

LETTER OPINION
2002-L-53

October 2, 2002

The Honorable John T. Traynor
State Senate
PO Box 838
Devils Lake, ND 58301-0838

Dear Senator Traynor:

Thank you for your September 11, 2002, letter asking whether a change of the Devils Lake Public School District's name to "Devils Lake Public School District - Home of the Satans"¹ would violate the Establishment Clause of the United States Constitution or similar provision in the North Dakota Constitution. You also ask whether the issue of the name change would be required to be placed on the ballot for a public vote under N.D.C.C. § 15.1-07-02 if it is my opinion that the proposed name would contravene a constitutional provision.

Section 15.1-07-02, N.D.C.C., is a ministerial statute which requires the proposed name change to be placed on the ballot if the appropriate number of qualified electors of the district petition.² Whether a statute violates constitutional guarantees is a question for the courts. Verry v. Trenbeath, 148 N.W.2d 567, 573 (N.D.1967). Ministerial officers lack legal authority to question the constitutionality of the statutes under which they operate. Husebye v. Jaeger, 534 N.W.2d 811, 816, n. 2, State ex rel. Johnson v. Baker, 21 N.W.2d 355, 359 (N.D.1945).³ However, a court of competent jurisdiction may determine that a matter proposed for an election may be stricken from the ballot for failure to meet constitutional requirements. See Petition of Teigen, 221 N.W.2d 94 (N.D.1974) (court enjoined Secretary of State from placing candidate's name on ballot where the candidate was constitutionally disqualified from office).

¹ It is my understanding that this issue relates to a decision by the school board to drop "the Satans" as a public school mascot. A petition has been filed under N.D.C.C. § 15.1-07-02 to change the school district's name at the next election.

² The number is one-third of those who voted at the most recent annual school board election. N.D.C.C. § 15.1-07-02.

³ "[T]he courts recognize the principle that the constitutionality of a statute cannot be questioned by one whose rights it does not effect and who has no interest in defeating it. And where it is held that a ministerial officer may raise the question it is because injury to himself might result or a violation of duty be imputed to him on account of his failure to do so." Id.

Therefore, it is my opinion that if the petition to change the name of the Devil's Lake School District meets the requirements contained in N.D.C.C. §15.1-07-02, the matter must be placed on the ballot unless a court having jurisdiction orders otherwise.

Your other question, whether adding the name Satans to that of the school district would violate the Establishment Clause, requires the determination of factual issues that are beyond the scope of my authority to answer in a legal opinion. However, I can address the test that a court would follow in determining this issue.

The First Amendment to the Constitution of the United States states, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment of the United States Constitution has been construed to make the First Amendment provision relating to religion applicable to the States and to subdivisions of the States, including local boards of education. Williams v. Board of Ed. of Kanawha County, 388 F.Supp. 93, 96 (D.C.W. Va. 1975). However, "[t]he Amendment does not guarantee that nothing about religion will be taught in the schools [or] that nothing offensive to any religion will be taught in the schools." Id.

The issue of a public school system's use of a mascot with religious overtones has been addressed by the United States Court of Appeals for the Sixth Circuit. In that case, the alleged violation of the establishment clause was that the school's athletic mascot was named the "Blue Devil" and this mascot was used on athletic uniforms, diplomas, certificates of achievement, and in decorating the gymnasium. Kunselman v. Western Reserve Local School District, 70 F.3d 931 (6th Cir. 1995).⁴

The Kunselman court followed the three-prong test developed by the United States Court in Lemon v. Kurtzman, 403 U.S. 602 (1971). This test provides that a permissible practice "must clearly reflect a secular purpose, have a primary effect that neither inhibits nor advances religion, and avoid excessive government entanglement with religion." Id. at 932, citing Lemon, 403 U.S. at 612-13. The court observed that the name "Blue Devils" was chosen in emulation of the team of the same name at Duke University, which in turn was apparently named for an elite corps of French alpine soldiers who wore blue berets and fought in World War II under that name. Id. at 931-32. The court also noted evidence showing that the Blue Devil mascot has been perceived as having an entirely secular purpose and effect, principally to provide "a menacing type of figure" for sporting or athletic events. Id. at 932.

The first part of the test, whether naming the Devils Lake School District the "Home of the Satans" would be for a secular purpose, is a factual matter that only the courts can decide. However, it may reasonably be inferred, and the school district's history likely reflects, that

⁴ For purpose of the opinion, the court assumed that Satanism or the Church of Satan is a religion. Id.

the Satans name was developed based on the geographic proximity of Devils Lake and the school district's location within the City of Devils Lake.⁵ Further, it is likely that evidence would show that the Satans name and mascot was adopted for the secular purpose and effect of providing a menacing figure for sporting or athletic events, and not for the purpose of promoting worship of the devil.

The Kunselman court focused on the second prong of the Lemon test, that the principal or primary effect must be one that neither advances nor inhibits religion. Quoting the United States Supreme Court in Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 597 (1989), the court noted that:

when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices."

Id. at 932 (citations omitted). The court also stated that the content and context of the religious display must be analyzed and the constitutionality of its effect must be judged according to the standard of a reasonable observer. Id. at 932.

In its analysis the Kunselman court determined that no reasonable person would believe that the principal or primary effect of the Blue Devil mascot was to advance or inhibit religion or to endorse or disapprove of any religious choice. Id. at 932-33. The court noted that the principal purpose and effect of the Blue Devil mascot was to serve as a "secular symbol for athletic activities." Id. at 932. The court was careful to point out that, while the plaintiffs in the case were personally offended by the mascot, that is insufficient to establish a First Amendment violation in the context of the particular case. The court concluded that no reasonable person would think that the school authorities "are advocating Satanism any more than the French alpine soldiers, Duke University or numerous other schools are encouraging worship of the devil when they use the name and symbol." Id. at 933.

Similarly, while a reasonable observer might object to the Satans name based upon religious beliefs, it is a factual matter to be determined by the courts whether a reasonable observer would conclude that the school board was advocating Satanism or disapproving other religious beliefs through use of the mascot.

The Kunselman court did not address the third prong of the Supreme Court's Lemon test for violations of the establishment clause, that of excessive government entanglement with

⁵ The terms Satan and Devil are synonyms. The American Heritage Dictionary, 389, 1091 (2d. col. ed. 1991).

religion. The United States Supreme Court has modified the Lemon test for the purposes of evaluating aid to schools. The Supreme Court now examines only the first and second factors, but acknowledges that its cases discussing excessive entanglement applied many of the same considerations as had their cases discussing the primary effect of the government program at issue. This has caused the Supreme Court to “recast Lemon’s entanglement inquiry as simply one criterion relevant to determining a statute’s effect.” Mitchell v. Helms, 530 U.S. 793, 808 (2000), citing Agostini v. Felton, 521 U.S. 203, 232-33 (1997). Whether the use of the Devils Lake Satans mascot entails any entanglement between the school district and any religious authorities is also a factual question for the courts.

The North Dakota constitution forever guarantees the free exercise and enjoyment of religious profession and worship without discrimination or preference. N.D. Const. art. I, § 3. See also N.D. Const. art. XIII, § 1. The State Constitution may afford broader rights than those granted under an equivalent provision of the federal constitution. City of Bismarck v. Altevoigt, 353 N.W.2d 760, 766 (N.D. 1984). See also State v. Jacobson, 545 N.W.2d 152 (N.D. 1996) (discussing this issue in detail, with one opinion of the court, three concurring opinions and one dissenting opinion). However, on the particular facts of this case, there appears to be no difference in the state constitutional provisions protections for the freedom of religious belief and practice than those implicated under the similar federal constitutional provisions. See State v. Patzner, 382 N.W.2d 631, 639 n. 5 (N.D.1986).

Therefore, if a court were to find that the change of name of the Devils Lake Public School District to “Devils Lake Public School District - Home of the Satans” was for a secular purpose and it did not inhibit or advance religion, there would be no violation of either the Establishment Clause of the United States Constitution or Article I, § 3 of the North Dakota State Constitution.

As I discussed in the beginning of this opinion, the issue must be placed on the ballot because only a court can decide the factual issue whether that name change violates the Establishment Clause.

Sincerely,

Wayne Stenehjem
Attorney General