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

HAYDEN GRIFFITH, an Individual,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 15-CV-273-GKF-FHM**
	)	
CANEY VALLEY PUBLIC SCHOOLS, et al.,	)	
	)	
	)	
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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NOW COMES, Plaintiff Hayden Griffith ("Ms. Griffith"), in response to Defendants Caney Valley Public Schools and Superintendent Rick Peters Motion to Dismiss Plaintiff's First Amended Complaint. The prior ruling denying a preliminary injunction is not dispositive of the merits of this case, including claims made in the First Amended Complaint. Ms. Griffith's First Amended Complaint contains sufficient facts to make her claims plausible and put the School District on notice of her claims. With an opportunity to conduct discovery, which was unavailable at the preliminary injunction stage due to time constraints, Ms. Griffith can establish and satisfy her burden that she was deprived of her Constitutional and statutory rights.

STANDARD OF REVIEW OF A 12(B)(6) MOTION TO DISMISS

When considering defendant's motion for failure to state a claim, the court must construe the factual allegations in the complaint in the light most favorable to plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984); *In re SemGroup Energy Partners, L.P.*, 729 F. Supp. 2d 1276, 1286 (N.D. Okla. 2010). If the factual allegations in the plaintiff's complaint are sufficient to show that the right to relief is plausible and above mere speculation, the court should deny the defendant's motion. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 570 (2007). The Tenth Circuit has concluded that the *Twombly/Iqbal* standard is "a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the Court stated will not do." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012). Under Rule 8, specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests. *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1172 (10th Cir. 2015) (quoting *Khalik*, 671 F.3d at 1192).

As shown below, Ms. Griffith has alleged sufficient facts to make her claims plausible and has not merely inserted labels and conclusions or a recitation of the elements to her claims. Thus, the motion should be denied so that discovery can commence to permit Ms. Griffith to further develop her claims.

INTRODUCTION

Ms. Griffith originally filed this action seeking injunctive relief against Defendants for violating the Oklahoma Religious Freedom Act (ORFA), Okla. Stat. tit. 51, § 251 *et seq.* (2015), as well as her Constitutional rights under the First Amendment's free speech and free exercise clauses. As an expression and practice of her Native American religious beliefs and academic success, Ms. Griffith requested an accommodation to wear a sacred eagle feather on her graduation cap during school graduation ceremonies. The feather was ceremonially gifted to her by an elder of the Delaware Tribe of Indians in Oklahoma, of which she is an enrolled member, in recognition of her academic achievement. Teachers and representatives of the Caney Valley Public Schools (the "School District") told her that she would be barred from the ceremony if she wore the feather. The position taken by the School District substantially burdened her religiously motivated conduct, which is protected under ORFA, and also infringes upon Ms. Griffith's constitutionally guaranteed right to freedom of religious exercise and expression.

A preliminary injunction hearing was held on short notice and with limited testimonial evidence. The preliminary injunction was denied and Ms. Griffith attended graduation without wearing the feather. Thereafter, Ms. Griffith amended her complaint to allege nominal damages as a result of the deprivation of her right to religious exercise and free speech, as opposed to injunctive relief that was requested prior to graduation. *See Corder v. Lewis Palmer Sch. Dist.*

No. 38, 566 F.3d 1219 (10th Cir. 2009) (holding that first amendment violations at high school graduation are not moot after graduation has occurred where nominal damages are alleged.).

ARGUMENT

I. Ms. Griffith's Complaint States a Claim under the Oklahoma Religious Freedom Act

When Ms. Griffith's allegations are taken as true, her complaint states a claim that her religious exercise was substantially burdened.[1] Under ORFA, "substantially 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). Similarly, the Oklahoma Court of Appeals has held that a substantial burden exists where, among other things, the government meaningfully curtails a person's ability to express adherence to his or her faith. *Steele v. Guilfoyle*, 76 P.3d 99, 102 (Okla. Civ. App. 2003).[2]

Ms. Griffith properly alleged that her request to wear an eagle feather on her cap during graduation was religiously motivated and a practice she desired to undertake to express adherence to her faith. (Doc. 31 at ¶¶ 14, 15, 16, 17, 18, 25). Moreover, the Native American practice of wearing eagle feathers is recognized and embedded in federal law and widely

[1] Defendants did not make any "compelling governmental interest" or "least restrictive means" argument in their Motion to Dismiss Plaintiff's First Amended Complaint, and therefore this response only focuses on whether or not Ms. Griffith has alleged a substantial burden on her religious exercise, which is all that is necessary to establish a prima facie claim under ORFA.

[2] Defendants' Motion completely ignores this test, instead focusing on the two alternate tests set forth in *Steele*. (Doc. 32 at 13-14), and the Court's preliminary injunction ruling also does not analyze this part of the test and instead focuses on the two alternative tests (Doc. 23 at 9-10). Consequently, Ms. Griffith has alleged sufficient facts that fit within the *Steele* test that have yet to be addressed by Defendants or the Court, and the allegation is sufficient to survive a motion to dismiss.

recognized by federal courts as an essential facet of Native American religious exercise. *See* Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a (2013) (creating religious exception for Native Americans to law forbidding possession of eagle feathers and parts); *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."); 50 C.F.R. § 22.22 (2014); Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes, 59 Fed. Reg. 22953 (Apr. 29, 1994) ("Eagle feathers hold a sacred place in Native American culture and religious practices.").

Defendants prohibited Ms. Griffith from wearing her eagle feather during the graduation ceremony in a manner consistent with her religious beliefs, i.e., on her head and not dominated by another object such as a graduation cap. (Doc 31 at ¶¶ 24-28). By issuing and standing by this prohibition, the School inhibited and curtailed her ability to practice and express adherence to her faith during the graduation ceremony. (Doc. 31 ¶¶ 13-18). Therefore, Ms. Griffith has properly alleged that the School prevented a practice motivated by her sincerely held religious belief, which is sufficient to sustain a claim under the ORFA.

Defendants' assertions do not establish any failure to state a claim, but are addressed solely to the merits of the claim, which is not appropriate as part of a motion to dismiss under Rule 12(b)(6). Even with respect to the merits of the claim, Ms. Griffith's religiously motivated conduct does not have to be required by her religious beliefs, nor must it manifest a central tenant of her beliefs. The ORFA's text as well as *Abdulhaseeb* and *Steele* say quite the opposite. The ORFA's definition of substantial burden is government action "to inhibit or curtail *religiously motivated* practice." Okla. Stat. tit. 51, § 252(7) (2015)(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. *Id.* at § 252(2). Likewise, the federal analogue to the ORFA also includes a broad definition of religious exercise, protecting it regardless of whether it is central to, or compelled by, one's religious beliefs.[3] Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc–5(7)(A) (2013); *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."). Indeed, inquiring into the centrality of a particular religious practice to a claimant's religion would put federal courts in the untenable position of being arbiters of religious mandates. *Native Am. Council of Tribes v. Weber*, 897 F. Supp. 2d 828, 846 (D.S.D. 2012), *aff'd*, 750 F.3d 742 (8th Cir. 2014) ("Interfaith differences ... are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences[.]") (*citing Thomas v. Review Bd. of Ind.*

[3] The federal case law that the *Steele* Court cited to for approval was analyzing ORFA's federal analogue. *See* 76 P.3d at 102.

Emp't Sec. Div., 450 U.S. 707, 717 (1981) ("It is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow workers more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *Gladson v. Iowa Dep't of Corr.*, 551 F.3d 825, 833 (8th Cir. 2009) ("[N]o 'doctrinal justification' is required to support the religious practice allegedly infringed."); *Love v. Reed*, 216 F.3d 682, 689 (8th Cir. 2000). Accordingly, there is no legal requirement that Ms. Griffith's conduct be pursuant to a religious mandate or central to her religion. Instead, it only needs to be religiously motivated, and her Amended Complaint articulates ample religious motivation for wanting to wear a sacred eagle feather on her graduation cap. As such, she has properly stated a claim under the ORFA.

Relying on *Steele*, Defendants erroneously suggest that a substantial burden on religious exercise does not exist where a Plaintiff has alternative means of practicing her religion. Recently, the U.S. Supreme Court flatly rejected this notion in *Holt v. Hobbs*, pointing out that such an approach improperly imports elements of a less rigorous First Amendment analysis to a religious liberty statute that guarantees greater religious liberty protections. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). Instead, the Court said that the substantial burden inquiry goes to the specific religious practice at issue in the case, "not whether the [plaintiff] is able to engage in other forms of religious exercise." *Id.* at 862.

Similarly, reliance on *Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439 (1988), is misplaced.[4] *Lyng* is not the proper legal standard and any characterization of the burden placed upon her as "incidental" is inconsistent the nature of the substantial burden imposed by the

[4] Defendants' discussion of *Lyng* goes to the merits of Ms. Griffith's claim and does not address the more basic matter of whether she has properly stated a claim to survive a challenge under Rule 12(b)(6).

government here. The *Lyng* opinion was issued before enactment of the Religious Freedom Restoration Act ("RFRA"), the ORFA's federal analogue. The *Lyng* 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" the claimant's religious conduct under a less demanding constitutional standard, which is inapplicable to statutory religious liberty claims. *Compare Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 451 (1988), *with Holt*, 135 S. Ct. at 860 (. . . Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment") and *Hobby Lobby*, 573 U.S. at ___, 134 S.Ct. at 2761. Indeed, the heightened statutory protections for religious conduct enacted in RFRA and, later, ORFA, were a direct response to judicial decisions like *Lyng* 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 exercise. Rather, it is precisely the type of government curtailment of religious liberty statutes like ORFA were designed to curb.

The accommodations alluded to in Defendants' motion are insufficient to avoid a substantial burden on Ms. Griffith's religiously motivated conduct and are also attacks on the merits of her allegations, which is not a proper consideration under a Rule 12(b)(6) motion. Further, all of Defendants' suggestions would have required Ms. Griffith to either forgo her religious conduct during the graduation or wear her eagle feather in a manner that violate her religious beliefs regarding how an eagle feather is properly worn. Accordingly, all of Defendants' proposed alternatives create a substantial burden on Ms. Griffith's religious exercise.

The eagle feather is not merely and "adornment" or decoration, it is a sacred object, and Defendants undue prohibitions prevented her from wearing it in a manner consistent with her religious beliefs. Merely being afraid that others might make similar requests is not a sufficient justification for abridgment of Ms. Griffith's religious liberty. *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*, 764 F.3d at 472 ("'general statements of interests' are not sufficient to demonstrate a compelling governmental interest; rather the interests need to be closely tailored to the law."); *Hardman*, 297 F.3d at 1127.

Ms. Griffith has stated claims that plausibly fit within the above precedents, and a determination on the merits as to whether she has sustained her burden is not proper as part of a motion to dismiss. With a meaningful opportunity for discovery, which was unavailable at the preliminary injunction stage due to time constraints, she can establish a depravation of her right to religious exercise. Because Ms. Griffith has properly stated a claim under the ORFA, she cannot be deprived of the right to pursue further discovery through a motion to dismiss.

II. Ms. Griffith States a Claim under 28 U.S.C. § 1983

A. Free Speech

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Rather, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S.

479, 487 (1960). As a threshold matter, analyzing a student's free speech claim requires the Court to conduct a forum analysis. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004); *Fleming v. Jefferson Cty. 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); *Bear v. Fleming*, 714 F.Supp.2d 972, 986 (D.S.D. 2010) (noting that the first thing the Supreme Court did in *Kuhlmeier* was determine that the newspaper was not a public forum).

After the forum analysis, the court must analyze which category of speech a plaintiff's speech fits within. In the school setting, there are three main categories of speech: student speech that happens to occur on the school premises, government speech, and school sponsored speech. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004); *Fleming*, 298 F.3d at 923.

The First Amended Complaint contains facts, when taken as true, show that the School District, by permitting expression on select topics by students, has created at least a limited public forum, engaged in unlawful viewpoint discrimination against Ms. Griffith's speech and unreasonably restricted her speech in light of the forum's purpose. Additionally, the type of speech she sought was not school-sponsored, but instead merely happened to occur in a school setting. Thus, the School District must prove specific facts that demonstrate a substantial interference with operations and discipline, which make a dismissal based on Rule 12(b)(6) inappropriate.

Both aspects of the free speech analysis are discussed below in turn.

1. The Amended Complaint plausibly states facts sufficient to make it above mere speculation that the school district created a limited public forum within the graduation ceremony.

The Supreme Court has identified three types of forums: the traditional public forum, the public forum created by governmental designation, and the nonpublic forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); *Summum v. Callaghan*, 130 F.3d 906, 914 (10th Cir. 1997). In addition to those three, a "limited public forum," arises where the government allows selective access to some speakers or some types of speech in a nonpublic forum, but does not open the property sufficiently to become a designated public forum. *Shero v. City of Grove, Okl.*, 510 F.3d 1196, 1202 (10th Cir. 2007)(citations omitted); *Callaghan*, 130 F.3d at 916.

The Ninth Circuit recently affirmed that a high school graduation, or parts of it, may indeed be a designated or limited public forum. *Nurre v. Whitehead*, 580 F.3d 1087, 1094 (9th Cir. 2009) While the court did not have to address the issue as the school district conceded the point, the court nevertheless contemplated that a school district can create a limited public forum within a graduation ceremony, particularly if there is "student-selected" work or expression. *Id.*

Although some restrictions on speech in the school context are subject to rational basis review, when a public body establishes a limited public forum of this sort, restrictions on expression are permissible only when 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. *Id.; see Shero* 510 F.3d at 1202 ; *Chiu,* 260 F.3d at 346 (citing *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 106-07 (2001)); *Kuhlmeier*, 484 U.S. at 267; *see also Callaghan*, 130 F.3d at 914 (discussing different types of public forums). The School District here likewise recognizes that

the graduation ceremony may "be considered a limited or designated public forum, in which viewpoint discrimination is not permitted." (Doc. 32 at 4).

In this case, Ms. Griffith's allegations, when taken as true, establish that the School District has created at least a limited public forum and potentially a designated public forum, and therefore cannot discriminate based on viewpoint. The School District broadly permits items such as stoles worn by members of the National Honor Society ("NHS"), Future Farmers of America ("FFA"), and others in recognition of school related activities, academics, and school related success. (Doc. 31 at ¶¶ 30, 47). An NHS stole represents membership in the National Honor Society. The NHS is not a governmental entity; it is a private, non-profit organization established to recognize outstanding high school students. As the NHS website notes, "NHS serves to honor those students who have demonstrated excellence in the areas of scholarship, leadership, service, and character." *About Us*, National Honor Society, http://www.nhs.us/about-us.aspx (last visited Sept. 1, 2015). FFA is also a non-profit organization established to, among other things, "develop competent, aggressive, rural and agricultural leadership in Oklahoma." Constitution, Oklahoma FFA Association, *available at* http://www.okffa.org/BB/BlueBook15_16/031_Constitution.pdf (last visited August 31, 2015).

Thus, the First Amended Complaint shows that the School District has already opened the door to allow forms of expression for academics, leadership, service, character and school related success by permitting students to wear variations on graduation attire, but it will only allow certain students to make those expressions. Ms. Griffith is seeking to slightly supplement her graduation regalia, as other students are permitted to do for school related activities, academics, and school related successes. In allowing this for some students, the School District has created a designated or limited public forum within the graduation ceremony for the

discussion of certain subjects, specifically school related activities and academics and in recognition of school related success.

Within the forum that the School has created, it is engaging in viewpoint discrimination and unreasonably restricting speech in light of the purpose served by the forum. Here, the School 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. Ms. Griffith is not being allowed to express her views on achievement while other students and organizations are allowed to express their views.

The School's restriction is also not reasonable in light of the forum's purpose: celebrating student success and achievement. That is precisely the message that Ms. Griffith is attempting to convey. (Doc. 31 at ¶¶16, 30). For the many Native Americans in attendance, an eagle feather is understood to symbolize honesty, truth, majesty, strength, courage, wisdom, power, and freedom. (Doc. 31 at ¶15). Certainly these are values have a rightful place in a high school graduation, and restricting an unobtrusive expression of those values is not reasonable in light of the forum. *See Nurre*, 580 F.3d at 1094, and 1100 (Smith Jr., dissenting) (though the prohibition was viewpoint neutral, it was not reasonable in light of the purpose served by the forum).

Just like NHS, FFA, and other students, Ms. Griffith's eagle feather was given to her in recognition of, and to honor, her great accomplishment of completing high school and to acknowledge her passage into adulthood. (Doc. 31 at ¶¶ 16, 30, 47). Thus, the feather is a form of recognition for her school-related academic success, leadership, service, and character. While she may not be in the National Honor Society, it is a powerful sign of her 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).

Contrary to Defendants' assertion, the situation here is quite different from *Bear v. Fleming*, 714 F. Supp. 2d 972 (D.S.D. 2010), and *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219 (10th Cir. 2009). In neither case did the court examine whether the school was opening the forum for certain topics or subjects by permitting particular graduation regalia, such as stoles and sashes, awarded by non-school entities. Here, the School allows special additions to graduation regalia and expressions from other non-profit groups and individuals, thereby making this case subject to a different legal standard than *Bear* and *Corder*. Additionally, unlike *Bear*, Ms. Griffith is seeking a very minimal variation in graduation attire. Ms. Griffith agreed to wear the School's uniform cap and gown, whereas the student in that case wanted to wear his traditional regalia instead of his cap and gown.

Ms. Griffith could develop, through discovery, further facts to show that the School District has in fact created a limited public forum by permitting these, and perhaps other, students to express their academic success but yet denied Ms. Griffith that right. Thus, it is premature to dismiss this action as Ms. Griffith's Complaint contains facts sufficient to state a claim.

2. Ms. Griffith has stated sufficient facts to plausibly show her speech is protected.

The type of speech Ms. Griffith wanted to engage in is protected. As noted, within the school setting, there are three main categories of speech: student speech that happens to occur on the school premises, government speech, and school sponsored speech. *Axson-Flynn*, 356 F.3d at 1285; *Fleming*, 298 F.3d at 923. The two types that are relevant to the instant case are student speech occurring on school premises and school-sponsored speech.

Where a student's speech happens to occur on school premises, the school must show that the speech would materially and substantially interfere with the requirements of appropriate

discipline in the operation of the school in order for the prohibition to be sustained. *Tinker* 393 U.S. at 509. A mere desire to avoid purported discomfort and unpleasantness generated by the speech is not sufficient. *Id.*

School-sponsored speech is student speech that a school "affirmatively ... promote[s]," as opposed to speech that it "tolerate[s]." *Kuhlmeier*, 484 U.S. at 270-71. "[E]xpressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" constitute school-sponsored speech, over which the school may exercise editorial control, "so long as [its] actions are reasonably related to legitimate pedagogical concerns." *Fleming*, 298 F.3d at 923-34.Although the Tenth Circuit has held a school can discriminate based on viewpoint when the speech is school-sponsored, other circuits do not follow that rule. *Compare Fleming*, 298 F.3d at 926, *and Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir.1993) *with Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005), *and Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir.1991) (en banc), *and Searcey v. Harris*, 888 F.2d 1314, 1319 n. 7 (11th Cir.1989). Ms. Griffith's First Amended Complaint states that she wishes to silently wear an eagle feather as a sign of academic success, to honor her family, and as a form of religious expression, and therefore her speech is her own and protected as in *Tinker*. The School District has not established that its action was caused by something more than a mere fear of a disturbance, or that Ms. Griffith's expression will substantially interfere with the work of a school or impinge on the rights of other students. *See Tinker*, 393 U.S. at 509; *Kuhlmeier*, 484 U.S. at 266.

Here, Ms. Griffith's silently wearing an eagle feather to express her academic success is not so closely connected to the School District or permanently integrated into the school environment that it appears the School District is sponsoring the speech. Rather, it is silent

speech conducted by an individual student to express her academic success, and there are no facts in the First Amended Complaint to show members of the public would reasonably believe it bears the imprimatur of the School District. Ms. Griffith's wearing of an eagle feather is very different than the valedictorian speech at issue in *Corder*. The Supreme Court has recognized that "the question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Kuhlmeier*, 484 U.S. at 270-71. Ms. Griffith's case calls on the School to tolerate her speech, not for the School to affirmatively promote it. In *Corder*, 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. *See* 566 F.3d at 1229. Therefore, the speech in *Corder* was easily confused with the school's own speech.[5] Here, Ms. Griffith's silent wearing of an eagle feather does not bear the School's imprimatur. Unlike *Corder*, Ms. Griffith is not engaging in activity akin to school-sponsored speech, but merely making her own silent expression as in *Tinker*.

The School notably points out that a high percentage of students and graduation attendees are Native American and will understand the significance of Ms. Griffith's eagle feather. Indeed there will be no confusion that Ms. Griffith's expression is her own and not the School's. They will understand Ms. Griffith's eagle feather as symbolizing her personal academic achievements. In short, the line between the School's speech and Ms. Griffith's is not blurred. *See Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

[5] *See Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (referring to *Hazelwood* as the school's own speech). Justice Alito, which the Tenth Circuit cites in *Corder*, would limit *Hazelwood* to what is in essence the school's own speech.

Further, even if Ms. Griffith's speech were deemed school-sponsored, the School District has undermined the pedagogical interests it asserts, and therefore its actions are not reasonably related to legitimate pedagogical concerns. The School District claims its prohibition on Ms. Griffith's expression advances messages of unity, community, discipline, and respect for authority. It further claims that it is attempting to avoid controversy in the community and the singling out of students.[6] However, 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. Those sashes, stoles, and chords worn around the neck are just as visible to the audience as a feather on the cap. Accordingly, community, discipline, and respect for authority are not advanced when the School District already singles out certain students 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, which the School District itself has already undermined.

The allegations in Ms. Griffith's Amended Complaint, when taken as true, sufficiently set forth plausible claims that the School District violated her free speech rights guaranteed under the First Amendment. Therefore, Defendants' Motion to Dismiss should be denied.

B. Free Exercise

Although rules of general applicability burdening First Amendment free exercise rights may be subject to rational basis review, where a plaintiff makes a colorable showing of infringement of recognized and specific constitutional rights, a hybrid-rights analysis applies,

[6] The School makes bare assertions regarding its pedagogical interests, unsupported by any record. These assertions are not sufficient as this is a 12(b)(6) motion, not a 12(c) or summary judgment motion. *See* LCvR 7.2(j) (factual statements or documents appearing only in the brief shall not be deemed to be a part of the record in the case).

subjecting the government's actions to a heightened level of scrutiny. *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 881-82 (1990); *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699-700 (10th Cir. 1998).

In this instance, Ms. Griffith has thoroughly pleaded a colorable First Amendment free speech claim in addition to her free exercise claim, giving rise to a heightened level of scrutiny. Accordingly, the School must demonstrate that its infringement on Ms. Griffith's religious exercise actually furthers a compelling interest, and does so by the least restrictive means. As detailed above in discussing Ms. Griffith's claim under the ORFA, the School has failed to do so.

Moreover, Defendant's prohibition of Ms. Griffith's wearing of an eagle feather on her cap during graduation is not a formal, written policy. (Doc. 31 at ¶¶22, 23). There is no mention of such a rule in the School's graduation dress code. (Doc. 31 at ¶22). Instead, this prohibition was imposed by Superintendent Peters in an ad hoc fashion. (Doc. 31 at ¶21). As such, it is not a rule of general applicability, but instead a rule crafted in response to Ms. Griffith's inquiries. As such, Superintendent Peters' determination is not subject to the same deference accorded to generally applicable rules, such as the law in *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). As Defendants acknowledge, when a rule is not generally applicable, strict scrutiny applies. Defendants' inability to meet the strict scrutiny standard is thoroughly explained above in the discussion of Ms. Griffith's ORFA claim.

Nevertheless, Ms. Griffith pleaded sufficient facts to support a claim even under a less rigorous standard. For the same reasons the School fails the rational basis test under Ms. Griffith's free speech claim, it likewise fails with regard to her free exercise claim. The School manages to advance its interests while affording some exceptions to graduation attire for stoles and sashes, but then claims it cannot make the same accommodations for a single feather. The

School's motivation is its fear of further accommodation requests by other students (Doc 31 at ¶ 28), but those unsubstantiated, speculative fears a not sufficient to justify abridgment of Ms. Griffith's Constitutional rights.

Defendants' asserted interests also go to the merits of Ms. Griffith's claim and are not a proper reason to dismiss. It does not establish failure to state a claim—the arguments are, in fact, rebuttals to a properly asserted claim. Whether any of the Defendants' purported interests are sufficient to overcome Ms. Griffith's asserted first amendment rights is not properly addressed through a motion to dismiss under Rule 12(b)(6).

III. Claims Against Superintendent Peters Should Not be Dismissed

Superintendent Peters must remain a Defendant because there is no proof that he was operating within policy-making authority that was duly delegated by the School Board. Local governments can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where the alleged unconstitutional conduct implements or executes a policy statement or decision officially adopted and promulgated by that body's officers. *Monell v. Dep't of Soc. Serv. of City of New York*, 436 U.S. 658, 690 (1978). However, the doctrine of respondeat superior does not apply to local governments sued under § 1983. *Id.* As such, local governments are not liable solely because an employee violates an individual's constitutional rights. *Id.* at 691. In that instance, liability attaches to the individual employee.

In this case, the School has no formal or written policy banning the wearing of eagle feathers on graduation caps during graduation ceremonies. (Doc. 31 at ¶22). Instead, the decision to forbid Ms. Griffith's wearing of an eagle feather appears to be an ad hoc determination made by Superintendent Peters. (Doc. 31 at ¶24). If he made this decision without policy-making authority, duly delegated by the School District's governing body, then he is liable under § 1983.

Until he establishes that he was lawfully delegated that final policy-making authority, this Court may not dismiss the suit against Superintendent Peters.

CONCLUSION

When Plaintiff's factual allegations are construed in the light most favorable to her, the complaint sufficiently shows that the right to relief is plausible and above mere speculation. Accordingly, for the foregoing reasons, with the exception of those grounds explicitly conceded by the Plaintiff herein, Defendants' Motion to Dismiss should be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of September, 2015, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument to the Clerk of Court using the Electronic Case Filing System (the "ECF System") for filing and transmittal of a Notice of Electronic Filing to the filing following ECF registrants (names only):

Matthew Campbell, Esq.
Robert Daniel Carter, Esq.
Anthony Thomas Childers, Esq.
Fred Andrew Fugitt, Esq.
Daniel Eduardo Gomez, Esq.
Brady Ross Henderson, Esq.

/s Daniel E. Gomez