

December 19, 2013

Dr. Meria Joel Carstarphen
Superintendent
Austin Independent School District
1111 W. Sixth Street
Austin, TX 78703

Mel Waxler
Chief of Staff
Austin Independent School District
1111 W. Sixth Street
Austin, TX 78703

Ylise Janssen
Senior Attorney
Austin Independent School District
1111 W. Sixth Street
Austin, TX 78703

Ms. Donna Houser
Principal, Anderson High School
8403 Mesa Drive
Austin, TX 78759

RE: Private Christmas Caroling By Anderson High School Students

Dear Superintendent Carstarphen, Mr. Waxler, Ms. Janssen, and Principal Houser:

I am an attorney with Liberty Institute, a national law firm dedicated to defending religious liberty in America. Liberty Institute represents and advises governmental entities, including school boards and administrators, across the nation on matters affecting constitutional rights within our public schools. We recently learned of a controversy within Austin Independent School District (the "District") regarding private, voluntary Christmas caroling by Anderson High School students.

Our understanding is that members of the Anderson High School Choir intend to sing Christmas carols and other seasonal music at private homes within the community. Student participation in the caroling is voluntary, and the performances take place in private residences during non-instructional time. Some of the songs include references to "Christmas" and other religious themes. Other songs have Jewish origins, while others still are non-religious.

We recently learned that an attorney for the District advised against the student-initiated performances due to concern over a purported Establishment Clause violation because it could

be perceived that the District is endorsing the religious themes in some of the songs. We write to inform you that, because the performances are student-initiated and occur during non-instructional time, the District need not worry about a perception of religious endorsement. Additionally, there is no Establishment Clause violation in the inclusion of religious themes in school choral music programs.

When examining these issues, the United States Court of Appeals for the Fifth Circuit, in which the District resides, held that voluntary student speech that occurs off-campus during non-instructional time is private speech that is not subject to governmental regulation. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004). The circumstances here are such that the Christmas carols are also private speech and not subject to District regulation. Accordingly, there is no issue concerning District sponsorship or endorsement of the students' private speech. The District should treat the Christmas carols in the same manner it treats what a student says in the privacy of the home.

Even if the District were to sponsor the students' Christmas carol performances, federal courts have consistently ruled that including religious Christmas themes in public school choral music programs is constitutional. As one federal court put it, "it is recognized that a significant percentage of serious choral music is based on religious themes or text." *Bauchman v. West High Sch.*, 132 F.3d 542, 554 (10th Cir. 1997). In fact, the United States Court of Appeals for the Fifth Circuit, in which the District resides, stated that approximately "60-75 percent of serious choral music is based on sacred themes or text." *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir. 1995). Thus, even a random selection of *serious* choral music is likely to result in songs that include religious themes. *Bauchman*, 132 F.3d at 556. As a result, federal courts will not second-guess or place numerical criteria on musical selections. *Id.* In fact, another federal court held that to allow students only to study, and not to participate in religious art, literature, and music when such works have developed an independent secular and artistic significance would give students a limited view of our culture. *Floreys v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1314 (8th Cir. 1980).

Because the majority of serious choral music is based on religious themes or text, the inclusion of religious Christmas music does not violate the Establishment Clause of the First Amendment. The Fifth Circuit refused to find that a public school endorses religion simply because "a religious song with widely recognized musical value is sung more often than other songs." *Duncanville*, 70 F.3d at 408. Rather than endorsing religion, the fact that a chosen song contains religious elements is a function of statistical probability—religious music predominates the field of serious choral music. Not only is the selection of religious Christmas music constitutionally permissible, the decision to exclude it is wrought with peril.

The First Amendment of the Constitution demands government neutrality towards religion, not hostility. If the District were to begin sponsorship of the Christmas carol performances—which it has not—any intentional exclusion of religious Christmas music because of the religious themes would demonstrate an impermissible hostility towards religion that violates the First Amendment. The Fifth Circuit declared that "[l]imiting the . . . religious piece[s] of music [that] can be [performed] is tantamount to censorship and does not send students a message of neutrality. . . . Within the world of choral music, such a restriction would

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require hostility, not neutrality, toward religion.” *Duncanville*, 70 F.3d at 408-09. Therefore, in order to avoid an impermissible hostility toward religion, the District must not engage in any attempt to limit religious Christmas music on the basis of its religious content.

Therefore, the District may not restrict the students in the choir from caroling. Not only is it not necessary under the Establishment Clause, the District is without the authority under Fifth Circuit precedent to restrict the caroling or any private student speech outside of school hours and off school property.

Please contact us if you have any questions regarding this matter, or if you would like to discuss in greater detail.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael Berry", written over a horizontal line.

Michael Berry

Attorney

Liberty Institute

cc: Jonathan Saenz