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April 10, 2014

Jay Jurrens
Superintendent, New Hampton CSD
710 West Main Street
New Hampton, IA 50659

Re: Coffee House and Religious Music

Dear Jay:

This letter is written in response to your request for a legal opinion on the propriety of performing a certain piece of religious music as part of the New Hampton High School music department's spring music concert known as "Coffee House" that is performed in the high school gym. It is our understanding that the concert includes a mix of instrumental and vocal music selections and has a variety of music, including music with religious content. Traditionally, the religious content of the concert includes a song titled *In This Very Room*, which has been included in the Coffee House program ever since 1986 after students in the high school had heard it performed at Luther College's Dorian Festival. The song has explicitly Christian lyrics, including the refrain "For Jesus, Lord Jesus . . . is in this very room." We further understand that the song is performed by the students standing in a large circle and holding hands while they sing the song.

The analysis of your question implicates both the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution, which is made applicable to the states by the Fourteenth Amendment. The Constitution of the State of Iowa also includes both an Establishment and a Free Exercise Clause at Article I section 3.

Under the Establishment Clause, the government "shall make no law respecting an establishment of religion." Unfortunately, Establishment Clause jurisprudence has been described by Justice Clarence Thomas of the United States Supreme Court as being in "shambles" and "hopeless disarray," thus making our analysis somewhat uncertain. For the most part, courts have employed the three-prong test originally formulated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which considers whether a government action (1) has a secular purpose, (2) has the primary effect of advancing or inhibiting religion, or (3) fosters an excessive entanglement between government and religion. Sometimes this test is supplemented by the so-called "endorsement test," which asks whether the challenged governmental practice has the actual purpose of endorsing religion or whether it has that effect from the perspective of a "reasonable observer." *Utah Highway Patrol Association v. American Atheists, Inc.*, ____ U.S. _____, 132 S.Ct. 12, 181 L.Ed.2d 379 (2011) (Justice Thomas, dissenting from the denial of certiorari.)

In *Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir. 1980), our own federal appeals court upheld the validity of a school board policy permitting observance of holidays having both a religious and a secular basis. Applying the *Lemon* test, the court concluded that the policy had a secular purpose, namely "the advancement of the students' knowledge of society's cultural and religious heritage;" that the policy did not have the effect of either advancing or inhibiting religion; and that the policy did not unconstitutionally entangle the Sioux Falls School District in religion or religious institutions.

We have also reviewed two cases from other federal appeals courts arising from fact situations very similar to yours. In *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995), an atheist high school student presented claims based on a number of allegedly improper practices on behalf of the school district, including the high school choir's use of a religious Christian song titled *The Lord Bless You and Keep You* as a theme song at each of the choir's performances. The court recognized that two practical effects flowed from designating this as the choir's theme song; it was sung often and it was carried over from year to year. Nonetheless, the court found no Establishment Clause violation, noting, among other things, that legitimate secular reasons existed for performing the song, as it was deemed particularly useful to teach students to sight read and to sing *a capella*, and the song was characterized as "a good piece of music by a reputable composer." According to the court, to forbid the district from having a theme song that is religious would force it to disqualify the majority of appropriate choral music simply because it is religious, which in turn would require hostility, not neutrality, toward religion. Two years later, in *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997), the appeals court rejected a Jewish student's challenge to a Salt Lake City high school's performance of songs with Christian religious content at school programs, some of which were held in Christian churches in the community. As in the Fifth Circuit case, the court concluded that the performance of the religious material had a valid secular purpose because "any choral curriculum designed to expose students to the full array of vocal music culture . . . can be expected to reflect a significant number of religious songs;" that performance of the music did not have the principal or primary effect of advancing or endorsing religion; and that "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" amounted to religiously neutral educational choices rather than unconstitutional entanglement.

Under the Free Exercise Clause, the government shall make no law prohibiting the free exercise of religion. To establish a violation of the Free Exercise Clause, the complaining party must allege something more than the fact that the song lyrics offended her personal religious beliefs. Rather, she must allege facts demonstrating the challenged action created a burden on the exercise of her religion. Therefore, a plaintiff states a claim her exercise of religion is burdened if the challenged action is coercive or compulsory in nature. Therefore, to state a Free Exercise claim, the plaintiff must allege facts showing she was "coerced" into singing songs contrary to her religious beliefs. *Bauchman*, 132 F.3d at 557. In the *Bauchman* case, the court concluded that "the fact Ms. Bauchman had a choice whether or not to sing songs she believed infringed upon her exercise of religious freedom, with no adverse impact on her academic record, negates the element of coercion and therefore defeats her Free Exercise claim." For the same reason, the court in *Bauchman* also rejected the plaintiff's claim that her rights under the First Amendment's Freedom of Speech Clause had been violated. The court recognized that the First Amendment prohibits the government from compelling speech, but concluded that the plaintiff had not alleged facts sufficient to show she was coerced or compelled to engage in any choir activities against her will.

Based on these and other authorities which we have reviewed, it appears that the performance of *In this Very Room* at the Coffee House concert would not violate either the Establishment Clause or the Free Exercise Clause if, as in the *Doe* and *Bauchman* cases, the district can establish a valid secular purpose for performing the song, especially if the program as a whole presents a variety of religious and secular music and students are allowed to opt out of the performance with no adverse effect on their academic standing.

We thank you for consulting with our office on this matter. Please do not hesitate to contact us if you have any further requirements or any questions concerning the contents of this letter.

Very truly yours,

SWISHER & COHRT, P.L.C.

By: 

Beth E. Hansen

JDD/kak