



Ninth Circuit Upholds School District's Prohibition of Religious Music at Graduation Ceremony

In a split decision, the Ninth Circuit Court of Appeals upheld the decision of Everett School District No. 2 to require all musical selections at graduation ceremonies to be “purely secular.” (Nurre v. Whitehead (9th Cir. 2009) --- F.3d ----, 2009 WL 2857196.)

At a graduation ceremony in 2005, the District permitted a choir to perform “Up Above My Head,” a vocal piece which included references to “God,” “heaven,” and “angels.” Following that ceremony, the District received several complaints from attendees regarding the religiously themed musical selection.

Prior to the 2006 graduation, the school band proposed performing an instrumental version of “Ave Maria,” a religious piece, during the graduation ceremony. The principal reviewed the request and met with the District’s associate superintendent concerning the band’s proposal. The principal and associate superintendent determined that the band should be directed to select another piece because “Ave Maria” had religious connotations. The associate superintendent sent an email to all District principals stating that musical selections for all graduations must be “purely secular” in nature.

A band student sued the District’s superintendent in her official and individual capacities. The student raised three claims. First, the student argued that the superintendent censored her speech in violation of the First Amendment. Second, the student argued the superintendent acted with hostility toward religion in violation of the First Amendment’s Establishment Clause. Third, the student argued the superintendent violated the Equal Protection Clause of the Fourteenth Amendment.

In considering First Amendment claims, courts first analyze whether the conduct is speech. In this instance, the Ninth Circuit found, even though the musical selection was instrumental, it was a protected form of expression and thus protected speech under the First Amendment.

If a claim involves protected speech, courts then analyze the type of forum in which the claimant seeks to engage in the speech. The type of forum affects the level of the court’s scrutiny – generally non-public forums receive less scrutiny, whereas open forums receive greater scrutiny.

In this instance, the parties appeared to concede the graduation ceremony was a “limited public forum.” A limited public forum is a government forum for expression that has not traditionally been open for all subjects, but has been opened by the government for expression related to certain, limited subjects. In a limited public forum, speech restrictions must be viewpoint neutral and can be based on subject matter only if the restrictions are reasonable in light of the purpose served by the forum. The majority found the District’s restrictions to be reasonable because: (1) the District sought to avoid the controversy that occurred following the 2005 graduation, and, (2) given the compulsory nature of the graduation ceremony where students could be expected to attend, the District was justified in keeping all musical performance at graduations entirely secular. The majority emphasized, however:

[W]e confine our analysis to the narrow conclusion that when there is a captive audience at a graduation ceremony, which spans a finite amount of time, and during which the demand for equal time is so great that comparable non-religious musical works might not be presented, it is reasonable for a school official to prohibit the performance of an obviously religious piece.

The Ninth Circuit next considered the student's Establishment Clause claim. According to the United States Supreme Court, the Establishment Clause to the First Amendment, "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."

The Ninth Circuit found that the District's actions were not hostile towards religion. Rather, the court found a reasonable person familiar with the complaints regarding religious music at the 2005 graduation would understand that the District's prohibition of religious music had the secular purpose and effect of maintaining neutrality towards religion and ensuring compliance with the Establishment Clause.

Finally, the Ninth Circuit considered the student's Equal Protection claim. The Equal Protection Clause generally prohibits a government entity from treating an individual differently than other similarly situated individuals. The Ninth Circuit rejected the student's claim finding that the District had a legitimate interest in prohibiting music it believed could violate the Establishment Clause.

Notably, the Ninth Circuit sought to clarify its decision by stating:

[W]e do not hold that the performance of music, even "Ave Maria," would necessarily violate the Establishment Clause. We hold only that [the superintendent's] actions were reasonable in light of her past experience and her understanding of the law and did not violate [the student's] constitutional rights.

The majority did not decide whether the superintendent would be entitled to qualified immunity, or immunity from personal liability, because it found no violation of the Constitution. However, both the dissenting judge and the majority agreed, "the state of the law is such that no reasonable school administrator would have known that such action would violate the constitutional rights and qualified immunity would attach to [the superintendent]."

This case exemplifies the complexity of free speech issues in the school setting. Under the majority's narrow holding, school districts may choose to permit only secular music at graduation ceremonies given the unique and compulsory nature of those ceremonies. However, as the dissenting judge aptly acknowledged, "no bright lines exist in this complex field of First Amendment law, and I sympathize with school officials, who often find themselves in a Catch-22, subject to criticism and potential law suits regardless of the position they take."

Counsel for the student has informed our office that she will likely seek review of this decision by the United States Supreme Court. We will issue an updated NewsFlash if the Supreme Court reviews this case.

Should you have any questions regarding this case and its impact, please contact one of our four offices.

*F3 NewsFlash prepared by Christopher D. Keeler and Dean T. Adams.
Chris is a partner in the F3 San Marcos office.
Dean is a senior associate in the F3 San Marcos office.*

This F3 NewsFlash is a summary only and not legal advice. We recommend that you consult with legal counsel to determine how this case may apply to your specific facts and circumstances. Information on a free NewsFlash subscription can be found at www.fagenfriedman.com.

157072.1

6300 Wilshire Blvd., Suite 1700, Los Angeles, California 90048 Tel. 323.330.6300 Fax 323.330.6311
70 Washington St., Suite 205, Oakland, California 94607 Tel. 510.550.8200 Fax 510.550.8211
520 Capitol Mall, Suite 400, Sacramento, California 95814 Tel. 916.443.0030 Fax 916.443.0030
1 Civic Center Dr., Suite 300, San Marcos, California 92069 Tel. 760.304.6000 Fax 760.304.6011

© 2009 Fagen Friedman & Fulfroost, LLP

All rights reserved, except that the Managing Partner of Fagen Friedman & Fulfroost, LLP hereby grants permission to any client of Fagen Friedman & Fulfroost, LLP to use, reproduce and distribute this NewsFlash intact and solely for the internal, noncommercial purposes of such client.