

**Florey v. Sioux Falls School District 49-5 (1980)**

**[*Florey v. Sioux Falls School District 49-5*, 619 F.2d 1311 (8th Cir.), cert. denied, 449 U.S. 987 (1980). Appendix and dissenting opinion have been omitted.]**

**United States Court of Appeals for the Eighth Circuit upholds constitutionality of Christmas observances in public schools so long as secular as well as religious aspects of Christmas are presented.]**

**619 F.2d 1311 (1980)**

**United States Court of Appeals,  
Eighth Circuit.**

**FLOREY V. SIOUX FALLS SCHOOL DISTRICT 49-5**

**No. 79-1277.**

**Submitted Sept. 11, 1979.**

**Decided April 22, 1980.**

**Rehearing and Rehearing En Banc Denied May 20, 1980.**

**[\* \* \* \* \*]**

Before HEANEY, ROSS and McMILLIAN, Circuit Judges.

HEANEY, Circuit Judge.

I.

In response to complaints that public school Christmas assemblies in 1977 and prior

years constituted religious exercises, the School Board of Sioux Falls, South Dakota, set up a citizens' committee to study the relationship between church and state as applied to school functions. (1) The committee's deliberations, which lasted for several months, culminated in the formulation of a policy statement and set of rules outlining the bounds of permissible school activity. After a public hearing, the School Board adopted the policy statement and rules recommended by the committee. (2)

The appellants brought suit for declaratory and injunctive relief, alleging that the policy statement and the rules adopted by the School Board violate the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. The district court reviewed the practices of the Sioux Falls School District and found that the 1977 Christmas program that was the subject of the initial complaints "exceeded the boundaries of what is constitutionally permissible under the Establishment Clause." The court also found, however, that programs similar to the 1977 Christmas program would not be permitted under the new School Board guidelines and concluded that the new rules, if properly administered and narrowly construed, would not run afoul of the First Amendment. *Florey v. Sioux Falls Sch. Dist.* 49-5, 464 F.Supp. 911 (D. S.D. 1979).

The appellants' claim is that the School Board policy and rules are unconstitutional both on their face and as applied. At the time of the district court proceeding, however, no holiday season had passed with the rules in effect. Consequently, little evidence was presented on the actual implementation of the rules, and the district court made no findings in that regard. The record does contain some evidence of the interpretation given the rules by school administrators with respect to the Christmas holiday. We may consider that evidence, as well as the district court's observations on the 1977 Christmas program, in discerning the meaning of the rules, but because of the absence of district court findings on their application, we limit our review to the constitutionality of the rules on their face.

## II.

The close relationship between religion and American history and culture has frequently been recognized by the Supreme Court of the United States. (3) Nevertheless, the First Amendment to the Constitution explicitly prescribes the relationship between religion and government: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof \* \* \*

" (4) This apparently straightforward prohibition can rarely be applied in a given situation with ease, however. As the Supreme Court has noted, "total separation [between church and state] is not possible in an absolute sense." *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745 (1971). As a result, the Court

has developed a three-part test for determining when certain governmental activity falls within the constitutional boundaries:

First, the [activity] must have a secular \* \* \* purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, \* \* \* finally, the [activity] must not foster “an excessive governmental entanglement with religion.”

*Id.* at 612-613, 91 S.Ct. at 2111 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970)).

A. *Purpose.*

The appellants’ contention that the School Board’s adoption of the policy and rules was motivated by religious considerations is unsupported. The record shows that the citizens’ committee was formed and the rules drawn up in response to complaints that Christmas observances in some of the schools in the district contained religious exercises. The motivation behind the rules, therefore, was simply to ensure that no religious exercise was a part of officially sanctioned school activities. This conclusion is supported by the opening words of the policy statement: “It is accepted that no religious belief or non-belief should be promoted by the school district or its employees, and none should be disparaged.” The statement goes on to affirmatively declare the purpose behind the rules:

The Sioux Falls School District recognizes that one of its educational goals is to advance the students’ knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization.

The express language of the rules also leads to the conclusion that they were not promulgated with the intent to serve a religious purpose. Rule 1 limits observation of holidays to those that have both a religious *and* a secular basis. Solely religious holidays may not be observed. Rule 3 provides that music, art, literature and drama having a religious theme or basis may be included in the school curriculum only if “presented in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday.” Similarly, Rule 4 permits the use of religious symbols only as “a teaching aid or resource” and only if “such symbols are displayed as an example of the cultural and religious heritage of the holiday and are temporary in nature.” We view the thrust of these rules to be the advancement of the students’ knowledge of society’s cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama that is likely to be of interest to the students and their audience.

This purpose is quite different from the express and implied intent of the states of

New York, Pennsylvania and Maryland in the Supreme Court “School Prayer Cases.” First, we emphasize the different character of the activities involved in those cases. The challenged law in *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), provided for the recitation of a state-authored prayer at the start of each school day. The Supreme Court had no difficulty characterizing this practice as a religious activity:

There can, of course, be no doubt that New York’s program of daily classroom invocation of God’s blessings as prescribed in the Regents’ prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious \* \* \*.

*Id.* at 424-425, 82 S.Ct. at 1264.

Since prayer, by its very nature, is undeniably a religious exercise, the conclusion is inescapable that the advancement of religious goals was the purpose sought by the school officials in *Engel*. Indeed, the state officials published the prayer in a document entitled “Statement on Moral and Spiritual Training in the Schools.” There can be little doubt that their intent was to promote “spiritual” ends.

Similarly, in *Abington School Dist. v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), the Supreme Court emphasized the “pervading religious character of the ceremony” involving daily Bible reading in the schools. *Id.* at 224, 83 S.Ct. at 1572. Again, when a state intentionally sets up a system that by its essential nature serves a religious function, one can only conclude that the advancement of religion is the desired goal. As explained more fully in the next section of this opinion, however, the programs permitted under the Sioux Falls rules are not unquestionably religious in nature. Thus, we are not required to infer that the Sioux Falls School Board intended to advance religion.

Moreover, in the Supreme Court prayer cases, compulsory religious exercises were imposed on all schools by state law. The Sioux Falls rules, by contrast, do not require the individual schools to have holiday activities; they merely permit the inclusion of certain programs in the curriculum in the event that classroom teachers feel that such programs would enhance their overall instructional plan. The rules are an attempt to delineate the scope of permissible activity within the district, not to mandate a statewide program of religious inculcation.

The appellants argue that the “legislative” history of Rule 1 compels the conclusion that the rule was designed to advance religion. The basis for this argument is a proposed amendment to Rule 1 introduced before both the citizens’ committee and the School Board. The proposed amendment would have added to Rule 1 the following

words: “Such observances shall be limited to secular aspects of these holidays.” The amendment was defeated by both the citizens’ committee and the School Board. The School Board rejected the proposal, appellants assert in their brief, “because it wanted to allow schools to observe the religious basis of holidays.” This, they maintain, is an unconstitutional purpose.

We do not agree that the rejection of the proposed amendment renders the School Board rules constitutionally infirm. First, the record is devoid of evidence indicating the reasons the proposal was rejected. A number of possibilities suggest themselves, including the ambiguity of the proposed addition. The appellants’ assertion that the rejection was due to the School Board’s desire “to observe the religious basis of holidays” is thus unsupported. Furthermore, even if the appellants’ contention were correct, the Constitution does not necessarily forbid the use of materials that have a “religious basis.” Government involvement in an activity of unquestionably religious origin does not contravene the Establishment Clause if its “present purpose and effect” is secular. *McGowan v. Maryland*, 366 U.S. 420, 445, 81 S.Ct. 1101, 1115, 6 L.Ed.2d 393 (1961). Thus, although the rules permit the schools to observe holidays that have both a secular and a religious basis, we need not conclude that the School Board acted with unconstitutional motives. To the contrary, we agree with the district court’s finding that the School Board did not adopt the policy statement and rules for the purpose of advancing or inhibiting religion.

#### B. *Effect.*

The appellants contend that, notwithstanding the actual intent of the School Board, the “principal or primary effect” of the rules is to either advance or inhibit religion. See *Lemon v. Kurtzman*, *supra*, 403 U.S. at 612, 91 S.Ct. at 2111. We cannot agree. The First Amendment does not forbid all mention of religion in public schools; it is the *advancement* or *inhibition* of religion that is prohibited. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788, 93 S.Ct. 2955, 2973, 37 L.Ed.2d 948 (1973). Hence, the *study* of religion is not forbidden “when presented objectively as part of a secular program of education.” *Abington School Dist. v. Schempp*, *supra*, 374 U.S. at 225, 83 S.Ct. at 1573. We view the term “study” to include more than mere classroom instruction; public performance may be a legitimate part of secular study. This does not mean, of course, that religious ceremonies can be performed in the public schools under the guise of “study.” It does mean, however, that 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. As the district court noted in its discussion of Rule 3, “[t]o allow students *only* to study and *not* to perform [religious art, literature and music when] such works \* \* \* have developed an independent secular and artistic significance would give students a truncated view of our culture.” 464 F.Supp. at 916

(emphasis in original).

The appellants assert, however, that something more than secular study is authorized by the Sioux Falls rules. They point to Rule 1, which states that holidays that have a religious and secular basis may be “observed” in the public schools. “Observation,” they maintain, necessarily connotes religious ceremony or exercise and the rule thus has the impermissible effect of advancing religion.

A review of the policy statement and rules as a whole leads us to conclude that the appellants’ emphasis of the word “observe” is misplaced and their interpretation of it incorrect. First, as noted in section II.A of this opinion, the rules must be read together with the policy statement of the School Board. That statement makes it clear that religion is to be neither promoted nor disparaged in the Sioux Falls schools. Consequently, any ambiguity in the meaning of the word “observed” must be resolved in favor of promoting that policy. Moreover, the only evidence presented on the definition of the word “observed” was the testimony of the School Superintendent, Dr. John Harris. Dr. Harris explained that “observed” means “that programs with content relating to both the secular and religious basis of [the holiday] could be performed, could be presented in the school.” (Transcript at 65.) As noted earlier, we view performance or presentation to be a legitimate and important part of “study” in the public schools. Thus, the use of the word “observe” does not mean that the rules have the effect of advancing religion so long as the religious content of the program is “presented objectively as part of a secular program of education.” *Abington School Dist. v. Schempp, supra*, 374 U.S. at 225, 83 S.Ct. at 1573.

To determine whether religion is advanced or inhibited by the rules, then, we must look to see if a genuine “secular program of education” is furthered by the rules. It is unquestioned that public school students may be taught about the customs and cultural heritage of the United States and other countries. This is the principal effect of the rules. They allow the presentation of material that, although of religious origin, has taken on an independent meaning.

The district court expressly found that much of the art, literature and music associated with traditional holidays, particularly Christmas, has “acquired a significance which is no longer confined to the religious sphere of life. It has become integrated into our national culture and heritage.” (5) Furthermore, the rules guarantee that all material used has secular or cultural significance: Only holidays with both religious and secular bases may be observed; music, art, literature and drama may be included in the curriculum only if presented in a prudent and objective manner and only as a part of the cultural and religious heritage of the holiday; and religious symbols may be used only as a teaching aid or resource and only if they are displayed

as a part of the cultural and religious heritage of the holiday and are temporary in nature. Since all programs and materials authorized by the rules must deal with the secular or cultural basis or heritage of the holidays and since the materials must be presented in a prudent and objective manner and symbols used as a teaching aid, the advancement of a “secular program of education,” and not of religion, is the primary effect of the rules.

The appellants argue that, despite the secular benefits, inclusion of material with a religious theme, basis or heritage invalidates the rules. In support of this assertion, the appellants point out that several of appellants’ witnesses, all of them ordained clergymen, testified that the singing of Christmas carols would have some religious effect on them. But the appellants misread the test laid down by the Supreme Court. As noted, *Lemon v. Kurtzman, supra*, permits a given activity if “its *principal* or *primary* effect [is] one that neither advances nor inhibits religion.” 403 U.S. at 612, 91 S.Ct. at 2111 (emphasis added). It would be literally impossible to develop a public school curriculum that did not in some way affect the religious or nonreligious sensibilities of some of the students or their parents. School administrators should, of course, be sensitive to the religious beliefs or disbeliefs of their constituents and should attempt to avoid conflict, (6) but they need not and should not sacrifice the quality of the students’ education. They need only ensure that the primary effect of the school’s policy is secular. The district court’s finding that they have done this by the challenged rules is not clearly erroneous.

The distinction between an activity that primarily advances religion and one that falls within permissible constitutional limits may be illustrated by comparing the 1977 kindergarten Christmas program found by the district court to be an impermissible religious activity and the programs authorized by the new School Board guidelines. The 1977 program at one of the elementary schools contained a segment that, in the words of the district court, “was replete with religious content including a responsive discourse between the teacher and the class entitled, ‘The Beginners Christmas Quiz.’” The “Quiz” read as follows:

Teacher: Of whom did heav’nly angels sing,

And news about His birthday bring?

Class: Jesus.

Teacher: Now, can you name the little town

Where they the Baby Jesus found?

Class: Bethlehem.

Teacher: Where had they made a little bed

For Christ, the blessed Saviour's head?

Class: In a manger in a cattle stall.

Teacher: What is the day we celebrate

As birthday of this One so great?

Class: Christmas.

This "Quiz" and other similar activities constituted, the district court found, "a predominantly religious activity" which exceeded constitutional bounds. We agree with this characterization and with the district court's observation that similar programs would be prohibited by the new rules. The administration of religious training is properly in the domain of the family and church. The First Amendment prohibits public schools from serving that function.

### C. *Entanglement.*

The appellants contend that the new guidelines in Sioux Falls unconstitutionally "foster 'an excessive government entanglement with religion.'" *See Lemon v. Kurtzman, supra*, 403 U.S. at 613, 91 S.Ct. at 2111. All the Supreme Court cases cited by the appellants in support of the "entanglement" test deal with governmental aid to sectarian institutions, not with the permissible scope of activity in the public schools. In a "parochial" case, the court is presented with a situation in which the state is involving itself with a concededly religious activity or institution. The real danger is the potential for state repression of such institutions. In the present case, by contrast, the school district is called upon to determine whether a given activity is religious. This type of decision inheres in every curriculum choice and would be faced by school administrators and teachers even if the rules did not exist. Indeed, the rules are guidelines designed to aid in the decisionmaking process. Rather than entangling the schools in religion, the rules provide the means to ensure that the district steers clear of religious exercises. We think the district court was correct in finding that the new rules do not unconstitutionally entangle the Sioux Falls school district in religion or religious institutions.

### III.

The appellants also contend that implementation of the policy and rules of the Sioux

Falls School Board should be enjoined because the rules violate the Free Exercise Clause of the First Amendment. This contention does not withstand scrutiny. (7)

The public schools are not required to delete from the curriculum all materials that may offend any religious sensibility. As Mr. Justice Jackson noted in *McCullum v. Board of Education*, 333 U.S. 203, 235, 68 S.Ct. 461, 477, 92 L.Ed. 649 (1948),

Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them \*\* has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.

These inevitable conflicts with the individual beliefs of some students or their parents, in the absence of an Establishment Clause violation, do not necessarily require the prohibition of a school activity. On the other hand, forcing any person to participate in an activity that offends his religious or nonreligious beliefs will generally contravene the Free Exercise Clause, even without an Establishment Clause violation. *See Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In this case, however, the Sioux Falls School Board recognized that problem and expressly provided that students may be excused from activities authorized by the rules if they so choose. (8)

#### IV.

We recognize that this opinion affirming the district court will not resolve for all times, places or circumstances the question of when Christmas carols, or other music or drama having religious themes, can be sung or performed by students in elementary and secondary public schools without offending the First Amendment. The constitutionality of any particular school activity conducted pursuant to the rules, in association with any particular holiday, cannot be determined unless and until there is a specific challenge, supported by evidence, to the school district's implementation of the rules. We simply hold, on the basis of the record before us, that the policy and rules adopted by the Sioux Falls Board of Education, when read in the light of the district court's holding that segments of the 1977 Christmas program at one of the elementary schools were impermissible, are not violative of the First Amendment. (9)

For the foregoing reasons, the judgment of the district court is affirmed.

1. The committee consisted of the school district's director of music, Jewish, Catholic and Protestant clergy, an attorney, a member of the American Civil Liberties Union, and parents and teachers of students in the district.

2. The policy statement and rules are set out in the appendix to this opinion. The rules challenged in this case are those contained under the heading "Observance of Religious Holidays."

3. See, e.g., *Abington School Dist. v. Schempp*, 374 U.S. 203, 212, 83 S.Ct. 1560, 1566, 10 L.Ed.2d 844 (1963) ("It is true that religion has been closely identified with our history and government."); *Engel v. Vitale*, 370 U.S. 421, 434, 82 S.Ct. 1261, 1268, 8 L.Ed.2d 601 (1962) ("The history of man is inseparable from the history of religion."); *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952) ("We are a religious people whose institutions presuppose a Supreme Being.").

4. The First Amendment has been made applicable to the states by the Fourteenth Amendment. *Engel v. Vitale*, *supra*, 370 U.S. at 422, 82 S.Ct. at 1262; *Zorach v. Clauson*, *supra*, 343 U.S. at 309, 72 S.Ct. at 681; *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940).

5. The singing of "Christmas carols" appears to be a primary focal point of appellants' objections to the rules. These carols had their origin in England, France, Germany and other European countries. The first carols written in the United States appeared in the Nineteenth Century, but European carols were sung far earlier. The earliest printed collection of carols was published in 1521. Many of the popular carols of today, including *Adeste Fideles*, *Hark the Herald Angels Sing* and *Joy to the World*, were written in the early part of the Eighteenth Century. The most popular of all, *Silent Night, Holy Night*, was probably composed in Austria in 1818 and first published in 1840. Carols were banned for a period in the New England Colonies by the Puritans, but they have been sung in homes, schools, churches and public and private gathering places during the Christmas season in every section of the United States since that time. Today, carols are sung with regularity on public and commercial television and are played on public address systems in offices, manufacturing plants and retail stores in every city and village. See T. Coffin, *The Book of Christmas Folklore* (1973); R. Myers, *Celebrations, The Complete Book of American Holidays*; 5 *Encyclopedia Americana* 693 (International ed. 1968).

Many carols have a religious theme; some do not. As in the centuries gone by, some persons object to the singing of carols with a religious basis in any place but the church or home because they feel that to do so debases religion; others have the same

objection but because they feel it enhances religion. We take no part in this argument, it being entirely clear to us that carols have achieved a cultural significance that justifies their being sung in the public schools of Sioux Falls, South Dakota, if done in accordance with the policy and rules adopted by that school district.

6. In keeping with the goal of avoiding conflict with students' religious beliefs, the Sioux Falls policy statement includes the following:

The school district should utilize its opportunity to foster understanding and mutual respect among students and parents, whether it involves race, culture, economic background or religious beliefs. In that spirit of tolerance, students and staff members should be excused from participating in practices which are contrary to their religious beliefs unless there are clear issues of overriding concern that would prevent it.

The school district may, of course, excuse students from participating in this or any other school activity. But excusing students from participation does not solve Establishment Clause problems, *Abington School Dist. v. Schempp*, *supra*, 374 U.S. at 224-225, 83 S.Ct. at 1572-1573, and we find this aspect of the school district rules to be irrelevant to our Establishment Clause analysis.

7. The free exercise issue is stressed by amicus curiae, but it seems to have been added to the appellants' appeal brief as an afterthought. Neither the complaint, the trial briefs, nor the district court opinion mention the Free Exercise Clause; all are concerned only with the Establishment Clause.

8. *See* note 6 *supra*.

9. For a contrary view, *see* Note, *Religious--Holiday Observances in the Public Schools*, 48 N.Y.U.L. Rev. 1116 (1973). The authors of that Note would permit programs relating to religious holidays but would prohibit the display of any religious art or symbols as a part of the program and would further prohibit the singing of carols or songs that express reverence to God, Jesus, Buddha, Mohammed, or any other religious prophet or leader.