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Investigative Report

To: Twin Peaks Charter Academy Board
From: William Bethke
Re: Analysis of Legal Issues Related to Valedictorian Speech Incident
Date: July 21, 2015

Introduction

I was engaged by Twin Peaks Charter Academy (the School; Twin Peaks) to conduct an independent investigation of claims that the School had violated the law in connection with a decision not to permit the class valedictorian (valedictorian or "the Student") to give his prepared speech at the School's 2015 graduation ceremony.

Persons interviewed in relation to the events include:

- BJ Buchmann, School Director and Principal.
- Doug Bean, Twin Peaks Dean of Students.
- Tracy Volan, Executive Assistant to Mr. Buchmann.
- Don Young, Father of the valedictorian.
- Alise Curry, Mother of the valedictorian.
- Dallin Witt, former Twin Peaks Teacher.

I also received numerous written documents from the School and the parents,

bearing on the events. These included some written statements reflecting details of particular events observed by school employees. At my request, Mr. Bean provided a brief demonstration of the "Infinite Campus" student information system, and printed some documents for me. Also at my request, Ms. Volan retrieved and provided additional documents. The valedictorian and his parents expressed a reluctant willingness for him to be interviewed, but a preference for resting on the written documents and parents' interview. I elected to honor the family's preference and did not interview the Student. All school employees were advised that I was retained by the School and that they should not assume the confidentiality of their statements would be maintained by the Board. Non-employees were similarly advised that a likely outcome of this process would be a report that might become public. A draft report was submitted to the Board president on July 17, 2015. The president made six comments on that draft and I made small changes to clarify wording in response to some, but not all, of those comments. No substantive aspects of the report changed from the draft to the final.

Background

Briefly, the School was conducting its second ever graduation in May, 2015. In 2014, nine graduates marked the first graduation at Twin Peaks. In 2015, this number rose to 28. The School had three students — a valedictorian, salutatorian and class historian — slated to give brief speeches. It also had an adult graduation speaker. The Principal vets student speeches in advance. In 2015, the valedictorian was late turning in his draft speech. When the Principal met with the valedictorian to discuss this draft, the Principal expressed concerns about some of the humor in the speech being excessively

pointed or critical, the use made of teacher and student names in the speech, and that the Student was "coming out" — telling the school community he was gay — for the first time in this speech. The Principal was also concerned with whether the Student had revealed his sexual orientation to his parents, or was planning on graduation being when his parents would learn that he was gay.

Factual disputes have emerged over where events went from here, and will be discussed further below. In the end, however, the Principal made a final decision at the ceremony itself not to allow the valedictorian to give his speech. Though recognized as valedictorian in the formal graduation program, the Student was not recognized as such from the stage.[1] The Student handed out copies of his speech to students beginning shortly after graduation. He also returned to the school and gave the speech to other students the next week, and has subsequently given the speech in other public contexts.

A marked public controversy ensued, in which supporters of the Student accused the School of both improperly "outing" the Student to his parents and of discriminating against him based on his sexual orientation by refusing to allow him to deliver his speech (or otherwise fully recognize him as valedictorian) at graduation. The School, through officials other than the Principal, aggressively defended its actions in the media. Ultimately, the School agreed to conduct an independent investigation, focused on the events related to graduation and whether any standard of law was violated.

[1] There was also a subsidiary issue concerning a song the valedictorian wished to sing, with his classmates who were in the school choir singing from the audience. The Principal expressed confusion about this plan and when the valedictorian's speech was cancelled there was no song. Though it does not bear directly on the analysis, below, it was also concerning to the Principal at the graduation itself that the student appeared with the sleeves torn off his graduation gown, turning it into a kind of cape. He was provided a substitute gown.

Disputed Facts and Findings of Fact

There is no dispute that the valedictorian was late delivering a draft speech to the Principal. There is a dispute over the conversation that ensued. Briefly, the Principal indicates that he felt the speech had inappropriate and potentially insulting humor. As an example (shared with the valedictorian), the speech recognized the good qualities of the Student's English teacher, but went on to say that the Student had read summaries of certain assigned books (instead of the books themselves), did not understand the purpose of the study of literature, and intended to never read a book again in his life. According to the Principal, the valedictorian agreed, during their discussion, that this was probably inappropriate. The Principal was concerned with several instances of similar humor. The speech also named another graduating student, a girl, and recounted the valedictorian's failed effort to ask her out on a date. The Principal believed naming another student in this fashion was inappropriate. The Principal asked whether the Student had mentioned to his mother and father than he was gay — suggesting or implying that having his parents learn this for the first time through a graduation speech might not be appropriate. It is also clear the Principal was distinctly uncomfortable with the prospect of the Student "coming out" though his graduation address. This much of the conversation does not appear to be in material dispute.

What is disputed is, first, whether the Principal indicated to the valedictorian that the Principal intended to contact the Student's parents concerning the "coming out" aspect of the speech. The Principal reports he did mention this and that the Student gave a noncommittal reply (perhaps "all-righty then"), which the Principal took to indicate there was no strong objection to this contact. The Principal left the meeting assuming it

was clear he would be in touch with the parents. The Student represents that he did not give permission for this contact and, not surprisingly, the first disputed legal issue is whether the Principal improperly "outed" the Student to his parents.

There is no dispute the Principal contacted the Student's father and, later, his mother. There is no dispute this was the first formal notice to both parents that their child was gay. Notably, both parents have been entirely supportive of their son.

Second, the Principal and valedictorian agree that the Principal asked for a revised speech, but their accounts then differ dramatically. According to the Principal, the valedictorian repeatedly failed or refused to come in to submit a revised draft or discuss the speech. On one occasion, the Principal asked office staff to retrieve the Student so he could check on progress in revising the speech. When the Student saw the front office staff approaching, he quickly exited the room he was in and disappeared. On "senior night," the valedictorian was awarded his medal in a school ceremony. Immediately afterward, he "fled" another attempt to initiate a conversation. The day before graduation, the Student delivered a note to the Principal's office, but did so by quickly entering, leaving the note, and then refusing an invitation to stay and talk, saying he was too busy. The note made no mention of some of the requested revisions (for example, the removal of a student's name or changing some of the humorous and possibly offensive comments). Instead, it was a point-by-point and well-argued defense of the Student's decision to "come out." The Principal read this as reflecting a decision not to change the speech at all.

The valedictorian, on the other hand, insisted in written statements or reports (that vary in some details) that he provided the Principal with a revised speech, showing that

he had taken seriously the request to remove names and change the tone of parts of the speech. He had narrowed his resistance to change to the "coming out" part of the speech and explained himself, in writing, on that point. The investigator notes, however, that the version of the speech finalized just hours before the graduation ceremony (and retrieved from the Infinite Campus system, as discussed below), only partially addressed the issues other than "coming out." While the Student had substantially edited the discussion of the English teacher, he had left in comments that made it appear he had been able to pass classes without really doing the work (and there is no doubt the Student is academically gifted) — and leaving in other humorous comments that the Principal believed were too pointed. In addition, the account of asking out a classmate and being refused remained, with the name and some details removed. In a graduating class of 28 students, it was very likely this girl remained personally identifiable. It is also very probable that had the valedictorian and Principal met to discuss this draft (and it is undisputed they never did), the Principal would have encouraged or required changes to the speech having nothing to do with "coming out." At the same time, it is clear the Principal intended to at least discourage and perhaps to flatly prohibit any mention of the Student's sexuality.

The investigator found the Principal's account of these events credible, and supported by other witnesses and documents. However, the investigator does <u>not</u> find that the Student was fabricating his <u>belief</u> that the Principal had seen a revised speech. The misunderstanding — which appears to be genuine on both sides — arose from the "Infinite Campus" student data system and its use of "Google Docs." Simply, when the valedictorian first created his draft speech, he shared the draft by sending a Google Docs

"invite" to the Principal. By clicking on this "invite" the Principal was given access to the speech. The Principal never received another "invite" and never realized the Student was editing the speech in Google Docs. In fact, the original "invite" gave Principal ongoing "permission" to view revisions. But the Principal did not realize the Student was making revisions and expecting the Principal to access those through Google Docs. And, indeed, the valedictorian made repeated edits to the speech, right up to hours before the ceremony. When the investigator visited the School, he inquired about the use of the Google Docs system, and Mr. Bean, another administrator, used administrative access to the system to produce the entire history of the valedictorian's speech. From this history, it was clear the valedictorian repeatedly edited the speech (at times making substantial changes and at other times merely making slight changes in word choice).[2] In addition, the Principal had not accessed the edited document before the graduation.

Thus, the investigator finds that the valedictorian understandably believed his speech was being viewed by the Principal as he changed it. Given that assumption, the Principal's repeated attempts to talk with the Student were doubtless viewed as requests to discuss edits (which may be one reason the Student changed the speech repeatedly). When the Principal continued to seek a meeting, the Student at last delivered his hand-written note to the Principal. The valedictorian understandably believed he was communicating his unwillingness to change only one part of the speech. But the Principal understandably believed the valedictorian was refusing or procrastinating in changing his speech, repeatedly dodging face-to-face meetings (as he was), then

[2] The student continued to edit the speech for several days after the graduation ceremony.

delivering a hand-written note that the Principal inferred meant the Student would make no changes. While there was confusion, given that the Student repeatedly evaded any conversation with the Principal, the investigator finds that the Principal's inferences regarding the Student's intention were reasonable (though in hindsight mistaken).

There is, third, what might be called a dispute over the tone of the initial exchange. It is obvious the Student came into this conversation with a high level of trust in the Principal. By all accounts, their relationship had been a good one and in submitting the draft speech, the valedictorian selected the Principal as the first person he would tell that he was gay. The Principal appears to the investigator to be a soft-spoken and very calm individual. At the same time, the investigator finds that the Principal was distinctly uncomfortable with the topic of the Student's sexuality. His discomfort may have been apparent to the Student. To the extent this was experienced by the valedictorian as rejection by a person the Student trusted, his sense of betrayal may well have been acute. It is also clear that the Student was displeased with the Principal contacting his parents and this further damaged his trust. The Principal's account of his conversation with the Student are consistent with his soft-spoken persona. The Student's accounts suggest a harsher, punitive and critical tone to their exchange. To some extent, of course, the Student's perceptions may be colored by the charged nature of this issue — this was a long-thought-about moment for the Student and having it questioned to any degree was no doubt difficult. But to some extent, the advocacy and publicity — generated by both the School's defenders and supporters of the Student — also resulted in exaggeration in some of the Student's written accounts. In short, the investigator credits that the Principal, despite his discomfort with the topic, which was likely evident, behaved calmly

and was not attempting to badger or humiliate the Student.

The investigator notes that the Principal expressed regret that his relationship with both the Student and parents had been damaged by these events. He also expressed that while he disagreed with some of the parents' public statements, he fully respected and understood their decision to support their son. While the investigator could delve into more specific factual nuances, the findings made above are sufficient to begin analysis. Other facts will be discussed in the analysis.

Analysis

I. Did the Principal Improperly "Out" the Student to His Parents?

As an initial matter, the investigator finds that the issue of "outing" the valedictorian does not present a question under the Family Educational Rights and Privacy Act (FERPA).[3] That statute protects information contained in school records. Generally, this is information that appears in the centrally maintained records of the school, not every bit of information a school official happens to know (or thinks they know) about a student, nor every piece of paper.[4] Here, there is no FERPA "record" that provided this information. Rather, a draft speech which the school could elect to keep or not keep and that would ordinarily not be considered any part of the Student's "educational record" was the only written source of this information. The investigator finds FERPA did not apply to this document, particularly in its draft state.

That does not end the analysis of this issue. Several cases have considered claims that deliberately "outing" a person constitutes an improper invasion of constitutional or

[3] 20 U.S.C. § 1232g.

[4] See *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002) (graded papers not a FERPA record at least until the grades were entered in the teachers' gradebook, and thus the school's "central" records).

common law privacy rights and thus violates applicable law.[5] On the surface, the outcomes in these cases might appear inconsistent with each other. But, as discussed below through review of two of the reported cases, factual difference explain much of the variance in results.

In *Sterling v. Borough of Minersville*[6] a police officer threatened an 18-year old with "outing" to his grandfather. This individual and a 17-year-old had been arrested for underage drinking, and the police had reason to suspect they were also engaged in sexual activity. The only charge, however, concerned use of alcohol. For a number of reasons, the threat of disclosure to the 18-year-old's family had no legitimate law enforcement purpose. In response to this threat, the young man stated he would kill himself. Upon release from police custody, he did. The court of appeals was called upon to decide if the police officer's conduct violated the "clearly established" right to privacy. In particular, the court stated "[i]t is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity."[7]

In contrast, in *Nguon v. Wolf,*[8] the court rejected a right to privacy claim based on a school official informing a parent that discipline for "inappropriate public displays of affection" concerned public same-sex displays of affection. The court rejected this

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[5] Secure Supreme Court guidance on informational privacy as a constitutional matter awaits some future case. The Court, however, has more than once "assumed" such a right exists and then analyzed whether a violation could be found. *See, e.g., NASA v. Nelson*, 562 U.S. ___ (2011). The investigator makes the same assumption here and also notes that if a federal constitutional right did not exist, state constitutional and common law principles might well fill in the gap.

[6] 232 F.3d 190 (3rd Cir. 2000).

[7] *Id* at 196.

[8] 517 F.Supp.2d 1177 (C.D.Cal. 2007).

argument, first, because the displays of affection were made public by the student. This eliminated any "reasonable expectation that her [the plaintiff's] sexual orientation would not be disclosed in the context of her school. Her conduct at school was inconsistent with any right to keep her sexual orientation private."[9] Beyond this, the administrator was expected to interact with the parents when imposing student discipline and therefore needed to provide some form of explanation of the student's perceived misconduct. "If a school administrator is prevented from providing a parent with the context for discipline, it is difficult to see how the school administrator could have a meaningful discussion of the conduct, or the parent could mount a meaningful protest."[10]

Obviously, neither of these cases is factually similar to the case here. Nonetheless, three differences between these cases stand out and suggest principles that can be applied here. First, in *Sterling* the young man who had been arrested was no longer a minor, so the interest in the police informing parental figures (in that case, a grandparent) was attenuated or simply absent. Second, in *Nguon* the student had already made her sexual orientation known in a public school context, and the only official communication "outing" the student occurred in that same school context — there was no remaining "legitimate expectation of privacy" being impaired. Third, in *Sterling* the threat was extraneous to legitimate law enforcement activity. In *Nguon* revealing the context for student discipline was at the least appropriate, and perhaps a necessity to proper school administration.

While the issue is closer here than it was in either *Sterling* or *Nguon,* the

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[9] *Id* at 1191.

[10] *Id* at 1194.

investigator finds that the disclosure made to the parents did not violate privacy rights of the valedictorian. First, it is clear the valedictorian was in the process of "coming out." The investigator certainly understands that giving a draft speech to the Principal was not intended as a license to broadcast the student's sexuality to the world. And that is not what happened. Instead, the Principal approached the two parents to inform them of their son's intended public announcement. This was a limited disclosure with an appropriate purpose: preparing the parents for their son's possible public disclosure at a graduation they would attend and enabling them to discuss the issue with him. While the Principal did not have the level of duty to report that was present in *Nguon,* he at least had discretion to try to manage a school event without the parents being surprised by this disclosure. Second, while the valedictorian was 18 years old, he was still a high school student. The graduation ceremony itself is, for at least some purposes, the mark of transition to adult status in relation to one's parents.[11] Finally, while the Principal certainly could have done more to be sure the Student did or did not object to discussions with his parents, this is not a case in which an official simply discloses information (or threatens disclosure) over clear objection or without warning. The Principal attempted to obtain the Student's agreement that discussion with his parents was warranted and based not on clear consent, but on lack of a clear objection, went ahead.

Subsequently — indeed, almost immediately following graduation — the

[11] By analogy, FERPA treats the period, if any, between an 18th birthday and high school graduation as transitional. An 18 year old can claim the right to prevent his or her parents from inspection of records. 20 U.S.C. § 1232g(d). But during this period parents keep some right of review of the records. 20 U.S.C. § 1232g(b)(1)(H). And parents have other FERPA rights related to student safety and emergencies, special education records, and Section 504 records. While FERPA is not applicable here, the complexity of these rules reflects what is readily apparent: 18-year-olds who have not yet graduated are typically in a transitional phase of parent involvement in their lives.

valedictorian began distributing copies of his speech. The next week he returned to the campus and gave his speech publicly to a group of students. No allegation of "outing" the Student can be made after such public disclosure by the Student. The investigator emphasizes that it is not his role to approve or disapprove of the public relations efforts of either the School or the Student's supporters. It is quite clear that parties other than the Student, the parents, and the Principal escalated in public communications. The limited conclusion here is that the Principal's decision to talk to the parents of a student, with at least notice to the Student, shortly in advance of a high school graduation where the Student intended to "come out" did not violate a constitutional or common law privacy right. The Student's immediate subsequent distribution of his speech and public appearances made it clear he was indeed in the process of relinquishing all expectation of privacy in his sexual orientation.

II. Was the Student Discriminated Against Based on Sexual Orientation?

The core issue in this case is an assertion that this student was refused a valuable and earned opportunity to address the school community as its 2015 valedictorian for discriminatory reasons — that is, because he is gay. To understand the analysis that follows, it is important to provide some legal context for valedictory addresses.

A. First Amendment Rights and Student Graduation Speeches

In *Corder v. Lewis-Palmer School District*,[12] a comprehensive high school had fifteen students named as valedictorians (all had a 4.0 grade average). Each student was give roughly one-half minute to speak. The principal vetted all the speeches. One student, however, gave a speech that was different from her submitted text. From the

[12] 566 F.3d 1219 (10th Cir. 2009), *cert. denied* 558 U.S. 1048 (2009).

stage she praised "Jesus Christ," and urged her audience to "find out more about the sacrifice He made for you ...."[13] At the end of the ceremony, this student was refused her diploma. After a meeting with the student and her parents, the student was informed she would only get a diploma if she apologized to the entire school community, by email, for her conduct. The apology was written by the district and focused, in part, on the student changing the text of her speech without notice, but went on to say "I realize that, had I asked ahead of time, I would not have been allowed to say what I did."[14]

The student raised a free speech claim, mainly asserting that under *Tinker v. Des Monines Independent School District,*[15] her speech would not have been disruptive and therefore fell within her rights. The school district and the court found, instead, that under other precedents in the *Tinker* line, this was a speech that "members of the public might reasonably perceive to bear the imprimatur of the school."[16] Under these circumstances, the court found that the district was "entitled to exercise editorial control over [the student's] speech as long as its action was reasonably related to pedagogical concerns."[17] Among those pedagogical concerns were "discipline, courtesy and respect for authority."[18] And the Court went out of its way to state that the district's editorial control did not need to be the "most" or "only" reasonable" actions, merely

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[13] *Id* at 1221.

[14] *Id* at 1222.

[15] 393 U.S. 503 (1969).

[16] 566 F.3d at 1227. The leading Supreme Court decisions on student free-expression are: *Tinker, supra; Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); and *Morse v. Frederick*, 551 U.S. 393 (2007). The *Hazelwood* case, concerning student journalists, is cited prominently in *Corder*.

[17] *Id* at 1229.

[18] *Id* at 1228.

"reasonable."[19] On closely-related reasoning, the Court rejected first amendment "free exercise of religion," and fourteenth amendment "equal protection" (that is, discrimination) claims. Notably, *Corder* was decided by the Tenth Circuit Court of Appeals. Absent contrary Supreme Court precedent (or a conflict within the circuit) this ruling on federal law is binding in Colorado. Non-lawyers reading this report may not fully appreciate the reference to "reasonable relation" in *Corder*. Generally, stating that an official only needs to show a "reasonable relation" to some legitimate goal is a signal that it is highly unlikely the decision will be second-guessed in court. While this is not a rigid rule, it would require an unusual or extraordinary showing to say that "editorial" control over speech, in this context, was "unreasonable."

As a matter of ethics the facts here are more favorable to the Student than the facts in *Corder*. He presented his intended speech and his reasons for wanting to "come out" to the Principal. Unlike Ms. Corder he did not attempt to play a game of "bait and switch" with the administration. But legally the valedictorian here is in exactly the same unfavorable position Ms. Corder was in trying to talk about her religion.[20] In either case *Corder* holds that students do not really possess significant free speech to shape school-sponsored speeches. Instead those are under "editorial" control.

Notably, *Corder* did not just reject a straightforward free speech claim, it also rejected an "equal protection," or discrimination claim. And just as both constitutional and statutory provisions prohibit discrimination based on religion, Colorado law also

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[19] *Id* at 1231 (commenting on Corder's "compelled speech" objection to the forced apology).

[20] One could distinguish *Corder* on the basis of a District's concern that it might to "establish" religion via a student speech. With 15 students giving 30 second addresses snf a fraction of one devoted to personal religious belief that seems strained and it was not significant in the court's analysis.

prohibits discrimination based on sexual orientation.[21] These protected statuses are important and parallel. But by itself that does not overcome the "editorial" power of a school district when dealing with a student's graduation ceremony speech. Under *Corder* this is, in effect, speech "of" the School and not true free speech of students. Here (as discussed below), due to the confusion, the Principal never made a clear, final decision that he would not allow just the sexual orientation aspect of the speech. None of his concerns with the speech were actually discussed and resolved. As a result, the investigator cannot find that discouraging (and perhaps prohibiting) the elements of the speech bearing on sexual orientation was in and of itself an act of discrimination. If it were, *Corder's* endorsement of "editorial control" would quickly unravel. Indeed, in that event Ms. Corder would have suffered unlawful discrimination based the religious comments in her speech.

This does not exhaust, of course, a discrimination analysis. But it does fairly indicate that claiming a valedictory speech was disallowed or (as in *Corder*) disciplined in a discriminatory manner will be a steep hill to climb. The investigator has considered four possibilities: whether a discrimination claim remains in the treatment of the Student aside from disallowing his speech; whether Supreme Court decisions since *Corder* suggest that precedent may no longer be sound; whether there is any comparative basis for finding improper discrimination based on sexual orientation; and whether the *Corder* court's construction of a Colorado statute, in relation to a state-law claim, was sound.[22]

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[21] C.R.S. § 24-34-601.

[22] On matters of state law, the decisions of Colorado courts are the final authority and Tenth Circuit decision, while important, is only persuasive.

B. Failure to Accord Sufficient Honor

One can easily imagine a straightforward case of discrimination against a valedictorian or other student graduation speaker. Suppose Ms. Corder, for example, had been barred from speaking simply because it was known she had strong religious beliefs. Or suppose the valedictorian here had "come out" before graduation, and then been barred from speaking without regard to the content of his speech. In both of these instances, the School's "editorial control" would not be the issue; discrimination would be. A concern along these lines was expressed in the investigator's interview with the parents. In effect, the parents argued that while they could perhaps understand a decision not to permit the speech, they could not understand why the Student was not at least honored by being mentioned or named officially as valedictorian from the stage. This argument has some force. If the Student was not willing to give a speech the School was willing to have presented, it was still possible for the School to honor him from the stage, as it honored the salutatorian and class historian.

This argument founders on a basic question: was this failure or refusal to officially honor the valedictorian from the stage attributable to his sexual orientation? The great difficulty in answering that question is that the events were, to a large extent, improvised as a result of confusion. The Student believed his speech was acceptable but for his decision to reveal his sexual orientation. The Principal believed the Student had either procrastinated or refused to make any changes. The speech, in fact, had features having nothing to do with sexual orientation to which the Principal objected. And it seems clear the Principal was frustrated with the Student repeatedly refusing to speak to him about a revised speech (while the Student assumed the Principal had been following his changes

online). In hindsight, it is easy to advocate for some formal acknowledgement of the valedictorian form the stage. Any on-the-spot attempt, however, to explain why the valedictorian was being honored but not giving a speech could easily have been construed as accusatory or still insufficient or invited the valedictorian to refuse the honor. Normally, the honor is speaking, and disentangling the two is not as straightforward as it might seem. Simply, the investigator cannot find that the failure to compose some last-minute *ad hoc* means of honoring the valedictorian, while refusing to let him speak, was motivated by the Student's sexual orientation. It is telling that the Principal had known for some time that the Student was gay, yet the "senior night" ceremony and his formal recognition as valedictorian there went forward. The issue between the Principal and the Student on graduation night was not that the Student was gay, it was the confusion and tug-of-war over the Principal's efforts to assert "editorial control." A discriminatory motive is not the most plausible explanation for the events at graduation. To the contrary, the best explanation by far was the Principal's frustration with the breakdown in the process for reviewing the speech. And that frustration was the immediate and overwhelming cause of the last minute improvisations, awkwardness, and oversights.

C. Has Supreme Court Precedent Undermined *Corder*?

Two 2015 decisions of the Supreme Court of the United States have caused the investigator to reflect briefly on whether *Corder* is sound precedent.

In *EEOC v. Abercrombie & Fitch*,[23] the Supreme Court reversed the Tenth Circuit in a statutory religious discrimination claim. In *Abercrombie* the Court found that a

[23] 575 U.S. ___ (2015).

Muslim woman rejected as a job applicant for wearing a traditional head covering (or hijab) had properly stated a case for religious discrimination based on her employer's refusal to accommodate her expression of religious devotion through dress. Though widespread reporting of the case suggested a broad ruling, the decision is remarkably narrow — focused only on whether the employee had to formally request an accommodation (when her need for such consideration was obvious). Despite the technical aspects of the ruling, the Court observed that nondiscrimination against expressions of religious belief (under the statute there) "requires otherwise-neutral policies to give way to the need for an accommodation"[24]— rejecting the Tenth Circuit's reliance on the surface "neutrality" of the employer's action. And, of course, near the end of the last term the Supreme Court ruled in favor of same-sex marriage. There, the Court's opinion begins with this observation: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[25]

These two cases clearly hold that certain expressions of identity have, in some contexts, enhanced protection. To make that point as strongly as the investigator can in this context: would an African-American student have a right to insist over administration objection on giving a graduation speech that asserted, in light of recent controversy, that "black lives matter?" Would a child of immigrants be, as a matter of enforceable right, entitled to praise immigrant contributions to America? Should Ms. Corder have had the right to mention her faith? And should the valedictorian here have been entitled to

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[24] Slip op. at 7.

[25] *Obergefell v. Hodges*, 576 U.S. ___, ___, Slip op. at 2-3 (2015).

reveal to his teachers, classmates and their parents that he was gay? In theory, if one of these questions should be answered in the affirmative, they all should be. In each case (and many others one could imagine), identity and expression are deeply entangled.

As sympathetic as some of these hypotheticals may be to different readers (and are to the investigator), it would severely over-read both these recent Supreme Court decisions to find that the Tenth Circuit's ruling in *Corder* had been undermined. When student speech relates to deeply-felt issues of identity, it may gain authentic enhanced protection in many contexts. One should truly hesitate, for example, before finding that such speech would satisfy the *Tinker* test of threating disruption of the school environment.[26] But that is not the test applicable in this context. Here, the speech is treated as speech of the School, and *Corder* squarely states that the School is not required to "endorse" even sincere and heart-felt expressions of personal identity. While these recent Supreme Court rulings are suggestive, they also involve distinguishable facts and distinguishable law. The investigator must conclude that *Corder* remains binding here.

D. Did the School Discriminate by Permitting Similar Student Speech?

Another point raised in some of the criticisms of the School's conduct is that an adult speaker at this very graduation alluded to the parentage and conception of the students in a way that some of those attending the graduation found more likely to be sexually suggestive than the valedictorian's proposed speech. This comparison is off-point. To begin with, schools do not ordinarily vet the speeches of adult speakers in the

[26] Within the last year many schools have dealt with student protests over police use of deadly force. In that context, the expressive activity was not school-sponsored, and the *Tinker* test applied. Because of the racial issues entailed in these protests, many schools and districts permitted (or took very mild action to regulate) student activity that undoubtedly disrupted regular education.

same way they vet student speeches. Second, while a School could certainly be held to be endorsing such remarks this is normally considered in identifying who is selected to speak, not through direct editorial control over the speech. Third, questioning whether a student should reveal their sexual orientation at graduation is not principally about allusions to sex. Rather, a comparative case for discrimination would be plausible if the School permitted similar school-sponsored student expression on matters of personal identity in a way that was then denied to the valedictorian, because he was gay.

This possibility caused the investigator to examine the available texts of the other student speeches given at graduations at Twin Peaks. If the School favored some expressions of identity over others, that would at least present a *prima facie* case of discrimination. The School was able to produce all the speeches given (at least in draft form, with some markups) in 2015 and two of the three given in 2014. None of these four student speeches so much as hint at expressions related to deeply-felt issues of personal identity. Obviously, this record would perhaps be too thin to show any established practice in any event. The School, after all, has now conducted exactly two graduations. But such evidence as there is does not suggest any comparative case for discrimination.

E. Did *Corder* Correctly Construe C.R.S. § 22-1-120?

Last, completeness requires review of one state-law issue also discussed in *Corder*. The same line of Supreme Court cases that caused *Corder* to find student graduation speeches subject to essentially plenary editorial control by school officials included a case that sharply limited the right of student journalists working in "school sponsored" newspapers. Indeed, *Corder* relied heavily on this very decision: *Hazelwood*

Sch. Dist. v. Kuhlmeier.[27] The Colorado General Assembly reacted to *Hazelwood* by passing a statute giving a greater level of protection to student journalists. The Tenth Circuit found the statute was confined to protecting student newspapers, publications or journalists, and did not change the ground rules for valedictory speeches. Because this is a ruling on an issue of state law, the Tenth Circuit decision is important persuasive authority, but not technically binding.

For the most part, however, the Tenth Circuit's description of this statute as entirely focused on student publications is accurate. The statute makes one statement that no student free speech or free press "shall be deemed to be an expression of school policy."[28] Taken in isolation, that statement seems contrary to the *Corder* observation that student graduation speeches will be understood as carrying the "imprimatur" of the School. But quoting just this phrase mis-reads the statute. Subsection seven, from which this quote was taken, goes on to protect Schools from any liability to third parties arising from student speech or publication. The purpose of this subsection is obviously to protect the School from the possible consequences of changes made in other parts of statute — changes that only benefit student journalists. Thus, the statute throughout is unmistakably focused on defining in detail the boundaries (much more generous than those in *Hazelwood*) for student journalism and addressing resulting implications. In short, the investigator is fully persuaded by *Corder*'s construction of this statute.

The General Assembly or any other legislative body, could elect to enact protection analogous to C.R.S. § 22-1-120 for student graduation speeches. In doing so,

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[27] 484 U.S. 260 (1988).

[28] C.R.S. § 22-1-120(7).

there would no doubt be debate and discussion concerning what the appropriate boundaries and processes should be for that context. Even under Section 22-1-120, students are not given unfettered free speech. Rules giving them greater scope than they are given under *Hazelwood* are set out in the statute, and then entrusted to an adult "faculty advisor" to the student newspaper. No such scheme of rules and processes replacing *Hazelwood* exists in Colorado law for student graduation speeches.

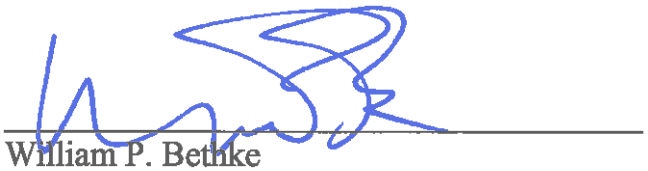
The Student here made a well-argued and intuitively appealing case that he should be able to speak about a matter of profound personal importance at the moment of graduation, in connection with a recognition he had earned. This is precisely the kind of argument that supported the passage of C.R.S. § 22-1-120. But that statute is more limited and no analogous rule of law helps the valedictorian escape the holding in *Corder*. Current Colorado statutes, limited to the student publication context, do not reach this case.

Conclusion

Our society is changing with remarkable speed on the subject of sexual orientation. While this investigation was underway same-sex marriage, as already noted, became the law of the land. As is usually the case in times of rapid social change, many people are uncomfortable with this change. Some are opposed. Individuals who act on that opposition by using official power to discriminate against LGBT individuals will be called to legal account in many cases. But there will also be instances of confusion, unease, ambiguity, or misunderstanding. When these occur, dialogue among people of good will can moderate the kind of public controversy that ensued in this case. That such conversation or dialogue broke down here is obvious to all. The investigator

emphasizes, however, that both the student and School should take some ownership for the initial breakdown. The investigator does not find either the Student or Principal acted out of any malice or ill-will. Yet the Student repeatedly evaded conversations that might have clarified the situation or changed the course of events. And the Principal obviously lost — and regrets having lost — the trust that might have made the Student more willing to engage. The resulting confusion was genuine and, with the benefit of hindsight, understandable. It is not, however, well understood or credibly explained as acts of discrimination.

The investigator concludes the events through the graduation itself did not entail any violation of applicable law by the School.



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