

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(AUSTIN DIVISION)**

CHRISTINA CASTILLO COMER,
Plaintiff,

v.

ROBERT SCOTT, Commissioner, *et al.*,
Defendants.

CA No. 1:08CV00511-LY

**PLAINTIFF’S RESPONSE TO
DEFENDANT’S UNOPPOSED REQUEST TO
TAKE JUDICIAL NOTICE OF PROPOSED RULES**

Although Defendant has asked this Court to take judicial notice of 65 pages of proposed revisions to the Texas Essential Knowledge and Skills for Science, Defendant has not shown or even proffered that these proposed revisions are relevant to this case. They are not.

In terminating Comer, the Agency’s November 5, 2007 Termination Memo said that Comer had violated the requirement of remaining “neutral” on the issue of “teaching creationism in public education.” These proposed revisions say nothing expressly about teaching creationism. As such, they are not pertinent and do not controvert Plaintiff’s Fact No. 17: “Creationism was not under consideration by the State Board of Education on October 26, 2007, when Plaintiff Comer forwarded the email at issue in this case, or at any time thereafter.”¹

It appears that parts of these proposed changes – other than the one provision quoted by Defendant – implicitly promote creationism by watering down the teaching of evolution.² Their

¹ See Plaintiff’s Motion for Leave To Supplement Plaintiff’s Statement of Material Undisputed Facts, filed December 24, 2008 and Order dated February 11, 2009 granting Plaintiff’s Motion.

² For example, in Section 112.36 Earth and Space Science, Beginning with School Year 2010-2011, proposed subsection 8(A), pertaining to fossils, provides that students “assess the arguments for and against universal common descent in light of this fossil evidence.” The view that this and other proposed changes to this section are pro-creationist and unscientific is expressed in a report entitled “Report of the Earth and Space Science TEKS Working

adoption would violate the Establishment Clause for the reasons previously set forth throughout Plaintiff's briefs in support of her motion for summary judgment. Whether expressly or implicitly, the state may not promote creationism as science or dilute evolution to appease creationists.

Epperson v. Arkansas, 393 U.S. 97, 106 (1968) *reh'g denied en banc*, 201 F.3d 602 (5th Cir. 2000), *cert. denied*, 530 U.S. 1251 (2000) (states "may not require that teaching and learning be tailored to the principles or prohibitions of any religious sect or dogma").

Thus, the significance for this case is that TEA may not require Comer and its other employees to be "neutral" as to policies that expressly or implicitly promote creationism as science or denigrate evolution as science. This is so whether or not such unconstitutional policies are being considered by the State Board of Education.

Respectfully submitted,

/s/
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February 19, 2009

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Group Concerning The Five Amendments Passed by the State Board of Education on January 22, 2009"
(<http://www.texscience.org/reports/ESS-Report-Final-2009Jan29.htm> at page 3). The report says that this proposed language is "totally unscientific. There are no good arguments in modern science 'against universal common descent,' which has been accepted by biologists for over 130 years, so the phrase is asking for something that authors and publishers cannot honestly supply. . . . The added phrase supports an anti-evolution intent which is not scientific."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of February, 2009, I served the foregoing Plaintiff's Response To Defendant's Unopposed Request to Take Judicial Notice of Proposed Rules via email and the Court's electronic system to Defendants' counsel, as follows:

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*Attorney for Defendants Texas Education
Agency and Robert C. Scott, in his individual
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/s/ _____
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