

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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JEFFREY MICHAEL SELMAN,
DEBRA ANNE POWER,
KATHLEEN CHAPMAN, JEFF
SILVER, PAUL MASON, and
TERRY JACKSON,

Plaintiffs,

vs.

COBB COUNTY SCHOOL
DISTRICT, COBB COUNTY BOARD
OF EDUCATION, and JOSEPH
REDDEN, Superintendent,

Defendants. :

CIVIL ACTION NO.

1:02-CV-2325-CC

ORDER

This matter is before the Court on Defendants' Motion for Summary Judgment [Doc. No. 22-1]; Plaintiffs' Motion for Leave to File Supplemental Material in Response to Defendants' Motion for Summary Judgment [Doc. No. 27-1]; and Defendants' Motion to Strike Affidavits [Doc. No. 28-1].

INTRODUCTION

This is an action arising under 42 U.S.C. §§ 1983 and 1988 and the First and Fourteenth Amendments to the United States Constitution challenging the constitutionality of a sticker (the "Sticker") commenting on evolution that was placed in certain science textbooks. This action likewise includes claims arising under Georgia state law.

Plaintiffs Jeffrey Michael Selman, Debra Anne Power, Kathleen Chapman, Jeff Silver, Paul Mason, and Terry Jackson (collectively referred to as "Plaintiffs") are all

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parents of children who attend schools in the Cobb County School District.¹ Plaintiffs all reside in Cobb County and have standing to bring this action.

The Defendants in this matter are the Cobb County School District (the "School District"), the Cobb County Board of Education (the "Board of Education" or "Board"), and Joe Redden, whom Plaintiffs have sued in his official capacity as Superintendent (collectively referred to as "Defendants").

SUMMARY OF FACTS

In the fall of 2001, the School District began the process of adopting new science textbooks. (Redden Aff. ¶3.) At the beginning of that process, the School District's textbook adoption committee raised concerns regarding the curriculum and instruction on the origin of life. (*Id.*) At that time, Cobb Policy IDBD stated that curriculum should be planned with respect for family teachings regarding origin of human species, while also stating that separation of church and state shall be maintained. Regulation IDBD stated that curriculum shall be organized to avoid compelling any student to study the origin of human species. The Regulation also provided that the origin of species would not be taught at the elementary or middle school levels.² (Redden Aff. ¶ 4.)

Following a legal review of the various issues that the textbook adoption committee raised, the school administration determined that it would recommend revisions to Policy and Regulation IDBD to strengthen evolution instruction. (Redden Aff. ¶¶ 5-6.) These plans were made prior to any final recommendation on the adoption of science textbooks and prior to the decision by the Board of

¹ At the time that the response to Defendants' Motion for Summary Judgment was due, there was only one Plaintiff in the action, Mr. Selman. However, by Order dated January 28, 2004, the Court permitted Plaintiff Selman to amend the Complaint to add the additional Plaintiffs.

² The School District's policies are voted on by the Board. (Johnston Dep. at 25:12-13.) The regulations, which are subsets of the policies, are written by administration as a means of executing the policy. (*Id.* at 25:11-14.)

Education³ to place the Sticker in science textbooks. Plaintiffs mention, however, that the administration's action was subject to approval by the Board of Education. Moreover, Plaintiffs assert that approval by the Board of Education was conditioned on imposition of the disputed Sticker in textbooks. (Tippins Dep. at 77:6.)

Prior to presenting the new Policy and Regulation IDBD, the administration recommended science textbooks for adoption by the Board of Education. (Redden Aff. ¶ 7.) Upon adopting the textbooks, the Board of Education voted unanimously to include the following statement on the Sticker in certain science textbooks:

This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.

This statement was drafted by legal counsel and was intended to be Constitutional. (Deposition of Curt Johnston at 8:9-12,15-18,21.) However, Plaintiffs argue that the Sticker is nevertheless unconstitutional.

Following the textbook adoption, the Board adopted its revised Policy IDBD, theories of origin. (Johnston Dep. at 24:14-17, Ex. 1.) In pertinent part, the policy states:

The purpose of this policy is to foster critical thinking among students, to allow academic freedom consistent with legal requirements, to promote tolerance and acceptance of diversity of opinion, and to ensure a posture of neutrality toward religion. It is the intent of the Cobb County Board of Education that this policy not be interpreted to restrict the teaching of evolution, to promote or require the teaching of creationism, or to discriminate against, or on behalf of, a particular set of religious beliefs, religion in general, or non-religion.

The revised Regulation IDBD was subsequently implemented, stating that "teachers are expected to set limits on discussion of theories of origin in order to respectfully focus discussion on scientific subject matter" and that teachers "should maintain a posture of neutrality toward religion." (Johnston Dep. at 25:7-12, Ex. 2.)

³ Board members in 2001-2002 included Gordon O'Neill, Betty Gray, Johnny Johnson, Laura Searcy, Lindsey Tippins, Curt Johnston, and Teresa Plenge. (Redden Aff. ¶ 7.)

Notwithstanding the above-stated policy and regulation, Plaintiffs contend that the Sticker restricts the teaching of evolution, promotes and requires the teaching of creationism, and discriminates for and against particular sets of religious beliefs, religion in general, or non-religion. Defendants counter that most of the members of the Board of Education never intended to promote or benefit religion in voting for the inclusion of the Sticker in certain science textbooks. (Affidavits of Laura Searcy ¶5; Gordon O'Neill ¶4; Betty Gray ¶5; and Johnny Johnson ¶5.) Most Board members testified that they were either aware of the fact that the Policy and Regulation were being revised to strengthen evolution instruction at the time they voted on the sticker, or that the Policy and Regulation are consistent with their purpose in voting on the sticker. (Deposition of Teresa Plenge at 17:13-23; 33:9-17;42:3-12;43:4-7.; Johnston Dep. at 24:14-25; Johnson Aff. ¶4; Gray Aff. ¶4; Searcy Aff. ¶4.)

Among the reasons that Board members voted to place the Sticker in textbooks were parent concerns regarding the content of the new textbook and the strengthening of evolution instruction, parent concerns regarding the imbalanced presentation of theories of origin, teacher concerns regarding the teaching of theories of origin, their own concerns that the science textbooks did not address scientific controversy regarding evolution, their own desire to assure parents that the enhanced evolution instruction would not be unduly offensive to their philosophical or religious beliefs, and their own desire to promote critical thinking.

The Sticker, revised Policy IDBD, and revised Regulation IDBD all state or imply a purpose of promoting critical thinking, but the Plaintiffs complain that the Sticker seeks critical thinking only about evolution. The parties do not dispute that the science textbooks into which the Sticker was placed offer a comprehensive perspective of current science thinking regarding theory of origins.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment shall be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). The substantive law applicable to the case determines the materiality of facts. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Further, a dispute is genuine if the evidence is such that the factual issues “may reasonably be resolved in favor of either party.” Id. at 250. However, an issue of fact is not genuine if it is not supported by evidence or if it is created by evidence that is “merely colorable” or “not significantly probative.” Dickson v. Amoco Performance Prods., 845 F. Supp. 1565, 1568 (N.D. Ga. 1994) (citing Liberty Lobby, 477 U.S. at 250)).

The moving party bears the initial burden of showing that there is no genuine issue of material fact. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc). When the nonmoving party has the burden of proof at trial, the moving party may discharge its initial burden by “‘showing’ ... that there is an absence of evidence to support the nonmoving party’s case.” Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party fails to discharge its initial burden, then the court must deny the motion. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1116 (11th Cir. 1993). If, however, the moving party meets the burden, the nonmoving party must then “go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” Celotex, 477 U.S. at 324 (citing Fed.R.Civ.P. 56(e)).

In ruling on a summary judgment motion, the Court must view the evidence in a light most favorable to the nonmoving party. Samples on behalf of Samples v. Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988). If reasonable minds could differ as to the import of the evidence, and a reasonable interpretation of the evidence could

lead to a verdict in favor of the nonmoving party, then summary judgment is inappropriate. Liberty Lobby, 477 U.S. at 251-52.

DISCUSSION

I. Motion to Strike Affidavits

As an initial matter, Defendants move to strike certain portions of the affidavits submitted by Plaintiffs in response to Defendants' Motion for Summary Judgment. Defendants argue that some of the affidavits contain information that is not based on the personal knowledge of the affiants as required by Rule 56(e) of the Federal Rules of Civil Procedure inasmuch as the affiants speculate as to the School Board's intent and speculate about the basis for the language of the Sticker.⁴ Consequently, Defendants maintain that these portions of the affidavits are not admissible evidence.

This Court has held on several occasions that the proper method for challenging the admissibility of evidence in an affidavit is to file a notice of objection to the challenged portions of the affidavit, not a motion to strike. Jordan v. Cobb County, 227 F. Supp. 2d 1322, 1346-47 (N.D. Ga. 2001); Snow v. Bellamy Mfg. & Repair, Civ. A. No. 1:94-CV-957-JTC, 1995 WL 867859, at *2 (N.D. Ga. 1995); Morgan v. Sears, Roebuck & Co., 700 F. Supp. 1574 (N.D. Ga. 1988); Pinkerton & Laws Co. v. Roadway Express, Inc., 650 F. Supp. 1138, 1141 (N.D. Ga. 1986); Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 595 F. Supp. 1442 (N.D. Ga. 1984), rev'd on other grounds, 788 F.2d 1500 (11th Cir. 1986); Smith v. Southeastern Stages, Inc., 479 F. Supp. 593 (N.D. Ga. 1977). Federal Rule of Civil Procedure 12(f) provides that "the court may order stricken *from any pleading* any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f) (emphasis added). Inasmuch as Fed.R.Civ.P. 12(f) does not provide for striking

⁴ Federal Rule of Civil Procedure 56(e) provides, in pertinent part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

affidavits or portions thereof, the Court concludes that a notice of objection is the preferred procedure. In considering Defendants' Motion for Summary Judgment, however, the Court will assess the admissibility of the evidence presented in the challenged affidavits, but the Court **DENIES** Defendants' Motion to Strike Affidavits [Doc. No. 28-1.]

II. Motion for Summary Judgment

A. Claim Under the United States Constitution

The Establishment Clause forbids any government action "respecting an establishment of religion."⁵ The Supreme Court has provided a three-prong test that courts usually employ in establishment of religion challenges to determine whether government action comports with the Establishment Clause. First, the School Board must have adopted the law with a secular purpose. Second, the action's principal or primary effect must be one that neither advances nor inhibits religion. Third, the action must not result in an excessive entanglement of government with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). If the state action in question fails to meet either of these prongs, then the action violates the Establishment Clause.⁶

In this case, the Court is faced with the challenge of determining whether the School Board's placement of the Sticker in science textbooks violated the Establishment Clause. The Supreme Court has recognized that "[s]tates and local

⁵ The First Amendment unequivocally states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Fourteenth Amendment incorporates the First Amendment against the states and their political subdivisions. See Everson v. Board of Education, 330 U.S. 1, 8 (1947) (applying Establishment Clause to states); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying Free Exercise Clause to states).

⁶ The Court notes that while the Lemon test has not escaped criticism, the Lemon test is routinely applied by the Eleventh Circuit and is the test the Court will apply today. See, e.g., McGinley v. Houston, ___ F.3d ___, 2004 WL 405439 (11th Cir. March 5, 2004); Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003); Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383 (11th Cir. 1993); Church of Scientology Flag Serv. v. City of Clearwater, 2 F.3d 1514 (11th Cir. 1993). The Court will consider County of Allegheny v. ACLU, 492 U.S. 573 (1989) when addressing the second prong of the Lemon test.

school boards are generally afforded considerable discretion in operating public schools.” Edwards v. Aguillard, 482 U.S. 578, 583 (1987). “At the same time ... the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.” Board of Education v. Pico, 457 U.S. 853, 864 (1982). With this background, the Court will analyze the Sticker in question under the Lemon test.

1. Purpose of Statute

The first prong of the Lemon test focuses on the purpose of the state action and the subjective intentions of the state actor. “The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion.” Lynch v. Donnelly, 465 U.S. 668, 690 (1984). A state-sponsored practice violates this prong of Lemon only “if it is entirely motivated by a purpose to advance religion.” Wallace v. Jaffree, 472 U.S. 38, 56 (1985). Thus, it logically follows that a state-sponsored practice may satisfy this first prong “even if it is ‘motivated in part by a religious purpose.’” Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1084 (11th Cir. 2000) (en banc) (citing Wallace, 472 U.S. at 56), vac. on other grounds, 531 U.S. 801, 121 S.Ct. 31, 148 L.Ed.2d 3 (2000), reinstated, Adler v. Duval County Sch. Bd., 250 F.3d 1330 (11th Cir.2001). While courts typically defer to a state’s articulated secular purpose, this Court is bound to investigate whether the statement of such purpose is sincere and not a sham. Edwards, 482 U.S. at 587. Edwards directs that a determination of the statement’s purpose should involve a look at the language of the statute itself, enlightened by its context and history. 482 U.S. at 594.

Defendants argue that the language of the Sticker, on its face, is “neutral and devoid of religious content.” Defs. Br. Supp. Summ. J. at 14. A close examination of the language reveals that there is a lack of religious content, and Plaintiffs do not argue to the contrary. However, Plaintiffs do argue that the language is biased and serves the improper purpose of denigrating evolution. Plaintiffs highlight the

portion of the statement that says “evolution is a theory, not a fact” as evidence that the Sticker is biased and serves to promote religion. Plaintiffs argue that while science is full of theories, Defendants have picked only the theory of evolution to disclaim. (Johnston Dep. at 19:15; Tippins Dep. at 81:17; Plenge Dep. at 12:13, 18, 21; Pallas Aff. ¶ 12; Freed Aff. ¶ 11.) Further, Plaintiffs assert that the Sticker is indeed a “disclaimer” because the Sticker asks students to “critically” consider evolution. (Freed Aff. ¶ 11.)

While the Sticker, on its face, is neutral towards religion and contains no religious content, the statement is not clearly neutral towards evolution. A cursory reading of the Sticker would likely posit doubt in the mind of the reader regarding the merits of evolutionary theory when those doubts might not otherwise exist. Assuming arguendo that the Sticker’s purpose is to posit that doubt, then a trier of fact would likely want to understand the underlying context in which the statement was developed to determine the constitutionality of the Sticker. Thus, further investigation into the context and history of the language contained on the Sticker is necessary.

Regarding the context and history of the Sticker in question, Defendants present the case that the School District was in the process of expanding its instruction on evolution and changing its Policy and Regulation to reflect that evolution must be taught, regardless of family teachings or possible offense. Once Cobb County parents learned of these changes, they expressed concern that the instruction of evolution would be in a manner that would “negate any possibility of religious belief.” Defs. Br. Supp. Summ. J. at 15. Defendants assert that faced with these concerns, they decided to place the Sticker in the textbook as a way to accommodate religious belief and reduce any offense that resulted from the changes in the School District’s Policy and Regulation.

The Court notes that the Supreme Court “has long recognized that the government may (and sometimes must) accommodate religious practices and that

it may do so without violating the Establishment Clause.” Hobbie v. Unemployment Appeals Com., 480 U.S. 136, 144-145, 107 S. Ct. 1046, 1051 (1987). However, the Court believes that permissible accommodation becomes impermissible establishment when the state actually seeks to promote religion rather than simply remove burdens on the free exercise of religion. That is the essence of the dispute here. While Defendants argue that they seek only to accommodate religious beliefs, Plaintiffs argue that Defendants are promoting and have the intent to promote religion by encouraging the teaching of intelligent design and creationism.

Despite these criticisms, Defendants assert that the state-sponsored action in this case has legitimate, secular purposes. First, Defendants say that this Sticker encourages critical thinking by explaining to students that evolution is only a theory. While the natural implication from the Sticker is that other theories exist, the Sticker does not reference or promote any other theories. As Defendants maintain, the Sticker includes no reference to “Christianity, the Bible, Christian practices, creationism, or any other religious topic.” Defs.’ Br. Supp. Summ. J. at 18. The Sticker likewise makes no mention of intelligent design. Thus, other theories that students might consider plausibly could be religious or non-religious in nature.

Plaintiffs counter that promoting critical thinking about evolution is futile and contrary to scientific consensus because most professional science associations do not “endorse teaching the evidence against evolution.” Pls.’ Resp. to Defs.’ Summ. J. at 20. Aside from Plaintiffs’ failure to cite any evidence in support of this proposition in the record, Plaintiff Selman himself even admits that not all scientists support the theory of evolution and that scientific controversy exists. (Selman Dep. at 48:2-17.) Plaintiffs’ second criticism of this stated purpose is that Defendants have in a discriminatory manner isolated evolution as the one theory to disclaim. However, the reason why Defendants focus on the theory of evolution as opposed to other theories brings the Court to the second secular purpose articulated by

Defendants.

The Sticker placed in the science textbooks also serves the purpose of reducing any offense that may have been caused to students and parents as a consequence of the School District's change in Policy and Regulation and the adoption of the new textbooks. (Johnson Aff. ¶3; Gray Aff. ¶3; O'Neill Aff. ¶3; Searcy Aff. ¶3.) In Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999), the Fifth Circuit considered a challenge to a similar "disclaimer" regarding evolutionary instruction.⁷ That "disclaimer," however explicitly expressed to students that the school board was not trying to influence or dissuade the Biblical version of Creation or any other concept. While the Fifth Circuit ultimately struck down the "disclaimer" as unconstitutional largely because of the reference to the Bible, the Court recognized as a legitimate secular purpose reducing offense to students and parents caused by

⁷ The Tangipahoa Parish, Louisiana, Board of Education passed the following resolution:

Whenever in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation the following statement shall be quoted immediately before the unit of study begins as a disclaimer from endorsement of such theory.

It is hereby recognized by the Tangipahoa Parish Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.

It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion or maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.

Freiler, 185 F.3d 337, 341 (5th Cir. 1999).

evolutionary instruction. Id. at 345. That court stated: “[W]e acknowledge that local school boards need not turn a blind eye to the concerns of students and parents troubled by the teaching of evolution in public classrooms.” Id. at 345-46. This Court agrees and finds that reducing offense to students and parents is a legitimate, secular purpose.

Seeking to set forth a genuine issue of material fact as to whether the Sticker in question actually serves a secular purpose that is not a ‘sham,’ Plaintiffs have come forth with evidence in several forms. First, Plaintiffs have submitted several affidavits from professors who are familiar with evolution, creationism, and intelligent design. In addition to discussing general information regarding the aforementioned alternative theories, they make such statements as the “wording of the disclaimer reveals that the motivation behind the disclaimers is non-scientific” and that “the only other credible motivation is a religious one, especially since the groups backing the stickers are known to object to the teaching of evolution.” (Pallas Aff. ¶ 16.) Furthermore, without indicating that they had the benefit of speaking with any members of the Board of Education or that they reviewed the deposition testimony of the Board members, they also make such statements as “[a]pparently, the Cobb County School Board wants its students to think critically only about evolutionary theory and not about any other theories presented in their textbooks.” (Pallas Aff. ¶ 14; Freed Aff. ¶ 14; Matson Aff. ¶ 14.) While these might be the affiants’ opinions, their opinions are obviously based on several assumptions that have no support in the record. Plaintiffs claim that these are “substantially expert affidavits.” However, assuming that these individuals could qualify as such, they have offered no basis to establish how they reached their particular opinions. Therefore, the Court will not consider such untrustworthy evidence.

Plaintiffs have also referenced the deposition testimony of members of the Board of Education to identify genuine issues of material fact. However, Plaintiffs’

characterization of that testimony is equally unreliable.⁸ For example, Plaintiffs cite to the depositions of Board members' to support the statement that "[t]he disclaimer was accepted because parents who wanted intelligent design and creationism taught in public schools complained to the school board about teaching evolution without teaching intelligent design and creationism." Pls.' Resp. to Defs. Summ. J. at 2. However, a review of that testimony reveals that Plaintiffs' statement is largely without support. Except for one Board member who acknowledged that parents wanted principles like intelligent design and creationism discussed, (Plenge Dep. at 19:17), all of the other Board members simply stated that parents were dissatisfied that only a single theory was being taught and that the existence of other theories was not even being acknowledged (Johnston Dep. 7:21; 8:3; 9:4; 16:21; 22:15; Tippins Dep. at 13:10; 14:17, 21; 32:10; Redden Dep. at 12:24, 18:24.) When asked about examples of non-religious theories that exist or that parents might want discussed, Board member Redden mentioned that there were other non-religious theories, such as the Big Bang Theory, that could be discussed. (Redden Dep. at 7.) Likewise, Board member Johnston mentioned Raelian as another non-religious theory concerning the origin of life. (Johnston Dep. at 23:1.)

Plaintiffs likewise have produced a series of e-mails exchanged on a listserv associated with intelligent design to which a Cobb County parent belongs.⁹ The

⁸ In addition to the testimony identified in the text that Plaintiffs mischaracterized, Plaintiffs also cite to deposition testimony to assert that "school board members concocted a scheme to assert that a dispute exists in science about the legitimacy of evolution." Pls.' Resp. to Defs.' Summ. J. at 3. However, there is no evidence in the record to support this assertion. Moreover, while a couple of Board members acknowledged an awareness of intelligent design and creationism, their deposition testimony does not indicate that they "wanted to inform students that they contend that evolution is involved in a scientific dispute with intelligent design/creationism." *Id.*

⁹ Plaintiffs submitted this material subsequent to the filing of their response to Defendants' Motion for Summary Judgment in a document titled "Notice of Filing " [Doc. No. 27-1.] The Court construes this as a Motion for Leave to File Supplemental Material in Response to Defendants' Motion for Summary Judgment. In the interest of

discussion in these e-mails relates to how parents can essentially become activists to encourage schools to consider theories on origin of life other than evolution, particularly intelligent design. The Cobb County parent explains in these e-mails how he and other parents have been able to covertly persuade the Cobb County School District to change their policy regarding evolution to allow for student consideration of other theories. Part of the parents' strategy was to disguise what was essentially a religious issue for them as one concerning consideration of other theories *generally*. While these e-mails provide support for Plaintiffs' theory that there were parents in Cobb County advocating for discussions of intelligent design in schools, a reasonable trier of fact would likely conclude that these parents came across to the members of the Board of Education as parents who were simply concerned that their children were being spoon-fed a single idea regarding the origin of living things. The Court is unwilling to impute the ill-motives of these parents to the Board of Education, particularly when the record evidences that the parents arguably engaged in trickery to get Board members and others affiliated with Cobb County schools to believe that they were concerned solely with objective science.

Thus, there is little evidence in the record to establish that the Board of Education's adoption of the Sticker in question was motivated even in part by a religious purpose.¹⁰ The majority of the members of the Board of Education have

considering all relevant evidence and because Defendants have lodged no objection, the Court **GRANTS** this motion.

¹⁰ There is evidence in the record that a Board member sought legal advice regarding whether Intelligent Design could be taught in classrooms. (Tippins Dep. at 51:18-25;59:1-11.) After learning that it could not, however, this was no longer an issue. The fact that an inquiry was made is relevant but not dispositive. In Adler, an Eleventh Circuit case considering whether it constituted an establishment of religion for a school to permit students to vote on whether to select a student to deliver a message of their own choosing at high school graduation, the court addressed this very issue and said: "There is nothing inappropriate about a school system attempting to understand its constitutional obligations and to instruct school officials on how to comply with the law."

attested that they did not intend to promote or benefit religion in voting for the inclusion of this Sticker in certain textbooks. (Searcy Aff. ¶5; O'Neill Aff. ¶4; Gray Aff. ¶5; Johnson Aff. ¶5.) Further, the evidence shows that most of the Board members had little specific knowledge about intelligent design or creationism, the theories that Plaintiffs purport they sought to promote. (Johnston Dep. at 10:22-23;27:9-15; Plenge Dep. at 16:22-25; 24:1-8; 29:1-8; Tippins Dep. at 25:2;26:3;28:2-11.)

Even if a few of the Board members had a religious purpose in mind when adopting the Sticker, the Sticker would not be constitutionally invalid. Bown v. Gwinnett County School District, 112 F.3d 1464, 1471-72 (11th Cir. 1997) (holding that religious purpose of individual legislators was insufficient to declare statute invalid). Furthermore, even if all of the Board members admitted that they were motivated in part by a religious purpose, the Sticker still satisfies the first prong of the Lemon test because the adoption of the Sticker clearly was not motivated *wholly* by an impermissible purpose. See Wallace, 472 U.S. at 56. The Sticker here encourages critical thinking among students and also reduces any offense that students might sustain with the School District's strengthening and enhancement of evolution instruction in Cobb County schools. Thus, the Court finds Plaintiffs have failed to raise a genuine issue of material fact as to whether the Board of Education had a secular purpose in deciding to put the Sticker in certain science textbooks.

2. Primary Effect of Sticker

The Court next turns its attention to the second prong of the Lemon analysis. Under this prong, a state action may be deemed impermissible if its primary effect is to advance or prohibit religion. In making this determination, the Court pays "particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." Allegheny, 492 U.S. at 592.

Adler, 206 F.3d at 1086.

“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” Lynch, 465 U.S. at 688.

The Sticker in this case does not, on its face, advance or endorse a religious belief or practice. Rather, the Sticker simply informs students that evolution is a theory, not a fact, and that it should not be taken at face value. As mentioned above, Plaintiff Selman has acknowledged that even other scientists dispute the theory of evolution. Therefore, encouraging consideration of alternatives to evolutionary theory does not necessarily entail promotion of religious beliefs.

Moeller v. Schrenko, 251 Ga. App. 151, 554 S.E.2d 198 (2001), a Georgia case analyzing an Establishment Clause challenge under Lemon, considered whether a school’s use of biology textbook containing references to creationism violated the Establishment Clause. This case is distinguishable from the case at bar because the material challenged in Moeller actually referenced religious ideas. Nevertheless, in analyzing the material under the second prong of Lemon, the Moeller court held the following:

[T]he only religious references which are made inform the students that creationism is one commonly given explanation for the origin of life. This reference in no way advances or endorses a religious belief or practice and, as such, use of the textbook does not violate the second prong of the *Lemon* test.

Moeller, 251 Ga. App. at 154. This decision is persuasive inasmuch as the Sticker here, according to Defendants, serves a similar purpose of informing students that there are alternative theories regarding the origin of human life.

The Fifth Circuit in Freiler, however, reached an opposite conclusion. The court in that case ruled that the oral “disclaimer” regarding evolution had the primary effect of protecting and maintaining “a particular religious viewpoint, namely belief in the Biblical version of creation.” The Court went on to state:

In reaching this conclusion, we rely on the interplay of three factors: (1)

the juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories of the origin of life; (2) the reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life; and (3) the “Biblical version of Creation” as the only alternative theory explicitly referenced in the disclaimer.

Freiler, 185 F.3d at 346.

This case is, of course, is distinguishable from Freiler inasmuch as the Sticker at issue does not remind students that they have the right to maintain beliefs taught by their parents regarding the origin of life and there is no express reference to the “Biblical version of Creation” or any other theory of origin other than evolution. Nevertheless, Plaintiffs do contend that there is at least an arguable disavowal of endorsement of evolution by the Sticker’s statement that “evolution is a theory, not a fact,” and the Sticker also implicitly encourages students to consider other alternatives. Indeed, most of the Board members concurred that they wanted students to consider other alternatives. Therefore, the Court believes that Plaintiffs have raised a genuine issue of material fact regarding the primary effect of the Sticker.

3. Excessive State Entanglement with Religion

The third prong of Lemon asks whether as a result of the Board of Education’s adoption of this Sticker, the government will be required to monitor the activity of Cobb County classrooms. While Defendants argue that there is no entanglement issue here, Plaintiffs contend that the effect of this Sticker being in textbooks is that the School Board will have to monitor individual classrooms to make sure that intelligent design and creationism are not being taught. In reply to this argument, Defendants explain that neither the School District nor the Board of Education monitor the Sticker after it is placed in the textbooks. Rather, the Sticker serves only as note that evolution is not the only theory on the origin of life.

Inasmuch as Defendants are encouraging students to consider alternative theories to evolution, it is reasonable to expect that these alternative theories will

come up in classroom discussion. This is particularly so, where as here, there is evidence that there is a group of parents in Cobb County who are advocating for intelligent design to be discussed in the classroom. The current IDBD Policy mentions that the Board of Education desires that students have academic freedom. Although the Policy is qualified to state that the academic freedom should be "consistent with legal requirements," the practical effect of students being encouraged to consider and discuss alternatives to evolution could implicate excessive entanglement concerns. Therefore, the Court finds that there are likewise genuine issues of material fact remaining with respect to this third prong of Lemon.

B. Claim Under State Law

Having found that genuine issues of material fact exist regarding whether Defendants' have violated the Establishment Clause, the Court believes that there are likewise genuine issues of material fact remaining regarding whether Defendants have violated state law.

CONCLUSION

For the foregoing reasons, the Court hereby **DENIES** Defendants' Motion for Summary Judgment [Doc. No. 22-1].

Further, the Court **GRANTS** Plaintiffs' Motion for Leave to File Supplemental Material in Response to Defendants' Motion for Summary Judgment [Doc. No. 27-1] and **DENIES** Defendants' Motion to Strike Affidavits [Doc. No. 28-1].

SO ORDERED this 31st day of March, 2004.


CLARENCE COOPER
UNITED STATES DISTRICT JUDGE