



December 6, 2013  
VIA EMAIL & U.S. MAIL

Dr. Darlene Schottle, Superintendent  
Kalispell Public Schools  
233 1st Avenue East  
Kalispell, MT 59901

Dr. Kate Orozco, Superintendent  
Whitefish Public Schools  
600 East 2nd Street  
Whitefish, MT 59937

**Re: School Choirs' Participation in Community Christmas Programs**

Dear Drs. Schottle and Orozco:

It has come to our attention that Kalispell Public Schools and Whitefish Public Schools recently received letters from the American Civil Liberties Union of Montana ("ACLU") and the Freedom from Religion Foundation ("FFRF") criticizing high school choir students' voluntary participation in a community Christmas festival held at a local church. The relevant facts, as we understand them, are that choirs from Flathead High School, Glacier High School, and Whitefish High School were scheduled to perform a variety of religious and non-religious Christmas songs at the "Peace on Earth Community Christmas Celebration" that is open to the general public and sponsored by a local church in Kalispell on December 5th and 6th. Students were free to opt out of this activity and would not be punished for doing so. Both the ACLU and FFRF sent you letters alleging that school choirs' participation in a Christmas celebration held at a local church violates state and federal law. Your school districts, recognizing that such activities provide a valuable service to the community and are perfectly lawful, have allowed the choir performances to go forward.

We write to commend you for rejecting the ACLU's and FFRF's unfounded demands that school choirs be excluded from the community Christmas festival, to explain that such participation fully complies with applicable law, and to offer our assistance if either of these organizations takes legal action against your school districts. By way of introduction, Alliance Defending Freedom is an alliance-building legal organization that frequently assists students, teachers, and public school districts in understanding their rights and responsibilities when it comes to

seasonal religious expression.

Every federal court to examine the issue has determined that including Christmas carols in school choir performances fully complies with the First Amendment.<sup>1</sup> There is consequently no doubt that the Flathead, Glacier, and Whitefish choirs could have performed the same music planned for the Peace on Earth Community Christmas Celebration at a concert held at their respective schools.<sup>2</sup> Even the ACLU and the FFRF appear to recognize this fact.<sup>3</sup> The only question is whether performing those songs at a local church as part of a community Christmas festival changes the legal analysis. We strongly believe that it does not.

To comply with the law, schools' actions must serve a secular purpose, not have the primary effect of advancing religion, and not excessively entangle the government with religion. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Allowing choir students to voluntarily participate in a community Christmas festival easily satisfies this test. Courts are "reluctan[t] to attribute unconstitutional motives to" school officials "when a plausible secular purpose for" their actions is offered. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Here, the educational reasons for allowing school choirs to participate in the community Christmas festival are clear. Such performances not only offer students challenging music and valuable performance experience, they also give students a chance to observe and learn from other choirs and to serve the greater community.

Nor does allowing choir students to perform religious and non-religious Christmas songs at a community festival held at a local church have the primary effect of advancing religion. It simply allows choirs which are already performing a wide variety of Christmas songs at school to serve the wider community with their talents, see and learn from other choirs' techniques, and gain valuable performance experience in front of a large audience.

That the church sponsoring the Christmas festival may view this event as a celebration of "the birth of our savior Jesus Christ" is irrelevant. One would expect a church to view Christmas in religious terms. But no reasonable person would

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<sup>1</sup> See, e.g., *Bauchman v. West High Sch.*, 132 F.3d 542, 556 (10th Cir. 1997) 556 ("[T]he selection of religious songs from a body of choral music predominated by songs with religious themes and text ..., without more, amount[s] to religiously neutral educational choices"); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995) (stating that "a position of neutrality towards religion must allow choir directors to recognize the fact that most choral music is religious" in nature); *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1316 n.5 (8th Cir. 1980) (recognizing that Christmas "carols have achieved a cultural significance that justifies their being sung ... in public schools").

<sup>2</sup> See *Duncanville*, 70 F.3d at 408 ("[D]isqualif[ing] the majority of appropriate choral music simply because it is religious" necessarily "require[s] hostility, not neutrality, toward religion.").

<sup>3</sup> See ACLU Letter at 3 ("A choir concert at one or both of the high schools would be a much better alternative."); FFRF Letter at 2 ("[T]here are many other venues in the community ... that would welcome a performance by these high school choirs.").

attribute that *private* motivation to *public* school districts that are merely seeking a valuable learning and service opportunity for students.<sup>4</sup> Moreover, there is no indication that Kalispell Public Schools or Whitefish Public Schools “advanced religion through [their] own activities and influence.”<sup>5</sup> None of the school districts’ actions promoted religion, they simply allowed students to sing time-honored Christmas songs for a wider audience. Because students’ choir performances at the Christmas festival are not related to any religious activities by the school districts themselves, entanglement concerns are completely absent.

Your school districts were also right to be concerned that only disallowing choir students from singing at community events sponsored by churches would violate the First Amendment. “[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>6</sup> Government entities are thus generally prohibited from “impos[ing] special disabilities on the basis of religious views or religious status.”<sup>7</sup> Yet this is exactly the type of religious discrimination FFRF and the ACLU are demanding of your schools.

We commend you for rejecting the ACLU’s and FFRF’s demands and for refusing to “[f]oster[] a pervasive bias or hostility to religion,” which “undermine[s] the very neutrality the Establishment Clause requires.”<sup>8</sup> Please know that should either group pursue legal action against your school districts, we would be happy to discuss defending them free of charge.

Sincerely,



Rory T. Gray, Litigation Counsel  
Jeremy D. Tedesco, Senior Legal Counsel  
J. Matthew Sharp, Legal Counsel

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<sup>4</sup> See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995) (plurality opinion) (recognizing the “crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free speech and Free Exercise Clauses protect”).

<sup>5</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987).

<sup>6</sup> *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

<sup>7</sup> *Employment Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990).

<sup>8</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995).