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

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

**DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION**

Defendants, Independent School District No. 18, Washington County, Oklahoma, also known as Caney Valley Public Schools, ("District"), Rick Peters, District Superintendent, Clint Sumner, member, District Board of Education, Joe Lewis, member, District Board of Education, Jeanie Huffaker, member, District Board of Education, Ron Pruitt, member, District Board of Education, Sue Woods, member, District Board of Education ("Defendants") offer the following in response to Plaintiff's Objection[1] to the Report and Recommendation [Doc. No. 20] entered by United States Magistrate Judge Frank H. McCarthy recommending that Plaintiff's Motion for Preliminary or Permanent Injunction be denied.[2]

[1] Defendants initially note that Plaintiff has failed to comply with LCvR7.2©, requiring that briefs exceeding fifteen (15) pages in length be accompanied by an indexed table of contents and authorities cited.

[2]Due to the extreme limitation in time to respond to Plaintiff's twenty-two page objection, and without the benefit of a table of authorities or index outlining Plaintiff's brief,

For the reasons below, Defendants request the Court to adopt the Recommendation of Magistrate Judge McCarthy.

**Standard of Review**

When resolving objections to a magistrate judge's report and recommendation, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed.R.Civ.P. 72(b)(3). Similarly, 28 U.S.C. § 636 provides:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1).

A party objecting to the recommendation must "serve and file specific, written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b). "[F]ailure to make timely objections to the magistrate's findings or recommendations waives appellate review of both factual and legal questions." *United States v. One Parcel of Real Prop., With Buildings, Appurtenances, Improvements, & Contents, Known as: 2121 E. 30th St., Tulsa,*

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District would further refer the Court to its Motion to Dismiss Plaintiff's Complaint [Doc. No. 14], and response to Plaintiff's Motion for Permanent and Preliminary Injunction [Doc. No. 17].

*Oklahoma*, 73 F.3d 1057, 1059 (10th Cir. 1996) (citations and quotations omitted).

**FACTS**

The testimony offered at the hearing on May 19, 2015, came from Plaintiff and from District Superintendent Rick Peters, District High School Principal, Debra Keil and Defendants' witness Annette Ketchum. The Court also admitted Defendant's two exhibits, the District graduation dress code and "Mrs. Ward's Graduation Top 10." From the evidence presented, Magistrate McCarthy found the following:

1. District's graduation ceremony is a formal ceremony and that the unity of the graduating class as a whole is fostered by the uniformity of the caps which are the most prominently visible part of the graduation regalia viewed by the audience to the graduation. [Doc. No. 19, p.4].

2. Plaintiff's religion does not require her to wear the eagle feather at graduation. [Doc. No. 19, p.7].

3. That the failure [by Plaintiff] to wear the feather will not result in any religious detriment to her. [Doc. No. 19, p.7].

4. That District's policy does not infringe on Plaintiff's ability to wear the eagle feather in any other setting. [Doc. No. 19, p.7].

5. That Plaintiff may wear the eagle feather on her cap up to the point she enters the graduation ceremony and affix it to the cap afterwards. [Doc. No. 19, p.7].

6. The District Superintendent, Rick Peters, is agreeable to having his picture taken

with Plaintiff wearing her eagle feather after the ceremony. [Doc. No. 19, p.7].

## ARGUMENTS AND AUTHORITIES

**PROPOSITION I: THE MAGISTRATE'S REPORT AND RECOMMENDATION DENYING PLAINTIFF'S MOTION FOR PRELIMINARY OR PERMANENT INJUNCTION WAS CORRECT AND SHOULD BE ADOPTED.**

Plaintiff filed this action on May 15, 2015, [Doc. No 4] and sought a preliminary or permanent injunction for an order prohibiting the District from enforcing its neutral, generally applied rule that no student decorate his or her graduation cap. [Doc. No. 3]. For her causes of action, Plaintiff asserted claims under the Free Speech clause of the First Amendment, the Free Exercise clause of the First Amendment, and the Oklahoma Religious Freedom act, codified at Okla. Stat. tit. 51, §§ 251.

Having been referred to Magistrate Judge Frank H. McCarthy for an expedited hearing [Doc. No. 8] wherein testimony was introduced by both parties, [Doc. No. 18] a Report and Recommendation that Plaintiff's Motion be denied was entered. [Doc. No. 19]. Magistrate Judge McCarthy determined that:

> Three types of preliminary injunctions are specifically disfavored: preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits. For these categories of disfavored preliminary injunctions, "the movant has a heightened burden of showing that the traditional four factors weigh heavily and compellingly in its favor before obtaining a preliminary injunction." *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012) (quoting *Dominion Video*, 269 F.3d at 1154-55). Granting Plaintiff's request for a preliminary injunction would involve each of these categories, therefore the heightened burden applies.

[Doc. No. 19, pp. 2-3] (emphasis added). In her objection [Doc. No. 20], Plaintiff does not object to the conclusion reached by Magistrate Judge McCarthy that her requests carry a heightened burden.

Further, Magistrate Judge McCarthy correctly found that Plaintiff was unable to show a substantial likelihood of success in any of the three alleged causes of action, and consequently, that Plaintiff could not show irreparable harm, that the balance of harms warranted extraordinary relief, or that the public interest was in Plaintiff's favor.

**A. Magistrate Judge McCarthy correctly found that Plaintiff's claim under the Free Exercise Clause of the First Amendment should fail.**

As found by Magistrate Judge McCarthy, a [governmental] rule which is neutral as to its content, and applied equally does not raise free exercise concerns, even if the rule incidentally burdens some particular religious practice or belief. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir.2006) (citations omitted). A neutral rule of general applicability is reviewed under the rational basis standard. *Corder v. Lewis Palmer School Dist. No. 38*, 566 F.3d 1219, 1233 (10th Cir. 2009).

Though a higher "hybrid-rights" standard may apply to some cases, there has to be "at least [a] . . . colorable showing of infringement of recognized and specific constitutional rights, rather than mere invocation of a general right." *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694 (10th Cir. 1998). As Plaintiff has failed to sufficiently show a Free Speech claim, she has failed to make a "colorable showing" sufficient to bring her Free Exercise claim within the hybrid exception. Thus, District's prohibition on cap decorations

should be reviewed using the rational basis test. *See also, Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

Here, the testimony offered show that the District had interests of recognizing only those academic achievements that are accomplished within the District, and in maintaining the image of class unity, and in the formality of the graduation ceremony. Specifically, the testimony from District witnesses established that due to the set up of the graduation location, the graduation caps would be the prime focus of the audience and the most visible aspect during graduation. Indeed, of those courts which have considered a school's interest in graduation, at least two have found that these types of concerns are legitimate and rationally related to a rule prohibiting variances in dress. *Corder*, 566 F.3d 1219; *Bear v. Fleming*, 714 F.Supp.2d 972 (D.SD 2010). Though Plaintiff contends that District has already allowed some students to be "singled out" through the wearing of stoles and sashes, though not on their cap, the evidence at the hearing showed that these stoles and sashes are only for District related accomplishments including Future Farmers of America, the National Honor Society, or student council. As was the testimony offered by District, these recognitions are for school achievements, but even so, are limited to additions to the graduation gown. The evidence at the hearing was that no changes, alterations or decorations have ever been permitted to the graduation cap.

**B. Magistrate Judge McCarthy correctly found that Plaintiff's claim under the Free Speech clause of the First Amendment must fail.**

District does not dispute that students retain some level of constitutional protection for their speech even when in the school setting; however, student rights "must be 'applied in light of the special characteristics of the school environment.'" *Hazelwood School District v. Kuhlmeier*, 484 U.S.260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 592 (1969)).

Speech which occurs as part of a school sponsored activity and which may be characterized as "school-sponsored speech" may be controlled even as to its subject matter so long as the restrictions are reasonably related to legitimate pedagogical concerns. *Corder*, 566 F.3d 1219 at 1227; *Fleming v. Jefferson County Sch. Dist. R–1*, 298 F.3d 918, 923 (10th Cir. 2002).

Speech made during the highly controlled, and directed graduation ceremony has been widely held to constitute school-sponsored speech. *Corder*, 566 F.3d at 1229; *Bear v. Fleming*, 714 F.Supp.2d 972 (D.SD 2010); *Lundberg v. W. Monona Cmty. Sch. Dist.*, 731 F. Supp. 331, 338 (N.D. Iowa 1989). *See also*, *Lee v. Weisman*, 505 U.S. 577, 597, 112 S. Ct. 2649, 2660, 120 L. Ed. 2d 467 (1992) (stating, "teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students."); *Appenheimer v. Sch. Bd. of Washington Cmty. High Sch. Dist*. 308, 01-1226, 2001 WL 1885834, at *6 (C.D. Ill. May 24,

2001) (stating, "It is clear that the commencement falls under the imprimatur of the state.") *Am. Civil Liberties Union of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1479 (3d Cir. 1996) (stating that graduation, ". . . is a school sponsored event. School officials decide the sequence of events and the order of speakers on the program, and ceremonies are typically held on school property at no cost to the students.")

Here, the evidence presented to Magistrate Judge McCarthy established District's interest in showing school unity among its graduating senior class, and a desire to recognize only those achievements which occurred within the school setting, for a school sponsored activity. As described above, both interests arise out of the District's pedagogical concerns, and are rationally related to their neutral, generally applied rule that no decoration of any kind, even for school recognized groups, is permitted on the graduation cap.

In part, Plaintiff contends that because District has allowed students to wear stoles and sashes (not on their caps) provided by school sponsored groups, for school sponsored activities, that occur within the school setting, that District must then also allow Plaintiff to wear a feather on her cap, which is not school related, but which she believes has some religious significance. Both the District Court in *Bear* and even the United States Supreme Court in *Hazelwood*, found that school-sponsored activities, such as a school newspaper and graduation, were not public forums.

In *Hazelwood*, the Court found that the student newspaper was not a public forum because "the school officials . . . did not deviate from their policy that the newspaper's

production was to be part of the education curriculum and a regular classroom activity . . . ." 484 U.S. at 261. Likewise the Court found that, "[t]he officials did not evince any intent to open the paper's pages to indiscriminate use by its student reporters and editors, or by the student body generally." *Id*.

The same was held by the District Court in *Bear*, stating, "Graduation proceeding is a school-sponsored event, and, thus, the students' speech, including that of Mr. Dreaming Bear, is school-sponsored speech . . . Clearly, the graduation exercises are not a public forum open to public expression of speech." 714 F. Supp. 2d at 988.

Here, the District allows recognition only for academic honors such as the National Honor Society, or participation in student council or Future Farmers of America. All three of these groups are school-sponsored, and occur within the school setting. By so allowing recognition for these groups, District has not opened itself up as a public forum, limited or not. Rather, only school related messages, from school sponsored groups, are allowed during the school-sponsored graduation ceremony, constituting school-sponsored speech.

### C. Magistrate Judge McCarthy correctly found that Plaintiff's claim under the Oklahoma Religious Freedom Act must fail.

Like the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), Plaintiff must carry at least two burdens to be successful in her claim, 1) religious exercise is 2) substantially burdened by the school policy. *Yellowbear v. Lampert*, 741 F.3d 48, 53 (10th Cir. 2014). *See also Steele v. Guilfoyle*, 2003 OK CIV APP 70, ¶ 7, 76 P.3d 99, 102. As

adopted by Oklahoma Court of Civil Appeals, a regulation is said to be a substantial burden where it:

> [S]ignificantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a prisoner's individual beliefs, meaningfully curtail[s] a prisoner's ability to express adherence to his or her faith; or ... deny[s] a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion.

*Steele*, 2003 OK CIV APP at ¶ 8, 76 P.3d at 102. (citing, *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir.1995). Further, as cited in *Steele*, a government regulation does not substantially burden religious activity when it merely has an incidental effect that makes it more difficult to practice the religion. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988).

As stated in the Magistrate's report, Plaintiff testified that there was no requirement that she wear the feather during graduation. Plaintiff testified throughout the hearing that to her, being given a feather was like being given a cross. Though the eagle feather indeed may itself be considered sacred, and a symbol of her beliefs, it is not a religious tenet that she be required to wear the feather, either for graduation, or any event outside of the tribal setting. Under Plaintiff's analysis, even a Christian student who desired to wear a cross on their cap, either attached to the tassel or made with glitter on the top of the cap, would be allowed to do so as it would be an expression of their faith. District's rule is not a substantial burden on her right to express adherence to her faith. Plaintiff would only be required to not wear the feather for a thirty minute period during graduation, and would be allowed to wear the

feather at any time before the ceremony, directly after the ceremony, and even have her official portrait with the superintendent taken while wearing the feather. Such a restriction does not "meaningfully curtail" Plaintiff's ability to express adherence to her faith.

## CONCLUSION

Defendants' respectfully request that the Court adopt Magistrate Judge McCarthy's Report and Recommendation as submitted. Plaintiff has requested that she be allowed an exemption to a neutral rule of general applicability, as the rule incidentally burdens her belief that an eagle feather is a sacred object. Even if the District's rule incidentally burdens a particular religious practice or belief, the standard of review is rational basis. Defendants have shown that the school desires to have control of the presentation of its graduates to show school unity, and to avoid singling out students for non-school related activities. Similarly, Plaintiff's requested action constitutes school-sponsored speech, and as such, may be restricted so long as the restriction is rationally related to a reasonable pedagogical concern. Again, the District's interest in controlling the graduation attire, especially that portion which is most visible, is rationally related to its desire to set forth a message of unity to it graduates and the audience. District's desire is not to recognize every lifetime achievement of its students, though admirable, but to limit recognition to those which are related to school academics or activities.

Finally, as found by Magistrate Judge McCarthy, Plaintiff's religion does not require her to wear an eagle feather at graduation. Though it may be a desire or wish of hers to wear

an object which she considered religious in nature or sacred, prohibiting such would not be a substantial burden to one of the principal tenets of her faith, nor a substantial burden on her right to express adherence to her faith. Plaintiff would only be prohibited from wearing the feather for a thirty minute period during graduation, and she would be allowed to wear the feather at any time before the ceremony, directly after the ceremony, and even have her official portrait with the District superintendent taken while wearing the feather. Such a restriction does not "meaningfully curtail" Plaintiff's ability to express adherence to her faith.

S/Anthony T. Childers
Anthony T. Childers, OBA #30039
Attorney For Defendant
The Center For Education Law, P.C.
900 N. Broadway, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 528-2800
Facsimile: (405) 528-5800
E-mail: TChilders@cfel.com

**Certificate of Service**

I hereby certify that on May 20, 2015 I electronically transmitted the attached document to the Clerk of the Court using the ECF system for filing and transmittal of a Notice of Electronic filing to the following registrants: Matthew Campbell, Daniel E. Gomez, Joel West Williams, Brady Henderson.

S/Anthony T. Childers
Anthony T. Childers