



December 15, 2011  
VIA FACSIMILE, E-MAIL AND U.S. MAIL

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**Re: Inclusion of *Silent Night* in Elementary School Program**

Gentlemen:

Recently, you received a letter from Americans United for Separation of Church and State complaining about the inclusion of the traditional German Christmas carol, *Silent Night*, in the Christmas program at G.W. Trenholm School. The song would be one of 9 others performed in the program as part of a celebration of Christmas. Apparently, the group warned that the inclusion of the song, or any other religious songs, would be “unconstitutional.” We are writing to urge you not to cave to the group’s demands and to provide you with accurate legal advice on the acceptable use of religious songs in school Christmas programs.

Students may sing religious Christmas carols during school activities such as choir, Christmas programs, and other events, without offending the Constitution. *See, e.g., Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1319 (8th Cir. 1980); *Clever v. Cherry Hill Twp. Bd. of Educ.*, 838 F. Supp. 929 (D.N.J. 1993). In *McGowan v. Maryland*, the U.S. Supreme Court held that some government involvement with religion does not violate the Establishment Clause if it has a secular purpose and effect. 366 U.S. 420, 445 (1961). Thus, no lower court has ever ruled that public schools must ban the singing of religious Christmas carols or the inclusion of any and all religious content in a Christmas program.

In *Florey v. Sioux Falls School District*, for example, the Eighth Circuit Court of Appeals held that schools may observe religious holidays without violating the Establishment Clause if doing so furthers a secular program of education. 619 F.2d at 1319. In the case, the school held Christmas assemblies that included activities such as singing “traditional Christmas music and songs, including Christmas carols such as ‘Silent Night’ and ‘O Come All Ye Faithful.’” *Id.* at 1323 (McMillian, J., dissenting). The court upheld the school’s inclusion of religious songs in the Christmas program because it furthered the school’s stated purpose of advancing “the

students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama...." *Id.* at 1314. In other words, because the school had a secular purpose for including the religious songs in its Christmas program, it did not violate the Establishment Clause.

Likewise, in *Doe v. Wilson County Sch. Sys.*, an elementary school included a brief nativity scene and two religious Christmas carols in its program. 564 F. Supp. 2d 766 (M.D. Tenn. 2008).

The program lasted approximately twenty to twenty-two minutes. The first twenty minutes of the program consisted of a reading of Clement Clark Moore's "Twas the Night Before Christmas" by a student narrator with dramatization of the scenes by students and the singing of secular Christmas carols by the student chorus. At the end of the secular program, the students who were dressed as Mary, Joseph and the angels stepped out of the front row of the chorus to stand near a crib to portray the nativity scene. The audience was invited to join the children in singing the two religious Christmas carols printed in the program. The nativity scene lasted approximately two minutes.

*Id.* at 784. The Court held that the inclusion of the Nativity scene and the religious songs did not violate the Constitution. "Considering the Christmas program as a whole, it was a secular performance with a bit of religious symbolism at the very end to reflect the historic, cultural and religious significance of the Christmas holiday. Taken as a whole, the inclusion of the nativity scene as a part of the program did not offend the Constitution." *Id.* at 801.

Here, *Silent Night* is but one of the nine other songs included in the Christmas program at G.W. Trenholm. Thus, as long as the inclusion of *Silent Night* or any other religious Christmas song is based upon a secular reason—i.e. recognition of the religious heritage of Christmas—then the Constitution does not prohibit the inclusion of the religious song in the school's Christmas program.

We therefore urge you to take a stand against the legally unsupported demands of Americans United for Separation of Church and State. If you have any questions about this letter or about ensuring that the Christmas program complies with law, please give us a call at 770-339-0774. We would be happy to assist you in any way we can.

Sincerely,



David A. Cortman, Senior Counsel  
Jeremy D. Tedesco, Legal Counsel  
J. Matthew Sharp, Litigation Staff Counsel