UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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Andrea Skoros, individually, and as next friend of Nicholas and Christos Tine,

Plaintiffs, **CV-02-6439 (CPS)**

- against - **MEMORANDUM DECISION AND ORDER**

City of New York *et alia*,

Defendants.

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APPEARANCES:

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- and -
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SIFTON, Senior Judge.

This is a civil rights action brought under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 challenging the holiday displays policy of the New York City public schools. The action is brought by Andrea Skoros individually and as next friend of Nicholas and Christos Tine, her minor sons. Defendants include the City of New York (the "City"), Joel I. Klein, in his official capacity as Chancellor of the New York City Department of Education ("DOE"),

and Sonya Lupion, individually and in her official capacity as principal of the Edith K. Bergtraum School. Plaintiffs seek declaratory and injunctive relief and damages.

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, which authorizes jurisdiction over civil actions arising under federal law, and 28 U.S.C. § 1343(3), which authorizes jurisdiction over civil actions arising under 42 U.S.C. § 1983. Both sides initially cross-moved for summary judgment, and the plaintiffs moved in the alternative for a preliminary injunction. On December 4, 2003, the parties appeared before the undersigned and agreed to withdraw their motions for summary judgment and to present the matter to the Court for decision as a bench trial on the basis of the papers previously submitted in connection with the cross-motions, supplemented by any additional documentary or testimonial evidence either side might choose to present.[1] I thereupon ordered a consolidation of the preliminary injunction hearing with the bench trial, pursuant to Rule 65 of the Federal Rules of Civil Procedure,[2] and on December 16, 2003, the matter was taken on submission. For the following reasons, I conclude that the

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[1]Plaintiffs' counsel, Robert J. Muise, joined by telephone.

[2]Rule 65(a)(2) states, in relevant part: "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Fed. R. Civ. P. 65(a)(2).

New York City DOE holiday displays policy does not violate the United States Constitution, and the complaint is, accordingly, dismissed. What follows sets forth the findings of fact and conclusions of law on which this determination is based, as required by Rule 52(a) of the Federal Rules of Civil Procedure.

FACTS

Plaintiff Andrea Skoros is, as mentioned, the mother of Christos and Nicholas Tine. Skoros is Roman Catholic and is raising her sons in the Roman Catholic faith. During the 2001/2002 school year, Nicholas was a third-grade student in New York City Public School 165, the Edith K. Bergtraum School ("P.S. 165"), where defendant Sonya Lupion was and continues to be principal. The following year, Nicholas attended fourth grade at P.S. 169. During the 2002/2003 school year, Christos attended second grade at P.S. 184. Currently, Christos is in the third-grade class at P.S. 184, and Nicholas is in the fifth-grade class at P.S. 169.

In November 2001, the General Counsel to the Chancellor of the DOE issued a memorandum to all DOE superintendents and principals regarding holiday displays (the "Holiday Displays memorandum"). The Holiday Displays memorandum sets forth guidelines for school officials to follow with respect to the display of holiday, cultural, and seasonal symbols in the New York City public schools. The November 2001 memorandum, which was redistributed unchanged in November 2002, states:

> New York City is a diverse multi-cultural community. It is our responsibility as educators to foster mutual understanding and respect for the many beliefs and customs stemming from our community's religious, racial, ethnic and cultural heritage. In furtherance of this goal, we must be cognizant of and sensitive to the special significance of seasonal observances and religious holidays. At the same time, we must be mindful that the Constitution prohibits a school system from endorsing or promoting a particular religion or belief system.

The memorandum provides the following guidelines concerning the display of cultural and holiday symbols:

1. The display of <u>secular</u> holiday symbol decorations is permitted. Such symbols include, but are not limited to, Christmas trees, Menorahs, and the Star and Crescent.

2. Holiday displays shall not appear to promote or celebrate any single religion or holiday. Therefore, any symbol or decoration which may be used must be displayed simultaneously with other symbols or decorations reflecting different beliefs or customs.

3. All holiday displays should be temporary in nature.

4. The primary purpose of all displays shall be to promote the goal of fostering understanding and respect for the rights of all individuals regarding their beliefs, values and customs.

(Joint Stip. of Facts, Exs. 1, 2) (emphasis in original).[3]

During both the 2001/2002 and 2002/2003 school years, representatives from the Catholic League for Religious and Civil Rights requested that school officials in the DOE allow the

[3]The guidelines in their current form were developed in 1997 by the DOE's Office of Legal Services in conjunction with the Office of the Corporation Counsel. (*See* Vignola Decl. ¶ 13.)

inclusion of a crèche[4] in the school seasonal displays. School officials denied the request, pursuant to the Holiday Displays memorandum. (*See* Joint Stip. of Facts, Exs. 7-15; Skoros Decl. ¶ 8.) In addition, in December 2002 Ms. Skoros inquired by letter to Christos' teacher what religious symbols the children would be coloring for Christmas. (*See* Skoros Supp. Decl. ¶ 3; Dahan Decl. ¶¶ 10-11, Ex. B.) Christos' teacher, Mrs. Dahan, replied by describing the different Christmas symbols the children had been working on, indicated they would be having a party to celebrate the holiday, and included a copy of the DOE Holiday Displays memorandum. (*See id.*)

Both sides agree that, as interpreted and implemented by the DOE, the Holiday Displays memorandum does not permit the public display of the crèche by school officials alone or as part of a school-authorized holiday or seasonal display in the public schools within the DOE. (*See* Joint Stip. of Facts ¶ 13.) The holidays to which the DOE memorandum applies include Ramadan, Chanukah, Kwanzaa, and Christmas, which coincide more or less

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[4]Although the parties use the terms "crèche" and "nativity scene" interchangeably, this opinion will refer to the crèche, defined as "a representation of the stable at Bethlehem with the infant Jesus surrounded by Mary, Joseph, the oxen and asses, and adoring shepherds and magi." *Webster's Third New International Dictionary of the English Language Unabridged*, Merriam-Webster, Inc. (1993); *see The Oxford American Dictionary and Language Guide*, Oxford University Press (1999) (defining crèche as "a representation of a Nativity scene" and Nativity as "the birth of Christ ... the festival of Christ's birth; Christmas").

with the winter solstice and with a winter vacation during which the public schools are closed.

The parties jointly stipulate that the holiday display in the lobby of P.S. 165 in 2001 included a menorah, Christmas tree, star and crescent, and other holiday symbols. (*See* Joint Stip. of Facts ¶ 22.) The pictures of the display in P.S. 184 in 2002, provided in the joint stipulation of facts, show the front entrance holiday display including a festively decorated Christmas tree and a table adjacent to the tree with several dreidels[5] and three paper menorahs, one with a sign stating "Happy Hanukah." (*See* Joint Stip. of Facts, Exs. 16, 19.) In addition, five dreidels and two kinaras[6] apparently drawn by students are displayed on the walls next to the Christmas tree. (*See id.*) Pictures of the back entrance to P.S. 184 depict student artwork affixed to the walls, including two snowflakes, six Christmas wreaths with student written work, four dreidels, and one menorah. (*See id.*, Exs. 17, 18, 20.) Pictures of Christos' classroom in P.S. 184 in December 2002 show a calendar representing the month of December with snowmen, Christmas trees, dreidels, and Santa in his sleigh pulled by reindeers. (*See id.*, Ex. 21.) Hanging by clothespins from a line strung across the

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[5]A dreidel is a four-sided top used in a children's game traditionally played during Chanukah. *See* Random House Dictionary (unabridged 1973 ed).

[6]A kinara is a seven-branched candelabra lighted during Kwanzaa celebrations. *See* The New Encyclopedia Britannica, (15th ed. vol. 7, at 54-55).

classroom are student-created, three-dimensional paper Christmas wreaths and dreidels and at least one drawing of a kinara. (*See id.*, Exs. 21, 22, 25, 26.) Affixed to tables and chairs in the classroom are student-created stockings, with a name on each, presumably the students' names. (*See id.*, Exs. 23, 24.) There is also a paper wreath made of alternating snowmen and Christmas trees topped with the Star of Bethlehem affixed to a wall, as well as a display of snowmen under "A Winter Wonderland" sign. (*See id.*, Exs. 23, 24, 27.)

The joint stipulation of facts also includes pictures of the holiday images present in the hallways, classrooms, and the administrative office of P.S. 169 in December 2002. Thirteen photographs of the holiday symbols displayed around P.S. 169 are included, displaying the festive nature of the holiday display, not to mention the creative flare of the students, teachers, and administrators. Included among the imagery are reindeers made from small brown bags beneath a "Songs, Symbol, Signs of the Season" sign; three-dimensional paper dreidels; Christmas trees topped with the Star of Bethlehem, candles, snowmen, stars, paper and stuffed teddy bears surrounding a card describing a book entitled "The Chanukah Guest"; paper menorahs, paper Christmas trees, decorated paper Christmas wreaths and bells, drawings of Kwanzaa kinaras, gingerbread men cutouts surrounding a book entitled "The Gingerbread Baby," and a Christmas tree made of cutout hand tracings colored green and covered with Christmas decorations; a table-top artificial Christmas tree next to an

electric menorah; images of Santa Claus; candy canes, more paper-bag reindeer with cards inscribed with the verses to "Rudolph the Red-Nosed Reindeer"; a snowman atop a mound of packages wrapped as Christmas presents; cotton-ball snowmen; a sign reading "Happy Holidays" and another reading "Let it Snow." (*See id.*, Exs. 28-40.) In addition, a bulletin board in Nicholas' classroom displayed cards describing Kwanzaa, Christmas, Ramadan, and Chanukah. (*See* Homer Decl. ¶ 4.) Ramadan is described in one card as follows:

> Ramadan, the ninth month of the Muslim calendar, is a holy month for Muslims, believers in the religion Islam. During Ramadan, Muslims fast (take no food or drink) from dawn to sunset. It is a very spiritual time for Muslims. They arise early for a pre-dawn meal. At the end of the day, the fast is broken by taking the *lftar* meal, often with friends or family invited into one another's homes. When the new moon appears and the month of Ramadan is over, Muslims celebrate a joyous holiday called *Eid-ul-Fitr* (Festival of Fast-Breaking). They dress in their best clothing for prayers at the mosque and celebrate with family and friends.

(Homer Decl., Ex. A.) The Chanukah card states:

> Hanukkah is celebrated by Jews in remembrance of a great victory, which won them the right to practice their religion. Also called the Festival of Lights, Hanukkah lasts for eight days because the oil in the Hanukkah story lasted that long. Candles are lit each evening during the eight days of Hanukkah. The candle holder is called a *menorah*. It holds eight candles and one servant candle, which is used to light the others–one more candle each night of Hanukkah. Some children receive gifts on each of the eight nights of Hanukkah. They play *dreidel* games and enjoy special Hanukkah foods.

(Homer Decl., Ex. A.) The card describing Kwanzaa states:

> Kwanzaa is the holiday when African Americans celebrate their cultural heritage. It was created in 1966 by Dr.

> Maulana Karenga, an African who wanted his people to have a special time to celebrate and learn about their cultural origins. Kwanzaa is celebrated from December 26 through January 1. Families and friends gather to remember their ancestors and to enjoy African music, dancing, poetry, and foods. The holiday has seven days, seven symbols, and seven principles. The principles correspond to the seven days of the celebration and serve as guides for daily living.

(Homer Decl., Ex. A.) The Christmas card states:

> Christmas, December 25, is the Christian holiday that celebrates the birth of Jesus Christ. This holy time is marked by Nativity scenes, caroling, and church services where Christians hear again the story of the birth of the baby Jesus. Christmas includes many festive customs such as decorating homes and evergreen trees with colored lights, bright ribbons, and shining ornaments. People hang stockings by the fireplace, send Christmas cards to friends near and far, and wrap carefully chosen gifts for their loved ones. The jolly figure of Santa Claus is the bringer of gifts in this happy season.

(Homer Decl., Ex. A.)

Plaintiffs further allege that, during the winter holiday season, Nicholas and Christos were "directed" to make menorahs and thereby "directed to engage in a sort of mock religious practice of Jews." (Pls. Brief at 27-28; *see* Skoros Decl. ¶ 10; Skoros Supp. Decl. ¶ 2.) Plaintiffs also allege that Nicholas was taught about the story of Chanukah and its origin but not about Christmas and its origin. (*See* Skoros Decl. ¶ 10; Skoros Supp. Decl. ¶ 4.) However, based on all of the evidence submitted concerning the implementation of the holiday displays policy at Nicholas' and Christos' schools including the declarations of Nicholas' and Christos' teachers, I conclude that the Tine children were not in fact "directed" to make menorahs

and voluntarily colored menorahs as part of their seasonal art projects. (*See* Baumgardt Decl. ¶ 3; Crawley-Soliman Decl. ¶ 3; Homer Decl. ¶¶ 3-7; Dahan Decl. ¶¶ 4-8; Pantelis Decl. ¶¶ 3-6.) In addition, I conclude on the same basis that, in the creation of such holiday displays, the children were taught about the origins of each of the holidays celebrated, including Kwanzaa, Chanukah, Ramadan, and Christmas. (*See* Homer Decl. ¶¶ 3-7; Dahan Decl. ¶¶ 4-8.)

CONTENTIONS

Plaintiffs allege that the DOE's policy regarding holiday displays in the public schools on its face and as applied violates the Establishment Clause, plaintiffs' right to free exercise of religion, and plaintiff Skoros' right to control the religious upbringing and education of her children. Plaintiffs contend that the menorah and the star and crescent are religious symbols and that their inclusion, absent the inclusion of the crèche, impermissibly endorses Judaism and Islam at the expense of Christianity. In addition, plaintiff Skoros contends that her children, both minor students in the New York City public schools, when provided with coloring books including the story of Chanukah and the image of a menorah and when exposed to the holiday displays in the entrances, hallways, and classrooms of their schools, were coerced to accept Judaism and Islam at the expense of their Catholic beliefs.

In response, defendants argue that the DOE guidelines concerning holiday displays do not promote any religion but

rather serve the secular, educational purpose of promoting cultural understanding. Specifically, the City takes the position that the menorah and star and crescent are holiday symbols with secular dimensions which, when displayed with other secular symbols of the holidays, serve the secular educational purpose of promoting cultural understanding while avoiding the promotion or endorsement of any particular religious faith. The crèche, the City argues, is a religious symbol, the inclusion of which would, under all the circumstances, bring about exactly the kind of constitutional harms that plaintiffs seek to prevent.

ESTABLISHMENT CLAUSE CLAIM

Establishment Clause law in the Supreme Court with respect to government-sponsored displays of religious symbols may perhaps best be described as an on-going evolutionary process of fitting recognized precedents to developing factual situations presented by an increasingly diverse society.

Opinions of one or more of the Supreme Court Justices have, from time to time, announced the demise of such precedents as *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *see, e.g., Lamb's Chapel v. Center Moriches Union Free School Distr.,* 508 U.S. 384, 396-401 (1993) (Scalia, J., concurring), and voiced the not unusual appellate judges' complaint about tests that rely on trial court fact-finding, predicting that the absence of a comprehensive one-size-fits-all test will produce "a jurisprudence of minutiae," relying on "little more than intuition and a tape measure." *E.g., County of Allegheny v. Greater Pittsburgh*

ACLU, 492 U.S. 573, 675-76 (1989) (Kennedy, J., concurring and dissenting).

In fact, *Lemon* and its progeny, as even their critics acknowledge, have proven resilient, *see Lamb's Chapel*, 508 U.S. at 398-99, and provide a framework within which the resolution of this case is not that difficult. The problem is not the inadequacy of the Supreme Court's articulated standards for deciding cases such as these. The problem, if problem it is, is that contemporary society is, for better or worse, experiencing exposure to an expanding variety of cultures and religions.

Lemon held that, in determining whether a governmental action violates the Establishment Clause, courts must consider: (1) whether the challenged practice has a secular purpose; (2) whether the practice either advances or inhibits religion in its principal or primary effect; and (3) whether the practice fosters excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. Although *Lemon* still governs facial challenges to government policy, the second prong has evolved into an independent test for challenges to government-sponsored policies regarding displays of religious symbols as they are applied in particular situations.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court confronted a city-sponsored display in a private park that included a crèche, Santa Claus, Christmas tree, carolers, and a banner proclaiming "Seasons Greetings." Justice O'Connor, elaborating on the second prong of *Lemon* and developing what has

become known as the endorsement test, found the display permissible, recognizing that a public Christmas display of both secular and religious symbols of Christmas in the context of the holiday itself does no more than serve the secular purpose of recognizing the national holiday. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). The majority in *Lynch* had no problem permitting the display since the context made clear that no religious endorsement by the government was intended. *Lynch*, 465 U.S. 671, 680, 687.

In *Allegheny*, the Court confronted two different displays: one, a government-sponsored display of a menorah together with a Christmas tree, *Allegheny*, 492 U.S. at 581-82, 587; the other, a free-standing crèche on the courthouse steps, *id.* at 579-82. The two situations were distinguished by the Court in a manner with direct relevance to this case. A plurality of the Court held that the menorah and Christmas tree display did not offend the Establishment Clause because of the overriding secular purpose of recognizing the diversity of religious holidays during the winter season and the consequential lack of coercion. *Id.* at 613-20 (Blackmun, J.), 632-38 (O'Connor, J.), 663 (Kennedy, J., joined by Rehnquist, C.J., White, J., Scalia, J.). At the same time, a plurality struck down the free-standing crèche because nothing in the context of the display neutralized its distinctively religious nature. *Id.* at 598-603 (Blackmun, J., joined by Brennan, J., Stevens, J., Marshall, J., O'Connor, J.).

Facial Challenge to DOE Policy

The court of appeals for this Circuit recognizes the continued relevance of the *Lemon* test for the resolution of a facial challenge on Establishment Clause grounds. *See Commack Self-Service Kosher Meats Inc. v. Weiss*, 294 F.3d 415, 425 (2d Cir. 2002) ("As the Supreme Court has recently reiterated, in cases involving facial challenges on Establishment Clause grounds, we assess the constitutionality of an enactment by reference to the three factors first articulated in Lemon.") (quoting *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 314 (2000)) (internal quotation marks and citations omitted). In *Commack* the court of appeals reminded us that "the *Lemon* factors require that a challenged law (1) have a valid secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion." *Id.* (citing *Lemon*, 403 U.S. at 612-13). Based on a *Lemon* analysis, I conclude that the DOE has succeeded in designing a policy[7] sensitive to the variety of cultural,

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[7]**The City objects to the characterization of the Holiday Display memorandum, along with its interpretation and application, as a "policy." However, it is abundantly clear that a memorandum authored by the General Counsel to the DOE Chancellor entitled "Holiday Displays" and distributed to all superintendents and principals in the City DOE in two successive school years, establishing "guidelines" for holiday displays and relied upon in denying repeated requests to include a crèche in the holiday displays, is properly considered a "policy" as required to establish liability by a municipality such as New York City under 42 U.S.C. § 1983. *See Monell v. Dept. of Social***

(continued...)

religious, and ethnic backgrounds of New York City public school students, and one that passes constitutional muster.[8]

Secular Purpose

The first step of the facial analysis is to determine if the DOE holiday display policy has an unconstitutional purpose. "Under the *Lemon* standard, a court must invalidate a [state policy] if it lacks a secular legislative purpose." *Santa Fe*, 530 U.S. at 314 (quoting *Lemon*, 403 U.S. at 612). "[G]overnmental action will only be found to lack a secular purpose where 'there [is] no question that the statute or activity was motivated wholly by religious considerations.'" *Commack*, 294 F.3d at 431 (quoting *Lynch*, 465 U.S. at 680).

The Holiday Display memorandum states that the "primary purpose of all displays shall be to promote the goal of fostering understanding and respect for the rights of all individuals regarding their beliefs, values and customs." (Joint Stip. of Facts, Exs. 1, 2.) Consistent with that purpose, the memorandum dictates that "holiday displays shall not appear to promote or celebrate any single religion or holiday." (*Id.*) Specifically,

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[7](...continued)
Servs., 436 U.S. 658, 690-91 (1978).

[8]This Court's role is simply to review the constitutionality of the policy, not re-write it. *See Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469, 476 (2d Cir. 1999) ("when government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway").

the memorandum states that "any symbol or decoration which may be used must be displayed simultaneously with other symbols or decorations reflecting different beliefs or customs." (*Id.*) The text of the memorandum notes that it is the educator's responsibility "to foster mutual understanding and respect for the many beliefs and customs stemming from our community's religious, racial, ethnic and cultural heritage" and that "the Constitution prohibits a school system from endorsing or promoting a particular religion or belief system." (*Id.*) Accordingly, I find that the DOE holiday display policy, by its terms, states a secular purpose.

The DOE's stated secular purpose is entitled to deference, but nonetheless, a court's duty is to "distinguish a sham secular purpose from a sincere one." *Santa Fe*, 530 U.S. at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in judgment)). This inquiry involves an examination of the circumstances surrounding the development of the policy. *See Santa Fe*, 530 U.S. at 315. Such an inquiry depends on "judicial interpretation of social facts" and the "unique circumstances" surrounding the adoption of the DOE holiday display policy. *See Sante Fe*, 530 U.S. at 315 (quoting *Lynch*, 465 U.S. at 693-94 (O'Connor, J., concurring)).

Plaintiffs argue that, despite its stated purpose, "by purposefully excluding the Christian Nativity scene or crèche, [the DOE] policy actually narrows or reduces understanding and respect." (Pls. Brief at 23.) Specifically, plaintiffs allege

that the true purpose of the DOE holiday display policy "is to promote and endorse observance of Jewish and Islamic religious holidays and seasonal observances and to secularize Christian religious holidays and seasonal observances, in particular, the Christian holiday and seasonal observance of Christmas." (Am. Compl. ¶ 14.) However, there is simply no evidence sufficient to establish such an insidious purpose on the part of the DOE. The DOE decided to include the star and crescent among the permitted symbols with secular dimensions at least in part in response to litigation brought by the Secretary-General for the National Council on Islamic Affairs. (*See* Vignola Decl. ¶ 22.) The only evidence as to the reason for the inclusion of the menorah is that the DOE's holiday display policy was formulated after consultation with lawyers, DOE's counsel, and the Corporation Counsel of the City of New York, with an eye towards parity and a concern that the holiday displays do not promote or celebrate any single religion or holiday. (*See* Joint Stip. of Facts, Exs. 9, 13.)

It bears noting in this context that, despite the growing diversity of this country, it is still by and large Christian. (*See* Grumet Opp. Decl., Ex. A, *Religious Expression at Christmastime: Guidelines of the Catholic League, Christmas 2003* (noting that 86% of Americans identify themselves as Christian).) Without a diversity policy a winter holiday display in New York City's public schools would be dominated by images representative of Christmas, as is true in most residential and

commercial areas of the City. Efforts to inject variety into the winter holiday season have had the beneficial consequence of making both Chanukah and Ramadan more familiar to the public. *See Allegheny*, 492 U.S. at 586-87 (Blackmun, J., joined by Stevens and O'Connor, JJ.). Potential sources of social divisiveness have been lessened or accommodated without undermining the religious message of each of the religions affected. It is now customary for Jewish children to receive Chanukah presents, a practice that has developed in parallel with the giving of Christmas presents.[9] *See id.*; (Grumet Opp. Decl., Ex. E, Louis Jacobs, "Hanukkah," Encyclopedia of Religion, V.6 at 193 (Mircea Eliade, ed. 1987)). Similarly, Ramadan has adopted some of the non-religious practices traditionally associated with the celebration of Christmas. This year, for example, Hallmark Cards introduced greeting cards celebrating Eid al-Fitr (*see Muslim market gets new emphasis; Ramadan cards, dolls hot sellers*, *Chicago Tribune*, Nov. 23, 2003; Teresa Watanabe, *Los Angeles Times*, Nov. 1, 2003; Jason Derose, *Marketplace Morning Report*, Minnesota Public Radio, Nov. 24, 2003), and the Postal Service expects to sell 44 million Eid stamps this year (up from 35 million printed in 2002) as part of its Holiday Celebration series. (*See Muslim market gets new emphasis; Ramadan cards, dolls hot sellers*, *Chicago Tribune*, Nov. 23, 2003.) The

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[9]Gift-giving for Christians is rooted in the story of the birth of Baby Jesus, when the Magi came to Bethlehem bearing gifts.

placement of Kwanzaa during the winter holiday season, while not government sponsored, is nevertheless an effort to inject another secular alternative into an otherwise highly religious season. The DOE policy, permitting the inclusion of symbols of Kwanzaa, Chanukah, and Ramadan in addition to Christmas, is thus an attempt to diversify the season so that children who do not celebrate Christmas can participate in the seasonal celebration and can learn about cultures different from their own without trespassing on their own religious beliefs. It is clear that the DOE policy is simply an attempt to diversify the season and provide non-Christian holidays with parity in the school-sponsored holiday displays.

By emphasizing secular aspects of the Christmas holiday alongside secular aspects of other belief systems involved, the City does not discriminate against Christians. *See Allegheny*, 492 U.S. at 610-11. The Supreme Court in *Allegheny* explicitly rejected this notion and explained the difference between secular and religious celebration of Christmas:

> Celebrating Christmas as a religious, as opposed to a secular holiday, necessarily entails professing, proclaiming, or believing that Jesus of Nazareth, born in a manger in Bethlehem, is the Christ, the Messiah. If the government celebrates Christmas as a religious holiday...it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief. In contrast, confining the government's own celebration of Christmas to the holidays' secular aspects does <u>not</u> favor the religious beliefs of non-Christians over those of Christians. Rather, it simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs, an allegiance that would truly favor Christians over non-Christians.

Allegheny, 492 U.S. at 611-12. Accordingly, plaintiffs' allegation that the DOE's holiday display policy's purpose is to secularize Christmas by including secular symbols but not religious symbols is without merit. The DOE holiday display policy is valid in its purpose and on its face as a neutral accommodation of the multiculturalism of New York City's public school children which protects minority views and adequately safeguards a diversity of religious and non-religious beliefs.

Primary Effect

The second prong of the *Lemon* test requires a court to determine whether the "principal or primary effect" of the policy advances or inhibits religion. *Commack*, 294 F.3d at 430 (quoting *Lynch*, 465 U.S. at 612). "[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capital Square v. Pinette*, 515 U.S. 753, 777 (1995)[10] (O'Connor, J., concurring in part and concurring in judgment). However, laws that merely have an "indirect, remote or incidental benefit upon religion," *Lynch*, 465 U.S. at 683, do not advance religion in violation of the Establishment Clause. *Commack*, 294 F.3d at

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[10]In *Capital Square*, a plurality of the Court found that the endorsement test did not apply to private religious displays in traditional public forums, but nearly all of the Justices agreed that the test should apply to government-sponsored religious expression. *See Capital Square*, 515 U.S. at 764-66 (Scalia, J., with Rehnquist, C.J., Kennedy and Thomas, JJ., concurring); *id.* at 785-88 (Souter, J., with O'Connor and Breyer, JJ., concurring); *id.* at 797-99 (Stevens, J., dissenting).

430. Accordingly, "when courts adjudicate claims that some governmental activity violates the Establishment Clause, they must be careful not to invalidate activity that has a primary secular purpose and effect and only incidental religious significance." *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469, 476 (2d Cir. 1999)

Courts are required to be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools" because "[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 students and his or her family." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). In addition, the heightened scrutiny is required because "[s]tudents are impressionable and their attendance is involuntary." *Edwards*, 482 U.S. at 583-84.

In this case, the text of the policy permits the inclusion of a menorah and a star and crescent among other secular symbols in school holiday displays. Accordingly, one crucial question is whether the DOE policy conveys or attempts to convey the message that children should embrace Judaism and Islam. *See Wallace*, 472 U.S. at 73-74. Absent a demonstration of City endorsement of a particular set of religious beliefs, the display of symbols with religious dimensions in connection with a legitimate secular purpose, i.e., the celebration of multiple

winter holidays, is simply an acknowledgment of the holidays without expressing allegiance to particular religious beliefs or religion over non-religion. *See Allegheny*, 492 U.S. at 611-12. The question cannot, however, be answered in the abstract but, instead, requires the Court to consider whether an objective observer, acquainted with the history, language, and administration of the holiday display policy, would perceive it as an endorsement of religion. *Santa Fe*, 530 U.S. at 309; *see also Wallace v. Jaffree*, 472 U.S. 38, 73-74 (1985) (O'Connor, J., concurring in part and concurring in judgment); *Lynch*, 465 U.S. at 694 (concurring opinion) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion").

The principal effect of the DOE holiday display policy and its interpretation is the advancement of its secular purpose. The holiday display policy allows the presentation of symbols that, although perhaps religious in origin, have developed significant secular connotations. The symbols are used as teaching aids or resources to foster understanding and respect and are presented as part of a larger display of cultural symbols of the winter holidays that is temporary in nature. Because all symbols must have significant secular dimensions and must be presented in a prudent and objective manner as a teaching aid, the advancement of a secular program of education, and not of religion, is the primary effect of the policy and its interpretation.

This prong of the *Lemon* test also forbids governmental conduct whose primary effect is to inhibit religion. *Lemon*, 403 U.S. at 612. A "practice that plainly embodies an intentional discrimination among religions must be closely fitted to a compelling state purpose in order to survive constitutional challenge." *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring, n.1). As evidenced by the text of the policy, which suggests the inclusion of a Christmas tree as well as a menorah and a star and crescent, the DOE holiday display policy does not "plainly embody an intentional discrimination among religions." *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring, n.1). However, even practices that *suggest* a denominational preference require strict scrutiny. *See Allegheny*, 492 U.S. at 608-09. Plaintiffs argue that a policy which allows for Jewish and Muslim symbols with religious dimensions but excludes the crèche, a Christian symbol with religious dimensions, suggests an impermissible hostility towards Christianity.[11] This argument fails for two reasons.

First, despite plaintiffs' argument to the contrary, the holiday display policy does in fact allow for Christmas

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[11]Plaintiffs also argue that the crèche should be included because it too has secular dimensions, namely, a celebration of the historical birth of Jesus. This argument is frivolous. While the birthdays of historically significant figures are regularly celebrated in this country, it is not a practice to celebrate such anniversaries with a depiction of their birth. The celebration of Christ's nativity in the form of the crèche is what it is)) a religiously oriented evocation of the miracle of Christ's birth)) a central tenet of Christian beliefs.

symbols with religious dimensions.[12] The text of the policy itself suggests the inclusion of a Christmas tree topped with the Star of Bethlehem. (*See* Joint Stip. of Facts, Exs. 23, 27, 28, 30.) A Christmas tree, even one without the Star of Bethlehem, has religious connotations in addition to secular connotations. *See Sechler v. State College Area School Dist. 121*, F. Supp. 2d 439, 451 (M.D. Pa. 2000) ("the Christmas tree (despite being called a "Giving Tree") and the doves plainly have religious connotations in addition to their secular meaning"); *Chabad-Lubavitch of Georgia v. Harris*, 752 F. Supp. 1063, 1068 (N.D. Ga. 1990) ("the Christmas tree is a mixed secular-and-religious symbol"); (Grumet Opp. Decl., Ex. A, *Religious Expression at Christmastime: Guidelines of the Catholic League, Christmas 2003* (noting that a Christmas tree in a public school is among the symbols "viewed as secular or religious depending on the context")). The Christmas tree, as evidenced by its name, does not derive from the Jewish or Islamic faiths but, like Christmas stockings and Christmas wreaths, is a product of the celebration of the birth of Jesus. It is also clear that the religious origins of Christmas will be explored during the creation and observation of these holiday displays. This is evidenced by the Christmas card displayed on the bulletin board in Ms. Homer's fourth-grade class. (*See* Homer Decl., Ex. A.) The card

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[12]Indeed, the card describing the Christmas holiday in Nicholas' classroom refers to "Nativity Scenes" as one of the symbols marking "this holy tune." (Homer Decl., Ex. A.)

describing Christmas, posted alongside cards describing Chanukah, Ramadan, and Kwanzaa, describes Christmas as "the Christian holiday that celebrates the birth of Jesus Christ." (Homer Decl., Ex. A.)

Even if a holiday display were devoid of a Christian religious symbol apart from the Christmas tree, the display would not be in violation of the Establishment Clause. Implicit in the *Allegheny* holding is a recognition that an explicit Christian religious symbol such as a crèche need not be included in a Christmas time display to counterbalance the display of a menorah before the message is reasonably perceived as one of inclusion. *See Allegheny*, 492 U.S. 573 (1989) (upholding the constitutionality of a display including a Christmas tree, a menorah and a "salute to liberty" sign).

Second, the policy does not single out the crèche but, rather, distinguishes between symbols with secular dimensions that are permissible and "purely religious" symbols that are not permissible. (*See* Defs. Brief at 12.) "[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." *Good News Club v. Milford Central School*, 533 U.S. 98, 114 (2001); *see Parents Association of P.S. 16 v. Quinones*, 803 F.2d 1235, 1240 (2d Cir. 1986). "The rationale behind the requirement of neutrality is, in part, that governmental actions giving even the appearance of favoring one religion over another are likely to cause divisiveness and disrespect for government by those who

hold contrary beliefs." *See Quinones*, 803 F.2d at 1240. "The concern for neutrality is nowhere more important than in education programs, for the government's activities in this area can have a magnified impact on impressionable young minds, providing a crucial symbolic link between government and religion, thereby enlisting)) at least in the eyes of impressionable youngsters)) the powers of government to the support of the religious denomination." *Quinones*, 803 F.2d at 1240 (quoting *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985)) (internal quotation marks omitted).

As interpreted, the policy prohibits not just the crèche, but anything considered purely religious, including excerpts from religious text such as the Torah or the Qur'an, scenes of worship, objects of worship, illustrations of deities or religious figures like Muhammad, and illustrations of religious events. (*See* Vignola Decl. ¶ 16.) Mr. Vignola explains that these displays are prohibited because of a concern that their display would violate the Establishment Clause. (*See* Vignola Decl. ¶ 16.) In addition, Mr. Vignola explains that "[h]oliday displays raise a particular concern because they may be seen by students outside the immediate context of classroom instruction" and therefore pose "a greater risk" of "being perceived as endorsing religion." (*See* Vignola Decl. ¶ 15.) Because the DOE "has a strong, perhaps compelling, interest in avoiding Establishment Clause violations," *see Lamb's Chapel*, 508 U.S. at 394, 113 S. Ct. 2141, it may proscribe activities that

risk giving the impression that the school endorses religion." *Marchi*, 173 F.3d at 477.

As the Eighth Circuit Court of Appeals has noted, "[i]t would be literally impossible to develop a public school curriculum that did not in some way affect the religious or non-religious sensibilities of some of the students or their parents." *Florey v. Sioux Falls School Dist.*, 619 F.2d 1311, 1317 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980). However, the DOE "need only ensure that the primary effect of the school's policy is secular." *Id.*

In this case, the DOE has succeeded. Exclusion of the crèche from holiday displays is not discriminatory or hostile towards Christianity but, rather, serves the holiday display policy's secular purpose. By excluding purely religious symbols of all faiths, the policy avoids the appearance of endorsing any one religion and, instead, has the primary secular effect of celebrating the diversity of the winter holiday season.

Entanglement

The third prong of the *Lemon* test demands that government policy not "foster an excessive ... entanglement with religion." *Lemon*, 403 U.S. at 613. "[I]f the state must engage in continuing administrative supervision of nonsecular activity, church and state are excessively intertwined." *Brandon v. Board of Ed. of Guilderland Central School Dist.*, 635 F.2d 971, 979 (2d Cir. 1980).

Entanglement is not an issue in this case. The DOE's efforts to assure compliance with the Establishment Clause in the operation of its schools via a uniform holiday display policy are designed to guard against the entanglement that would ensue if the DOE had to police each and every display in every public school year after year. *See Florey*, 619 F.2d at 1318, and *Clever v. Cherry Hill Township Bd. of Ed.*, 838 F. Supp. 929, 941 (D.N.J. 1993) (rejecting excessive entanglement challenge to school district policy designed to ensure compliance with Establishment Clause). If the DOE were not permitted to design a policy that embraces the multiculturalism of the New York City public school children during the winter holiday season, school administrators might be left no choice but to exclude any reference to Christmas, Chanukah, and Ramadan. The Establishment Clause jurisprudence does not demand such a result. Because the DOE holiday display policy has a genuine secular purpose, does not impermissibly promote or inhibit religion, and does not unduly entangle the government in nonsecular activity, the policy on its face does not violate the Establishment Clause.

<u>As Applied Challenge to DOE Policy</u>

I turn next to the constitutionality of the winter holiday displays as the DOE displays policy was applied in P.S. 169, P.S. 165, and P.S. 184 in December 2001 and 2002. The constitutionality of these displays is governed by *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), in which the court of appeals recognized the endorsement test for as applied

Establishment Clause challenges.[13] The endorsement inquiry is a "highly fact-specific test" that requires a court to ascertain whether "a reasonable observer of the display in its particular context [would] perceive a message of governmental endorsement or sponsorship of religion." *Elewski*, 123 F.3d at 53; *see Allegheny*, 492 U.S. at 593; *see also Capital Square*, 515 U.S. 753. "Thus, if a [religious symbol's] context)) like the context of the crèche in *Lynch* or that of the menorah in *Allegheny*)) neutralizes the message of governmental endorsement, then the [religious symbol] passes muster under the Establishment Clause." *Elewski*, 123 F.3d at 54. The context is important because "it is not the simple exposure to religious symbols that is constitutionally impermissible; rather, it is the message conveyed, particularly to impressionable youngsters, by linkage of such symbols to their public school." *Spacco v. Bridgewater School Dept.*, 722 F. Supp. 834, n.1 (D. Mass. 1989) (citing *Larkin v. Grendel's Den. Inc.,* 103 S. Ct. 505 (1982), and *Allegheny,* 492 U.S. 573)). "The symbolism of a union between church and state is most likely to influence children of tender

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[13]In *Elewski*, the court of appeals found that a city-owned crèche in a public park at the foot of a decorated evergreen tree and surrounded by sawhorse barricades with the mayor's name in red lettering, observed in the context of the entire downtown holiday display which included a privately owned menorah located in a nearby public park, was not a violation of the Establishment Clause because "an observer would perceive a celebration of the diversity of the holiday season, including traditional religious and secular symbols." *Elewski*, 124 F.3d 51, 55 (2d Cir. 1997).

years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." *Quinones*, 803 F.2d at 1240 (quoting *Grand Rapids*, 473 U.S. 373).

Although the Establishment Clause jurisprudence is mindful of protecting impressionable children from the perception of government-sponsored religion in public schools, *see Edwards*, 482 U.S. at 583-84, "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer [who] must be deemed aware of the history and context of the community and forum in which the religious display appears." *Creatore v. Town of Trumbull*, 68 F.3d 59, 61 (2d Cir. 1995) (quoting *Capitol Square*, 515 U.S. at 773-74 (O'Connor, J., concurring in part and concurring in judgment)). This is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Elewski*, 123 F.3d at 53-4 (quoting *Lynch*, 465 U.S. at 694 (opinion of O'Connor, J.)). Accordingly, "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." *Capital Square*, 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in judgment).

Accordingly, the message presented by the display of a menorah and a star and crescent in the context of the greater holiday displays in the public schools must be reviewed as perceived by the children, Christian children in particular, but

not one hyper-sensitive Catholic child. Upon reviewing the dizzying array of holiday symbols depicted in P.S. 165, 169, and 184, it is impossible to conclude that Christian students attending one of these schools may interpret the inclusion of menorahs and a star and crescent in the temporary displays as an endorsement of Judaism or Islam over Christianity or feel coerced into practicing a particular religion. The context of these holiday displays neutralizes the religious dimensions of the menorah and the star and crescent such that even a child participating in the creation of the display would not perceive it to be an endorsement of Judaism or Islam. Nor would any child looking at them objectively view these holiday displays, including, as they do, numerous Christmas symbols, and perceive a message of disapproval of Christianity. Ultimately, the effect of the holiday displays at P.S. 165, P.S. 169, and P.S. 184, is to allow students to share the knowledge of various religious and non-religious holidays occurring during the winter without feeling threatened by them. As in *Elewski*, a reasonable Christian child observing the display would not perceive religious endorsement or coercion but "a celebration of the diversity of the holiday season, including traditional religious and secular symbols of that season." *Elewski*, 123 F.3d at 55. The photographs of the displays in P.S. 184 and P.S. 169 in December 2002 reinforce the conclusion that the interpretation and implementation of the DOE holiday display policy is a model of neutralism and plurality.

Plaintiffs also allege that Nicholas and Christos were "directed" to make menorahs and thereby "directed to engage in a sort of mock religious practice of Jews." (Pls. Brief at 27-28.) However, as noted earlier, the evidence does not support a finding that the Tine children were "directed" to make menorahs. But, even if they were in some sense directed to draw and color menorahs as part of a lesson plan, for example, plaintiffs' assertion that this activity is "a sort of mock religious practice of Jews" borders on the offensive, displaying the very insensitivity for the religious practices of others that the DOE's policies are designed to reduce. Although classroom activities including the coloring of a picture of a menorah and learning from the teacher the religious origins of the symbol may be distasteful to the parent of a Christian child or to the child itself, such activities do not constitute a violation of the Establishment Clause. *See Santa Fe*, 530 U.S. at 313 ("By no means do [the Religion Clauses of the First Amendment] impose a prohibition on all religious activity in our public schools.") (internal citations omitted). Study of religion in the public schools, "when presented objectively as part of a secular program of education," does not offend the Establishment Clause. *Lynch*, 465 U.S. at 679-80 (citing *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963)). Courts have long held that teaching about religion may be part of a secular program of education, so long as instruction is "presented objectively" as part of an appropriate study of secular subjects such as literature,

history, civilization, ethics, or comparative religion. *Altman v. Bedford Cent. School Dist.*, 245 F.3d 49, 76 (2d Cir. 2001) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)); *see also Stone v. Graham*, 499 U.S. 39, 42 (1980). Moreover, "when the primary purpose served by a given school activity is secular, that activity is not made unconstitutional by the inclusion of some religious content." *Florey*, 619 F.2d at 1316. Clearly the creation of these displays fulfills the secular objectives of the holiday display policy, which is to foster understanding and respect for the many beliefs, values, and customs stemming from the community's religious, racial, ethnic, and cultural heritage and do not violate the Establishment Clause.

FREE EXERCISE CLAIM

The Free Exercise Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship." *Altman*, 245 F.3d at 79 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)). To establish a violation of their free exercise rights, plaintiffs "must show the coercive effect" of the DOE's policy "as it operates against [them] in the practice of [their] religion." *Brandon v. Guilderland*, 635 F.2d 971, 976 (1980) (quoting *Abington*, 374 U.S. at 223). In addition, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

Plaintiffs' free exercise claims are based on their allegations that, by virtue of exposure to their schools' holiday displays and discussions regarding the origins of Chanukah or Ramadan during the creation of such displays, the children were subjected to coercion to accept the Jewish and Islamic faiths and to renounce Christianity. It is clearly established from both the content of the Holiday Displays memorandum and the multiple declarations of school teachers and administrators submitted by the City that the defendants do not intend to restrict the religious activities of any of the children in the schools, including the Tine children. However, if neutral actions have a restrictive effect, a court must inquire as to whether or not the "government has placed a substantial burden on the observation of a central religious belief or practice." *Altman*, 245 F.3d at 79 (citation omitted). The evidence does not indicate that the DOE holiday display policy on its face or as applied in the temporary holiday displays in P.S. 165, 169, or 184 has the effect of operating against or burdening the Tine children's observation of their religious practices or beliefs. As noted earlier, the holiday displays evidenced in this action conveyed an inclusive message, did not advance or promote any particular religion, and did not coerce plaintiffs to reject Christianity. Thus, plaintiffs' passive exposure to and even their participation in the creation of the displays, including symbols from several different religious and cultural holidays, do not interfere with their ability to practice their own faith. Similarly, lessons

given during the course of the holiday season about the meanings of the symbols or the origins of the holidays they represent, when presented in the secular manner evidenced here, do not interfere with the Tine children's ability to practice their own faith. Accordingly, the DOE holiday display policy on its face and as applied in P.S. 165, 169, and 184 does not violate plaintiffs' free exercise rights.

PARENTAL RIGHTS CLAIM

Parents have a First Amendment right to direct the religious upbringing and education of their children, *see Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972), as well as a distinct Fourteenth Amendment liberty interest in the upbringing of their children, *see Immediato v. Rye Neck School Dist.*, 73 F.3d 454, 461 (2d Cir. 1995). However, these rights must be weighed against the State's interest in regulating elementary and secondary education. *Yoder*, 406 U.S. at 213-14; *Immediato*, 73 F.3d at 461.

Plaintiff Skoros' parental rights claim is closely related to the her children's free exercise claim. Plaintiff Skoros alleges that, by virtue of the DOE's coercion of her children to accept the Jewish and Islamic faiths and renounce Christianity, the DOE infringed upon her right (1) "to control the religious upbringing and training of her minor children"; (2) "to raise her children according to the religion, system of values, and moral norms she deems appropriate"; and (3) "to the care, custody, education of and association with her children,"

in violation of the First and Fourteenth Amendments. (Am. Compl. ¶¶ 25, 28.)

As previously noted, the evidence does not support a finding that the Tine children were in any way coerced to have them adopt Judaism or Islam or to renounce Christianity by their participation in the creation of the temporary holiday displays. In addition, the evidence does not support a finding that the temporary holiday displays in the Tine children's schools interfered with plaintiff Skoros' relationship with her children or her ability to control their upbringing. Although plaintiff Skoros repeatedly claims that Nicholas and Christos were "directed" to make a menorah, the more credible explanation is that offered by their teachers who state that the children were provided coloring books containing an image of a menorah which they chose to color. Certainly, such a situation does not amount to an act "undeniably at odds with fundamental tenets of [one's] religious beliefs." *Yoder*, 406 U.S. at 218. Accordingly, the DOE holiday display policy and the temporary displays in the Tine children's schools do not interfere in any way with plaintiff Skoros' raising her children.

CONCLUSION

For the aforementioned reasons, the clerk of court is directed to enter judgment in favor of the defendants on all counts and to furnish a filed copy of the within to all parties and to the magistrate judge.

SO ORDERED.

Dated : Brooklyn, New York
February 18, 2004

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United States District Judge