

N O T I C E

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To: Michael Eric Manely, Esq.
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Suite C
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Marietta, GA 30060

July 22, 2003

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Jeffrey Michael Selman,

plaintiff

CIVIL ACTION

v.

NO. 1:2-cv-2325-CC

Cobb County School District, et al,

defendant

NOTICE TO RESPOND TO SUMMARY JUDGMENT MOTION

On 7/21/03, Cobb County School District, et al,
filed a motion for summary judgment in this Court, case document
number 22.

Pursuant to this Court's order dated April 14, 1987, opposing coun-
sel is hereby notified that within 20 days from the date said motion was

served, filing of all materials, including any affidavits, depositions, answers to interrogatories, admissions on file and any other relevant materials to be considered in opposition to the motion for summary judgment, is required. Federal Rules of Civil Procedure, Rule 56(c); Moore v. State of Florida, 703 F.2d 516, 519 (11th Cir. 1983).

Unless otherwise stated by the trial court, the Court will take said motion for summary judgment under advisement immediately upon the close of the aforesaid 20 day period. Id. at 519. See also Donaldson v. Clark, 786 F.2d 1570, 1575 (11th Cir. 1986); Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985).

The entry of a summary judgment by the trial court is a final judgment on the claim or claims decided. Finn v. Gunter, 722 F.2d 711, 713 (11th Cir. 1984). Whenever the non-moving party bears the burden of proof at trial on a dispositive issue and the party moving for summary judgment has demonstrated the absence of any genuine issue of fact, the nonmoving party must go beyond the pleadings and must designate, by affidavit or other materials, "... specific facts showing that there is a genuine issue for trial." Federal Rules of Civil Procedure, Rule 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 324; 106 S.Ct. 2548, 2552-53; 91 L.Ed.2d 265, 272-3.

Luther D. Thomas, Clerk
United States District Court
Northern District of Georgia

Copies to counsel of record

N O T I C E
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To: Ernest Linwood Gunn IV, Esq.
Brock Clay Calhoun Wilson & Rogers
49 Atlanta Street
Marietta, GA 30060-8611

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NORTHERN DISTRICT OF GEORGIA
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Luther D. Thomas, Clerk
United States District Court
Northern District of Georgia

Copies to counsel of record

ORIGINAL
U.S. DISTRICT COURT
D.C. Atlanta

JUL 21 2003

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

By: *Chauscher*
Deputy Clerk

Jeffrey Michael Selman, :
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 Plaintiff, :
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 v. :
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 :
 Cobb County School District, :
 Cobb County Board of Education, :
 Joe Redden, Superintendent, :
 :
 :
 Defendants. :

Civil Action File
No. 1:02-CV-2325-CC

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT


COME NOW, Cobb County School District, Cobb County Board of Education and Joe Redden, named as Defendants in the above-styled action, and pursuant to Rule 56 of the Federal Rules of Civil Procedure move that this Court enter summary judgment against Plaintiff on all claims. Defendant show that, based upon the brief and evidentiary materials filed concurrently herewith, there is no genuine issue of material fact as to any claim asserted by Plaintiff.

[signature on following page]

Respectfully submitted this 21 day of July, 2003.

**BROCK, CLAY, CLAY, CALHOUN,
WILSON & ROGERS, P.C.**

Attorneys for Defendant



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ORIGINAL

JUL 21 2003

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

THOMAS, Clerk
Chleucher
Deputy Clerk

Jeffrey Michael Selman,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action File
	:	No. 1:02-CV-2325-CC
	:	
Cobb County School District,	:	
Cobb County Board of Education,	:	
Joe Redden, Superintendent,	:	
	:	
Defendants.	:	

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COME NOW, Cobb County School District, Cobb County Board of Education and Joe Redden, named as Defendants in the above-styled action, and pursuant to Rule 56 of the Federal Rules of Civil Procedure file this Brief in Support of the Motion for Summary Judgment on all claims and show as follows:

I. INTRODUCTION

Public schools are in a precarious position whenever providing instruction on the theory of evolution because it is a scientific theory which also can relate to philosophical or religious ideas. If evolution is taught as pure irrefutable fact, without regard to the religious or philosophical sensibilities of parents and students, school districts can be

sued for violations of the Free Exercise clause of the First Amendment. When school districts acknowledge that science instruction need not be unduly offensive to a student's religious beliefs, they run the risk of a suit like this one, where it is insisted that any criticism of the theory of evolution can only be motivated by a desire to promote religion.

Plaintiff maintains that the Board's decision to place a statement in science textbooks which stated "evolution is a theory, not a fact" which "should be critically considered" constitutes an establishment of religion. The statement is not only neutral on its face, in context it was part of a broader effort by the Cobb County Board of Education (the "Board") to **enhance** evolution instruction. The Board adopted new textbooks providing appropriate instruction on theories of evolution, and revised its Policy and Regulation to make clear that evolution would be taught, that religion would not be taught, and that religious neutrality would be maintained in the classroom. The sticker has several secular purposes, and does not otherwise constitute an establishment of religion.

II. STATEMENT OF FACTS

The Cobb County School District ("CCSD") began the process of adopting new science textbooks in the fall of 2001. (Redden Affidavit, ¶3). At the beginning of that process, in October

2001, CCSD's textbook adoption committee raised concerns regarding curriculum and instruction on theories of the origin of life. (Id.). The committee asked for guidance regarding the interpretation of CCSD Policy and Regulation IDBD, regarding theories of origin. 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. (Redden Affidavit, ¶4).

After legal review of issues raised by the textbook adoption committee, the school administration determined that revisions to Policy and Regulation IDBD would be recommended which would strengthen evolution instruction. (Redden Affidavit, ¶¶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 Education to place the sticker in science textbooks which is at issue here. (Id.)

Prior to presenting the new Policy and Regulation, the administration recommended science textbooks for adoption by the

Board of Education; the Board members included Gordon O'Neill, Betty Gray, Johnny Johnson, Laura Searcy, Lindsey Tippins, Curt Johnston, and Teresa Plenge. (Redden Affidavit, ¶7). Upon adopting the textbooks, the Board voted unanimously to place a sticker in certain science textbooks stating:

"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."

(Complaint, ¶13). The sticker was drafted by legal counsel and was intended to be Constitutional. (Deposition of Curt Johnston, pp.7, 1.21-8, 1.15). According to Plaintiff, the sticker does not accurately state the "fundamentalist Christian" viewpoint regarding evolution; that view would be, not that evolution is a theory, but that never happened. (Selman Depo., p. 46, 1.15-20).

Following the textbook adoption, the Board adopted its revised Policy IDBD, theories of origin. (Johnston Depo., p.24, 11. 14-17, Exh. 1). The policy states in part:

"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 for or against 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 Depo., p. 25, 1.7-12, Exh. 2).¹

Of the seven Board members, the majority testified that they did not intend to promote or benefit religion in voting for the statement at issue. (Affidavits of Laura Searcy, ¶5; Gordon O'Neill, ¶4; Betty Gray, ¶5; and Johnny Johnson, ¶5). Most Board

¹The Regulation is the administrative statement regarding execution of the Policy. (Johnston Depo., p.25, 11.11-15).

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, pp. 17 11.13-23; 33, 11.9-17; 42, 11.3-12; 43, 11.4-7; Deposition of Curt Johnston, pp. 24, 11.14-25, 1.12, Exh. 1, 2; Johnson Affidavit, ¶4; Gray Affidavit, ¶4; Searcy Affidavit, ¶4).

As would be expected, Board members had a variety of reasons for their votes to place the facially-neutral statement in certain textbooks. Concerns by parents regarding the content of the new textbooks and the improving evolution instruction were considered by all of the Board members, although different Board members had different ideas about what the parent concerns were.

Lindsey Tippins was concerned that the science textbooks did not address "controversy in the field of science about macroevolution from an evidentiary standpoint." (Tippins Depo., p.14, 1.23-p. 15, 1.4).² Mr. Tippins testified that there were communications from members of the public, as well as members of

²Plaintiff admits that a small minority of scientists dispute the theory of evolution. (Selman Depo., p.48, 11.2-17). While he holds only a bachelor's degree in history, he considers anyone who holds a different scientific viewpoint regarding evolution as a "religious fanatic." (Selman Depo., p. 10, 11.7-15; p. 39, 11.6-22).

the scientific community, both supporting and opposing the idea that there might be a scientific controversy regarding evolution. (Tippins Depo., pp. 22, 11.2-19; p. 24, 11.1-9). His purpose in voting for the sticker was "to pursue and facilitate open discussion in the classroom about controversial issues of a scientific nature." (Tippins Depo., p. 61, 11. 12-16). Mr. Tippins raised issues about whether intelligent design or scientific creationism should be included, but he admitted that he did not know whether either concept was scientific in nature. (Tippins Depo., p. 25, 1. 2-20; p. 26, 11. 19-p. 27, 1.14). He raised these issues at a Board work session in the information gathering stage, and requested a legal opinion regarding the issue. (Tippins Depo., p. 51, 1. 18-p. 52, 1. 11). After he was advised that it was not permissible to teach these concepts, that was the end of his consideration. (Tippins Depo., p. 56, 1. 25-p.57, 1. 17).

Curt Johnston heard parent complaints that the textbooks at issue did not make a fair presentation of the theories of origin. (Johnston Depo., p. 9, 1. 3-8). In response to parent complaints, "we consulted our attorney and asked him if he felt there was any language that would help to address their issues but stay within the confines of the law." (Johnston Depo., p. 7, 1.19-p. 8, 1.12). At around the time of the vote, Mr. Johnston

issued a public statement the sticker "was not intended to interject religion into science instruction but simply to make students aware that a scientific dispute exists." (Johnston Depo., p. 12, l. 22-p.14, l. 20).³ In voting for the statement, he wanted students to critically consider information regarding evolution and try to determine its validity. (Johnston Depo., p. 19, ll. 4-12). This purpose was consistent with his purpose in approving the Policy and Regulation concerning theories of origin. (Johnston Depo., p. 24, l. 14-p. 26, l.6, Exh. 1, 2).

Teresa Plenge recalled that the Board deliberation on evolution instruction began with proposed revisions to the evolution policy. (Plenge Depo., p. 14-l. 15-p. 15, l.8). She testified that some parents wanted the curriculum to include principles like intelligent design and creationism, and others just wanted a broad-based approach to the subject, which led to the sticker at issue. (Plenge Depo., p. 19, l. 14-p. 20, l.12). She stated that another purpose she had was that teachers had requested clarification due to problems with the previous Policy regarding teaching theories of origin. (Plenge Depo., p. 17, l. 13-23). Her intent in voting for the sticker was consistent with

³Mr. Johnston stated that the scientific dispute included creation science, intelligent design, and the theory that life on Earth came from outer space. (Johnston Depo., p. 13, l. 15-p. 14, l. 20).

the revised Policy and Regulation regarding theories of origin. (Plenge Depo., p. 42, l. 3-p.43, l.7).

Other Board members at the time were attempting to provide a statement to assure parents that the enhanced evolution instruction would not be unduly offensive to their philosophical or religious beliefs, or as stated in the Policy, "to promote tolerance and acceptance of diversity of opinion". (Johnson Affidavit, ¶3); Gray Affidavit, ¶3, O'Neill Affidavit, ¶3; Searcy Affidavit, ¶3). Consistent with the belief of Mr. Tippins, Mr. Johnston, and Dr. Plenge that the scientific controversy was worthy of discussion, the other Board members stated that they also wanted the sticker to promote critical thinking. (Johnson Affidavit, ¶3; O'Neill Affidavit, ¶3; Gray Affidavit, ¶3; Searcy Affidavit, ¶3).⁴ Ms. Searcy also felt that the placement of the sticker in the front of these textbooks would serve a purpose of notification to parents and students so that they could handle any potential offense or conflicts the scientific information might cause. (Searcy Affidavit, ¶3). Consistent with Dr.

⁴The sticker states, in part, that evolution curriculum "should be approached with an open mind, studied carefully, and critically considered." (Complaint, ¶13). The Policy states a purpose to "foster critical thinking among students"; the Regulation states discussion of theories of origin "should be moderated to promote a sense of scientific inquiry." (Johnston Depo., Exh. 1, 2).

Plenge's concern about providing clarification to teachers in the classroom, both Ms. Searcy and Ms. Gray thought that the sticker served the additional purpose of clarifying the new policy that evolution would be taught (contrary to statements in the previous Policy and Regulation).⁵ (Searcy Affidavit, ¶4; Gray Affidavit, ¶4).

III. ARGUMENT AND CITATION OF AUTHORITY

A. First Amendment Prohibits Government from Promoting Religion.

The principle of government neutrality toward religion, and the idea that the school district is permitted to accommodate, but not promote, religious belief, is a central issue in this case. The evolution sticker came about during a series of events designed to bolster evolution instruction; it is no coincidence that some segments of the public were up in arms regarding the changes in evolution instruction. The mere acknowledgment that evolution is a theory, not a fact, and the later expression that science and religion are different concepts, but not mutually exclusive, are exactly the kinds of recognition of diversity of

⁵George Stickel, Supervisor of High School Science, stated that he and other teachers were previously cautious and concerned about the handling of the subject of evolution in classrooms. He stated his belief that the statement at issue would promote critical thinking. (Stickel Affidavit, ¶¶4-6).

opinion and tolerance which public schools should be about.

In Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971), the Court identified "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity'." 403 U.S. at 612(citation omitted).

In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court. Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith - as an absolutist approach would dictate - the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.

Lynch v. Donnelly, 465 U.S. 668, 678, 104 S.Ct. 1355(1984). The Establishment Clause analysis is "in large part a legal question to be answered on the basis of judicial interpretation of social factsEvery government practice must be judged in its unique circumstances". Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 315, 120 S. Ct. 2266 (2000) (citing Lynch). See Lee v. Weisman, 505 U.S. 577, 598, 112 S.Ct. 2649 (1992) ("the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.")

Based on the interplay between the Free Exercise Clause and the Establishment Clause, the Court has noted that government is often required to accommodate religion, and that such accommodation does not necessarily constitute a violation of the Establishment Clause. Hobbie v. Unemployment Appeals Comm., 480 U.S. 136, 144, 107 S.Ct. 1046 (1987).

The Establishment Clause limits any governmental effort to promote particular religious views to the detriment of those who hold other religious beliefs or no religious beliefs, while the Free Exercise Clause affirmatively requires the government not to interfere with the religious practices of its citizens The line between improper

establishment and accommodation 'must be delicately drawn both to protect the free exercise of religion and to prohibit its establishment.'

Brown v. Gilmore, 258 F.3d. 265, 274-275 (4th Cir. 2001). The government may constitutionally accommodate religious belief, not to the minimum extent required to avoid a Free Exercise violation, but to a even greater extent, so long as the principle of neutrality is not violated. Walz v. Tax Commission, 397 U.S. 664, 673, 90 S.Ct. 1409 (1970).

The Supreme Court has generally examined Establishment Clause cases under the criteria set out in Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S.Ct. 2105 (1971). The Lemon test requires that a governmental law or policy (1) have a secular legislative purpose; (2) have a principal or primary effect which neither advances nor inhibits religion; and (3) not foster an excessive governmental entanglement with religion. If the law or policy at issue does not satisfy each of the three prongs, it violates the Establishment Clause.

As will be shown herein, the purpose prong of the Lemon test is the only part of the test where there is any real legal issue in this case. If the sticker has a permissible secular purpose, its effect clearly does not advance religion, and there is no

issue of school district entanglement with religion whatsoever.

B. Evolution Statement Has Clear Secular Purposes.

The court should defer to a State's articulation of a secular purpose, so long as the statement is sincere and not a sham. Edwards v. Aguillard, 482 U.S. 578, 586-7, 107 S.Ct. 2573 (1987). In Wallace v. Jaffree, Justice O'Connor stated that the inquiry into the purpose "should be deferential and limited . . . Even if the text and official history of the statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief 'was and is the law's reason for existence'." 472 U.S. 38, 75-6, 105 S.Ct. 2479, 2499-2500 (1985) (O'Connor, concurring). To determine the statement's purpose, the Court should look at the language of the statement itself, as well as the legislative history and unique context of the statement. Edwards, 482 U.S. at 594.

In this case, although Plaintiff will disagree with the validity of the statement as a scientific matter, there can be no dispute that the language itself is neutral and devoid of religious content. In Moeller v. Schrenko, 251 Ga. App. 151, 554 S.E. 2d 198 (2001), the Court rejected challenges to similar language in a science text. The text in that case stated that "science is unable to resolve disputes concerning the origin of

life", and mentioned creationism and evolution as alternatives. 251 Ga. App. at 153. The Court found such instruction did not even raise an Establishment Clause issue. Id.

As to the context of the sticker, this is not a case in which a school had attempted to have school-sponsored prayer, and then enacted a new policy for the purpose of getting around the clear prohibition on the practice, or where a school district restricted the instruction of evolution unless creationism was also taught. In this case, the school district was in the process of unilaterally expanding its evolution instruction, as well as changing its Policy and Regulation to require clearly that evolution must be taught despite family teachings or possible offense. These changes were in the works months before any complaints by parents. The challenges came, not surprisingly, from parents who were concerned that evolution might be taught in a way which would negate any possibility of religious belief. In this context, the statement that evolution is a theory and not a fact, and should be critically considered, is not only entirely accurate, but is also entirely appropriate as an accommodation of religious belief.⁶

⁶A theory is defined as "a set of statements or principles devised to explain a group of facts or phenomena, especially one that has been repeatedly tested or is widely accepted and can be used to make predictions about natural phenomena." American

In fact, the Supreme Court has a long history of validating efforts of public schools to avoid unnecessarily offending people of diverse religious beliefs, or the lack thereof, whether they be popular or unpopular. Bethel Sch. Dist. v. Frazier, 478 U.S. 675, 681, 106 S.Ct. 3159 (1986). ("fundamental values . . . essential to a democratic society. . . include tolerance of divergent political and religious views, even when the views expressed may be unpopular.") See Zorach v. Clauson, 343 U.S. 306, 314, 72 S.Ct. 679 (1952) (government is not required to "show a callous indifference to religious groups"); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).

In recent cases, the Eleventh Circuit has been unwilling to do a searching inquiry to attempt to unearth an impermissible purpose for a government act which furthers the secular purpose of accommodating religious belief. In Adler v. Duval County Sch. Board, 206 F. 3d 1070 (11th Cir. 2000) (*en banc*) (*vacated* 531 U.S. 801, *reinstated* 250 F.3d 1330 (11th Cir. 2001), the Eleventh Circuit considered an Establishment Clause challenge to Duval County School's policy allowing students to vote on whether to select a student to deliver a message of their own choosing at high school graduation. The court affirmed the district court's

Heritage Dictionary of the English Language, 4th Ed. (2000).

finding that the policy was Constitutional on its face and satisfied the three prongs of the Lemon test. In analyzing the purpose of the school policy, the court found that certain historical facts suggesting a religious intent could not overcome the neutrality of the policy on its face.⁷

The court focused on the facial neutrality of the policy, noting that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Id. at 1077. The Eleventh Circuit found three clear secular purposes for the graduation message policy: (1) allowing graduating students to participate in planning the graduation ceremony; (2) allowing students to solemnize graduation; and (3) "permitting student freedom of expression, whether the content of the expression takes a secular or religious form." Id. at 1085.

As expressed in the Complaint and in deposition questioning, Plaintiff's case hinges largely on alleged individual Board members' statements discussing whether creationism could be taught, mainly before the Board members received a legal opinion negating this possibility. The Adler court refused to find that

⁷ In response to suggestions that "student-initiated, student-led prayer might be constitutional", a memorandum entitled "Graduation Prayers" was issued advising school principals on graduation messages. 206 F.3d at 1071-1072.

isolated statements by individual board members or officials could overcome the language of the policy itself.

Discerning the subjective motivation of those enacting the statute, to be honest, is almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed finite'.

Id. at 1086 (citing Edwards v. Aguillard, 482 U.S. 578, 636-637, 107 S.Ct. 2573, (1987) (Scalia, J., dissenting)).

Under the analysis set forth in Adler, the court should not find a religious purpose for the evolution sticker, ignoring undisputed secular purposes such as promoting critical thinking, fostering tolerance and avoiding undue offense to parents and students. To begin with, on its face, the sticker does not mention Christianity, the Bible, Christian practices, creationism, or any other religious topic. Indeed, as Mr. Selman himself admitted, while the Complaint alleges that the statement is a "fundamentalist Christian expression", in fact the language itself is at odds with the belief of fundamentalist Christians.

Moreover, the context of this particular message completely discounts any religious purpose. The three-sentence sticker was placed in textbooks providing comprehensive evolution instruction over hundreds of pages of text. (Stickel Affidavit, Exh. A, B).

The Board was in the process of beefing up its evolution curriculum, and on the heels of the vote on the sticker enacted a Policy which explicitly states four secular purposes: (1) to foster critical thinking among students; (2) to allow academic freedom consistent with legal requirements; (3) to promote tolerance and acceptance of diversity of opinion; and (4) to ensure a posture of neutrality toward religion. The actions of the Board not only belie the allegation their purpose was religious, they also negate the possibility that any reasonable person could glean a religious effect.

In Bown v. Gwinnett County School District, 112 F.3d 1464 (11th Cir. 1997), the court conducted a similar analysis in finding that the legislative history of Georgia's Moment of Quiet Reflection in Schools Act could not be construed to overcome the express statutory language articulating a clear secular purpose and disclaiming a religious purpose. The Act amended a previous law which allowed teachers to conduct a brief period of silent prayer or meditation at the beginning of each school day; the Act stated that the period of quiet reflection "shall not prevent student-initiated voluntary school prayers." 112 F.3d at 1466.

In Bown individual statements by legislators indicated a clear religious purpose in voting for the Act. However, the Court noted that the motivations of individual legislators could

not invalidate the law. "[E]ven if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law." Id. at 1471-72 (quoting Board of Education v. Mergens, 496 U.S. 226, 110 S.Ct. 2356, (1990)).

In this case, Plaintiff offers the statements of a board member (Mr. Tippins) who raised the possibility of teaching creationism in the classroom, but who later stated that once he was advised that such a practice would be impermissible, that was the end of the matter as far as he was concerned. Every board member testified that they intended the sticker to promote critical thinking by students, which not only matches the language of the sticker itself, but is also echoed in the Policy and Regulation which implemented the evolution curriculum. A majority of the Board testified that they had no intent whatsoever to promote religion in voting for the statement, and that religious accommodation in the form of addressing the fears of parents that evolution would be used to denigrate religious belief was also a primary motive. Plaintiff's evidence can amount no more than a scintilla in the face of the clear evidence of a secular purpose and the facial neutrality of the statement.

C. Primary Effect of Sticker Does Not Advance Religion.

The issue under the effects prong of the Lemon test is whether the government action in fact conveys a message of endorsement or disapproval of religion. Bown, 112 F.3d at 1472. "Endorsement sends a message to non-adherents 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. 668, 688.⁸ The message in this case does not endorse any religious viewpoint whatsoever, and its message can only be characterized as inclusive. Unless belief in the infallibility of the theory of evolution can be characterized as a religion, contrary to the holdings of many courts, the statement that "evolution is a theory and not a fact" cannot be reasonably construed as either an endorsement or disapproval of religion.

The message in this case is much further removed from a possible endorsement of religion than other government actions which the courts have found permissible. In Bown, for example, the court held that the moment of silent reflection did not have

⁸The lack of any endorsement is demonstrated by comparing the position of Plaintiff and Defendants. In contrast to Plaintiff's view that any criticism of evolution theory is religious fanaticism, Defendants' official policy encourages "tolerance", "acceptance", and "neutrality."

a primary effect of advancing religion, even though prayer was allowed during the time and teachers were permitted to inform students that they could pray. 112 F.3d at 1472. In Adler, the court found a lack of impermissible effect based on the language of the policy itself. 206 F.3d at 1089; see also Brown v. Gilmore, 258 F.3d at 277-78.

One case upon which the Plaintiff will rely can be easily distinguished. In Freiler v. Tangipahoa Parish Board of Education, the Fifth Circuit addressed a similar issue regarding a statement required by the school board to be read prior to instruction on evolution. In that case, the language of the statement to be read specifically mentioned the Biblical version of creation: "the scientific theory of evolution. . . .[is] not intended to influence or dissuade the Biblical version of Creation or any other concept." 185 F.3d 337, 341 (5th Cir. 1999). While the district court in that case found that there was no secular purpose for the statement, the Fifth Circuit disagreed, holding that the disclaimer promoted the stated purposes of disclaiming any orthodoxy of belief and reducing student/parent offense caused by the teaching of evolution. 185 F.3d at 345. The Freiler court found, however, that the statement had the primary effect of advancing a particular religious viewpoint due to three factors, including the reminder

that students had a right to maintain beliefs taught by their parents, and the proffer of the "Biblical version of Creation" as an alternative theory to be considered. *Id.* at 346. None of these three factors are present here to allow a finding that the primary effect is to promote religion.⁹

D. Statement Causes No Entanglement.

The issue under the entanglement prong is whether, in order to avoid the religious effect of a government action, the government must enter into an arrangement which requires it to monitor the activity. *Bown*, 112 F.3d at 1473. The Eleventh Circuit in *Adler* and *Bown* found absolutely no issue with entanglement, although there were ongoing activities occurring pursuant to the policies at issue, largely because the policies were facially neutral. The statement at issue in this case is not only facially neutral, but it was a one-time occurrence which could not possibly require any type of monitoring. There is simply no entanglement issue here.

E. No Valid Georgia Constitutional Claim.

Plaintiff's claim under Article I, Section II, Paragraph VII of the Georgia Constitution, regarding a prohibition against

⁹See *Freiler v. Tangipahoa Parish Board of Education*, 201 F.3d 602 (*pet. rehearing en banc*) (Barksdale, dissenting); *Tangipahoa Parish Board of Education v. Freiler*, 530 U.S. 1251, 120 S.Ct. 2705 (*pet. for cert.*) (J. Scalia, dissenting).

government aid to any church, fails for the same reasons as the federal claim. Whether this provision is interpreted in a manner similar to the federal constitutional claim, or even in a more restrictive manner, if the expenditure of funds on the stickers does not in fact serve to aid religion, the court's inquiry is at an end. Although there is little case law interpreting this section, courts have approved practices which arguably provide a much greater assistance to religious causes than the facially neutral statements at issue here. For instance, in Birdine v. Moreland, 579 F. Supp. 412 (N.D. Ga. 1983) the court approved the practice of the Georgia Department of Transportation providing religious grade markers at the request of decendants. See Savannah v. Richter, 160 Ga. 177, 127 S.E. 148 (1925); 2000 Op. Atty. Gen. No. 2000-9, 2000 GA. AG LEXIS 24 (approving "respect for Creator" portion of character education curriculum in Georgia). Summary judgment should be granted on this claim.¹⁰

¹⁰All claims against Superintendent Joseph Redden should be dismissed as well. It is undisputed that the decision to place the sticker in textbooks was made the Board, and not by the Superintendent. (Redden Affidavit, ¶7). In addition, Superintendent Redden is not a policymaker for the School District as a matter of law. O.C.G.A. § 20-2-50; State Board of Education v. Elbert County Board of Education, 112 Ga. App. 840, 146 S.E. 2d 344 (1965). Superintendent Redden is protected by qualified immunity due to a lack of clearly established law on this issue. Hope v. Pelzer, 536 U.S. 730, 122 S.Ct. 2508 (2002).


IV. CONCLUSION

In Plaintiff's view, there is simply no scientific controversy regarding any aspect of the theory of evolution, contrary to the statements in the science textbooks at issue in Moeller v. Schrenko. Since there is no scientific controversy, Plaintiff believes any criticism of this theory must necessarily be religious in nature. Both his premise and his conclusion are faulty. The Board members have several valid secular reasons for putting the sticker in textbooks which are on its face only promotes a sense of scientific inquiry. The sticker has a secular purpose, a secular effect, and raises no entanglement issues, since so that summary judgment is due to be granted as to both the Plaintiff's claims.

Respectfully submitted this 21 day of July, 2003.

**BROCK, CLAY, CLAY, CALHOUN,
WILSON & ROGERS, P.C.**

Attorneys for Defendant




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CERTIFICATE OF COMPLIANCE WITH PAGE AND TYPE LIMITATIONS

Pursuant to Local Rule 7.1 (D), counsel hereby files with the Court this Certificate of Compliance. The brief filed in support of Defendants' Motion for Summary Judgment was composed with Courier New Font in 12-point type.


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Deputy Clerk

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

Jeffrey Michael Selman,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action File
	:	No. 1:02-CV-2325-CC
	:	
Cobb County School District,	:	
Cobb County Board of Education,	:	
Joe Redden, Superintendent,	:	
	:	
Defendants.	:	

**STATEMENT OF MATERIAL FACTS AS TO WHICH THERE
IS NO GENUINE ISSUE TO BE TRIED**

COME NOW, Cobb County School District, Cobb County Board of Education and Joe Redden, named as Defendants in the above-styled action, and pursuant to Rule 56 of the Federal Rules of Civil Procedure file this Statement of Material Facts As To Which There Is No Genuine Issue to Be Tried and show as follows:

1.

The Cobb County School District ("CCSD") began the process of adopting new science textbooks in the fall of 2001. (Redden Affidavit, ¶3). At the beginning of that process, in October 2001, CCSD's textbook adoption committee raised concerns

regarding curriculum and instruction on theories of the origin of life. (Id.).

2.

In the fall of 2001, 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. (Redden Affidavit, ¶4).

3.

After legal review of issues raised by the textbook adoption committee, the school administration determined that revisions to Policy and Regulation IDBD would be recommended which would strengthen evolution instruction. (Redden Affidavit, ¶¶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 Education to place the sticker in science textbooks which is at issue here. (Id.)

4.

Prior to presenting the new Policy and Regulation IDBD, the administration recommended science textbooks for adoption by the Board of Education. (Redden Affidavit, ¶7).

5.

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

6.

Upon adopting the textbooks, the Board voted unanimously to place a sticker (the "sticker") in certain science textbooks stating:

"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."

(Complaint, ¶13).

7.

The sticker was drafted by legal counsel and was intended to be Constitutional. (Deposition of Curt Johnston, pp.7, 1.21-8, 1.15).

8.

The sticker does not accurately state the "fundamentalist Christian" viewpoint regarding evolution. (Selman Depo., p. 46, 1.15-20).

9.

Following the textbook adoption, the Board adopted its revised Policy IDBD, theories of origin. (Johnston Depo., p.24, ll. 14-17, Exh. 1). The policy states in part:

"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 for or against a particular set of religious beliefs, religion in general, or non-religion."

10.

The revised Regulation IDBD was subsequently implemented by the Board, 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 Depo., p. 25, 1.7-12, Exh. 2).

11.

Of the seven Board members, the majority testified that they did not intend to promote or benefit religion in voting for the statement at issue. (Affidavits of Laura Searcy, ¶5; Gordon O'Neill, ¶4; Betty Gray, ¶5; and Johnny Johnson, ¶5).

12.

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, pp. 17 11.13-23; 33, 11.9-17; 42, 11.3-12; 43, 11.4-7; Deposition of Curt Johnston, pp. 24, 11.14-25, 1.12, Exh. 1, 2; Johnson Affidavit, ¶4; Gray Affidavit, ¶4; Searcy Affidavit, ¶4).

13.

A small minority of scientists dispute the theory of evolution. (Selman Depo., p.48, 11.2-17).

14.

Board member Lindsey Tippins was concerned that the science textbooks did not address "controversy in the field of science about macroevolution from an evidentiary standpoint." (Tippins Depo., p.14, 1.23-p. 15, 1.4).

15.

Mr. Tippins testified that there were communications from members of the public, as well as members of the scientific community, both supporting and opposing the idea that there might be a scientific controversy regarding evolution. (Tippins Depo., pp. 22, 11.2-19; p. 24, 11.1-9).

16.

Mr. Tippins' purpose in voting for the sticker was "to pursue and facilitate open discussion in the classroom about controversial issues of a scientific nature." (Tippins Depo., p. 61, 11. 12-16).

17.

After Lindsey Tippins was advised that it was not permissible to teach intelligent design or scientific

creationism, he did not further consider teaching them. (Tippins Depo., p. 56, l. 25-p.57, l. 17).

18.

Board member Curt Johnston heard parent complaints that the textbooks at issue did not make a fair presentation of the theories of origin. (Johnston Depo., p. 9, l. 3-8).

19.

In response to parent complaints, the Board consulted legal counsel and asked him if he felt there was any language that would help to address parent issues but stay within the confines of the law. (Johnston Depo., p. 7, l.19-p. 8, l.12).

20.

At around the time of the vote, Mr. Johnston issued a public statement the sticker "was not intended to interject religion into science instruction but simply to make students aware that a scientific dispute exists." (Johnston Depo., p. 12, l. 22-p.14, l. 20).

21.

Mr. Johnston stated that the scientific dispute included creation science, intelligent design, and the theory that life on Earth came from outer space. (Johnston Depo., p. 13, l.15-p.14, l.20)

22.

In voting for the statement, Mr. Johnston wanted students to critically consider information regarding evolution and try to determine its validity. (Johnston Depo., p. 19, ll. 4-12).

23.

Curt Johnston's purpose in voting for this sticker was consistent with his purpose in approving the Policy and Regulation concerning theories of origin. (Johnston Depo., p. 24, l. 14-p. 26, l.6, Exh. 1, 2).

24.

Board member Teresa Plenge recalled that the Board deliberation on evolution instruction began with proposed revisions to the evolution policy. (Plenge Depo., p. 14-l. 15-p. 15, l.8).

25.

Dr. Plenge testified that some parents wanted the curriculum to include principles like intelligent design and creationism, and others just wanted a broad-based approach to the subject, which led to the sticker at issue. (Plenge Depo., p. 19, l. 14-p. 20, l.12).

26.

Dr. Plenge stated that another purpose she had was that teachers had requested clarification due to problems with the

previous Policy regarding teaching theories of origin. (Plenge Depo., p. 17, l. 13-23).

27.

Dr. Plenge's intent in voting for the sticker was consistent with the revised Policy and Regulation regarding theories of origin. (Plenge Depo., p. 42, l. 3-p.43, l.7).

28.

Board members Johnson, Gray, O'Neill, and Searcy voted for the sticker, in part "to promote tolerance and acceptance of diversity of opinion". (Johnson Affidavit, ¶3); Gray Affidavit, ¶3, O'Neill Affidavit, ¶3; Searcy Affidavit, ¶3).

29.

Consistent with the belief of Mr. Tippins, Mr. Johnston, and Dr. Plenge that the scientific controversy was worthy of discussion, the other Board members stated that they also wanted the sticker to promote critical thinking. (Johnson Affidavit, ¶3; O'Neill Affidavit, ¶3; Gray Affidavit, ¶3; Searcy Affidavit, ¶3).

30.

Board member Searcy also felt that the placement of the sticker in the front of these textbooks would serve a purpose of notification to parents and students so that they could handle

any potential offense or conflicts the scientific information might cause. (Searcy Affidavit, ¶3).

31.

Consistent with Dr. Plenge's concern about providing clarification to teachers in the classroom, both Ms. Searcy and Ms. Gray thought that the sticker served the additional purpose of clarifying the new policy that evolution would be taught. (Searcy Affidavit, ¶4; Gray Affidavit, ¶4).

32.

The sticker, revised Policy IDBD and revised Regulation IDBD all state or imply a purpose of promoting critical thinking. (Complaint, ¶13; Johnston Depo., Exh. 1,2).

33.

George Stickel, Supervisor of High School Science, and other teachers were cautious and concerned about the handling of the subject of evolution in classrooms prior to the issuance of the sticker and revised Policy and Regulation. Mr. Stickel stated his belief that the statement at issue would promote critical thinking. (Stickel Affidavit, ¶¶4-6).

34.

Science textbooks into which the sticker was placed offer a comprehensive perspective of current science thinking regarding theory of origins. (Stickel Affidavit, ¶¶ 7-8, Exh. A,B).

Respectfully submitted this 21 day of July, 2003.

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Attorneys for Defendant



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

Jeffrey Michael Selman, :
 :
 Plaintiff, :
 :
 v. : Civil Action File
 : No. 1:02-CV-2325
 :
 Cobb County School District, :
 Cobb County Board of Education, :
 Joe Redden, Superintendent, :
 :
 Defendants. :

CERTIFICATE OF SERVICE

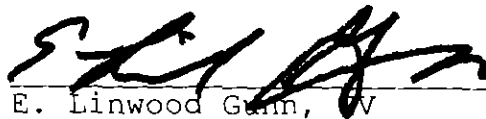
I CERTIFY that I have this day served upon those persons listed below a copy of the within and foregoing **STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED** by hand-depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon to ensure delivery to:

Michael E. Manely
The Manely Firm
7 Atlanta Street, Suite C
Marietta, GA 30060

this 21 day of July, 2003.

**BROCK, CLAY, CALHOUN,
WILSON & ROGERS, P.C.**

Attorneys for Defendants

A handwritten signature in black ink, appearing to read "E. Linwood Gunn", is written over a horizontal line.

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

JUL 21 2003

LEONARD D. THOMAS, Clerk
By: *Chalisher*
Deputy Clerk

Jeffrey Michael Selman,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action File
	:	No. 1:02-CV-2325-CC
	:	
Cobb County School District,	:	
Cobb County Board of Education,	:	
Joe Redden, Superintendent,	:	
	:	
Defendants.	:	

CERTIFICATE OF SERVICE

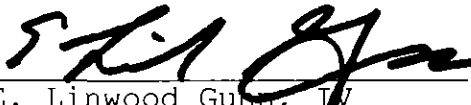
I CERTIFY that I have this day served upon those persons listed below a copy of the within and foregoing **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** and **DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** by hand-depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon to ensure delivery to:

Michael E. Manely
The Manely Firm
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this 21 day of July, 2003.

**BROCK, CLAY, CALHOUN,
WILSON & ROGERS, P.C.**

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