

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

CHRISTINA CASTILLO COMER	§	
Plaintiff,	§	
	§	
v.	§	CA No. 1:08CV00511-LY
	§	
ROBERT SCOTT, Commissioner, Texas	§	
Education Agency, in his official	§	
capacity and TEXAS EDUCATION	§	
AGENCY,	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE COURT:

In support of their motion under FED. R. CIV. P. 12(b), to dismiss the plaintiff's claims against them, the defendants Robert Scott and the Texas Education Agency (TEA) respectfully submit the following.

STANDARDS FOR DISMISSAL UNDER RULE 12(B)

I. The Plaintiff Must Allege Non-Conclusory Facts That Plausibly Support Her Claims.

On a motion to dismiss under Rule 12(b)(6), the court is called upon "to determine whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Cornish v. Correctional Services Corp.*, 402 F.3d 545, 548 (5th Cir. 2005) (brackets and internal quotation marks omitted). "In other words, a motion to dismiss an action for failure to state a claim admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Ramming v. U.S.*, 281 F.3d 158, 161-62 (5th Cir. 2001).

We accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiffs. At the same time, the plaintiffs must plead specific facts, not mere

conclusional allegations, to avoid dismissal for failure to state a claim. We will thus not accept as true conclusory allegations or unwarranted deductions of fact.

Milofsky v. American Airlines, Inc., 404 F.3d 338, 341 (5th Cir. 2005) (citations and internal quotation marks omitted).

Recently, the Supreme Court has clarified the standards for dismissal under this rule, holding that they are less deferential to the plaintiff's pleadings than was previously thought.

In the past, this court has frequently used the expression that a case will not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The Supreme Court, however, recently retired *Conley's* "no set of facts" language[,] stating that "the phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard."

Cuvillier v. Taylor, 503 F.3d 397, 401 n. 4 (5th Cir. 2007) (citations and parentheses omitted) (quoting *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1964-66, 1969 (2007) (discussing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957)). Now, under the current standard:

To survive a Rule 12(b)(6) motion to dismiss, a complaint . . . must provide . . . factual allegations that when assumed to be true raise a right to relief above the speculative level. Conversely, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.

Cuvillier, 503 F.3d at 401 (citation, internal quotation marks, and ellipse omitted) (quoting *Twombly*, 127 S.Ct. at 1964-65). "The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 127 S.Ct. at 1965.

Even under the pre-*Twombly* standard, a court would not accept conclusions and improbable

inferences in the plaintiff's pleadings as true, but only the specific factual allegations. *Cornish*, 402 F.3d at 548 (“we will not strain to find inferences favorable to the plaintiffs”); *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993) (“The Court is not required to conjure up unpled allegations in order to save a complaint, and conclusory allegations or legal conclusions masquerading as factual contentions will not suffice.”). Nor must the court supply by inference critical gaps left by the plaintiff in her pleadings. As this court has explained:

Even under the liberal pleading standard set forth by Rule 12(b)(6), the Court may not assume the plaintiff can prove facts he has not alleged. Moreover, dismissal is appropriate where the complaint is devoid of facts to establish any one of the required elements of the claim asserted.

In re Dell, Inc. ERISA Litigation, ___ F. Supp.2d ___, 2008 WL 2600175, *3 (W.D. Tex. 2008) (citations omitted).

II. Dismissal May Be Based On the Plaintiff's Pleadings, Together With Exhibits Attached To The Complaint And/Or The Motion, As Well As Matters Subject To Judicial Notice.

Ordinarily, the court's review under Rule 12(b) is confined to the face of the plaintiff's complaint. However, there are three exceptions applicable to this case. First, when the plaintiff attaches exhibits to her complaint and refers to them in her pleadings, as Ms. Comer has done, the exhibits may support dismissal. *In re Dell, Inc. ERISA Litigation*, 2008 WL 2600175, *4 (“In evaluating a 12(b)(6) motion, the Court must limit its consideration to the contents of the pleadings, *including attachments thereto.*”) (emphasis added). Thus, when an “allegation is contradicted by the contents of an exhibit attached to the pleading, then indeed the exhibit and not the allegation controls.” *United States ex rel Riley v. St. Luke's Episcopal Hospital*, 355 F.3d 370, 377 (5th Cir. 2004).

Second, as this court has explained:

Documents not attached to the pleadings, but to the motion to dismiss, may be considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim because in so attaching, the defendant merely assists the plaintiff in establishing the basis of the suit, and the court in making the elementary determination of whether a claim has been stated.

In re Dell, Inc. ERISA Litigation, 2008 WL 2600175, *4 (citations, brackets, quotation marks, and ellipse omitted) (quoting *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000)). See also *Sheppard v. Texas Dep't of Transp.*, 158 F.R.D. 592, 596 (E. D. Tex.1994) (“note[d] approvingly” by the Fifth Circuit in *Collins*, 224 F.3d at 499 n. 1).

Finally, “In deciding a motion to dismiss the court may consider . . . matters of which judicial notice may be taken.” *United States ex rel. Willard v. Humana Health Plan*, 336 F.3d 375, 379 (5th Cir. 2003).

BACKGROUND

The central claim in this lawsuit arises from a fundamental misconception of the relationship between the Texas Education Agency, headed by defendant Scott, and the State Board of Education. The plaintiff's pleadings betray an implicit assumption that the State Board of Education is the governing body of TEA, and imply that TEA and the Board are jointly responsible for developing the curriculum that will be used for teaching academic subjects in Texas public schools. Without these unstated but inescapable premises, paragraph 28 of the Complaint would be entirely extraneous and irrelevant to the remainder of the plaintiff's pleadings. In that paragraph, the plaintiff alleges that this summer “the [Texas] state education board will determine the curriculum” for Texas public schools, including whether to retain a current requirement that pupils be taught “the ‘strengths and weaknesses’ of evolution . . .” Complaint ¶ 28 (quoting Exhibit G) (brackets supplied by plaintiff).

The New York Times article reproduced as Exhibit G nowhere mentions TEA. But it does

say that “the State Board of Education first mandated the teaching of evolution in the late 1980s,” and notes that the Board has fifteen members. To assess the true significance for this litigation of the State Board’s role in curriculum development, as well as the necessity for TEA not to take sides in *any* debate on curriculum philosophy or techniques, it is important to understand the legal relationship between the two separate entities of TEA and the State Board of Education.

While it is true that at one time the State Board governed TEA and selected its Commissioner, that has not been the case since statutory changes beginning in 1991. Since 1995, the Commissioner has been appointed by the Governor, subject to Senate confirmation. TEX. EDUC. CODE §§ 7.051-.052. Texas law now provides separate, though marginally overlapping, authority and responsibility for the Commissioner and TEA on one hand and the State Board on the other.

The Texas Constitution requires that there be a State Board of Education and that, among other enumerated duties, it provide for free textbooks in the public schools. TEX. CONST. art. VII §§ 3(b) & 8. Its members are elected from fifteen districts. TEX. EDUC. CODE § 7.101. Despite other significant changes in its powers and duties, the State Board of Education retains the responsibility for adopting the textbooks the state purchases for use in Texas public schools. TEX. EDUC. CODE §§ 31.022, 31.023; *see Hill v. Lower Colorado River Authority*, 568 S.W.2d 473, 479 (Tex. Civ. App. – Austin 1978, writ ref. n.r.e.) (citing *Charles Scribner’s Sons v. Marrs*, 114 Tex. 11, 30, 262 S.W. 722, 729 (Tex. 1924)). In addition, the Legislature has assigned to the Board, by statute, the responsibility, *inter alia*, to:

- “establish curriculum and graduation requirements” for Texas public schools;
- “establish a standard of performance considered satisfactory on student assessment instruments”;

- “adopt rules to carry out the curriculum”; and
- prescribe the set of “essential knowledge and skills” (TEKS) that every school child must demonstrate.

TEX. EDUC. CODE §§ 7.102(c)(4)-(5), -(11), 28.001-002. Science is, not surprisingly, a topic for the TEKS. *Id.* at § 28.002(a)(1)(C).

The Board develops the TEKS “with the direct participation of educators, parents, business and industry representatives, and employers . . .” *Id.* at § 28.002(c). TEA staff are not included in the list of *direct* participants. Pursuant to section 28.002(c), the TEKS are set out in rules promulgated by the Board – not the Commissioner. 19 T.A.C. ch. 74 subch. A (also available online at <http://www.tea.state.tx.us/rules/tac/chapter074/ch074a.html>).

The Board may perform only such duties as are specified for it in the Texas Constitution and Education Code. TEX. EDUC. CODE § 7.102(a). Those sources nowhere provide for State Board control or oversight of the Commissioner or TEA. Instead, the Board’s “powers and duties . . . shall be carried out with the advice and assistance of the commissioner.” *Id.* at § 7.102(b).

The responsibilities of the Commissioner and TEA intersect with those of the Board with respect to curriculum development, but their respective roles in the process remain distinct. Pursuant to sections 7.055(b)(2)-(3) and 7.102(b), the Commissioner provides TEA staff to assist the Board, which has no staff of its own, with the many administrative, procedural, and clerical tasks necessary to develop the curriculum and TEKS. But in accordance with section 28.002(c) and related provisions, proposals for the *substance* of the curriculum and TEKS must come from local educators and other sources outside of TEA.

The enumerated powers and duties of the Commissioner and TEA do not include the

development of the curriculum or TEKS. *Id.* at §§ 7.021, 7.055. While the Commissioner has broad authority to grant waivers to a school or district “of a requirement, restriction, or prohibition imposed by this code or rule of the board or commissioner,” he is expressly prohibited from granting a waiver from any “requirement, restriction, or prohibition relating to essential knowledge or skills under Section 28.002 . . .” *Id.* at § 7.056(a), -(e)(3)(A). Once the State Board of Education, in partnership with educators and other external participants, develops the curriculum and TEKS, it then becomes the responsibility of TEA staff to “administer and monitor compliance” by local school districts “with education programs required by federal or state law . . .” *Id.* at § 7.021(b)(1).

As a matter of both professionalism and the separation of powers, it is inherent in, and essential to, the relationship between TEA and the State Board of Education, as mandated by the state laws outlined above, that TEA staff, in their capacity as state employees, must not take positions, even by implication, on contested curriculum issues the State Board will be called upon to resolve. Thus, for example, it is inappropriate for TEA staff to communicate public positions on issues in recent curriculum debates, such as:

- Whether schools should teach “whole language” or “phonics” in English Language Arts;
- Whether schools should have grammar as a separate section of the English curriculum or embedded in the overall curriculum;
- How schools should present the treatment of minorities in U.S. or Texas history;
- Whether schools should have required reading lists in English or other subjects (and if so what books should be included on them);
- Whether schools should emphasize scientific processes or content;
- Whether schools should require laboratory instruction in science courses;
- How schools should integrate the Spanish-language grammar or decoding skills into English

TEKS for students with limited English proficiency (LEP);

- Whether to include instruction on contraceptives along with abstinence, in the presentation of human sexuality in health education.

The plaintiff characterizes this necessary restraint as a “policy.” *E.g.*, Complaint ¶¶ 1, 3, 4, 52, 57, 60. However, the only document she identifies as reflecting the “policy” is her Exhibit B, which nowhere uses the word “policy.” The Agency’s appropriate concern about the perception of partisanship on curriculum issues can be called a “policy” in the broadest sense of the word. *E.g.*, see MIRRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1993) at 901 (as the first meaning of “policy”: “a prudence or wisdom in the management of affairs”).¹ It is more properly understood as an inherent and necessary feature of, and corollary to, the interagency relationship through which the state-mandated curriculum development process is carried out. *See* the second paragraph of Exhibit B to the Complaint (discussed in part IV-C below).

It is the responsibility of educators, parents *et al.*, not of TEA staff, to advocate for particular approaches and positions in the public school curriculum. It is the responsibility of the elected members of the State Board of Education, not of TEA employees, to select from among competing points of view as to how the curriculum should be composed.

ARGUMENT

Before examining the plaintiff’s allegation that her “termination” violated the Establishment Clause of the First Amendment, the defendants will address TEA’s immunity to suit and the plaintiff’s due process and retaliation claims, which can be more quickly dispensed with.

¹ *See also* BLACK’S LAW DICTIONARY (abr. 5th ed. 1983) at 603 (“The general principles by which a government is guided in its management of public affairs”).

I. The Plaintiff's Claims Against The Texas Education Agency Are Jurisdictionally Barred By Eleventh Amendment Immunity.

This issue will not dispose of the entire suit because claims will remain against Commissioner Scott. However, because it is jurisdictional, the defendants will address it first. *See Ramming*, 281 F.3d at 161 (“the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits”) (internal quotation marks omitted). “[T]he burden of establishing federal jurisdiction rests on the party seeking the federal forum.” *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001).

Absent a valid waiver or abrogation, “Eleventh Amendment” immunity² bars a federal court from hearing claims for any relief, including prospective and equitable relief, against a state or one of its agencies. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 n. 8, 100, 104 S.Ct. 900, 907 n. 8, 908 (1984). Moreover, a state agency is not a suable “person” for purposes of a § 1983 claim. *Cronen v. Tex. Dept. of Human Services*, 977 F.2d 934, 936 (5th Cir. 1992) (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989)).

It cannot be seriously disputed that the Texas Education Agency is a state agency. *E.g., see* TEX. EDUC. CODE §§ 7.004 (making TEA subject to Sunset provisions of the Government Code), 7.051 (Commissioner appointed by Governor and confirmed by Senate). Accordingly, all the plaintiff's claims against defendant TEA must be dismissed. *Eddins v. Excelsior Independent School Dist.*, 88 F. Supp.2d 683, 685 (E.D. Tex. 2000) (dismissing § 1983 claims against TEA on 11th Amendment immunity grounds). *See also Briggs v. Mississippi*, 331 F.3d 499, 502-03 (5th Cir.

² What is commonly called “Eleventh Amendment immunity” is not really derived from the Eleventh Amendment. *Alden v. Maine*, 527 U.S. 706, 713, 119 S.Ct. 2240, 2246 (1999) (“The phrase is convenient shorthand but something of a misnomer”).

2003) (dismissing Establishment Clause claim against the state on 11th Amendment immunity grounds).

The plaintiff's naming of TEA as a defendant is symptomatic of a broader lack of understanding of federal jurisdiction. She attempts to base jurisdiction for her claims on, *inter alia*, 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-02. Complaint ¶ 5. However, neither the Reconstruction-era Civil Rights Act nor the federal declaratory judgment statute creates jurisdiction. *See In re B-727 Aircraft Serial No. 21010*, 272 F.3d 264, 270 (5th Cir. 2001) ("the Declaratory Judgment Act does not provide a federal court with an independent basis for exercising subject-matter jurisdiction"); *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1346-47 (5th Cir. 1985) ("As the United States Supreme Court, this court, and the major commentators have all pointed out, 42 U.S.C. § 1983 is not a jurisdictional statute and, therefore, does not give federal courts the power to decide claims that arise under it.") (footnotes omitted).

II. The Plaintiff Cannot State A Viable Due Process Claim.

The plaintiff claims that the defendants "deprived [her] of her Fourteenth Amendment due process rights by firing her without affording her the rights to which she was entitled under Texas Operating Procedures 07-08(2) [*sic*]." Complaint ¶ 62. Somewhat more particularly, she alleges that neither in the November 5, 2007 meeting in which she received Exhibit B nor "at any other time" did any TEA official "inform[] Director Comer of any right to appeal her termination as required by Texas Operating Procedures 07-08(2) [*sic*]." Complaint ¶ 46.

As support for a constitutional due process claim, the foregoing allegations suffer numerous fatal defects. To prevail on a procedural due process claim, a plaintiff must show that (1) she was deprived of a property interest (2) without constitutionally adequate notice and opportunity to be

heard. *Garcia v. Reeves County, Tex.*, 32 F.3d 200, 203 (5th Cir. 1994).

A. The Plaintiff did not Have a Property Interest in Continued State Employment.

“The constitutional right to due process is not . . . an abstract right to hearings conducted according to fair procedural rules.” *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003). “Rather, it is the right not to be deprived of life, liberty, or *property* without such procedural protections.” *Id.* at 282-83 (emphasis added) (citing *Baldwin v. Daniels*, 250 F.3d 943, 946 (5th Cir.2001) (“To bring a procedural due process claim under § 1983, a plaintiff must first identify a protected life, liberty or property interest and then prove that governmental action resulted in a deprivation of that interest.”)).

To be entitled to due process in conjunction with a termination of employment, a public employee must have a property interest in continued employment by her state agency. *Gilbert v. Homar*, 520 U.S. 924, 928-929, 117 S. Ct. 1807, 1811 (1997); *Garcia*, 32 F. 3d at 202-03. “The hallmark of a protected property interest is an entitlement under state law that cannot be removed except for cause.” *Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Services*, 925 F.2d 866, 877 (5th Cir. 1991).

To determine whether a public employee has a “property interest” sufficient to entitle her to due process, federal courts look to state law. *Systems Contractors Corp. v. Orleans Parish School Bd.*, 148 F.3d 571, 574 n. 16 (5th Cir. 1998). Property interests are created and defined according to state law. *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 275 (5th Cir.2000).

“In Texas, employment is at will.” *Conner v. Lavaca Hosp. Dist.*, 267 F.3d 426, 439 (5th Cir. 2001). *Accord, Texas Workforce Com’n v. BL II Logistics, L.L.C.*, 237 S.W.3d 875, 881 (Tex. App. – Texarkana 2007, no pet. his.) (“Texas is an ‘at will’ employment State; that is, ‘absent a specific

agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.”) (citing *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex.1998) (citing *Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex.1993) (per curiam))). Consequently, “[u]nless a contract exists to alter that at-will status,” the plaintiff has “only a unilateral expectation of continued employment, leaving [her] without a protected property interest.” *Conner*, 267 F.3d at 439. *See also Farias*, 925 F.2d at 877 (because plaintiff “could be discharged at will, he had no protected property interest and no right to a due process hearing”) (citation omitted).

TEA Operating Procedure (OP) 07-08, which is referred to in the Complaint at ¶¶ 46 and 62, and which is central to the plaintiff’s due process claim, is attached to this motion as part of Exhibit 1. *Collins*, 224 F.3d at 498-99. It declares unequivocally at section 3, under the heading “At-Will Status,” that “TEA is an employment-at-will agency which means every employee serves at the will of the Commissioner and can be dismissed for any legally permissible reason.” As if that were not enough, it continues:

This OP and its implementation do not affect the employment-at-will status of TEA employees, or otherwise create a property interest or contract right. Accordingly, this OP neither modifies the “at-will” status nor constitutes a contract of employment.

To counter the foregoing, the plaintiff has not pled any facts identifying a contract or statute or rule altering her employment at will status sufficiently to give her a property interest protected by constitutional due process. Such facts cannot be derived by implication. Under Texas law, a property interest must be stated in express and unambiguous terms, which are strictly construed in favor of the state. *Hopkins v. Stice*, 916 F.2d 1029, 1031 (5th Cir. 1990) (citing *Batterton v. Texas General Land Office*, 783 F.2d 1220, 1223 (5th Cir. 1986) (citing *State v. Standard*, 414 S.W.2d 148,

153 (Tex. 1967)). “[W]hatever is not unequivocally granted in clear and explicit terms is withheld,” so that “[a]ny ambiguity or obscurity in the terms of the [property interest] must operate in favor of the state.” *Schwartz v. State*, 703 S.W.2d 187, 189 (Tex. 1986).

Even without the express language in OP 07-08 § 3 above, the plaintiff could not have relied on the agency’s provision of post-termination procedures to infer a property interest in her employment. *See Cabrol v. Town of Youngsville*, 106 F.3d 101, 106-07 (5th Cir. 1997); *Henderson v. Sotelo*, 761 F.2d 1093, 1097-98 (5th Cir. 1985) (citing *Olim v. Wakinekona*, 461 U.S. 238, 250-251, 103 S.Ct. 1741, 1748 (1983)).

B. Assuming, Implausibly, a Property Interest, the Defendants did not Deprive the Plaintiff of the Interest Without Adequate Notice and Opportunity to be Heard.

Because the plaintiff had no ownership interest in her state job, the defendants need show no more to be entitled to dismissal of this claim. *Kinsey v. Salado Indep. School Dist.*, 950 F. 2d 988, 997 (5th Cir.) (en banc) (in the absence of a property interest “we do not consider what process is due”). However, it is useful to examine the plaintiff’s pleading of this claim, which demonstrates a misperception of constitutional law that is symptomatic of her claims generally.

For purposes of this section, and for no other, in view of the criteria for a Rule 12(b)(6) dismissal, the defendants will assume that the plaintiff was “terminated,” when in fact she resigned.³ The putative discharge, nevertheless, was accompanied by constitutionally adequate notice and

³ In order for a resignation to be treated as a termination for purposes of a discrimination, retaliation, or denial of due process claim, the plaintiff must establish that the resignation amounted to a constructive discharge (which the plaintiff here has not pled). “A constructive discharge occurs when the employer makes working conditions so intolerable that a reasonable employee would feel compelled to resign.” *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007). “This inquiry is an objective, ‘reasonable employee,’ test under which we ask ‘whether a reasonable person in the plaintiff’s shoes would have felt compelled to resign.’” *Id.*

opportunity to be heard.

1. The (alleged) violation of agency termination policy is not by itself a denial of constitutional due process.

The plaintiff alleges that the defendants denied her due process by failing to “afford[] her the rights to which she was entitled under [OP] 07-08(2).” Complaint ¶ 62. However, even if it were true that the defendants violated the TEA operating procedure, that would not suffice to state a viable due process claim. *Ramirez v. Ahn*, 843 F.2d 864, 867 (5th Cir. 1988) (“even if an action by a government entity violates its own rules or those of the state, there is no constitutional deprivation unless the conduct also trespasses on federal constitutional safeguards. As long as an individual receives notice and a hearing that satisfies federal due process, any violations of state law are completely irrelevant to constitutional analysis.”); *Wells v. Dallas Independent School Dist.*, 793 F.2d 679, 682 (5th Cir. 1986) (“If a state or local government demands that its officials afford a more elaborate process than the Constitution requires, its demands alone cannot expand the boundaries of . . . due process.”).

By “Texas Operating Procedures 07-08(2),” the plaintiff apparently refers to section 9-g-(2) of OP 07-08. That subsection requires that, first, the supervisor seeking the termination⁴ presents a proposed termination memorandum (described in subsection (1)) to the associate commissioner over the employee’s division. *See* Exhibit 1 (attached). Next, if the associate commissioner approves the termination, a Human Resources representative “and an appropriate supervisor will provide the employee written notice of the adverse employment action and inform the employee of the appeals process discussed below in paragraph 3.” *Id.*

⁴ Subsection g refers to “adverse employment actions, as defined in Section 8(c)(5) . . .” “Involuntary dismissal” is listed at § 8(c)(5)(e).

It is not altogether clear from the plaintiff's pleadings that the November 5, 2007 meeting was meant to be the formal presentation of notice of termination under subsection g(2) above. Complaint ¶ 46. Although Exhibit B shows that the associate commissioner had approved the action proposed in the "termination memo," the meeting did not include an HR person. It appears that, instead, Dr. Shindell and Ms. Martinez were giving Ms. Comer advance warning of the termination decision so that she would have the opportunity to resign. Had she not chosen to resign, the g(2) process would then have been implemented, including informing her of her right to appeal.

Nevertheless, in accordance with the standards for Rule 12(b)(6) dismissal, the defendants will assume for argument sake that under agency operating procedures Dr. Shindell and Ms. Martinez should have informed Ms. Comer of her right to appeal her termination. The question remains as to whether the United States Constitution required them to do so (again assuming, contrary to the same OP on which the plaintiff relies, that she had a property interest).

2. As a matter of law, assuming a property interest, the defendants provided constitutionally sufficient notice.

The notice required by the Due Process Clause of the Fourteenth Amendment is of the grounds for termination, not of subsequent appeal procedures. *Fowler v. Smith*, 68 F.3d 124, 127 (5th Cir. 1995) ("Procedural due process entitles a public employee with a property right in his employment to notice of the charges against the employee, an explanation of the employer's evidence, and an opportunity to present his side of the story."). For information about how to contest the proposed discharge, the agency is entitled to rely on the employee to consult agency policies and procedures. *E.g., see Nunez v. Simms*, 341 F.3d 385, 391 (5th Cir. 2003) (employee "should have known from the language in the contract and the provisions of Texas law, that the contract gave her

no right to continued employment”). This should be especially true for a TEA veteran who had been a supervisor for almost a decade. Complaint ¶¶ 2, 7, 11.

Section 8(g)(2) of OP 07-08 requires, and Exhibit B to the Complaint provided, a detailed explanation of the grounds for the proposed termination. Had the plaintiff then consulted that section of the OP, she would have found that it refers to subsection (3), which refers to the process in section 9(d)(5), whereby the terminnee may appeal to the Commissioner. This provision gives the employee the opportunity to present to the Commissioner the reasons why she should not be terminated and any evidence she has to support her position. Exhibit 1 (attached).

3. As a matter of law, assuming a property interest, the defendants provided a constitutionally sufficient opportunity to respond.

For a termination of public employment (again, assuming a property interest), “[t]he essential requirements of due process . . . are notice and an opportunity to respond.” *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495 (1985). The opportunity to respond “need not be elaborate,” but can be “something less than a full evidentiary hearing.” *Id.* at 545, 105 S.Ct. at 1495 (internal quotation marks omitted). For a disciplinary or performance-based termination of a public employee with a “property interest”:

The opportunity to present reasons, either in person *or in writing*, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.

Id. at 546, 1495 (emphasis added, citation omitted).

As noted, all that the Constitution requires is the *opportunity* to tell the employee’s side of the story. That opportunity, and along with it any due process claim the employee might have had,

is waived by the employee's failure to take advantage of procedures set out in agency policy. *McDonald v. City of Corinth*, 102 F.3d 152, 156 (5th Cir. 1996); *Browning v. City of Odessa*, 990 F.2d 842, 845 n. 7 (5th Cir. 1993) (citing *Rathjen v. Litchfield*, 878 F.2d 836, 839 (5th Cir. 1989)).

III. The Plaintiff Cannot State A Viable Free Speech Retaliation Claim.

The plaintiff contends that she is entitled to relief under § 1983 for the defendants' action in terminating her for opposing the unconstitutional "neutrality policy." Complaint ¶¶ 59-60. Inasmuch as this "count"⁵ is set out separately from "count" I, which also alleges that the putative "neutrality policy" violates the Establishment Clause, the plaintiff evidently attempts in "count" II to assert a claim of retaliation for the exercise of speech protected by the First Amendment.

Even though count II, like count I, is based on the Establishment Clause, it is analyzed according to the elements of a First Amendment employment retaliation claim. *See Hennessy v. City of Melrose*, 194 F.3d 237, 245 (1st Cir. 1999). "To establish a § 1983 claim for employment retaliation related to speech, a plaintiff-employee must show: (1) he suffered 'an adverse employment action'; (2) he *spoke 'as a citizen on a matter of public concern'*; (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech 'precipitated the adverse employment action.'"⁶ *Nixon v. City of Houston*, 511 F.3d 494, 497 (5th Cir. 2007) (emphasis added, citations omitted).

In keeping with the standards for a Rule 12(b)(6) motion, the defendants will assume for

⁵ "This term [count] is no longer used in pleading under the Rules of Civil Procedure." BLACK'S LAW DICTIONARY (abr. 5th ed. 1983) at 183. When it is used, each "count" is supposed to constitute a separate ground for relief that could stand alone. *Id.*

⁶ In contrast to a due process claim, as analyzed above, a First Amendment retaliation claim does not depend on a property interest. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 283-84, 97 S.Ct. 568, 574 (1977).

purposes of this motion that a proposed termination coupled with a resignation can constitute an adverse employment action for purposes of this claim. Although, as shown in Exhibit B to the Complaint, the proposed termination was based on a series of actions by Ms. Comer reflecting insubordination and/or poor judgment, of which forwarding the e-mail in question was simply cumulative, the defendants will assume *arguendo*, for purposes of this motion only, that the plaintiff's "speech" "caused" the "adverse action."⁷

Nevertheless, the plaintiff here cannot satisfy the second element above, that she spoke as a citizen. "An employee is not speaking as a citizen – but rather in his role as an employee – when he makes statements pursuant to his official duties." *Nixon*, 511 F.3d at 497 (brackets and internal quotation marks omitted) (discussing *Garcetti v. Ceballos*, 547 U.S. 410, 420-25, 126 S.Ct. 1951, 1959-62 (2006)).

Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. . . . Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, *demonstrate sound judgment*, and *promote the employer's mission*.

Garcetti, 547 U.S. at 421-23, 126 S.Ct. at 1960 (emphasis added).

Consequently, when public employees express positions as public employees, "the Constitution does not insulate their communications from employer discipline." *Id.* at 421, 126 S.Ct.

⁷ "If an employer would have reached the same decisions without regard to the constitutionally protected incident, then the incident was not a motivating factor in defendant's decision." *Bradley v. University of Texas M.D. Anderson Cancer Center*, 3 F.3d 922, 925 (5th Cir. 1993) (citing *Mt. Healthy City Sch. Dist.*, 429 U.S. at 285-87, 97 S.Ct. at 575-76).

at 1960. A state employee's communication to members of the public is ineligible for First Amendment protection even when "his speech is not necessarily required by his job duties but nevertheless is related to his job duties." *Nixon*, 511 F.3d at 498 (citing *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007)).

The plaintiff's pleadings show without question that she "spoke" in her capacity as a TEA employee. According to the plaintiff, her duties as Director of Science included "professional outreach to . . . organizations, and teacher groups" and "technical assistance to . . . science teachers . . ." Complaint ¶ 10. The e-mail at issue was sent to her at a TEA e-mail address and her answer, promising to "help get the word out," clearly identifies her as:

Chris Castillo Comer
Director of Science
Texas Education Agency

Exhibit H to the complaint. The plaintiff's "FYI" forwarding e-mail, to 36 "science teachers in the Austin area" and heads of science teacher organizations (Complaint ¶ 32), identifies the sender in the same way. Exhibit I.

Because her pleadings show that the plaintiff did not speak as a private citizen and therefore did not exercise speech protected by the First Amendment, she cannot state a § 1983 claim for First Amendment retaliation. Consequently, the court does not have to reach the "*Pickering* balance," weighing the citizen's "interest in the speech" against "the government's interest in the efficient provision of public services." *Nixon*, 511 F.3d at 497 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35 (1968)). See *Garcetti*, 547 U.S. at 423, 126 S.Ct. at 1961 ("When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences" but

when “the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny.”).

IV. The Plaintiff Cannot State A Viable Establishment Clause Claim.

Whereas “count” II, examined above, challenges the so-called “neutrality policy” as applied to Ms. Comer, “count” I attacks the putative “policy” on its face. Complaint ¶¶ 56-57. That is, the plaintiff argues that the very existence of the “policy” offends the Constitution and violates her rights, regardless of its consequences for one employee. As a matter of law, on the facts pled by the plaintiff, this claim must be dismissed.

A. The Plaintiff Lacks Standing to Litigate a Facial Establishment Clause Claim.

The issue of standing is jurisdictional.⁸ *Johnson v. City of Dallas*, 61 F.3d 442, 443-44 (5th Cir. 1995). “It is the responsibility of the complainant clearly to allege facts . . . sufficient to support standing.” *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 607 (5th Cir. 2004). Consequently, “dismissal for lack of standing [is] appropriate at [the] pleading stage when [the] plaintiff fails to set forth specific facts” showing that the plaintiff has standing. *Id.*

“To qualify as a party with standing to litigate, a person must show, first and foremost, ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent.’” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S.Ct. 1055, 1067 (1997).

An interest shared generally with the public at large in the proper application of the Constitution and laws will not create standing. We have consistently held that a

⁸ “Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.” *Bauer v. Texas*, 341 F.3d 352, 357 (5th Cir. 2003). “[P]rudential standing . . . embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction . . .’” *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 2308 (2004).

plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.

Public Citizen, Inc. v. Bomer, 274 F.3d 212, 219 (5th Cir. 2001) (citations, brackets, and quotation marks omitted).

“In order to demonstrate that a case or controversy exists to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future.” *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 1665 (1983)). “Past exposure to illegal conduct” is not enough by itself to satisfy this requirement. *Id.* See also *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285-86 (5th Cir. 1992).

Whereas the First Amendment right at issue in count II is the right of a state employee not to be subjected to retaliation for the exercise of protected free speech, the First Amendment right at issue in count I is the right not to have government require the teaching of religion in public schools. That is a right that public school teachers, students, and parents have standing to assert. All of the cases relied on by the plaintiff (discussed in part IV-B below) were suits by teachers and parents.

The plaintiff, however, does not claim to be either a public school teacher or the parent of a public school student. And, as explained in the BACKGROUND above, as a matter of law, the plaintiff has no role, in her capacity as a TEA employee, in the prescription of the content of the statewide public school curriculum. Consequently, even if it were true that TEA had a policy of “neutrality” that somehow governed the *teaching* of science (as opposed to employee expressions

of positions on curriculum issues), the plaintiff's interest in the issue is no greater than that of members of the public generally.

B. The Plaintiff's Establishment Clause Authorities are Inapplicable to a State Agency's Regulation of Employee Speech.

A critical legal flaw in the plaintiff's claim, even accepting all her factual allegations as if they were true, is that it depends on a body of law that is inapplicable to this case. In each of the decisions relied upon by the plaintiff, the state or a school board mandated that a position statement be included in textbooks or classroom instruction.

The plaintiff's principal authority is *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573 (1987). Complaint ¶¶ 4, 6, 13, 22, 26, 54, 56. Two of the other Establishment Clause cases cited in the Complaint, *Kitzmiller* and *Selman*, *infra*, rely on and apply *Aguillard*. In the *Aguillard* case, "the legislature **required** the **teaching** of a theory that coincided with [a] religious view. The legislative history documents that the Act's primary purpose was to change the science curriculum **of public schools** in order to provide persuasive advantage to a particular religious doctrine." *Id.* at 592, 107 S.Ct. at 2582 (emphasis added). "The Louisiana Creationism Act advances a religious doctrine by **requiring** either the banishment of the theory of evolution from *public school classrooms* or the presentation of a religious viewpoint that rejects evolution in its entirety." *Id.* at 596, 107 S.Ct. at 2584 (emphasis added). "[T]he First Amendment does not permit the State to **require** that **teaching and learning** must be tailored to the principles or prohibitions of any religious sect or dogma." *Id.* at 591, 107 S.Ct. at 2581 (emphasis added) (quoting *Epperson v. State of Ark.*, 393 U.S. 97, 106, 89 S.Ct. 266, 271 (1968) (cited in the Complaint ¶ 26)).

The public school classroom context was essential to the *Aguillard* holdings.

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. . . . Therefore, in employing the three-pronged *Lemon* test, we must do so mindful of the *particular concerns that arise in the context of public elementary and secondary schools*.

Aguillard, 482 U.S. at 583-85, 107 S.Ct. at 2577-78 (emphasis added) (referring to *Lemon v. Kurtzman* (discussed in part IV-D below)).

By contrast, the same concerns do not apply, or do not apply so significantly, when the state interacts with adults. *Id.* at 583, 107 S.Ct. at 2578 (“The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses. ‘*This distinction warrants a difference in constitutional results.*’”) (emphasis added).

The remaining cases relied on by the plaintiff follow the same pattern as *Aguillard*. *Kitzmiller v. Dover Area School Dist.*, 400 F. Supp.2d 707, 708 (M.D. Pa. 2005) (Complaint ¶¶ 4, 18, 25, 26, 54) (school board resolution mandated that “[s]tudents will be made aware of gaps/problems in Darwin’s theory and of other theories of evolution including, but not limited to, intelligent design,” and that “teachers would be required to read [a prescribed] statement to students in the ninth grade biology class”); *Selman v. Cobb County School Dist.*, 390 F. Supp.2d 1286, 1292 (N.D. Ga. 2005) (school board required placement of sticker on science textbooks proclaiming that “[e]volution is a theory, not a fact”), *vacated and remanded*, 449 F.3d 1320 (11th Cir. 2006) (cited in the Complaint at ¶¶ 19 and 54, without noting the decision was vacated on appeal); *McLean v. Arkansas Bd. of Ed.*, 529 F. Supp. 1255, 1256-57 (D. Ark. 1982) (Complaint ¶ 24) (statute required that “[p]ublic schools within this State shall give balanced treatment to creation-science and to evolution-science”); *Epperson*, 393 U.S. at 98-99, 89 S.Ct. at 267 (Complaint ¶ 26) (“Arkansas law

ma[de] it unlawful for a teacher in any state-supported school or university ‘to teach the theory or doctrine that mankind ascended or descended from a lower order of animals,’ or ‘to adopt or use in any such institution a textbook that teaches’ this theory”).

C. The TEA “Policy” of Agency Neutrality on Curriculum Issues is Constitutional.

As explained in the BACKGROUND above, TEA’s posture of nonpartisanship in curriculum issues is a necessary and inherent component of its statutorily mandated relationship with the State Board of Education. The plaintiff refers to the “policy” as if it pertained only to the evolution-creationism controversy in science education. The specific facts she pleads do not support that characterization.

The one statement of the policy presented by the plaintiff is in Exhibit B to her Complaint. The explanation to her on the first page of this memorandum shows unmistakably that the “policy” applies more globally than just to the one curriculum controversy highlighted in her case.

As the Director of Science, Ms. Comer should understand that it is her job to explain law and rule regarding the science Texas Essential Knowledge and Skills (TEKS), but not to cross the line into providing guidance or opinions about *instructional methodology or any other matters about which we have no statutory authority*. It is crucial for Ms. Comer to exercise good judgment and the utmost care when sharing information regarding science education in Texas . . . and ensure that it does not appear in any way that she is advocating for any given position or stance.

Exhibit B to the Complaint (emphasis added).

As expressed in Exhibit B, the “policy” covers staff expressions of views on *any* “instructional methodology” or “other matters about which we have no statutory authority.” The plaintiff pleads no facts showing that the “policy” as applied is limited to evolution vs. creationism. The only instance of its application that she describes is her own case.

Nevertheless, for purposes of this motion and for no other, recognizing the standards for Rule

12(b)(6) dismissal, the discussion below will treat the “policy” as if it were designed for the evolution/creationism debate.

Indisputably, the “policy” in question governs only the conduct of TEA employees in their official capacity. The plaintiff does not allege, much less plead facts that if proven would show, that TEA mandates “neutrality” by *public school* personnel in the *teaching* of science in the *classroom*. As discussed in the BACKGROUND above, as a matter of law, TEA has no authority or responsibility for prescribing to local public schools what may and may not be taught.

All that the plaintiff’s authorities hold with respect to “neutrality” is that, in the context of classroom instruction, a mandatory superficial neutrality can have the effect of promoting a religious agenda by implying that creationist or “intelligent design” concepts have as much scientific credibility as evolution. But in each of those cases, the public school context, coupled with a history of efforts by the same defendants to inject religion into the science curriculum, rendered a facially neutral requirement unconstitutional in its effect. *Aguillard*, 482 U.S. at 590, 594, 107 S.Ct. at 2581, 2583; *Kitzmiller*, 400 F. Supp.2d at 728, 746.

By contrast, the TEA “policy” at issue does not say anything to public school students about the scientific validity of evolution or creationism. The only message it conveys to the public is that TEA does not take sides on matters that are the province of the State Board of Education.

Outside of the public school context, state official neutrality is not only permissible under the Establishment Clause. It is required, as the plaintiff’s own authorities stress.

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. ***The First Amendment mandates governmental neutrality*** between religion and religion, and

between religion and nonreligion.

Epperson, 393 U.S. at 103-04, 89 S.Ct. at 270 (emphasis added).

“The touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’” *Kitzmiller*, 400 F. Supp.2d at 746. *Accord*, *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 470 (5th Cir. 2001) (en banc) (“The Court has required that a government allocate benefits among secular and religious organizations in a neutral manner.”); *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680, 685 (7th Cir. 1994) (“The Establishment Clause requires government neutrality with respect to religion.”).

In a case that is instructive for the issues here, the plaintiffs argued that a school district policy requiring that the “principal or primary effect” of any instructional activity “must be one that neither advances nor inhibits religion” favored religion in specific applications. *Weinbaum v. Las Cruces Public Schools*, 465 F. Supp.2d 1182, 1188 (D. N.M. 2006). Rejecting the challenge, the court held that “the government does not violate the Establishment Clause by enacting neutral policies that happen to benefit religion.” *Id.* at 1196 (brackets and internal quotation marks omitted).

D. Even if the *Lemon* Test Were Applicable to This Case, Which it is not, the Challenged TEA “Policy” Would be Constitutional Under it.

Because, as shown above, this is not a case about controlling instruction in the classroom, the plaintiff’s Establishment Clause authorities are inapplicable to the TEA “policy” at issue. Not even the permissive standards for a Rule 12(b) motion allow that application, because it is a question of law. Nevertheless, even if the putative “policy” were judged by Establishment Clause criteria, it would still pass muster.

Although it is never cited in her Complaint, all of the plaintiff's authorities except *Epperson* (which was pre-*Lemon*) apply the *Lemon* test to decide the issues presented in those suits.

First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion.

Aguillard, 482 U.S. at 583, 107 S.Ct. at 2577 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111 (1971)). See also *Kitzmiller*, 400 F. Supp.2d at 735 (same); *Selman*, 390 F. Supp.2d at 1298 (same).

First, the plaintiff has pled no facts showing that the TEA "policy" of agency neutrality on curriculum issues has a religious purpose. "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Aguillard*, 482 U.S. at 585, 107 S.Ct. at 2578 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 1368 (1984) (O'CONNOR, J., concurring)). "The court should defer to a state's *articulation* of a secular purpose, so long as the statement is sincere and not a sham." *Selman*, 390 F. Supp.2d at 1300 (emphasis added) (citing *Aguillard*, 482 U.S. at 586-87, 107 S.Ct. at 2579). *Accord*, *Doe*, 240 F.3d at 468 ("Courts normally defer to a government's statement of secular purpose [which] must be sincere and not a sham"). The plaintiff has pled no facts that if proven would support the conclusion that the purpose articulated in the second paragraph of Exhibit B, to avoid trespassing on "matters about which we have no statutory authority," is insincere or a sham.

Second, as discussed above, the effect of the policy is not to communicate or suggest to an objective observer any sort of preference for religion. See *Selman*, 390 F. Supp.2d at 1305 ("Regardless of the School Board's actual subjective purpose in voting for the Sticker, the effects

prong asks whether the statement at issue in fact conveys a message of endorsement or disapproval of religion to an informed, reasonable observer.”). This is a question of law. *Id.* at 1306 (“Whether the [policy] communicates a message of endorsement of religion is not really based on the Court’s factual findings but is ‘in large part a legal question to be answered on the basis of judicial interpretation of social facts.’”) (quoting *Lynch*, 465 U.S. at 693-94, 104 S.Ct. at 1370). “The Court’s focus is on ascertaining the view of a disinterested, reasonable observer.” *Selman*, 390 F. Supp.2d at 1306.

“Entanglement, *Lemon*’s final prong, mandates that a challenged governmental action must not foster an excessive government entanglement with religion.” *Weinbaum*, 465 F. Supp.2d at 1188 (quoting *Lemon*, 403 U.S. at 613, 91 S.Ct. at 2111). The “policy” at issue does not result in *any* entanglement, much less excessive entanglement, with religion. “Contacts between the government and religion are only impermissible if they are so extensive that they have ‘the effect of advancing or inhibiting religion.’” *Weinbaum*, 465 F. Supp.2d at 1188.

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable and we have always tolerated some level of involvement between the two. Entanglement must be “excessive” before it runs afoul of the Establishment Clause.

Agostini v. Felton, 521 U.S. 203, 233, 117 S.Ct. 1997, 2015 (1997) (citation omitted). The plaintiff points to no contacts at all between the defendants and religion, much less an excessive entanglement.

CONCLUSION

In view of all the foregoing, the defendants respectfully urge that all of the plaintiff’s claims against them be dismissed.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

ROBERT B. O'KEEFE
Chief, General Litigation Division

/s/ James C. Todd
JAMES C. TODD
Texas Bar No. 20094700
Assistant Attorney General
Office of the Attorney General
General Litigation Division -019
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120 (Telephone)
(512) 320-0667 (Facsimile)
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that I have electronically submitted for filing, a true and correct copy of the above and foregoing Defendants' 12(b) Motion to Dismiss in accordance with the Electronic Case Files System of the Western District of Texas on this the 11th day of August, 2008, which will send notification to the following:

Judith W. Bagley
PATTON BOGGS LLP
2001 Ross Avenue, Suite 3000
Dallas, Texas 75201

and, I hereby certify that I have mailed copies of this document by regular U.S. Mail to the following non-CM/ECF participants:

Douglas B. Mishkin
John L. Oberdorfer
Pamela S. Richardson
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, DC 20037
Attorneys for Plaintiff

/s/ James C. Todd

JAMES C. TODD
Assistant Attorney General

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

CHRISTINA CASTILLO COMER
Plaintiff,

v.

ROBERT SCOTT, Commissioner, Texas
Education Agency, in his official
capacity and TEXAS EDUCATION
AGENCY,
Defendants.

§
§
§
§
§
§
§
§
§

CA No. 1:08CV00511-LY

ORDER

On this day the Court considered Defendants' 12(b)(6) Motion to Dismiss and brief in support. After due consideration, the Court is of the opinion that the Motion is meritorious and that it should be granted. Therefore,

IT IS ORDERED that Defendants' Motion to Dismiss is hereby GRANTED. Plaintiff's claims against the Defendants are DISMISSED.

SIGNED this _____ day of _____, 2008.

HON. LEE YEAKEL
UNITED STATES DISTRICT JUDGE

EXHIBIT 1

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

CHRISTINA CASTILLO COMER	§	
Plaintiff,	§	
	§	
v.	§	CA No. 1:08CV00511-LY
	§	
ROBERT SCOTT, Commissioner, Texas	§	
Education Agency, in his official	§	
capacity and TEXAS EDUCATION	§	
AGENCY,	§	
Defendants.	§	

AFFIDAVIT OF AARON BUCK

BEFORE ME, the undersigned authority, on this day personally appeared **Aaron Buck**, who being first duly sworn according to law, upon his oath, deposed and said:

“My name is Aaron Buck. I am over eighteen years of age and am fully competent to make this Affidavit. I have personal knowledge of the facts contained herein, and they are all true and correct.

I am employed as a Program Specialist with the Texas Education Agency (TEA) in the Division of Organization Development. It is my responsibility to maintain and update the agency’s operating procedures; thus, my position requires me to be familiar with the operating procedures. Attached hereto is a document totaling eight (8) pages from the TEA operating procedures entitled OP 07-08 -- Employee Disciplinary Actions and Complaint Procedures. The document attached hereto is a true and correct copy of the OP 07-08 which was effective on August 24, 2006 through December 13, 2007.

Further, affiant sayeth naught.”


(Affiant)

SIGNED under penalty of perjury, on this the 8th day of August, 2008.

NOTARY PUBLIC, THE STATE OF TEXAS

Notary's printed name: Diane Saldana

My Commission expires: March 15, 2010



OP 07-08 - EMPLOYEE DISCIPLINARY ACTIONS AND COMPLAINT PROCEDURES

1. Purpose. To publish guidelines for employee disciplinary actions and procedures for employee complaints.
2. Scope. This procedure applies to all employees of the Texas Education Agency (TEA) except those employees who serve as Directors I-V, General Counsels IV and V, Portfolio Managers III, and Chief Investment Officer. OP 07-21, Performance Appraisals, Disciplinary Actions, and Complaint Procedures Applicable to Directors I-V, General Counsels IV and V, Portfolio Managers III, and Chief Investment Officer, addresses disciplinary actions and complaint procedures for these employees.
3. Responsibility. The Division of Human Resources is the office of primary responsibility (OPR) for this procedure.
4. Nondiscrimination. TEA shall comply fully with the nondiscrimination provisions of all federal and state laws and regulations by assuring that no person shall be excluded from consideration for selection, appointment, training, promotion, retention, or any other covered personnel action, nor be denied any benefits or participation in any educational programs or activities which it operates, on the grounds of race, religion, color, national origin, sex, disability, age, or status as a disabled veteran or Vietnam-era veteran (except where age, sex, or disability constitutes a bona fide occupational qualification necessary for proper and efficient administration).
5. Retaliation Prohibited. No retaliatory employment actions shall be taken against an employee who files a complaint pursuant to this OP. Any employee who is found to have taken a retaliatory employment action will be subject to disciplinary action.
6. At-Will Status. TEA is an employment-at-will agency which means every employee serves at the will of the Commissioner and can be dismissed for any legally permissible reason. This OP and its implementation do not affect the employment at-will status of TEA employees, or otherwise create a property interest or contract right. Accordingly, this OP neither modifies the "at-will" status nor constitutes a contract of employment.
7. Probationary Period. All employees are initially hired on a probationary basis. The probationary period extends through the first 12 months of employment. Disciplinary actions may be taken during the probationary period without regard to progressive disciplinary considerations.
8. Disciplinary Actions.
 - a. Reasons for Disciplinary Actions. Disciplinary actions may be required for many reasons. Some, but not all of these reasons, are listed and defined as follows:
 - (1) Inadequate Job Performance - Job performance and/or productivity below that expected or required.
 - (2) Inadequate Job Knowledge - Demonstrated failure to possess or acquire the knowledge required to adequately perform the job.
 - (3) Insubordination - Failure to follow a directive given by a supervisor or other agency representative who possesses the authority to give the directive; use of language or conduct that shows disrespect towards one's supervisor(s); acting outside the scope of one's authority.
 - (4) Misconduct - Improper, unacceptable, and/or unlawful behavior. Some examples of misconduct include:

- (a) Physical or verbal abuse;
 - (b) Deliberately disrupting the normal office routine or the performance of other employees;
 - (c) Falsifying time or travel reports;
 - (d) Using the apparent authority of the agency for personal gain;
 - (e) Knowingly disclosing confidential information to an individual not authorized to receive it;
 - (f) Outside employment that constitutes a conflict of interest;
 - (g) Use of alcoholic beverages, controlled substances, inhalants, and illegal drugs/substances while on duty; or any other time if it affects the employee's behavior or performance on the job;
 - (h) Intentional falsification or misstatement of information on employment applications or other official government documents;
 - (i) Conviction of criminal offense;
 - (j) Unauthorized use of state property;
 - (k) Failure to report any conflict of interest;
 - (l) Inappropriate comments which could be construed by a reasonable person to be insulting or demeaning to others, including (but not limited to) comments based on race, sex, religion, color, national origin, age, or disability;
 - (m) Any form of sexual harassment;
 - (n) Misuse of work hours and/or leave time;
 - (o) Failure to follow or adhere to established policies of TEA; or established rules or procedures within the employee's division or office;
 - (p) Conduct that negatively impacts TEA;
 - (q) Refusal to fully participate in internal or external agency investigations;
 - (r) Failure to communicate with a supervisor or other authorized agency representative the current status of any medical condition which prevents attendance at work; and
 - (s) Failure to report leave time taken.
- (5) Unacceptable Absenteeism. Occurs when an employee is unable to adequately perform his or her job due to absenteeism, or when the normal day-to-day work activities of the office are disrupted due to an employee's use of unscheduled leave.
- (6) Unscheduled Leave. Any leave not approved in advance, other than sick or emergency leave, which creates a hardship on the employee's division and/or job functions.

- (7) Unauthorized Absence. An unauthorized absence occurs when an employee:
 - (a) Fails to report to work and does not promptly notify supervisor of acceptable reason for the absence;
 - (b) Takes leave time without prior approval, or in cases of sick leave or emergency leave, without notifying the supervisor at the earliest practicable time; or
 - (c) Fails to return to work at the conclusion of an approved leave period and has not received approval for additional leave.
- (8) Unacceptable Tardiness. Habitual tardiness that causes the employee's productivity to suffer and/or places a hardship on the employee's division.
- (9) Job Abandonment. Fails to report to work without prior approval for leave and does not provide notification regarding the nature of the absence or expected date of return within a reasonable period of time.
- b. Disciplinary Action Guidelines. Disciplinary action may be taken to address performance deficiencies or any other employee actions or inactions which are unacceptable, unlawful, or not in compliance with TEA policies. Management is not constrained by these guidelines from taking any appropriate disciplinary action warranted by the unique circumstances concerning individual employees. No specific disciplinary action is a prerequisite for any other disciplinary action. The existence of any disciplinary process does not constitute an entitlement or right to such process.

The appropriate disciplinary action in any situation will be determined on a case-by-case basis after taking into consideration:

- (1) The type and severity of the misconduct or performance deficiency involved;
- (2) The degree to which the employee holds responsibility for his or her actions or behavior;
- (3) The employee's work record (including any prior history of disciplinary problems);
- (4) Any mitigating circumstances surrounding these situations; and/or
- (5) The impact on TEA's missions.
- c. Types of Disciplinary Actions. Disciplinary action should be in keeping with the underlying reason for such actions. Where appropriate, progressive discipline will be used. In all cases, the disciplinary action will be designed to fit the individual circumstances and may include involuntary dismissal even though the misconduct or performance deficiency is a first occurrence. Types of disciplinary actions include, but are not limited to, the following:
 - (1) Letter of Counseling;
 - (2) Performance Improvement Plan;
 - (3) Written Reprimand;
 - (4) Disciplinary Probation;
 - (5) Adverse employment actions, which may include:

- (a) Suspension with or without pay;
 - (b) Salary reduction;
 - (c) Transfer or reassignment;
 - (d) Demotion; and
 - (e) Involuntary dismissal.
- d. Procedures for Letters of Counseling and Performance Improvement Plans. Letters of Counseling and Performance Improvement Plans may be issued by the employee's supervisor(s) whenever deemed appropriate based on the reasons set forth in Section 8(a) above. It is recommended that the supervisor consult with the Division of Human Resources and legal counsel prior to implementing these disciplinary actions.
- e. Procedures for Written Reprimands. After consultation with the Division of Human Resources and legal counsel, Written Reprimands may be issued by the employee's supervisor(s) whenever deemed appropriate based on the reasons set forth in Section 8(a) above.
- f. Disciplinary Probation. After consultation with the Division of Human Resources and legal counsel, an employee may be placed on disciplinary probation whenever deemed appropriate based on the reasons set forth in Section 8(a) above. During the period of disciplinary probation, an employee is not eligible for a merit increase or a promotion within the agency.
- g. Procedures for Adverse Employment Actions. The following procedural steps must be followed for recommended adverse employment actions, as defined in Section 8(c)(5), unless the Commissioner or Commissioner's designee determines that exceptional circumstances require immediate action and/or deviation from these procedural steps. *For adverse employment actions originating out of the offices of the Commissioner, chief deputy commissioner, associate commissioners, or any other office not reporting to an associate commissioner, the procedures for adverse employment actions will be determined by the head of the office in question with the Commissioner reserving the right to make the final decision.*
- (1) Adverse employment actions may be initiated by the immediate supervisor or any higher level supervisor through the division director and next level manager, if applicable, after consultation with the Division of Human Resources and legal review. Proposed adverse employment actions must be in writing and specify the acts of the employee constituting grounds for such discipline and the type of sanction being proposed. A draft of the proposed action should be forwarded to the Division of Human Resources for review.
 - (2) The proposed adverse employment action must be forwarded to the associate commissioner responsible for the division in question. Within 10 working days, unless agreed otherwise, the associate commissioner or the associate commissioner's designee must decide in writing whether to approve, deny, or modify the proposed adverse employment action. The associate commissioner may consult with the employee in question, the employee's supervisor(s), and other persons having relevant knowledge. If the associate commissioner approves or modifies the action, the Division of Human Resources and an appropriate supervisor will provide the employee written notice of the adverse employment action and inform the employee of the appeals process discussed below in paragraph 3. A copy of the final disciplinary action memorandum shall be provided to Human Resources.

- (3) An employee who has received an adverse employment action or a former employee who was involuntarily dismissed may appeal the decision to the Commissioner. The appeal shall be processed pursuant to Section 9(d)(5) of this OP, titled "Formal Presentation - Step Four (FINAL)." This appeal must be in writing, stating all grounds for challenging the decision, and clearly identified as an appeal of the disciplinary action. It must be filed with the Commissioner's office within 5 working days from receipt of the notice described above in paragraph 2. A copy of this appeal must also be filed at the same time with *both* the manager of the Division of Human Resources and the agency's Chief Counsel.
- h. **Personnel Files.** All formal disciplinary actions will become part of an employee's official personnel file maintained in the Human Resources Division. Formal disciplinary actions include all actions specified under Section 8(c), except for Letters of Counseling. A Letter of Counseling shall be kept in the employee's personnel file maintained by the division.
- i. **Administrative Leave or Reassignment.**
 - (1) After consultation with the Division of Human Resources and legal counsel, employees may be placed on administrative leave with pay or reassigned pending an investigation of employee conduct or pending approval of a disciplinary action.
 - (2) If an employee engages in conduct that presents an immediate risk of harm, then the employee may be placed on administrative leave with pay pending an investigation or pending disciplinary action. Under such circumstances, the division director or a higher level manager may impose the action as soon as necessary and provide notification to Human Resources and legal counsel immediately thereafter. In any situation involving an immediate threat to the safety of persons or property, Emergency Services should be called immediately (9-911 or Capitol Police at 463-3333).
 - (3) Administrative leave or reassignment imposed pursuant to this section shall not be considered a disciplinary action.
- j. **Disabling of Computer and Building Access.** When an employee is terminated, placed on administrative leave pending disciplinary action, or suspended, the employee's computer and building access shall be disabled. When an employee is demoted or reassigned, any computer access that was specific to the employee's former position will be curtailed. An employee's supervisor shall immediately notify the Information Security Function and Computer Access of any of the personnel actions listed above, and shall notify Agency Infrastructure of a termination, involuntary administrative leave, or suspension.
- k. **Dismissals for Non-Disciplinary Reasons.** Reductions in force are non-disciplinary actions and will be conducted in accordance with OP 07-25, Reduction in Force.
- l. **Entitlement to Terminal Leave Upon Dismissal.** Employees who are dismissed for disciplinary reasons will have the leave available to employees who resign or who are otherwise terminated for non-disciplinary reasons.
- m. **Employee Representative.** The employee may represent himself or herself or has the right to be represented by an individual of his or her choice. If the chosen representative is an employee of TEA, the representative must take annual or compensatory leave, or leave without pay, for the time used during work hours for such representation. The

representative cannot claim the right to strike (pursuant to Texas Government Code, Section 617.005).

9. Employee Complaints on Conditions of Employment Other Than Claims of Sexual Harassment.

- a. The following complaint procedures are available to TEA employees with regard to complaints relating to conditions of their employment or disciplinary actions. Employees who are bringing a complaint regarding an adverse employment action, as defined by Section 8(c)(3), shall proceed directly to Step Three. The Commissioner reserves the right to deviate from these procedures when deemed appropriate. These procedures do not apply to sexual harassment claims, which are addressed by OP 07-29, Sexual Harassment.

For employee complaints originating out of the offices of the Commissioner, deputy commissioners, or associate commissioners, the procedure for employee complaints will be determined by the head of the office in question with the Commissioner reserving the right to make the final decision.

- b. Conditions of employment subject to these complaint procedures include treatment of employees, wages, hours, benefits, promotions, work assignments, or any other matter which is appropriate for communication between TEA and its employees.

Any employee who has a complaint involving allegations of illegal discrimination is encouraged to use the complaint procedures in this OP or in OP 07-17, *Nondiscrimination*, as it may be the most efficient way for TEA and the employee to explore and resolve disputes. Using these internal complaint procedures will not prevent the employee from filing complaints of discrimination with the appropriate state or federal agency.

- c. Documents or information relating to complaints brought under this OP must be kept in separate files and do not become part of an employee's official personnel file or any personnel files kept in the employee's division.

- d. Complaint Procedures. The following procedural steps must be followed:

- (1) Informal Presentation. An employee shall informally present to his or her immediate supervisor any problem or concern about employment conditions within 10 working days from the occurrence of the events on which the complaint is based. If it is not practicable for the employee and supervisor to meet within 10 days, the deadline may be extended by mutual agreement. If the immediate supervisor does not have authority over the decision or action being grieved, the complaint may be submitted to the most immediate supervisor having authority over the matter.

- (a) If a complaint involves allegations of discrimination or harassment based on race, sex, religion, color, national origin, disability, age, or veteran status, the employee may report the complaint directly to the EEO Coordinator pursuant to OP 07-17, *Nondiscrimination*. If such complaints are presented to the employee's supervisor, the supervisor shall refer the complaint to the EEO Coordinator. The EEO Coordinator shall investigate all complaints of illegal discrimination or harassment. See OP 07-17, Nondiscrimination.

- (b) If any complaint, either formal or informal, involves allegations of unlawful conduct or serious misconduct on the part of TEA or a TEA employee (other than illegal discrimination or harassment), the complaint shall be referred to the Internal Audits

Division for review and possible investigative action. Upon review, the internal auditor will either investigate the complaint or refer it back to the appropriate supervisor. Upon conclusion of an investigation, the auditor will report the investigative findings to the appropriate supervisor for disposition of the complaint.

(2) Formal Presentation - Step One.

- (a) If informal resolution is not successful, the employee may file a written complaint with his or her immediate supervisor, or with the most immediate supervisor having authority over the matter, within 10 working days from the informal presentation of the complaint. The written complaint shall be submitted on a Grievance Form, and shall specify in detail the factual basis underlying the complaint and the relief being sought. The employee shall forward a copy of the written complaint to the Division of Human Resources.
- (b) Within 10 working days of receiving the written complaint, the supervisor must provide either a written response to the complaint or written notification stating that he or she will be unable to meet such deadline. If unable to provide a response within 10 days, the supervisor will indicate an approximate date when the employee may expect a response.
- (c) If the supervisor fails to provide a response or notification of extended deadline within 10 days, or fails to meet the projected timeline, the employee has the option of proceeding to the next step.

(3) Formal Presentation - Step Two.

- (a) The employee may appeal the results of the supervisor's review to the next level manager by filing a written appeal within 5 working days of receiving the written response or within 5 working days of a lapsed deadline (as discussed in Section 9(d)(2)(b) above).
- (b) Within 10 working days, the Step Two manager must issue a written decision, unless a different time period is required and the employee is so notified. The manager may confer with the employee, the employee's supervisor(s), and any other persons having relevant knowledge of the situation.

(4) Formal Presentation - Step Three.

- (a) The employee may appeal the Step Two decision to the next level manager by filing a written appeal within 5 working days of receiving the Step Two response. If the Step Two manager was an associate commissioner, then the employee may proceed to Step Four.
- (b) Within 10 working days, the Step 3 manager must issue a written decision, unless a different time period is required and the employee is so notified. The manager may confer with the employee, the employee's supervisor(s), and any other persons having relevant knowledge of the situation.

(5) Formal Presentation - Step Four (FINAL). The employee or former employee may file a final appeal to the Commissioner with a copy being sent to *both* the manager of the Division of Human Resources and the Chief Counsel of Legal Services. The appeal must be submitted in writing within 5 working days of receiving the decision being appealed, and must describe the basis of appeal, the evidence supporting the employee's position,

the previous efforts to resolve the complaint, and the relief sought. The Commissioner or the Commissioner's designee will determine on a case-by-case basis the appropriate process, if any, to use for the appeal.

- (a) Status of Complaint After Termination or Resignation. If the remedy requested by the employee can reasonably be granted after the employment relationship has ended, then the former employee has the option of continuing the complaint process until its conclusion.

Adam Jones
Associate Commissioner for
Finance and Operations

August 24, 2006
Effective Date

Grievance Form