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2003 DEC -5 PM 6:00
RICHARD W. WIEKING
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NOT FOR CITATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JONAS EKLUND, et al.,

Plaintiffs,

v.

BYRON UNION SCHOOL DISTRICT,
et al.,

Defendants.

No. C 02-3004 PJH

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT;
DENYING PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

The parties' cross-motions for summary judgment came on for hearing on December 3, 2003 before this court. Plaintiffs appeared through their counsel Edward White, and defendants appeared through their counsel Linda Lye. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby rules as follows.

BACKGROUND

Plaintiffs are Jonas and Tiffany Eklund, and their two children, Chase and Samantha. They object to the Byron Union School District's use of a role-playing game to teach seventh grade world history students about Islam as violating the Establishment Clause of the First Amendment.¹

Excelsior School is the middle school for the Byron Union School District, and includes all seventh grade classes.² This year, Excelsior received a Distinguished School

¹ All other plaintiffs and claims have been dismissed from this litigation. Jonas and Tiffany Eklund bring claims solely in their capacity as next friends of Chase and Samantha, and thus their claims are coextensive with their children's.

² Excelsior School only included seventh and eighth grade classes until the 2003 school year, when sixth grade classes were added, and the school was renamed Excelsior Middle School. Castro Decl. ¶ 3.

1 Award from the California Department of Education, honoring it as one of the state's "most
2 exemplary and inspiring public schools." Castro Decl. ¶ 2, Exh. A. Chase Eklund was
3 enrolled in Excelsior School for seventh grade during the 2001-2002 school year, and
4 Samantha was in the seventh grade at Excelsior for the 2002-2003 school year.³

5 The California State Board of Education requires that seventh grade world history
6 classes contain a unit on Islamic history, culture, and religion. Castro Decl. ¶¶ 5, 6; Exh. B
7 at 28 ¶ 7.2 (Board of Education requirements). The state has approved a standard
8 textbook, Across the Centuries, which is used in the Byron Union School District, but
9 Excelsior teachers are also encouraged to use other instructional methods that they in their
10 professional judgment feel best serve their students. Id. ¶¶ 7, 9, 12.

11 Accordingly, some teachers have chosen to supplement the Islam unit with portions
12 of an interactive educational module. This module, which is called "Islam: A simulation of
13 Islamic history and culture," suggests a variety of role-playing activities to engage students
14 in the subject matter. The module is premised on having students role-play situations
15 roughly equivalent to the five elements of faith in the Muslim religion. See Complaint Exh.
16 A (entire module).⁴ Experts in this litigation have testified that role-playing is an
17 entertaining and effective method for students to learn material. See, e.g., Johnson Decl.
18 ISO Eklunds' Opp. ¶ 22 (plaintiffs' expert, stating "role-playing and simulation are wonderful
19 teaching strategies," but noting that all strategies must be viewed in context); Cuban Decl.
20 ¶¶ 4-6 (defendants' expert, describing role-playing as "best practices" for middle school
21 students).

22 The Eklunds claim that the use of the module violates the First Amendment.

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25 ³ Chase is currently in the ninth grade at the Byron Union district high school, and
Samantha is in the eighth grade at Excelsior.

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⁴ The Five Pillars of Islam, practiced by devout Muslims, are: Shahada, or the profession of faith by Muslims in God; Salaat, prayer five times a day; Ramadan, ritual fasting from dawn to dusk during the month of Ramadan; Zakaat, or charity; and Haaj, a pilgrimage to Mecca.

1 A. Brooke Carlin's World History Class

2 During the 2001-2002 school year, defendant Brooke Carlin taught seventh grade
3 world history at Excelsior. Chase Eklund was one of her students. The parties agree that
4 Carlin used a variety of sources to teach the Islam unit, including assigned readings from
5 Across the Centuries, classroom discussions, handouts, and geographic materials.
6 Coincidentally, the Islam unit was underway on September 11, 2001, and the class also
7 spent a week discussing the attacks in the context of world history. Carlin Decl. ISO Def.
8 MSJ ("Carlin Decl.") ¶¶ 12-16.

9 The parties also agree that Carlin used modified portions of the Islam module.
10 Carlin admits that she distributed copies of the "Student Guide" portion of the Islam module
11 to students as an introduction to the material. Complaint Exh. A at 1:12-13. The Student
12 Guide states that "[f]rom the beginning [of this module], you and your classmates will
13 become Muslims." Id. Carlin states that she went over the guide in great detail and
14 specifically emphasized that the module was merely a role-playing game and that the
15 students would not actually become Muslims through their participation in the module. A
16 student enrolled in a different section of seventh grade world history that year confirms this.
17 Carlin Decl. ¶¶ 26, 29; E.C. Decl. ¶¶ 9-12.⁵ Chase does not deny this. See C. Eklund
18 Depo. 100:8-101:10 (memory unclear about Carlin's explanation). See also E.C. Depo.
19 135:2-137:17; Carlin Depo. 83:7-85:24.

20 Students were divided into groups for the purposes of the module, and the students
21 were also encouraged, but not required, to choose a Muslim name, to facilitate role-
22 playing. See, e.g., Carlin Decl. ¶¶ 27, 43; C. Eklund Depo. 44:9-17; E.C. Depo. 93:21-
23 94:24. Chase selected the name "Affat." C. Eklund Decl. ¶ 2. Carlin did not refer to the
24 students by their Muslim names, though the students sometimes referred to each other by
25 the Muslim names while in their groups, or in a joking manner outside of class. Carlin

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27 ⁵ The parties have agreed, pursuant to this Court's General Order no. 53, that all
28 non-party minor children will be referred to by their initials only.

1 Decl. ¶ 43; C. Eklund Depo. 98:24-99:15; E.C. Depo. 175:5-178:1.

2 For the first two pillars of Islam, Carlin admits that, in the classroom, she read
3 Muslim prayers and portions of the Qu’ran aloud in class, required student groups to recite
4 a line from a Muslim prayer, such as “In the name of God, Most Gracious, Most Merciful,”
5 on their way out of class, and had the students make group banners. Carlin Decl. ¶¶ 57-
6 67; C. Eklund Depo. 114:1-115:23, 131:24-135:24. Some banners stated the opening
7 words of the Qu’ran in Arabic (“Bismillah,” which means, “In the name of God, the Merciful,
8 the Compassionate”), and some groups independently wrote out the English translation of
9 “Bismillah” on their banners as well. C. Eklund Depo. 131:9-22; C. Eklund Decl. ¶ 2; E.C.
10 Depo. 98:5-99:8, 202:12-203:14. However, this was not required. C. Eklund Depo.
11 112:23-113:17, 131:9-22. Banners have been assigned as non-book-based classroom
12 assignments in other classes at Excelsior. E.C. Decl. ¶ 28.

13 For the third and fourth pillars, Carlin also required students to give up things for a
14 day, such as watching television or eating candy, to demonstrate the Islam principle of
15 Ramadan, or fasting.⁶ Carlin Decl. ¶¶ 68-71; C. Eklund Decl. ¶ 3; see also E.C. Depo.
16 99:9-100:15. Carlin also required students to perform volunteer community service, such
17 as school beautification or assisting in school administration, in conformance with the
18 Muslim requirement of Zakaat, or charitable donation. Carlin Decl. ¶¶ 73-75. See also C.
19 Eklund Depo. 120:19-121:20; E.C. Depo 102:5-103:7. Community service is often a
20 component of school activities. Carlin Decl. ¶ 74. These four activities took about a week,
21 in an eight-week unit on Islam. Carlin Decl. ¶¶ 9, 45.

22 Finally, to demonstrate the fifth pillar of Hajj, or pilgrimage to Mecca, Carlin had the
23 students participate in a board game, called “Race to Makkah.” The students were divided
24 into groups, and assigned a camel game piece. The groups would roll the dice and move
25 along the board based on chance and the students’ knowledge of information about Islam,
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27 ⁶ The Eklunds allege that Carlin gave extra credit to students who fasted for a
28 lunch period. C. Eklund Depo. 119:17-120:18. Carlin denies this. Carlin Decl. ¶ 68.

1 with the goal of the game to arrive at “Mecca.” Carlin Decl. ¶¶ 76-87; see also, e.g., C.
2 Eklund Depo. 80:14-85:7. The information was presented in the form of flash cards (called
3 “wisdom” or “quiz” cards) that designated pieces of religious information in three
4 categories, designated as “trivia,” “truth,” or “fact.” Certain “truth” or “fact” cards included
5 statements of religious faith such as “The Qu’ran . . . is God’s third revelation that was
6 revealed to Prophet Muhammad,” or “The Holy Qu’ran is God’s word as revealed to
7 Prophet Muhammad through the Archangel Gabriel,” without any qualifying language such
8 as “Muslims believe. . .” prefacing the statement. See, e.g., Complaint Exh. A at 2:11-35
9 (wisdom and quiz cards). However, when using the cards, Carlin explained that these
10 statements were what Muslims believed and not actual historical fact. Carlin Decl. ¶ 82; C.
11 Eklund Depo. 94:21-96:15.

12 Carlin also permitted students to dress up in Arabic-style clothing for their group
13 presentations.⁷ Carlin Decl. ¶ 51; E.C. Depo. 118:5-125:10. Chase, however, refused to
14 do so, claiming that it would make him feel “weird.” C. Eklund Depo. 107:16-108:24.

15 As part of the final, Carlin required the students to write an essay critiquing elements
16 of Islamic culture. The essay assignment stated, “BE CAREFUL HERE – if you do not
17 have something positive to say, don’t say anything!!!” Carlin Decl. Exh. I. Carlin stated
18 that she explained to the class that this caution was included because this assignment
19 followed closely after the events of September 11, 2001 and she feared the students might
20 otherwise use the essay to express racist remarks. Carlin Decl. ¶ 90. Carlin explained to
21 the class that they could express constructive criticism about Islamic culture in their essay,
22 but it had to be supported with reasons. Id. The Eklunds do not challenge this version of
23 the facts.

24 B. Other Classes at Excelsior

25 Other classes at Excelsior also use role-playing simulations to enhance the

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27 ⁷ The Eklunds claim that Carlin also required students to design and color an
28 Islamic prayer rug. C. Eklund Depo. 105:19-24, 106:9-107:11. Carlin denies this. Carlin Decl.
¶ 91.

1 students' learning experiences. For instance, the eighth grade U.S. history class
2 participates in a mock Senate, and the seventh grade biology class participates in a mock
3 medical school. Castro Decl. ¶¶ 10, 11. The seventh grade world history class also uses
4 role-playing simulations for their unit on medieval Europe. Carlin Decl. ¶¶ 95, 96. In that
5 unit, Chase recalled dressing up as a priest, which he did not feel related to religion and
6 did not make him feel uncomfortable. C. Eklund Decl. ¶ 3; C. Eklund Depo. 37:13-16,
7 43:16-44:5, 109:15-20. ("That doesn't have anything really to do with God or anything or
8 anybody that you look up to.")

9 Chase agreed that he understood throughout the other role-playing simulations that
10 he had not actually become a Senator or a priest during the class. C. Eklund Depo. 51:5-
11 54:15, 108:25-109:23. Chase also agreed that many of the role-playing elements of the
12 Islam unit were not real either – for instance, he agreed that his "camel" game piece was
13 not really a camel, his name did not become "Affat," and he did not actually become a
14 Muslim through his participation in the Islam module. *Id.* at 53:2-54:15, 84:22-85:7.

15 Other classes at Excelsior also teach about religions. For instance, one unit of
16 seventh grade world history dealt with the rise of Christianity after the fall of the Roman
17 Empire, and another with the role of Buddhism in Chinese culture. Carlin Decl. ¶¶ 93, 94;
18 see also, e.g., C. Eklund Depo. 56:22-58:22; E.C. Depo. 41:1-46:13. In sixth grade ancient
19 history, the students also learned about the Greek and Roman mythological gods. C.
20 Eklund Depo. 55:4-56:15. However, these units did not involve role play. See, e.g., E.C.
21 Depo. 252:17-254:22, 268:22-269:3.

22 C. Michelle Carr's World History Class

23 The next year, 2002-03, defendant Michelle Carr taught seventh grade world history.
24 One of her students was Chase's sister, Samantha.

25 The Eklunds requested that Samantha be excused from the Islam unit, which she
26 was. Carr Decl. ¶ 21. Samantha testified that when she asked to be excused, Carr
27 seemed angry. Samantha also testified that the other student who also wished to be
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1 excused was nervous about giving Carr the note. Samantha and the other student were
2 separated from the rest of the class and assigned readings from the textbook on the
3 French Revolution. Carr would periodically check in on the two students during class.
4 Samantha claims that Carr did not explain or answer any questions about the reading,
5 though Samantha also admits that she never asked Carr any questions. S. Eklund Depo.
6 45:16-54:20; see also S. Eklund Decl. re Free Exercise MSJ (“S. Eklund Decl.”) ¶¶ 2, 3.

7 Carr testifies that she mostly relied on Across the Centuries for her Islam unit. She
8 distributed a few handouts from the Islam module, including a map, a glossary, and
9 pictures of the Arabic alphabet, and the students used a modified version of the “Race to
10 Mecca” game. She did not use any of the role-playing elements of the module. Carr
11 testifies that she always prefaced all her remarks with the phrase, “Muslim people believe.
12 .” and always distinguished between Muslim beliefs and historical facts. Carr Decl. ¶¶ 9-
13 19. Because Samantha was not there, the Eklunds do not challenge this version of the
14 facts.

15 At the end of the Islam unit, Samantha was given a separate test on the material
16 she was studying, which she failed. S. Eklund Decl. ¶ 3.

17 ANALYSIS

18 A. Legal Standard

19 1. Summary Judgment

20 Summary judgment is appropriate when the evidence shows there is no genuine
21 issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.
22 R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

23 2. Establishment Clause

24 The First Amendment states that “Congress shall make no law respecting an
25 establishment of religion . . .” U.S. Cons., amend. I. This portion of the First Amendment
26 is known as the Establishment Clause, and through the Fourteenth Amendment, the states
27 and their school districts are required to comply with its terms. Lee v. Weisman, 505 U.S.

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1 577, 580 (1992). The Supreme Court has outlined three separate, but interrelated, tests
2 for evaluating Establishment Clause claims: the Lemon test, the Lynch endorsement test,
3 and the Lee test. See generally, e.g., Newdow v. U.S. Congress, 328 F.3d 466, 485 (9th
4 Cir. 2003), cert. granted in part, 124 S. Ct. 384 (U.S. Oct. 14, 2003) (No. 02-1624) (Pledge
5 of Allegiance case, explaining history of Establishment Clause standards).

6 Under Lemon v. Kurtzman, the government action at issue must 1) have a secular
7 purpose; 2) not have the principal or primary effect of advancing or inhibiting religion; and
8 3) not foster excessive government entanglement with religion. 403 U.S. 602, 612-13
9 (1971) (in the context of the constitutionality of granting state aid to nonpublic schools).

10 However, in Lynch v. Donnelly, Justice O'Connor's concurring opinion set forth a
11 "clarification" of Establishment Clause jurisprudence, which banned government activity
12 that created "excessive entanglement with religious institutions" or that represented
13 "government endorsement or disapproval of religion." 465 U.S. 668, 688 (1984)
14 (O'Connor, J. concurring) (nativity scene in city Christmas display). Endorsement in this
15 context was defined as "send[ing] a message to nonadherents that they are outsiders, not
16 full members of the political community, and an accompanying message to adherents that
17 they are insiders, favored members of the political community." Id. This test was endorsed
18 over the Lemon test in County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (creche
19 and menorah in city display), and subsequent cases have adopted an "endorsement" test
20 and declined to analyze the Lemon entanglement requirements. See, e.g., Zelman v.
21 Simmons-Harris, 536 U.S. 639, 648-49 (2002) (school vouchers).

22 Next, the Supreme Court decided Lee v. Weisman, 505 U.S. 577 (prayer at school
23 graduation). Lee declined to reconsider Lemon, having determined that a Lemon analysis
24 was unnecessary on the facts of the case, but also promulgated a new "coercion test."
25 "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to
26 support or participate in religion or its exercise, or otherwise to act in a way which
27 establishes a state religion or religious faith, or tends to do so." 505 U.S. at 587.
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1 All of these tests are applied, often in the same case. See, e.g., Santa Fe Indep.
2 Sch. Dist. v. Doe, 530 U.S. 290, 310-16 (2000) (prayer before school football games,
3 applying all three tests interchangeably). Thus, the Ninth Circuit has stated that “[w]e are
4 free to apply any or all of the three tests, and to invalidate any measure that fails any one
5 of them.” Newdow, 328 F.3d 487 (applying Lee coercion test only).

6 B. Jurisdiction

7 1. Mootness

8 As an initial matter, the court does not have jurisdiction to grant equitable relief in
9 this case. The Ninth Circuit has held, in the context of claims raised by a graduated high
10 school senior, “it is well-settled that once a student graduates, he no longer has a live case
11 or controversy justifying declaratory and injunctive relief against a school’s action or policy.”
12 Cole v. Oroville Union High Sch. Dist., 228 F.3d 1092, 1098 (9th Cir. 2000), cert. denied,
13 532 U.S. 905 (2001) (claims for declaratory and injunctive relief based on school’s refusal
14 to permit proselytizing valedictorian speech for graduated senior, because “as graduates of
15 Oroville, [plaintiffs] will never again be required to omit sectarian references from their
16 Oroville graduation presentations.”).

17 Similarly, both Chase and Samantha Eklund have now completed the seventh
18 grade, and will never be required to learn Islamic history in seventh grade world history
19 class again. They thus may not move for equitable relief in this case.⁸ However, “although
20 a student’s graduation [or completion of an academic program] moots his claims for
21 declaratory and injunctive relief against school officials, it does not moot his damages
22 claims.” Cole, 228 F.3d at 1099-1100 (citation omitted). Chase and Samantha thus may
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24 ⁸ The Eklunds argue that the court should nonetheless grant equitable injunctive
25 relief in its discretion, citing Bilbrey v. Brown, 738 F.2d 1462, 1470 (9th Cir. 1984) (student
26 claiming Fourth Amendment violations by school). However, as defendants pointed out in oral
27 argument, Bilbrey arose in the context of a certified class action, so the mooting of the named
28 plaintiffs’ claim would not have affected the standing of the entire class. See, e.g., County of
Riverside v. McLaughlin, 500 U.S. 44, 51 (1990). Here, where the Eklunds have not brought
a class action suit, the court loses equitable jurisdiction as soon as Chase and Samantha’s
claims become moot. Cole, 228 F.3d at 1099.

1 proceed in this matter, but on their nominal damages claim only.

2 2. Immunity from Suit

3 Furthermore, both defendant Byron Union school district and defendant Thomas
4 Meyer, the superintendent of the school district, were sued in their official capacities only.
5 As the parties have agreed, the Eleventh Amendment bars damages claims against state
6 agencies, and thus summary judgment in favor of those two official parties is granted.
7 Cole, 228 F.3d at 1100 n. 4; see also March 12 Order at 12 (citations omitted).

8 The court therefore addresses the claims raised under the Establishment Clause
9 against defendants Carlin, Carr, and Principal Nancie Castro only.

10 C. Establishment Clause Claims

11 As an initial matter, the Supreme Court has held that the public schools bear the
12 responsibility of educating their students about the history and cultures of other countries,
13 which often must include a discussion of religion as well. “[I]t might well be said that one’s
14 education is not complete without a study of comparative religion or the history of religion
15 and its relationship to the advancement of civilization.” School District of Abington
16 Township, Penn. v. Schempp, 374 U.S. 203, 225 (1963); see also Engel v. Vitale, 370 U.S.
17 421, 434 (1962) (“The history of man is inseparable from the history of religion.”).

18 All parties agree that the school district is entitled to teach students a basic history
19 of Islamic religion and culture. The parties instead dispute whether role-playing games,
20 and the details of this particular role-playing game, are a proper way to do so.

21 1. “Five Pillars of Islam” Activity

22 The parties agree that the students were taught about the five pillars of the Islamic
23 faith, and that the students were asked to role-play or perform activities that were roughly
24 analogous to each pillar. Thus, to demonstrate the Muslim profession of faith in Islam, the
25 students made banners announcing their group’s city affiliation, and to demonstrate the
26 requirement of daily prayers, Carlin read portions of poetic prayers from the Qu’ran, and
27 students informally recited lines of an Islamic prayer in class. The students also gave up
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1 something for a day to represent Ramadan, performed community service to represent the
2 Muslim pillar of charity, and played a trivia board game to represent the Muslim hajj
3 pilgrimage. Also, to further the role-playing experience for the “Five Pillars of Islam”
4 activity, the students were encouraged to select Muslim names and dress up in Arab
5 clothes.

6 The Eklunds contend that the role-playing activities, taken as a whole, constitute the
7 practice of Islam, and the school’s use of the Islam simulation module thus constitutes an
8 impermissible endorsement of the Islam faith.

9 a. Coercion – Lee

10 Under Lee, the Establishment clause is violated if a school coerces students into
11 participating in religious activities. 505 U.S. at 587. For the purposes of the Lee test,
12 “subtle and indirect pressure,” such as social pressure from peers to conform to school-set
13 norms, can constitute coercion, even if students are otherwise free to opt out of the activity.
14 Id. at 592-94; see also Newdow, 328 F.3d at 488. However, defendants argue that
15 whether or not Chase and Samantha were “coerced” into participation in the role-playing
16 module, the module does not violate Lee because, as a threshold matter, none of the
17 activities in questions constituted “religious” activity.

18 In determining whether the activity in question is considered “religious,” the court
19 conducts an objective review of whether the students were actually practicing a religion.
20 Brown v. Woodland Joint Unified Sch. Dist., 27 F.3d 1373, 1379 (9th Cir. 1994) (“the
21 Supreme Court and this circuit have consistently applied an objective standard for public
22 school Establishment Clause inquiries,” citing, inter alia, Lee); see also Altman v. Bedford
23 Central Sch. Dist., 245 F.3d 49, 78 (2d Cir. 2001), cert. denied, 524 U.S. 827 (2001) (Earth
24 Day activities to increase environmental awareness in high school cannot be viewed by an
25 objective observer as practicing the religion of Gaia, which advocates the divinity of the
26 Earth); cf., e.g., Newdow, 328 F.3d at 488-89 (requiring children affirmatively to pledge
27 their devotion to a nation “under God” considered a religious act, given the legislative
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1 history of the pledge and the context in which the pledge is recited).

2 Objectively, the students at Excelsior cannot be considered to have performed any
3 actual religious activities in their seventh grade world history class. Devout Muslim
4 practitioners who adhere to the actual five pillars of Islam must 1) publicly proclaim their
5 faith that there is only one God, and Muhammad is His prophet; 2) pray five times a day,
6 facing Mecca; 3) donate to charity as an act of faith; 4) fast for the month of Ramadan from
7 sunrise to sunset; and 5) make a pilgrimage to Mecca once in their life, if they are
8 financially and physically able to do so. See, e.g., Complaint Exh. A at 1:24, (history text
9 provided in module); Carlin Decl. ¶¶ 13, 74; Carlin Decl. Exh. C at 63 (explanation of five
10 pillars of faith in Across the Centuries).

11 By contrast, the students did not perform the actual five pillars of faith in their class
12 – they did not proclaim faith in one God or belief in Muhammad as His prophet, pray five
13 times a day, fast for a month, make charitable donations, or travel to Mecca. Instead, the
14 students participated in activities which, while analogous to those pillars of faith, were not
15 actually the Islamic religious rites. See Carlin Decl. ¶¶ 57, 60, 61, 68, 70, 72, 76; Campo
16 Decl. ¶¶ 3 (plaintiffs' expert, describing activities performed by students); E.C. Decl. ¶¶ 27,
17 30-33, 35, 39; C. Eklund Depo. 114:1-115:23; 120:19-121:20 (describing his activities);
18 Spencer Depo. 21:22-25; Spencer Decl. ISO Plaintiffs' MSJ Opp. ¶¶ 8-12, 23, 25, 26,
19 (admitting that students did not actually perform Muslim rituals).⁹ In fact, at oral argument,
20 plaintiffs' attorney agreed that these activities were merely "approximations" of Muslim
21 religious activity.

22 Role-playing activities which are not in actuality the practice of a religion do not
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24 ⁹ In citing expert testimony, the court is mindful that expert testimony is not often
25 relevant in the court's determination of constitutionality, and does not cite it for that purpose
26 here. "The Supreme Court generally has not relied on expert testimony to determine whether
27 a school practice [violates the Establishment Clause]. Instead of engaging in a 'battle of the
28 experts' in deciding Establishment Clause cases, courts have relied upon assumptions about
a 'hypothetical observer' . . .to determine [constitutionality]." Brown, 27 F.3d at 1382 (noting
that expert testimony does not raise disputed issues of material fact when the expert testimony
itself is "of little use in determining whether a practice is unconstitutional").

1 violate the Establishment Clause. In Brown, parents challenged school reading
2 assignments for elementary school students that discussed witches and instructed the
3 students to pretend to cast magic spells. The parents claimed that the school was asking
4 the children to practice actual pagan or Wiccan religions, in violation of the First
5 Amendment. 27 F.3d at 1377. The Ninth Circuit held that these reading assignments
6 were merely “fantasy activities . . . that happen to resemble religious practices” and thus
7 “are not ‘overt religious exercises’ that raise Establishment Clause concerns.” Id. at 1382.
8 Similarly, the students here were engaged in simulations of Islam activities that were
9 similar to, but not actual, elements of the Islamic faith. Objectively speaking, these
10 “approximations” of Islamic behavior cannot be considered actual “religious activity” for the
11 purposes of the Lee coercion test, and therefore the Lee test cannot be met.

12 In addition, there is no evidence that the students performed these classroom
13 activities with any devotional or religious intent. See C. Eklund Depo. 53:16-54:15 (stating
14 that he did not believe that anything he had done had made him Muslim), E.C. Depo. ¶ 31
15 (“I never did anything in Ms. Carlin’s class that made me think I was engaging in prayer of
16 any kind.”).¹⁰ The students’ subjective lack of spiritual intent further demonstrates that the
17 activities in question cannot objectively be considered “religious activity” for the purposes of
18 Lee. See Bauchman v. West High School, 132 F.3d 542, 552 n. 8 (10th Cir. 1997) (under
19 Lee, the singing of Christian devotional music in a high school choir in church settings not
20 considered religious activity when no showing was made that the songs were sung in “a
21 worshipful context”); Altman, 245 F.3d at 78 (no objective observer could find high school’s
22 Earth Day activities religious activity because plaintiffs made no showing that the Earth was
23 worshipped as divine at the event); see also Doe v. Duncanville Independent Sch. Dist., 70

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25 ¹⁰ Carlin also notes that none of the students performed the role-playing activities
26 with any of the requisite ritualistic formalities of the Muslim religion. For instance, when
27 reciting lines of the Muslim prayer, none of the students were bowing or kneeling, directing
28 themselves towards Mecca, engaging in ritual washing, or taking off their shoes. Carlin Decl.
¶¶ 61, 62. See also, e.g., C. Eklund Depo. 135:15-136:8 (confirming that Islamic religious
ritual requirements for prayer were not met). This further demonstrates the students’ lack of
devotional intent.

1 F.3d 402, 407 n. 7 (5th Cir. 1992) (singing of religious song as school choir “theme song”
2 not considered religious activity because song was not used as an invocation or in any
3 religious context).

4 Thus, the role-playing elements of the Islam unit does not require that the students
5 engage in actual “religious activity,” and the Lee coercion test therefore cannot be met.

6 b. Endorsement of Religion – Lemon and Lynch

7 The Eklunds next argue that, even if the activities in question do not constitute
8 actual religious activity, the nature of the role-playing module nonetheless has the effect of
9 advancing or endorsing the Islam religion, in violation of Lemon and Lynch. The Eklunds
10 argue that the students could reasonably have believed they were practicing the Islam
11 religion, even if in fact they were not, and the students could also have believed that their
12 grade in the class would be based on their willingness to believe the tenets of Islam.

13 Under both Lemon and Lynch, the Islam module is unconstitutional if it has the
14 primary effect of either endorsing or disapproving of any religion. 465 U.S. at 688; 403
15 U.S. at 612-13. The effect of the role-playing must be assessed from the objective
16 standpoint of a reasonable observer (here, a seventh grader at Excelsior), and the court
17 must also take the larger context of the challenged activity into account. Id. at 1378-80;
18 see also Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1540 (9th Cir. 1985) (Canby,
19 J. concurring) (cited in Brown, stating that activity must be considered “as a whole in the
20 context of the entire curriculum,” and noting that “objectivity is to be assessed with
21 reference to the manner in which often highly partisan, subjective material is presented,
22 handled, and integrated into the school curriculum. . .”). Furthermore, in evaluating
23 constitutionality, the court must consider the primary purpose of the activity as well as the
24 facts of the situation at hand. See, e.g., Lemon, 403 U.S. 602, 612-13 (first prong of
25 analysis); Lynch, 465 U.S. at 688.¹¹

26 _____
27 ¹¹ It has been observed that Lynch collapses the Lemon test into these two prongs
28 and eliminates the “entanglement” requirement. Newdow, 328 F.3d at 486. Since these two
prongs are dispositive here, entanglement need not be discussed.

1 i. Objective Review of Program

2 Upon an objective review of the situation at hand, the students would not reasonably
3 have understood the module to have endorsed Islam over other religions merely because
4 of the role-playing activities at issue. As a matter of law, “a practice’s mere consistency
5 with or coincidental resemblance to a religious practice does not have the primary effect of
6 endorsing religion.” Brown, 27 F.3d at 1381 (role-playing witchcraft rituals not an
7 endorsement of Wiccan religion). Thus, the mere fact that the Islam role-playing module
8 involved approximations of Islamic religious acts is not sufficient to create an endorsement
9 of the Islamic faith.

10 Furthermore, viewing the module within its larger context, a reasonable Excelsior
11 student would not have believed that it represented an endorsement of religion either. The
12 students participated in many role-playing exercises in their middle school years, and
13 learned about a number of religions as well, for purely educational purposes. Carlin also
14 repeatedly explained to the students the nature of the Islam role-playing assignment,
15 explained that it did not represent reality, and the students subjectively understood the
16 distinction between the simulation and their actual religious faith. See, e.g., C. Eklund
17 Depo. 53:16-54:15; Carlin Decl. ¶¶ 26, 29; E.C. Decl. ¶¶ 9-12; Carlin Depo. 83:7-85:24;
18 E.C. Depo. 135:2-137:17. Given these facts, an objective review of the activities in
19 question does not result in a finding of an endorsement of Islam. Cf., e.g., Bauchman, 132
20 F.3d at 555 (singing of Christian choral music in churches by high school choir, in settings
21 similar to church services, did not represent an endorsement of Christianity, when viewed
22 in the context of Salt Lake City, a highly religious area, and given that the choir also
23 performed secular songs in churches, and performed both secular and religious works in
24 non-religious settings as well).

25 ii. Secular Purpose

26 Defendants also argue that the use of the Islam module was motivated by the purely
27 secular purpose of instructing students about Islamic culture and history. See, e.g., Castro
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1 Decl. Exh. B (California requirement that world history classes present unit on Islam).
2 Plaintiffs present no evidence refuting that explanation. The court therefore determines
3 that defendants acted with an appropriate secular purpose in its use. See Lynch, 450 U.S.
4 at 680 (non-secular purpose may only be found “when . . . there was no question that the .
5 . . . activity was motivated wholly by religious considerations”) (emphasis added).

6 The secular nature of the activities further demonstrates the module’s non-
7 endorsement of religion. Even if the role-playing module is presumed to involve religious,
8 or quasi-religious activity, the Ninth Circuit has stated that “[s]ome student participatory
9 activity involving school-sponsored ritual may be permissible . . . where the activity is used
10 for secular pedagogical purposes.” Brown, 27 F.3d at 1380 n. 6 (citing as examples
11 reenactments of actual religious rituals, such as an American Indian dance, the Last
12 Supper, or a Passover dinner, “if presented for historical or cultural purposes”).¹² Thus,
13 even quasi-religious role-play is permissible if it does not objectively endorse one religion
14 over another.

15 Similarly, plaintiffs claimed at oral argument that the display of the group banners
16 showing portions of the Bismillah was analogous to the display of the Ten Commandments
17 in school classrooms, which has been found unconstitutional. However, the display of the
18 Ten Commandments in a classroom setting was found unconstitutional because the
19 Supreme Court determined that upon objective review, the primary purpose for their
20 display was to endorse Christianity. Stone v. Graham, 449 U.S. 39, 41 (1980). Here, in
21 contrast, the primary purpose of the Islam module was the secular goal of educating
22 students about Islamic culture. Thus, even the display of religious texts in a purely secular
23 context will survive Constitutional review as well.

24 c. Conclusion

25 The role-playing games therefore neither constitute actual religious activity for the

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27 ¹² This language in Brown appears to imply that, when a proper secular purpose
28 is shown in the state’s use of actual religious activity, the Lemon test will still be applied, even
if Lee would otherwise potentially be violated.

1 purposes of Lee nor an endorsement of Islam for the purposes of Lemon and Lynch, and
2 thus Carlin's use of the role-playing module in Chase's class does not violate the
3 Establishment Clause.¹³

4 2. Educational Assignments

5 The Eklunds also argue that certain reading and writing assignments given in the
6 role-playing module violate the First Amendment as well.¹⁴ The Eklunds claim that when
7 playing the "Race to Makkah" trivia game, Carlin permitted the students to view the
8 "wisdom" and "quiz" cards provided for use in the game. Certain of these cards contain
9 statements concerning the tenets of Muslim religious belief, and ask the students to
10 provide the "right" answer. Complaint Exh. A at 2:11-35. The Eklunds object because
11 some of the cards state that certain religious beliefs are "true," when they are merely what
12 Muslims believe to be true.¹⁵

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14 ¹³ The Eklunds also argue, through their experts, that the role-playing module need
15 not even be assigned, since the textbook Across the Centuries provides adequate exposure
16 to Islamic history. However, since the module is constitutional, the state is not required to
17 refrain from its use. "[O]nce the state is free to use a secular means of attaining a goal, it is
18 not required to use an alternative secular means that is less likely to be associated with
19 religion." Brown, 27 F.3d at 1382 (no endorsement of religion through decision to use the
20 materials at issue in the suit).

21 ¹⁴ In an abundance of caution, defendants also move for summary judgment based
22 on the Eklunds' expert's statements that the Islam unit and module should have included more
23 information about Islamic religious wars and terrorism, and therefore the unit endorsed Islam
24 by implication. See, e.g., Spencer Expert Report at 23-24 (at Lye Decl. ISO Def. MSJ Exh.
25 G, stating that the Islam unit should have included discussions of anti-Christian jihads in the
26 seventh century, and information about Osama bin Laden). Assuming for the purposes of this
27 motion that the material presented an unfairly partisan and religious view of Islam, this would
28 nonetheless not be a basis for finding the reading assignments in the module unconstitutional.
It is permissible to assign even partisan religious texts without violating the First Amendment.
Grove, 753 F.2d at 1540 (concurring opinion, noting that "Luther's 'Ninety-Nine Theses' are
hardly balanced or objective, yet their pronounced and even vehement [anti-Catholic] bias
does not prevent their study in a history class's exploration of the Protestant Reformation, nor
is Protestantism itself 'advanced' thereby"), cited in Brown, 27 F.3d at 1380.

¹⁵ The statements to which the plaintiffs object include "The Qu'ran . . . is God's
third revelation that was revealed to Prophet Muhammad – Fact;" and "The Holy Qu'ran is
God's word as revealed to Prophet Muhammad through the Archangel Gabriel – Truth." Other
statements of this type include: "The Black Stone came down from heaven with Adam . . .
Truth;" "Jinns, who were created from fire, can be good or evil, with the chief evil Jinn being
Satan – Fact;" "Archangel Gabriel came to Prophet Muhammad while he meditated in a cave
and revealed God's word to him . . . – Truth;" "Complete this phrase: 'Allah is the only true

1 The plaintiffs also complain that, in the five-paragraph essay assignment critiquing
2 Islam, Carlin stated, “BE CAREFUL HERE – if you do not have something positive to say,
3 don’t say anything!!!” Lye Decl. Exh. I at 5. Plaintiffs claim that this instruction had the
4 effect of instructing students that they were required to support Islam in order to receive a
5 good grade on the essay.

6 The cards and the essay assignment, however, do not endorse Islam under either
7 Lemon or Lynch.¹⁶ As for the cards, the “Wisdom cards” are elements of the “Race to
8 Makkah” game, which were divided into three categories: trivia, fact, and truth. Complaint
9 Exh. A at 2:2 (module teacher’s manual). These cards were to be collected during the
10 game and read to the class. Carlin Decl ¶¶ 80, 83. “Trivia” and “truth” cards were worth
11 three points in the game, while fact cards were worth four. Complaint Exh. A at 2:10. The
12 Quiz cards, in contrast, requires the student to answer the question, for points. Id. Carlin
13 claims, and the Plaintiffs do not contest, that she explained that the cards represented only
14 what Muslims believe. Carlin Decl. ¶ 82; C. Eklund Depo. 94:21-96:15.

15 Given the context in which the cards were used, no objective observer could
16 conclude that the cards endorsed Islam. As an initial matter, students may read and
17 discuss even extremely proselytizing individual materials, in a classroom setting without
18 violating the First Amendment. Brown, 27 F.3d at 1380, citing Grove, 753 F.2d at 1540.¹⁷
19 Furthermore, even if the materials themselves were otherwise impermissible, the students
20 were in fact able to distinguish between actual historical truth and a positive statement of
21 Muslim belief, and Carlin actively emphasized that difference in the classroom setting. The
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23 God and Muhammad is his _____.” While there is no evidence that any individual card was
24 used by Carlin in the “Race to Makkah” game, the court will assume for the purposes of this
25 motion that students were exposed to all of them.

26 ¹⁶ The Lee test is not implicated here since neither answering questions nor writing
27 a school essay can be construed as religious activities, and plaintiffs do not so contend.

28 ¹⁷ Plaintiffs’ argument that the sectarian nature of the written materials would
override Carlson’s secularizing verbal explanations in the classroom is thus insufficient to state
an Establishment Clause claim.

1 reading of perhaps non-ideally worded cards does not represent an endorsement of
2 religion or a violation of the Establishment Clause.

3 Similarly, the essay assignment is constitutional as well. Carlin explained that in
4 class she had discussed with the students that, in light of the heightened emotions
5 concerning the September 11 terrorist attacks, racist comments about Islam would not be
6 tolerated in the essay and any anti-Islam commentary was to be supported with at least
7 one reason. Carlin Decl. ¶¶ 90. Plaintiffs do not deny that Carlin provided this explanation.
8 In that context, the statement “if you do not have anything positive to say, don’t say
9 anything!!!” is properly understood as a reminder to the students of Carlin’s cautionary
10 instructions and cannot be said to endorse Islam in any way.

11 Thus, none of the challenged educational assignments at issue in Carlin’s 2001
12 world history class violate the Establishment Clause either.

13 3. Opt-Out

14 Plaintiffs next sue Michelle Carr for Establishment Clause violations, based on her
15 alleged anger with Samantha Eklund when she opted out of the Islam unit, and her alleged
16 subsequent failure to provide Samantha with additional instruction on her alternate work
17 assignment.

18 Assuming for the purposes of this motion the truth of the Plaintiffs’ allegations, they
19 remain nonetheless insufficient to show a violation of the First Amendment in Carr’s use of
20 the role-playing module. Merely reading portions of the module and generally discussing
21 Muslim beliefs in a schoolroom context, as the parties admit was the extent of Carr’s
22 instruction, is permissible under the First Amendment. Brown, 27 F.3d at 1380 (“reading,
23 discussing, or contemplating” other religions is “not reasonably viewed as communication
24 of a message of endorsement”).¹⁸ Thus, even if Samantha perceived Carr as becoming

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26 ¹⁸ Plaintiffs argued at the hearing that Samantha’s claim was also based on a
27 “pattern and practice” of Establishment Clause violations at Excelsior, arguing that Samantha
28 and her parents did not know at the time that she opted out of the class that Carr’s use of the
module was more limited than Carlin’s. However, even if Carr had used the module to the
same extent as Carlin, Carlin’s use of the module was also constitutional, so the same

1 angry at her for requesting not to participate in the unit, or that Carr seemed unwilling to
2 answer her (unasked) questions about her alternate assignment, that is nonetheless not
3 enough to revive an otherwise-improper Establishment Clause claim. Bauchman, 132 F.3d
4 at 556 (student's allegations of retaliation and harassment based on decision to opt out of
5 class later found to be constitutional, if true, demonstrated a "lack of sensitivity, crudeness,
6 and poor judgment" on the part of the school community," but "d[id] not rise to the level of a
7 constitutional violation," and could not be used to "breathe constitutional life into otherwise
8 unactionable conduct.").

9 Carr thus did not violate Samantha's constitutional rights.

10 4. Principal Castro

11 Plaintiffs also appear to have raised claims against Principal Castro in her
12 supervisory capacity.¹⁹ However, because neither Carlin nor Carr violated the plaintiffs'
13 constitutional rights, Castro cannot be held liable for any constitutional violation in her
14 supervisory role either. Quintanilla v. City of Downey, 84 F.3d 353, 355 (9th Cir. 1996)
15 (failure to show violation of constitutional rights by subordinates destroys § 1983 claim
16 against supervisor).

17 C. Qualified Immunity

18 Finally, even if defendants were to have violated the Establishment Clause, they
19 further claim that their actions are protected under the doctrine of qualified immunity. The
20 court agrees.

21 The doctrine of qualified immunity generally shields government officials from
22 liability for civil damages "insofar as their conduct does not violate clearly established
23 statutory or constitutional rights of which a reasonable person would have known." Harlow
24 v. Fitzgerald, 457 U.S. 800, 818 (1982). It safeguards "all but the plainly incompetent or

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26 argument applies.

27 ¹⁹ Plaintiffs do not appear to raise any claims against Castro based on any actions
28 taken in her individual capacity, and, in fact, did not discuss any such claims either in their
papers or at the oral argument.

1 those who knowingly violate the law.” Malley v. Briggs, 475 U.S. 335, 341 (1986).

2 Furthermore, qualified immunity should be determined at the earliest possible stage in the
3 litigation, to spare the defendants the burden of proceeding to an unnecessary trial.

4 Saucier v. Katz, 533 U.S. 194, 200-01 (2001).

5 Under Saucier, the court is required to conduct a two-step analysis of claims for
6 qualified immunity. First, the court must determine if, as a matter of law, the Eklunds have
7 demonstrated a violation of their constitutional rights. If so, the defendants may be
8 immune from liability if they can show that the right at issue was not “clearly established” at
9 the time the alleged violation occurred, such that reasonable school officials would have
10 believed their actions to be lawful. Saucier, 533 U.S. at 202; Harlow v. Fitzgerald, 457 U.S.
11 800, 806 (1982). See also Lassonde v. Pleasanton Unified Sch. Dist., 320 F.3d 979, 983
12 (9th Cir. 2003), cert. denied, 124 S. Ct. 78 (2003).

13 Here, based on the undisputed facts of record, defendants could reasonably have
14 believed that the Islam simulation module and its accompanying written materials were
15 constitutional. Brown clearly holds that role-playing activities that simulate religious activity
16 constitute neither the practice of religion for the purposes of Lee nor an endorsement of
17 religion under Lemon, 27 F.3d at 1380-82, and defendants point to no subsequent cases
18 demonstrating otherwise. Furthermore, Supreme Court cases since Abington Township
19 have held that religion may properly be taught in the schools in a secular and pedagogical
20 context, as defendants were doing here. Given the status of the law at the time that Chase
21 and Samantha were enrolled in the seventh grade, the defendants acted reasonably in
22 their use of the Islam simulation module, and even if a constitutional violation had been
23 found, qualified immunity would exempt the defendants from liability in any event.

24 CONCLUSION

25 The court rules as follows:

26 Summary judgment is GRANTED in favor of the defendant school district and
27 defendant Superintendent Green under the Eleventh Amendment.

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Summary judgment is GRANTED as to defendant Carlin and DENIED as to plaintiff Chase Eklund and his parents. Summary judgment is GRANTED as to defendant Carr and DENIED as to Samantha Eklund and her parents. Summary judgment is GRANTED as to Castro and DENIED as to all plaintiffs.

Summary judgment is thus GRANTED in favor of all defendants and against all plaintiffs, on nominal damages claims only. All equitable claims against defendants are dismissed as moot.

This order fully adjudicates the matters listed at nos. 63 and 76 on the clerk's docket for this case, and all other pending matters. The clerk is ordered to close the file.

IT IS SO ORDERED.

Dated: December 5, 2003



PHYLLIS J. HAMILTON
United States District Judge