

FREEDOM FROM RELIGION *foundation*

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SENT VIA EMAIL AND U.S. MAIL: AFugitt@cfel.com

Mr. F. Andrew Fugitt
The Center for Education Law, Inc.
900 N. Broadway, Suite 300
Oklahoma City, OK 73102

Re: Nativity Scene in Holiday Concert

Dear Mr. Fugitt:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) regarding a constitutional violation that occurs each year in Edmond Public Schools. It is my understanding that you represent the District, please let me know if that is no longer the case.

A concerned Edmond Public Schools community member has reported that each year, third grade teachers at Chisholm Elementary have students rehearse a live nativity scene, which the students then perform at the school's holiday concert in December. We understand that Chisholm students who participate in the nativity play various roles, including Mary and Joseph, etc.

Teaching students the biblical story of the birth of Jesus and having them regularly rehearse a performance of that story entangles the school with the bible's devotional message. Such a performance would be appropriate in a church setting, but not in a public school. We write to ensure that district teachers do not incorporate religious promotion into their lessons and that future school events do not include live nativities or other religious performances.

As you are aware, the District has a duty to ensure that "subsidized teachers do not inculcate religion" or use their positions of authority to promote a particular religious viewpoint. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). Federal courts have consistently rejected the promotion of religious viewpoints in the classroom. See, e.g., *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990) (ruling that a school board could limit a teacher's comments on creationism because the board had the responsibility to ensure that the teacher was not "injecting religious advocacy into the classroom").

While a public school can hold holiday concerts, religious performances and instruction that emphasize the religious aspects of a holiday are prohibited. As the Supreme Court has stated, "[t]he government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting people praise God for the birth of Jesus." *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593-94 (1989). A live nativity performance celebrating the story of Jesus's birth is precisely the sort of religious endorsement prohibited by the Establishment Clause.

The Supreme Court has recognized that "[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not

purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.” *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (finding unconstitutional a statute allowing the teaching of creationism, a religious belief, in classrooms). District employees should be particularly mindful of not ostracizing their non-Christian students, given that fully 47% of young Americans—those born after 1999, *i.e.*, all of the district’s current students—are not Christian, including those who practice minority religions and the 38% who are atheists, agnostic, or otherwise not religious.¹

Please note that including a live nativity performance in a school’s holiday concert remains illegal even if participation in the nativity scene is “voluntary.” Giving students the option to opt out of an activity does not cure the constitutional violation. As the Supreme Court explained in *Lee v. Weisman*, “It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.” 505 U.S. 577, 596 (1992). There is immense pressure for students to do as their instructors and their peers are doing. Public school staff and administrators should be aware of these concerns and ensure that all students are made to feel welcome in all programs. This is even more problematic in the elementary school setting, where students are particularly young and impressionable.

In 2015, FFRF brought a federal lawsuit against a public school district in Indiana over a holiday concert that included a living nativity, in which students reenacted the nativity story from the New Testament while the school choir sang religious songs. Even though this performance only took up the last 20 minutes of a 90-minute performance, the court enjoined the school district from including the live nativity because “when the School places such disproportionate emphasis in . . . the religious aspect of [Christmas] through the live depiction of the nativity scene, it adds to the perception that the School is actually endorsing that religion.” *FFRF v. Concord Cmty. Schs.*, 148 F.Supp.3d 727, 741 (N.D. Ind. Dec. 2, 2015), *injunction preserved unchallenged on appeal*, 885 F.3d 1038, 1053 (7th Cir. 2018).

We ask that the District investigate this situation and ensure that future school-sponsored performances will not include nativity scenes and that District teachers will not promote religion through classroom assignments. Please respond in writing to outline what steps the District has taken so that we may notify our complainant that this matter has been resolved.

Sincerely,



Christopher Line
Staff Attorney
Freedom From Religion Foundation

¹ Robert P. Jones & Daniel Cox, *America’s Changing Religious Identity*, PUBLIC RELIGION RESEARCH INSTITUTE (Sept. 6, 2017), available at www.prrri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf.