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The Unconstitutionality of the East Ramapo School District's Theocracy

The East Ramapo school district is located in a residential suburban area of Rockland County, approximately 40 miles northwest of Manhattan.¹ As of November 2014, there were 33,000 school age children in the district, of which 9,000 attended public schools while 24,000 attended private Jewish day schools.² The East Ramapo school Board is controlled primarily by Orthodox Jewish men who send their children to private schools.³ Most public-school families are poor minorities, who have complained for years that the Hasidic-controlled education board has cut programs for public school students while Jewish children who study privately are unharmed by budget cuts.⁴ The Board appears to favor the interests of religious private schools over public schools as evidenced by the handling of the district's budget crisis and allocation of state funds.⁵

While under Orthodox control, the spending for private schools increased while the board undertook spending cuts to public school programs in addition to eliminating employment positions and implementing purchasing freezes to balance the budget.⁶ Specifically, transportation costs increased overall by 48.1%, more than double the 21.9% statewide increase, while spending on private school transportation rose by 76.6%, more than triple the statewide average.⁷ Moreover, the district spends \$60 million for special education costs to serve 2,423 students, with private school students receiving state funded special education services in upwards of 40 yeshivot, the

¹ Freeman Klopott, Hasidic Townhouse Foes Seek to Dissolve Catskills Village, BloombergBusiness, Sept. 24, 2014, <http://www.blomberg.com/news/articles/2014-09-24/hasidic-townhouse-foes-seek-to-dissolve-catskills-village>.

² New York State Education Dept., Report of Investigation-East Ramapo: A School District in Crisis, at 6 (2014).

³ Leslie Brody, Former NYC Schools Chancellor Dennis Walcott to Serve as East Ramapo Monitor, The Wall Street Journal, Aug. 13, 2015, at 2.

⁴ *Id.*

⁵ *Id.*

⁶ See Report of Investigation, *supra* note 2, at 30-32.

⁷ *Id.* at 15.

Kiryas Joel union free school district and out of district private schools.⁸ Additionally, the district's legal fees rose by 668%, including payouts of over \$9 million dollars to 14 law firms to defend against litigation.⁹ The Board also regularly conducts meetings in executive session, about 60-70% or more, to limit opportunity for public participation at Board meetings.¹⁰ Lastly, the Board closed an underperforming school and subsequently sold it to an ultra-Orthodox Jewish congregation for \$4.9 million, allegedly millions of dollars less than its fair market value.¹¹ To rectify the situation, State Education Commissioner Mary Ellen Elia appointed Former NYC School Chancellor Dennis Walcott to serve as East Ramapo's Monitor and to head a three-member team that would oversee the school board's conduct.¹²

The Problem with the East Ramapo School Board

Orthodox Judaism is the branch of Judaism that strictly adheres to traditional Jewish practices and beliefs, such as keeping kosher, Sabbath observance, traditional prayer, Torah study and gender segregation. To avoid mingling with gentiles, Orthodox Jews believe in complete segregation between themselves and non-Jews in all social situations, including educational environments. The East Ramapo School board is comprised entirely of Orthodox Jewish men who send their children to private Jewish day schools. Most of the 9,000 public-school children who live in the East Ramapo school district are poor minority students, whose parents have complained for years that the Orthodox-controlled school board has cut programs for public school students while the 24,000 Jewish children who attend private schools are unharmed by these budget cuts.

⁸ *Id.* at 17

⁹ *See Id.*; Report of Investigation, *supra* note 2, at 27.

¹⁰ *Id.* at 34-35

¹¹ Mareesa Nicosia, E. Ramapo Parents Challenge 2nd Hillcrest Sale, Lohud, Jan. 15, 2015, <http://www.lohud.com/story/news/education/2015/01/14/East-Ramapo-parents-challenge-second-hillcrest-sale-yeshiva/2175405>

¹² *See Id.*; Former NYC Schools Chancellor Dennis Walcott to Serve as East Ramapo Monitor, at 1-2.

Based on the Board's conduct, the East Ramapo School Board has established a de facto theocracy as it favors the interests of and makes decisions that benefit Jewish private schools, and the Orthodox community in particular, over public schools as evidenced by the handling of the district's budget crisis, allocation of state funds and the intentional exclusion of the parents of public school children from the decision-making process. Instead of the New York State Education Department implementing "The Lakewood Model", wherein the state-appointed monitor has veto power over the Board's and Superintendent's decisions, can attend all board meetings, including closed sessions, and oversee strategic planning, the Education Department decided to appoint a Monitor without such authority.¹³ Since the Monitor's real power is nonexistent in that it lacks veto power and cannot reverse board decisions, fire board members or attend closed executive board sessions, the Monitor will not be able to rectify the underlying problem of the Board's theocratic tendencies.¹⁴

The issues in this case are: 1) Whether it violates the Establishment Clause of the First Amendment for state funds for special education purposes to be given to Jewish private schools; 2) Whether the Board's conduct, favoring Jewish private schools and the Orthodox community in the allocation of those funds is a violation of the Establishment Clause; and 3) Whether a reasonable observer would view the Board's decisions as sending a message of endorsement of the Jewish religion. This essay argues and concludes that as to the first issue, there is no Establishment Clause violation for a school board controlled by Orthodox Jews, whose children attend private schools, to allocate special education funds to private religious schools. With respect to the second and third issues, however, this essay argues and concludes that the Establishment

¹³ Amy Sara Clark, Answer to East Ramapo School Oversight in Lakewood?, The Jewish Week, Dec. 12, 2014, <http://www.thejewishweek.com/news/new-york/answer-east-ramapo-school-oversight-lakewood>.

¹⁴ See *Id.*; Former NYC Schools Chancellor Dennis Walcott to Serve as East Ramapo Monitor, at 4.

Clause is violated. The Board's conduct, consisting of eliminating public school programs and resources while simultaneously providing more state funds to Yeshivot, favors Jewish private schools and the Orthodox community, violates the Establishment Clause. Any reasonable observer viewing the Board's decisions to intentionally exclude the parents of public school children from the decision-making process, and the closing of public schools and selling the building below market value to a synagogue for the purpose of opening a Jewish private school, would view these actions as sending a message of endorsement of the Jewish religion, in flagrant violation of the Establishment Clause.

Supreme Court's Jurisprudence on Religious Control of Government

Theocratic control of a governmental entity, such as the East Ramapo school district in this case, obviously implicates the First Amendment. The Religion Clauses of the First Amendment of the Constitution, made applicable to the states via the Fourteenth Amendment, safeguards the right to freedom of religion and expression from government intrusion.¹⁵ The Free Exercise Clause prevents the government from "regulating, prohibiting, or rewarding religious beliefs as such."¹⁶ The Establishment Clause, which dictates that "Congress shall make no law respecting an establishment of religion", enforces the "separation of church and state" in addition to ensuring religious freedom.¹⁷ Although the authors of the Religion Clauses regarded the establishment of religion as significant and "fraught with great dangers", the language of the clauses are unclear, making it difficult to recognize when the Clause has been violated.¹⁸ The Establishment Clause was designed to avoid state "sponsorship, financial support, and active involvement of the

¹⁵ U.S. Const. amend. I.

¹⁶ *Sherbert v. Verner*, 374 U.S. 398402 (1963).

¹⁷ Legal Information Institute, http://www.law.cornell.edu/wex/first_amendment

¹⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)

sovereign in religious activity.”¹⁹ Thus, our analysis commences with the cumulative development of the law.

The fact that Orthodox Jews control the Board of Education, in and of itself, does not constitute an Establishment Clause violation. In fact, in *McDaniel v. Paty*, the Court upheld the right of religious citizens to seek public office.²⁰ In that case, the Court reviewed a Tennessee statutory provision disqualifying “ministers of the Gospel or priests of any denomination...” from seeking public office.²¹ In striking down the Tennessee statute, the Court held that it violated the candidate’s First Amendment rights as it conditioned his right to the free exercise of his religion on the surrender of this right to seek public office.²² The Court reasoned that the government may not use religion as a basis for imposing benefits or penalties.²³ Further, government may not bar from political participation individuals, such as ministers, whom it deems as overly involved in religion.²⁴

The challenged statute in *McDaniel*, although held unconstitutional, reflected a concern about religious control over governmental entities, which would clearly violate the Establishment Clause. Courts employ three tests to make such inquiries. The first is the Lemon test. In *Lemon v. Kurtzman*, a Pennsylvania statute that reimbursed religious schools for teacher salaries, textbooks, and other instructional materials and a Rhode Island statute that allowed the state to pay private school teachers a 15% salary supplement were found unconstitutional under the Establishment Clause.²⁵ The Court found that despite promoting a secular legislative purpose, the statutes

¹⁹ *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970)

²⁰ *McDaniel v. Paty*, 435 U.S. 618, 619 (1978).

²¹ *Id.* at 618.

²² *Id.*

²³ *Id.* at 619.

²⁴ *McDaniel*, 436 U.S. at 641.

²⁵ *Lemon*, 403 U.S. at 641-42.

involved excessive entanglement between church and state.²⁶ In arriving at its decision, the Court, coined the three-prong *Lemon* test, which looked at the statute’s secular legislative purpose, whether the statute advanced or inhibited religion as its primary effect, and whether the statute excessively entangled government with religion.²⁷ The *Lemon* Test has subsequently been modified by *Agostini v. Felton*, which will be discussed below.²⁸

The second test, the Endorsement test, was set out in Justice O’Connor’s concurring opinion in *Lynch v. Donnelly*. *Lynch* involved an action brought against the government for including a nativity scene in its Christmas display.²⁹ The Court found that, notwithstanding the religious significance of the nativity scene, the city’s display did not violate the Establishment Clause of the First Amendment.³⁰ The Court reasoned that the inclusion of the display was not an advancement or endorsement of religion since the benefits caused by its inclusion to one religion over another was “incidental, indirect and remote.”³¹ Justice O’Connor, in a separate concurring opinion, joined the majority; however, the Justice criticized the Court’s reliance on the *Lemon* test, proposing instead an alternative that would replace the purpose and effect prongs of the test with the endorsement test, which examines “whether the government intends to convey a message of endorsement or disapproval of religion” and whether the government’s conduct has the “effect of communicating a message of government endorsement or disapproval of religion.”³² Additionally, Justice O’Connor went on to state that “The Establishment Clause prohibits government from

²⁶ *Id.* at 603.

²⁷ *Id.* at 612-613.

²⁸ *Agostini v. Felton*, 521 U.S. 203, 234 (1997), modified, 403 U.S. 602 (1971).

²⁹ *Lynch v. Donnelly*, 465 U.S. 668 (1984)

³⁰ *Id.*

³¹ *Id.* at 669.

³² *Id.* at 690-691.

making adherence to a religion relevant in any way to a person's standing in the political community."³³

The third test, known as the delegation test, asks whether the governmental authority has been delegated to a religious entity or to a group based on religious identify or characteristics. In *Larkin v. Grendel's Den, Inc.*, the Court found a Massachusetts statute unconstitutional that gave churches the power to prevent the issuance of liquor licenses to establishments within a 500-foot radius of a church.³⁴ The Court, in an opinion written by Chief Justice Burger, held that by giving churches a "unilateral and absolute power" over an important governmental function, the statute violated the constitutionally required separation between church and state because it "enmeshes churches in the processes of government" and creates the danger of "[p]olitical fragmentation and divisiveness along religious lines."³⁵

The Court next considered the delegation issue in *Board of Education of Kiryas Joel Village School District v. Grumet*. In *Grumet*, the New York State legislature enacted a special statute that created a separate school district to provide special education services to students with disabilities who attended a religious school operated by the Satmar Hasidic Orthodox Jewish Sect.³⁶ The challenged statute violated the three-prong Lemon test because it had a religious rather than a secular purpose; it was enacted to meet the religious requirements of the Satmar Hasidim; and it had the effect of advancing, protecting, and fostering the religious beliefs of the Hasidic community.³⁷ Justice Souter, writing for the majority, held that the statute deviated from the constitutional mandate of neutrality toward religion by delegating the government's

³³ Lynch, 465 U.S. at 687.

³⁴ *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

³⁵ *Id.*

³⁶ *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994)

³⁷ *Id.*

discretionary authority over public schools to a group defined by its character as a religious community under circumstances that gave no assurance that governmental power would be exercised neutrally.³⁸ The Court decided that the statute resulted in an impermissible fusion of government with religious functions, since the statute delegated power to an electorate defined by common religious belief and practice.³⁹

In addition to the three federal constitutional tests, states have similarly addressed issues of theocratic control of government. In *State of Oregon v. City of Rajneeshpuram*, the State sought judgment declaring that it was not required to recognize the municipal status of a city allegedly controlled by a religious organization.⁴⁰ In addressing the question, the Oregon District Court applied the *Lemon* test to determine whether such recognition had a secular purpose; whether its principal or primary effect advanced or inhibited religion and whether the statute fostered “an excessive government entanglement with religion.”⁴¹ The Court held that governmental conduct, through operation of state law, which imparts sovereign municipal status to a city completely controlled, inhabited and owned by a religious organization, even if elected according to state law, would have the primary effect of advancing religion, which violates the Establishment Clause.⁴²

Similarly, in *State of New Jersey v. Celmer*, the Supreme Court of New Jersey examined a statutory scheme which delegated governmental powers to make laws and enforce laws through municipal courts to the Ocean Grove Camp Meeting Association of the United Methodist Church.⁴³ The Court ruled that the statute granting the camp meeting association, a religious

³⁸ Grumet, 512 U.S. at 687.

³⁹ *Id.* at 688.

⁴⁰ *State of Oregon v. City of Rajneeshpuram*, 598 F.Supp. 1208 (1984)

⁴¹ *Id.* at 1212.

⁴² *Id.* at 1208.

⁴³ *State v. Celmer*, 80 N.J. 405, 408 (1979).

organization, municipal powers violated the Establishment clause.⁴⁴ The state cannot cede governmental powers to a religious organization, transforming the religious organization into civil government.⁴⁵

THE SPECIAL EDUCATION FUNDING THAT IS GIVEN TO PRIVATE JEWISH DAY SCHOOLS IS CONSTITUTIONAL UNDER THE MODIFIED LEMON TEST

The main federal law involving the educational rights of children with disabilities is the Individuals with Disabilities Education Act (IDEA), which requires states to provide a free and appropriate public education for all children with disabilities who attend public or private schools.⁴⁶ This law authorizes Special Education funding that is given to private Jewish day schools and is constitutional under the modified *Lemon* test. To determine whether the funding violates the Establishment Clause, the government action must first have a secular purpose, and second not have the principal or primary effect of advancing or inhibiting religion.⁴⁷ The funding has a principal or primary effect of enhancing or inhibiting religion if 1) the funding results in religious indoctrination and 2) it defines its recipients by reference to religion.⁴⁸ The funding results in religious indoctrination if the allocation of the aid is not the result of the independent, private choice of individual parents.⁴⁹ Funding defines its recipients by reference to religion when allocating the aid creates a financial incentive to undertake religious indoctrination.⁵⁰ A financial incentive to undertake religious indoctrination is present when 1) the aid is not allocated on the

⁴⁴ *Id.* at 405.

⁴⁵ *Id.* at 413.

⁴⁶ 20 U.S.C. §§ 1400, *et seq.*

⁴⁷ *Lemon*, 403 U.S. at 612.

⁴⁸ *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (modified the entitlement analysis and will be discussed *infra*).

⁴⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 640 (2002)

⁵⁰ *Agostini*, 521 U.S. at 205.

basis of neutral, secular criteria that neither favor nor disfavor religion, and 2) is not made available to both religious and secular beneficiaries on a nondiscriminatory basis.⁵¹

The law that authorizes the funding to Jewish day schools has a legitimate secular purpose. To determine whether the funding violates the establishment clause, the government action must 1) have a secular purpose, and 2) not have the principal or primary effect of advancing or inhibiting religion.⁵² In *Witters v. Washington Dep't of Servs. for the Blind*, the Supreme Court held that a statute granting aid under a vocational rehabilitation program that provides services to a visually impaired student on the campus of a private Christian college served a valid secular purpose of “promot[ing] the well-being of the visually handicapped through the provision of vocational rehabilitation services.”⁵³ Even if a minuscule amount of the state aid awarded under the program flows to the religious institution, this fact does not detract from the secular purpose of the statute.⁵⁴ Likewise in *Zobrest v. Catalina Foothills Sch. Dis.*, the Court found that providing interpretive services under the Individuals with Disabilities Act (IDEA) to a student attending Catholic high school served the secular purpose of “assist[ing] States and Localities to provide for the education of all handicapped children.”⁵⁵ Here, like in *Zobrest* and *Witter*, the purpose of the funding to Jewish Day schools is the facilitation of access to secular special education services to all handicapped and disabled students who would not otherwise receive such services if offered only in public schools in the East Ramapo School District. Thus, the funding given to Jewish day schools for special education services has a clear secular purpose.

⁵¹ *Id.*

⁵² *Lemon*, 403 U.S. at 612.

⁵³ *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 485–86, (1986).

⁵⁴ *Id.* at 486.

⁵⁵ *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

Since the funding provided to Jewish day schools has the valid secular purpose of providing special education services to disabled and handicapped children, the next question is whether the law that authorizes the funding has the principal or primary effect of advancing or inhibiting religion.⁵⁶ The funding has the principal or primary effect of enhancing or inhibiting religion, if 1) the funding results in religious indoctrination and 2) it defines its recipients by reference to religion.⁵⁷

To understand how the Supreme Court defines an unconstitutional effect, we must consider three decisions: *Agostini, Mitchell & Zelman*. In *Agostini v. Felton*, the Court held that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis, given on the premises of religious schools by government employees, did not violate the Establishment Clause when such instruction contained safeguards.⁵⁸ Instead of applying all three of *Lemon*'s prongs, inquiring whether the statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, *Agostini* examined only the first and second of those factors. The Court modified the entanglement analysis by eliminating it as a separate prong and making it simply one criterion relevant to determining a statute's effect.⁵⁹ The Court then identified three primary criteria under the statutory effects prong to determine whether governmental aid has the effect of advancing religion: (1) whether the aid results in governmental indoctrination, (2) whether it defines its recipients by reference to religion, or (3) whether it creates an excessive entanglement.⁶⁰ After applying the modified *Lemon* test, the Court found that the program did not result in religions

⁵⁶ *Agostini v. Felton*, 521 U.S. 203 (1997).

⁵⁷ *Id.* at 234.

⁵⁸ *Id.* at 203.

⁵⁹ *Id.* at 232-33.

⁶⁰ *Id.*

indoctrination, did not define its recipients by reference to religion and it did not create an excessive entanglement.⁶¹

Mitchell v. Helms involved an action challenging the constitutionality of a school aid program that provided federal funds to public and private schools to implement "secular, neutral, and non-ideological" programs.⁶² The Court held that it is not a violation of the Establishment Clause to earmark funds for religious schools if there is no indication that the funds will be used for religious purposes.⁶³ The Court reasoned that, since the loans were suitable for both religious and public schools, the loans did not represent governmental indoctrination or advancement of religion because they were made in a nondiscriminatory manner.⁶⁴ In upholding the program, the Court used the modified *Lemon* Test: whether the program has a secular purpose and whether the program has a primary effect of advancing or inhibiting religion.⁶⁵ However, the third criterion of the *Lemon* Test was held irrelevant in evaluating aid to religious schools in *Agostini*.⁶⁶

In *Zelman v. Simmons-Harris*, the Court ruled that a school voucher program which allowed parents to send their children to private schools did not violate the Establishment Clause, even though the majority of participating private schools are religiously affiliated.⁶⁷ The Court upheld the program on the basis of the following findings: the secular purpose of the program was to assist poor children in a failing public school to complete their education; the program did not favor religion since it allowed all schools to participate irrespective of religious affiliation; the program did not incentivize private schools because participating private schools received half the

⁶¹ *Agostini*, 521 U.S. at 206.

⁶² *Mitchell v. Helms*, 530 U.S. 793 (2000)

⁶³ *Id.* at 796.

⁶⁴ *Id.*

⁶⁵ *Id.* at 807.

⁶⁶ *Id.* at 807-808.

⁶⁷ *Zelman*, 536 U.S. at 639.

aid of community school and only a third of that given to magnet schools, and the program provided ample educational opportunities for parents to select secular options for their children.⁶⁸ The Court reasoned that the program was neutral to religion, used criteria based on financial need and geography with respect to a particular school district, and enabled beneficiaries the true choice with regard to educational options available to utilize the aid.⁶⁹

Applying the effects test as outlined in *Agostini, Mitchell & Zelman*, the law that authorizes funding received by Orthodox day schools as a general matter, does not have the principal or primary effect of enhancing or inhibiting religion. Funding has the primary effect of inhibiting or advancing religion if 1) the funding results in religious indoctrination and 2) it defines its recipients by reference to religion.⁷⁰ The fact that funding is given to Orthodox day schools in this case does not result in religious indoctrination. The funding results in religious indoctrination if 1) the allocation of the aid is not the result of the independent, private choice of individual parents.⁷¹ In *Zelman*, the program gave parents a choice as to where and in what manner to educate their children.⁷² The law that sets out the special education funding does not limit allocation to religious schools. A child receives special education services regardless of the school chosen, so no incentive is created to send children to private yeshivas. Thus, the funding does not result in religious indoctrination.

Now that it has been established that funding does not result in religious indoctrination, the next question is whether the funding given to Jewish day schools defines its recipients by reference to religion. The law that authorizes the funding given to Orthodox day schools does not define its

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Lemon*, 403 U.S. at 612.

⁷¹ *Zelman*, 536 U.S. at 640.

⁷² *Id.* at 645-48.

recipients by reference to religion. Funding defines its recipients by reference to religion when 1) allocating the aid creates a financial incentive to undertake religious indoctrination.⁷³ A financial incentive to undertake religious indoctrination is present when the aid is not allocated on the basis of neutral, secular criteria that neither favors nor disfavors religion, and 2) is not made available to both religious and secular beneficiaries on a nondiscriminatory basis.⁷⁴

The special education funding law does not define its recipients by reference to religion in this case. In *Agostini*, the recipients of the funding under New York City's Title I program did not receive any incentive to modify their religious beliefs or practices to obtain program services.⁷⁵ Like in *Agostini*, the receipt of funding in this case is not based on whether or not Orthodox Jews modify their religious beliefs or practices. The funds are available to any and all students who qualify for special education services under the IDEA. In concurrence, Justice Powell made clear that “state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private decisions of beneficiaries.”⁷⁶ Therefore, the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavors religion.

Turning to the next inquiry, one asks whether the funds are made available to both religious and secular beneficiaries on a nondiscriminatory basis. The funds are made available to both religious and secular beneficiaries on a nondiscriminatory basis. In *Agostini*, New York City's Title I services are available to all children who meet the eligibility requirements, regardless of religious belief or affiliation and no matter where the children attend school.⁷⁷ Similarly, in *Mitchell*, under

⁷³ *Agostini*, 521 U.S. at 205.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Mueller v. Allen*, 463 U.S. 388, 398-399 (1983)

⁷⁷ *Agostini*, 521 U.S. at 205.

the state statute, the aid was allocated based on enrollment to both private and public schools.⁷⁸ Like in *Agostini* and *Mitchell*, the funds allocated to Orthodox day schools are to provide special education services to those children who qualify under IDEA, regardless of religious affiliation.

One could argue that the Establishment Clause necessitates that aid to religious schools not be used for religious purposes. But this argument fails because, provided the state funding is not “unsuitable for use in the public schools because of religious content” and eligibility for state funding is assessed in a constitutionally permissible fashion, the use of the funding to indoctrinate religiously cannot be attributed to the government.⁷⁹ Further, the more “attenuated [the] financial benefit ... that eventually flows to parochial schools,” the more Courts are willing to find state funding permissible.⁸⁰ Additionally, the manner in which the funding is used does not affect the criteria governing the aid's allocation and thus does not establish any impermissible incentive under *Agostini* 's second prong.⁸¹ Therefore, there is no financial incentive to undertake religious indoctrination in order for Orthodox day schools to obtain state funding.

Accordingly, the special education funding is distributed based on the true private choice of parents, and thus constitutional. It is neutral in all respects toward religion, and is part the district's general and multifaceted undertaking to provide special education and related services to children eligible for services under the IDEA. Special educational funding is directly available to a broad class of individuals defined without reference to religion and allows participation of all district schools whether religious or nonreligious.

⁷⁸ *Mitchell*, 530 U.S. at 796.

⁷⁹ *Id.* at 820.

⁸⁰ *Mueller*, 463 U.S., at 400.

⁸¹ *Mitchell*, 530 U.S. at 820.

THE CONDUCT OF BOARD OF EDUCATION IN EAST RAMAPO IS UNCONSTITUTIONAL UNDER THE LEMON TEST

In contrast to the constitutionality of the school aid that flows to yeshivas, the East Ramapo Board of Education's conduct violates the Establishment Clause. In order to determine whether a state action violates the Establishment Clause, the government action must 1) have a secular purpose, 2) not have the principal or primary effect of advancing or inhibiting religion; and 3) not foster an excessive entanglement between government and religion.⁸² There is government entanglement if 1) the conduct fosters excessive administrative entanglement between government and religion or 2) has the potential for "Political Entanglement", which divides an electorate or legislature along religious lines. To determine whether the government entanglement with religion is excessive, one must examine 1) the character and purposes of the institutions that are benefited, 2) the nature of the aid that the State provides, and 3) the resulting relationship between the government and the religious authority.

The conduct of the East Ramapo school board does not have a legitimate secular purpose. To determine whether the Board's conduct violates the establishment clause, the government action must 1) have a secular purpose, and 2) does not the principal or primary effect of advancing or inhibiting religion. In *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, the Supreme Court ruled that the posting of the Ten Commandments in courthouses did not serve a valid secular purpose.⁸³ In finding that the secular purpose of posting the Ten Commandments was a sham, the Court concluded that the county's actual purpose was to emphasize and celebrate the Commandments' religious message.⁸⁴ According to the *Lemon* test,

⁸² Agostini, 521 U.S. at 218.

⁸³ *McCreary County, Ky. v. ACLU*, 545 U.S. 844 (2005)

⁸⁴ *Id.* at 846.

governmental conduct requires a secular purpose; however, “the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.”⁸⁵ The case at bar is similar *McCreary* in that the Board’s conduct is based solely on a desire to surreptitiously funnel tax-payer money into Jewish day schools for the benefit of Orthodox children, without regard for the effect on public schools and public school children. Thus, the board’s conduct clearly has no secular purpose.

Using the unconstitutional effects test defined by *Agostini, Mitchell & Zelman*, the conduct does have the principal or primary effect of advancing religion. Conduct has a principal or primary effect or primary effect of enhancing or inhibiting religion if 1) the conduct results in religious indoctrination and 2) it defines its recipients by reference to religion.⁸⁶

The Board’s conduct does result in religious indoctrination. Conduct results in religious indoctrination if the allocation of the aid is not the result of the independent, private choice of individual parents.⁸⁷ In *Zelman*, the program gave parents a choice as to where and in what manner to educate their children.⁸⁸ This case is dissimilar in that Orthodox parents do not have a true private choice in where to send their children. In order for funding to reach private Jewish day schools, the Board of Education must approve the placement of special education children. The parents do not have a choice in where to enroll their children, as the decision is at the discretion of the Board of Education.⁸⁹ One could argue that Orthodox Jewish parents could find a private school and request approval for placement from the Board of Education and, if approved, the decision to

⁸⁵ *Id.* at 864

⁸⁶ *Agostini*, 521 U.S. at 234.

⁸⁷ *Zelman*, 536 U.S. at 640.

⁸⁸ *Id.* at 645-48.

⁸⁹ Gary Stern & Mareesa Nicosia, *East Ramapo: A district in Crisis*, *Lohud*, Sept. 9, 2012, <http://www.lohud.com/story/news/education/2014/09/17/east-ramapo-district-crisis/15775703/?from=global&sessionKey=&autologin=>.

allocate funds would be the independent, private choice of individual parents. However, this argument fails because ultimately, whether or not the child attends the program is determined by the Board of Education and not the parents. Therefore, the Board's conduct does result in religious indoctrination.

Now that it has been established that the Board's conduct results in religious indoctrination, one turns to whether the Board's conduct defines its recipients by reference to religion. Conduct defines its recipients by reference to religion when allocating aid creates a financial incentive to undertake religious indoctrination.⁹⁰ A financial incentive to undertake religious indoctrination is present when 1) the aid is not allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and 2) is not made available to both religious and secular beneficiaries on a nondiscriminatory basis.⁹¹ In *Agostini*, the recipients of the funding under New York City's Title I program did not receive any incentive to modify their religious beliefs or practices to obtain program services.⁹² Here, since the state has not taken or acted upon the complaints of non-Orthodox Jews and non-Jewish parents who send their children to public school, these parents may either become Orthodox Jews and/or convert to Orthodox Judaism in order to send their children to Jewish day schools to receive adequate services for their children.⁹³ One could argue that the Board's conduct has only a remote and incidental effect on the advancement of religion. However, this is an unsuccessful argument in that the government has conferred upon the Orthodox controlled school board the authority to determine who will receive services and where those services will be administered. The power conferred upon the school board

⁹⁰ *Agostini*, 521 U.S. at 205.

⁹¹ *Id.*

⁹² *Id.*

⁹³ This is common knowledge within the Orthodox community. See, e.g., *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS*, [2009] UKSC 15, [2010] 2 A.C. 728 (appeal taken from Eng.) (U.K.).

may be used by the Orthodox to employ overtly religious objectives, which would favor members of the Jewish faith.⁹⁴ There is no “effective means of guaranteeing” that the Board’s power “will be used exclusively for secular, neutral, and non-ideological purposes.”⁹⁵ One could also claim that parents aren’t required to modify their beliefs in order to gain services. However, this argument fails because, despite years of complaints about the diminishing services to public school children and the appointment of a monitor without veto power over the board, the board continues to make budget cuts and allocate funds in a manner beneficial to yeshivot. Obviously, the allocation of state aid creates a financial incentive for non-Orthodox Jews and non-Jews to undertake religious indoctrination.

The next inquiry asks whether the funds are made available to both religious and secular beneficiaries on a nondiscriminatory basis. The funds are not made available to both religious and secular beneficiaries on a nondiscriminatory basis. In *Agostini*, New York City's Title I services are available to all children who meet the eligibility requirements, regardless of religious belief or affiliation and no matter where the children attend school.⁹⁶ Similarly, in *Mitchell*, under the state statute, the aid was allocated based on enrollment to both private and public schools.⁹⁷ In this case, these funds are only going to benefit a certain type of student, the Orthodox, in a biased way. The Board approves special education placement for eligible children in yeshivot, despite the fact that the district could provide services inexpensively in a public school setting. Further, the Board eliminated special education positions that would benefit all special education children whether receiving these services in a private or public school setting. Yet, despite the fact that services are

⁹⁴ See Klopott, *supra* note 1, at 3.

⁹⁵ *Mitchell*, 530 U.S. at 793

⁹⁶ *Agostini*, 521 U.S. at 205.

⁹⁷ *Mitchell*, 530 U.S. at 793.

available to all children who meet eligibility requirements under the IDEA, the only children benefiting are Orthodox Jewish children since only the Orthodox are allowed to enroll in Jewish day schools.⁹⁸ One could argue that the funds are being distributed based on the neutral, secular criteria of the IDEA. But this is not persuasive because the Board is making decisions in a manner that would prevent non-Orthodox children from obtaining services under the IDEA while ensuring that Orthodox children, the only children permitted to attend Jewish day schools, receive more services. Since the Jewish day schools are receiving most of the money while students attending public schools are receiving fewer services, it is obvious that the funds are not made available to both religious and secular beneficiaries on a nondiscriminatory basis. Hence, the Board's conduct has the principal or primary effect of enhancing or inhibiting religion.

Having established that the Board's conduct has the principal or primary effect of enhancing or inhibiting religion, the inquiry now focuses on whether there is entanglement between the government and the Jewish religion. There is government entanglement if 1) the conduct fosters excessive administrative entanglement between government and religion or 2) has the potential for "Political Entanglement", which divides an electorate or legislature along religious lines.⁹⁹ To determine whether the government entanglement with religion is excessive, we must examine 1) the character and purposes of the institutions that are benefited, 2) the nature of the aid that the State provides, and 3) the resulting relationship between the government and the religious authority.¹⁰⁰ In *Larkin v. Grendel's Den, Inc.*, the Court invalidated a statute that delegated to churches the power to prevent the issuance of liquor licenses to establishments within

⁹⁸ This is common knowledge within the Orthodox community. See *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS*, [2009] UKSC 15, [2010] 2 A.C. 728 (appeal taken from Eng.) (U.K.), *supra* note 93.

⁹⁹ *Lynch*, 465 U.S. at 679.

¹⁰⁰ *Lemon*, 403 U.S. at 615.

a 500-foot radius of a church.¹⁰¹ The Court held that by giving churches a "unilateral and absolute power" over an important governmental function, the statute violated the constitutionally-required separation between church and state as it "enmeshes churches in the processes of government" and creates the danger of "[p]olitical fragmentation and divisiveness along religious lines."¹⁰² Similar to the church in *Larkin*, the Orthodox-controlled school board has absolute power and discretion in making budget cuts, allocating state funds and other important governmental functions.¹⁰³ Jewish day schools exist for the primary purpose of promoting the Jewish religious teachings and traditions to ensure Jewish children remain strict adherents to the Jewish faith. The Board of Education supplies these schools with funds in order to provide services under the IDEA for eligible children who qualify for services. Notwithstanding the district's budgetary problems, the Orthodox-controlled Board approves placement for Orthodox students in yeshivot when there are inexpensive alternatives in district.¹⁰⁴ Further, closing schools and subsequently selling public property at a significant discount to religious authorities in the Orthodox community to open Jewish day schools is indicative of a close relationship between the government and religious authorities.¹⁰⁵ The mere fact that the Board is Orthodox is irrelevant; however, the fact that the Orthodox-controlled Board is utilizing its political authority to act in a manner beneficial to the Orthodox Community, suggests the Board has established a theocratic government.

Now that it has been established that the Board's conduct fosters excessive entanglement, one may inquire whether the Board's conduct has the potential for "Political Entanglement", which

¹⁰¹ *Larkin*, 459 U.S. at 116.

¹⁰² *Id.*

¹⁰³ See Klopott, *supra* note 1, at 26-33.

¹⁰⁴ See Report of Investigation, *supra* note 2, at 18.

¹⁰⁵ Uriel Heilman, In Rockland County, non-Orthodox try to create alternative to Hasidic dominance, Jewish Telegraphic Agency (JTA), Feb. 19, 2015, <http://www.jta.org/2015/02/19/news-opinion/united-states/in-rockland-county-non-orthodox-try-to-create-alternative-to-hasidic-dominance>.

divides an electorate or legislature along religious lines. Public schools in East Ramapo, where no Orthodox Jews are enrolled, continue to have services eliminated while Jewish day schools increasing receive the majority of the education funding. This, coupled with the fact that the Board regularly holds closed door meetings at late hours to prevent the parents of public school children from participating in public board meetings and that their complaints are constantly overlooked, has led to mistrust of the Orthodox Jews in East Ramapo.¹⁰⁶ Parents are of the impression that the Orthodox Jews only care for themselves and the needs of their children, which has resulted in contentious interactions between the Orthodox and non-adherents of the Jewish faith.

Thus, the Board's conduct not only fosters excessive administrative entanglement between government and religion, but has the potential for political divisiveness. This, combined with the Board's improper religious purposes for making its decisions and the impermissible principal or primary effect of those decisions, implicates a clear violation of the Establishment Clause.

THE BOARD'S DECISIONS HAVE THE EFFECT OF SENDING THE MESSAGE OF ENDORSEMENT OF A PARTICULAR RELIGION TO A REASONABLE OBSERVER

Now that we have concluded that the East Ramapo School Board's conduct is unconstitutional under the *Lemon* test, one now turns to whether the Board's conduct is also unconstitutional under the Endorsement test, in that it endorses a particular religion, in this case, Judaism. To determine whether the government endorses a particular religion, one must show that 1) the board's decisions intended to or have the effect of sending a message of endorsement of a particular religion to a reasonable observer.¹⁰⁷ In *Lynch v. Donnelly*, the Court held that the

¹⁰⁶ See Report of Investigation, *supra* note 2, at 35.

¹⁰⁷ *Lynch*, 465 U.S. at 690-691.

inclusion of a crèche in a holiday display was not an advancement or endorsement of religion.¹⁰⁸ In concurrence, Justice O'Connor, utilizing the endorsement test, found that the purpose of including the crèche in the display was not to promote religion but rather to celebrate a public holiday through traditional symbolism.¹⁰⁹ Further, the Justice concluded that the crèche did not have the effect of communicating a message of the government's endorsement of Christianity because, despite the religious and sectarian significance of the crèche, a reasonable observer would not associate a display celebrating a public holiday with very strong secular components and traditions to be an endorsement of the Christian religion and faith.¹¹⁰ Endorsement conveys a message to non-adherents that they are outsiders and not full members of the political community, while the message to adherents is the exact opposite, one of favoritism.¹¹¹

Any reasonable observer scrutinizing the Board's decisions would conclude that the decisions are made to benefit Jewish day schools and the Orthodox community in particular.¹¹² Those decisions involve a clear message, whether intended or inadvertent, that one's adherence to Judaism is relevant to citizenship and the benefits of citizenship. First, The Board decided to close public schools and sell state-owned buildings below market value to Jewish organizations to open Jewish day schools. Second, the Board regularly cut the school budget; however, despite budgetary cuts, Jewish day schools increasingly receive the majority of the education funding in East Ramapo, while public schools, where no Orthodox Jews are in attendance, continue to have services eliminated. Third, the Board holds regular closed door meetings at late hours to prevent the parents of public school children from participating in public board meetings. Fourth, because

¹⁰⁸ *Id.* at 669.

¹⁰⁹ *Id.* at 691.

¹¹⁰ *Id.*

¹¹¹ *Abington School District v. Schempp*, 374 U.S. 203 (1963)

¹¹² See Report of Investigation, *supra* note 2, at 29.

public school parents are consistently prevented from participating in the public meetings and their complaints are constantly overlooked, the Board is conveying a message to parents that they are not full members of the political community and that the Orthodox Jews control the political process. Therefore, the Board's decisions do have the effect of communicating a message of governmental endorsement of Judaism, which clearly violates the Establishment Clause.

Even though no statute or state law has formally delegated power to a religious body, as in *Larkin v. Grendel's Den*, or along religious lines as in *Kiryas Joel*, the East Ramapo School Board functions as a religious body that possesses civic power, an unmistakable violation of the most basic division of governmental and religious functions.

Conclusion

Although the Special Education funding received by Jewish day schools is constitutional, the board's conduct and decisions violate the Establishment Clause. The Special Education funding that is given to private Jewish day schools is constitutional under the modified *Lemon* Test. First, the funding to Jewish day schools has a legitimate secular purpose. Second, the funding does not have the principal or primary effect of enhancing or inhibiting religion. Third, the funding does not result in religious indoctrination. Fourth, the funding does not define its recipients by reference to religion. And, lastly, there is no financial incentive to undertake religious indoctrination.

However, the conduct of the Board of Education in East Ramapo is unconstitutional under the *Lemon* Test since the conduct of the East Ramapo school board does not have a legitimate secular purpose. First, the conduct does have the principal or primary effect of enhancing religion. Second, the conduct does result in religious indoctrination. Third, the conduct does define its recipients by reference to religion. Fourth, there is a financial incentive to undertake religious

indoctrination in this case. Fifth, there is entanglement between the government and Judaism. Finally, there is excessive governmental entanglement between the Orthodox-controlled school board and the Jewish religion.

Lastly, the Board's decisions have the effect of sending a reasonable observer the message that it endorses a particular religion. Likewise, the Board's decisions have the effect of sending the message that the government endorses Judaism to a reasonable observer.

In light of the above, the only way to ensure that the East Ramapo School Board operates constitutionally is for the New York State Education Department to adopt the successful "Lakewood Model" and expand the Monitor's authority similar to that of the Lakewood Monitor. By granting Mr. Walcott real authority, he, like the Monitor in Lakewood, could successfully thwart Establishment Clause violations and quash any semblance of an East Ramapo Theocracy.