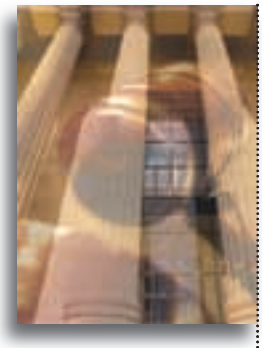

Religious Music and Public Schools: A Harbinger of Litigation to Come?

By Charles J. Russo, J.D., Ed.D.

Educators must consider whether forbidding the use of religious music in schools is likely to stifle student expression.

Debate continues over the place of religious expression, including music, in public schools. In *Nurre v. Whitehead* (2009), a high school senior in Washington sued the superintendent for denying the wind ensemble that she was part of the opportunity to perform an instrumental version of "Ave Maria" at her commencement ceremony due to its religious connotations.

During the past several years, the wind ensemble had been allowed to choose its selection for the commencement ceremony and had voted to play "Ave Maria" at the upcoming event. The wind ensemble had performed the song earlier in the academic year at a school concert. Even so, due to criticism of a vocal piece that was sung at the graduation a year earlier that included express references to "God," heaven," and "angels," the superintendent refused to allow the students to perform "Ave Maria."

In her suit, the student alleged that the superintendent violated her rights to freedom of religion and speech under the First Amendment, as well as her right to equal protection under the Fourteenth Amendment.

In response to the student's claims, a federal trial court granted the superintendent's motion for summary judgment, thereby affording her immunity from liability on two grounds. First, the court rejected the claim as moot, meaning that a live controversy for which it could grant relief was no longer present, because the student had graduated. Second, the court decided that since the superintendent placed a valid restriction on the student's speech rights in a limited public forum, her actions passed all three parts of the test that the Supreme Court enunciated in *Lemon v. Kurtzman* (1971), the traditional standard in disputes involving religion and public education. Pursuant to the *Lemon* test,

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute 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." (pp. 612–13)

Dissatisfied with the outcome, the student sought further review. The Ninth Circuit affirmed in favor of the superintendent.

Ninth Circuit's Analysis

The Ninth Circuit began its analysis by conceding that instrumental music, even without words, is a form of speech for First Amendment purposes. However, the court noted that the graduation, which essentially rendered seniors a captive audience because they were expected to attend, was a school-sponsored function as part of a limited public forum (as opposed to an open forum on a public street or a closed forum in the superintendent's office). As such, the court's opinion was that the superintendent had the authority to restrict student expression to musical performances that were entirely secular in nature due to her desire to avoid the kind of controversy that arose at the graduation a year earlier.

As to the student's claim that the superintendent was hostile toward religion in refusing to permit the ensemble to perform "Ave Maria," the Ninth Circuit applied the *Lemon* test. Turning to the first prong of the test, the court acknowledged that since school officials admitted, and the student did not

dispute the point, that the superintendent forbade the playing of "Ave Maria" to avoid a conflict with the establishment clause, she acted with a valid secular purpose.

In reviewing the second prong of the *Lemon* test, the Ninth Circuit found that in evaluating whether an action has a principal or primary effect of advancing or, as alleged here, inhibiting religion, jurists must review restrictions both as a whole and in their context. The court maintained that since the superintendent prohibited the ensemble from performing "Ave Maria" to avoid the kind of conflict that occurred a year earlier, her actions had the legitimate secular effect of preserving neutrality while ensuring compliance with the establishment clause.

The Ninth Circuit next addressed entanglement, pointing out that it takes two forms. According to the court, the first form, administrative entanglement, usually involves discrimination or ongoing supervision of religion. The court indicated that the second type, political discrimination, occurs when officials divide citizens along political lines but this alone is insufficient to create entanglement. The court conceded that although the student had a claim of entanglement, since she failed to allege which form it was, it was necessary to review both types.

The court held that the one-time review of the titles of the musical pieces in response to complaints to evaluate whether they had overtly religious titles was not administrative entanglement because it was not a form of discrimination. Similarly, the court asserted that there was no political entanglement insofar as it ordinarily arises in cases involving financial aid to religious schools, and there was no political divisiveness because the panel refused to hypothesize whether such a political response might have emerged under the circumstances.

Along with affirming that officials satisfied the *Lemon* test, the Ninth Circuit explained that its order was not designed to lead to the result that the performance of religious music per se, even "Ave Maria," violated the establishment clause. Instead, the court ruled that under the unique circumstances of the graduation, the superintendent's action passed constitutional muster.

The Ninth Circuit also rejected the student's claim that the superintendent violated the equal protection clause by treating her and the other members of the ensemble differently from previous classes. The court determined that insofar as the superintendent had a legitimate interest in avoiding a violation of the establishment clause by ensuring that the musical selections were secular, she did not violate the student's equal protection rights. The court concluded that because the student's claims were rendered moot due to her having graduated, the trial court correctly granted the superintendent's motion for summary judgment.

School officials who wish to avoid a situation such as *Nurre* should set specific parameters addressing the types of music or songs that students can select.

The third member of the panel agreed with the Ninth Circuit's judgment in granting the superintendent's motion for immunity, but partially dissented over its upholding the prohibition of the performance of the instrumental version of "Ave Maria." The dissent contended that forbidding the playing of the "Ave Maria" was not a reasonable restraint on the student's freedom of expression because the First Amendment neither required nor condoned such a result. If anything, the dissent feared that even though the law is unsettled in this area, the outcome will only create greater confusion, generate additional litigation, and further limit student expression in violation of the First Amendment.

Reflections

Less than a week after the Ninth Circuit handed down its judgment, the Third Circuit heard oral arguments in a case from New Jersey with a slightly different twist. At issue in *Stratechuk v. Board of Education, South Orange-Maplewood School District* (2008) is a father's appeal of the rejection of his claim that a school board policy banning the use of religious music in holiday celebrations was unconstitutional. It will be interesting to watch how this case plays itself out, especially since the attorney representing the father voiced his belief that the case could make its way to the Supreme Court.

Due to the threat of litigation over the place of religious music at graduations and other activities, school business officials and other education leaders must be careful to balance the rights of all involved. In so doing, as suggested by the partial dissent in *Nurre*, educators must consider whether forbidding the use of religious music in schools is likely to stifle student expression. At the same time, while seeking to comply with the First Amendment's requirement that school officials "make no law respecting an establishment of religion," educators must be equally as careful to avoid the charge that the student raised in *Nurre*, namely, that the superintendent was hostile to religion.

In walking the fine line between the possible endorsement of religion that the superintendent feared and the hostility that the student alleged in Nurre,

school business officials should work closely with other education leaders, their lawyers, and school boards to develop written policies that consider the following points.

1. Even if students are allowed to select music or songs to be performed at school-sponsored activities, such as at graduation ceremonies, educators are still ultimately responsible for what occurs at school-sponsored events. School officials who wish to avoid a situation such as *Nurre* should set specific parameters addressing the types of music or songs that students can select. Guidelines should stress that selections not only must be secular in nature but must also avoid overt religious content, thus avoiding conflict with the establishment clause.
2. If educators choose to have instrumental musical compositions played or religious songs sung as part of school-sponsored learning activities, they must ensure that selections advance specific secular curricular goals that neither advance nor inhibit religion.

   To this end, in courses in such areas as global studies or music, selected pieces of religious or sacred music along with secular and nonreligious music would be an essential curricular element. Including religious music in specified courses can be important, since doing so both illustrates the role that religion played in shaping societies and helps ensure that students do not miss out on some of the world's greatest musical classics.

   If educators allow the use of religious music or songs, they should choose pieces that are representative of all major religious traditions—especially those that are being studied and/or celebrated at a specific time of year. Taking an inclusive approach demonstrates that educators are attempting to treat religious music evenhandedly as part of the larger mosaic of cultural diversity.

   Yet, as again highlighted by the partial dissent, due to the unsettled nature of the law in this area, it is unclear whether doing so can pass judicial scrutiny if parents or students complain. As such, educators who proceed in this way should do so with extreme caution.
3. Education officials and their attorneys should review their written policies annually to ensure that they are up-to-date with the latest legal developments, particularly with regard to case law, since, as the partial dissent noted, the status of the law on religious music and so many other areas remains in a constant state of flux. Having written policies in place certainly does not guarantee that boards and officials can avoid being sued. Yet since keeping policies current can demonstrate to the courts that educators are attempting to comply with the law, they may avoid potentially costly litigation.

If educators allow the use of religious music or songs, they should choose pieces that are representative of all major religious traditions.

References

Lemon v. Kurtzman, 403 U.S. 602 (1971).

Nurre v. Whitehead, 520 F. Supp.2d 742 (W.D. Wash. 2007), 2009 WL 2857196 (9th Cir. 2009).

Stratechuk v. Board of Education, South Orange-Maplewood School District, 577 F. Supp.2d 731 (D.N.J. 2008), oral arguments conducted September 14, 2009, Case No. 08-3826 (3d Cir.).

U.S. Const., amend. I.

Charles J. Russo, J.D., Ed.D., Panzer Chair in Education and adjunct professor of law at the University of Dayton (Ohio), is vice chair of ASBO's Legal Aspects Committee. Email: Charles_j_russo@hotmail.com