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## Ninth Circuit Talks Graduation and First Amendment Rights

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In a recent opinion, *Waln v. Dysart School District* (9th Cir. 2022, Nos. 21-15737) \_\_\_F.4th\_\_\_ [2022 WL 17544355], the United States Ninth Circuit Court of Appeals analyzed a school district policy that prohibited students from decorating their graduation caps. The Court determined that the student plaintiff had plausibly alleged that the school district policy was applied selectively, and thus the student had stated a viable claim for a violation of the First Amendment.

### Background

A Native American student (Student) who is a member of the Sisseton Wahpeton Oyate Tribe, graduating from a Dysart School District (District) high school in Arizona, asked the District to accommodate her religious practice by allowing her to wear an eagle feather on her cap during her high school graduation ceremony. The District, which had a policy preventing students from decorating their gown or cap but allowed “school medallion and school approved honor cards and stoles” to be worn over gowns, without any other exceptions, declined the Student’s request.

Despite the denial, the Student arrived at graduation wearing an eagle plume on her cap, which was given to her by her grandmother and had been blessed in a religious ceremony in South Dakota. The District prohibited the Student from attending the graduation. However, that same day, the District allowed another student that was graduating from a different high school within the District to participate in the ceremony, with a graduation cap displaying a breast cancer awareness sticker. The Court analyzed whether the Student had sufficiently stated a claim that the selective enforcement of the policy violated her First Amendment rights of Free Speech and Free Exercise of Religion.

### Free Exercise of Religion Claim

To prevail on a Free Exercise of Religion claim, a plaintiff must show that “a government entity has burdened [her] sincere religious practice pursuant to a policy that is not ‘neutral’ or ‘generally applicable.’” To be generally applicable, among other things, the rule must be enforced evenhandedly.

The Court analyzed the Student’s argument that another student was permitted to display a secular message, which was also against District policy.

The District asserted that the reason for the difference in treatment was due to the students attending two different high schools within the District, however, the Court determined that this argument missed the mark. The Court stated that the critical factor was that the District allowed secular conduct which violated the purported legitimate government interests the District claimed necessitated the policy to the same degree that the Student's wearing of the feather would have done. As such, the Court concluded that the policy was not generally applicable due to the selective treatment and that there were sufficient facts to allow the Student to proceed with a Free Exercise of Religion claim against the District.

## Free Speech Claim

Next, the Court analyzed whether the Student adequately alleged that the District's policy infringed on protected speech in the school context. Here the Court focused on whether the District had regulated the speech based on the "viewpoint" of the speaker. To prevail on this claim, the Student would need to show that the policy was discriminatory either on its face or in its application. In its analysis, the Court held that the policy appeared to be viewpoint neutral on its face, as it prohibits all speech for all students on all graduation caps at the ceremony. However, there was a question as to whether the District enforced the policy in a selective way since it did not allow the Student to express her religious message on her cap while other students were allowed to adorn their caps with stickers expressing other viewpoints. Ultimately, the Court determined that the Student had adequately alleged that the District's policy infringed on her Free exercise of Religion and Free Speech rights.

The case was therefore reversed and remanded back to the lower court for further proceedings.

## Takeaways

This decision has limited application for California school districts since students here have the right to wear "religious, ceremonial, or cultural" adornments at their school graduation ceremony under California law. (See [2019 Client News Brief Number 1.](#)) This is still an important decision as it follows a series of cases that have looked closely at a school district's enforcement of school rules and whether they were applied to religious conduct in an even-handed manner. (See [2022 Client News Brief Number 31.](#)) Thus, this case serves as a reminder that school district rules impacting religion and speech must be applied consistently to secular and non-secular views.

For more information about this ruling or about addressing student and staff free speech and free exercise of religion rights in general, please contact an attorney at one of our [eight offices](#) located statewide. please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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