOLS,	)	Hon. Gregory K. Frizzell
et al,	)	
Defendants.	)	

**PLAINTIFF HAYDEN GRIFFITH’S OBJECTIONS TO MAGISTRATE’S  
REPORT AND RECOMMENDATION**

The plaintiff, Hayden Griffith (“Plaintiff” or “Ms. Griffith”), for the reasons stated herein, and pursuant to Fed. R. Civ. P. 72(b)(2), files these written objections to Magistrate Judge Frank McCarthy’s May 19, 2015, Report and Recommendation (Doc. 19).

**INTRODUCTION**

Ms. Griffith is a senior at Caney Valley High School (“School”) and is scheduled to participate in a graduation ceremony on Thursday, May 21, 2015. As an expression of her Native American religious beliefs, she has intended to wear a sacred eagle feather on her graduation cap. The feather was ceremonially gifted to her by an elder of the Delaware Tribe of Indians, of which she is an enrolled member, in recognition of her achievement. Teachers and representatives of the School and of the Caney Valley Public Schools (the “School District”) have told her that she will be barred from the ceremony if she wears the feather as requested. The position taken by the School and School District would infringe upon Ms. Griffith’s constitutionally guaranteed right to freedom of religious exercise and expression. With graduation just days away, the only way to protect Ms. Griffith from this infringement is a preliminary or permanent injunction entered in an expedited manner.

## FACTS

The following facts were pleaded and were confirmed by testimony at the preliminary injunction hearing held Tuesday, May 19, 2015. Testimony was given by Ms. Griffith, Rick Peters, Superintendent of Caney Valley Public Schools, and Debra Kyle, principal of Caney Valley High School. The following facts are undisputed and confirmed by testimony:

As a proud member of the Delaware Tribe and the Cherokee Nation, Ms. Griffith has long participated in and observed traditional and cultural practices. She has served as head girl dancer and princess at the Oklahoma Indian Summer pow-wow and served two years as princess for the Delaware War Mother's organization. Ms. Griffith also observes traditional religious practices based on her Native American heritage.

An important aspect of her religious beliefs is the sacred nature of eagle feathers. At the age of five (5) years, Ms. Griffith was honored and blessed to receive from tribal elders an eagle plume in recognition of her participation, commitment, and respect of Native American values and traditions. In her religious beliefs, eagles, as they roam the sky, have a special connection with God. It is her belief that eagle feathers are sacred objects that symbolize honesty, truth, majesty, strength, courage, wisdom, power, and freedom.

Very recently, Ms. Griffith was ceremonially gifted a sacred eagle feather from a Delaware tribal elder. In her Native American tradition, when an eagle feather is gifted from a tribal elder, it is among the highest forms of recognition that may be bestowed upon a young person. This particular eagle feather was gifted to Ms. Griffith in recognition of her great accomplishment of completing high school and to acknowledge her passage into adulthood. Ms. Griffith's high school graduation ceremony is among the most significant events of her life and she wants to wear the single eagle feather gifted to her by the tribal elder to acknowledge and

honor her Native American culture and family and as a practice and expression of her Native American religious beliefs.

A few weeks ago, Ms. Griffith's mother took a photograph of Ms. Griffith wearing her graduation cap with the sacred eagle feather attached to the top of the cap along with the traditional tassel. Her mother posted the photo on her Facebook internet account and the photo was seen by a teacher at the School. The teacher told Ms. Griffith that she would not be allowed to wear the feather at the graduation ceremony. Ms. Griffith and her mother requested that the School allow her to wear the sacred eagle feather on her graduation cap at the ceremony but was told by Superintendent Peters that it would not be allowed.

Caney Valley Public Schools does not have any formal written policy or procedure that expressly forbids the wearing of sacred eagle feathers on graduation caps. A document titled "Graduation Dress Code" does not prohibit such practice. Ms. Griffith is also aware of a document that was circulated to graduating students titled "Mrs. Ward's Graduation Top 10" which states in Paragraph 4 that "HATS MAY NOT BE DECORATED AT ALL." It refers, however, to "glitter and paint" as prohibited. Ms. Griffith also was informed by Caney Valley School District officials, including Superintendent Peters, that she will not be allowed to participate in graduation ceremonies if she attaches her sacred eagle feather to her graduation cap based on a characterization of the feather as a "decoration."

According to Ms. Griffith's religious beliefs, when an eagle feather is worn, it is not merely a "decoration," but a sacred object. Her religious belief is that, as a sacred object, the eagle feather must be treated and handled with great respect and reverence. In accordance with her Native American beliefs and traditions, the sacred eagle feather may only be worn on the head and cannot be dominated by another object that is also being worn on the head. Thus, in

order to wear the eagle feather in a manner consistent with her religious beliefs and also wear the required graduation attire, Ms. Griffith must attach the eagle feather to her graduation cap so that the eagle feather will not be dominated by another object also being worn on her head. Caney Valley School District officials have informed Ms. Griffith that she may wear the eagle feather on a necklace or attached to her hair; however, wearing the eagle feather in such a manner would violate her religious beliefs that it must be worn on her head and cannot be dominated by another object also worn on her head.

Additionally, Ms. Griffith testified that because this eagle feather was ceremonially gifted to her in order to be worn on this solemn occasion, not wearing the eagle feather on her head, in a traditional manner would bring dishonor to the sacred object, her tribal elders, and to God.

On April 28, 2015, Superintendent Peters issued a press release in which he stated that Ms. Griffith's request was denied. Superintendent Peters claimed that the decision was

“based upon our neutral practice of not allowing any student to adorn or decorate his or her graduation cap. We are concerned that if we grant this student's request, then we have opened the door to virtually any other decoration.”

After numerous attempts to resolve this situation amicably, Ms. Griffith filed a complaint in this matter on Friday, May 13, 2015. Upon motion of Ms. Griffith, a motion for preliminary injunction was set for an expedited hearing before Magistrate Judge McCarthy for May 19, 2015. After a hearing, Magistrate Judge McCarthy issued a Report and Recommendation on that same date. It is to that Report and Recommendation that Ms. Griffith now interposes objections.

#### **STANDARD OF REVIEW**

The district judge reviews a magistrate judge's report and recommendation de novo. Fed. R. Civ. P. 72(b)(3). “The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with

instructions.” *Id.* In this case, it is requested that the Court reject the recommendation and issue a preliminary or permanent injunction as requested by Ms. Griffith.

## **OBJECTIONS**

### **I. THE REPORT AND RECOMMENDATION ERRONEOUSLY FOUND THAT MS. GRIFFITH DID NOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS ON HER ORFA AND FEDERAL CONSTITUTIONAL CLAIMS**

#### **A. Claims under the Oklahoma Religious Freedom Act**

Judge McCarthy erroneously found that Ms. Griffith did not demonstrate a likelihood of success on the merits on her claim under the Oklahoma Religious Freedom Act (“ORFA”) because she purportedly failed to establish that her religious exercise was not “substantially burdened” by the School. This is not so.

Under ORFA “[s]ubstantially burden” means to “inhibit or curtail religiously motivated practice.” Okla. Stat. tit. 51, § 252(7). The Tenth Circuit has stated that a substantial burden exists where the government “prevents participation in conduct motivated by a sincerely held religious belief.” *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010). Here, as recited above, there is ample, unrebutted evidence that Ms. Griffith’s request to wear an eagle feather on her cap during graduation is religiously motivated conduct, and the sincerity of her beliefs is unquestioned by the School. Likewise, it is undisputed that the School’s graduation dress code is being applied by them in a manner barring Ms. Griffith’s wearing of an eagle feather on graduation cap during the ceremony. Therefore, by preventing Ms. Griffith from wearing her eagle feather during the graduation ceremony, the School is preventing conduct motivated by her sincerely held religious belief.

Judge McCarthy did not cite the Tenth Circuit test, but instead made his findings based on standards articulated by the Oklahoma Civil Court of Appeals in *Steele v. Guilfoyle*, 76 P.3d

99, 102 (Okla. Civ. App. Okla. 2003). In *Steele*, the court said that a substantial burden exists where the government: (1) significantly inhibits or constrains conduct or expression that manifests some central tenet of a person's individual beliefs, (2) meaningfully curtails a person's ability to express adherence to his or her faith, or (3) denies a person reasonable opportunities to engage in those activities that are fundamental to her religion. *Id.*

Ms. Griffith's case fits squarely into the second test the *Steele* court articulated as constituting a substantial burden by the government: meaningful curtailment of a person's ability to express adherence to his or her faith. *Steele*, 76 P.3d at 102. The standard is akin to that more recently expressed by the Tenth Circuit where the government "prevents participation in conduct motivated by a sincerely held religious belief." *Abdulhaseeb*, 600 F.3d at 1315 (10th Cir. 2010). It is un rebutted by the School, and acknowledged in Judge McCarthy's Report and Recommendation, that Ms. Griffith seeks to wear her eagle feather because it is a sacred item that is representative and expressive of her Native American religious beliefs. The School has prohibited her from wearing it in a manner consistent with her religious beliefs, i.e., on her head and not dominated by another object such as a graduation cap. By issuing this prohibition, the School inhibits and curtails her ability to express adherence to her faith during the graduation ceremony.

Moreover, Ms. Griffith testified that not wearing this sacred eagle feather, which was ceremonially gifted for this occasion, would dishonor and disrespect the sacred object, her tribal elders and God. Forcing her into this position is undoubtedly a substantial burden on her religious exercise. Ms. Griffith is left with a Hobson's choice: forgo participation in graduation ceremonies – an enormously significant event in her young life – or act in a manner brings

dishonor to her religion and God. The Tenth Circuit in *Abdulhaseeb* describes this type of Hobsons's choice as a "substantial burden." 600 F.3d at 1315

Ms. Griffith's religiously motivated conduct does not have to be mandated by her religious beliefs. It is of no moment that "[Ms. Griffith] testified that her religion does not require her to wear the eagle feather at graduation and the failure to wear the feather will not result in any religious detriment to her." Report and Recommendation at 7. ORFA's definition of substantial burden is government action "to inhibit or curtail *religiously motivated* practice." Okla. Stat. tit. 51, § 252(7) (emphasis added). ORFA also defines "exercise of religion" expansively to include any exercise of religion under Article 1, Section 2, of the Constitution of the State of Oklahoma, the Oklahoma Religious Freedom Act, and the First Amendment to the Constitution of the United States. Okla. Stat. tit. 51, § 252(2). The federal analogue to ORFA likewise includes a broad definition of religious exercise, protecting it regardless of whether it is central to, or compelled by, one's religious beliefs. 42 U.S.C. § 2000cc-5(7)(A); *see also Burwell v. Hobby Lobby Stores, Inc.*, \_\_\_U.S. \_\_\_, 134 S.Ct. 2751, 2772 (2014) ("exercise of religion' shall be construed in favor of broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."). Accordingly, there is no legal requirement that her conduct be pursuant to a religious *mandate*. Instead, there only needs to be a religious *motivation* for Ms. Griffith's conduct, and no one disputes her religious motivation for her request to wear a sacred eagle feather on her graduation cap.

The Report's reliance on *Lyng v. Nw. Indian Cemetery Prot. Ass'n* is misplaced and any characterization of the burden placed upon her as "incidental" is inconsistent with the nature of the substantial burden imposed by the government here. The *Lyng* opinion was issued before enactment of the federal analogue to ORFA, the Religious Freedom Restoration Act. The

opinion never uses the phrase “substantial burden,” much less attempts to define or apply the standard. Instead, the *Lyng* court was examining whether the government’s conduct “prohibited” plaintiff’s religious conduct, a standard more favorable to government restrictions and which is inapplicable to statutory religious liberty and free exercise claims. *See Lyng v. Nw. Indian Cemetery Prot. Ass’n*, 485 U.S. 439, 451 (1988). Indeed, the heightened statutory protections for religious conduct enacted in RFRA and, later, ORFA, were a direct response to judicial decisions that did not sufficiently shield citizens from government constraints on religious liberty. *See Cutter v. Wilkinson*, 544 U.S. 709, 714-17 (2005). The School’s undue restriction of Ms. Griffith’s wearing of an eagle feather during the graduation ceremony is no “incidental effect” on her religious expression. Rather, it is precisely the type of government curtailment of religious liberty statutes like ORFA were designed to curb.

Although Judge McCarthy pointed to Ms. Griffith’s ability to wear the eagle feather on her graduation cap before and after the graduation ceremony, this ignores the very heart of her request: wearing the eagle feather on her cap *during* the graduation ceremony. Ms. Griffith is seeking injunctive relief for the graduation ceremony, and it is that time that the Court should consider, not before or after. Indeed, the School itself recognizes and underscores the significance of the graduation ceremony, and it is Ms. Griffith’s solemn regard for that ceremony that motivates her desire for religious expression. The suggestion that she can wear her eagle feather during the time for mingling and photographs before and after the main event does not recognize the import of the graduation itself. The fact that she might be able to wear her eagle feather at other times is not a valid reason to deprive her of religious expression in celebrating her actual graduation – an occasion she has described as one of the most significant achievements of her life and one which the School agrees is significantly important.

Finally, the School fails the third *Steele* test: denying a person reasonable opportunities to engage in those activities that are fundamental to her religion. *Steele v. Guilfoyle*, 76 P.3d at 102. For this test, the *Steele* court relied on *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995). In that case brought by a Native American prisoner seeking religious accommodation under the federal analogue to the ORFA, the court took judicial notice of the central and fundamental role that sweat lodge ceremony played in Native American religious life. Similarly, other courts have consistently recognized the religious nature of eagle feathers. See *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014) (“[T]he eagle feather is sacred to the religious practices of many American Indians.”); *United States v. Hardman*, 297 F.3d 1116, 1126-27 (10th Cir. 2002) (en banc) (“The eagle feather is sacred in many Native American religions, including claimants’. Any scheme that limits their access to eagle feathers therefore must be seen as having a substantial effect on the exercise of religious belief.”) (footnote omitted); *United States v. Abeyta*, 632 F. Supp. 1301, 1303 (D.N.M. 1986) (“The central tenets of ancient Indian religious faith are shared among New Mexico’s pueblos and, of all birds, the eagle holds an exalted position in all pueblo religious societies. The use of their feathers, particularly from the tail and wings, is indispensable to the ceremonies of the Katsina Society and other pueblo rituals.”). Additionally, in this case, the fundamental religious significance of eagle feathers to Ms. Griffith has gone un rebutted and there is no question that forbidding her from wearing it in a religiously appropriate manner denies her the opportunity to engage in religious expression.

Having established a substantial burden under many different tests, the burden shifts to the School to demonstrate that it is: (1) essential to furthering a compelling government interest, and (2) is the least restrictive means of furthering that compelling government interest. Okla.

Stat. tit. 51, § 253. A compelling interest cannot be a “general statement of interest.” *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014). In applying the federal analogue to ORFA, the U.S. Supreme Court has made it clear that statutory protection of religious practice is expansive and that government interference with religious conduct is subject to the highest level of judicial scrutiny and will only be upheld for the most compelling reasons. *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015); *Burwell v. Hobby Lobby*, 573 U.S., at \_\_\_, 134 S.Ct. 2751, 2761 (2014).

Moreover, such religious freedom statutes apply to the person, and broadly formulated, generalized fears about what could happen if others are given similar accommodations are insufficient. *See Holt*, 135 S. Ct. at 863; *Hobby Lobby*, 573 U.S., at \_\_\_, 134 S.Ct. at 2779 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431(2006)); *see also Merced v. Kasson*, 577 F.3d 578, 592 (5th Cir. 2009) (applying the Texas Religious Freedom and Restoration Act and holding that the government must satisfy the compelling interest standard as applied to the plaintiff); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014) (“ ‘general statements of interests’ are not sufficient to demonstrate a compelling governmental interest; rather the interests need to be closely tailored to the law.”); *U.S. v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002).

Banning decorations on high school graduation caps does not further a compelling government interest when applied to Ms. Griffith’s request to wear an eagle feather on her graduation cap as a religious practice, expression, and/or observance. Superintendent Peters has stated that the reason for not allowing Ms. Griffith to wear her eagle feather on her graduation cap is that, “We are concerned that if we grant [Hayden Griffith’s] request, then we have opened the door to virtually any other decoration.” Fearing a preverbal flood of other requests is not a

compelling interest. *See Holt*, 135 S. Ct. at 863; *Hobby Lobby*, 573 U.S., at \_\_\_, 134 S.Ct. at 2779 (quoting *Gonzales*, 546 U.S. at 430-431); *see also Merced*, 577 F.3d at 592.

The School has only offered broad, speculative justifications for not allowing Ms. Griffith to wear an eagle feather on her cap during graduation. The School's justifications fail to articulate an application of the compelling interest standard "to the person," i.e., Ms. Griffith, and instead advances only a speculative, broadly formulated, and generalized fear of having to consider requests regarding graduation attire from graduates besides Ms. Griffith. Testimony from Superintendent Peters and Principal Kyle also raised the "formality" of the ceremony but were unable to articulate how the feather would harm the formality of the occasion. The only other interest expressed by the Schools officials was "uniformity" and "unity" among the class, but admitted that individual achievements also are recognized in the form of National Honor Society stoles and emblems from a student's participation in a particular organization. In asserting these interests, the School fails to consider the religious motivations specific to Ms. Griffith and the need for a legitimate particularized compelling interest in order to suppress free exercise and expression that is motivated by a sincerely held religious belief.

#### **B. Federal Constitutional Claims**

The magistrate failed to analyze whether the school district created a limited public forum or designated public forum *within* the graduation ceremony, which would outlaw viewpoint discrimination. While the Magistrate cited to and relied heavily on *Bear v. Fleming*, 714 F.Supp.2d 972 (D.S.D. 2010), that case contained no evidence that the School District created a limited public forum or a designated public forum within the graduation ceremony. In this instance, the School District broadly permits items "such as stoles recognizing members of the National Honor Society[.]" in recognition of "school related activities and academics[.]" and

in “recognition of school related success.” Doc. 17 at 6-7.<sup>1</sup> Thus, the School District has already opened the door to allow forms of expression for academics and school related success in student organizations by wearing a sash or stole traditionally around the neck, but it will only allow certain students to make those expressions.

Ms. Griffith has confirmed that the particular feather she wishes to wear was given to her “in recognition of [her] great accomplishment of completing high school and to acknowledge [her] passage into adulthood.” Doc. 4-1 at 1. As an expression of completing high school, the feather is a form of recognition for her school related success and success in academics, and must traditionally be worn on her head and not dominated by another object. Many Native Americans are given, and wear, a feather on their cap at graduation as a sign of academic success and school related success. While they may not be in the National Honor Society, or other student groups, it is a powerful sign of their success given the graduation rate for Native Americans is far below that of the general population. Executive Office of the President, 2014 Native Youth Report 16 (2014).

### **1. The School District Created a Limited Public Forum or a Designated Public Forum**

The case the Magistrate confirmed that the Court must determine whether or not the School District has created a public forum as a threshold matter. *See* Doc. 19 at 5 (citing *Bear*, 714 F.Supp.2d 972). In *Bear*, the Court noted that the first thing the Supreme Court did in *Hazelwood*, arguably the controlling analysis here, was determine that the newspaper was not a public forum. *Bear*, 714 F.Supp.2d at 986 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)). The Tenth Circuit has likewise confirmed that utilizing the forum analysis is

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<sup>1</sup> The School District has also confirmed that many in the graduation crowd will understand Ms. Griffith’s message in the eagle feather as they are Native American. Doc. 17 at 14. Thus, this portion of her free speech claim is established. *See Bear*, 714 F.Supp.2d at 979 (discussing free speech claims for conduct).

necessary. *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 924 (10th Cir. 2002); see also *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 344 (5th Cir. 2001). In *Bear and Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219 (10th Cir. 2009), another case cited by the Magistrate, there was no question as to whether the School District created a limited or designated public forum within its graduation ceremony.<sup>2</sup>

In *Bear*, there was no evidence that the school was opening the forum for certain topics or subjects as the School District has done here with permitting regalia on school related activities, academics, and in recognition of school related successes. Likewise, there was nothing in *Corder* that the School District there was permitting regalia by any and all students who were in the honor society or were valedictorians but not permitting students in the Junior Classical League for example to not wear their sash. The promotion of a valedictorian speech, such as the one in *Corder*, is much more akin to what the Supreme Court sees as *Hazelwood's* application than the instant case, where the line between what is and is not school sponsored speech is blurred. See *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Justice Alito referring to *Hazelwood* as the school's own speech).

School facilities may be deemed to be public forums if school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). When a state creates a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). The School may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Good News Club v. Milford Cent. Sch.*, 533 U.S.

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<sup>2</sup> Justice Alito, which the Tenth Circuit cites in *Corder*, would limit *Hazelwood* to what is in essence the school's own speech. *Morse v. Frederick*, 551 U.S. 393, 423 (2007).

98, 106, (2001); *see Sumnum v. Callaghan*, 130 F.3d 906, 914 (10th Cir. 1997) (describing a that a designated public forum may be for certain speakers, or for the discussion of certain subjects and discussing the difference between designated public forum and a limited public forum). Additionally, in defining the forum the Court has focused on the access sought by the speaker. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999).

Ms. Griffith is seeking to modify her graduation regalia, as other students are permitted to do for school related activities, academics, and school related successes. The School District has evinced the intent to indiscriminately permit graduation regalia to be modified by its students for school related activities and academics and in recognition of school related success. Thus, it has created a designated public forum within the graduation ceremony for the discussion of certain subjects – school related activities and academics and in recognition of school related success.

When a public body establishes a designated or limited public forum of this sort, that body may restrict the expression that takes place within the forum so long as the restriction (1) does not discriminate against speech on the basis of viewpoint and (2) is reasonable in light of the purpose served by the forum. *Shero v. City of Grove, Okl.*, 510 F.3d 1196, 1202 (10th Cir. 2007); *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001) (citing *Milford Cent. Sch.*, 533 U.S. at 106-07).

Here, the School District is discriminating on the basis of viewpoint as it will allow only certain views on school related activities, academics, and in recognition of school related successes to be expressed, but not others. Similar to the Supreme Court's analyses on viewpoint discrimination in limited public fora in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (exclusion of Christian children's club from meeting after hours where school had opened

its limited public forum to activities that served a variety of purposes), *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (refusing to fund a student publication because the publication addressed issues from a religious perspective while funding printing costs of other student group publications), and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (excluding a private group from presenting films at the school while allowing others based on the films' discussions of family values from a religious perspective), Ms. Griffith is not being allowed to express her religious views on achievement while other students are.

Ms. Griffith has explained that to properly wear her feather to honor her beliefs and her achievement, it must be worn in a certain location, just as a sash must be worn around the neck. The School District will permit the sash, stole, or cord around the neck as is traditional, but will not permit the feather in a traditional manner. Thus, the school district is discriminating on the basis of viewpoint.

**2. The feather is not the “school’s own speech” and school district’s actions are not reasonably related to legitimate pedagogical concerns**

The Magistrate Judge applied the standard in *Bear* and *Hazelwood* that the school can regulate school sponsored speech if it is not in a designated public forum, if members of the public might reasonably perceive the expression to “bear the imprimatur of the school” and “so long as their actions are reasonably related to legitimate pedagogical concerns.” *Bear*, 714 F.Supp.2d at 987. The Supreme Court sees *Hazelwood’s* rule as a rule that applies where it is the school’s own speech. *See Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Justice Alito referring to *Hazelwood*).

First, Ms. Griffith’s wearing of an eagle feather is not akin to a valedictorian speech, where the School District informed the students how to organize the speech, exercised control

over valedictory speeches in advance of graduation, and named valedictory speakers based on the School District's qualifications. *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1229 (10th Cir. 2009). Second, Ms. Griffith will be wearing the uniform cap and gown of the School District, unlike the student in *Bear* that wanted to wear his traditional regalia *instead of* his cap and gown. *Bear*, 714 F.Supp.2d at 975. Ms. Griffith, like the other students that will be wearing a National Honor Society stole signifying their achievement, wishes to wear a single feather on her cap to signify her achievement. The National Honor Society stoles are clear in their markings that they represent the national organization and thus are not the “school’s own speech” and likewise, to the more than 40% Native population at the school, they would not confuse the eagle feather on Ms. Griffith’s cap as the “school’s own speech.” Thus, Ms. Griffith’s request is quite different than the other school sponsored speech cases raised.

The School District’s actions must also be “reasonably related to legitimate pedagogical concerns.” *Bear*, 714 F.Supp.2d at 987. Here, the Magistrate found that the School District’s concerns were with the “unity of the graduating class as a whole” being fostered by uniform caps, which are the most prominent portion of the regalia. Doc. 19 at 4. The School District confirmed this. Doc. 17 at 14. Even if the School Districts policy is applied, unity is not fostered as a whole because some students are permitted to stand out and express the items given to them as signs of school related activities, academics, and in recognition of school related successes while other students are not permitted to wear such expressions. Thus, as applied, there is no uniformity or unity. Further, the sashes, stoles, and chords worn around the neck are just as visible to the audience as a feather on the cap, and thus there is no *reasonable* reason for prohibiting that form of expression.

The School District also maintains that community, discipline, and respect for authority

are conveyed to the students by the requirements that all students have similar dress, and that no one student is singled out. Doc. 17 at 14. However, some students are permitted to be singled out – students with National Honor Society stoles – yet others are not permitted to be singled out for their achievement. Thus, community, discipline, and respect for authority are not advanced when the School District in fact already singles certain students out over others and the regalia is not uniform. As a result, the School District’s prohibition on Ms. Griffith’s expression of academic achievement and school success is not reasonably related to a legitimate pedagogical concern.

### **3. The hybrid rights standard of review applies**

The Magistrate did not analyze whether the hybrid rights compelling-interest/closely-tailored analysis must be applied to determine the validity of the policy. *See* Doc. 3 at 22; *Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998). The School District argued that Ms. Griffith did not make a colorable showing on her free speech claim. Doc. at 17, n. 1. As discussed above, however, Ms. Griffith has established a “colorable” showing on her free speech claim and thus the Magistrate Judge should have analyzed the claim under the hybrid analysis. *Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d at 700.

### **4. The school district’s policy is not rationally related to a legitimate governmental interest**

While the School District’s graduation cap policy may be neutral and generally applicable, as applied to Ms. Griffith it is not rationally related to a legitimate government interest. Here, the Magistrate found that the School District’s concerns were with the “unity of the graduating class as a whole” being fostered by uniform caps, which are the most prominent portion of the regalia. Doc. 19 at 4. The School District confirmed this. Doc. 17 at 14. Even if

the School District's policy is applied, unity is not fostered as a whole because some students are permitted to stand out and express the items given to them as signs of school related activities, academics, and in recognition of school related successes while other students are not permitted to wear such expressions. Thus, as applied, there is no uniformity or unity. Further, the sashes, stoles, and chords worn around the neck are just as visible to the audience as a feather on the cap, and thus there is no *reasonable* reason for prohibiting that form of expression.

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Finally, The School conceded that it would allow Ms. Griffith to wear the feather on several other locations, including clipped to her hair, as a necklace, or held in her hand (although these would violate her religious requirements for the proper wearing of an eagle feather). So, according to the School, its interests are preserved when the eagle feather is worn in her hair, but destroyed when it moves a few inches to her cap. This suggests that the School's purported interests are not reasonably related to the rule as applied to Ms. Griffith. For Ms. Griffith, these few inches are the difference between following her religion and violating it.

As a result, the School District's prohibition on Ms. Griffith's exercise of religion is not rationally related to a legitimate governmental interest.

**II. THE MAGISTRATE ERRED IN CONCLUDING THAT MS. GRIFFITH WILL NOT SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT ISSUED.**

Ms. Griffith has established violations under ORFA and the Federal Constitution. If her graduation day passes without the requested relief, the opportunity to exercise her religious rights, to honor her family, and be personally acknowledge and honored by her Indian family, will be forever lost. The harm cannot be later remedied. The harm to her is therefore irreparable and a preliminary injunction is therefore warranted.

**III. THE MAGISTRATE JUDGE ERRED IN CONCLUDING THAT THE THREATENED INJURY TO MS. GRIFFITH DOES NOT GREATLY OUTWEIGH ANY POSSIBLE INJURY TO THE SCHOOL**

While the injury to Ms. Griffith would be great and irreparable, the harm to the School is minimal and likely non-existent. In his April 28, 2015 press release, Superintendent Peters cites as his concern that allowing Ms. Griffith's religious expression would "open the door" to other less meritorious requests for exceptions to what he characterizes as a policy precluding "decorations" on graduation ceremony attire. It should also be considered that if Ms. Griffith is granted a preliminary injunction for purposes of tomorrow's graduation, it can still pursue arguments that its rule is constitutional and apply it in future graduations, if the Court later agrees. However, the harm to Ms. Griffith in being denied a preliminary injunction, a later permanent injunction is not helpful to her. The harm to her greatly outweighs any potential harm to the School.

The School, in fact, has offered to allow Ms. Griffith to wear her feather as a necklace or as an attachment to her hair, as opposed to the graduation cap. This is clear evidence that the presence of the feather would result in no harm to the School. The difference in a few inches of where the feather might be placed is of little to no concern to the School, but it is a world of

difference to Ms. Griffith in light of her religious beliefs. As outlined above, to comply with her religious practices and beliefs, the feather is to be worn on the head and cannot be dominated by another object that is also being worn on the head. Thus, the feather must be attached to her graduation cap so that the feather is the predominant feature. The distinction is the difference between a sincerely held religious belief, and the requirement by school officials that it be placed in a manner inconsistent with that belief.

Additionally, a number of school districts nationwide have granted variances in graduation attire to accommodate Native American traditional and religious practices, and there have been no reports of disruptive results or a floodgate of non-religious decorations. A preliminary injunction is therefore warranted because the harm to Ms. Griffith would be irreparable while the harm to the School would be minimal to non-existent.

#### **IV. THE MAGISTRATE JUDGE ERRED IN CONCLUDING THAT A PRELIMINARY INJUNCTION WOULD NOT SERVE THE PUBLIC INTEREST**

The public interest prong is easily satisfied in this case because First Amendment and statutory rights issues are involved. The courts have held that “[t]he public has an interest in the protection and preservation of First Amendment rights.” *McIntire v. Bethel Sch. Indep. Sch. Dist. No. 3*, 804 F. Supp. 1415, 1429 (W.D. Okla. 1992). Accordingly, “[v]indication of constitutional freedoms and protection of First Amendment rights is in the public interest.” *Id.*

#### **CONCLUSION**

For the foregoing reasons, the assigned District Judge should modify or reject the Report and Recommendation and the issue a preliminary injunction enjoining the School District, through its representatives and agents, from precluding Ms. Griffith from wearing a sacred eagle feather on her graduation cap at Caney Valley High Schools’ graduation ceremony on Thursday, May 21, 2015 or, alternatively, should enter declaratory judgment and enter a permanent

injunction to allow Ms. Griffith's religious expression at graduation.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 20th day of May, 2015, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument, the “ to the Clerk of Court using the Electronic Case Filing System (the “ECF System”) for transmittal to the following counsel of record:

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