IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHRISTINA CASTILLO COMER,	§	
	§	
PLAINTIFF,	§	
	§	
V.	§	CAUSE NO. A-08-CA-511-LY
	§	
ROBERT SCOTT, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE TEXAS EDUCATION AGENCY, AND THE TEXAS EDUCATION AGENCY,	§	
	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER ON MOTION TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT

Before the Court are Defendants' Motion to Dismiss filed August 11, 2008 (Clerk's Document 16), Defendants' Motion, with Brief, for Summary Judgment filed September 18, 2008 (Clerk's Document 23), Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss filed September 18, 2008 (Clerk's Document 24), Defendants' Opposition, with Brief, to Plaintiff's Motion for Summary Judgment filed October 17, 2008 (Clerk's Document 28), Defendants' Reply in Support of Their Motion to Dismiss filed October 17, 2008 (Clerk's Document 29), Plaintiff's Opposition to Defendants' Motion for Summary Judgment filed October 17, 2008 (Clerk's Document 31), Defendant's Reply in Support of Summary Judgment filed November 14, 2008 (Clerk's Document 34), Plaintiff's Reply in Support of Motion for Summary Judgment filed November 14, 2008 (Clerk's Document 36), Plaintiff's Supplement to Statement of Undisputed Material Facts filed

February 11, 2009 (Clerk's Document 39-2), Defendant's Advisory to the Court of New Authority filed February 27, 2009 (Clerk's Document 47), and Plaintiff's Response to Defendant's Advisory to the Court of New Authority filed March 3, 2009 (Clerk's Document 48). The Court conducted a motions hearing on December 17, 2008. Having considered the motions, responses, replies, supplement, advisory, the arguments of counsel, the applicable law, and the record in this cause, the Court will deny Comer's motion for summary judgment, dismiss Comer's claims against Defendant Texas Education Agency, grant in substantial part the motion for summary judgment of Defendant Robert Scott, as Commissioner of the Texas Education Agency ("Agency"),[1] and dismiss Comer's claims with prejudice.

I. Background

Comer was the Agency's Director of Science for the Curriculum Division from May 1998 to November 7, 2007. As part of her duties as Director of Science, Comer directed the kindergarten-through-twelfth-grade science program in Texas public schools. Comer received many awards during her years as a director at the Agency. Comer has worked in the science-education field for over 30 years, as a science mentor teacher for the Urban Systemic Initiative, science teacher in the San Antonio Independent School District, high-school administrator at San Antonio's Burbank High School, Texas science standards writer, and science teacher consultant for the American Association for the Advancement of Science.

[1] In her motion for summary judgment, Plaintiff Christina Castillo Comer abandoned her claims against the Agency and maintains only her claims against Scott. Throughout this opinion, however, the Court will refer to Scott as the "Agency," because he is sued in his official capacity as Commissioner of the Agency.

On October 26, 2007, Comer read an email from Glenn Branch, Deputy Director of the National Center for Science Education ("Branch email"). The Branch email described an upcoming presentation by Barbara Forrest on November 2, 2007, hosted by the Center for Inquiry Austin. The email explained that Forrest is a philosophy professor at Southeastern Louisiana University and a member of the National Center for Science Education board of directors. The email further explained that Forrest planned to speak on the topic "Inside Creationism's Trojan Horse" and would report on her expert testimony in *Kitzmiller v. Dover School Board. See* 400 F.Supp. 2d 707 (M.D. Pa. 2005). Comer forwarded the email to two list services–the officers of the Science Teachers Association of Texas and a group of local geo-science educators. She also forwarded the email to seven science-education professionals. Comer added the comment "FYI" to the forwarded information.

Later on the morning of October 26, 2007, Sharon Jackson, the Agency's Deputy Associate Commissioner for Standards and Alignment, called Comer out of a meeting into Jackson's office. Jackson handed Comer a hard copy of an email from Lizette Reynolds, Deputy Commissioner of Statewide Policy and Programs, which asserted that Comer's forwarding of the Branch email was an offense worthy of Comer's termination or at least reassignment of her duties. Reynolds's email called for Comer to issue a disclaimer, and Jackson ordered Comer to draft and send such a disclaimer. Comer immediately drafted the disclaimer, Jackson and Reynolds reviewed and approved it, and Comer emailed it to everyone to whom she had forwarded the Branch email. The email asked recipients to "please disregard the previous email with the subject title 'Barbara Forrest . . .'; it was sent in error. This does not represent the position of the Texas Education Agency."

On November 7, 2007, Tom Shindell, the Agency's Director for Organizational Development, directed Comer to meet with him in his office. Comer met with Shindell and Curriculum Manager Monica Martinez. Shindell told Comer they were there to discuss her termination. Shindell presented Comer with a memorandum from Martinez to Susan Barnes, Associate Commissioner for Standards and Programs. The memorandum described Comer's initial email regarding the Forrest speech and stated that the Branch email "clearly indicates that [the organization of which Forrest is a member] opposes teaching creationism in public schools." The memorandum further stated that Comer's forwarding of the email "implies that TEA endorses the speaker's position on a subject on which the agency must remain neutral . . . sending this email . . . creat[es] the perception that TEA has a biased position on a subject directly related to the science education T[exas] E[ssential]K[nowledge][and] S[kills]."[2]

After presenting the termination memorandum to Comer, Shindell placed Comer on administrative leave and explained that she could either resign or be terminated. Shindell gave Comer until noon the following day to make her decision. Neither Shindell nor anyone else at the November 7, 2007 meeting informed Comer of her right to appeal a termination. *See* Texas Educ. Agency, Operating Procedures, OP 07-08 (2006). Comer signed a resignation letter in Shindell's office on November 8, 2007. No one informed Comer at that time of her right to appeal a termination.

[2] The Court refers to the Agency's policy of remaining neutral on the teaching of creationism in public schools, as reflected in the termination memorandum, as the "neutrality policy."

II. Comer's Claims

Comer filed this lawsuit on July 1, 2008, alleging three counts against the Agency. First, she alleges the Agency's neutrality policy violates the Establishment Clause of the First Amendment to the United States Constitution because it has the purpose or effect of endorsing religion. *See* U.S. Const. amend. I, cl. 1. Second, Comer avers that by terminating her employment because she violated its neutrality policy the Agency deprived Comer of her right to carry out her duties free of a state policy that has the purpose or effect of promoting religion. *See* Civil Rights Act of 1871, 42 U.S.C. § 1983 (2006). Third, Comer alleges that the Agency violated her Fourteenth Amendment due-process rights by terminating her employment without affording her the process to which she was entitled under state procedures. *See* U.S. Const. amend XIV, sec. 1; Texas Educ. Agency, Operating Procedures, OP 07-08 (2006).

Comer seeks declaratory and injunctive relief. Specifically, she seeks: (1) a declaratory judgment that the Agency's neutrality policy regarding creationism violates the Establishment Clause; (2) a declaratory judgment that her termination pursuant to such policy violates the Establishment Clause; (3) an injunction requiring the Agency to offer to reinstate Comer in her former position as Director of Science, Curriculum Division at the Agency; and (4) an injunction prohibiting the Agency from having, expressing, or imposing a neutrality policy regarding the teaching of creationism in Texas public schools, a policy that expressly or implicitly equates evolution and creationism, or that in any way credits creationism as a valid scientific theory; and (5) costs and attorney's fees.

The Agency moved to dismiss Comer's claims, and the parties subsequently agreed to a summary-judgment briefing schedule without the Agency waiving its right to judgment based on its motion to dismiss.[3] Both the Agency and Comer have filed motions for summary judgment.

III. Analysis

A. The Parties' Positions

1. Comer's Position

Comer asserts that four undisputed material facts form the basis of her motion for summary judgment: (1) the Agency's responsibilities include "overseeing development of the statewide curriculum";[4] (2) Comer's responsibilities included "explaining law . . . regarding the science Texas Essential Knowledge and Skills";[5] (3) the Agency has a policy that "teaching creationism in public

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[3] The Agency repeats its motion-to-dismiss arguments in its motion for summary judgment. Accordingly, the Court will consider only the Agency's motion for summary judgment.

[4] Comer takes this statement from the Agency's Internet website. The website states:

> [u]nder the leadership of the commissioner of education, the TEA:
> - manages the textbook adoption process;
> - oversees development of the statewide curriculum;
> - administers the statewide assessment program;
> - administers a data collection system on public school students, staff, and finances;
> - rates school districts under the statewide accountability system;
> - operates research and information programs;
> - monitors for compliance with federal guidelines; and
> - serves as a fiscal agent for the distribution of state and federal funds.

Texas Education Agency, TEA Missions and Responsibilities, http://www.tea.state.tx.us/index4.aspx?id=150 (last visited March 25, 2009).

[5] The State Board of Education ("Board") develops the essential knowledge and skills students must master, also called the "Texas Essential Knowledge and Skills," or "TEKS." For consistency with the terminology used in the parties' briefing and exhibits, the Court also refers to such essential knowledge and skills as the "TEKS." The TEKS require students to demonstrate the knowledge and

schools" is a "subject on which the agency must remain neutral"; and (4) the Agency terminated Comer for violating such neutrality policy.[6]

Comer argues four undisputed legal points support her motion for summary judgment: (1) the Establishment Clause prohibits a government policy that has the purpose or effect of advancing religion; (2) creationism is a religious, not scientific, concept; (3) because creationism is religion, not science, by teaching creationism in the classroom the government unconstitutionally advances religion; and (4) a state may not condition an employee's employment on compliance with an unconstitutional policy.

Essentially, Comer argues that when the Agency that oversees curriculum development requires its curriculum staff to remain neutral as to whether creationism may be taught as part of public-school science curriculum, it unconstitutionally treats religion like science. As framed by Comer, all three of her counts turn on the constitutionality of the neutrality policy. Accordingly, to defeat the Agency's motion for summary judgment and prevail on her motion for summary judgment, Comer must demonstrate the neutrality policy's unconstitutionality.

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skills necessary to read, write, compute, problem solve, think critically, apply technology, communicate across all subject areas, and continue to learn in their future endeavors. *See* Tex. Educ. Code Ann. § 28.001 (West 2006); *id.* § 28.002 (West Supp. 2008).

[6] Throughout her briefing, Comer asserts she was "terminated" or "fired." However, she signed a resignation letter, and the Agency argues she resigned. It appears that despite Comer's assertion that it is undisputed she was "fired" for violating the neutrality policy, the parties dispute at least the terminology. Because the distinction is immaterial to the Court's resolution of the issues presented, the Court does not decide whether her resignation was effectively a termination but will use the word "termination" for consistency with Comer's pleadings.

2. The Agency's Position

The Agency argues that Comer misunderstands the relationship between the Agency and the State Board of Education ("Board"). The Board is composed of 15 elected members, who establish curriculum and standards of student performance, adopt rules to carry out the curriculum, and prescribe the TEKS. Tex. Educ. Code Ann. § 7.102(c)(4)-(5), (11) (West 2006); *id.* § 28.002 (West Supp. 2008). The Agency asserts that its staff aids the Board with administrative, procedural, and clerical support in developing curriculum and TEKS, but the Agency does not develop the substance of the TEKS. The Board develops the curriculum and TEKS with the participation of local educators and other members of the community. *See id.* § 28.002(a), (c). Once the Board develops the curriculum and TEKS, Agency staff is responsible for administering them and monitoring compliance. *See id.* § 7.021(b)(1).

The Agency asserts that achieving the required balance between the Agency and Board requires that Agency staff, in their capacities as state employees, not advocate for or take positions on contested curriculum issues the Board will resolve. The Agency asserts this policy is not limited to the creationism-evolution controversy; it applies to any issue regarding which there is a curriculum debate and over which the Agency has no statutory authority. The Agency points out that the policy does not apply to public-school personnel. The Agency asserts that Comer's superiors directed her multiple times not to advocate for or against a position on a curriculum issue that the Board was considering or might consider.

Essentially, the Agency argues the neutrality policy's background, its wide applicability to any disputed curriculum issue, and its narrow application to Agency employees in their official capacities mean it is facially constitutional and constitutional as applied to Comer.

B. Standing

The Agency argues Comer lacks standing to challenge the facial constitutionality of the Agency's neutrality policy, because only public school teachers, students, and parents of students have standing to assert the right not to have government require the teaching of religion in public schools. The Agency asserts Comer has not alleged that she belongs to such a group and therefore has suffered no greater injury than the public generally. Comer responds that she has standing because she is seeking an offer of reinstatement to her position at the Agency.

Standing implicates a court's jurisdiction and must be addressed before analyzing the merits of a plaintiff's claim. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998). Standing is an essential part of the case-or-controversy requirement of Article III of the Constitution. *See* U.S. Const. art. III, sec. 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As such, the standing inquiry addresses whether a plaintiff's claim may be resolved by a court. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The "irreducible constitutional minimum of standing" requires first that a plaintiff has suffered an injury in fact, that is, an actual or imminent invasion of a concrete and particularized legally protected interest. *Lujan*, 504 U.S. at 560; *Doe v. Beaumont Ind. Sch. Dist.*, 173 F.3d 274, 281 (5th Cir. 1999). Second, there must be a causal connection between a plaintiff's complained-of injury and the defendant's actions. *Id.* Third, it must be likely that a plaintiff's injury will be redressed by a favorable decision from the court. *Id.* A plaintiff is only entitled to declaratory and injunctive relief if she alleges facts showing continuing harm or that she is at substantial risk of suffering injury inflicted by defendants in the future. 28 U.S.C. § 2201(a) (2006) (requiring "actual controversy" between parties); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983); *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003).

Comer avers the Agency terminated her employment because she violated an allegedly unconstitutional policy. She asserts invasion of her alleged constitutional right to perform her job free of state-imposed policies that violate the Establishment Clause. Loss of employment is an actual injury, and violation of an alleged constitutional right is an invasion of a concrete, particularized interest. Such deprivations create a continuing harm. It is irrelevant that Comer is not a student, teacher, or parent of a student, because the allegedly unconstitutional policy was directed at Agency employees like herself. If Comer prevails, the Court can redress Comer's injury through the declaratory and injunctive relief she requests. The Court concludes that Comer has standing to mount a facial challenge of the Agency's neutrality policy.

C. Summary-Judgment Standard

A court must grant a motion for summary judgment "if 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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue is material if its resolution could affect the outcome of the action." *Commerce & Indus. Ins. Co. v. Grinell Corp.*, 280 F.3d 566, 570 (5th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In deciding whether fact issues exist, a court "must view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.* In determining whether there is a genuine dispute as to any material fact, a court must consider all of the evidence in the record, but does not make credibility determinations or weigh the evidence. *Austin v. Will-Burt Co.*, 361 F.3d 862, 866 (5th Cir. 2004). A movant initially must demonstrate that there is no genuine issue of material fact on an element of the

nonmovant's claim by "pointing out to the district court [] that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

"The nonmovant must respond to the motion for summary judgment by setting forth particular facts indicating that there is a genuine issue for trial." *Caboni v. General Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002). A nonmovant may not rely on mere allegations in the pleadings. *Id.* Unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a proper motion for summary judgment. *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary-judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994). A party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports its claim. *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

Rather, a nonmoving party must set forth specific facts showing the existence of a "genuine" issue concerning every essential component of its case. *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997). The standard of review "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record before the court." *See James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). If the record as a whole could not lead a rational jury to find for a nonmoving party, there is no genuine issue for trial and summary judgment is warranted. *Wheeler v. Miller*, 168 F.3d 241, 247 (5th Cir. 1999).

D. The Policy's Constitutionality

1. Establishment Clause Jurisprudence

The Establishment Clause prohibits a state from enacting a "law respecting an establishment of religion . . . ". U.S. Const., amend. I, cl. 1; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

In the public-school context, the Fifth Circuit has employed three complementary tests to determine whether state action violates the Establishment Clause. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999). A court need not apply every test each time it faces an Establishment Clause question; it may discern which test or tests apply most appropriately to the situation before it. *Id.* at 343-44.

The first and longest-applied test is the disjunctive *Lemon* test. *See Lemon*, 403 U.S. 602, 612-13 (1971). Under the *Lemon* test, a state policy violates the Establishment Clause if it: (1) lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion. *Lemon*, 403 U.S. at 612-13; *Doe v. Santa Fe Ind. Sch. Dist.*, 168 F.3d 806, 815 (5th Cir. 1999). The second test is the "endorsement test," under which a court analyzes whether a state endorses religion by means of a challenged action or policy. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592-94 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1986); *Freiler*, 185 F.3d at 343. The third test is the "coercion test," by which a court analyzes whether a school-sponsored activity has the effect of coercing students to participate in a formal religious observation. *Freiler*, 185 F.3d at 343. In some Establishment Clause cases, the Supreme Court has ignored all such tests and instead considered "the nature of the monument and [] our Nation's history." *Van Orden v. Perry*, 545 U.S. 677, 686 (2005). Clearly, a court must

tailor its Establishment Clause analysis to the facts before it and their context. *See Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1982); *Freiler*, 185 F.3d at 344.

Here, the parties analyze the neutrality policy's constitutionality under the *Lemon* test and the related endorsement test. Comer argues the policy fails the test's second prong, because by treating creationism like science it has the primary effect of advancing religion. *See Lemon*, 403 U.S. at 612. The Agency argues its neutrality policy passes the *Lemon* test, because Comer has failed to discredit its articulated secular purpose of avoiding trespassing on issues on which the Agency has no statutory authority, and an objective observer would not think the policy endorses religion.[7] The Court agrees that the *Lemon* test is helpful in this context, as is the endorsement test. *See Aguillard*, 482 U.S. at 585-94 (applying *Lemon* test to teaching of creationism in public school and stating such teaching improperly endorses religion); *Lemon*, 403 U.S. 612-13. Neither the coercion test nor historical review is applicable. *See Van Orden*, 545 U.S. 686; *Aguillard*, 492 U.S. at 590-91; *Freiler*, 185 F.3d at 343.

Lemon's second prong and the endorsement test overlap significantly. Under *Lemon*'s second prong, state action advances religion when it "gives a preferential, exceptional benefit to religion that it does not extend to anything else." *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996). A state action, such as the teaching of creationism in public schools, endorses religion if its purpose is to advance a particular religious belief. *Aguillard*, 492 U.S. at 593. Further, a state unconstitutionally endorses religion when it conveys a message that religion is

[7] In her motion for summary judgment, Comer expressly relies on only the second *Lemon* prong. Accordingly, although the Agency has argued the first prong as well, the Court will analyze the policy under only the second prong.

favored, preferred, or promoted over other beliefs. *Ingebretsen*, 88 F.3d at 280. Because of the tests' similarity, the following analysis addresses both tests.

Comer analogizes the Agency's neutrality policy to the balanced-treatment approach the Supreme Court struck down in *Aguillard*. In *Aguillard*, the Supreme Court held facially unconstitutional Louisiana's "Creationism Act," which forbid public schools from teaching evolution unless they also taught "creation science." 492 U.S. at 581. The Court held the Creationism Act failed the first prong of the *Lemon* test, which asks whether the state's primary purpose in enacting the statute was to endorse religion. *Id.* at 585. The Court found that the legislative record contradicted the state's purported secular purpose of promoting academic freedom. *Id.* at 587-89. Further, the Supreme Court found that "historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution [were] present in [the] case," and the Creationism Act's purpose was to promote and advance a particular religious viewpoint. *Id.* at 591-93. The Supreme Court conducted its analysis "mindful of the particular concerns that arise in the context of public elementary and secondary schools." *Id.* at 585.

The Agency distinguishes *Aguillard* and other classroom-based cases from Comer's case, because in such cases, a state or school board mandated the teaching of creationism or otherwise took proactive steps in public-school settings.

2. Application

The Court agrees with the Agency that *Aguillard* and its progeny are distinguishable. Courts have held that state action promoting creationism or deriding evolution in the classroom violates the Establishment Clause, because such action has the effect of advancing or endorsing religion. *See Aguillard*, 492 U.S. at 597; *Freiler*, 185 F.3d at 348 (holding that required reading of evolution

disclaimer in public-school classroom was unconstitutional). Such holdings do not, however, automatically imply that the Agency's neutrality policy also violates the Establishment Clause.

The Agency's neutrality policy has different origins and effects from the balanced-treatment approach struck down in *Aguillard*. Agency staff must remain neutral on contested curriculum issues, not only creationism and evolution. The policy is reasonable, given the elected body the Agency supports. The Agency supports 15 elected Board members who often disagree among themselves regarding curriculum issues and who make final decisions regarding such disputed issues. Agency staff, by virtue of their job description, must avoid acting in ways that favor any particular Board member's position.

Further, even taking as true Comer's assertions that Agency staff develops the substantive curriculum and that her position involves explaining law regarding TEKS, Comer's role as Director of Curriculum is attenuated from the classroom. To bridge this gap, Comer hypothesizes various situations that would require her to refrain from fully answering questions posed to her by classroom teachers.[8] She argues that exercising such restraint prevents her from providing the "guidance" the Agency touts as its mission and impedes her ability to "explain law" regarding the TEKS. However, Comer provides no summary-judgment proof involving instances in which she had to respond to inquiries of the type she hypothesizes. Indeed, Comer's termination is the only example in the record of the neutrality policy's application, and no summary-judgment proof demonstrates that the neutrality policy affects anyone but Agency staff. Hypotheticals do not create material fact issues.

[8] Specifically, Comer imagines receiving a "request from a classroom teacher asking how to respond to a student's question about the relationship between evolution and creationism . . ." to which she states she would have to respond "I cannot answer your question because I am required to be neutral about creationism." She also envisions being asked "[i]s creationism science?" to which her silence would imply approval.

Comer repeatedly asserts that the neutrality policy treats creationism like science, but it only treats creationism as science to the extent that Agency staff may not take a public position on it. Given the reasons for the Agency's neutrality policy, Agency staff must remain neutral on disputed curriculum issues regardless of a particular position's merit or constitutionality. The State "readily agree[s] that if the Board chooses to consider including some kind of recognition of alternatives to evolutionary theory in the biology curriculum, it will be entering perilous waters", but that is the Board's voyage to weather.

Further, a policy that incidentally benefits religion does not violate the *Lemon* test. *Widmar v. Vincent*, 454 U.S. 263, 273-74 (1981). The *Widmar* court struck down a public-university policy prohibiting a religious organization from using university facilities. *Id.* at 277. The university had a stated policy of encouraging student organizations, and the religious group in question had used university facilities in the past. *Id.* at 265. In determining that any benefit to religion was incidental, the Court found it especially relevant that the forum was open to a diverse array of groups, "an important index of secular effect." *Id.* at 274. Although the analogy is not a perfect fit, the array of curricular disputes "benefitted" by the Agency's neutrality policy is analogous to the array of benefitted student groups in *Widmar*, and this Court concludes that if the policy benefits religion at all, any such benefit is at best incidental.

To determine whether state action improperly endorses religion, courts analyze the action from the perspective of a reasonable observer. The reasonable observer exemplifies the "community ideal of reasonable behavior," is familiar with the origins and context of the state action, and understands the history of the community where the state action is implemented. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-81 (1995) (O'Connor, J., concurring); *see also*

McCreary County v. American Civil Liberties Union, 545 U.S. 844, 866 (2005); *Kitzmiller*, 400 F.Supp.2d at 715. As such, a court's inquiry does not focus on any particular observer of a practice. "[T]here is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion." *Pinette*, 515 U.S. at 780.

A reasonable observer would be aware of the neutrality policy's context, including the relationship between the Agency and the Board and understand that the policy applies beyond the creationism-evolution debate. In such context, a reasonable observer would not believe the policy advances or endorses creationism and its associated religion. The Court notes that the reasonable-observer standard evolved in display-related cases, and the Agency's neutrality policy differs from monuments and other displays because it operates quietly within an agency instead of in public view. *See McCreary County*, 545 U.S. at 866 (holding ten-commandment courthouse display violated Establishment Clause); *Pinette*, 515 U.S. at 779-81 (holding organization's placement of cross on publicly-used statehouse plaza did not violate Establishment Clause). The neutrality policy's "observers" are Agency staff and the professionals with whom they interact, who are arguably more informed than the reasonable observer about the policy's context.

It is not clear if anyone other than Agency staff is affected by the Agency policy, though Comer hypothesizes that classroom teachers may inquire about curricular distinctions between evolution and creationism. Again, she provides no summary-judgment proof that teachers have ever asked her such questions. Comer asks the Court to assume her job description included counseling them regarding such questions, but that is not obvious from her job title and the Agency's website. Regardless, a reasonable classroom-teacher observer informed of the reason Comer must adhere to the neutrality policy would find it difficult to believe such policy advanced or endorsed religion.

Comer does not argue she is prevented from explaining in response to a hypothetical inquiry that her neutrality is not a comment on the merits of contested positions but instead applies to all contested curriculum issues and derives from the nature of her position at the Agency.

IV. Conclusion

In sum, Comer provides no summary-judgment proof raising an issue of material fact regarding whether the Agency's neutrality policy has a primary effect of advancing or endorsing religion. As a matter of law, the Agency's neutrality policy, if it advances religion at all, only does so incidentally. Further, a reasonable observer of the neutrality policy would not believe the Agency endorses religion through the policy. Because the neutrality policy does not violate the Establishment Clause, all of Comer's claims fail, and the Court will grant summary judgment in favor of the Agency. In light of the foregoing, the Court renders the following orders:

IT IS ORDERED that Comer's Motion for Summary Judgment (Clerk's Document 24) is **DENIED.**

IT IS FURTHER ORDERED that to the extent Defendants' Motion for Summary Judgment (Clerk's Document 23) seeks dismissal of Comer's count one for lack of standing, it is **DENIED.**

IT IS FURTHER ORDERED that, as Comer has abandoned her claims against the Texas Education Agency, to the extent Defendants' Motion for Summary Judgment (Clerk's Document 23) seeks dismissal of Comer's claims against the Texas Education Agency based on 11th Amendment immunity, the motion is **DISMISSED**, and all of Comer's claims against the Texas Education Agency are **DISMISSED.**

IT IS FURTHER ORDERED that in all other respects Defendants' Motion for Summary Judgment is **GRANTED**, and Comer's claims against Robert Scott, as Commissioner of the Texas Education Agency, are **DISMISSED WITH PREJUDICE.**

IT IS FINALLY ORDERED that Defendants' Motion to Dismiss (Clerk's Document 16) is **DISMISSED.**

SIGNED this 31st day of March, 2009.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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	§	
PLAINTIFF,	§	
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V.	§	CAUSE NO. A-08-CA-511-LY
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ROBERT SCOTT, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE TEXAS EDUCATION AGENCY, AND THE TEXAS EDUCATION AGENCY,	§	
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DEFENDANTS.	§	

FINAL JUDGMENT

Before the Court is the above-entitled and numbered cause. Today by separate order the Court denied Plaintiff Christina Castillo Comer's motion for summary judgment, dismissed Comer's claims against Defendant Texas Education Agency, granted in substantial part Defendant Robert Scott, as Commissioner of the Texas Education Agency's motion for summary judgment, and dismissed with prejudice Comer's claims against Scott in his capacity as Commissioner. Seeing that no matters remain pending in this cause, the Court renders the following final judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that to the extent Defendants' Motion for Summary Judgment (Clerk's Document 23) seeks dismissal of Comer's count one for lack of standing, it is **DENIED.**

IT IS ORDERED that, as Comer has abandoned her claims against the Texas Education Agency, to the extent Defendants' Motion for Summary Judgment (Clerk's Document 23) seeks dismissal of Comer's claims against the Texas Education Agency based on 11th Amendment

immunity, the motion is **DISMISSED,** and all of Comer's claims against the Texas Education Agency are **DISMISSED.**

IT IS FURTHER ORDERED that in all other respects Defendants' Motion for Summary Judgment (Clerk's Document 23) is **GRANTED**, and Comer's claims against Robert Scott, as Commissioner of the Texas Education Agency, are **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that all relief not expressly granted is **DENIED.**

IT IS FINALLY ORDERED that this cause is **CLOSED.**

SIGNED this 31st day of March, 2009.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE