December 9, 2004

Mr. Karl Springer
Superintendent, Mustang Public Schools **VIA FAX AND U.S. MAIL**
906 S. Heights Drive,
Mustang, OK 73064

**RE: THE U.S. CONSTITUTION DOES NOT PROHIBIT LAKEHOMA ELEMENTARY FROM INCLUDING THE NATIVITY AND THE SONG "SILENT NIGHT" FROM ITS HOLIDAY PLAY.**

Dear Mr. Springer:

Mrs. Kelly Fordyce, mother of students Ryan and James, has contacted has contacted the American Center for Law & Justice ("ACLJ") regarding an issue of serious constitutional concern. The purpose of this letter is to apprise you of the facts as reported to us by Mrs. Fordyce and to explain the constitutional law as it applies to these facts. It is our hope that upon reading this letter, and after seeking whatever legal counsel you deem necessary, that you will take the appropriate steps to remedy the situation described herein.

By way of introduction, the American Center for Law and Justice (ACLJ) is a not-for-profit public interest law and educational group. Our organization exists to educate the public and the government about the right to freedom of speech, particularly in the context of the expression of religious sentiments. Jay Sekulow, Chief Counsel for the American Center for Law and Justice, has served as lead counsel in four significant Supreme Court cases in this area: *Locke v. Davey*, 540 U.S. 712 (2004), *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993) and *Westside Board of Education v. Mergens*, 496 U.S. 226 (1990) and has submitted amicus briefs on behalf of the ACLJ in numerous Supreme Court cases, including: *Good News Club v. Milford Central School Dist.*, 533 U.S. 98 (2001); *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995).

According to Ms. Fordyce, Lakehoma Elementary School has been performing a holiday play for over twenty years. The play concerns a group of school children who celebrate the holiday season in different ways while they are inside the school building during a blizzard. The children first celebrate the holidays by having a Mexican-style fiesta, then lighting a menorah in recognition of Chanukah, and, finally, depicting a nativity scene and singing "Silent Night" to celebrate Christmas. Clearly, the play recognizes the diverse ways in which the holiday season is celebrated by different peoples and cultures.

Recently and most unfortunately, the play, which is to be performed today, has been censored by you from containing (1) a depiction of the nativity and (2) the singing of "Silent Night." This act of censorship is without any justification in the law and is not warranted by the Establishment Clause of the First Amendment.

You should be aware that no court has ever banned the singing of religious Christmas carols by public school choirs. A case that addressed this specific issue upheld the singing of religious Christmas carols in public schools. In *Florey v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980), the United States Court of Appeals for the Eighth Circuit held that the study and performance of religious songs, including Christmas carols, are constitutional if their purpose is the "advancement of the students' knowledge of society's cultural and religious heritage as well as the provision of an opportunity for students to perform a full range of music, poetry, and drama that is likely to be of interest to the students and their audience." *Id.* at 1314.

The federal appeals court in *Florey* found that religious songs and symbols can be used in public schools if they are presented in a "prudent and objective manner and only as part of the cultural and religious heritage of the holiday." *Id.* at 1317. It is important to note that the decision in *Florey* was based on two U.S. Supreme Court cases that permit the study of the Bible in public schools. In *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963), the Supreme Court stated, "It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."

Recent Courts of Appeals cases have confirmed the central holding of *Florey*. The United States Court of Appeals for the Fifth Circuit, in *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995), upheld a school's longtime use of "The Lord Bless You and Keep You" as its theme song. In its decision, the Court stated, "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. . . . Such animosity towards religion is not required or condoned by the Constitution." *Id.* at 408.

Similarly, in *Bauchman v. West High School*, 132 F.3d 542 (10th Cir.), *cert. denied*, 524 U.S. 953 (1998), a student sued the school because of, among other things, the religious content of the songs performed by the school choir. The court, citing *Doe*, dismissed the lawsuit, noting that "the Constitution does not require that the purpose of government-sanctioned activity be unrelated to religion." *Id.* at 553. Furthermore, the court recognized that "a significant percentage of serious choral music is based on religious themes or text . . . Any choral curriculum designed to expose students to the full array of vocal music culture therefore can be expected to reflect a significant number of religious songs." *Id.* at 553-54 (internal citations omitted). It is hardly surprising, then, that "the Constitution does not forbid all mention of religion in public schools." *Id.*

Moreover, the U.S. Supreme Court has clearly indicated that governmental bodies, which include public schools, are free to celebrate the holiday season with symbols of the season. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court addressed the constitutionality of a government-erected crèche. Significantly, the *Lynch* court upheld the constitutionality of the holiday display in that case because the crèche was a part of a larger holiday display in which there were a variety of secular symbols. As the *Lynch* court pointed out regarding Pawtucket, Rhode Island's display of the crèche:

> It would be ironic . . . if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol — the crèche — at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.
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> The Court has acknowledged that the "fears and political problems" that gave rise to the Religion Clauses in the 18th century are of far less concern today. We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the

> three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.

*Id*. at 686 (citation omitted) (emphasis supplied).

What the Supreme Court wrote about the city display of a crèche applies with equal force to your decision to censor the nativity display and "Silent Night" from the school play: the idea that they pose an Establishment Clause danger is "farfetched indeed". Because the play's use of a Christmas symbol and song is one part of a larger holiday seasonal celebration, there is no question that Lakehoma's use of a nativity scene and "Silent Night" in its play would not violate the U.S. Constitution.

We are currently working with Mrs. Fordyce to decide what legal avenues may be taken to remedy the issue described herein. In the meantime, we ask that you take the immediate and necessary steps to ensure that the censorship of the school play of its Christmas content is corrected.

Should you have any questions or concerns about the foregoing, please do not hesitate to contact me.

Very truly yours,
AMERICAN CENTER FOR LAW & JUSTICE

Francis J. Manion
Senior Counsel

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