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RELIGIOUS MUSIC IN THE PUBLIC SCHOOLS: A GUIDE FOR SCHOOL DISTRICTS

I. INTRODUCTION

Where does religious music¹ differ from the other religious issues such as prayer at graduation, the use of tax money in parochial schools, or the teaching of creationism in public schools, which have been addressed in divided communities and by various court cases? Perhaps the issue that makes music different is the simultaneous coexistence of religious and secular benefits from music. As one researcher questioned:

Is a song with a sacred text only a vehicle for religious worship and divine praise, or an independent aesthetic entity as well? Once a sacred text is set to music. . . can either element of the song—text or music—be isolated or viewed as more powerful than the other? Can one sing a sacred song, recognizing the important aesthetic relationship between music and text, without engaging in a religious exercise?²

The concern that school administrators face is whether the words of the song will be considered before, or instead of, the aesthetic, secular benefits. Use of religious music could lead to charges that the school is promoting the religious beliefs presented in the work and violating the First Amendment. The purpose of this paper is to serve as a primer for school boards on the history of relevant legal issues surrounding the use of religious music in the schools, discuss the arguments behind using religious music in the schools, show concrete examples of how school districts have dealt with these issues, and suggest a proper course of action for those school districts that wish to implement their own policy on the performing of religious music.

1. Choral, rather than instrumental, music is the "religious music" dealt with in this paper.

2. Faith D. Kasparian, *The Constitutionality of Teaching and Performing Sacred Choral Music in Public Schools*, 46 Duke L.J. 1111, 1115 (1997).

II. HISTORY OF CONSTITUTIONAL MANDATES SURROUNDING THE FIRST AMENDMENT RELIGION CLAUSES

Before specifically considering the constitutionality of using religious music in public schools, it is necessary to review past judicial decisions in the area of religion in the schools in general.

The First Amendment to the United States Constitution proclaims that: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; . . ."³ There are two distinct and separate parts to this phrase of the First Amendment that are commonly known as the "establishment clause" and the "free exercise clause." The free exercise clause's purpose has been typically held "to prevent the government from impairing the liberty of individuals to exercise their religious faith."⁴ The purpose of the establishment clause is a matter that has been bitterly disputed in a myriad of court cases, especially in the last century. The establishment clause is open to interpretation to meaning anything from simply that the United States government cannot establish an official State church, to meaning that no mention of deity or religion is ever permissible by any State actor. The courts have generally held that the meaning is somewhere in the middle, that it is to somehow ensure governmental neutrality on individual religious beliefs.⁵ In applying these two clauses, the Supreme Court has developed several important tests.

A. Separation Test

1. *Everson v. Board of Education*

"In *Everson v. Board of Education*,⁶ the Supreme Court first advanced the separation principle, interpreting the Establishment Clause to require the total separation of church

3. U.S. Const. amend. I.

4. Benjamin B. Sendor, *A Legal Guide to Religion and Public Education* 3 (2d ed., Educ. L. Assn. 1997).

5. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Lemon v. Kurtzman*, 370 U.S. 421 (1962); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984); *Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

6. 330 U.S. 1 (1947).

and state.”⁷ The Court said that “[t]he ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”⁸ The Court also invoked the now-famous phrase by Thomas Jefferson, that “the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”⁹ The Court said that “[the First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers.”¹⁰

In *Everson*, New Jersey schools were providing public school busses to transport students to parochial schools. The Court said that this action did not violate the establishment clause because the program did “no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”¹¹ Thus, the Court held that while some religious benefit could be tangentially accrued through a school program, the purpose and main effect of the program was a secular one of public safety and it passed constitutional muster.¹²

2. *Engel v. Vitale*

In *Engel v. Vitale*,¹³ the Supreme Court found that a school-directed prayer breached the separation requirement.¹⁴ The prayer in question in this case was one written by the school district itself and directed to be said aloud by the entire class at the start of each school day.¹⁵ The Court stated that a prayer is always a religious exercise and thus presumably would always be a violation of the Constitution when composed and imposed

7. Lisa Ness Seidman, *Religious Music in the Public Schools: Music to Establishment Clause Ears?*, 65 Geo. Wash. L. Rev. 466, 471 (1997).

8. *Everson*, 330 U.S. at 15.

9. *Id.* at 16 (quoting *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878)).

10. *Id.* at 18.

11. *Id.*

12. *Id.* at 17-18.

13. 370 U.S. 421 (1962).

14. *Id.* at 425.

15. *Id.* at 422-23.

by a public school.¹⁶ The Court declared that even if the prayer were “denominationally neutral and participation in its utterance voluntary,”¹⁷ it would still be unconstitutional. The voluntariness of a student’s participation in the prayer does not save it from the First Amendment.

B. *Lemon Test*

*Lemon v. Kurtzman*¹⁸ is perhaps the most well-known establishment clause case the Supreme Court has heard. *Lemon* represents the movement of the Court to a three-pronged test. In *Lemon*, the Court had to consider several state statutes which provided for salary supplements to parochial school teachers who taught purely secular core subjects, and had no religious material or religious influences in the classroom. The Justices enumerated a three-part test known as the *Lemon* test that indicated that a state action “first, . . . must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”¹⁹ Applying the three-prong test to the facts at hand, the Court found that the state statutes were unconstitutional.²⁰ Although the statutes have a clear secular purpose like those in *Everson*, these statutes failed the third prong because “the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.”²¹ The Court suggested that the entanglement was too great because the state would constantly have to ensure that the parochial schools were not violating the restrictions upon which the salary supplements were based.²²

16. *Id.* at 424-25.

17. Julian R. Kossow, *Preaching to the Public School Choir: The Establishment Clause, Rachel Bauchman, and the Search for the Elusive Bright Line*, 24 Fla. St. U. L. Rev. 79, 88 (1996).

18. 403 U.S. 602 (1971).

19. *Id.* at 613 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); *Waltz v. Tax Commn.*, 397 U.S. 664, 674 (1970)).

20. *Id.* at 614.

21. *Id.*

22. *Id.* at 619.

C. *Endorsement Test*

Justice Sandra Day O'Connor "is the main proponent of the endorsement theory [and] variations of her test have been applied in several majority opinions by other members of the Court."²³ She first introduced the endorsement test in her concurrence in *Lynch v. Donnelly*.²⁴ This test is an offshoot of the purpose and effect prongs of the *Lemon* test. Justice O'Connor said "[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice. . . in fact conveys a message of endorsement or disapproval."²⁵ Under the endorsement test, the Court would evaluate "both the subjective and the objective components of the message communicated by a government action," and if the action demonstrated such endorsement or disapproval, it would be forbidden.²⁶

The endorsement test has not yet captured a majority of the Court, but it continues to be applied piecemeal in different opinions.²⁷ Justice O'Connor herself has acknowledged that one, overarching endorsement test may not be the final answer and instead suggested that maybe "a better approach might be to develop several specialized tests as the Court has done in its free speech jurisprudence. Unfortunately, such an approach has yet to emerge."²⁸

D. *Coercion Test*

1. *Allegheny v. ACLU*

Another alternative to the *Lemon* test is the coercion test, originally developed by Justice Anthony Kennedy in *Allegheny*

23. Seidman, *supra* n. 7, at 478.

24. 465 U.S. 668, 687 (1984).

25. *Id.* at 690.

26. *Id.*

27. Seidman, *supra* n. 7, at 479 (citing *Allegheny v. ACLU*, 492 U.S. 573, 595 (1989) (Blackmun, J.); *Texas Monthly v. Bullock*, 489 U.S. 1, 9 (1989) (Brennan, J.); *School Dist. v. Ball*, 473 U.S. 373, 389 (1985) (Brennan, J.).

28. Seidman, *supra* n. 7, at 478 (citing *Bd. of Educ. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring)).

v. ACLU.²⁹ In *Allegheny*, the Court examined the constitutionality of a government building with a holiday display which included religious symbols such as a crèche and a menorah.³⁰ Like Justice O'Connor in *Lynch*, Justice Kennedy used the *Lemon* test as a basis for his opinion. However, Justice Kennedy wrote for the majority that no action should be considered as violating the establishment clause unless it is directly coercive.³¹ He argued that an act should not be unconstitutional if it does not "coerce anyone to support or participate in any religion or its exercise [or] in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"³² Justice O'Connor took exception to the coercion test, proclaiming that "[a] standard that prohibits only 'coercive' practices or overt efforts at government proselytization . . . but fails to take account of the numerous more subtle ways that government can show favoritism . . . would not . . . adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."³³ Applying this coercion test to the facts at hand, Justice O'Connor said that the simple display did not force anybody to support or participate in any religion and thus should be found constitutional.

2. *Lee v. Weisman*

In *Lee v. Weisman*,³⁴ the Court used the coercion test to determine that prayer at a public school graduation, offered by a local rabbi, but delivered in a non-sectarian manner was unconstitutional.³⁵ The Court found that while attendance at graduation ceremonies was theoretically voluntary, in practical reality, it was essentially a mandatory part of a student's education experience.³⁶ Personal desires for closure and peer pressure to conform creates an environment where students

29. 492 U.S. 573 (1989).

30. *Id.* at 578.

31. *Id.* at 659.

32. *Id.*

33. *Id.* at 627-28.

34. 505 U.S. 577 (1992).

35. *Id.* at 581.

36. *Id.* at 595.

who might otherwise refuse to participate in an environment where a prayer is offered are nonetheless “coerced” into attendance and participation.³⁷ Such coercion mandates that the ceremony be devoid of any government religious practices such as providing a rabbi to pray over the services.³⁸

3. *Santa Fe Independent School District v. Doe*

In *Santa Fe Independent School District v. Doe*,³⁹ the Court addressed the issue of student-offered prayers before football games. The Court applied the holding of *Lee* and found that such prayers are a form of coercion despite the fact that the students voted to decide who would offer the invocation.⁴⁰ While this procedure seemed democratic and fair, the Court said that “the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.”⁴¹ The minority was inherently coerced by the will of the majority.⁴² The dissent, penned by Chief Justice William Rehnquist, wondered if the majority’s holding meant that schools could no longer sing the national anthem before football games because the last verse concludes with “And this be our motto: ‘In God is our trust.’”⁴³

III. ARGUMENTS BEHIND USING RELIGIOUS MUSIC IN THE SCHOOLS

A. *Religious Effect of a Song*

Proponents of religious music in the schools argue that when religious words are set to music, they are changed somewhat, even assuming a particular song is, in reality, a prayer set to music. While a prayer according to *Engel* is “always religious,” sacred choral music is not.⁴⁴ While a song

37. *Id.* at 593.

38. *Id.* at 595.

39. 530 U.S. 290 (2000).

40. *Id.* at 299, 317.

41. *Id.* at 304.

42. *Id.* at 305.

43. *Id.* at 322 (quoting Francis Scott Key, *The Star-Spangled Banner*).

44. Kasparian, *supra* n. 2, at 1158.

may carry some religious benefit to certain listeners, "it may simultaneously be a secular aesthetic entity that in no way depends on the performer's or the listener's endorsement of the textual message."⁴⁵

Opponents argue that religious music is inappropriate in the public schools because the religious words are inextricable from the song. They claim that a religious song is a prayer set to music.⁴⁶ Why should students be allowed to sing a song praising God, Jesus, or some other religious figure, when if they speak the same words without music it is considered an unconstitutional prayer?

B. Secular Objective Achieved Through Religious Music

Proponents of religious songs in public schools argue that excluding such songs would give students a truncated view of music. So many of the great choral works by the prominent composers of history (such as Handel, Bach, Mendelssohn, and others) are in fact religious that one choir director indicated that some "60-75 percent of serious choral music is based on sacred themes or text."⁴⁷ The works of these artists are used for a secular purpose, such as to demonstrate to students the difference between Baroque and Renaissance periods of music. If students were not introduced to such works, they would have an incomplete and less-satisfying musical education. Beyond such historical considerations, religious-themed music, particularly Christmas and other holiday music, has achieved such pervasiveness that it has a special cultural significance today.

Opponents of religious music in public schools point to the fact that the Supreme Court "has said that a purely secular objective cannot be achieved through religious means."⁴⁸ They don't dispute that some secular purpose can be found for using religious music, but they maintain that such a secular purpose could be achieved by finding other works by those composers which do not include religious themes, or by using the works of other composers.⁴⁹ Even Christmas music should be secular.⁵⁰

45. *Id.*

46. Seidman, *supra* n. 7, at 470.

47. *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir. 1995).

48. Seidman, *supra* n. 7, at 493 (citing *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 224 (1963)).

49. *Id.* at 497-98.

Students are free to enjoy religious-based songs at home or at their place of worship, but in a public school they should be constrained to those songs which are devoid of any religious purpose.⁵¹

C. *Teaching Religion, or Teaching About Religion*

Proponents argue that a choir performance is like the homework and exams given in book and lecture-oriented courses.⁵² As the National Association for Music Education (NAME), Music Educators National Conference (MENC) stated: "participation in actual performance produces a better grasp of the aesthetic import of great music than mere listening or nonparticipation."⁵³ MENC also points out that since "it is possible to study Communism without indoctrination or to examine the ills of contemporary society without promoting the seeds of revolution, then it must also be possible to study sacred music (with performance-related activities)" without the school being considered proselytizing.⁵⁴

Oponents, however, argue that while nonsectarian, nonproselytizing teaching about religion may be constitutional, performing religious music goes beyond that standard to become actual teaching of religion.⁵⁵ They contend that the difference between the two standards is in the active participation required of the student.⁵⁶ A student in American History could hear that Pilgrims came to America seeking freedom to practice their religion, or a student in Music Appreciation could listen to the teacher lecture about how the Protestant Revolution brought about a change in musical style in Europe, without the student having to become personally involved with the subject. If a student is forced to sing the words of songs from specific religions, opponents argue, it becomes the school forcing the student to speak words contrary to his/her beliefs and then present those words to the general

50. *Id.* at 504.

51. *Id.* at 505.

52. Natl. Assn. for Music Educ., *Music Educators National Conference Position Statement: Music with a Sacred Text*
<http://www.menc.org/publication/books/relig0.html> (accessed Dec. 2, 2000).

53. *Id.*

54. *Id.*

55. Seidman, *supra* n. 7, at 468-69.

56. Seidman, *supra* n. 7, at 493.

public through a performance.⁵⁷

IV. CASE LAW SPECIFICALLY REGARDING RELIGIOUS MUSIC IN THE SCHOOLS

The Supreme Court has yet to grant certiorari to a case dealing specifically with religious music in public schools, but the arguments discussed in the previous section have been addressed in the lower courts.

A. *Florey v. Sioux Falls School District*

*Florey v. Sioux Falls School District*⁵⁸ involved school policies that allowed for the celebration of holidays such as Christmas and Easter which have a concurrent secular and religious basis.⁵⁹ The 8th Circuit Court applied the *Lemon* test to arrive at their opinion. The court concluded that the school policy passed the first prong of the *Lemon* test because the action had a secular purpose.⁶⁰ The court said that even if the origin of the action is “unquestionably religious” as Christmas celebrations are, it does not “contravene the Establishment Clause if its ‘present purpose and effect’ is secular.”⁶¹ The court found that a secular purpose existed in this case, namely that the school district wished to “advance the students’ knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization.”⁶² The program of Christmas music also passed the effect test, because while some religious benefit may accrue to a Christian when exposed to a song about Jesus Christ’s birth, the primary effect of a Christmas carol is to create a link to “our national culture and heritage.”⁶³ The court addressed the centuries-long history of several popular Christmas carols and their omnipresence in offices, stores, and on all forms of media throughout December in demonstrating that the primary effect of such songs is cultural and not religious.⁶⁴ The court

57. *Id.*

58. 619 F.2d 1311 (8th Cir. 1980).

59. *Id.* at 1314.

60. *Id.* at 1315.

61. *Id.* at 1315 (quoting *McGowan v. Maryland*, 366 U.S. 420, 445 (1961)).

62. *Id.* at 1314.

63. *Id.* at 1316 (quoting *Florey v. Sioux Falls Sch. Dist.* 464 F.Supp. 911 (1979)).

64. *Id.* at 1317.

concluded its evaluation of the *Lemon* test by holding that the Christmas program did not create an excessive entanglement between the state and religion.⁶⁵ While noting that some Christmas programs may be found unconstitutional, it would have to be on a case-specific basis.⁶⁶ Here, the court found it noteworthy that the Sioux Falls School District specified that any religious-themed songs were to be only a part of the program and interspersed with more secular-based songs, and that any student who objected to singing the religious songs would be excused without penalty.⁶⁷ This balanced approach to religious and secular music seemed to be the deciding factor in this particular case as far as the entanglement prong is considered.

B. *Doe v. Duncanville Independent School District*

In *Doe v. Duncanville Independent School District*,⁶⁸ the 5th Circuit Court of Appeals looked at, among other issues, a choir that had adopted a Christian song as a theme song to be sung at each of the choir's concerts.⁶⁹ The choir director indicated several reasons for using the song *The Lord Bless You and Keep You* in the choir performances. He testified that the song was "particularly useful to teach students to sight read and to sing *a cappella*" and that it is "a good piece of music . . . by a reputable composer."⁷⁰ However, the plaintiff in this case maintained that by singing out the song rather than just treating it as another part of the repertoire, the school was impermissibly endorsing religion.⁷¹ The court held that even "repeated singing of a particular religious song [does not amount] to an endorsement of religion."⁷² This case is significant in that it specifically found that religious songs are not *per se* sung prayers. The court distinguished the facts at hand from those of another case where the song really was a "school-composed prayer set to music which the students sang

65. *Id.* at 1318.

66. *Id.* at 1319.

67. *Id.*

68. 70 F.3d 402 (1995).

69. *Id.* at 407.

70. *Id.*

71. *Id.*

72. *Id.*

before athletic events.”⁷³ The court found the school-composed song was “more akin to pre-game prayers . . . than the widely recognized choral music at issue here.”⁷⁴

C. *Bauchman v. West High School*

Bauchman v. West High School,⁷⁵ dealt with a case brought against the school by a Jewish member of a school choir that performed a great deal of Christian music and often sang at churches and during religious devotional services. *Bauchman* represents what this author believes will be shown in future cases to be the high-watermark for allowing religious music in public schools.

Presumably in a desire to cover all their bases, and recognizing that the Supreme Court “has resisted confining such sensitive [establishment clause] analyses to ‘any single test or criterion,’” the 10th Circuit Court took the task of evaluating the facts in light of all three tests the Supreme Court has used: the *Lemon* test, the endorsement test, and the coercion test.⁷⁶

The *Bauchman* court felt that the endorsement test was generally the future of establishment clause cases, so it evaluated the *Lemon* test under its umbrella.⁷⁷ Here, the court found, almost summarily, that the choir’s repertoire and performances fulfilled the secular purpose prong. The court pointed out that not every purpose for choosing a specific song or location must be secular, just that there be some secular purpose.⁷⁸ The court identified several of the common secular purposes to religious music that have already been discussed in this paper: the religious nature of much historically significant music, the benefit of a particular song in teaching specific musical qualities such as “sight reading, intonation, harmonization, expression,” and the desire for a complete musical education.⁷⁹ The court also found several secular purposes for performing in local churches instead of at the school or other non-religious buildings. Such purposes could

73. *Id.* at 408.

74. *Id.* (citing *Doe v. Aldine Indep. Sch. Dist.*, 563 F.Supp. 883 (S.D. Texas 1982)).

75. 132 F.3d 542 (10th Cir. 1997).

76. *Id.* at 550 (citing *Lynch*, 465 U.S. at 678-79).

77. *Id.* at 551.

78. *Id.* at 553-54.

79. *Id.* at 554.

include their acoustical qualities, seating capacity, and general ambiance.⁸⁰

The court said that under the endorsement test, to satisfy *Lemon's* effect prong the court must use a "reasonable observer" standard to see if an action would "advance or promote religion or a particular religious belief."⁸¹ The court said that a reasonable observer in Salt Lake City, Utah would be aware of the "historical tension between the government and [The Church of Jesus Christ of Latter-day Saints], and the traditional and ubiquitous presence of religious themes in vocal music."⁸² That knowledge, combined with the interspersing of secular and religious songs in the choir's repertoire, and the fact the choir performs at various public and church settings, would lead such a reasonable observer to conclude that the choir's actions do not advance or endorse religion.⁸³

The court built on its reasoning above to conclude that no entanglement occurred between the state and religion. It went so far as to hold that "a reasonable observer would conclude the selection of religious songs from a body of choral music predominated by songs with religious themes and text, and the selection of public performance venues affiliated with religious institutions, without more, amount to religiously neutral educational choices."⁸⁴ If, as the court reasons, a church is not a religious entity for the purposes of this case, there can really be no entanglement at all.

The court doesn't address the coercion test by name, but it does argue that Bauchman was not compelled to perform songs to which she took exception. Although the choir was a graded course with mandatory performances, "[Bauchman] was given the option of not participating to the extent such participation conflicted with her religious beliefs. Moreover, she was assured her Choir grade would not be affected."⁸⁵ Since Bauchman was free to choose not to perform without any regard to her grade; she was not coerced to violate her religious beliefs.⁸⁶

80. *Id.*

81. *Id.* at 555.

82. *Id.*

83. *Id.*

84. *Id.* at 556.

85. *Id.* at 557.

86. *Id.*

V. PRESENT AND PROPOSED SCHOOL BOARD POLICIES REGARDING RELIGIOUS MUSIC IN THE SCHOOLS

To prepare an effective model policy for school boards to follow regarding the performance of religious music in school, it is helpful to analyze several existing policies. The model policy will then take the best from these various policies and include the judicial requirements gleaned from the case law previously discussed.

A. *Existing Policies Concerning Religious Music in Public Schools*

For a school board to put together a comprehensive policy on the performance of religious music, it is important to consider what policies other school districts have enacted, and if possible, why. Not surprisingly, the policies that currently exist present a broad spectrum approaches to religious music in the schools.⁸⁷

87. It is also essential that school boards consult their state codes to see if there are any sections relevant to the performance of religious music in the school. For example, the Utah Code Annotated, sections 53A-13-101.1 and 101.2 state, in pertinent part:

53A-13-101.1 Maintaining constitutional freedom in the public schools.

Any instructional activity, performance, or display with includes examination of or presentation about religion, political or religious thought or expression, or the influence thereof on music, . . . or any other element of the curriculum, . . . which is designed to achieve secular educational objectives included within the context of a course or activity and conducted in accordance with the applicable rules of the state and local boards of education may be undertaken in the public schools.

No aspect of cultural heritage, political theory, moral theory, or societal value shall be included within or excluded from public school curricula for the primary reason that it affirms, ignores or denies religious belief, religious doctrine, a religious sect, or the existence of a spiritual realm or supreme being.

Public schools may not sponsor prayer or religious devotionals.

School officials and employees may not use their positions to endorse, promote, or disparage a particular religious, denominational, sectarian, agnostic, or atheistic belief or viewpoint.

53A-13-101.2 Waivers of participation.

If a parent . . . or other legal guardian of a student . . . determines that the student's participation in a portion of the curriculum or in any activity would require the student to affirm or deny a religious belief or right of conscience, or engage or refrain from engaging in a practice forbidden or required in the exercise of a religious right or right of conscience, the parent, guardian, or student may request:

a waiver of the requirement to participate; or

1. *More Restrictive Policies*

The Williamsville Central School District in Williamsville, New York, presented a proposal which was fairly restrictive specifically toward Christmas and other religious holiday music.⁸⁸ After extensive debate, the school board came to a consensus on the following policy: Music will be chosen for its musical merit. A good piece of music should not be excluded because of its religious or cultural origin.

Religious and cultural music should be treated with respect with regard to its content as a means of fostering mutual respect among students of differing religious and cultural backgrounds.

As part of the adopted music program, songs associated with specific holidays or celebrations may be utilized. Care must be taken so that use of these materials does not consume a majority of the available instructional time during any holiday season.

Student performances conducted during the school year must be clearly related to the curricular program of the student group which is performing. Performances should not focus upon any single holiday or celebration, but rather should be reflective of the curricular material studied by the students.

Members of the staff implementing the policy of the district are directed to review music selections which may be associated with religion with Coordinator of Music and the building principals.⁸⁹

a reasonable alternative that requires reasonably equivalent performance by the student of the secular objectives of the curriculum or activity in question.

The school shall promptly notify a student's parent or guardian if the student makes a request under Subsection (1).

If a request is made under this section, the school shall:

- waive the participation requirement;
- provide a reasonable alternative to the requirement; or
- notify the requesting party that participation is required. The school shall ensure that the provisions of Subsection 53A-13-101.3(3) are met in connection with any required participation.

88. See Marc W. Brown, *Christmas Trees, Carols and Santa Claus: The Dichotomy of the First Amendment in the Public Schools and How the Implementation of a Religion Policy Affected a Community*, 28 J.L. & Educ. 145 (1999).

89. *Id.* at 191.

The very contentious battle that waged in the community prior to the passage of the above policy started when the school board began a review of all policies following an incident of anti-Semitic harassment. The school board members were concerned with increasing cultural diversity and understanding in their school district.⁹⁰ Originally, the committee set up by the school board to rewrite the policy regarding religion wanted to excise any religious music that would not “be appropriate for performance at any time during the school year” and said that “programs whose themes focus on religious holidays are not appropriate.”⁹¹ What this essentially meant was that songs from Christmas or other holidays with religious themes, like “Silent Night” or “Away in a Manger,” were forbidden; whereas generic seasonal songs, like “Frosty the Snowman” or “Over the River and Through the Woods,” would be allowed.

This proposal led to the cancellation of Williamsville North High School’s traditional Christmas musical program, which in turn set off a maelstrom of bitter disputes and lawsuits between members of the community and between the community and the school board. Various Christian groups claimed they were being discriminated against, while other religious groups defended the policy as protecting their rights against long-standing discrimination by Christians.⁹² The Williamsville Central School District held several open meetings to allow the community full opportunity for discussion, and the policy presented above was finally passed. The policy as passed was supposed to take a moderate route with appropriate musical programs developed through a balancing test to be utilized by teachers. To see if their musical selections satisfied the policy, the music teachers had to answer the following four questions:

- (1) Is it constitutionally permissible? (the role of the teacher is to teach – not proselytize);
- (2) Is it tied to the curriculum (science teachers cannot use a nativity scene for instruction);
- (3) Is it culturally sensitive? (students should not have

90. *Id.* at 154.

91. *Id.* at 157.

92. *Id.* at 158-68.

to sing songs that are opposed to their religious beliefs); and

(4) Is it age appropriate? (a nativity scene could be appropriate in an elementary class but not in a high school class).⁹³

One school district in Los Altos, California took restrictions against performing religious music to an even greater extreme.⁹⁴ A draft of a portion of the policy stated: "Under no circumstances may educators assign or recruit students to sing songs or parts of songs that are not neutral among all religious beliefs (including polytheistic, monotheistic, non-theistic or atheistic religious beliefs)."⁹⁵

A policy created by Davis County School District in Bountiful, Utah, was likely influenced by the *Bauchman* case which was being litigated south of Bountiful at the time the policy was being formulated. One of the major issues in that case was the choir's performance in churches around the area. As a result, Davis County School District made certain that its policy included specific guidelines to performing in houses of worship. The policy states that:

No school employee or student may be required to attend in any religious service . . . students may voluntarily attend and perform during a religious service as individuals or as members of a group, provided all arrangements are made by students or non-school adults . . . unless granted an appropriate waiver, students . . . may be required to rehearse or otherwise perform in a church-owned or operated facility if the following conditions are met: [t]he performance is not part of a religious service, [t]he activity of which the performance is a part is neither intended to further a religious objective nor under the direction of a church official; and [t]he activity is open to the general public.⁹⁶

Administrators in the St. Louis Park School District in Minneapolis, Minnesota, were concerned with a school choir being tied too closely to a specific religion or church, but they

93. *Id.* at 172.

94. Kasparian, *supra* n. 2, at 1123.

95. *Id.*

96. First Amendment Center, *Finding Common Ground: A First Amendment Guide to Religion and Public Education*, 16.9, 16.35 (internal numbering omitted) (Charles C. Hayes, ed. & Oliver Thomas legal ed., 3d ed., The Freedom Forum 1998).

were more concerned with such concerts being held on school property.⁹⁷ They took the approach that a volunteer group would be the best way to handle the problem. Their policy states that a “volunteer group practicing outside of school hours may present a program of religious music in the school outside of school hours. Such a group would have much latitude in its choice of music and would be limited only by the rules governing use of the school facilities.”⁹⁸ They also included in that restriction that there “be no caroling in the public areas of the school during school hours.”⁹⁹

2. *Less Restrictive Policies*

Other school districts’ policies have taken a more lenient approach to performing religious music. The Nebo School District in Spanish Fork, Utah allows the presentation of a “study, performance, or display which includes examination of or presentations about religion, religious thought or expression, or the influence thereof in music. . . in the public schools so long as it is designed to achieve permissible educational objectives and is presented within the context of the approved curriculum.”¹⁰⁰

Likewise, a draft of Salt Lake City, Utah School District’s policy shows a more inclusive approach in allowing:

secular and religious selections as the school and the particular department or teacher may deem appropriate, considering the artistic merit of the selection for inclusion as part of a total curriculum. Determinations of curriculum should be made without regard to religious or secular consideration, as long as the primary reason for selection or use is not to affirm, ignore or deny any secular or religious belief.¹⁰¹

The National Association for Music Educators, Music Educators National Conference has weighed in with its own standards for the use of religious music in public schools. The MENC policy is interesting because the group is not tied to any

97. *Id.* at 16.35.

98. *Id.*

99. *Id.*

100. Nebo Sch. Dist. Bd. of Educ. *Policy: Recognizing Constitutional Freedoms in the Schools*, File IGAC (unpublished manual Jan. 10, 1996) (on file with author).

101. M. Byron Fisher, Partner, Fabian & Clendenin, Counsel, Salt Lake City Sch. Dist., *Draft Policy Secular and Religious Curriculum* (1995).

religious sect or school district. MENC maintains that the use of religious music is indispensable to a complete musical education, but that steps should be taken to ensure it is used in a neutral fashion.¹⁰² To assist music teachers in preparing their religiously neutral repertoire, it suggests that teachers ask themselves the following series of questions:

1. Is the music selected on the basis of its musical [and] educational value rather than its religious context?
2. Does the teaching of music with sacred texts focus on musical and artistic considerations?
3. Are the traditions of different people shared and respected?
4. Is the role of sacred music one of neutrality, neither promoting nor inhibiting religious views?
5. Are all local and school policies regarding religious holidays and the use of sacred music observed?
6. Is the use of sacred music and religious symbols or scenery avoided?
7. Is performance in devotional settings avoided?
8. Is there sensitivity to the various religious beliefs represented by the students and parents?¹⁰³

Rather than writing their own official policies, a number of school districts have informally adopted the MENC guidelines.¹⁰⁴

As demonstrated by the policies described here, both more and less restrictive policies should be created using full and open discussion between community members and school boards. Open discussion is more likely to result in an acceptable balance between opinions and avoid extremes on either side of the issue which are almost certain to offend somebody and lead to great problems in the future.

B. Model Policy

102. Natl. Assn. for Music Educ., *supra* n. 43.

103. *Id.*

104. Telephone Interview with Lori Bitters, Music Chair, Orem High School, Orem, Utah (Oct. 25, 2000).

The ultimate purpose of this article is to suggest a model policy that could be formally adopted by school boards and written into their rules and regulations. This model policy should act as a starting point, allowing for alteration as is required to meet the needs of the individual school district. This model policy takes into account the differing court decisions discussed earlier as well as the direction courts will likely rule in the future. This policy considers and attempts to synthesize the best parts from the different policies that have been written to this point, from the strict Williamsville and Los Altos policies to the more lenient MENC and Nebo policies. This paper will not attempt to create an entire religion policy, simply the portion directly relating to religious music, thus this model policy should be read as one to be placed in the context of a larger religion policy to be adopted by the school district.

1. Model School District Policy on Religious Music

General Purpose of Policy

Model School District recognizes the inherent, secular value of religious music as part of a balanced repertoire in presenting a comprehensive and complete music education.

The goal of the District's music department is to enable students to receive a performance-based education about music, not religious indoctrination.

"Religious music" is defined as any music which recognizes the existence of a supreme being or deity of any religious faith or belief, or any music that is suggestive of, or that has become so closely associated with, religions or religious holidays that it may be looked upon as being of a religious nature.

Religious Music in Schools

In accordance with the stated purpose of this policy, seasonally appropriate and sacred religious music may be practiced and performed by Model School District choirs as part of a balanced repertoire which includes both secular and religious music in the total curriculum. This repertoire shall be organized by the choir director and principal of each school, with the principal having ultimate authority for rejecting any work not believed to be in harmony with Model School District policy.

Music should be selected on the basis of its musical and artistic qualities and educational value. A piece of music should not be selected, approved, or rejected solely because it contains religious themes or text.

Performances should be presented in a prudent, balanced manner such that if any religious works are included, they do not endorse or denigrate any particular religious sect or belief, and the performance as a whole would not be construed by a reasonable observer to be predominately religious in nature.

Performances in Houses of Worship or During Devotional Services

Model School District choirs shall not perform during any worship or devotional services.

Model School District choirs may perform during secular programs located in houses of worship or other church-owned facilities provided they meet the following criteria:

- (a) the performance is not part of any worship or devotional services,
- (b) the performance is open to the general public, and
- (c) the location meets a secular need that another, nonreligious location cannot (i.e. seating arrangement or capacity, acoustical quality, presence of required resources or facilities).

Volunteer Groups

Nothing in this policy should be read to preclude any individual student or group of students from volunteering to perform music of any type or in any location which would otherwise be contrary to Model School District rules.

Voluntary performance shall not, in any way, be supported or represented as being supported by the District.

Waiver

1. No student shall be compelled to perform any work the student, his/her parent, or his/her legal guardian feels would be against their religious belief.

2. If such situation arises, the student shall be excused from the portion of the performance deemed objectionable, while minimizing any embarrassment and without bringing undue attention to the student.
3. Non-participation shall not result in any penalty including, but not limited to, the lowering of course grades.
4. If necessary, the school may provide a reasonable alternative to ensure the student meets the educational objectives of the course.

2. *Discussion of Model Policy*

It is anticipated that this model policy will pass the synthesis of the *Lemon* test and endorsement test currently being used by the courts. The case law looks for a balance and assurance that the predominate effect is not religious. This approach attempts to protect the minority according to the definition in *Santa Fe* by assuring that one person or group cannot arbitrarily impose its will. The stated policy is to be balanced and there is a built-in check on the choir director through the school principal. More stringent requirements are not necessary because, unlike the prayers in *Santa Fe*, religious-themed songs are not per se religious.

The Model Policy is more detailed in its approach to performances in churches because it more closely skirts the issue of entanglement or endorsement of a particular religion. For various reasons, there are times when a particular church or church-owned facility would simply be the best possible location for a performance and that situation is accounted for.

VI. CONCLUSION

Religious music is not only appropriate in a study of choral music, it is essential to presenting an honest portrayal of music in society. Religious music represents not only some of history's greatest musical works; it often represents the only musical works which remain from several eras of history. Among other expectations, students in school choirs generally expect that will they learn the proper mechanics of singing, have the opportunity to perform a wide variety of musical selections, and be introduced to the great works and great

composers of history. Such a study would be grossly inadequate if it did not address such works as “[t]he chorales of J.S. Bach, the “Hallelujah Chorus” from George Frideric Handel’s *Messiah*, spirituals, and Ernest Bloch’s *Sacred Service*.”¹⁰⁵ Besides their historical import, many religious songs (such as Christmas carols) are ingrained as part of a collective consciousness. To neglect these would be to create students without a true understanding or appreciation of their own cultural history. Lastly, the ultimate reason many students participate in choral groups is that singing and performing for others brings joy and happiness to both the participants and the audience. Many times the songs which resonate the most, and are thus the most enjoyable to perform, simply happen to have religious-based texts. Very few songs are as rewarding to perform or incite as great a reaction in an audience as a rousing rendition of “Hava Nagilah” (a Jewish song of celebration), “Ave Maria” (a hauntingly beautiful serenade for Mary, the mother of Jesus Christ), or “Betelehemu” (a Nigerian carol praising the birth of Christ in Bethlehem).

Obviously, there is a dividing line somewhere between the enjoyable performance of a good piece of music in a proper setting and the imposition of one’s religious beliefs on others. The cases and articles cited in this paper have all attempted to give some indication of where the dividing line falls. In practical reality, the dividing “line” is probably more of a gray area on a spectrum of fact scenarios. While one cannot point to where exactly the division lies, the choir director at West High School as described in *Bauchman* crossed over the line. Any performance in a house of worship is automatically suspect and its permissibility should be determined on a case-by-case basis according to the timing of the concert (during a worship service or a secular program), the reason for choosing church or temple as the site for the performance, the songs to be performed, and overall environment while there. The choir director took the West High School choir to perform during religious devotional services of the church he belonged to, during which he and several members of the choir of the same religion preached from the pulpit.¹⁰⁶ During class practices, the teacher regularly bore testimony of his faith and advocated his religion to the

105. Natl. Assn. for Music Educ., *supra* n. 43.

106. *Bauchman*, 132 F.3d at 574.

choir.¹⁰⁷ During one choir tour in the Pacific Northwest, he introduced the choir as a religious choir.¹⁰⁸ The director admitted that he knew his actions were unconstitutional according to the prevailing Supreme Court opinions, but refused to alter his actions because he disagreed with those opinions.¹⁰⁹ Despite the 10th Circuit Court's dismissal of the case, the actions of the choir director exceed constitutional limits under any test proposed by the Supreme Court to this point.

The courts to this point have held that religious music is constitutionally allowed as long as it meets the tests the courts have established in other First Amendment disputes. The Supreme Court has not yet addressed the issue of religious music directly, but it is expected that the Court will find the performing of religious music in public schools passes constitutional muster to the same extent that it has found in other areas. Chief Justice Rehnquist's pondering the banning of the national anthem in *Santa Fe* because it contains the word "God" seems unlikely to come to pass based on all the case law to the contrary. It is unfortunate that school districts are creating strict and exclusive policies such as that created in Los Altos which banned all religious music. Until directly prohibited from doing so, school districts should do all in their power to implement written policies that specifically allow for the performance of religious music in a manner which is sensitive and respectful of all religious beliefs and which promotes the historical and secular aspects of such music in order to present a complete music education.

Brian A. Whitaker

107. *Id.*

108. *Id.*

109. *Id.*