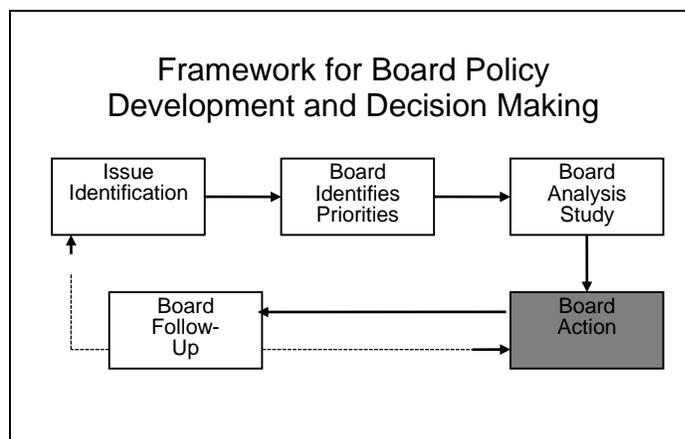


Iowa State Board of Education

Executive Summary

August 6, 2015



Agenda Item: *In re Religious Music (New Hampton Community School District)*

Iowa Goal: All PK-12 students will achieve at a high level.

State Board Role/Authority: Under Iowa Code section 290.1, the State Board of Education has authority to hear appeals from local school board decisions.

Presenter: Nicole Proesch, Designated Administrative Law Judge and Legal Counsel, Office of the Director

Attachments: 1

Recommendation: It is recommended that the State Board approve the proposed decision affirming the decision of the local board of directors of the New Hampton Community School District to continue its current practices of the school choir performing on a Church Tour, singing religious songs at the Winter Music Festival, and performing "In This Very Room" at the final Coffeehouse Concert.

Background: The Appellants appealed the decision of the New Hampton Community School District Board to continue its current practices of the school choir performing on a Church Tour, singing religious songs at the Winter Music Festival, and performing "In This Very Room" at the final Coffeehouse Concert. The Appellants argued that these practices convey a preference for Christianity and as such violate the Establishment Clause of the First Amendment of the U.S. Constitution. In reviewing governmental action for a violation of the Establishment Clause, we apply a three-prong test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), and its progeny. After applying these prongs to the facts and circumstances in this case, we find the district has correctly applied the Establishment Clause jurisprudence to the facts and as such the district has not abused its discretion in choosing to continue its current practices.

Thus, it is recommended that the State Board affirm the decision of the local board.

IOWA DEPARTMENT OF EDUCATION
(Cite as ___ D.o.E. App. Dec. ___)

<i>In re: Religious Music,</i>)	
)	
J.T. and J.K.,)	
)	PROPOSED DECISION
Appellant,)	
)	
v.)	
)	
New Hampton Community)	Admin. Doc. No. 5006
School District,)	
)	
Appellee.)	

STATEMENT OF THE CASE

The Appellants, J.T. and J.K., filed this appeal on behalf of their minor daughter, A.T., who was a student in the New Hampton Community School District (“NHCS D” or “District”). The Appellants seek reversal of a March 9, 2015, decision by the NHCS D Board of Education (“NHCS D Board”) to continue its current practices of the school choir performing “In This Very Room” among other religious songs during choir performances and performing a Church Tour. The affidavit of appeal filed by the Appellants on March 18, 2015, attached supporting documents, and the District’s supporting documents are included in the record. Authority and jurisdiction for the appeal are found in Iowa Code § 290.1 (2015). The undersigned finds that she and the State Board of Education (“State Board”) have jurisdiction over the parties and subject matter of the appeal before them.

An in-person evidentiary hearing was held in this matter on June 2, 2015, before designated administrative law judge, Nicole M. Proesch, J.D., pursuant to agency rules found at 281 Iowa Administrative Code chapter 6. The Appellants were present and self-represented. Superintendent Jay Jurrens (“Superintendent Jurrens”) appeared on behalf of NHCS D. NHCS D was represented by attorney Steve A. Weidner. Also present for the District was the Board Secretary Bob Ayers, the Board President, Tom Rasmussen, the current choir instructor, Jill Irvin, and the former choir instructor, Karl Fliris.

J.K. testified in support of the appeal. Appellant’s exhibits #1-5 were admitted into evidence without objection. Superintendent Jurrens, Mr. Rasmussen, Ms. Irvin, and Mr. Fliris testified for NHCS D and the District’s exhibits #A-F were admitted into evidence without objection.

FINDINGS OF FACT

The NHCS D covers approximately 248 square miles of territory in and around New Hampton, Iowa, and served approximately 982 students in grades kindergarten through twelve during the 2014-2015 school year. At the time of the March 9, 2015, decision of the NHCS D Board, A.T. was finishing her senior year at New Hampton High School (“NHS”). A.T. has since graduated from NHS.

The issue in this appeal dates back to the 2011-2012 school year, when A.T. was a freshman at NHS.¹ During this year A.T. joined the NHS Choir. The NHS choir program was made up of approximately 86 students in grades nine through twelve during the 2014-2015 school year. The current choir director, Jill Irvin, has been with NHCS D since the 2013-2014 school year and teaches grades five through twelve. Ms. Irvin has a B.A. in music from Simpson College. Prior to Ms. Irvin, from the fall of 1982 to the spring of 2007 Karl Fliris was the choral instructor at NHS. Both Ms. Irvin and Mr. Fliris testified about the NHS Choir program and their backgrounds in choral instruction and we find both were credible witnesses.

The NHS choir program consists of the NuHi Chorale, Chamber Choir, and the Main Street West Show Choir. Students who participate in choir are required to attend several musical performances throughout the year that are graded, which include a Church Tour, the Winter Music Festival, and the Coffeehouse concert. Students can also volunteer to participate in various other performances throughout the year including a large group competition, singing the national anthem, or performing for local businesses, but these volunteer opportunities are not graded. If a student misses a required performance or chooses to opt out of the performance for religious reasons, they are given the opportunity to do an alternative assignment.²

For each of these performances Ms. Irvin chooses songs for the choirs to perform from a choir library and based on her experience. Her song selections reflect the strengths of the various choirs, different cultural references, different seasons, and the songs that would best fit each musical performance. For example, if the students are performing for large group competitions, Ms. Irvin chooses from a list of songs offered by the Iowa High School Music Association that have good choral structure. Generally, pop songs are not recommended or included on that list. Some of the song selections on the list have a religious content, but Ms. Irvin does not choose the music based on religious significance, nor does she provide any religious instruction on the meaning of the content. Ms. Irvin

¹ The Appellant’s also have two other children in the District. One is entering 9th grade and one is entering 7th grade in the 2015-2016 school year.

² The NHCS D Board policies that relate to teaching religion, religion based exclusion from a school program, and school ceremonies and observances, and are Code Nos. 603.8, 604.5, and 606.4. The Appellants do not directly challenge these policies.

also chooses music from a variety of different cultural backgrounds, including Brazilian, Latin, Jamaican, and Mongolian music.

Ms. Irvin testified that approximately, 60-75% of choral music selections are based on religious music. This is because historically money from churches and royalty commissioned the work of composers because they could afford to do so. Monks originally came up with a system to read and write music so it could be preserved. Other individuals did not have the money to commission the music or a way to preserve music and thus other music was passed down by word of mouth but religious music was preserved and written down. With the high ratio of religious choral music in music libraries in relation to non-religious pieces, to limit choral selections to non-religious pieces would significantly limit the amount of good choral pieces that are available for performances.

History of the Church Tour

The Church Tour is a choir performance tour of local churches³ in the New Hampton Community that began well before Karl Fliris came to NHS in 1982. The performances serve two general purposes. First, they are preparation for the Winter Music Festival and secondly, they provide a platform to advertise the schools music program and upcoming concerts to the community. Mr. Fliris inherited the tour from the previous vocal music instructor and continued the tradition when he arrived. Many of the churches in the District at that time who wanted to participate in the tour were Christian churches. This is in part because this area is predominantly Christian. There have been no synagogues or mosques visited during these tours; however, both Mr. Fliris and Ms. Irvin testified if those other venues presented themselves as an option they would include them in the tour.

During the tour students go from church to church at scheduled times performing the songs they have prepared for the Winter Music Festival. Students do not take part in church services, nor is there any discussion about religion or about the various churches that are visited. Both Ms. Irvin and Mr. Fliris testified that, from a choral standpoint, the architectural structure of the various churches provides a variety of different acoustics from church to church that expose the choir students to different sounds and give students an opportunity to listen to each other's sound and attempt to blend sounds with one another. The school gym and other venues do not have good acoustics nor do they offer the space needed to house the choir and the audience. The tour performances also provide students with an opportunity to be together, bond, and learn the music in a different setting. The Church Tour has continued to be a part of the NHS Choir program.

³ Mr. Fliris testified that there were approximately 12-14 churches that they visited. The churches were all Christian churches however, these make up a majority of churches in this area. He would not have turned down visits to places of worship of other faiths.

History of the Winter Music Festival

The Winter Music Festival⁴ is a winter concert that includes performances by both the NHS Choirs and the NHS Concert band that occurs every December. During this concert a variety of musical selections are chosen that contain both religious and non-religious content so show off the talents of the choirs. The choral instructor is responsible for picking the music for this concert. During Ms. Irvin's first year at NHS she chose songs she felt would be appropriate for a high school choir to sing during the winter season. Some of her selections included religious content; however, they were not chosen for the religious content. After her first year Ms. Irvin knew the students better and chose music based on vowel shapes, dynamics, ranges, and acapella selections. Her selections were not chosen based on religious significance. Nor are the students taught about the meaning of the songs.

For the 2014 Winter Music Festival the following choral selections were chosen:

On this Christmas Morn - Noble Cain*⁵
O Holy Night - Arr. Kirby Shaw*
Carol of the Bells - Arr. Peter J. Wilhousky
African Noel - Arr. Patrick L. Liebergen
A Red, Red, Rose - James Mulholland
Thirty Second Fa La - Donald Moore
Baby Its Cold Outside - Arr. Ryan O'Connell
Pat a Pan Salsa - Arr. Tom Fettke and Thomas Grassi
Lux Aurumque - Eric Whitacre
Salamo - Ernani Aguilar
Hallelujah Chorus - G.F. Handel*

History of the Coffeehouse Concert

The Coffee House Concert is the last concert of the year and it includes performances by both the NHS Choirs and the NHS Concert band. Members of the community are invited to enjoy cookies and drinks while they listen to these performances hence the name "Coffeehouse Concert." The choral instructor generally selects the music for this concert with some input from the students. For the high school seniors this is the last concert they will perform before they graduate.

During Ms. Irvin's first year at NHS she learned from the students that the Coffeehouse Concert had many traditions for the students that they wanted to continue. Among those are that students wear formal attire and for the final selection the students

⁴ The Winter Music Festival was previously referred to as the New Hampton High School Christmas Concert.

⁵ The * denotes songs to which the Appellants object.

sing the song “In this Very Room.” During the final performance the entire choir exits the bleachers, creates a large circle around the audience, some hold hands, and sings the lyrics of “In This Very Room.” While, the students are not required to or even asked to hold hands, they are not prevented from doing so either. Some students are overcome with emotion during this performance because it is the last performance of their high school careers. Superintendent Jurrens testified that there is a sense of camaraderie of the students during the performance.

Here are the lyrics at issue:

In this very room there’s quite enough love for one like me,
And in this very room there’s quite enough joy for one like me,
And there’s quite enough hope and quite enough power to chase away and gloom,
For Jesus, Lord Jesus . . . is in this very room.

The tradition of singing “In This Very Room” started during Mr. Fliris’s tenure at NHS. Mr. Fliris and the students heard the song at the Dorian Honor Choir Festival⁶ at Luther College. After hearing that performance the NHS students requested to perform it at the Coffeehouse Concert. During the first year the NHS Choir performed the song only the seniors sang it. However, Mr. Fliris wanted all the students to sing the final song and over time it evolved into the entire choir taking part in the performance. Mr. Fliris testified that he did not delve into the meaning of the song but concentrated on the notes, tune, and diction.

Even prior to the choir singing “In This Very Room” as the final selection Mr. Fliris had the choir circle the audience and sing to the parents and relatives for the last selection of the Coffeehouse Concert because he thought it would be “cool to sing this way.” This tradition of encircling the audience continued with the singing of “In This Very Room.” The tradition of students holding hands during the performance also evolved over the years. The students at some point began to hold hands during the performance on their own. It was not something Mr. Fliris started, nor did he stop it from occurring. Mr. Fliris testified that in his experience when a choir holds hands it makes them like one so they all perform together.

Ms. Irvin has allowed these traditions to continue. Ms. Irvin testified that there is an educational purpose in singing the song “In This Very Room” because it teaches the students to blend their sounds, to work on pure tones, and to work on their vowel sounds in the words of the song.⁷ Ms. Irvin testified that her focus as an instructor is to teach the music and not the meaning of the words.

⁶ This is a choir of 1400-1500 high school students from all over the Midwest which sang the song. Mr. Fliris testified it was a powerful performance because of the size of the choir.

⁷ Mrs. Irvin provided examples of working on vowel sounds for the words “Jesus,” “room,” “enough,” “power,” and “joy.”

Complaints to the District

As a member of the NHS choir during her first year A.T. took part in the Church Tour, Winter Music Festival, and the Coffeehouse Concert. At the end of her first year the Appellants attended the Coffeehouse concert and were immediately struck by the choir and A.T. singing "In This Very Room," because of the religious text of the piece and the manner in which it was performed with the students encircling the audience and holding hands.

After sitting through the concert J.T. approached the choral director and expressed her concerns that the performance was endorsing Christianity. Nothing came of this conversation. During the following school year, which would have been the 2012-2013 school year, the same choral director continued the same practice of performing "In This Very Room" as the last selection and in the same manner in the Coffeehouse Concert. Again, J.T. expressed her concerns regarding the performance and the endorsement of Christianity; however, by the time she expressed her concerns it was too late to change the selections for the concert.

During the 2013-2014 school year, which was A.T.'s junior year, J.K. spoke with Superintendent Jurrens about his concerns regarding the selection of "In This Very Room" and the endorsement of Christianity. Several weeks after expressing his concerns J.K. received a legal brief from the District asserting that its current practices were legal. A.T. was given the option of opting out of the Coffeehouse Concert and completing an alternative assignment. A.T. did not do an alternate assignment at that time.

During the summer of 2014 J.K. approached Superintendent Jurrens again about his concerns and Superintendent Jurrens suggested that J.K. put it on the school board agenda for further discussion. During the 2014-2015 school year, A.T.'s senior year, A.T. also opted out of participating in the Church Tour and organized choir robes instead.⁸ A.T.'s grades were not negatively affected by her decision to opt out of the performance. However, it was not until after the Appellants attended the 2014-2015 Winter Music Festival, which J.K. described as a concert in which every song was praising a Christian god, that they approached the board.

At the January 2015 school board meeting the Appellants presented their concerns to the NHCS Board and asked for a dialogue about alternative music selections and more diversity and culture in the program. The issue was then placed on the board's agenda for February 2015. The February board meeting was highly attended and fifteen people addressed the board regarding their views, including the Appellants. A petition was presented to the board with hundreds of signatures in support of the current

⁸ Ms. Irvin testified that A.T. chose to sort choir robes as an alternate assignment.

practices. The board agreed to consult with legal counsel and diversity experts before making any decisions. The issue was put on the March 9, 2015, board agenda for further consideration.

At the March 9, 2015 board meeting the NHCSD Board again addressed the issue. A petition was presented at the meeting with 582 signatures from community members wishing to continue current practices. The NHCSD Board received a legal opinion that the NHS Choir's current practices of performing "In This Very Room" at the Coffeehouse Concert and performing a "Church Tour," while questionable, did not violate any laws. Thus, the NHCSD Board decided to continue its current practices. The NHCSD Board also formed a diversity committee to review diversity issues in the school.⁹

The Appellants filed a timely notice of appeal with the State Board on March 18, 2015. The Appellants argue that these practices show a clear preference for Christianity and violate the Establishment Clause of the First Amendment. The District argues that these practices do not violate the Establishment Clause of the U.S. Constitution.

A.T. opted out of participating in the Coffeehouse Concert in May of 2015. Instead A.T. was given credit for her auditions for New York art school as an alternative assignment.

CONCLUSIONS OF LAW

The Iowa Supreme Court has stated that the standard of review for appeals under Iowa Code section 290.1 is abuse of discretion. "[W]here a statute provides for a review of a school district's discretionary action, the review, by necessary implication, is limited to determining whether the school district abused its discretion." *Sioux City Cmty. Sch. Dist. v. Iowa Dep't of Educ.*, 659 N.W.2d 563, 568 (2003). The abuse of discretion standard requires the Board to look only at whether a reasonable person could have found sufficient evidence to come to the same conclusion as the school district. *Id.* at 569; *see also* Iowa Code § 17A.19(10)(f)(1). If a decision was not based upon substantial evidence or was based on an erroneous application of law we will find the decision is unreasonable. *Id.* The Board may not substitute its own judgment for that of the school district. *See id.* The question in this appeal is whether or not the District correctly applied the law, in this case the Establishment Clause,¹⁰ to the facts and circumstances in this case.

The Appellants argue that the District's traditions of performing songs at various churches on a Church Tour, and singing songs with religious text at the Winter Music Festival, and singing "In this Very Room" at the Coffeehouse Concert conveys preference for Christianity in violation of the Establishment Clause. The Establishment Clause of

⁹ J.K. testified that he, J.T., and A.T. attended several of the diversity meetings. However, the committee did not address the songs in the first few meeting he attended so he stopped attending.

¹⁰ The Appellants do not allege a violation of the Free Exercise Clause and we will not address that here.

the First Amendment states that the federal government “shall make no law respecting an establishment of religion.” U.S. Const. amend. I. This prohibition is extended to the states and their political subdivisions, which include public schools, through the Fourteenth Amendment. U.S. Const. amend. XIV. This Clause was intended to afford protection against “sponsorship, financial support, and active involvement of the sovereign in religious activity.” *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970). The Appellants rely on Supreme Court cases involving school prayer to support their contention that the District’s practices violate the Establishment Clause; however, that reliance is misplaced. School-led prayer in schools is, under applicable legal standards, significantly different than religious text in Choral music selections. While the Supreme Court has never specifically addressed the circumstances presented in this case, i.e., a public school choral instructor choosing religious songs as part of a secular curriculum and choir venues that involve singing in churches, three appeals courts have addressed similar issues by applying Supreme Court precedent and rejected the constitutional challenges. See *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1315 (8th Cir. 1980); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995); and *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997), *cert. denied*, 524 U.S. 953 (1998). Thus, to determine whether or not the District’s conduct in this case violates the Establishment Clause we must start where our muddled Establishment Clause precedent begins as set forth by the United States Supreme Court in the seminal case of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), and its progeny.

In *Lemon*, the Supreme Court set forth a three-part test for evaluating the constitutionality of government action under the Establishment Clause, which is now referred to as the *Lemon Test*. Under the *Lemon Test*, a government activity does not violate the Establishment Clause so long as 1) it has a secular purpose, 2) it does not have the principal or primary effect that either advances or inhibits religion, and 3) it does not foster an excessive government entanglement with religion. *Id.* (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) and *Walz, supra*, at 674). However, the law does not require a total separation between church and state because some relationship between the two is inevitable. *Id.* at 614 (citing *Zorach v. Clausen*, 343 U.S. 306 (1952); *Sherbert v. Verner*, 374 U.S. 398 (1963)). The three parts of the *Lemon Test* have a great deal of overlap, and the facts as found herein are applicable to multiple *Lemon* prongs.

A. Purpose

To sustain a claim under the Establishment Clause the Appellants must allege facts indicating that the District has no clearly secular purpose for its activities. Conduct that is entirely motivated by a purpose of advancing religion would violate the Establishment Clause. See *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985).

1. The Church Tour

We will first consider whether or not the singing of religious songs on the Church Tour, alone, violates the purpose prong. Both Ms. Irvin and Mr. Fliris testified that the Church Tour has two primary purposes. First, to provide an opportunity for students to practice songs for the Winter Music Festival in venues with different acoustics and second, to promote the schools choir to the local community. Notably the acoustics available in the various churches provide a unique learning experience for the choir students to listen to each other's sound and attempt to blend with one another for a better sound. These acoustics are much better than the acoustics offered in the school's auditorium and gymnasium. The evidence shows that students do not take part in church services nor do they receive religious instruction during the tour. The Appellants offered no facts that contradict the District's stated purposes. As such the fact that the performance includes religious music and takes place in a church is not enough to support an argument that the activity is taking place for a religious purpose.

2. The Winter Music Festival

Next we will examine whether or not the singing of religious songs at the Winter Music Festival violates the purpose prong. The evidence shows that the primary purpose of the festival is to show off the abilities of both the NHS Choir and Concert Band at the midpoint of the year. The festival itself contains a variety of different choral pieces chosen by the choral instructor from a variety of genres and diverse cultures to suit the winter season. It is well recognized that a significant percentage of choral music is based on religious themes or text. *See e.g., Doe, 70 F.3d at 407-08.* Thus, the NHS program would contain religious music based on statistics alone. In this case, some of the music contains religious text and some does not. Ms. Irvin did not choose the music for its religious significance, nor does she instruct students on the meaning of the text. In fact, many of the pieces chosen reflect the strengths of the various choirs. Thus, secular purposes exist for the music selections chosen. The law does not require the District to remove all songs that contain religious references from its programs. While, the Appellants argue that the singing of the Alleluia Chorus at the close of the festival has no secular purpose, they offer no evidence to show that the purpose is to advance religion either.

3. "In This Very Room"

Finally, we examine whether or not the singing of "In This Very Room" at the Coffeehouse Concert violates the purpose prong. The Coffeehouse Concert is held each year to show off the abilities of both NHS Choir and the Concert Band and what they have learned over the course of the year. It is the final concert of the year and the final performance for the seniors. A cursory review of the 2015 Coffeehouse Concert program

shows that only one of the six choral pieces contained religious text. That one song was “In This Very Room.”

Both Ms. Irvin and Mr. Fliris testified that “In This Very Room” was originally chosen by the students because the students liked the song and not for its religious significance. There was no evidence presented that either Mr. Fliris or Mr. Irvin provided instruction to the students on the religious meaning of the song. Both testified that the song provided an opportunity to teach the students the music and not the meaning of the words. There was also no evidence that the practice of the students encircling the audience and holding hands during the performance had a religious significance. Instead the evidence shows this was the last song of the year and students were displaying a unified performance for the final song. Regardless of how one may subjectively be moved or not moved by the music, the District did not have a religious purpose for selecting and performing the song. The Appellant’s argument that there are thousands of other non-religious pieces that can be chosen does not defeat the fact that this piece was chosen for secular purposes.

There is no evidence offered by the Appellants that show these activities were chosen for a non-secular purposes. Instead the allegations focus solely on the religious component of the Choir’s activities. This is not enough to show a violation of the Establishment Clause. Thus, we move onto to analyze the second prong of the *Lemon Test*.

B. Effect

The second prong under the *Lemon Test* is the effect prong. To sustain a claim under the effect prong the Appellants must allege facts indicating the choir curriculum or choir activities have the principal or primary effect that either advances or inhibits religion.

The First Amendment does not forbid all mention of religion in public schools; it is the advancement of or inhibition of religion that is prohibited. *Florey*, 619 F.2d at 1315 (citing *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 788 (1973)). Even the study of religion is not forbidden if it is part of a secular program. *Id.* (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)). “We view the term ‘study’ to include more than mere classroom instruction; public performance may be a legitimate part of secular study.” *Id.* at 1316. When the primary purpose of a given activity is secular, the activity is not made unconstitutional by including some references to religion. *Id.* “To allow students only to study and not to perform (religious art, literature and music when) such works have developed an independent secular and artistic significance would give students a truncated view of our culture.” *Id.* (internal citations omitted).

1. The Church Tour

Here, we first examine whether or not the singing of religious songs on the Church Tour has the principle or primary effect of advancing religion. The Appellants argue that the mere act of performing some religious songs at Christian churches advances Christianity. However, the evidence shows the primary purpose of the Church Tour is secular, as it provides the students an opportunity to practice a variety of cultural songs for the Winter Music Festival in different venues with better acoustics and it promotes the NHS Choir to the community.

The facts here are strikingly similar to the facts in *Bauchman*, 132 F.3d 542 (10th Cir. 1997). In *Bauchman*, the Tenth Circuit rejected the constitutional challenge of a Jewish student to a high school choir's performance of songs with religious content at school concerts, some of which were held at Christian churches. The court applied an objective inquiry into whether or not an individual might be offended by the content or location of the choir's performance, or whether or not an individual would find the activity endorses religion. *Id.* at 555. The court reasoned:

We believe a reasonable observer aware of the purpose, context and history of public education in Salt Lake City, including the historical tension between the government and the Mormon Church, and the traditional and ubiquitous presence of religious themes in vocal music, would perceive the following with respect to Ms. Bauchman's factual allegations concerning the Choir curriculum and performance venues: the Choir represents one of Salt Lake City's public high schools and is comprised of a diverse group of students; many of the Choir's songs have religious content—content predominately representative of Judeo-Christian beliefs; in contrast to a church choir, this Choir also performs a variety of secular songs; the Choir's talent is displayed in the diverse array of songs performed and in a number of different public (religious and nonreligious) settings, all of which reflect the community's culture and heritage. Certainly, any given observer will give more or less meaning to the lyrics of a particular song sung in a particular venue based on that observer's individual experiences and spiritual beliefs. However, the natural consequences of the Choir's alleged activities, viewed in context and in their entirety by a reasonable observer, would not be the advancement or endorsement of religion. Ms. Bauchman's complaint therefore fails to support a claim that the Choir curriculum or Choir activities have a principle or primary effect of endorsing religion. *Id.*

Here, the District has offered ample evidence that there are sound promotional and educational reasons for this tour, and the Appellants have failed to offer any evidence

of a contrary purpose by the District. The use of some religious music during the tour does not mean that the tour has the effect of advancing religion so long as the content of the program is “presented objectively as part of a secular program.” *Abington*, 374 U.S. at 225. There is no question that public school students may be taught about the customs and cultural heritage of the United States and other countries, and as such, students may be presented materials that have a religious origin but have taken on an independent meaning. *Id.* The program for the Church Tour and the Winter Music Festival contains a variety of music that is reflective of the customs and cultural heritage of several countries. There was no evidence that the music performed on the Church Tour was presented in a nonobjective manner or supporting one religion over another. Nor, is the tour restricted to Christian churches. As such, the Appellants’ argument fails.

2. The Winter Music Festival

Next we look at the effect prong in relation to the songs performed at the Winter Music Festival. The Appellants must show that the song selections that were chosen have the principle or primary effect of advancing religion. The evidence shows that the selections for the festival were chosen for a variety of reasons, none of which were for religious content. The singing of religious music alone does not show advancement of religion. Religious music can be part of a secular music program so long as it is presented objectively. *See id.* The District’s program is void of any content that even closely resembles “The Beginners Christmas Quiz” that was found to violate the effect prong in *Florey*. *See Florey*, 619 F.2d at 1317-1318. As with the Church Tour, there is no evidence that the music performed at the Winter Music Festival was presented in a nonobjective manner or supporting one religion over another.

3. “In This Very Room”

Finally, we review the effect prong as it relates to the Coffeehouse Concert and the singing of “In This Very Room.” The Appellants argue that the activity of singing “In This Very Room,” with students encircling the audience, and holding hands, as the last song of the Coffeehouse Concert has no secular purpose and only advances Christianity. However, the evidence shows that the song was chosen by the students as the final song of the year -- not for its religious significance but because the students liked the song.

These facts are remarkably similar to the facts set forth in *Doe v. Duncanville Independent School District*. 70 F.3d 402 (5th Cir. 1995). In *Doe* the religious song “The Lord Bless You and Keep You” was adopted by the school personnel and students as the Choir’s theme song. As the theme song it was sung often and carried over from year to year. *Id.* at 407. The Fifth Circuit found that legitimate secular reasons existed for maintaining the song as the Choir’s theme song and upheld its use. *Id.* In particular, the song was useful for teaching the students to cite read and sing acapella. *Id.* The Fifth Circuit also found that the song did not advance or endorse religion and further rejected

the argument that repeated singing of a particular religious song endorses religion. *Id.* The court in *Doe* went on to say:

Given the dominance of religious music in this field, DISD [Duncanville Independent School District] can hardly be presumed to be advancing or endorsing religion by allowing its choirs to sing a religious theme song. As a matter of statistical probability, the song best suited to be the theme is more likely to be religious than not. Indeed, to forbid DISD from having a theme song that is religious would force DISD to disqualify the majority of appropriate choral music simply because it is religious. Within the world of choral music, such a restriction would require hostility, not neutrality, toward religion. A position of neutrality towards religion must allow choir directors to recognize the fact that most choral music is religious. Limiting the number of times a religious piece of music can be sung is tantamount to censorship and does not send students a message of neutrality. Where, as here, singing the theme song is not a religious exercise, we will not find an endorsement of religion exists merely because a religious song with widely recognized musical value is sung more often than other songs. Such animosity towards religion is not required or condoned by the Constitution. *Id.*

In this case, as in *Doe*, the song “In This Very Room” neither advances nor endorses religion. The District has articulated legitimate secular reasons for maintaining this song, which include teaching the students to blend their sounds, to work on pure tones, and to work on their vowel sounds. Although the song is accompanied by circling the audience and the students holding hands, we find these actions are for secular reasons and not to endorse religion. As a whole we believe a reasonable person who understands the history behind the song would find that the song is not advancing or endorsing religion.

Finally, we review whether or not the above activities have the principle or primary effect of inhibiting religion. The evidence shows that the District allowed A.T. to opt out of the above performances that she found objectionable with no effect on her grade. A.T. was also allowed to choose alternate assignments for herself. As such A.T.’s practice of her own religious views were not inhibited by these activities. As such we find no violation of the second prong.

C. Entanglement

The final and third prong under the *Lemon Test* is the entanglement prong. Under the entanglement prong a government activity does not violate the Establishment Clause so long as it does not does not foster an excessive government entanglement with religion.

Many of the Supreme Court cases that analyze the entanglement prong involve governmental aid to sectarian institutions and not the permissible scope of activity in the public schools. *Florey*, 619 F.2d at 1318. In those cases, the state is exceedingly involving itself with religious activities. *Id.* Here, none of the above activities involve providing governmental aid to sectarian institutions. As discussed we believe that an objective observer would conclude that the District's activities, without more, are religiously neutral activities. Consequently, we find no state involvement with the recognized religious activities and no violation of the third prong.

D. The District's Policies

The District has enacted three policies concerning religion in its curriculum: 1) Code No. 603.8 - Teaching About Religion; 2) Code No. 604.5 - Religious-Based Exclusion from a School Program; and 3) Code No. 606.4 - School Ceremonies and Observances. The Appellants have not challenged the policies as written. These policies are in line with the Establishment Clause precedent outlined above and the Free Exercise Clause of the First Amendment. We find that the District has complied with its policies and correctly applied them to the facts here.

In sum, we find that the NHCSB Board correctly applied Establishment Clause jurisprudence to the facts and circumstances before it. Furthermore, a reasonable person could conclude that the activities of the District have clear secular purposes and do not violate the constitution. Thus, this Board cannot find an abuse of discretion in the local board's decision to continue its current practices.

DECISION

For the foregoing reasons, the decision of NHCSB Board made on March 9, 2015 to continue its current practices of the school choir performing on a Church Tour, singing religious songs at the Winter Music Festival, and performing "In This Very Room" at the final Coffeehouse Concert is hereby AFFRIMED. There are no costs of this appeal to be assigned.

Date

Nicole M. Proesch, J.D.
Administrative Law Judge

Date

Charles C. Edwards, Jr., Board President
State Board of Education