



# PARKER McCAY

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October 31, 2013

Via Facsimile & Regular First Class Mail

Alliance Defending Freedom for Faith & Justice  
Attn: J. Matthew Sharp, Esq., Jeremy D.  
Tedesco, Esq., and Rory T. Gray, Esq.  
1000 Hurricane Shoals Road  
N.E. Suite D - 1100  
Lawrenceville, Georgia 30043

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

Dear Messrs. Sharp, Tedesco, and Gray:

This firm serves as general counsel to the Bordentown Regional School District Board of Education ("the Board"). Please accept this in response to your letter dated October 28, 2013 regarding your objections to the removal of certain religiously-oriented songs from its Winter Concert by the administration of the Bordentown Regional School District ("the District") in response to concerns raised by residents of the District.

As you are aware, the administration exercised its discretion to remove certain songs of a religious nature in reliance on the decision of the Third Circuit Court of Appeals in Stratechuk v. Bd. of Educ. of S. Orange-Maplewood Sch. Dist., 587 F.3d 597 (3d Cir. 2009), certif. denied, 131 S. Ct. 72, 178 L. Ed. 2d 24 (2010). As an initial matter, let me thank you for reaching out and expressing your opinions and legal arguments for why the District should reconsider that decision. While the cultural and musical value of Christmas carols, hymns, and other religious music is beyond dispute, the Board has a vested interest in both avoiding a potential Establishment Clause violation and in responding to the needs of its community members, even when those members of the community may be in the minority in expressing their discomfort with the inclusion of religiously-oriented music in the holiday concert.

I should clarify that your letter misstated the legal advice given by our firm when you wrote the following: "[C]ontrary 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."

**COUNSEL WHEN IT MATTERS.<sup>SM</sup>**

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To be clear, our firm did not render an opinion that the case law required removal of religious music from the holiday concert. As you are no doubt aware, while Stratechuk and the other cases cited in your letter do not necessarily require a prohibition on the inclusion of religious music in school-sponsored holiday concerts, Stratechuk clearly stands for the proposition that schools may choose to remove such music from their concerts in the interests of avoiding Establishment Clause violations, even if allowing the continued inclusion of such music would not, in fact, violate the Establishment Clause. The court recognized in its ruling that "the Constitution does not require the school to promote religion to the constitutionally permitted maximum and its failure to do so does not make it anti-religious in any constitutionally significant way. School districts can determine how close to the 'Establishment Clause line' they wish to place themselves." Stratechuk, supra, 587 F.3d at 606.

In addressing the arguments and the case law which you set forth in your letter, the Third Circuit wrote:

The cases cited by Stratechuk all upheld the policy of the respective schools or school districts [permitting the music]. That is far different from holding that the First Amendment compels a school district to permit religious holiday music or risk running afoul of the First Amendment. Stratechuk has offered no persuasive authority that the First Amendment prevents South Orange-Maplewood School District from formulating a policy that precludes performance of religious holiday music. Id. at 605.

Thus, I cannot agree with your statement that the administration's decision to remove certain religious music from this year's Winter Concert at the Intermediate School "crosses the constitutional line" into "demonstrating an unconstitutional hostility toward songs with religious origins." To the contrary, in the words of the Third Circuit, which are binding in this jurisdiction, "Establishment Clause jurisprudence recognizes that neutrality towards religion is quite different from hostility towards it." Id. at 607. Numerous courts have rejected the suggestion that "secular" means "anti-religious." Id. at 608 (citations omitted).

So too, the District's decision to remove religious songs from the Winter Concert cannot be construed as in any way demonstrating a hostility towards religion or religious music. In addition to the removal from the concert for the Intermediate School



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(grades 4-5) of three (3) religious songs, the building principals in the elementary schools (grades K-3) reviewed the programs for the elementary concerts in accordance with the guidance received. Importantly, the District has not acted to remove religious pieces from the overall program of music instruction if such music is part of the curriculum, nor has the District removed religious music from the concerts of the secondary schools in grades 6-12. While the administration acted to remedy what some residents perceived to be an overtly religious or devotional display by removing religious songs from the Winter Concert, the District continues to permit educational opportunities to examine religion and religious music inside the classroom from a balanced and objective point of view focused on its academic, cultural, and historical significance. Thus, the actions of the District in being sensitive to its residents' needs can hardly be said to show any form of hostility against religion or religious music.

Given that the District's actions are reasonable and these facts are "on all fours" with the facts and holding of Stratechuk, the decision concerning whether to permit religious songs to be included in the Winter Concert must remain in the sound collective judgment of the members of the local board of education. Be assured that the members of the Board will have ample opportunity to hear from their local constituency with respect to this matter.

Thank you for expressing your concerns and sharing your opinions regarding these issues. Should you have any further concerns, I welcome you to share this response with any members of the Bordentown community with whom you may be in contact and encourage them to share their views with the Board regarding this matter.

With kind regards, I am

Very truly yours,

PARKER McCAY P.A.

BY:

  
CAMERON R. MORGAN

CRM/bm

cc: Dr. Constance Bauer - via E-mail only  
Superintendent of Schools