

Exhibit “A”

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

COPE (a.k.a. CITIZENS FOR OBJECTIVE)	
PUBLIC EDUCATION, INC.), <i>et al.</i> ,)	
)	
Plaintiffs,)	
v.)	Case. No. 13-CV-4119-KHV- JPO
)	
KANSAS STATE BOARD OF)	
EDUCATION, <i>et al.</i> ,)	
)	
Defendants.)	

PLAINTIFFS' SURREPLY TO
DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Douglas J. Patterson, Esq. (KS # 17296)
Kellie K. Warren, Esq. (KS #16733)
Michelle W. Burns, Esq. (KS #21167)
PROPERTY LAW FIRM, LLC
4630 W. 137th St., Suite 100
Leawood, Kansas 66224
913-663-1300 Telephone
913-663-3834 Facsimile
doug@propertylawfirm.com
kellie@propertylawfirm.com
michelle@propertylawfirm.com

John H. Calvert, Esq. (MO #20238)
CALVERT LAW OFFICES
2300 Main St., Suite 900
Kansas City, MO 64108
816-797-2869 Telephone
816-448-3703
816-448-3101 Facsimile
jcalvert@att.net

Kevin T. Snider, Esq. (CA #170988)
PACIFIC JUSTICE INSTITUTE
P.O. Box 276600
Sacramento, California 95827-6600
(916) 857-6900 Telephone
(916) 857-6902 Facsimile
ksnider@pji.org
ATTORNEYS FOR PLAINTIFFS

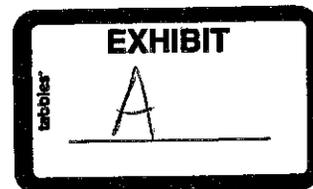


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I. Introduction.

Plaintiffs' Response to Defendants' Motion to Dismiss (Doc. 40) articulates in considerable detail why there is no legal basis to summarily dismiss the Complaint. In Reply (Doc. 41) Defendants argue that both the Complaint and the Response "mischaracterize" the Framework and Standards (the "Policy") because the Policy on its face conveys a different message. Ergo the Court should believe the Policy rather than the Complaint about it.

The Defendants' argument fails (a) because, the Reply actually fails to show that any of the factual allegations in the 122 paragraphs of the Complaint are implausible and therefore they must be deemed to be true, (b) because the allegations of the Complaint allege that the statements Defendants rely upon for their claim of mischaracterization are themselves false or misleading, (c) because, the claims of mischaracterization are themselves mischaracterizations of the Complaint and the Response, (d) because Defendants' argument that the Policy is religiously neutral on its face ignores the inclusive Constitutional meaning of "religion" and the detailed allegations of fact which show how the Policy seeks to establish a non-theistic religious worldview, and (e), because, Defendants fail to show a single element of the Plaintiffs' Prayer that is inconsistent with the requirements of the Establishment Clause and education which seeks to inform rather than to indoctrinate.

Finally, Defendants' arguments claiming a lack of standing actually support the arguments made in Plaintiffs' Response. Defendants' reliance on an illusory and ineffective opt-out policy undermines their claims of religious neutrality. And, their equal protection clause argument ignores specific provisions of the Policy which permit religious discrimination while misleading one to believe that it provides "equal treatment for all."

Plaintiffs also object to Defendants' unilateral insertion into the record of meeting minutes of a June 11, 2013 Kansas Board of Education meeting (Defs.' Reply (Doc. 41) at 14), a related June 11, 2012 [*sic*] Kansas Board of Education Meeting Media Streaming video (Defs.' Reply (Doc. 41) at 14), and Defendants' Reply specifically urges the Court to take judicial notice of a certain Report and Recommendation of the Next Generation Science Standards Review Committee ("R&R"). Defs.' Reply (Doc. 41) at 14. Plaintiffs have not had an opportunity to analyze any of these materials consistent with the rules of discovery as discovery has been suspended, and therefore object to their consideration by this Court.

II. Defendants' claim of mischaracterization is legally insufficient and is itself a mischaracterization of the Complaint and Plaintiffs' Response.

A. Defendants have not shown the allegations of fact to be implausible and therefore the Court must take them to be true.

Defendants' claim that the Complaint "mischaracterizes" the Framework and Standards (the "Policy") is irrelevant given the assumption of Rule 12(b)(6) that the allegations are true and therefore properly characterize the issues of fact.

As explained by the Court in *Semchyshyn v. Univ. of Kan.*, No. 08-2627-KHV, 2009 WL 5170162, at *2 (Dec. 11, 2009 allegations): "In ruling on Defendants' motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court assumes as true all well-pleaded factual allegations and then determines whether they plausibly give rise to an entitlement of relief." The fatal flaw in Defendants' Reply is that it claims the allegations of the Complaint are implausible but fails to identify any implausibility in any of the 122 paragraphs of very detailed and particularized allegations of the Complaint. Defendants' claims of implausibility are nothing more than conclusory and threadbare assertions that ignore completely the actual content of the

allegations as well as further detailed explanations contained in Plaintiffs' Response, particularly in Appendix A and pages 24-28 (Doc. 40).

Defendants' basic premise is that the factual allegations are in error. But that assertion is one to be made in an answer, not in a pleading that assumes the allegations to be true. Indeed, when reviewing a complaint in the face of a challenge brought under Rule 12(b)(6), a court must proceed under the assumption that all allegations in the complaint are true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

The Complaint alleges with exceeding particularity that the Policy seeks to establish a non-theistic religious worldview by leading impressionable young children to ask ultimate religious questions about the cause and nature of life and then using, "without adequately disclosing, an Orthodoxy (defined and explained in ¶¶ 8, 9 and 76-86 of the Complaint) and a variety of other deceptive methods to lead the children, beginning in Kindergarten, to answer the questions with only materialistic/atheistic answers." (Complaint, Doc. 1, ¶5). The following 117 paragraphs then explain with extensive particularity the various deceptive devices employed which include a litany of omissions and misrepresentations used to advance the Worldview.

Although the law requires the Court to treat those allegations of fact as true for purposes of Defendants' Motion to Dismiss, Defendants argue the Court may ignore that basic premise of the Rule because the allegations of fact are "implausible."

The core problem with this argument is that Defendants fail to show a single allegation to be implausible. Plaintiffs urge the Court to re-read the Complaint and ask: have the Defendants addressed this particular allegation and shown it to be implausible? The answer must be no because Defendants' claims of implausibility are based on blanket statements that fail to address the particulars of both the Complaint and Plaintiffs' arguments in its Response.

Therefore, on what basis then does Defendants' claim of implausibility rest? It rests entirely on the unproven assertion that the Policy does not on its face show it to be as characterized in the particularized allegations of the Complaint. The defect in this argument is that the Complaint alleges with exceeding particularity that the Policy is misleading and deceptive. Given the particularized claims of deception, one cannot expect the deception to be revealed from the face of the Policy.

All deceptions and contrivances are based on misrepresentations and omissions which necessarily do not appear from the face of the program alleged to be deceptive. Hence, allegations of deception necessarily depend on evidence outside the Policy to show it to be deceptive. Of course, Defendants do not address issues outside the Policy that are relevant to it as Defendants' claim of implausibility is confined to the Policy itself.

An example of the Defendants' error is their assertion that the Policy contains statements that belie the allegations of the Complaint as the Policy states "all ideas in science are evaluated against alternative explanations and compared with evidence," *id.*, and that "scientific knowledge is open to revision in light of new evidence," and "Science findings are limited to what can be answered with empirical evidence," (Reply, Doc. 41 at 3).

But these assertions in the Policy which Defendants rely upon are themselves alleged to be false and misleading as applied to historical origins science as the use of the Orthodoxy precludes consideration of the teleological alternative as well as evidence which contradicts the materialistic view and that supports the teleological view. See in particular the particularized allegations of the following paragraphs of the Complaint:

"11. Concealing the Orthodoxy. Although omissions mentioned in the preceding paragraph enhance the promotion of the Atheistic Worldview, a more robust tool for that indoctrination is the omission to provide standards that will adequately explain to

students the nature, use and effect of use of the Orthodoxy.

"12. Instead of candidly disclosing the Orthodoxy as explained by Richard Lewontin, its nature and use is masked by standards which misrepresent the materialistic and atheistic explanations provided as being based on all the "available evidence," and on "open-minded," "objective," "logical" and "honest" investigation per "common rules of evidence," when in fact the explanations violate all of those descriptors due to the use of the Orthodoxy and the lack of consideration given to evidence that is inconsistent with it.

See also Complaint (Doc. 1) ¶¶ 76-86 and 97-94 (General Methods of Indoctrination), and ¶¶94-122 ("F&S USE OF MISREPRESENTATION AND OMISSION TO ADVANCE THE WORLDVIEW").

Thus, the particularized allegations of the Complaint allege that the statements Defendants rely upon to support their motion are themselves alleged to be false as applied to historical origins science. Given the assumption of truth to Plaintiffs' allegations, then Defendants' assertions are necessarily inadequate.

Defendants could show the allegations to be implausible if for example, they could point to provisions of the Policy that use and advocate use of the ideas set out in Plaintiffs' Alternative Prayer, which call for an objective approach that seeks to inform rather than indoctrinate. However, Defendants instead claim the Prayer to be unconstitutional, thereby essentially admitting that the Policy lacks all of those characteristics and does use the Orthodoxy without disclosing it.

In fact all of the assertions of deception are very plausible. With respect to omissions one need only search the Policy for the omitted fact and when one comes up empty-handed the assertion becomes plausible. Similarly the asserted misrepresentations refer to facts and matters outside the Policy which Defendants must treat as true since their case relies entirely on the four corners of the Policy.

In essence the case against the Policy may not be decided simply by looking at the Policy itself. This would be like asking one to determine if a \$100 bill was a counterfeit by looking only at the bill in question. To determine its authenticity one would need to look at a known original and other factors and consider the testimony of experts and witnesses.

B. The Claim of mischaracterization is itself based on mischaracterizations of the Complaint and the Response.

Another key defect in the Reply is that its arguments are themselves based on mischaracterizations of the Complaint and the Response. In many instances the Reply misquotes or takes a quote out of context and in others it simply ignores allegations in the Complaint and statements in the Response which conflict with the alleged mischaracterization.

For example, the Reply argues that the Complaint "describes the Framework and Standards as *creating* an Orthodoxy....." (Doc. 41, page 2, emphasis added). The Complaint simply does not allege that the Policy creates an orthodoxy, rather it alleges that the Policy *uses* an existing orthodoxy called Methodological Naturalism without adequately disclosing its use and the effect of its use to students." (Complaint, (Doc. 1), ¶5)

As explained by Richard Lewontin, in paragraph 9 of the Complaint, the Orthodoxy is in the nature of a commitment by he and his colleagues to provide only materialistic answers to ultimate questions to ensure that the Divine Foot never enters the door. Plaintiffs' Response (Doc. 40) at pages A-3 and A-4 of the Appendix, explains how the *Kitzmiller* Court found the Orthodoxy to be a "convention" of existing science and how prior Kansas science standards have embraced it explicitly.

The nature and use of the Orthodoxy is extensively described in ¶¶ 8, 9 and 65-86 of the Complaint (Doc. 1). The evidence that the Policy uses the Orthodoxy derives from the fact that

the Policy directs that explanations be limited to those which can explain with only mechanistic or material causes (Appendix A to Response, Doc 40-1, p. A-3 and A-4), explicit standards that teach that the natural world is just material and not designed (Complaint, (Doc. 1) ¶¶100-104), standards that lead children to explain the origin of life and its diversity with only mechanistic or material causes, while omitting any scientific critiques of that idea, any discussion of the teleological alternative and any evidence that supports that alternative. (Complaint (Doc. 1) ¶¶109-122)

The word "teleology" does not appear in the Policy except in the context of dysteleology to explain that natural systems are not designed (Complaint (Doc. 1) ¶¶100-102). Thus careful analysis shows that the Orthodoxy is in fact used. However, it is also clear, particularly due to Defendants' assertions of ignorance about it, that no provision is included in the Standards to inform students of its use and the effect of that use on the plausibility of the materialistic/atheistic explanations provided.

Defendants' outright denial of the use of the Orthodoxy is extremely odd as Defendants have actively debated its use for the past 15 years and have explicitly incorporated the Orthodoxy in Kansas Science Standards adopted in January 2007. Discovery will show that members of the Department of Education supervised six days of public hearings on the issue in 2005 and were involved in actions taken to eliminate it in 2005 and then to again incorporate its use in standards adopted by Defendants in 2007.

Another example of Defendants' mischaracterization of Plaintiffs' Response is a statement in the Reply that the "Response describes the F&S as 'forbidding any mention of teleology in the classroom...allowing only materialistic/atheistic explanations of origins.'" (Doc. 41).

The Response does not actually make that statement as the quoted language is taken out of context. Page 5 of the Response (Doc. 41) states that the Court in the *Kitzmiller* case "issued a ruling effectively forbidding any mention of teleology in the classroom and allowing only materialistic/atheistic explanations of origins..."

In the proper context the quote shows that the Court in the *Kitzmiller* case recognized extensive use of the Orthodoxy and then embraced it to mandate the exclusion of the alternative. In this context showing its conventional nature, it is odd that Defendants deny the existence and use of the Orthodoxy.

In addition, Defendants' assertion implies that the F&S actually allows a candid discussion of teleology, without so stating. It is odd, because that implication is undermined by Defendants' claim that the alternative Prayer which calls for an objective discussion of teleology banned by the Orthodoxy, is unconstitutional, thereby advocating the very holding of the *Kitzmiller* Court. In fact when one searches the entire 850 pages of the Policy one does not find the word "teleology," or any variation thereof mentioned. Instead one finds statements as explained in Appendix A to the Response (Doc. 40) that all events are due to physico-chemical "mechanisms," or material causes, the core precept of Methodological Naturalism.

Thus Defendants seemingly feign ignorance of the Orthodoxy but champion its effects by arguing the Alternative Prayer is unconstitutional.

Defendants also claim that the Policy does not show on its face a goal to establish a non-theistic worldview. The argument ignores the detailed allegations of the Complaint as well as additional information provided in the Response (Doc 40-1, pp 24-26). Those provisions show that the Policy explicitly seeks to establish a "worldview" and to change the "worldviews" of students so that they are aligned with the "scientific [materialistic/atheistic] worldview" the

Policy promotes. The Complaint and the Response also show that in the context of the Orthodoxy a scientific worldview is one which limits explanations of the cause and nature of life to be only materialistic/atheistic. Hence, the worldview that the policy promotes is reasonably explained as "materialistic/atheistic" and "non-theistic."

The Complaint and the Response also detail the particular strategies used to inculcate the worldview in impressionable and immature young minds over a period of 13 years. All of these allegations are ignored. None are shown to be implausible. Hence, they must be deemed true for purposes of the Motion to Dismiss.

Another example of a mischaracterization is the assertion of the Reply that the Response states that the F&S teach that "there is no God" and that "life is not a creation," *id.* at 15" (Reply, (Doc. 41), p.2).

The Response does not say that. The quotes are again taken out of context. The context of the Response where these quotes occur is in the context of a discussion of the religious effect of excluding evidence-based explanations that might support a supernatural cause or teleological cause:

"Religion - in the comprehensive sense in which the Constitution uses that word - is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives." (*McGowan v. Maryland*, 366 U.S. 420, 461 (1961) (Frankfurter, J. concurring, with Harlan, J.) The ideas that there is no God or supernatural that has intervened in the natural world and that life is not a creation, but rather is just an occurrence arising from unguided evolutionary processes, do profoundly relate life to the world in which it is lived. Thus, these ideas are religious in the comprehensive sense in which the Constitution uses that word. (Resp. Doc 40, p. 12)

Thus the Complaint does not allege an explicit denial of God or the supernatural by the Policy, rather it alleges that the Policy advances that idea subtly and effectively via a thirteen year program of indoctrination using a concealed Orthodoxy and a variety of other deceptive methods that do reject the supernatural. Because it is a subtle but pervasive message its message

can escape detection by the average citizen and even many scientists who are themselves not aware of the existence and use of the Orthodoxy.

In 1988 Robert Wright, a popular science writer and author, explained the ignorance as the Orthodoxy was then an "unwritten rule of scientific conduct:"

"I'm not sure whether he [a computer scientist] disagrees with me or simply doesn't know what the word *teleological* means. It wouldn't surprise me if the latter was the case: he is generally insensitive *to the unwritten rules of scientific conduct, one of which is to scrupulously avoid even the faintest teleological overtones.* [ROBERT WRIGHT, THREE SCIENTISTS AND THEIR GODS 70-71 (1988) (emphasis added)]

Although the Policy recognizes the critical importance of explaining the use and effect of use of unwritten rules or assumptions (Resp. Doc 40, p. 4; Framework at 93), it makes no provision to tell the children about the most fundamental assumption it uses that has a profound effect on religious belief.

C. The argument that the Policy does not deliver a religious message is not valid as it ignores both the comprehensive Constitutional meaning of "religion" and the particularized allegations of the Complaint which have not been shown to be implausible.

The Reply states that "Defendants maintain that no reasonable observer could conclude that the purpose behind adopting the Framework and Standards was to endorse or disapprove religion." (Reply, (Doc. 41), p.10). The argument is not valid because it makes an argument not made with reference to the specific allegations of the Complaint and ignores the full context of those allegations which have not been shown to be implausible.

The Complaint does not allege that the sole purpose of adopting the Policy was solely religious. Rather it alleges a lack of secular purpose for the concealed use of the Orthodoxy and other deceptive methods used in teaching historical origins science that address ultimate religious questions. It does not allege that the sole purpose of the Policy "was to endorse or disapprove religion."

Furthermore, what a reasonable observer would conclude is a question of fact based on the context of the allegations and other evidence yet to be presented and that has yet to be shown implausible. The Complaint alleges particularized facts which if true could plausibly lead an objective observer using an inclusive definition of religion to the conclusion that the F&S do purposefully endorse a particular religious view. Defendants' contention amounts to nothing more than conclusory speculation that the Court may not engage in for purposes of a motion to dismiss.

Defendants' Reply essentially amounts to a denial of the well pleaded allegations that have not been shown to be implausible. Thus the Reply on its face shows that Defendants are not entitled to have their Motion sustained as its arguments of law are predicated on a set of facts completely different than those alleged in the Complaint. For example, the Reply (Doc. 41), states at 11:

Plaintiffs contend that the purported religious aspects of the Framework and Standards are "concealed." *See, e.g.,* Pls.' Resp. (Doc. #40) at 26. But the text, context, and history of the Framework and Standards show that the Board did not have any surreptitious religious intent in adopting the Framework and Standards. *See supra* Part I; Defs.' Mem. (Doc. #30) at 32-34.

As previously explained the particularized allegations of the Complaint refer to matters outside the Complaint that provide the context. Thus one may not limit the context to the four corners of the Policy and decide the issue. One example of this are provisions in the standards that set as a goal the correction of "misconceptions" held by children (Framework, 24-25, 312-313). The 850 pages do not reveal precisely the nature of the "misconceptions" to be changed, although certain teleological ideas are labeled unscientific, and presumably fall within that classification (Framework, p. 79 regarding the idea that life incorporates a "vital force" not explainable by physics and chemistry).

However, provisions of the Policy explaining the need to correct misconceptions set out a list of references that have informed the development of the Policy and that explain how the misconceptions can be changed. [Framework at 23 and 348-350] A number of these references reveal the nature of the "preconceptions" or "misconceptions" of children that need to be changed and how they may be changed through various methods of indoctrination. The misconceptions identified are theistic views arising due to logical teleological inferences from observations of the natural world as well as teachings by members of the child's family and community. The references also discuss methods used by the Policy to change these misconceptions to "counter-intuitive" "scientific" conceptions required by unguided naturalistic evolutionary theory. One of the references explains how young children should be taught to become "naturalistic reasoners rather than creationist reasoners."¹ Thus, as with any complaint, the allegations of fact are based on matters outside the Complaint and the Policy to be revealed during discovery.

Thus the premise of the Defendants that the Court need only view the four corners of the Policy to decide the Motion is patently absurd. Defendants' unsupported assertion that "the Framework and Standards do not pertain to religion at all" is disingenuous (Response (Doc. 41) at 13) As alleged in the Complaint and the Response the Policy takes the child into the religious sphere at age 5 and then leads the child to embrace a materialistic/atheistic worldview that life

¹ At page 23 the Framework cites *Learning Science in Informal Environments: People, Places and Pursuits*: (National Research Council. (2009) as an important basis for understanding how young children learn science. That research cites two works by E. Margaret Evans, a child psychologist that explains methods to effectively move young "creationist reasoners" to accept counter-intuitive ideas so as to become "informed naturalistic reasoners." [E Margaret Evans, *Teaching and Learning about Evolution*, Chapter 3, In J. Diamond (Ed.), *The virus and the whale: Explore evolution in creatures small and large*. Arlington, VA: NSTA Press. (2005) Available at: http://explore-evolution.unl.edu/CHAP3_P25-38.pdf; and, Evans, E.M. (2001). *Cognitive and contextual factors in the emergence of diverse belief systems: Creation versus evolution*. *Cognitive Psychology*, 42, 217-266.] The Evans 2001 paper is directly cited by the Framework at 249.

arises via unguided evolutionary processes without the aid of any supernatural intervention, which is a key tenet of the religions of Atheism and Religious ("secular") Humanism.

Defendants argue that the Policy is "facially neutral with respect to religion" because the authors "promote open-minded investigation of all empirical evidence and 'critique' of 'all ideas,'" while acknowledging that 'not all questions can be answered by science.'" (Reply (Doc. 41), at 17-18) However, this ignores the allegations of the Complaint that these statements children are led to accept are false and misleading as the concealed use of the orthodoxy does not permit an open-minded investigation or consideration of available evidence that undermines materialistic/atheistic explanations or that supports a teleological inference that natural systems may be designed. The 122 paragraphs particularize the deception in exceeding detail, all of which is ignored by Defendants' self-serving conclusory statement that is implausible given the assumed truth of the allegations. In a sense the Defendants' defense actually supports Plaintiffs' claim because it rests on the premise that the Policy is "facially" or superficially open-minded but not substantively open-minded as the Complaint alleges.

D. Defendants' argument that the relief Plaintiffs seek would violate the Establishment Clause is silent on the provisions that would do that.

The Defendants argue that an implementation of Plaintiffs' Prayer would violate the Establishment Clause (Reply, (Doc. 41), at 20-21). However, the conclusory statement fails to specify any provision of the Prayer that would do that. Due to its lack of specificity, the argument has no substance.

However, the argument itself is informative as it shows that the Defendants are operating under a major misconception - that the Prayer seeks to require the teaching of "Creation Science" (creation by God per a literal interpretation of the Biblical account in the Book of Genesis in six 24-hour days, a young Earth that is 6000-10,000 years old, geological deposition via a

worldwide flood, etc.). The argument reflects a complete failure to actually read the Prayer and Plaintiffs' response which very explicitly states:

"Neither the Complaint nor the Alternative Prayer in any way suggests that any tenet of a religious text be included in the curriculum, including any version of 'creation science' that seeks to promote a literal interpretation of the Biblical Genesis account." (Resp. Doc 40, at 39)

The philosophy of Plaintiffs' Prayer is explained at page 3 and 4 of their Response (Doc. 40).

The Defendants' argument also reflects a failure to recognize the difference between a prescription for "balance" versus a prescription for "objectivity." An objective approach to education does not require balance. In fact the prescription specified in the Prayer and in many other provisions of the Complaint show that the goal is to simply objectively "inform" students of the actual state of our scientific knowledge regarding origins science. The reason for the prescription is that the Policy seeks to inform only of the state of our scientific knowledge that robustly fits within the materialistic/atheistic dictates of the Orthodoxy.

Edwards is a case that supports the Complaint because it involved a case where the teaching of objective science was to be hobbled by a necessity to teach a Biblical orthodoxy. The Complaint does not seek to suppress the Orthodoxy that is actually used in much of science, rather it seeks to have it adequately disclosed so that the subject may be taught objectively. The key to religious neutrality in the area of origins science is to teach the actual state of our scientific knowledge objectively, rather than to skew the explanations to favor a particular religious view - in this case non-theistic religious views. This will necessitate informing students about the key assumptions used to arrive at the explanations provided.

The Defendants also argue that "an objective observer familiar with the history and context of the Framework and Standards," would not view the standards as promoting a religious

view (Reply, (Doc. 41), at 21). However, Defendants' observer is not implanted with the understanding that religion includes non-theistic religions like Atheism and Religious ("secular") Humanism nor does Defendant implant the observer with the detailed facts alleged in the Complaint. When these critical understandings are held by the observer it is entirely plausible that the observer will conclude that the concealed use of an Orthodoxy that allows only robust materialistic/atheistic explanations of origins in teaching impressionable young children for thirteen years in the systematic way contemplated by the Policy will not be objective or neutral as between theistic and non-theistic religion.

The Defendants argue that the Prayer "prohibits... theory which is deemed antagonistic to a particular dogma." (Reply, (Doc. 41), at 21) However, again Defendants' assertion is not accompanied by a reference to any particular provision of the Prayer to that effect. To the contrary the Alternative Prayer specifically seeks to do the opposite by requiring that students be informed of the use and effect of use of an Orthodoxy.

III. Defendants' arguments regarding Standing imply that Plaintiffs' Response shows the required standing.

Defendants argue that because the Complaint alleges that a future implementation of the F&S will have the effect of establishing a religious worldview, that the Complaint alleges only a future and not a present injury. (Reply, (Doc. 41) at 6-7). Defendants argue that it is only Plaintiffs' Response that alleges a present injury, and because the arguments in the Response are not contained in the Complaint, the Complaint should be dismissed.

This is an interesting argument as it implies that the Response does allege a sufficient injury while the Complaint does not. Also, it implicitly admits that the adoption itself carries a "message." Thus, at best the defect is merely one of pleading which can be solved via a simple amendment.

Defendants' assertions are also inadequate for at least two other reasons. First, the injury alleged need not be present if it is one that reasonably may be expected to occur in the future. As explained in the Response, Defendants have shown no plausible reason for anyone to believe the Policy will not be implemented and applied to the Plaintiffs, many of whom are very young.

Secondly, the Complaint, which must be liberally construed in favor of Plaintiffs, does in fact allege in paragraphs 123-126 a present injury in that the adoption of the Policy itself is alleged to amount to a "message" of "endorsement and promotion of an orthodoxy that establishes and promotes non-theistic religious beliefs while seeking to suppress competing theistic religious views because it... *sends a message* that they, being theists, are outsiders within the community and that non-theists and materialists are insiders within the community." (Complaint (Doc. 1) ¶123)

Thus, Defendants' argument regarding standing is based on semantics rather than substance.

IV. Defendants' assertion of the opt-out Statute undermines its claims of neutrality under the Establishment and Free Exercise Clause.

Defendants argue:

"Plaintiffs' revised theory of injury also ignores the fact that when the Board adopted the Framework and Standards it conscientiously sought to send a message of neutrality with respect to religion by expressly "mak[ing] clear to parents that an Opt Out opportunity for specific curriculum is permissible." June 11, 2013 Kansas Board of Education Minutes at 3.

Defendants also argue that because of the opt-out statute the Policy is non-coercive and therefore does not violate the Free Exercise Clause.

Plaintiffs' Response addresses these arguments at (Doc. 40) pages 6, 15, 39-40. The Response explains that the Board's justification of its adoption due to the opt out provision in the

statute actually amounts to an admission that the Policy is not religiously neutral. The discussion of the opt-out amounts to an acknowledgment that the Defendants were aware that the Policy was not neutral and was offensive to theists and friendly to atheists. This is because the opt-out discussion arose as a response to complaints specifically made at the meetings via the delivery of Exhibits A and B to the Complaint on May 14, 2014 to each Defendant as well as to written and verbal statements made by members of COPE to the Board on May 14, 2013, and June 11 (Complaint (Doc. 1) ¶58-62). Rather than seek a discussion of ways to cure the religious objections they simply pointed to a statutory opt-out provision which in substance does not resolve the issues raised in Exhibits A and B.

There are at least two problems with the opt-out defense. First government may not cure an endorsement under the Establishment Clause via an opt-out although it might cure a violation of the Free Exercise Clause. *Lee v. Weisman*, 505 U.S. 577, 583 (1992). Secondly, as explained in the Response, *infra.*, the opt-out is wholly illusory, ineffective and cost prohibitive given the systemic and pervasive nature of the alleged thirteen year program of indoctrination designed to be used in and "cohere with" all curriculum. Defendants have not responded to either of these issues.

Furthermore, the argument amounts to a defense to be raised by Defendants and involves a question of fact that cannot be resolved on a motion to dismiss. Plaintiffs' Response explains that for Free Exercise purposes the opt-out does not remove the element of coercion. The reason is that the program to be opted out from represents a long-term systemic, pervasive and largely concealed program of indoctrination so that any religious offense on any particular day will not likely be recognized by the child or the parent. Given the pervasive and stealth nature of the indoctrination it is highly unlikely that the parent or child will ever know when the offensive

instruction will occur. The statute involved does not require the school to provide notice to the child or parent of the use of curriculum that addresses religious issues or specifically how the curriculum will address those issues.

More importantly, given the systemic and pervasive nature of the program throughout the 13 year educational experience of the Child, it will be extremely costly for both the parent and the child to exercise an opt-out right. To effectively exercise the opt-out the child must miss relevant instruction that is not offensive. Also, in an English class the child may be subjected to a video or a reading of the *Blind Watch Maker* or the *Origin of the Species* due to the direction of the Policy to cause the science curriculum to cohere with all other subjects. The child should not be required to give up the need to learn English to avoid indoctrination in a materialistic/atheistic worldview. Since the program of indoctrination is designed for every grade level, the child would have to miss many days of school during each year to effectively opt-out, even if the parent and child knew when the religious instruction was to occur. The child who opts out will also likely be faced with ridicule from his or her peers and the parent will have to arrange for child care or home schooling. The only realistic way to avoid the indoctrination is for the parent to pay for home schooling or a private school education, exceedingly costly alternatives.

Defendants' Reply does not respond to these issues. Thus the Reply fails to address the illusory and costly nature of the opt-out from a pervasive program of indoctrination.

Plaintiffs also object to Defendants reference to the June 11, 2013 minutes of the meeting and a related video. Due to the moratorium on discovery Plaintiffs have not had access to either and have no knowledge as to whether the record reflected in such documents is complete.

V. Defendants equal protection clause arguments are undermined by the allegations of the Complaint which have not been shown to be implausible.

Defendants' discussion of neutrality and equal protection argue that the Complaint and Response fail to show any evidence of unequal treatment based on religion (Reply (Doc. 41) at 24-25). Again, the Reply simply ignores the specific allegations of the Complaint and the discussion in the Response. Paragraph 21 of the Complaint alleges:

Excluding Theists from policies of non-discrimination and "equity." Second, the F&S implicitly excludes from its policies regarding non-discrimination and equity, children, parents and taxpayers that embrace theistic worldviews, thereby enabling the discriminatory establishment of the non-theistic Worldview under the guise of "science."

The Response then explains at page 41 that although the Framework promises "equal treatment for all," (Framework 278) the provisions in the NGSS that provide for it [NGSS, *Appendix D - "All Standards, All Students."*, p. 2 (April 2013).] only make the equal treatment applicable to discrimination based on race, ethnicity, socio-economic status, gender and a variety of other categories other than religion. Due to the exclusion of religion, the Policy permits non-equal treatment and discrimination in favor of non-theistic religion over theistic religion. If equal treatment based on religious belief had been included in Appendix D, the Policy which promotes only non-theistic religion would violate its own policy. Thus the exclusion of religion from the equal treatment policy allows it to discriminate between particular religious beliefs.

Again, Defendants' argument relies on a misleading statement in the Framework (the Policy provides "equal treatment for all") as a basis for its claims while conveniently ignoring the specific allegations of the Complaint and the specific explanations of the Response showing the facial statement to be misleading.

VI. Conclusion

Based on the Complaint, the Plaintiffs' Response and foregoing the Court should overrule the Defendants' Motion.

Respectfully submitted,

s/ Douglas J. Patterson

Douglas J. Patterson, Esq. (KS # 17296)
Kellie K. Warren, Esq. (KS #16733)
Michelle W. Burns, Esq. (KS #21167)
PROPERTY LAW FIRM, LLC
4630 W. 137th St., Suite 100
Leawood, Kansas 66224
913-663-1300 Telephone
doug@propertylawfirm.com
kellie@propertylawfirm.com
michelle@propertylawfirm.com

s/ John H. Calvert

John H. Calvert, Esq. (MO #20238)
CALVERT LAW OFFICES
2300 Main St., Suite 900
Kansas City, MO 64108
816-797-2869 Telephone
816-448-3703
816-448-3101 Facsimile
jcalvert@att.net

s/ Kevin T. Snider

Kevin T. Snider, Esq. (CALIF#170988)
PACIFIC JUSTICE INSTITUTE
P.O. Box 276600
Sacramento, California 95827-6600
(916) 857-6900 Telephone
(916) 857-6902 Facsimile
ksnider@pji.org
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that on this ____ day of _____, 2014, the above and foregoing document was electronically filed with the Clerk of the Court by using the CM/ECF system with notice electronically sent to:

Jeffrey A. Chanay jeff.chanay@ksag.org
Cheryl L. Whelan cwhelan@ksde.org
Stephen O. Phillips steve.phillips@ksag.org
ATTORNEYS FOR DEFENDANTS

s/ Douglas J. Patterson
Douglas J. Patterson