



October 28, 2013  
VIA E-MAIL, FAX, & U.S. MAIL

Ms. Lisa Kay Hartmann, President (on behalf of the Board)  
Dr. Constance Bauer, Superintendent  
Bordentown Regional School District  
318 Ward Avenue  
Bordentown, NJ 08505  
Fax: 609-298-2515

**Re: The Inclusion of Religious Music in Public School Programs**

Dear Ms. Hartmann and Dr. Bauer:

It has come to our attention that the Bordentown Regional School District (the "District") recently decided that religious music is banned at the winter concert performances at elementary schools within the District. According to the October 18, 2013 statement from Dr. Bauer, "religious music should not be part of the elementary program(s)."<sup>1</sup> This decision is apparently based upon inaccurate information about the New Jersey federal court ruling in *Stratechuk v. Board of Education of South Orange-Maple School District*.

We write to explain that every federal court to examine the issue has determined that including Christmas carols and other religious music in school choir programs fully complies with the First Amendment and to urge you to immediately rescind the new policy instituted by administrative officials. By way of introduction, Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of people to freely live out their faith. We frequently assist students, teachers, and public school districts in understanding their rights and responsibilities when it comes to seasonal religious expression.

Federal courts have acknowledged that the vast majority of high-quality choral music is religious in nature.<sup>2</sup> The law thus clearly recognizes that "[a] position of neutrality towards religion must allow choir directors to recognize the

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<sup>1</sup> Winter Concert Information, <http://www.bordentown.k12.nj.us/news.cfm?story=73029&school=0> (last visited Oct. 23, 2013).

<sup>2</sup> See, e.g., *Bauchman v. West High Sch.*, 132 F.3d 542, 554 (10th Cir. 1997) (considering it well "recognized that a significant percentage of serious choral music is based on religious themes or text"); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir. 1995) (crediting testimony that approximately "60-75 percent of serious choral music is based on sacred themes or text").

fact that most choral music is religious” in nature.<sup>3</sup> Because singing a wide variety of religious songs—particularly during the holiday season—is simply a result of “the dominance of religious music in this field,” courts have never considered this fact to either unconstitutionally advance or endorse religion.<sup>4</sup> To the contrary, they have recognized for many years that Christmas “carols have achieved a cultural significance that justifies their being sung ... in public schools.”<sup>5</sup>

The New Jersey federal court recognized this significance when it upheld the Cherry Hill Township School District’s policy of including religious symbols and objects in calendars and displays that the district produced for Christmas and other seasonal events.<sup>6</sup> The court found that:

Christmas and Chanukah are celebrated as cultural and national holidays as well as religious ones, and there is simply no constitutional doctrine which would forbid school children from sharing in that celebration, provided that these celebrations do not constitute an unconstitutional endorsement of religion and are consistent with a school’s secular educational mission.<sup>7</sup>

The court went on to note that “[r]eligion is a pervasive and enduring human phenomenon which is an appropriate, if not desirable, subject of secular study. It is hard to imagine how such study can be undertaken without exposing students to the religious doctrines and symbols of others.”<sup>8</sup>

Importantly, contrary to the advice you received from the district solicitor, the ruling in *Stratechuk* does not require the District to censor religious music as long as it has a secular, educational purpose for including the music in its program. Rather, the court in *Stratechuk* explicitly refused to issue an opinion on the subject: “It is unclear whether in the specific circumstances presented in this case, the performance of religious holiday music at the December concerts would violate the Establishment Clause, and the Court declines to render an opinion as to that issue.”<sup>9</sup> On appeal, the United States Court of Appeals for the Third Circuit, looking at the same cases cited in this letter, correctly acknowledged that “[t]he cases cited by *Stratechuk* all upheld the policy [of permitting religious music in concerts] of the respective schools or school districts.”<sup>10</sup> The Third Circuit ruled that while the First

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<sup>3</sup> *Duncanville*, 70 F.3d at 408 (emphasis added).

<sup>4</sup> *Id.*; see also *Bauchman*, 132 F.3d at 556 (“[A] reasonable observer would conclude the selection of religious songs from a body of choral music predominated by songs with religious themes and text ..., without more, amount to religiously neutral educational choices”).

<sup>5</sup> *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1316 n.5 (8th Cir. 1980).

<sup>6</sup> *Clever v. Cherry Hill Twp. Bd. of Educ.*, 838 F. Supp. 929, 937 (D.N.J. 1993).

<sup>7</sup> *Id.* at 939.

<sup>8</sup> *Id.*

<sup>9</sup> 577 F. Supp. 2d 731, 744 (D.N.J. 2008).

<sup>10</sup> *Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist.*, 587 F.3d 597, 605 (3d Cir. 2009).

Amendment does not require schools to include religious music, neither does it prohibit schools from including religious music. Indeed, the court specifically acknowledged that “[s]ince 2004, songs with religious content have been performed at the December concerts; the 2005 concerts included ‘*Concerto VIII Fatto per la notte di natale*,’ ‘Waters of Babylon (psalm 137),’ ‘*Jubilate*,’ and ‘*Agnus Dei/Cum Sanctis*.”<sup>11</sup>

What the First Amendment does require is that the Bordentown Regional School District remains neutral towards religion and refrains from demonstrating an unconstitutional hostility toward songs with religious origins.<sup>12</sup> The district’s policy of excluding religious music, regardless of its demonstrated cultural value and educational merit, likely crosses that constitutional line.

As the United States Court of Appeals for the Fifth Circuit has explained, “[l]imiting the ... religious piece[s] of music [that] can be sung is tantamount to censorship and does not send students a message of neutrality.”<sup>13</sup> “[D]isqualif[ing] the majority of appropriate choral music simply because it is religious” necessarily “require[s] hostility, not neutrality, toward religion.”<sup>14</sup>

Moreover, the cultural and educational merits of Christmas carols and other religious songs are well established. The United States Court of Appeals for the Eighth Circuit, for example, recognized over thirty years ago that there is no constitutional objection to students in public schools learning and performing religious songs “presented objectively as part of a secular program of education.”<sup>15</sup> Such experience advances “students’ knowledge of society’s cultural and religious heritage, as well as [their ability] to perform a full range of music ... that is likely to be of interest to the students and their audience.”<sup>16</sup> It also “expose[s] students to the full array of vocal music culture.”<sup>17</sup> These secular objectives more than justify the traditional holiday concerts schools typically stage across the nation, which District officials unfortunately scuttled this year.

Music educators, not administrative officials, should choose which choral pieces—secular or sacred—are best-suited to the occasion and to “teach [students] a variety of vocal music skills (*i.e.*, sight reading, intonation, harmonization,

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<sup>11</sup> *Id.* at 602.

<sup>12</sup> See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) (“[F]ostering a pervasive bias or hostility to religion ... undermine[s] the very neutrality the Establishment Clause requires.”).

<sup>13</sup> *Duncanville*, 70 F.3d at 408.

<sup>14</sup> *Id.*

<sup>15</sup> *Florey*, 619 F.2d at 1315 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)).

<sup>16</sup> *Id.* at 1314; see also *id.* at 1316 (“It is unquestioned that public school students may be taught about the customs and cultural heritage of the United States and other countries.”).

<sup>17</sup> *Bauchman*, 132 F.3d at 554.

expression).<sup>18</sup> We request a response to our letter by **November 1, 2013**, confirming that the District will right this wrong by immediately rescinding the new policy put in place by administrative officials and permitting religious music to be included among the many secular songs performed at the winter concerts.

Cordially,



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<sup>18</sup> *Id.* at 554.