Religious Music in Public Schools: The Disappointing Analysis in *Stratechuk v. Board of Education, South Orange-Maplewood School District*

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I. Introduction

Religious music in a school's December concert is an issue that affects children, parents and teachers alike. While many have strong feelings for or against the inclusion of religious and holiday music during the annual choir and instrumental concerts in America's public schools, the legal contours of the issue are hazy at best. The District Court of New Jersey recently had an opportunity to address these issues head on in *Stratechuk v. Board of Education, South Orange-Maplewood School District*.[2] Unfortunately, the District Court of New Jersey did not rise to the challenge and failed to give adequate attention to the complex and poignant legal issues in the case. Its analysis under the Establishment Clause blended the three distinct prongs of the *Lemon* test[3] and gave too much weight to the school district's legislative purpose while it deemphasized the factual context of the case and pertinent legal precedent. Most alarming, however, was the District Court's unilateral conclusion of a genuine issue of material fact at the outset of its summary judgment discussion. These aspects of the District Court's opinion give the impression that its examination was outcome determinative instead of based in sound legal analysis.

First, this article will analyze the District Court's application of the summary judgment standard and whether its application was appropriate. Next, this article will address the District Court's Establishment Clause analysis and examine the

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[2] *Stratechuk v. Bd. of Educ., South Orange-Maplewood School District*, 577 F. Supp. 2d 731 (D.N.J. 2008).

[3] The test used by the District Court in analyzing the Establishment Clause was the *Lemon* test. This test has its origins in the Supreme Court case, *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The three prongs of the test address whether the government's action lacks a secular purpose, whether the government action has the principal or primary effect of advancing or inhibiting religion, and whether the government action involves an excessive entanglement with religion. If any of these prongs are satisfied, the government action violates the Establishment Clause. *Id.* at 612-13.

District Court's findings on each prong of the *Lemon* test. This article will discuss the District Court's use of precedent, its consideration of the factual context of the case and the basis for its conclusion. Finally, this article will resolve that the District Court's application of the summary judgment standard and analysis under the Establishment Clause was deficient and the Third Circuit, on appeal, should reverse it.

II. Statement of the Case and Procedural History

A. Facts

The School District of South Orange and Maplewood in New Jersey adopted Policy 2270, "Religion in Schools", on April 2, 2001.[4] The Policy permitted the inclusion of religious literature, music and drama in the curriculum so long as it served an educational goal and was presented objectively.[5] In a special section entitled "Treatment of Religious Holidays in Classrooms, School Buildings, Programs and Concerts," the Policy expressly prohibited religious music unless it furthered a specific goal of the music curriculum.[6] Furthermore, "music programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on the holidays."[7]

Until the 2004-2005 school year, Policy 2270 was not interpreted to ban religious holiday music from the music curriculum or from the annual holiday concert.[8] In January of 2004, however, a parent complained to the music teacher and the Superintendent of the School District that both the instrumental and vocal performances at the December concert had a "clear religious orientation and focused on religious holidays . . . in direct violation of the Board policy # 2270."[9] In response, the Superintendent acknowledged the parent's concern but explained that in the school's opinion, the December concert did not have a religious

[4] *Stratechck v. Bd. of Educ.*, 577 F. Supp. 2d at 733.
[5] *Id.*
[6] *Id.* at 734.
[7] *Id.*
[8] *Id.*
[9] *Id.*

orientation or focus because the concert included an assortment of holiday music from both the Christmas and Hanukkah traditions as well as secular music.[10]

When the Superintendent had his annual performance review in March, 2004, the School Board was concerned with the implementation of Policy 2270.[11] The Board's concern was informed by community members who felt the instrumental music program focused too heavily on the Christmas holidays.[12] Furthermore, the Board felt that the school could not fairly balance all religious groups in the December concert through a diverse musical selection.[13]

After the School Board meeting, the Superintendent met with the Director of Fine Arts in September of 2004 to explain that Policy 2270 would be implemented more consistently with less discretion by the faculty.[14] After the meeting, a memorandum was circulated through the School District by the Director of Fine Arts in October of 2004 articulating the new implementation requirements for Policy 2270. The memorandum read:

> All programs will be reviewed and approved by me. To save time and effort, I will come to you to look at your repertoire. Please let me know when I can do this.
> We will avoid any selection which is considered to represent any religious holiday, be it Christmas, Hanukkah, etc. This holds true for any vocal or instrumental setting.
> I would strongly suggest you gear towards the seasonal selections - - Winter Wonderland, Frosty the Snowman, etc. Music centered on Peace is also a nice touch.
> For the High School, the Brass Ensemble repertoire must also adhere to this policy, so the traditional carols must be eliminated from the repertoire.
> The MLK Gospel Choir cannot perform at the CHS Holiday Assembly for the Student Body.
> Your printed programs for any Holiday concert must avoid graphics which refer to the holidays, such as Christmas Trees and dreidels.[15]

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[10] *Id.*
[11] *Id.* at 735.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 736.

The Director of Fine Arts further clarified the new interpretation of Policy 2270 to individual faculty members. The Director informed teachers that they could teach about the holidays in class because classroom work is not a program under Policy 2270. Furthermore, religious songs that did not have a religious orientation or refer to a religious holiday, such as Vivaldi's Gloria (Cum Sancto Spiritu) could be performed under Policy 2270.[16]

Several parents and members of the South Orange and Maplewood community complained to the School District and the Superintendent regarding the new interpretation of Policy 2270. A petition was signed by members of the community urging the School District to practice religious tolerance. The Music Parents' Association requested a review and reinterpretation of the Policy. Even the music teachers at the school sent a letter to the School District expressing their "intense opposition to the change in the interpretation of the district's holiday music policy."[17] Members of the Martin Luther King, Jr. Association Gospel Choir (MLK Choir) sent their own letter of protest and expressed concern that the MLK Choir was now restricted from performing in the holiday concert regardless of their performance in the concert in the past.[18] Members of the community who opposed the October memorandum organized a public protest where the opponents of the policy assembled in front of the school and sang Christmas carols, Chanukah songs and other musical pieces which were prohibited by the School District.[19]

The Plaintiff, Michael Stratechuk, is the father of two children in the South Orange and Maplewood School District.[20] The Plaintiff alleged that the interpretation and implementation of the School District's Policy 2270 violates both the Establishment Clause and his children's First Amendment rights to receive information and ideas, the right to learn and the right to academic

[16] *Id.* at 737.
[17] *Id.* at 737-38.
[18] *Id.* at 738.
[19] Plaintiff's Notice of Motion and Motion for Summary Judgment at 18, *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d 731 (D.N.J. 2008) (No. 04-6189).
[20] *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d at 733.

freedom.[21] For purposes of this article, the discussion will center on Plaintiff's first claim and analyze whether the school district's policy violated the Establishment Clause.

B. Procedural History

Plaintiff filed his complaint against the School District, the Board of Education, the President of the Board and the Superintendant of the School in the District Court of New Jersey in December of 2004.[22] In May of 2005, the Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[23] The District Court granted the Defendants' motion and dismissed the case. In its decision, the District Court considered the text of Policy 2270 which was not relied upon in the pleadings. Rather, the Defendants submitted a copy of the official policy in its motion for dismissal. The Plaintiff objected to the District Court's consideration of the policy in deciding the motion to dismiss because the official policy did not reflect the restrictive policy alleged by the Plaintiff in his pleadings and the official policy was not part of the Plaintiff's complaint.[24] The District Court rejected Plaintiff's argument, considered the official policy and dismissed the case.[25]

The Plaintiff appealed to the Third Circuit which reversed the District Court's dismissal. The Third Circuit held that the Plaintiff's complaint did not rely upon the official policy. Rather, "the policy Stratechuk describes is more restrictive than the one set forth in the publicly available materials."[26] Furthermore, the Third Circuit found that the policy relied upon in the Plaintiff's complaint was "decidedly different than the 'official policy.'"[27] Most significantly, the Court found that "a categorical ban on exclusively religious music, enacted with the express purpose of sending a message of disapproval of religion, appears to state a

[21] *Id.* at 739.
[22] *Id.* at 739.
[23] *Stratechuk v. Bd. of Educ.*, 200 Fed. App'x. 91, 92 (3d Cir. 2006).
[24] *Id.* at 93.
[25] *Id.* at 93.
[26] *Id.* at 94.
[27] *Id.*

claim under the First Amendment," and therefore the District Court erred in dismissing the case.[28] The Third Circuit remanded the case with the express mandate that "the District Court must afford Stratechuk a chance to show that the policy in place in 2004-2005 is different from the official policy."[29]
After the case was remanded, in January of 2008, the Plaintiff filed a motion for summary judgment and Defendants filed a cross motion for summary judgment. The District Court issued its decision granting the Defendants' motion for summary judgment and dismissing the case.[30] The Plaintiff appealed this decision to the Third Circuit and the case is currently on the Third Circuit's docket.[31]

The balance of this note will analyze the District Court's opinion granting the Defendants' summary judgment motion by specifically addressing the District Court's application of the Third Circuit's mandate and the District Court's analysis under the Establishment Clause.

III. Analysis

A. The Third Circuit's Mandate and the District Court's Application of the Summary Judgment Standard

In remanding the case to the District Court, the Third Circuit expressly instructed the District Court to consider whether the policy alleged by the Plaintiff was different from the official policy codified in Policy 2270.[32] In its subsequent decision granting the Defendants' motion for summary judgment, the District Court dismissed this mandate in a single footnote.[33] The District Court opened its Discussion section by stating, "There is no genuine issue of material fact(s) between the parties."[34] However, this statement is followed directly by a footnote wherein the Court states, "There is a dispute between Plaintiff Michael Stratechuk

[28] *Id.*
[29] *Id.* at 95.
[30] *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d at 739.
[31] Robert Wiener, "Sides prep for new fight over holiday music ban," NEW JERSEY JEWISH NEWS, January 1, 2009 available at http://www.njjewishnews.com/njjn.com/010109/njsidesprep.html.
[32] *Stratechuk v. Bd. of Educ.*, 200 Fed. App'x. at 93.
[33] *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d at 740-41 n.7.
[34] *Id.* at 740.

and Defendants as to the source of the policy restricting the performance of holiday music during the December concerts."[35] The District Court then discusses whether the policy restricting the performance of the holiday music came from the official codification, Policy 2270, or the October 2004 memorandum. The District Court concludes in footnote 7 that the source of the policy is the official codification in Policy 2270 and that the October 2004 memorandum is an "interpretive lens" through which to understand the policy.[36] This outright conclusion of a critical disputed fact by the Court is hidden in footnote 7 and not considered again in the opinion.

There are several problems with footnote 7 in the District Court's opinion. First, by concluding this critical fact – the source and scope of the school's policy – outside the body of the opinion, the District Court flagrantly disregarded the mandate by the Third Circuit. Plaintiff alleged that Policy 2270 was not the source of the Establishment Clause and First Amendment violations. Rather, Plaintiff argued that the October 2004 memorandum and subsequent restriction of holiday music was its own distinct policy and that policy violated his and his children's Constitutional rights. The Defendants argued that the October 2004 memorandum was simply an interpretation of the existing Policy 2270 and Policy 2270 did not violate any constitutional rights. Instead of engaging in an analysis to determine whether the policy alleged by the Plaintiff was different and distinct from the official codified Policy 2270 as mandated by the Third Circuit, the District Court concluded in its diminutive footnote that Policy 2270 was the official policy and it should be interpreted in light of the October 2004 memorandum.[37]

The District Court's conclusion of this highly disputed and integral fact in a footnote defeats the reason for the Third Circuit's detailed remand. By instructing the District Court to look beyond the codified policy and consider the Plaintiff's

[35] *Id.* at 740-41 n.7.
[36] *Id.*
[37] *Id.*

claim as alleging a new policy defined by the October 2004 memorandum and the school district's subsequent restrictions on holiday music, the Third Circuit was expressing concern that the School District was deviating from the written policy and that this deviation posed constitutional issues. At the very least, this concern deserved more attention from the District Court than a quick dismissal in a footnote.

Second, by resolving this disputed issue of material fact in a footnote, the District Court violated the standard of review for summary judgment.[38] Here, the source and scope of the school's policy towards religious music was a question of fact and a genuine dispute between the parties. This fact is crucial to the analysis of Plaintiff's claims. If the school's policy was considered broadly to encompass both Policy 2270 and the October Memorandum, then the toleration of religious music in the curriculum under Policy 2270 would be a valid factor in determining whether the school violated the Establishment Clause under the First Amendment. However, if as Plaintiff argued, the school's policy regarding holiday music in the December concert was effectively only the October 2004 memorandum and the school's subsequent implementation of the memorandum, then the school's policy is more restrictive. It could then be argued that the October 2004 memorandum is its own distinct policy which evinces an attitude of disfavor towards religion in violation of the Establishment Clause.

In considering a motion for summary judgment, the District Court is not allowed to make conclusive judgments on genuine issues of material fact. Rather, the District Court is limited to determining whether a genuine issue of material fact exists and if that issue could reasonably be resolved in favor of either party at

[38] As articulated in its own opinion, "at the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine wither there is a genuine issue for trial. In doing so, the court must construe the facts and inferences in the light most favorable to the non-moving party." *Id.* at 740 (citations omitted).

trial.[39] Here, the issue of the source and scope of the school policy – either the official Policy 2270 or the October 2004 memorandum – was an issue of fact that could have reasonably been resolved in favor of either party. As such, it was not within the District Court's discretion to resolve this issue in favor of the defendant, especially not so summarily in a footnote.

The District Court's opinion therefore disregards the Third Circuit's mandate as well as the clearly established legal standard used in deciding summary judgment motions.

B. The District Court's Establishment Clause Analysis

After unilaterally defining the scope and source of the School District's Policy, the District Court proceeded to analyze whether Policy 2270 violated the Establishment Clause under the *Lemon* test.[40] Before engaging in the *Lemon* analysis, the District Court first recognized that school boards have broad discretion in there management decisions.[41] Further, the District Court noted that the judiciary should not "intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values;" however, the judiciary must balance its deferential treatment of school boards with the realization that protecting constitutional rights is vitally important in American schools.[42]

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[39] *Id.* See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (holding that when deciding a motion for summary judgment, the initial question is whether there are any genuine issues of fact that "may reasonably be resolved in favor of either party.")

[40] *Id.* at 741-42. The District Court acknowledged that the *Lemon* test developed by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has come under much criticism in recent cases. However, the Supreme Court, while criticizing the test, has continued to apply it in analyzing Establishment Clause claims. The *Lemon* test is a three part test. First, the court must decide whether a state action lacks a secular purpose. Second, the court must determine whether a state action has the principal or primary effect of advancing or inhibiting religion. Third, the court must analyze whether the state action involves and excessive entanglement with religion. If any of these three parts are met, the state action is deemed to have violated the Establishment Clause. *Lemon*, 403 U.S. at 612-13.

[41] *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d at 741. The District Court cites *Bd. Of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853.

[42] *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d at 741 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

In analyzing the purpose prong of the *Lemon* test, the District Court considered whether the purpose behind Policy 2270 was secular or in the alternative, if the purpose was to endorse or disapprove of religion. [43] The Plaintiff contended that because the memorandum in October 2004 specifically prohibited the performance of religious music or music associated with a religious holiday during the December concert, the school's purpose behind enacting the policy was to disfavor religion.[44] The School District, argued that its purpose was not to disfavor religion; rather, it was trying to keep away from any appearance of endorsement of religion and avoid potential Establishment Clause violations.

The District Court found the Defendant's argument more persuasive and rejected the Plaintiff's argument stating, "Plaintiff has not provided any evidentiary support for his naked assertion that the purpose underlying Defendants' actions was to show disapproval of religion."[45] The District Court emphasized that courts are normally deferential to the government's proffered purpose and the threshold for proving the legitimacy of the government's purpose is low.[46] Furthermore, the District Court found that "actions taken to avoid potential *Establishment Clause* violations have a valid secular purpose under the purpose prong of the *Lemon* test."[47]

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[43] *Id.* at 742.

[44] *Id*. at 743. The Plaintiff's brief elaborates on this argument. First, the Plaintiff states that the Establishment Clause prohibits government action where the government's official purpose behind the action is "to disapprove of a particular religion or religion in general." Plaintiff's Notice of Motion and Motion for Summary Judgment at 63, *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d 731 (D.N.J. 2008) (No. 04-6189). The flaw in the Plaintiff's analysis is that if failed to connect the text of Policy 2270 which expressly targeted religious music with the School's purpose behind enacting such a statute. By focusing solely on the text of the policy, the Plaintiff lost sight of what the purpose prong evaluates – the government's intention behind its action.

[45] *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d at 743.

[46] *Id.* at 742.

[47] *Id.* at 743. In support of its holding, the District Court cites *Borden v. Sch. Dist. of the Twp. of E. Brunswick*, 523 F. 3d 153, 174 (3d Cir. 2008). This recent Third Circuit decision considered whether a football coaches silent participation in student-prayer prior to a football game violated the Establishment Clause. The School District enacted a policy prohibiting school officials from participating in school prayer. The Third Circuit held that the School District had "a legitimate educational interest in avoiding Establishment Clause claims." *Borden*, 523 F.3d at 174. However, the Third Circuit did not apply the *Lemon* test in this case and never expressly held that it was a legitimate government purpose under the *Lemon* test to avoid Establishment Clause

Next, the District Court analyzed Policy 2270 under the effect prong of the *Lemon* test. The seminal opinion on the application of the *Lemon* test and the articulation of the *Lemon* prongs is Justice O'Connor's concurrence in *Lynch v. Donnelly*.[48] Justice O'Connor clearly explains the difference between the effect prong and purpose prong as well as their relation to each other:

> Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning. The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.[49]

In describing the effect prong, Justice O'Connor emphasized that it "is crucial a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."[50]

Justice O'Connor also articulated the impact of government sending a message of endorsement or disapproval of religion. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[51] Finally, while political divisiveness is not dispositive of the analysis, the existence of political divisiveness "may be evidence . . . that a government action is

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claims. The Third Circuit instead applied the endorsement test which focuses on the perceptions of the reasonable observer, not the government's subjective purpose. *Id.* at 175.

[48] 465 U.S. 668 (1984).

[49] *Lynch*, 465 U.S. at 690.

[50] *Id.* at 693.

[51] *Id.* at 688.

perceived as an endorsement of religion."[52] In such situations, "the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness."[53]

Justice O'Connor's concurrence was later endorsed by the Supreme Court as the primary method of application of the *Lemon* test. In *County of Allegheny v. American Civil Liberties Union of Greater Pittsburgh*, the Supreme Court lauded Justice O'Connor's interpretation of the *Lemon* test and elaborated on the application of the effect prong, stating "the effect . . . depends upon the message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display.' The inquiry, of necessity, turns upon the context in which the contested object appears."[54] Furthermore, the Court emphasized that a "secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed."[55]

The District Court began its analysis of the effect prong by citing Justice O'Connor's concurrence in *Lynch* as well as the Supreme Court's opinion in *County of Allegheny*,[56] but then failed to apply its principles to the instant action. Instead, the District Court dominated its analysis by focusing on Defendant's proffered argument that the policy promoted religious neutrality and dismissed the factual context of the case in a footnote. The District Court acknowledged that drastic changes to the School District's holiday music policy, without more, could convey a message of disapproval of religion to the reasonable observer.[57] However, the District Court then found that under the totality of the circumstances "there is ample evidence available to the objective observer

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[52] *Id.* at 689.
[53] *Id.*
[54] *County of Allegheny v. American Civil Liberties Union of Greater Pittsburgh*, 492 U.S. 573, 595 (1989) (citations omitted).
[55] *Id.* at 610.
[56] *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d at 745.
[57] *Id*. at 746.

regarding the interpretation of Policy 2270 . . . which removes any claim that it conveys a message of disapproval of religion."[58]

First, the District Court quickly disregarded the factual evidence of the public's reaction to the October Memorandum. The District Court did not consider any of the music teachers' reactions urging for religious tolerance, the MLK Gospel choirs petitions against the implementation of the memorandum, or the public protest that took place shortly after the enactment the October memorandum where people of all religions gathered to sing religious holiday music outside of the school to show their opposition to the new policy. Instead, the District Court summarily dismissed this factual context in a footnote by saying that "these complainants, however, may not serve as proxies for the reasonable observer, as it is unclear of the extent of their knowledge of the totality of the circumstances."[59]

This diminutive dismissal blatantly disregards the Supreme Court precedent in *Lynch* and *Allegheny* that the District Court itself cited. First, Justice O'Connor made clear that political divisiveness, such as the protest which occurred in this case, cannot be disregarded in the analysis of the effect test. Second, the Supreme Court clearly articulated that the effect test focuses on the context in which the government action appears. This specifically includes the public's reaction to the policy. By failing to address the massive amount of protest generated by the public in reaction to the October Memorandum, the District Court clearly erred in its application of the effect test. At minimum, these protests needed to be directly addressed in the District Court's opinion, not relegated to a footnote.

Next, the District Court focused its effect analysis on the text of Policy 2270. This is a misguided application of the effect test. The text of the policy and the District Court's subsequent analysis of the government's purpose behind the text is more appropriate in the purpose prong of the *Lemon* test, not the effect prong.

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[58] *Id.*
[59] *Id.* at 746 n.11.

Moreover, the text of Policy 2270, not the text of the October Memorandum, guided the District Court's effect analysis. Had the District Court properly applied the summary judgment standard and not unilaterally decided a genuine issue of material fact – specifically the source and contours of the School District's policy – the District Court would be unable to engage in this analysis. Here, the District Court's summary conclusion in the beginning of the opinion that the policy at issue was Policy 2270 in light of the October memorandum, and not solely the October memorandum, is crucial to the District Court's effect analysis. The District Court concluded that the text of Policy 2270 sent a message of neutrality to the objective observer, but refrained from analyzing whether the October Memorandum sent a similar message of neutrality.[60] Furthermore, had the October memorandum been viewed in isolation, the objective observer would be unlikely to receive any message of religious neutrality.

Finally, the Court dismissed any notion that prohibiting the performance of religious music during the holiday season sends a message of disapproval of religion. The District Court stated that the policy "simply restricts the performance of holiday music at the time of the religious holiday that the music honors. Given the continued performance of religious songs and the continued teaching of holiday music in the classroom, the objective observer would not determine that the implementation of Policy 2270, with respect to the School district's treatment of religious music, sends a message of disapproval of religion."[61] The Court cites no case law for this conclusion and instead, disregards precedent in its own district which points to the opposite view.

In *Clever v. Cherry Hill Township Bd. of Education*,[62] parents of children in the Cherry Hill School District challenged the School Districts policy on the use of religious themes in the educational program. Specifically, the plaintiffs challenged the display of Christmas and Chanukah symbols in calendars during

[60] *Id.* at 746.
[61] *Id.* at 747.
[62] 838 F. Supp. 929 (D.N.J. 1993).

the holiday season. In its analysis, the District Court of New Jersey reasoned that the effect prong could be violated if a school forced the absence of religious displays during the holiday season.

> Cases dealing with Lemon's second prong generally focus on governmental conduct which is alleged to promote or foster religion. However, this prong also forbids governmental conduct whose primary effect is to inhibit religion. Under normal circumstances, the absence of religious displays is neutral and without *First Amendment* significance. However, in the context of the Christmas-Chanukah holidays, this absence might be less than neutral. As our nation becomes overwhelmed with the tangible evidences of the year-end holiday spirit, the studied absence or even limitation of consistent celebrations within the school might well be interpreted by a student as governmental hostility to the celebrating religions. The fine points of *Establishment Clause* jurisprudence may be lost on a young student who sees Christmas and Chanukah everywhere but in her school.[63]

By failing to address this pertinent precedent in its own district, the District Court here refused to engage in meaningful analysis of the effect of prohibiting the performance of all religious and holiday music during the holiday season.

The District Court ends its effect analysis by returning to the legislative purpose behind the October memorandum. The District Court cited at length the motivation of the school board in forbidding performance of any religious or holiday music during the December concert. In doing this, the District Court blended the effect prong into the purpose prong. Instead of cloaking the objective observer with the entire factual context of the policy and *its effect*, the District Court painted the objective observer with legislative history and made the objective observer an embodiment of the School District's *legislative purpose.* The effect analysis of the District Court is flawed in many respects and deprives the case of its legal meaning.

[63] *Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 929, 940-41 (D.N.J. 1993).

Finally, the District Court also addressed whether the government's policy resulted in excessive government entanglement in religion. The Plaintiff argued that the October memorandum required the school to screen music to determine whether it was religious or secular nature. These screenings therefore required the School District to become excessively entangled with religion.[64] The main thrust of the Plaintiff's argument was that the School District in evaluating music is making decisions based purely on religious content instead of using criteria based on overall educational value. The Plaintiff's brief makes a strong argument on this point. The Plaintiff cites to two decisions in support of its view.[65] First, the Plaintiff refers to the Eastern District of Pennsylvania, *Slotterback v. Interboro School District*,[66] which found that excessive government entanglement with religion occurred when school officials were required to screen material and make determinations about which material was religious and which material was nonreligious.[67] Second, the Plaintiff cited Supreme Court precedent invoking *Widmar v. Vincent*.[68] In *Widmar*, the Supreme Court found that a University risked expansive entanglement problems by using screening methods to enforce its prohibition on religious worship. The Court reasoned that in an age where many diverse beliefs fall within the definition of religious worship or religious teaching, monitoring words and activities in an attempt to exclude religious connotations would prove to be an impossible task.[69]

In contrast, the Defendants again invoked their argument under the purpose prong and contended that the purpose of Policy 2270 is to avoid entanglement with religion. While the screening did require some entanglement with religion, the Defendants maintained that the entanglement was minimal and not in violation of the Establishment Clause.[70] The Defendants distinguished *Slotterback* and

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[64] *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d at 743
[65] Plaintiff's Notice of Motion and Motion for Summary Judgment at 86-87, *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d 731 (D.N.J. 2008) (No. 04-6189).
[66] 766 F. Supp 280 (E.D. Pa 1991).
[67] *Slotterback*, 766 F. Supp. at 296.
[68] 454 U.S. 263 (1981).
[69] *Widmar*, 454 U.S. at 272 n.11.
[70] *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d at 173.

Widmar by noting that both of those cases involved a conflict between the Free Exercise Clause and the Establishment Clause.[71] Since no Free Exercise rights were alleged in the instant action, the Defendants argued that the reasoning applied in *Slotterback* and *Widmar* was inapplicable.[72] Moreover, the Defendants maintained that minimal screening of music was necessary to ensure a balanced, religiously neutral curriculum.[73]

The District Court resolved this argument in favor of the Defendants. However, in coming to its conclusion, the District Court did not address *Slotterback* or *Widmar* at all. Instead, the District Court made its decision based on a common sense notion that if it were to find an excessive entanglement, "Defendants would find themselves in a 'Catch 22' – an action taken specifically to avoid an *Establishment Clause* violation, in and of itself would cause an *Establishment Clause* violation."[74] The Court further reasoned that to find excessive entanglement would result in the School District being unable to engage in the "screening that school districts engage in every day to ensure neutrality in matters of religion."[75]

While policy considerations are important in legal analysis, they should not dominate the legal analysis. The key distinction between the every-day line drawing school districts engage in and the screening that is necessary to enforce a policy which expressly prohibits religious music is whether the screening, because of the policy, becomes excessive. *Slotterback* and *Widmar* stand for the proposition that a government cannot hide behind the Establishment Clause when it enforces a policy that expressly prohibits religious material. If that policy causes the government entity to engage in religious monitoring and screening

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[71] Both of these cases involved students claiming a right under the Free Exercise Clause and the School District claiming the Establishment Clause as an affirmative defense. *See Widmar*, 454 U.S. at 269-270 and *Slotterback*, 766 F. Supp. At 286-87.
[72] Defendant's Reply Brief in Support of Summary Judgment at 24, *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d 731 (D.N.J. 2008) (No. 04-6189).
[73] *Id.*
[74] *Stratechuk v. Bd. of Educ.*, 577 F. Supp. 2d at 748.
[75] *Id.* at 749.

beyond what is expected in its normal day-to-day operation, then the policy has the potential to constitute an excessive entanglement in religion.

By refusing to engage in any legal analysis on this issue, the District Court based its entire conclusion of the excessive entanglement prong on practical concerns. This is an unacceptable form of legal analysis. While it is important to consider the practical implications of an opinion, the District Court should not have based its entire reasoning on practical concerns at the expense of addressing pertinent and important legal precedent.

IV. Conclusion

It is unfortunate that this issue which affects so many was not given greater attention by the District Court of New Jersey. First, the District Court blatantly disregarded the mandate by the Third Circuit which clearly articulated that the policy alleged by the Plaintiff was distinct from the official text of Policy 2270. Instead of following the mandate and properly considering the allegations of the Plaintiff's complaint, the District Court independently decided the scope and contours of the School District's policy. The District Court's unilateral resolution of a genuine issue of material fact was a blatant abuse of discretion under the summary judgment standard. This crucial fact could reasonably have been resolved in favor of either party, and therefore, summary judgment should have been denied.

Second, the District Court's Establishment Clause analysis under the effect prong and the excessive entanglement prong of the *Lemon* test was flawed and unsound. The District Court disregarded the factual context of the case, Supreme Court precedent and precedent in the District of New Jersey. This disregard evinces the conclusion that the analysis, instead of being based in grounded legal principles, was instead outcome determinative. Rather than face the complex and charged issues embedded in the performance of religious music during public school concerts, the District Court was anxious to dismiss the case and avoid facing a multifaceted poignant legal issue.

Hopefully the Third Circuit, in considering the pending appeal of this decision, will rise to the challenge of addressing the issues in this case and will reverse the premature dismissal by the district court.