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11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF CALIFORNIA**

14)Case No.: 2:05-CV-00061-FCD-JFM
15)
16 **LARRY CALDWELL,**)
17 **Plaintiff,**)
18 **vs.**)
19 **ROSEVILLE JOINT UNION HIGH**)
20 **SCHOOL DISTRICT; JAMES**)
21 **JOINER; R. JAN PINNEY; TONY**)
22 **MONETTI; STEVEN LAWRENCE;**)
23 **DONALD GENASCI; RONALD**)
24 **SEVERSON,**)
25 **Defendants.**)
26)
27)
28)

DATE: July 8, 2005
TIME: 10:00 a.m.
CTRM: 2
TRIAL DATE: none set

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MEMORANDUM OF POINTS AND AUTHORITIES

**I.
Introduction**

V. Statement of the Case

Plaintiff, Larry Caldwell (“Caldwell”) brings this action for violation of his civil rights against Roseville Joint Union High School District (the “District”) and six individual defendants who are board members and school administrators (collectively, “defendants”).

During a one-year period Caldwell sought to exercise his rights as a citizen to improve science education in the District. Specifically, Caldwell sought consideration of a science proposal called the “Quality Science Education Policy” or “QSE Policy.” The proposed QSE policy would change how Darwin’s theory of evolution is taught in biology classes, to include presentation of some of the scientific weaknesses of evolution along with the scientific strengths. QSE Policy is strictly secular in content with the secular goal of providing students a more thorough understanding of the theory of evolution, and to enhance students’ critical thinking skills in the process.¹

The QSE Policy was accompanied by proposed supplementary instructional materials that were designed to cover some of the scientific evidence relevant to the theory of evolution that was not covered in the District’s biology textbook (referred to collectively as the “QSE Instructional

¹ The QSE Policy states: “Because ‘nothing in science or in any other field of knowledge shall be taught dogmatically’ and ‘scientific theories are constantly subject to testing, modification, and refutation as new evidence and new ideas emerge’ (1), teachers in the Roseville Joint Union High School District are expected to help students analyze the scientific strengths and weaknesses of existing scientific theories, including the theory of evolution.” (Quotations from the California State Board of Education Policy on the Teaching of Natural Sciences (1989)).

² Defendants’ Points and Authorities filed in support of their motion to dismiss (hereinafter referred to as the “Defense Points and Authorities”) page 4, line 1.

1 Materials.”) The QSE Instructional Materials are strictly secular in content, consisting solely of
2 science materials prepared by secular scientists which contain no discussion relative to religion.

3 Caldwell is a Christian whom defendants pejoratively refer to as a “right-wing evangelical
4 Christian fundamentalist.”² Caldwell contends that defendants were motivated by their false
5 presumptions about his perceived religious and political viewpoints to discriminate against him in
6 violation of Caldwell’s rights under the First and Fourteenth Amendments to the United States
7 Constitution, and under equivalent provisions of the California Constitution.
8

9 Caldwell attempted to use five distinct public processes or fora to petition public officials
10 to adopt his QSE Policy and QSE Instructional Materials. Caldwell alleges that defendants
11 violated his constitutional rights in four of those five processes and fora. First, Caldwell was
12 denied the right to place his QSE Policy on the School Board agenda for public debate and
13 potential adoption in violation of California Education Code (“Educ.C.”) §35145.5, California’s
14 Brown Act opening meetings law, Government Code §54954 et seq., and the School Board’s
15 own by laws. Second, as to Caldwell, the District refused to comply with its own written
16 procedure to challenge District instructional materials. Third, the District refused to allow
17 Caldwell to be involved in the selection of instructional materials on an equal basis with other
18 citizens, even though Caldwell has a right to such involvement under Educ.C. §60002. Fourth,
19 Caldwell was denied the right to discuss his QSE Policy and QSE Instructional Materials at a
20 parent advisory council at his daughter’s school in violation of Educ.C. §51101(a)(14).
21
22

23 **B. Summary of Constitutional Claims**

24 The essence of the rights enshrined in the First and Fourteenth Amendments to the United
25 States Constitution is that all citizens should have an equal right to participate in public debates
26 and political processes and to petition their government, without regard to their political and
27 religious viewpoints and belief, and without discrimination.
28

1 Nowhere are these ideals more critical than in our local public schools.

2 “The public entrusts school boards with the education of its children, and the schools play
3 a critical role in the social, ethical, and civic development of those students. To relegate
4 discussion on the education of a community’s children to closed, back-room sessions
5 would deprive the public of the most appropriate forum to debate these issues.” *Leventhal*
6 *v. Vista Unified School District* (S.D.CA 1997) 973 F.Supp. 951, 960-61.)

7 The U.S. Supreme Court has opined as follows:

8 “[School boards] are educating the young for citizenship is reason for scrupulous
9 protection of Constitutional freedoms of the individual, if we are not to strangle the free
10 mind at its source and teach youth to discount important principles of our government as
11 mere platitudes.” *West Virginia Bd. Of Educ. V. Barnette*, 319 U.S. 624, 637, 63 S.Ct.
12 1178, 1185, 87 L.Ed. 1628 (1943)

13 In like manner, the California legislature has codified these principals as follows:

14 “It is essential to our democratic form of government that parents and guardians of
15 schoolage children attending public schools and other citizens participate in improving
16 public education institutions. . . . involving parents and guardians of pupils in the
17 education process is fundamental to a healthy system of public education.” §51000(a)

18 Regrettably, Caldwell discovered that these constitutional ideals are *not* being honored in
19 the District. He discovered instead that citizens like him, who are perceived by school officials as
20 holding disfavored political and religious viewpoints and beliefs, are subjected to a pervasive
21 policy and practice of discrimination by District officials, in an effort to keep their disfavored
22 viewpoints out of school board meetings and other public forums, and ultimately, to keep those
23 disfavored viewpoints out of policy in the District.
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1 The Second Amended Complaint presents a classic case of illegal viewpoint discrimination
2 and religious discrimination in violation of the First and Fourteenth Amendments to the United
3 States Constitution.

4 Caldwell contends that defendants do not approve of his religious belief and viewpoint,
5 which they wrongly perceive as being a “right-wing evangelical Christian fundamentalist
6 religious” belief and viewpoint, and defendants also do not approve of his political viewpoint on
7 science education, which defendants also wrongly perceive to be a “right-wing evangelical
8 Christian fundamentalist religious” viewpoint, even though his science education proposals are in
9 fact entirely secular.

11 Based upon defendants’ disapproval of Caldwell’s perceived religious belief and viewpoint
12 and his political viewpoint, defendants have sought to discriminate against and censor Caldwell’s
13 viewpoint on science education from every forum in which he has sought to express it, and
14 Caldwell contends that such viewpoint discrimination is part of an established policy and practice
15 by the District.

17 Caldwell further contends that defendants have every intention of continuing to censor his
18 viewpoint on science education and to discriminate against him and other citizens who are
19 perceived to hold his disfavored religious and political beliefs and viewpoints.

21 Here are some examples of the viewpoint and anti-religious discrimination Caldwell
22 experienced in the course of the District’s year-long effort to prevent Caldwell’s proposed science
23 education policy and curricula from being publicly debated and adopted as policy:

24 (1) The District’s Superintendent and two members of the School Board refused for
25 eight months to place Caldwell’s Quality Science Education Policy on the agenda of School Board
26 meetings, in violation of California law and the District’s own written policy. Even after they
27 belatedly placed his QSE Policy on the agenda, defendants continued to interfere with Caldwell’s
28

1 First Amendment rights to public debate and potential dynamic political action on his proposal by
2 the School Board, by subjecting him to:

3 (a) anti-religious invectives against Caldwell by a board member, that included
4 publicly reciting Caldwell's private expressions of his religious beliefs to a fellow
5 congregant, and urging fellow board members to reject Caldwell's secular science
6 education policy based upon Caldwell's religious status as a practicing Christian, and
7 because Caldwell had asked other Christians to support his proposal;
8

9 (b) a public threat by that same board member to use the District's resources to
10 actually *sue* Caldwell if he continued to petition District officials in support of his
11 proposal;

12 I a public announcement by that board member that Caldwell and other citizens
13 who share his viewpoint were no longer welcome to communicate directly with that board
14 member; and

15
16 (d) assertion by the Superintendent of a bogus procedural objection, when the
17 School Board appeared to be on the verge of adopting Caldwell's policy.

18 (2) At a prior school board meeting, the board member referenced above had derisively
19 compared Caldwell's proposal for improvement of science education to a hypothetical effort by
20 the District to tell Caldwell's local church what to teach in their children's Sunday school classes,
21 even though the board member began his remarks by conceding that Caldwell's science education
22 proposal itself was entirely secular;

23
24 (3) During that same school board meeting, the School Board also permitted
25 employees of the District and others in attendance at the meeting to hurl anti-Christian insults at
26 Caldwell, despite the School Board's written policy prohibiting members of the public in
27

1 attendance at School Board meetings from attacking the presumed religious motives of other
2 speakers;

3 (4) After the principal of Caldwell's daughter's high school informed all parents that
4 they were welcome to come discuss their views on how evolutionary theory should be taught in
5 biology classes in a parent advisory council known as the Granite Bay High School Curriculum
6 Instruction Team (the "GBHS CIT") that meets monthly, that same principal informed Caldwell
7 that *he was not* welcome to discuss his Quality Science Education Policy proposal on that same
8 subject in those meetings. This refusal was doubly discriminatory to Caldwell, since, at that time,
9 he had been told by the School Board President that Caldwell would not be permitted to bring his
10 QSE Policy proposal before the School Board for potential adoption until he had first taken it
11 before each high schools' parent advisory council.
12

13 (5) Later, that principal placed Caldwell's related Quality Science Education
14 Instructional Materials on the agenda of a GBHS CIT meeting, but when Caldwell and his
15 supporters showed up at the meeting, they were informed that the matter was not on the agenda
16 after all, and that they would not be permitted to discuss their viewpoint on the subject in that
17 meeting, nor in any future meeting.
18

19 (6) The District has an "instructional materials challenge" procedure available to all
20 parents in the District, which provides for five levels of review of such challenges, including a
21 hearing before a district-wide committee comprised of members of the public and school board
22 members. When Caldwell tried to utilize this procedure to petition school officials to address his
23 concerns about deficiencies in the District biology textbook's presentation of evolutionary theory,
24 defendants refused to convene the required district-wide committee, and made a premature "final"
25 decision to deny his challenge, without according Caldwell three of the five levels of review.
26
27 When Caldwell filed an administrative complaint with the District about this procedural
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1 deficiency, the hearing officer refused to provide any redress, and instead, claimed that the District
2 supposedly had been unaware that Caldwell desired to assert a challenge to the textbook because
3 he had not filled out a particular District form at the outset of the process. The District relied on
4 this transparent pretense for denying Caldwell his right to a public hearing and due process on his
5 challenge, even though more than *twenty* District administrators and employees, including the
6 Superintendent, two assistant superintendents, one or more principals, and nearly every science
7 teacher in the District, were well aware of Caldwell's desire in this regard, since, *inter alia*,
8 Caldwell had made a two-hour presentation to an administrator, principal and the science teachers,
9 that included expert testimony by Caldwell's science witness and submission of voluminous
10 supporting documents, and Caldwell and his expert had spent many hours in preparation for that
11 meeting.
12

13 (7) Pursuant to Educ.C. 60002(a), the District is required to "promote involvement" by all
14 parents and community members in the selection of instructional materials used in the District.
15 When Caldwell exercised that right, by submitting his proposed QSE Instructional Materials for
16 adoption and use in biology classes, District officials improperly based their denial of his proposed
17 materials on Caldwell's perceived and actual religious beliefs, rather than on the actual
18 educational and scientific merits of the materials.
19

20 (8) Caldwell attempted to utilize the District's administrative complaint procedure to bring
21 the religious discrimination he and his supporters were suffering to the attention of District
22 officials, with the hope that they would take remedial and prophylactic action to address the
23 problem. Instead, the District responded by subjecting Caldwell to *more* religious discrimination.
24 The District admitted that school officials had treated Caldwell and his policy proposals
25 differently because of his personal religious beliefs, but tried to justify such religious
26 discrimination. The District based this decision on false evidence manufactured by the same
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1 principal who had denied Caldwell access to GBHS CIT meetings. According to the District's
2 official decision on the administrative complaint, the principal accused Caldwell of asking the
3 principal to distribute Christian religious tracts at a GBHS CIT meeting. The District and the
4 principal subsequently admitted this allegation had been false and retracted it.

5 In sum, the rather modest purpose of this lawsuit is to cause this District to take
6 appropriate prophylactic action to ensure that Caldwell and other citizens holding disfavored
7 religious and political viewpoints will enjoy the same constitutional rights to "meaningful public
8 dialogue and, ultimately, dynamic political change" as other citizens, and to provide remedial
9 relief to Caldwell for the denial of his civil rights. *Levanthal, supra*, 973 F.Supp. at 960.

11 **II.**
12 **EACH OF PLAINTIFF'S CLAIMS ARE LEGALLY SUFFICIENT**

13 **V. Caldwell Has Stated A Legally Sufficient §1983 Claim For Illegal Viewpoint**
14 **Discrimination, In Violation Of Caldwell's Rights Under The**
15 **Free Speech Clause**

16 The SAC presents a classic case of illegal viewpoint discrimination in violation of the Free
17 Speech Clause of the First Amendment of the United States Constitution. Caldwell contends that
18 defendants do not approve of his viewpoint on science education, which they wrongly perceive to
19 be a "right-wing evangelical Christian fundamentalist religious" viewpoint on science education.
20 Based upon that disapproval, defendants have sought to discriminate against and censor
21 Caldwell's viewpoint on science education from every forum in which he has sought to express it,
22 and Caldwell contends that such viewpoint discrimination is part of an established policy and
23 practice by the District. Caldwell further contends that defendants have every intention of
24 continuing to censor his viewpoint on science education from District fora.
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1 The United Supreme Court views with special disfavor any regulations or policies that
2 restrict the exercise of free speech because of either the general subject matter of the speech —
3 sometimes known as “content discrimination” — and the even more insidious vice of “viewpoint
4 discrimination” that is based upon the message or view being expressed by a particular speaker or
5 group.

6 “When the government targets not subject matter, but particular *views* taken by
7 speakers on a subject, the violation of the First Amendment is all the more blatant.

8 Viewpoint discrimination is thus an egregious form of content discrimination. The
9 government *must* abstain from regulating speech when the specific motivating
10 ideology or the opinion or perspective of the speaker is the rationale for the
11 restriction.” *Rosenberger v. Rector and Visitors of the University of Virginia*, 515
12 U.S. 819, 829, 115 S. Ct. 2510, 2516 (1995)(citations omitted; emphasis added);
13 *See also Brown v. California Dep’t of Transp.*, 321 F.3d 1217 (9th Cir. 2003).

14
15
16 When government officials deny access to a forum “in a manner that discriminated against
17 a speaker based on his viewpoint,” they are guilty of “discrimination that is impermissible
18 regardless of forum status.” *DeBoer v. Village of Oak Park*, 267 F.3d 558, 567 (7th Cir. 2001).

19 Even in a “nonpublic forum,” where the Supreme Court has given government the greatest latitude
20 to restrict speech, discrimination based on *viewpoint* is forbidden. “To be consistent with the First
21 Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the
22 speaker’s viewpoint and must otherwise be reasonable in light of the purpose of the property.

23
24 *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 682, 118 S.Ct. 1633, 1643
25 (1998). The “requirement of neutrality” means that the government “cannot grant or deny access .
26 . . on the basis of whether it agrees with a [speaker’s] views. *Id.* At 676, 118 S. Ct. at 1640.

1 Needless to say, the same rule applies with even greater force to other types of public
2 forums, where the government’s authority to restrict speech is even more severely limited. Thus,
3 viewpoint discrimination is also impermissible in what the Supreme Court calls “a limited public
4 forum,” *Good News Club v. Milford Central School*, 598 U.S. 98, 112, 121 S.Ct. 2093, 2102
5 (2001) (“speech discussing otherwise permissible subjects cannot be excluded from a limited
6 public forum on the ground that the subject is discussed from a religious viewpoint”); *Mesa v.*
7 *White*, 197 F.3d 1041 (10th Cir. 1999) (County Commissioners violated First Amendment by
8 denying plaintiff a chance to speak at Commission meetings –a limited public forum—based on
9 his viewpoint.)

11 And viewpoints such as Caldwell’s which are perceived by government officials to
12 constitute a “religious” viewpoint are entitled to the same viewpoint neutral protection under the
13 Free Speech Clause as “non-religious” viewpoints on the same topic. Some government officials
14 such as defendants continue to appear to believe that the First Amendment allows them to exclude
15 religious speakers from public forums, on the theory that this is, at worst, merely a form of
16 “content” discrimination, which is sometimes allowable. They are mistaken. Where the
17 government allows speech in some forum on certain topics, they many not *single* out for exclusion
18 speech on that topic merely because the speaker wishes to address it from a viewpoint that is
19 perceived by government officials to be a *religious* viewpoint. The Supreme Court has now been
20 forced to make this point three times within the past decade. In the absence of any valid fear of an
21 Establishment Clause violation, “speech discussing otherwise permissible subjects cannot be
22 excluded from a limited public forum on the ground that the subject is discussed from a religious
23 viewpoint.” *Good News Club v. Milford Central School*, 598 U.S. 98, 112, 121 S.Ct. 2093, 2102
24 (2001). Such exclusion is blatant and “impermissible viewpoint discrimination.” *Id.* See also
25 *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 831, 115 S. Ct.
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1 2510, 2517 (1995); *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384,
2 391-393, 113 S. Ct. 2141, 2147 (1993)(although public school was not required to permit after-
3 hours use of its property for any purpose, it could not permit the facilities “to be used for the
4 presentation of all views about family issues and child rearing except those dealing with the
5 subject from a religious standpoint.”)

6 The principle that the Free Speech’s viewpoint-neutral mandate applies to allegedly
7 “religious” viewpoints as well as secular viewpoints on the same subject has, of course, been
8 applied by the Ninth Circuit. *Hills v. Scottsdale Unified School Dist.*, 329 F.3d. 1044, 2003 WL
9 21197150 (9th Cir. May 22, 2003) ; *Prince v. Jacoby*, 303 F.3d. 1074 (9th Cir. 2002); *Orin v.*
10 *Barclay*, 272 F.3d 1207, 1214-1216 (9th Cir. 2001); *Culbertson v. Oakridge School Dist. No. 76*,
11 258 F.3d. 1061 (9th Cir. 2001).

12
13 **V. Defendants subjected and continue to subject Caldwell to viewpoint**
14 **discrimination in School Board meetings**

15
16 Since viewpoint discrimination by the government is always impermissible under the Free
17 Speech Clause, no matter what type of government forum is involved, this Court need not reach
18 the question of characterizing the forum in which the viewpoint discrimination occurred in order
19 to determine that such exclusion is unconstitutional.

20
21 Nevertheless, in the case of School Board meetings in California, federal courts in the
22 Ninth District have already decided that public school board meetings in California are a limited
23 public forum in which citizens have a right guaranteed by the Free Speech Clause to place on the
24 agenda, of any regular meeting of a school board, any item that falls within the subject matter
25 jurisdiction of the School Board, and then to enjoy the right to public debate on that agenda item.
26 (*Leventhal v. Vista Unified School District* (S.D.CA 1997) 973 F.Supp. 951; *Baca v. Moreno*
27 *Valley Unified School Dist.*, 936 F.Supp. 719, 729 (C.D.Cal. 1996); *See also Frazer v. Dixon*

1 *Unified School District* (1993) 18 Cal.App.4th 781.) Regrettably, the District disagrees, stating
2 that Caldwell does not have the “absolute right to place anything he want[s] on the School Board’s
3 Agenda.” [See Points and Authorities, pg. 27, lines 19-20]

4 However, as the California Court of Appeal stated in *Fraser*:

5 “Members of the public have a right to place items on the agenda for all *regular*
6 meetings of school boards that may well be broader than for regular meetings of
7 other local legislative bodies. (See Educ.C. §35145.5.) Indeed, school boards are
8 required to ‘adopt reasonable regulations *to insure*’ that this right is protected,
9 subject only to the limitation that the regulations may ‘specify reasonable
10 procedures to insure the proper functioning of governing board meetings.’ (*Ibid.*
11 emphasis added [by court] It also appears that, at regular meetings, school boards
12 must allow members of the public to directly address ‘any item of interest to the
13 public ... that is within the subject matter jurisdiction’ of the school board, whether
14 or not that item has previously been placed on the agenda.” (18 Cal.App.4th at
15 791.)

16
17
18 As the federal court explained in *Leventhal*, one purpose of Educ.C. §35145.5 is to carry
19 out the intent of California’s Brown Act open meetings law with respect to local school boards:

20 “The preamble to the Brown Act sets forth the primary purposes of the Act as a
21 whole: The people of this state do not yield their sovereignty to the agencies which
22 serve them. The people, in delegating authority, do not give their public servants
23 their right to decide what is good for the people to know and what is not good for
24 them to know. The people insist on remaining informed so that they may retain
25 control over the instruments they have created. “ (973 F.Supp. at 959.) (Emphasis
26 added.)
27
28

1 The court in *Leventhal* also stated that the public’s right to place items on school board
2 agendas that is guaranteed by §35145.5 is also protected by the First Amendment of the United
3 States Constitution and provided a blunt warning to the dangers of any local school district policy
4 or official that attempts to restrict or put limits on the subjects that the public can place on regular
5 school board meeting agendas for public debate:

6 “The Defendants’ limitation on public criticism is of particular concern in this case,
7 arising as it does in the context of public education. The public entrusts school
8 boards with the education of its children, and the schools play a critical role in the
9 social, ethical, and civic development of those students. *To relegate discussion on*
10 *the education of a community’s children to closed, back-room sessions would*
11 *deprive the public of the most appropriate forum to debate these issues.* As Justice
12 Jackson warned in *West Virginia Bd. Of Educ. V. Barnette*, 319 U.S. 624, 637, 63
13 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943): “*That [school boards] are educating the*
14 *young for citizenship is reason for scrupulous protection of Constitutional*
15 *freedoms of the individual, if we are not to strangle the free mind at its source and*
16 *teach youth to discount important principles of our government as mere*
17 *platitudes.*” See also, e.g., *Shelton v. Tucker*, 364 U.S. 479, 486, 81 S.Ct. 247, 251,
18 5 L.Ed.2d 231 (1960) (“The vigilant protection of constitutional freedoms is
19 nowhere more vital than in the community of American schools.”).” (371 F.Supp.
20 at 960-961.) (Emphasis added.)

21 In this regard, the court in *Leventhal* condemned any attempt by a local district to try to
22 limit or censor the scope of matters that may be placed on the agenda and debated at school board
23 meetings by the public, or to limit such discussions in a manner favorable to the District’s
24 administration or board, which the court described as: “discussion artificially geared toward
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1 praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and,
2 ultimately, dynamic political change.” (973 F.Supp. at 960.)

3 In this case, the agenda item Caldwell wished to place on the agenda of a regular School
4 Board Meeting was his QSE Policy. The subject addressed in his QSE Policy – a secular proposal
5 for how evolutionary theory should be presented in biology classes — is clearly within the subject
6 matter jurisdiction of the School Board. At the high school level in California, decisions regarding
7 course content and instructional materials, including textbooks, are made at the local school board
8 level, rather than at the state-wide level. (Edu. C. § 60000, et seq.)

9
10 In their Defense Points and Authorities, defendants now admit what Caldwell always
11 suspected from their statements and conduct: that they perceive Caldwell as holding a “right-wing
12 evangelical Christian fundamentalist religious” viewpoint on how evolutionary theory should be
13 taught in biology classes. By their choice of adjectives, defendants obviously perceive Caldwell’s
14 viewpoint on the subject to be both a “political” viewpoint and a “religious” viewpoint.

15
16 Caldwell contends that defendants’ disapproval of his perceived religious/political
17 viewpoint on this subject motivated defendants to do everything they could to prevent Caldwell
18 from placing his QSE Policy on the School Board’s agenda for public debate and potential
19 political action. Defendants stonewalled for *eight months*, in blatant defiance of Caldwell’s rights
20 under statutory and constitutional law, as well as the School Board’s own By Laws. Defendants
21 only begrudgingly agreed to place the QSE Policy on the agenda after Caldwell threatened a
22 lawsuit on the basis of *Leventhal*. Even then, defendants continued to tried to interfere with
23 Caldwell’s enjoyment of his Free Speech rights, by verbally attacking his Christian beliefs, and
24 threatening to sue him, and telling him and his supporters that they were no longer welcome to
25 communicate directly with board members like other constituents.
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1 Incredibly, defendant Monetti continues to take the position on behalf of the District that
2 Caldwell purportedly *has no right* to place items on the School Board’s agenda.

3 Caldwell also contends that the District’s unwritten practice and policy of denying citizens
4 their Free Speech right to place items on the agenda of School Board meetings continues to this
5 day. As alleged in the SAC, defendant Monetti continues to take the position on behalf of the
6 District that Caldwell purportedly *has no right* to place items on the School Board’s agenda, and
7 Monetti continues to assert that purportedly has the right to censor and revise agenda items
8 submitted by citizens in his discretion. Caldwell further contends that this unwritten policy by the
9 District and Monetti is used to discriminate against viewpoints on school policy with which the
10 District, Monetti disagree. Caldwell further contends that the evidence in this case will prove that
11 the current school board president, Joiner, plays a role in carrying out that unwritten policy of
12 viewpoint discrimination.
13

14 Under 42 U.S.C.A. sec. 1983, Caldwell is entitled to seek injunctive relief from this Court
15 to order the District, Monetti and the other responsible government authorities in the District to
16 desist from this unwritten policy of viewpoint discrimination among citizens whose viewpoints
17 Monetti and the District agree with, and citizens whose viewpoints Monetti and the District
18 disagree with.
19

20 **V. Defendants subjected and continue to subject Caldwell to viewpoint**
21 **discrimination in GBHS CIT Meetings**
22

23 Caldwell contends that defendant Severson is among those District defendants who
24 perceive Caldwell as holding a “right-wing evangelical Christian fundamentalist religious”
25 viewpoint on how evolutionary theory should be presented in biology classes, and that Severson
26 strongly disapproves of Caldwell’s perceived religious/political viewpoint on this subject.

27 Caldwell also contends that Severson disagrees with Caldwell’s political viewpoint on what role
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1 parents should play in the selection of instructional materials and determination of course content
2 in the District.

3 Caldwell contends that Severson, acting as a high-level administrative employee on behalf
4 of the District, engaged in viewpoint discrimination against Caldwell, commencing in September
5 of 2003, by refusing to place Caldwell’s QSE Policy on the agenda of GBHS CIT Meetings for
6 public debate in violation of the Free Speech Clause, even though Severson contemporaneously
7 invited other parents –whose viewpoints Severson apparently approves of—to appear and discuss
8 the subject of how evolutionary theory should be taught in biology classes at GBHS CIT
9 Meetings. Caldwell further contends that Severson has continuously engaged in viewpoint
10 discrimination against Caldwell in this regard through the present time, by failing to place the item
11 on the agenda of any of the numerous monthly meetings of the GBHS CIT that have been held
12 since then.

13
14 Caldwell further contends that Severson, acting on behalf of the District, also engaged in
15 illegal viewpoint discrimination against Caldwell in December of 2003, when Severson actually
16 placed Caldwell’s proposed QSE Instructional Materials on the written agenda for public
17 discussion on his own, but then, when Caldwell and his supporters showed up at the meeting to
18 participate in the discussion, Severson announced that the item would not be on the agenda after
19 all, and Caldwell and his supporters were told that they would not be permitted to discuss the
20 subject in the GBHS CIT. At the meeting, Severson demonstrated his contempt for Caldwell’s
21 political and religious viewpoint by analogizing Caldwell’s QSE Policy and QSE Instructional
22 Materials to a hypothetical request by a parent who is a Holocaust denier that the Holocaust not be
23 taught in history class.
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1 Caldwell alleges that Severson’s action in removing the QSE Instructional Materials from
2 the GBHS CIT agenda was motivated by Severson’s intent to discriminate against the perceived
3 political/religious viewpoint held by Caldwell and other citizens who support his viewpoint on
4 how evolutionary theory should be presented in biology classes. Caldwell contends that even
5 though as a matter of official policy, all parents of students at GBHS are welcome to attend GBHS
6 CIT meetings and participate in public discussions of subjects such as how evolutionary theory
7 should be taught in biology classes, in fact, Severson, acting on behalf of the District has an
8 unwritten policy of only welcoming parents to participate in public discussions at GBHS CIT
9 meetings who share his political/religious viewpoint on such topics, and who share Severson’s
10 political viewpoint on the proper role of parents in policy decisions in the District.
11

12 Severson’s actual policy of viewpoint discrimination in GBHS CIT meetings presents a
13 striking example of a school official illegally attempting to limit public discussion in a designated
14 or limited public forum to “discussion artificially geared toward praising (and maintaining) the
15 status quo, thereby foreclosing meaningful public dialogue and, ultimately, dynamic political
16 change,” in violation of the Free Speech rights of Caldwell and other citizens. (*Levanthal, supra*,
17 973 F.Supp. at 960.)
18

19 Caldwell complained about Severson’s viewpoint discrimination against Caldwell and his
20 supporters at GBHS CIT Meetings to Severson, to Severson’s boss, Superintendent Monetti, to the
21 District’s hearing officer for administrative complaints, Assistant Superintendent Genasci, to the
22 Board President, and to the School Board as a whole, all to no avail. The District’s deaf ear
23 towards Caldwell’s complaint — and hostility towards Caldwell’s viewpoint—was epitomized by
24 then School Board President Pinney’s note to Severson *complimenting* him on his action in
25 removing the QSE Instructional Materials from the GBHS CIT meeting agenda and refusing to
26 permit Caldwell and his supporters to discuss their viewpoint on the issue in that forum, even after
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1 Pinney had previously advised Caldwell that the GBHS CIT meeting *was* the appropriate public
2 forum for Caldwell to present his science education proposals, before bringing them before the
3 School Board.

4
5 **V. Defendants subjected and continue to subject Caldwell to viewpoint**
6 **discrimination in its refusal to accord him a public hearing on his instructional**
7 **materials challenge to the Holt Biology Textbook**
8

9 As discussed above, the District, acting through Lawrence, refused to accord Caldwell the
10 third level of review of its Instructional Materials Challenge procedure with respect to Caldwell's
11 challenge to the Holt Biology Textbook --the level at which Lawrence was required by the
12 District's own written procedure to convene a public committee to consider public input on
13 Caldwell's challenge to the textbook.

14 Caldwell alleges that Lawrence, in refusing to provide this public forum and hearing for
15 Caldwell's instructional materials challenge, was acting pursuant to, and in accordance with, the
16 District's unwritten policy of discriminating against and attempting to suppress viewpoints on
17 school policy with which Lawrence, Monetti and the District disagree. Caldwell alleges that
18 Lawrence, by this action, sought to deprive Caldwell of his rights under the Free Speech Clause,
19 by relegating discussion of Caldwell's challenges to the Holt Biology Textbook's presentation of
20 evolutionary theory to "*closed, back-room sessions*" of school officials instead of dynamic public
21 debates in the appropriate public forum designated for that purpose by the District's own written
22 procedure.
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24

25 Caldwell complained about Lawrence's refusal to provide him with a hearing on his
26 instructional materials challenge by a properly constituted public committee to Lawrence, to
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1 Lawrence's boss, Superintendent Monetti, to the District's hearing officer for administrative
2 complaints, Assistant Superintendent Genasci, and to the School Board, all to no avail.

3
4 **V. Caldwell Has Stated A Legally Sufficient §1983 Claim For Violations Of His**
5 **Right To Equal Protection Under The Fourteenth Amendment**

6 The Northern District of California recently decided the pleading requirements for a
7 § 1983 claim for denial of equal protection against a local school district and its government
8 officials. *Williams v. Vidmar*, 367 F.Supp.2d 1265, 1269-1272 (2005). *Williams* recognized that a
9 teacher who contended that he was treated differently by his supervising school principal and his
10 school district based upon his status as a Christian could state a legally sufficient § 1983 claim for
11 denial of equal protection against the institutional and individual defendants. In *Williams* the court
12 explained its denial of defendants' 12(b)(6) motion to dismiss his equal protection claim as
13 follows:
14

15 "Under the liberal notice-pleading standard, it seems clear that Plaintiff's broadly
16 identified class is sufficient to put Defendants on notice. Although the allegation that he is
17 treated differently from teachers who are "similarly situated" is a legal conclusion, the
18 Court finds that in the context of the complaint, Williams has sufficiently alleged that
19 because he is an avowed Christian, he is being treated differently than other teachers in his
20 school with respect to his conduct as a teacher. Those allegations, liberally construed,
21 allege facts which if proven can entitle him to relief. Therefore, the Defendants' motion to
22 dismiss the Equal Protection claim is denied." *Williams, supra*, 367 F.Supp.2d at 1272.
23

24 Similarly, in this case, Caldwell has sufficient § 1983 claim for denial of equal protection
25 to survive a motion to deny under the liberal notice-pleading standard. Caldwell, like Williams,
26 alleges that he is an avowed Christian, and that defendants knew that he was an avowed Christian.
27

1 Defendants in this case have admitted that they viewed Caldwell as falling within a class of
2 citizens they perceive as holding a “right-wing evangelical Christian fundamentalist religious”
3 belief. Caldwell alleges that defendants have treated him, as a member of the class of citizen-
4 parents who are perceived as holding the “right-wing evangelical Christian fundamentalist
5 religious” from other parents and citizens who are not perceived by defendants as holding that
6 religious belief. Caldwell alleges the following examples of how defendants have treated him
7 unequally based upon his membership in this disfavored class of citizens:
8

- 9 (1) The District and individual defendants Monetti, Pinney and Joiner denied Caldwell his
10 right to place his QSE Policy on the agenda of a School Board Meeting for eight months.
- 11 (2) At a School Board meeting in September of 2003, during a discussion of the
12 supplementary instructional materials used to teach evolutionary theory in biology
13 classes, board member Joiner subjected Caldwell to anti-religious attacks on Caldwell
14 and his church, and Joiner compared Caldwell’s QSE Policy proposal regarding how
15 evolutionary theory should be presented in biology classes to a hypothetical proposal by
16 the District to tell Caldwell’s church what it should teach in its Sunday school classes,
17 even though Joiner began his remarks by admitting that Caldwell’s QSE Policy was a
18 secular science education proposal that *did not* include an effort by Caldwell to insert
19 religious beliefs into science classrooms. At that meeting, the School Board also
20 permitted employees of the District and others in attendance at the meeting to hurl anti-
21 Christian insults at Caldwell, even though the School Board has a written policy
22 prohibiting members of the public in attendance at School Board meetings from
23 attacking the presumed religious motives of other speakers
- 24 (3) At a School Board meeting in May of 2004, the meeting at which Monetti and the
25 District had finally put Caldwell’s QSE Policy on its agenda for public discussion and
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1 potential adoption, Joiner again subjected Caldwell to attacks on his Christian beliefs, as
2 well as his association with other Christians. This time, Joiner read aloud excerpts from
3 a private e-mail Caldwell had sent to a fellow member of his church congregation in
4 which Caldwell had communicated expressions of his religious faith by (1) praising God
5 for the fact that the District had finally granted Caldwell his right to place his QSE
6 Policy on the School Board's agenda, (2) asking for prayer support for his effort from a
7 fellow Christian in his church, and (3) signing the e-mail "In His Service;" and Joiner
8 urged his fellow board members to vote against Caldwell's secular QSE Policy proposal
9 on the basis of Caldwell's expression of his Christian faith to a fellow congregant and
10 Caldwell's request for a fellow church member to support his effort.
11

12 (4) At the May 2004 School Board meeting, Joiner also announced that he was asking the
13 District's outside counsel to look into the possibility of suing Caldwell to prevent him
14 from making further efforts to petition District officials to adopt his QSE Policy and
15 QSE Instructional Materials and to give him a full instructional materials challenge
16 procedure hearing on his instructional materials challenge to the Holt Biology Textbook;
17 Joiner's threat to sue Caldwell was an effort by Joiner to intimidate Caldwell from
18 continuing to exercise his civil rights as a citizen.
19

20 (5) At the May School Board Meeting, Joiner also announced that constituents who
21 supported Caldwell's QSE Policy and QSE Instructional Materials were no longer
22 welcome to communicate directly with Joiner, even though all other citizens who do not
23 share Caldwell's perceived religious beliefs and viewpoint were welcome to
24 communicate directly to Joiner.
25

26 (6) Caldwell alleges that Severson's viewpoint discrimination against Caldwell in
27 connection with GBHS CIT Meetings was motivated in part by Severson's disapproval
28

1 of Caldwell's religious beliefs, which Severson perceived as being "right-wing
2 evangelical Christian fundamentalist."

3 (7) Caldwell alleges that Lawrence's and Monetti's refusal to accord Caldwell all five levels
4 of review of his instructional materials challenge was motivated in part by Lawrence's
5 and Monetti's disapproval of Caldwell's religious beliefs, which they perceived as being
6 "right-wing evangelical Christian fundamentalist."

7
8 (8) Caldwell alleges that the District's refusal to approve his proposed QSE Instructional
9 Materials for use in biology classes was motivated in part by the disapproval by
10 Lawrence and the members of the District's district-wide committee of science teachers
11 which Lawrence chaired to their disapproval of Caldwell's religious beliefs, which
12 Lawrence and other members of his committee perceived as being "right-wing
13 evangelical Christian fundamentalist," rather than on the actual substantive scientific and
14 educational merits of Caldwell's proposed QSE Instructional Materials. *See Loewen v.*
15 *Turnipseed* (N.D. Miss. 1980) 488 F.Supp. 1138 [in which the court held that a school
16 district selection committee's rejection of a proposed history textbook submitted by
17 African American parents and authors, that was based, in part, on the race of the parents
18 and authors, rather than on the actual content and educational merits of the textbook,
19 gave rise to a §1983 claim and injunctive relief to override the textbook committee's
20 rejection of the textbook.]

21
22
23 (9) Caldwell alleges that the failure of the District's hearing officer for administrative
24 complaints, Genasci, to take action on Caldwell's complaints, including Caldwell's
25 complaint that he and other citizens who supported his QSE Policy and QSE
26 Instructional Materials had been the victims of religious discrimination, was motivated
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1 in part by Genasci’s disapproval of Caldwell’s religious beliefs, which Genasci
2 perceived as being “right-wing evangelical Christian fundamentalist.”

3
4 **V. Caldwell Has Stated A Legally Sufficient §1983 Claim For Violations Of His**
5 **Right To Religious Freedom Under The Establishment Clause Of The**
6 **First Amendment**

7
8 In the Ninth Circuit, §1983 claims based upon alleged violations of the Establishment
9 Clause of the First Amendment to the United States Constitution are evaluated on the basis of the
10 familiar “Lemon” test, together with the accompanying “endorsement” test. *Lemon v. Kurtzman*,
11 403 U.S. 602 (1971); *Lynch v. Donnelly*, 465 U.S. 668; *County of Allegheny v. ACLU*, 109 S.Ct. at
12 3095; *Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373, 1378-79 (9th Cir. 1994);
13 *Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th Cir.1993). To pass muster under the *Lemon*
14 test, the challenged practice must: (1) reflect a clearly secular legislative purpose; (2) have a
15 primary effect that neither advances nor inhibits religion; and (3) avoid excessive government
16 entanglement with religion. Under the endorsement test, the Establishment Clause proscribes
17 public schools from conveying a message that religion or a particular religious belief is either
18 endorsed or disapproved of. *Brown, supra*, 27 F.3d at 1378-79; *See, County of Allegheny v.*
19 *ACLU*, 109 S.Ct. at 3095.

20
21 As the Ninth Circuit framed the issue in *Brown*:

22
23 “A government practice has the effect of impermissibly advancing or disapproving of
24 religion if it is ‘sufficiently likely to be perceived by adherents of the controlling denominations as
25 an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.’
26 *School Dist. Of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267
27 (1985).”

1 As the court in *Williams, supra*, recently stated:

2 “The Establishment Clause of the First Amendment . . . operates to prohibit the
3 government from preferring one religion over another. *Larson v. Valente*, 456 U.S. 228,
4 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982).” *Williams, supra*, 367 F.Supp.2d at 1275-
5 1276.

6 The Ninth Circuit has held that the Establishment Clause applies to prohibit government
7 officials from excluding persons holding a particular religious belief from a forum created by a
8 government entity. *Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th Cir.1993):

9 “[E]xclusion of religious groups from a forum otherwise open to all would demonstrate
10 government hostility to religion rather than the neutrality contemplated by the
11 Establishment Clause.”

12 While the Ninth Circuit in *Kreisner* was discussing the Establishment Clause’s
13 requirement of religious neutrality in a traditional public forum, the same analysis would apply to
14 each of the fora at issue in this lawsuit, since the District has opened each of these fora to the
15 public for at least the limited or designated purpose of public discussion of school related subjects
16 by parents and other members of the community.

17 Caldwell has alleged a sufficient Establishment Clause claim for pleading purposes by
18 alleging sufficient facts to prove that the District and individual defendants made statements, made
19 decisions, and engaged in other conduct over the year-long period in question with regard to
20 Caldwell, his QSE Policy, his proposed QSE Instructional Materials, and his instructional
21 materials challenge to the Holt Biology textbook that would lead a reasonable observer to
22 conclude that Caldwell’s perceived “right-wing evangelical Christian fundamentalist religious”
23 beliefs are disapproved of by the District and its school officials, and that citizen-parents perceived
24 to hold such religious beliefs are “outsiders, not full members of the political community”, who
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1 are not welcome to participate in the political process and public debates in the District on the
2 same basis as citizens who are perceived to hold “favored” religious or irreligious beliefs. *Lynch*,
3 465 U.S. at 688. As the Supreme Court stated in *County of Allegheny v. American Civil Liberties*
4 *Union* , 492 U.S. 573, 593-94. 109 S. Ct. 3086 (1989), “[t]he Establishment Clause, at the very
5 least, prohibits government from appearing to take a position on questions of religious belief.”

6 Caldwell has clearly alleged sufficient facts to show that the District and other defendants
7 have communicated their disapproval of his religious beliefs, which defendants perceive to be the
8 “right-wing evangelical Christian fundamentalist religious” belief. Each of the examples of
9 official misconduct referenced in the above discussion of Caldwell’s equal protection claim also
10 serve to communicate the District’s disapproval of Caldwell’s perceived religious beliefs.

11 Caldwell has also stated a viable pendent state claim under the equivalent religious
12 freedom provisions in the California Constitution.

13 The Establishment Clause of the California Constitution states that “[t]he Legislature shall
14 make no law respecting the establishment of religion.” Cal. Const. art. I, § 4.

15 The California Constitution also contains a “No Preference Clause” that reads: “Free
16 exercise and enjoyment of religion without discrimination or preference are guaranteed.” Cal.
17 Const. art. I, § 4. According to the Ninth Circuit, “California courts have interpreted the No
18 Preference Clause to require that the government neither prefer one religion over another nor
19 appear to act preferentially. *Sands v. Morongo Unified School Dist.*, 281 Cal.Rptr. at 45, 809 P.2d
20 at 820 (1991).” *Brown, supra*, 27 F.3d at 1384-85.

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23
24 **V. Caldwell Has Stated A Legally Sufficient §1983 Claim Under The First**
25 **Amendment Right To Petition, And Petition, Instruction And Access To**
26 **Government Information Under CA Const. (42 U.S.C. §1983)**

27 The First Amendment to the U.S. Constitution guarantees the right to petition the
28 government for redress of grievances. In like manner, Article I, Section 3, of the California

1 Constitution (“CA Const.”) provides, in part, that “[t]he people have the right to instruct their
2 representatives, petition government for redress of grievances, and assemble freely to consult for
3 the common good.” Citizen participation in the board meetings of governmental entities
4 unquestionably falls under these federal and state constitutional rights. *Christian Gospel Church,*
5 *Inc. v. City and County of San Francisco*, 896 F.2d 1221, 1226 (9th Cir. 1990), *Evers v. County of*
6 *Custer*, 745 F.2d 1196, 1204 (9th Cir. 1984).

7
8 As to public school board meetings, expressive rights (i.e., speech and petition) are
9 protected by the federal and California constitutions. This protection exists because a school
10 board meeting is a limited public forum in that it is “open to the public in general, but limited to
11 comments related to the school board’s ‘subject matter.’” *Baca v. Moreno Valley Unified School*
12 *District*, 936 F.Supp. 719, 729 (C.D.Cal. 1996). The U.S. Supreme Court explained that a forum
13 for citizen involvement is created when a state statute provides for open school board meetings.
14 *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Committee*, 429
15 U.S. 167, 175 (1976).

16
17 Like Wisconsin, California has specifically mandated that government board meetings
18 be open to the public. See, California Government Code (“Gov.C.”) §54950, *et seq.* (hereinafter
19 referred to generally as the “Brown Act”). The California Education Code (“Educ.C.”) states that
20 school board meetings “shall be conducted in accordance [with the Brown Act].” Educ.C.
21 §35145. Of course, the Brown Act specifically allows members of the public to speak “on any
22 item of interest to the public...that is within the subject matter jurisdiction of the legislative body.”
23 Gov.C. §54954.3. Additionally, section 35145.5 of the Education Code states that members of the
24 public can place matters directly related to school district business on the agenda. In the present
25 case Caldwell sought to place an item on the agenda and speak to the board relative to school
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1 curriculum. Curriculum is unquestionably within the subject matter jurisdiction of a public school
2 district.

3 The rules for allowing public participation in school board meetings under the Brown
4 Act and the Education Code are the mechanism for members of the public to exercise their petition
5 and speech rights. *Leventhal v. Vista Unified School District* 973 F.Supp. 951 (S.D.Cal. 1997),
6 *Baca*, Id. In the present case, the SAC clearly states that Caldwell sought to place an item on the
7 school board agenda and that said request was repeatedly denied. SAC ¶31, *et seq.* Failure to
8 comply with the rules relating to public speech and petition under the Brown Act and Education
9 Code constitutes unlawful interference with First Amendment rights *Leventhal*, Id., 958-962,
10 *Baca*, Id., 728-731.

11
12 In that the facts of SAC must be deemed true (*In re Pacific Gateway Exchange, Inc.*
13 *Securities Litigation*, 169 F.Supp.2d 1160 (N.D.Cal.,2001)), the SAC has stated a cause of action
14 for violation of Caldwell’s rights under the First Amendment and Art I, §3 of the CA Const. to
15 petition and instruct government officials.
16

17
18 **V. Caldwell Has Stated A Legally Sufficient §1983 Claim**
19 **For Denial Of Due Process In Violation Of His Rights Under The**
20 **Fourteenth Amendment**

21 In *Williams, supra*, the court discussed the elements of a §1983 claim for denial of
22 procedural due process:
23

24 “To allege a procedural due process claim on the basis of a vague regulation, Williams
25 must first allege a deprivation of a constitutionally protected interest, and second, allege
26 that the deprivation was achieved by means of constitutionally vague policy or procedure.
27 *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).
28

1 Unconstitutional vagueness implicates dual concerns of fair notice of the line between
2 lawful and unlawful conduct, and sufficiently explicit statutory limitations on the
3 discretion of officials to avoid arbitrary and discriminatory enforcement. *Grayned v. City*
4 *of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

5 A different standard applies when a challenge to a regulation is based on facial vagueness
6 as opposed to a challenge that the regulation is vague as applied to the plaintiff.” 367
7 F.Supp.2d at 1274-75.

8 Caldwell has alleged sufficient facts to state a viable §1983 claim against defendants for
9 denial of procedural due process.

10
11 For example, the unwritten policy defendant Monetti uses to decide what item submitted
12 by citizens are actually included on the agendas of School Board meetings is unconstitutionally
13 vague on its face, since it is unclear from the policy what standards Monetti employs to make his
14 decision on agenda items. In this case, this vague policy resulted in Caldwell being denied
15 enjoyment of his primary constitutional rights of Free Speech, Petition, Equal Protection, and
16 religious liberty under the Establishment Clause, by keeping his QSE Policy off of the agenda for
17 School Board meetings for eight months.

18
19 Caldwell also alleges that the District’s unwritten policy for determining which items go
20 on School Board agendas and which items don’t is unconstitutionally vague as applied to Caldwell
21 and his QSE Policy.

22
23 Similarly, Caldwell alleges that the unwritten policy defendant Severson uses to determine
24 which items and which viewpoints are permitted to be discussed at GBHS CIT meetings is
25 unconstitutionally vague on its face, and/or as applied to Caldwell, in that it gives Severson nearly
26 unbridled discretion to decide which viewpoints are permitted to be expressed, and which
27 viewpoint are not permitted to be expressed. Caldwell further alleges that the unconstitutionally
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1 vague policy Severson and the District employ to make these decisions resulted in a deprivation of
2 Caldwell's primary constitutional rights to Free Speech, Petition, Equal Protection, and religious
3 liberty under the Establishment Clause.

4 Caldwell further alleges that the actual procedure the District used to process his
5 instructional materials challenge to the Holt Biology Textbook, which significantly departed from
6 the District's written procedure for such instructional materials challenges, was unconstitutionally
7 vague on its face and. Or as applied to Caldwell, resulting in a deprivation by Caldwell of his
8 primary constitutional rights to Free Speech, Petition, Equal Protection, and religious liberty under
9 the Establishment Clause.
10

11 Caldwell also alleges that the apparently ad hoc procedure the District used to decide
12 whether or not to adopt Caldwell's proposed QSE Instructional Materials was unconstitutionally
13 vague on its face and/or as applied to Caldwell, resulting in a deprivation of Caldwell's primary
14 constitutional rights to Free Speech, Petition, Equal Protection, and religious liberty under the
15 Establishment Clause.
16

17
18 **V. Caldwell Has Stated A Legally Sufficient Claim For The Prevention Of Waste of**
19 **Tax Dollars (CCP §526a)s**

20 Caldwell has brought a cause of action to prevent the unlawful and wasteful expenditure of
21 tax dollars under CCP §526a. Under CCP §526a a plaintiff need only show (1) conduct that is
22 illegal or wasteful and (2) an expenditure of tax dollars. The SAC sufficiently alleges that the
23 defendants have engaged in unlawful conduct, e.g., preventing Caldwell from placing an item on
24 the agenda. As to the expenditure of tax dollars, SAC makes said allegation (SAC ¶285).
25 Moreover, it "is immaterial that the amount of the illegal expenditures is small or that the illegal
26 procedures actually permit a saving of tax funds." *Wirin v. Parker* (1957) 48 Cal.2d 890, 894.
27
28

1 ["The mere 'expending [of] the time of the paid police officers of the city of Los Angeles in
2 performing illegal and unauthorized acts' constituted an unlawful use of funds which could be
3 enjoined under [C.C.P.] section 526a.] *Blair v. Pitchess* (1971) 5 Cal. 3d 258, 268.

4 In view of this, SAC has succinctly stated a cause of action under CCP §526a.

5
6 **III.**

7 **Defendants' Grounds for Dismissal Are Without Merit**

8
9 **V. Article III Standing**

10 The case of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), sets out a three-prong test
11 for determining whether a case falls under Article III jurisdiction. Showing jurisdiction and
12 standing requires: (1) an injury in fact, i.e., which is an invasion of a legally protected interest
13 which is concrete and particularized and actual or imminent rather than conjectural or
14 hypothetical; (2) a causal connection between the injury and conduct complained of so that the
15 injury is fairly traceable to the challenged action of the defendant and not the result of the
16 independent action of some third party who is not before the court; (3) the likelihood that an
17 injury will be redressed by a favorable decision. Caldwell meets each prong of this test because he
18 (1) suffered an actual injury in fact when he was not allowed to place pertinent items on the school
19 board agenda and precluded from participating in other public fora, (2) the Defendants' actions
20 directly caused the deprivation of Caldwell's rights under the First and Fourteenth Amendments,
21 and, (3) the equitable relief sought will remedy the violations of Caldwell's constitutional rights.

22
23
24 In the defendant's motion to dismiss it is asserted that there is no traditional Article III
25 subject matter jurisdiction "because the District Court does not have the power to grant the
26 injunctive and declaratory relief that Caldwell is seeking from this Court, which is to order the
27 District to adopt, or to reject, any particular materials for its High School science and biology
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1 curriculum.” [See Motion to Dismiss Pg. 10 Lines 24-27] This allegation is incorrect in that
2 Caldwell has stated a cause of action as discussed more fully above under “II. Each of the
3 Plaintiff’s Claims are Legally Sufficient.”
4

5 **V. Political Questions**

6 Here the defendants allege that Caldwell’s complaints are political questions citing
7 the case of *Baker v. Carr*, 369 U.S. 186 (1962), which is not relevant to the present case
8 because the defendants have misconstrued the SAC. Caldwell is not seeking to make a
9 determination as to curriculum. Such a hypothetical suit would be a political question.
10 Instead, Caldwell is seeking to vindicate his rights, as a member of the public, to
11 participate in the political process via speech and petition. Thus, this Court would not step
12 into the realm of political questions by providing the relief sought in the SAC.
13
14

15
16 **C. Prudential Standing**

17 Here, the defendants allege that the plaintiff is presenting issues that are more
18 appropriately addressed to the representative branches of government, and the rule against
19 the “adjudication of generalized grievances” should be applied by the Court.

20 A generalized grievance is a matter which is shared in substantially equal measure
21 by all or a large class of citizens. [See Federal Practice & Procedure Jurisdiction And
22 Related Matters, FPP § 3531.1] Here, Caldwell (not a large class of people) is personally
23 injured by being barred from placing pertinent items on the school board agenda, in
24 violation of his rights as stated in Educ.C. §35145.5.
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1 The defendants further argue that the plaintiff is “raising another person’s legal
2 rights.” This allegation is not correct in that Caldwell is defending his own rights rather
3 than another person’s rights. [See SAC, Paragraphs Nos. 149-152]

4 Lastly, the defendants allege that the plaintiff’s SAC does not fall within the “zone
5 of interests protected” by the law invoked. However, the “zone of interests” test for
6 standing is a generous one. One seeking standing need only assert an interest which is
7 “arguably” within the zone protected by the law [*California Cartage Co. v. U.S.*, 721 F.2d
8 1199 (1983)]. Caldwell’s rights to petition, speech and free exercise are unquestionably
9 within the zone protected by the law.
10

11
12 **V. Statement of Claim for Relief**

13 **1. Federal Qualified Immunity.**

14 Federal Qualified Immunity is not applicable when prospective injunctive and
15 declaratory relief is sought. The U.S. Supreme Court explained, “since our decision in *Ex*
16 *parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), we have often found federal
17 jurisdiction over a suit against a state official when that suit seeks only prospective
18 injunctive relief.” *Papasan v. Allain*, 478 U.S. 265, 278, 106 S.Ct. 2932, 2940, 92 L.Ed.2d
19 209 (1986) (citation omitted)
20

21 The Ninth Circuit has further explained that “relief that serves directly to bring an
22 end to a present violation of federal law is not barred by the Eleventh Amendment even
23 though accompanied by a substantial ancillary effect on the state treasury.” *Natural*
24 *Resources Defense Council v. California Dep’t of Transp.*, 96 F.3d 420, 423 (9th Cir.1996)
25 See also, *Cerrato v. San Francisco Community College Dist.*, 26 F.3d 973 (9th Cir. 1994),
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1 *Chaloux v. Killeen*, 886 F.2d 247, 252 (9th Cir.1989), and *Will v. Michigan Dep't of State*
2 *Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

3 **V. Direct Entity Liability.**

4 The defendants claim that there is no entity liability because Caldwell fails to meet
5 the four part test in *Blair v. City of Pomona*, 223 F.3d 1074, 1079 (9th Cir, 2000), i.e., (1)
6 that he had a constitutional right of which he was deprived; (2) that the local governmental
7 body had a custom created by those who may fairly be said to determine official policy; (3)
8 the custom amounted to a least deliberate indifference to the plaintiff's rights; (4) and that
9 the custom was the moving force behind that alleged constitutional violation.
10

11 All the elements of the four part test have been met. There was a deprivation of a
12 constitutional right in that Caldwell was deprived of his rights to free speech, freedom to
13 petition, equal protection, and due process. [See SAC Pg. 106 Lines 4-19] Second, the
14 school board had a custom of not allowing the public to exercise their right to place
15 pertinent items on the school board agenda in accord with Educ.C. §35145.5. [See SAC
16 ¶'s 107-121] Moreover, the school board's custom of not allowing Caldwell to place items
17 on the school board's agenda showed a serious and deliberate indifference to his rights.
18 [See SAC ¶'s 107-121] Finally, in this case the custom of not allowing parents to place
19 items on the school board's agenda was a moving force behind the constitutional violations
20 of Caldwell's civil rights. [See SAC ¶'s 107-121] Therefore, there is entity liability.
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23 **b. Individual Liability.**

24 The defendants argue that there is no individual liability because they have
25 qualified immunity. "The qualified immunity defense protects government officials
26 performing discretionary governmental functions from civil damages if their conduct does
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1 not violate clearly established statutory or constitutional rights of which a reasonable
2 person would have known.” [See Motion to Dismiss Pg. 18 Lines 3-5]

3 To determine whether or not qualified immunity should be granted the courts use a
4 two-step analysis. (1) Was the law governing the official’s conduct clearly established? (2)
5 Under that law, could a reasonable officer have believed the conduct was lawful? As to
6 the first step, in the present case, rights to petition and speech are clearly established and
7 the specific mechanism for exercising these rights in the context of public meetings has
8 been codified in the Brown Act and Educ.C. §35145.5. Concerning the second step,
9 schools are the most democratic institutions in this country. [*Plyler v. Doe*, 457 U.S. 202,
10 102 S.Ct. 2382 (1982)] The rights of the public to speech and petition have been clearly
11 established for many years under the California Education Code and the Brown Act. It
12 stretches credulity for the defendants to claim that they were unaware of the rules and
13 procedure for public meetings which are the mechanisms for members of the public to
14 engage in First Amendment activities.
15
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17 **c. Statute of Limitations**

18 The defendants allege that the Section 1983 action may be barred by a one-year
19 statute of limitations. [See Motion to Dismiss Pg. 23 Lines 19-27] However, California
20 has a two-year statute of limitations for civil rights actions. In *Harned v. Landahl*, 88
21 F.Supp.2d 1118, E.D.Cal., (Mar 17, 2000), it states that “[b]ecause §1983 contains no
22 statute of limitations, federal courts adopt the forum state statute of limitations for causes
23 of action ‘most analogous’ to §1983; for this purpose, the appropriate ‘most analogous
24 action’ is a personal injury action. 42 U.S.C.A. § 1983. In California, the statute of
25 limitations for a §1983 action is the same as that for a personal injury action, that is, one
26 year. 42 U.S.C.A. § 1983; West’s Ann.Cal.C.C.P. § 340(3).” The personal injury statute of
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1 limitations was later changed to two years by virtue of an amendment of § 340(3) in 2002,
2 effective in January 1, 2003. See Cal. Senate Bill 688 (Burton), State 2002, ch. 448, §§ 2,
3 3. Senate Bill 688 changed the statute of limitations period for most personal injury torts to
4 two years, see Cal.Civ.Proc.Code. § 335.1. In *Jones v. Blanas*, 393 F.3d 918, C.A.9 (Cal.
5 2004), it states that “a § 1983 action filed in California today would clearly be governed by
6 California’s new two-year statute of limitations for personal injury actions.” Therefore, the
7 action will not be barred by a statute of limitations.
8

9 **d. Exhaustion of Administrative Remedies**

10 The requirement to exhaust administrative remedies in the context of a taxpayer
11 action (CCP §526a) is limited to situations where a specific statute or regulation has
12 established “clearly defined machinery for submission, evaluation and resolution of
13 complaints by aggrieved parties.” *Common Cause of California v. Board of Supervisors of*
14 *Los Angeles County*, 49 Cal.3d 432, 441, (CA Supreme Court 1989) quoting *Ross v.*
15 *Superior Court*, 19 Cal.3d 899, 912 (1977) (Italics in original, inner quotations omitted).
16

17 In the present case, defendants have not identified any statute or regulation relative
18 to Educ.C. §35145.5 (public’s right to place an item on the agenda) or any of the other
19 causes of action in SAC. Having failed to cite such authority, defendants’ argument as to
20 failure to exhaust administrative remedies is without merit.
21

22
23 **E. Violation of the Establishment Clause of the First Amendment.**

24 See, “II. Each of Plaintiff’s Claims are Legally Sufficient” at “2. Establishment
25 Clause and Religious Freedoms under CA Const. (42 U.S.C. §1983).”

26 **F. Violation of the Equal Protection Clause of the Fourteenth Amendment.**
27
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1 See, “II. Each of Plaintiff’s Claims are Legally Sufficient” at “3. Equal Protection
2 (42 U.S.C. §1983).”

3 **G. Due Process Clause of the Fourteenth Amendment.**

4 See, “II. Each of Plaintiff’s Claims are Legally Sufficient” at “5. Procedural Due
5 Process (42 U.S.C. §1983).”

6 **H. Taxpayer’s Claim**

7 See, “II. Each of Plaintiff’s Claims are Legally Sufficient” at “6. Prevention of
8 Waste of Tax Dollars (CCP §526a).”

9 **I. The Various Immunities and Privileges Cited by Defendants Do Not Bar This**
10 **Action.**

11 **1. State Agent Immunity.**

12 In a similar case as is currently before this Court, this same argument was rejected.

13 “It is well established that the Eleventh Amendment does not bar a federal
14 court from granting prospective injunctive relief against an officer of the
15 state who acts outside the bounds of his authority.” *Cerrato*, 26 F.3d at 973
16 Accordingly, the Board members are subject to suit under 42 U.S.C. § 1983
17 for prospective injunctive and declaratory relief. See, e.g., *Chaloux v.*
18 *Killeen*, 886 F.2d 247, 252 (9th Cir.1989) (“[A]lthough the Supreme Court
19 held recently [in *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 109
20 S.Ct. 2304, 105 L.Ed.2d 45 (1989)] that the state or state officials are not
21 considered ‘persons’ under § 1983, this holding does not apply when a state
22 official in his or her official capacity is sued for prospective relief.”).

23 *Leventhal v. Vista Unified School District*, 973 F.Supp. 951, 121 Ed. Law
24 Rep. 95 (1997)

1 In that the school board officials were acting in their official capacity, there is no
2 state agency immunity.

3 **V. Defendants’ Absolute Discretionary Immunity Defense Is Without Merit.**

4 Defendants also allege that the Board members should be immune because California
5 Government Code § 820.2 grants “discretionary immunity” foreclosing liability for
6 government acts and omissions concerning personnel decisions.

7
8 This allegation is without merit because Caldwell’s case is similar to the case of
9 *Williams v. Vidmar*, 367 F.Supp.2d 1265 (ND CA 2005), in which an elementary school
10 teacher brought a civil rights action against a school principal and school district, claiming
11 violations of his constitutional rights arising from restrictions placed on his use of
12 supplemental classroom materials having religious content, and the defendants filed a
13 motion to dismiss. In *Williams* the defendant also relied on § 820.2 of the California
14 Government Code to argue that her actions against the plaintiff were discretionary acts for
15 which she is absolutely immune from suit, and the Court explained that “[t]he Ninth
16 Circuit has held that state statutory immunity provisions do not apply to federal civil rights
17 actions. *Guillory v. County of Orange*, 731 F.2d 1379, 1382 (9th Cir.1984). To construe a
18 federal statute to allow a state immunity defense ‘to have controlling effect would
19 transmute a basic guarantee into an illusory promise,’ which the supremacy clause does not
20 allow. *Id.*, at 1382 (citations omitted). Therefore, Defendant Vidmar’s motion to dismiss
21 based on discretion immunity is denied.” In view of the above, the defendants are not
22 eligible for discretionary immunity.

23 **3. Defendants’ Absolute Privilege Defense Under California Law Is Without Merit**

24
25 The defense of absolute privilege is incorrect because, while the Court recognizes the
26 privacy and property interests of the District’s employees, the District’s asserted interests pale in
27

1 comparison to the expressive rights of the public, and “First Amendment speech guarantees would
2 trump the statute.” [*Leventhal v. Vista Unified School District*, 973 F.Supp. 951, 121 Ed. Law Rep.
3 95 (1997)]

4 **4. Defendants’ State Sovereign Immunity Defense Is Without Merit**

5 Here the defendants assert that there is “state sovereign immunity” from suit for violation
6 of state laws in federal court, and that state officials and agencies cannot be sued in their “official
7 capacities,” when the “state may be financially liable.” However, Caldwell is suing the
8 defendants in their individual capacities. [See SAC ¶’s 3-8]

10 The defendants also allege that “[t]his action has been inappropriately filed in Federal
11 District Court in violation of the Sovereign Immunity of the State of California and its agents,
12 including the District and its officials, officers and employees named herein, and in violation of
13 the Eleventh Amendment. The District Court must dismiss this action because it has no subject
14 matter jurisdiction over the defendants.” [See Motion to Dismiss Pg. 34 Lines 4-7] However, the
15 Supreme Court set forth an exception to the state sovereignty doctrine in *Ex parte Young*, 209 U.S.
16 at 159-60 (1908); *Guillory v. County of Orange*, 731 F.2d 1379, 1382 (9th Cir.1984). Under the *Ex*
17 *parte Young* doctrine, a plaintiff may maintain a suit for prospective relief against a state official
18 in his official capacity, when that suit seeks to correct an ongoing violation of the Constitution or
19 federal law. *Ex Parte Young*, 209 U.S. at 159-60; see also *Armstrong v. Wilson*, 124 F.3d 1019,
20 1026 (9th Cir.1997) (rejecting the argument that *Ex parte Young* applies only to constitutional, not
21 statutory, violations). See also *Cardenas v. Anzai*, 311 F.3d 929 (Hawaii 2002).

24 **V. Defendants’ Failure to File a Concise, Short and Plain Statement Defense Is** 25 **Without Merit**

26 Although the defendants did not argue the merits of their claim relevant to a short and
27 plain statement, out of an abundance of caution, the plaintiff briefly responds as follows: This case
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1 encompasses a one-year fact situation, which by its nature includes many facts and multiple
2 processes and fora. Further, by stating the facts of the case in the complaint in detail, there is less
3 need for discovery by defendants. The SAC is much shorter than the 155 page pleading in *United*
4 *States ex rel. Garst v. Lockheed-Martin Corp*, 328 F. 3d. 374, 378 (7th Circuit, 2003). Finally, the
5 defendants do not address this issue in the argument section of their motion to dismiss, and
6 therefore it should be deemed waived.

7 8 IV.

9 **Defendants' Request for Sanctions, Attorneys Fees and Costs Should Be Denied**

10 The defendants allege that the SAC “is totally without merit, frivolous, and violates
11 Federal Rules of Federal Civil Procedure, Rule 11, and was only brought to advance a ‘political’
12 and ‘religious’ agenda against the District, and to harass its Board Members, Officials and
13 employees, in retaliation for its failure to adopt his QSE Policy into the District’s High School
14 science and biology curriculum.” [See Motion to Dismiss Pg. 34 Lines 14-17] This assertion is
15 without merit because the SAC clearly states causes of action for serious violations of Caldwell’s
16 civil rights. [See SAC Pgs 79-111]

17
18 It should be noted that there was also no meet or confer attempted by the opposing counsel.
19 Moreover, there is no proper motion before the court regarding sanctions. Thus, the request is
20 improper.

21
22 The defendants also allege that the SAC was filed in bad faith and contradicts well
23 established authority. This allegation is also completely without merit. The SAC states well
24 established authority to support its claims. However, the defendants have repeatedly cited
25 unpublished cases (i.e. *Quiroz v. State Board of Education*, 1997 U.S. District LEXIS 24154;
26 *Chiras v. Miller*, 2004 U.S. LEXIS 14177; *Selman v Cobb County School District*, 2005 U.S.
27 LEXIS 432) as well as other irrelevant cases to support their arguments. Even the case the
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PROOF OF PERSONAL SERVICE

I, Eileen K. Stevenson, do hereby declare as follows:

1. That if called upon, I could and would testify truthfully, as to my own personal knowledge as follows:

2. I am a citizen of the United States, employed in the County of Sacramento, State of California. My business address is 9851 Horn Road, Suite 115, Sacramento, CA, 95827. I am over the age of 18 years and not a party to the above-encaptioned action.

3. That, on June 24, 2005, at 3:34 p.m., I personally served the Defendants by hand delivering a true and correct copy of the document listed below to James B. Carr, Esq., Law Office of Matthew D. Evans, located at 641 Fulton Avenue, Second Floor, in the City of Sacramento California:

The document served was as follows:

PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; FOR FAILURE TO STATE A SHORT PLAIN STATEMENT FOR RELIEF

I declare, under penalty of perjury under the laws of the State of California and the United States of America, that the foregoing is true and correct, is of my own personal knowledge, and indicate such below by my signature executed on this 24th day of June, 2005, in the County of Sacramento, City of Sacramento, State of California.

_____/s/_____
Eileen K. Stevenson, Declarant