

CLIENT NEWS BRIEF

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**NINTH CIRCUIT UPHOLDS THE PROHIBITION OF RELIGIOUS
MUSIC AT A GRADUATION CEREMONY**

In Nurre v. Whitehead (9th Cir. Sept. 8, 2009) __F.3d__, the United States Court of Appeals for the Ninth Circuit upheld a lower court's ruling which found that a student's constitutional rights were not violated when the school district ("District") prohibited her from playing a religious piece of music at the high school graduation. The student claimed that such a prohibition violated her rights under the First Amendment and the Equal Protection Clause of the United States Constitution. The court disagreed, finding that the District's actions were reasonable in light of a similar controversy which arose during the previous year's graduation and because the action taken did not amount to an endorsement or a disapproval of a particular religious viewpoint.

In 2005, at the graduation ceremony for the students of Henry M. Jackson High School, located in Washington State, the student choir performed a vocal piece entitled, "Up Above My Head," which included references to "God," "heaven" and "angels." The song was included in a list of musical selections which had been previously approved by the school's principal. Immediately following the graduation, the District received complaints from graduation attendees regarding the religiously-themed music and the local newspaper printed letters to the editor complaining about the music's religious statements.

In preparation for the 2006 graduation ceremony, the same principal previewed a list of the proposed musical selections which included an instrumental version of the song "Ave Maria." The song was to be performed by the school's wind ensemble, which included Kathryn Nurre ("Nurre"). Recalling the complaints from 2005, the principal forwarded the list to District administrators, including the Superintendent. Because the title and meaning of the song had religious connotations, and would be easily identified as such by the title alone, the District required the wind ensemble to choose a different song to play at the graduation ceremony. In response, Nurre filed suit, alleging violations of her constitutional rights.

Nurre first alleged that the Superintendent censored her speech in violation of the First Amendment. The court noted that instrumental music is a form of expression and therefore protected speech. However, the court also found that the ceremony was a limited public forum where restrictions based on subject matter content are permissible, so long as they are reasonable. In other words, because the purpose of the ceremony was to showcase all of the

students' achievements before a captive audience and do so in a manner which preserved the District's neutrality, the District acted reasonably in keeping all musical performances secular.

Nurre also alleged violation of the Establishment Clause which prohibits government entities from establishing a national religion and from indicating a preference of one religion over another. The court found that the Superintendent's actions did not reflect hostility towards religion and that her actions were reasonable given the public outcry after the 2005 graduation ceremony. Also, the Superintendent's conduct was not overly invasive to constitute excessive government entanglement in religion. The inquiry into whether certain music could be performed occurred only once during the year in question and was done merely by reviewing song titles for religious references.

Finally, Nurre alleged that the Superintendent violated the Equal Protection Clause by treating her differently than past graduates who were allowed to select the music they performed. The court disagreed, finding that such a claim did not involve a fundamental right or a suspect class and that the District acted appropriately to avoid advancing or showing disapproval towards a particular religion or viewpoint.

The court's decision in this case was based on the specific facts at issue. The court did acknowledge the delicate balance of preserving students' free speech rights and the actions government officials must sometimes take to avoid collision with the Establishment Clause. The court also noted that the performance of religious music at a school event does not necessarily amount to a constitutional violation. This is consistent with California Education Code section 51511 which states in relevant part, “[n]othing in this code shall be construed to prevent, or exclude from public schools, references to religion or references to or the use of religious literature, dance, music, theatre, and visual arts . . . when such references or uses do not constitute instruction in religious principles or aid to any religious sect, church, creed, or sectarian purpose.” Government entities should nonetheless proceed with caution, especially given the court's history of striking down religious-themed activities at graduation ceremonies, as it did in Cole v. Oroville Union High School District (9th Cir. Oct. 2, 2000) 228 F.3d 1092 and in Lassonde v. Pleasanton Unified School District (9th Cir. Feb. 19, 2003) 320 F.3d 979.

Given the complexities of free speech issues, if you have any questions regarding the Nurre decision, or free speech laws in general, do not hesitate to contact any one of our seven statewide offices.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.



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