

1 **Larry Caldwell, SBN 88867**
1380 Lead Hill Boulevard Suite 106
2 Roseville, CA 95661
(916)774-4667
3 (916)797-4954
4 Plaintiff, In Pro Per

5 **Kevin T. Snider, SBN 170988**
6 **Mathew McReynolds, SBN 234797**
PACIFIC JUSTICE INSTITUTE
9851 Horn Road, Suite 115
7 PO Box 276600
8 Sacramento, CA 95827
Tel. (916) 857-6900
9 Fax (916) 857-6902

10 Attorney for Plaintiff

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

14 **LARRY CALDWELL,**
15 **Plaintiff,**

16 vs.

17
18 **ROSEVILLE JOINT UNION HIGH**
19 **SCHOOL DISTRICT; JAMES JOINER**
20 **and R. JAN PINNEY, in their official**
21 **capacities as members of the Board of**
22 **Education; TONY MONETTI in his**
23 **official capacity as Superintendent,**
24 **STEVEN LAWRENCE in his official**
25 **capacity as Assistant Superintendent for**
26 **Curriculum and Instruction, DONALD**
27 **GENASCI in his official capacity Deputy**
28 **Superintendent for Personnel and Chief**
Compliance Officer; RONALD
SEVERSON in his official capacity
Principal of Granite Bay High School;
and Does 1 through 10,

Defendants.

)Case No.: 2:05-CV-00061-FCD-JFM

)
)
)**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;**
)**AND FOR PUPORTED VIOLATION OF FRCP**
)**10(a)**

)DATE: September 23, 2005

)TIME: 10:00 a.m.

)CTRM: 2

)TRIAL DATE: none set

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES	5
MEMORANDUM OF POINTS AND AUTHORITIES	10
I. INTRODUCTION	10
II. Summary of Facts	14
III. The Court Has Jurisdiction to Decide This Case	17
A. Article III Standing -- Subject Matter Jurisdiction	17
B. The Issues Presented Are not Political Questions	18
C. Caldwell Has Prudential Standing	19
1. The TAC Is not a Generalized Grievance	19
2. Caldwell Is not Raising another Person’s Rights	20
3. Caldwell’s Constitutional Rights Protected by the First and Fourteenth Amendments Fall within the “Zone of Interests” Protected by Law	20
4. Caldwell is Not Required to Name His Child as a Plaintiff	20
D. Caldwell is Not Seeking the Adjudication of State Constitutional or Statutory Claims under 42 USC § 1983	20
E. Exhaustion of Administrative Remedies	21
F. The TAC States Six Legally Sufficient Claims for Relief	22
1. Caldwell’s Third Claim for Relief States a Legally Sufficient Claim under 42 USC § 1983 for Violation of Caldwell’s Rights under the Establishment Clause	22
2. Caldwell’s Free Exercise Claim In His Third Claim for Relief	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	States a Legally Sufficient Claim under 42 USC § 1983	26
3.	Caldwell’s First and Second Claims for Relief State Legally Sufficient Claims under 42 USC § 1983 for Violation of Caldwell’s Rights under the Free Speech and Petition Clauses of the First Amendment	27
4.	Caldwell’s Fourth Claim for Relief States a Legally Sufficient Claim under 42 USC § 1983 for Violations of His Right to Equal Protection Under the Fourteenth Amendment	31
5.	Caldwell’s Fifth Claim for Relief States a Legally Sufficient Claim under 42 USC §1983 Claim for Denial of Due Process in Violation of His Rights under The Fourteenth Amendment	32
6.	Caldwell’s Sixth Claim for Relief States a Legally Sufficient Claim for Relief under California CCP §526a	34
G.	None of the Purported Immunities and Privileges Cited by Defendants Bars any of Plaintiff’s Claims for Relief	35
1.	Defendants’ Federal Qualified Immunity Argument	35
2.	There is No Federal Qualified Immunity for Government Officials	37
(a)	Caldwell Has Alleged Constitutional Violations	37
3.	District Officials and Employees Are not Entitled to Qualified Immunity	37
4.	Defendants’ Absolute Discretionary Immunity Defense Is Without Merit	38
5.	Defendants’ State Sovereign Immunity Defense Is Without Merit	39
6.	Defendants’ Absolute Privilege Defense under California Law Is Without Merit	39

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

7.	There Are no Absolute Statutory Privileges Available to Defendants	40
8.	Caldwell’s Pendent State Law Claims Are Proper	40
H.	The TAC Constitute A Concise, Short and Plain Statement	40
I.	There Are No Other Pleading Defects	40
IV.	Defendants’ Request for Sanctions, Attorneys Fees and Costs Should Be Denied	41
V.	CONCLUSION	42
	PROOF OF PERSONAL SERVICE	43

1 **TABLE OF AUTHORITIES**

2 **Federal Cases**

3 *Arkansas Educational Television Commission v. Forbes*,

4 523 U.S. 666 (1998) 13

5 *Armstrong v. Wilson*,

6 124 F.3d 1019(9th Cir.1997) 39

7 *Baca v. Moreno Valley Unified School District*,

8 936 F.Supp. 719 (C.D.Cal. 1996) 28, 30

9 *Baker v. Carr*,

10 369 U.S. 186 (1962) 18

11 *Blair v. City of Pomona*,

12 223 F.3d 1074(9th Cir. 2000) 36

13 *Brown v. California Dep't of Transp.*,

14 321 F.3d 1217 (9th Cir. 2003) 12

15 *Brown v. Woodland Joint Unified School Dist.*,

16 27 F.3d 1373 (9th Cir. 1994) 23, 24, 25

17 *California Cartage Co. v. U.S.*,

18 721 F.2d 1199 (1983) 20

19 *Cardenas v. Anzai*,

20 311 F.3d 929 (9th Cir. 2002) 39

21 *Cerrato v. San Francisco Community College Dist.*,

22 26 F.3d 973 (9th Cir. 1994) 36, 37, 38

23 *Chaloux v. Killeen*,

24 886 F.2d 247, 252 (9th Cir.1989) 36, 38

25 *County of Allegheny v. ACLU*,

26 492 U.S. 573(1989) 23, 24

1	<i>DeBoer v. Village of Oak Park,</i>	
2	267 F.3d 558 (7 th Cir. 2001)	13
3	<i>Elk Grove Unified School District v. Newdow,</i>	
4	124 S. Ct. 2301 (2004)	20
5	<i>Ex parte Young,</i>	
6	209 U.S. 123 (1908)	35, 39
7	<i>Grayned v. City of Rockford,</i>	
8	408 U.S. 104; 92 S. Ct. 2294 (1972)	33
9	<i>Guillory v. County of Orange,</i>	
10	731 F.2d 1379 (9 th Cir.1984)	39
11	<i>Kreisner v. City of San Diego,</i>	
12	1 F.3d 775 (9 th Cir. 1993)	23, 25
13	<i>Larson v. Valente,</i>	
14	456 U.S. 228 (1982)	24
15	<i>Lemon v. Kurtzman,</i>	
16	403 U.S. 602 (1971)	23
17	<i>Leventhal v. Vista Unified School District,</i>	
18	973 F.Supp. 951(S.D.Cal.1997).	11, 17, 28, 29, 30, 38, 39
19	<i>Lujan v. Defenders of Wildlife,</i>	
20	504 U.S. 555 (1992)	18
21	<i>Lynch v. Donnelly,</i>	
22	465 U.S. 668 (1984)	23
23	<i>Natural Resources Defense Council v. California Dep't of Transp.,</i>	
24	96 F.3d 420 (9 th Cir.1996)	35
25	<i>Papasan v. Allain,</i>	
26	478 U.S. 265 (1986)	35

1	<i>PLANS, Inc. v. Sacramento City Unified School Dist.,</i>	
2	319 F.3d 504 (9 th Cir. 2003)	34
3	<i>Plyler v. Doe,</i>	
4	457 U.S. 202 (1982)	37
5	<i>Rosenberger v. Rector and Visitors of the University of Virginia,</i>	
6	515 U.S. 819 (1995)	12
7	<i>Sands v. Morongo Unified School Dist.,</i>	
8	281 Cal.Rptr. at 45, 809 P.2d at 820 (1991)	25
9	<i>Schneider v. California Dept. of Corrections,</i>	
10	151 F.3d 1194 (9 th Cir. 1998)	18, 19, 30, 40, 41
11	<i>School Dist. of Grand Rapids v. Ball,</i>	
12	473 U.S. 373 (1985)	24
13	<i>Shelton v. Tucker,</i>	
14	364 U.S. 479 (1960)	29
15	<i>United States ex re/. Garst v. Lockheed-Martin Corp.,</i>	
16	328 F.3d. 374, 378 (7 th Circuit, 2003)	40
17	<i>Usher v. City of Los Angeles,</i>	
18	828 F.2d 556 (9 th Cir. 1987)	14, 21, 37
19	<i>West Virginia Bd. of Educ. v. Barnette,</i>	
20	319 U.S. 624 (1943)	11, 29
21	<i>Will v. Michigan Dep't of State Police,</i>	
22	491 U.S. 58 (1989)	36, 38
23	<i>Williams v. Vidmar,</i>	
24	367 F.Supp.2d 1265 (ND CA 2005)	24, 31, 32, 33, 38
25	<i>Zinerman v. Burch,</i>	
26	494 U.S. 113; 110 S.Ct. 975 (1990)	33

27 **California Cases**

1	<i>Coalition of Labor, Agri. & Bus. v. Cty. of Santa Barbara Bd. of Superv.</i>	
2	129 Cal.App.4 th 205 (2005)	30
3	<i>Common Cause of California v. Board of Supervisors of Los Angeles County,</i>	
4	49 Cal.3d 432 (1989)	22
5	<i>Frazer v. Dixon Unified School District</i>	
6	18 Cal.App.4 th 781.(1993)	28
7	<i>Ross v. Superior Court,</i>	
8	19 Cal.3d 899 (1977)	22
9	Federal Constitutional Provisions	
10	Article III	17, 18
11	First Amendment to United States Constitution	13, 14
12	Fourteenth Amendment to United States Constitution	14
13	Federal Statutes	
14	28 USC § 1341	35
15	42 U.S.C. A. § 1983	20, 21, 22, 23, 26, 27, 31, 32, 33, 34, 37, 38
16	California Constitutional Provisions	
17	Cal.Const.Art. I §4	25
18	Cal.Const.Art. IX, §9	22
19		
20	California Statutes	
21	Cal.Civ. Code § 47	40
22	Cal.Civ.Proc.Code §526a	21, 22, 34, 35
23	Cal.Ed.Code §35145.5	19, 22, 28, 29, 30, 36, 37
24	Cal.Ed.Code §51000(a)	11, 22
25	Cal.Ed.Code §51101(a)(14)	15, 16
26	Cal.Ed.Code §60002(a)	16, 22
27		

1	Cal.Gov.Code § 815.2	40
2	Cal.Gov.Code § 820.2	38
3	Cal.Gov.Code §54950 (Brown Act Opening Meeting Law)	28, 30
4	Federal Rules	
5	FRCP 10(a)	40, 41
6	FRCP 11	41
7	FRCP 12(b)(1)	14
8	FRCP 12(b)(6)	14
9		
10	Other Authorities	
11	Federal Practice & Procedure Jurisdiction And Related Matters, FPP § 3531.1	19

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **Introduction**

4 The fundamental flaw that permeates Defendants’ motion to dismiss is their assertion that
5 the Third Amended Complaint (“the TAC”) attempts to use the courts to force a school district to
6 adopt and use Larry Caldwell’s (herein “Caldwell” or “Plaintiff”) proposed curriculum in science
7 classrooms. The TAC seeks nothing of the kind.

8
9 Rather, the TAC prays for equitable relief to protect Plaintiff’s right, protected by the First
10 and Fourteenth Amendments of the United States Constitution, to participate on an equal basis
11 with other citizens in public debates on science curriculum and instructional materials in the
12 Roseville Joint Union High School District’s (the “District”) designated forums and procedures
13 for such public debates by adult citizens, notwithstanding Defendants’ opposition to Caldwell’s
14 viewpoint on science education, which defendants have pejoratively –and inaccurately-- labeled
15 as “creationist,” “religious,” “religious alternative science,” “creation science,” “alternative
16 creationist science,” and “right-wing evangelical Christian fundamentalist.”¹ The TAC alleges
17 that the motivation for denial of First and Fourteenth Amendment rights was Defendants’ animus
18 toward Plaintiff’s actual or perceived religious and political viewpoints.
19
20

21 At the heart of this case is the question of whether public officials may deny a California
22 citizen his right to petition his local school board and to speak on public policy issues in public
23 board meetings and other citizen participation fora, simply because the public officials disagree
24 with his viewpoint on those issues. Caldwell contends that under the First and Fourteenth
25 Amendments of the United States Constitution, the answer to that question is unequivocally “no.”
26

27 ¹ Defendants’ Memorandum of Points and Authorities in Support of Motion to Dismiss Second Amended Complaint
28 (filed April 20, 2005), page 4, line 1.

1 The essence of the rights enshrined in the First and Fourteenth Amendments to the United
2 States Constitution is that all citizens should have an equal right to participate in public debates
3 and political processes and to petition their government, without regard to their actual or perceived
4 political and religious viewpoints and belief, and without discrimination.

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

6 “The public entrusts school boards with the education of its children, and the schools play
7 a critical role in the social, ethical, and civic development of those students. To relegate
8 discussion on the education of a community’s children to closed, back-room sessions
9 would deprive the public of the most appropriate forum to debate these issues.” *Leventhal*
10 *v. Vista Unified School District* (S.D.CA 1997) 973 F.Supp. 951, 960-61.)
11

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

13 “That [School boards] are educating the young for citizenship is reason for scrupulous
14 protection of Constitutional freedoms of the individual, if we are not to strangle the free
15 mind at its source and teach youth to discount important principles of our government as
16 mere platitudes.” *West Virginia Bd. Of Educ. V. Barnette*, 319 U.S. 624, 637, 63 S.Ct.
17 1178, 1185, 87 L.Ed. 1628 (1943)
18

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

20 “It is essential to our democratic form of government that parents and guardians of
21 schoolage children attending public schools and other citizens participate in improving
22 public education institutions. . . . involving parents and guardians of pupils in the
23 education process is fundamental to a healthy system of public education.” Ed.Code
24 §51000(a)
25

26 Regrettably, Caldwell discovered that these constitutional ideals are *not* being honored in
27 the District. He discovered instead that citizens like him, who are perceived by school officials as
28

1 holding disfavored political and religious viewpoints and beliefs, are subjected to a pervasive
2 policy and practice of discrimination by District officials, in an effort to keep their disfavored
3 viewpoints out of school board meetings and other public fora, and ultimately, to keep those
4 disfavored viewpoints out of policy in the District.

5 The TAC presents a classic case of illegal viewpoint discrimination and religious
6 discrimination in violation of the First and Fourteenth Amendments to the United States
7 Constitution. Defendants spend a great deal of their moving papers attempting to convince this
8 Court that school board meetings and parent participation councils are not public fora, and that
9 they are not even limited public fora. This Court need not even reach those questions in order to
10 decide that –regardless of the legal status of a fora--, once the government opens the fora to adult
11 speakers on a designated topic, it is *always illegal* for the government to determine access to that
12 fora on the basis of the viewpoint of a particular speaker on that topic, whether that viewpoint is
13 characterized as political, religious, or otherwise. Viewpoint discrimination among public
14 speakers is *always illegal* under the First and Fourteenth Amendments.
15
16

17 As the United States Supreme Court has stated:

18 “When the government targets not subject matter, but particular *views* taken by
19 speakers on a subject, the violation of the First Amendment is all the more blatant.
20 Viewpoint discrimination is thus an egregious form of content discrimination. The
21 government *must* abstain from regulating speech when the specific motivating
22 ideology or the opinion or perspective of the speaker is the rationale for the
23 restriction.” *Rosenberger v. Rector and Visitors of the University of Virginia*, 515
24 U.S. 819, 829, 115 S. Ct. 2510, 2516 (1995)(citations omitted; emphasis added);
25
26 *See also Brown v. California Dep’t of Transp.*, 321 F.3d 1217 (9th Cir. 2003).

1 When government officials deny access to a forum “in a manner that discriminated against
2 a speaker based on his viewpoint,” they are guilty of “discrimination that is impermissible
3 regardless of forum status.” *DeBoer v. Village of Oak Park*, 267 F.3d 558, 567 (7th Cir. 2001).
4 Even in a “nonpublic forum,” where the Supreme Court has given government the greatest latitude
5 to restrict speech, discrimination based on *viewpoint* is forbidden. “To be consistent with the First
6 Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the
7 speaker’s viewpoint and must otherwise be reasonable in light of the purpose of the property.”
8 *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 682, 118 S.Ct. 1633, 1643
9 (1998). The “requirement of neutrality” means that the government “cannot grant or deny access .
10 . . . on the basis of whether it agrees with a [speaker’s] views.” *Id.* At 676, 118 S. Ct. at 1640.

12 Yet, that type of illegal viewpoint discrimination is precisely what Caldwell has
13 encountered in the District. The District’s blatant disrespect and disregard for the Free Speech
14 Clause, as interpreted by the United States Supreme Court and the Ninth Circuit Court of Appeals,
15 is epitomized by the following argument in the District’s moving papers:

17 “Thus, Mr. Caldwell had no fundamental constitution [sic.] right under the Free Speech
18 Clause of the First Amendment to require the District to convert its board meetings and
19 other procedures for determining curriculum for the District’s high schools into traditional
20 unlimited public forums for the articulation and debate of his particular religious, political
21 or ‘strictly non-secular’ [sic.] views on evolution and/or creation science for inclusion or
22 exclusion into the biology and science curriculums.” (Defendants’ moving papers, p. 24,
23 lines 2-7.)²

26 ² Even though Defendants repeatedly allege in their moving papers that Caldwell purportedly advocated that “creation
27 science” be included in science classes, in fact, the evidence in this case will show that Caldwell *has never advocated*
28 *that creation science or any creation science materials* be adopted or used in the District. That factual allegation,
which does not appear in the TAC, has been fabricated by defense counsel out of whole cloth.

1 In other words, the District is of the opinion that the rights to free speech, petition,
2 religious freedom, equal protection and due process guaranteed by the First and Fourteenth
3 Amendments of the United States Constitution do not apply to public school board meetings and
4 parent advisory council meetings in the District, and that this Court purportedly lacks jurisdiction
5 to order the District to accord such constitutional rights to its citizens.

6 The District and the six individual Defendants who are board members and school
7 administrators³ have filed a motion to dismiss for lack of jurisdiction (FRCP 12(b)(1)) and failure
8 to state a claim (FRCP 12(b)(6)). When a motion to dismiss is brought, it is a maxim that at this
9 stage of the litigation the facts as alleged on the face of the complaint are controlling. *Usher v.*
10 *City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987). In that Defendants base the motion to dismiss
11 on a factual premise not found within the four corners of the TAC, the motion must be denied.⁴

12 II.

13 Summary of Facts

14 During a one-year period Caldwell sought to exercise his rights as a citizen to improve
15 science education in the District. Specifically, Caldwell sought consideration of a science
16 proposal called the “Quality Science Education Policy” or “QSE Policy.” The proposed QSE
17 policy would change how Darwin’s theory of evolution is taught in biology classes, to include
18 presentation of some of the scientific weaknesses of evolution along with the scientific strengths.
19 QSE Policy is strictly secular in content with the secular goal of providing students a more
20
21
22

23 ³ For ease of reading, unless otherwise specified, the school district and the individually named
24 defendants will be referred to collectively as “Defendants”, “District” or “RJUHSD.”

25 ⁴ Defendants’ moving papers are so littered with misstatements of the allegations of the TAC as to
26 suggest an effort by defense counsel to mislead this Court regarding the true allegations of the
27 TAC. In the interest of brevity, Plaintiff does not seek to correct each of those misstatements in
28 this brief, but respectfully urges the court to decide defendants’ motion on the basis of the actual
allegations of the TAC, rather than on defense counsel’s fictional descriptions of the purported
allegations of the TAC.

1 thorough understanding of the theory of evolution, and to enhance students' critical thinking skills
2 in the process.⁵

3 The QSE Policy was accompanied by proposed supplementary instructional materials that
4 were designed to cover some of the scientific evidence relevant to the theory of evolution that was
5 not covered in the District's biology textbook (referred to collectively as the "QSE Instructional
6 Materials.") The QSE Instructional Materials are strictly secular in content, consisting solely of
7 science materials prepared by secular scientists which contain no discussion relative to religion.
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. Three of these fora are the subject of
11 the TAC.

12 First, Caldwell attempted to place items on the District school board agenda as per
13 Education Code ("Educ.C.") § 35145.5. Although Caldwell began his requests at the beginning of
14 August 2003 (TAC ¶17) he was denied this right until May of 2004. (TAC ¶25).
15

16 Second, Caldwell sought to participate in the Curriculum Instruction Team (the "CIT") at
17 his daughter's high school, which is one of the District's parent advisory councils⁶ on curriculum
18 instruction at his daughter's high school. (TAC ¶s29-36) Educ.C. §51101(a)(14) requires
19 California high school districts to make all such parent advisory council meetings open to *all*
20
21

22 ⁵ The QSE Policy states: "Because 'nothing in science or in any other field of knowledge shall be
23 taught dogmatically' and 'scientific theories are constantly subject to testing, modification, and
24 refutation as new evidence and new ideas emerge' (1), teachers in the Roseville Joint Union High
25 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)).

26 ² Defendants' Points and Authorities filed in support of their motion to dismiss (hereinafter
27 referred to as the "Defense Points and Authorities") page 4, line 1.

28 ⁶ Granite Bay High School Curriculum Instruction Team ("CIT"). (TAC ¶32).

1 parents.⁷ In September of 2003, after the high school principal, Defendant Severson, notified all
2 parents of Granite Bay High School students that they were welcome to discuss how evolution is
3 taught in biology class at CIT meetings, Caldwell requested permission to place his QSE Policy
4 proposal for how evolution should be taught in biology classes on the agenda of a CIT meeting for
5 public discussion, but was denied permission by Severson. Three months later, when Severson
6 acted *sua sponte* to put Caldwell's proposed QSE Instructional Materials on the agenda of the
7 December 2003 CIT meeting, Caldwell and his supporters appeared at the meeting to discuss the
8 item, only to be told by Severson that the item had been pulled from the agenda. Severson then
9 refused to permit Caldwell and his supporters to discuss his QSE Instructional Materials at that
10 CIT meeting, and Severson never put the QSE Policy or the QSE Instructional Materials on the
11 agenda of CIT meeting again.

13 Third, Caldwell sought to exercise his right to change the District's use of a science
14 textbook by utilizing the District's Instructional Materials Challenge procedures. Said procedures
15 involve four levels of review. The TAC alleges that the District denied Caldwell's right to go
16 through all four levels of review, including, notably, a third level of review that was to involve
17 public debate and discussion by a District-wide committee that, according to the District's own
18 written procedure, was to include members of the public and a school board member.

20 A running theme of the District's responses to Caldwell's effort to have his QSE Policy
21 and QSE Instructional Materials considered by District officials has been a concerted effort to
22 block meaningful public debate on Caldwell's proposals; i.e., "to relegate discussion on the
23

24 ⁷ Defendants' contention that the California Education Code's requirement of parent participation in selection of
25 instructional material and parent advisory councils "is not mandatory" (Defendants' moving papers, p. 25, line 18) is
26 simply false. For example, Ed. Code sec. 60002(a) provides "Each district board . . . shall promote the involvement
27 of parents and other members of the community in the selection of instructional materials." It is hard to imagine
28 statutory direction more mandatory than "shall." Similarly, Ed. Code §51101(a)(14) provides, in relevant part: "the
parents and guardians of pupils enrolled in public schools have the right and should have the opportunity . . . to
participate in the education of their children, as follows: . 16 . (14) To participate as a member of a parent advisory
committee, schoolsite council, or site-based management leadership team. . . ."

1 education of [the District's] children to closed, back-room sessions [in order to] . . . deprive the
2 public of the most appropriate forum to debate these issues.” *Leventhal v. Vista Unified School*
3 *District* (S.D.CA 1997) 973 F.Supp. 951, 960-61.)

4 A corollary theme has been a concerted effort by District officials to limit public debate of
5 evolution policy for the District to:

6 “discussion artificially geared toward praising (and maintaining) the status quo, thereby
7 foreclosing meaningful public dialogue and, ultimately, dynamic political change.”

8 *Leventhal, supra*, 973 F. Supp. at 960.

9 As more fully described in the TAC, a number of oral and written communications have
10 been made by Defendants and those acting on their behalf which demonstrate animus against
11 Caldwell based upon his actual or perceived political and religious viewpoints and beliefs.
12

13 III.

14 The Court Has Jurisdiction to Decide this Case

15 A. Article III Standing – Subject Matter Jurisdiction

16 Defendants assert no Article III standing. The reason for this challenge –

17 “This Court cannot order the District to adopt Mr. Caldwell’s ‘QSE Policy’ or his
18 ‘QSE Instructional Materials’ into the District’s biology and/or science
19 curriculums. Thus, the Court lacks ‘traditional Article III’ subject matter
20 jurisdiction to hear this case, because it cannot grant the relief’ that is being
21 requested in the TAC.” (Defendants’ Points and Authorities, pg. 11 beginning line
22 27 to pg. 12 lines 1-3.)

23 A review of the prayer (TAC pp. 26-31) shows that Caldwell seeks nothing of the sort.
24 Tellingly, Defendants provide no citation to the TAC which even remotely implies that the above
25 characterization is what Caldwell has requested in the TAC. In determining the propriety of a
26
27
28

1 Rule 12(b) dismissal, a court may not look beyond the complaint. *Schneider v. California Dept. of*
2 *Corrections*, 151 F.3d 1194 (9th Cir. 1998). In view of Defendants’ basing their argument on
3 “facts” or “claims for relief” that do not appear on the face of the TAC, the Court must decline to
4 grant the motion.

5 Out of an abundance of caution, Plaintiffs provide the following analysis of Article III
6 standing. The case of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), sets out a three-prong
7 test for determining whether a case falls under Article III jurisdiction. Showing jurisdiction and
8 standing requires: (1) an injury in fact, i.e., which is an invasion of a legally protected interest
9 which is concrete and particularized and actual or imminent rather than conjectural or
10 hypothetical; (2) a causal connection between the injury and conduct complained of so that the
11 injury is fairly traceable to the challenged action of the defendant and not the result of the
12 independent action of some third party who is not before the court; (3) the likelihood that an
13 injury will be redressed by a favorable decision.

14 Caldwell meets each prong of this test because he (1) suffered an actual injury in fact when
15 he was not allowed to place pertinent items on the school board agenda and precluded from
16 participating in other public fora, (2) the Defendants’ actions directly caused the deprivation of
17 Caldwell’s rights under the First and Fourteenth Amendments, and, (3) the equitable relief sought
18 will remedy the violations of Caldwell’s constitutional rights by declaring that he has a right to
19 petition the government through by placing items on the agenda and participating in statutorily
20 prescribed petitionary processes and by enjoining Defendants from further keeping him from
21 exercising these rights.

22 **B. The Issues Presented Are not Political Questions**

23 Here the Defendants allege that Caldwell’s complaints are political questions citing
24 the case of *Baker v. Carr*, 369 U.S. 186 (1962).¹⁸ *Baker* is not relevant to the present case

1 because the Defendants have misconstrued the TAC. Defendants state, “[this] Court
2 should decline to exercise subject matter jurisdiction, because the issue of the adoption
3 and/or rejection of Mr. Caldwell’s QSE Policy and QSE Instructional Materials as part of
4 the District’s biology and science curriculum is a ‘political question.’” (Defendants’ Points
5 and Authorities, pg. 14 lines 15-17.) Again, Defendants fail to use the operative facts and
6 actual claims for relief as found in the TAC. Hence their motion must be denied.
7
8 *Schneider Id.*, 1197.

9 Of course, Caldwell is not asking the Court to make a determination as to
10 curriculum. Such a hypothetical suit would indeed be a political question. Instead,
11 Caldwell is seeking to vindicate his rights, as a member of the public, to participate in the
12 political process via speech and petition. Thus, this Court would not step into the realm of
13 political questions by providing the relief sought in the TAC.

14 **C. Caldwell Has Prudential Standing**

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

18 **1. The TAC is Not a Generalized Grievance**

19 A generalized grievance is a matter which is shared in substantially equal measure
20 by all or a large class of citizens. [See Federal Practice & Procedure Jurisdiction And
21 Related Matters, FPP § 3531.1] Here, Caldwell (not a large class of people) is personally
22 injured by being deprived of speech and petition rights by being barred from placing
23 pertinent items on the school board agenda, in violation of his rights as stated in Educ.C.
24 §35145.5. The TAC asserts that these expressive rights were denied to Caldwell as a result
25 of his actual or perceived religious beliefs. (TAC ¶ 46).
26
27
28

1 Caldwell is not seeking adjudication of his constitutional claims under 42 USC §
2 1983. Instead, the state constitutional claims are an independent basis for relief.
3 Additionally, Caldwell’s Sixth Cause of Action under CCP §526a is not “being asserted or
4 maintained under 42 USC § 1983....” (Defendants’ Points and Authorities, pg. 17 lines
5 13-14.) Again, in seeking to have the TAC dismissed, Defendants are requesting that this
6 Court look beyond the complaint. This is something which the courts are prohibited from
7 undertaking as a matter of law. *Usher v. City of Los Angeles, Id.*, 561.
8

9 **E. Exhaustion of Administrative Remedies**

10 The Defendants once again fail to cite and discuss the actual text of the TAC. The TAC
11 has adequately pled exhaustion of administrative remedies as follows:

12 “¶As to all of the acts described in the previous paragraphs, Plaintiff is informed
13 and believes and thereon alleges that he has exhausted his administrative remedies.

14 ¶As to all of the acts described in the previous paragraphs, in the alternative,
15 Plaintiff is informed and believes and thereon alleges that if he had not exhausted
16 his administrative remedies, it would be futile to further pursue administrative
17 remedies. ¶As to all of the acts described in the previous paragraphs, in the
18 alternative, Plaintiff is informed and believes and thereon alleges that if he had not
19 exhausted his administrative remedies, he is not required to exhaust administrative
20 remedies as a matter of law.” (TAC ¶¶49-51)
21

22 A motion to dismiss must specifically address the facts as found on the face of the
23 TAC. *Usher v. City of Los Angeles, Id.*, 561. Having failed to do that, the motion must be
24 denied.
25

26 However, out of an abundance of caution, Caldwell discusses the issue of
27 exhaustion of administrative remedies. The requirement to exhaust administrative
28

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

7
8 In the present case, Defendants have not identified any statute or regulation relative
9 to Educ.C. §35145.5 (public’s right to place an item on the agenda) or any of the other
10 causes of action in the TAC. Having failed to cite such authority, Defendants’ argument as
11 to failure to exhaust administrative remedies is without merit.

12 Finally, the District is asserting the novel proposition that exhaustion of
13 administrative remedies includes filing a writ in state court and seeking to have the
14 curriculum changed at the California Department of Education. (Defendants’ Points and
15 Authorities, pg. 5 lines 17-19). As a matter of law, “administrative remedies” do not
16 include filing a lawsuit in state court. Further, as the Defendants have pointed out, “local
17 boards of education” adopt instructional materials in their jurisdictions (CA Const., Art.
18 IX, sec., 7). Moreover, the legislature has further given parents and members of the
19 community the right to participate in this adoption process. (Educ.C. §§ 51100, 51101,
20 51102, and 60002(a)). Caldwell was not required to approach the California Department
21 of Education before filing suit for violation of his petition and speech rights by Defendants.
22
23

24 **F. The TAC States Six Legally Sufficient Claims for Relief**

25 **1. Caldwell’s Third Claim for Relief States a Legally Sufficient**
26 **Claim under 42 USC § 1983 for Violation of Caldwell’s Rights under**
27 **the Establishment Clause**

1 In the Ninth Circuit, §1983 claims based upon alleged violations of the Establishment
2 Clause of the First Amendment to the United States Constitution are evaluated on the basis of the
3 familiar “Lemon” test, together with the accompanying “endorsement” test. *Lemon v. Kurtzman*,
4 403 U.S. 602 (1971); *Lynch v. Donnelly*, 465 U.S. 668; *County of Allegheny v. ACLU*, 109 S.Ct. at
5 3095; *Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373, 1378-79 (9th Cir. 1994);
6 *Kreisner v. City of San Diego*, 1 F.3d 775, 785 (9th Cir.1993). To pass muster under the *Lemon*
7 test, the challenged practice must: (1) reflect a clearly secular legislative purpose; (2) have a
8 primary effect that neither advances nor inhibits religion; and (3) avoid excessive government
9 entanglement with religion. Under the endorsement test, the Establishment Clause proscribes
10 public schools from conveying a message that religion or a particular religious belief is either
11 endorsed or disapproved of. *Brown, Id.*, 27 F.3d at 1378-79; *See, County of Allegheny v. ACLU*,
12 109 S.Ct. at 3095.

13
14
15 **(a) Evolutionary Scientific Theory**

16 As an initial matter, Defendants’ entire argument is based on “facts” which do not appear
17 on the face of the complaint. “Caldwell’s allegations that the District was violating the
18 Establishment Clause of the First Amendment by the allowance of the scientific theory of
19 evolution, and the corollary of the District’s refusal to adopt Caldwell’s QSE Policy (religious
20 alternative science), is totally without merit.” (Defendants’ Points and Authorities, pg. 18 lines
21 21-24). First, the TAC never asserts that the District is without authority to teach evolutionary
22 theory. Second, the TAC clearly states that the QSE is secular, i.e., no where is it characterized as
23 “religious alternative science.” Because Defendants’ motion is based on nonexistent “facts” the
24 motion must be summarily denied.
25

26 Indeed, the problem with Defendants’ motion to dismiss is symbolic of the reason why the
27 District have and are violating Caldwell’s speech~~2~~ and petition rights. Just as Defendants’ read into
28

1 the TAC facts which do not exist, so too, the District has a policy and practice of denying
2 Caldwell’s First Amendment rights because of his actual or perceived religious beliefs. Tellingly,
3 Defendants state that “[t]he very relief that he is asking this Court to grant in the TAC would be
4 itself a violation of the First Amendment Establishment Clause....” What Caldwell is actually
5 seeking is that his procedural rights, which are in place to protect his speech and petition rights,
6 not be violated based on his actual or perceived religious views. The District’s religious litmus
7 test – are you now, or have you ever been, a Christian – is the violation of the establishment clause
8 that Caldwell seeks to vindicate through this litigation. It is for this reason that the policies and
9 practices of the Defendants has transgressed the endorsement test. *Brown, Id.*, 27 F.3d at 1378-
10 79. As the Supreme Court stated in *County of Allegheny v. American Civil Liberties Union*, 593-
11 94, “[t]he Establishment Clause, at the very least, prohibits government from appearing to take a
12 position on questions of religious belief.” *Id.*, 593-94.

13
14 As the Ninth Circuit framed the issue in *Brown*:

15
16 “A government practice has the effect of impermissibly advancing or disapproving of
17 religion if it is ‘sufficiently likely to be perceived by adherents of the controlling denominations as
18 an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.’
19 *School Dist. Of Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267
20 (1985).”

21
22 As the court in *Williams, supra*, recently stated:

23 “The Establishment Clause of the First Amendment . . . operates to prohibit the
24 government from preferring one religion over another. *Larson v. Valente*, 456 U.S. 228,
25 244, (1982).” *Williams, supra*, 367 F.Supp.2d at 1275-1276.

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

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

7
8 While the Ninth Circuit in *Kreisner* was discussing the Establishment Clause’s
9 requirement of religious neutrality in a traditional public forum, the same analysis would apply to
10 each of the fora at issue in this lawsuit, since the District has opened each of these fora to the
11 public for at least the limited or designated purpose of public discussion of school related subjects
12 by parents and other members of the community.⁸

13 **(b) Excessive Governmental Entanglement**

14
15 Consistent with their other points, the Defendants argue at length against a position not
16 found in the TAC. “The proposed adoption of ‘QSE Policy’ and... ‘Instructional Materials’...
17 would have been a violation of the Establishment Clause, and would have constituted excess
18 entanglement of the government with a particular religious viewpoint.” (Defendants’ Points and
19 Authorities, pg. 20 lines 5-8). By assuming that Caldwell is filing this suit to get this Court to
20 force the District to adopt the QSE Policy, is begging the question. The actual issue is whether he
21

22
23 ⁸ Caldwell has also stated a viable pendent state claim under the equivalent religious
24 freedom provisions in the California Constitution. The Establishment Clause of the California
25 Constitution states that “[t]he Legislature shall make no law respecting the establishment of
26 religion.” Cal. Const. art. I, § 4. The California Constitution also contains a “No Preference
27 Clause” that reads: “Free exercise and enjoyment of religion without discrimination or preference
28 are guaranteed.” Cal. Const. art. I, § 4. According to the Ninth Circuit, “California courts have
interpreted the No Preference Clause to require that the government neither prefer one religion
over another nor appear to act preferentially. *Sands v. Morongo Unified School Dist.*, 281
Cal.Rptr. at 45, 809 P.2d at 820 (1991).” *Brown₂supra*, 27 F.3d at 1384-85.

1 had and will have, the same speech and petition rights as all members of the public despite his
2 actual or perceived religious views. Since the pros and cons of the QSE Policy and Instructional
3 Materials are not a part of any cause of action in the TAC, no issue exists whereby the relief
4 sought would involve excessive entanglement. Therefore, the motion to dismiss must be denied.
5

6 **2. Caldwell’s Free Exercise Claim In His Third Claim for Relief States a Legally**
7 **Sufficient Claim under 42 USC § 1983**
8

9 (Plaintiff incorporates the discussion above under “**Caldwell Stated a Cause of Action**
10 **Under the Establishment Clause.**”) By placing a religious litmus test on whether Caldwell
11 would be able to enjoy his rights of speech and petition, as well as be afforded due process rights,
12 Defendants violated Caldwell’s right to free exercise of religion. In essence, the District’s policy
13 of treating citizens differently based upon their actual or perceived religious beliefs places citizens
14 in the position of having to make an untenable choice between: (1) maintaining and publicly
15 acknowledging their religious beliefs, practices and affiliations –and thereby foregoing their right
16 to participate in public debates on education policy in the District on an equal basis with citizens
17 holding favored religious beliefs or irreligious beliefs, or (2) renouncing or hiding their religious
18 beliefs, practices and affiliations –and thereby be permitted to participate in public debates on
19 education policy in the District on an equal basis with citizens holding favored religious beliefs or
20 irreligious beliefs.
21

22
23 The District admits this point by taking the position in its moving papers that the mere fact
24 that Caldwell is perceived by District officials to hold “right-wing evangelical Christian
25 fundamentalist” religious beliefs establishes that any proposal for science education proffered by
26 Caldwell would necessarily constitute a violation of the Establishment Clause “as a matter of
27 law,” according to the District. In other words, according to the District, “as a matter of law,”
28

1 citizens holding Caldwell’s religious beliefs have no right to have their proposals for science
2 education considered or adopted by the District. The message from this District and its officials is
3 clear: Christian citizens –and in particular, citizens perceived by District officials as holding
4 “right-wing evangelical Christian fundamentalist” religious beliefs --are not welcome to
5 participate in public policy making in the District, and are not even welcome to participate in
6 public debates about education policy in the District.
7

8 Caldwell respectfully submits that the Free Exercise Clause of the United States
9 Constitution protects citizens from having to make such a choice. Under our Constitution, citizens
10 have the right to maintain and publicly acknowledge their religious beliefs, practices and
11 affiliations *and* to participate in public debates on education policy in their local public school
12 district on an equal basis with citizens holding other religious or irreligious beliefs.

13 **3. Caldwell’s First and Second Claims for Relief State Legally Sufficient Claims**
14 **under 42 USC § 1983 for Violation of Caldwell’s Rights under the Free Speech**
15 **and Petition Clauses of the First Amendment**
16

17 Defendants restate the allegations in the TAC as follows: “What is his true complaint is
18 that the District did not adopt his QSE Policy and the related materials into the high school
19 biology and science curriculum!” (Defendants’ Points and Authorities, pg. 26 lines 8-9).

20 Once again, since Defendants are discussing facts different than those articulated in the
21 TAC, the motion to dismiss must be denied. Nevertheless, out of caution, Caldwell discusses the
22 free speech and petition issues.
23

24 In the case of School Board meetings in California, federal courts in the Ninth District
25 have already decided that public school board meetings in California are a limited public forum in
26 which citizens have a right guaranteed by the Free Speech Clause to place on the agenda, of any
27 regular meeting of a school board, any item that falls within the subject matter jurisdiction of the
28

1 School Board, and then to enjoy the right to public debate on that agenda item. (*Leventhal v. Vista*
2 *Unified School District* (S.D.CA 1997) 973 F.Supp. 951; *Baca v. Moreno Valley Unified School*
3 *Dist.*, 936 F.Supp. 719, 729 (C.D.Cal. 1996).⁹ Regrettably, the District disagrees, asserting that
4 Caldwell does not have the “unlimited right to place item that he want[s] on the School Board’s
5 Agenda.” [See Points and Authorities, pg. 27, lines 10-12]

6 However, as the California Court of Appeal stated in *Fraser v. Dixon Unified School*
7 *District* (1993) 18 Cal.App.4th 781.:

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

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

21 “The preamble to the Brown Act sets forth the primary purposes of the Act as a
22 whole: The people of this state do not yield their sovereignty to the agencies which
23 serve them. The people, in delegating authority, do not give their public servants
24

25
26
27 ⁹ For a discussion of state law, see *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th
28 781.

1 their right to decide what is good for the people to know and what is not good for
2 them to know. The people insist on remaining informed so that they may retain
3 control over the instruments they have created.” *Leventhal, Id.*, 959.

4 The court in *Leventhal* also stated that the public’s right to place items on school board
5 agendas that is guaranteed by Educ.C. § 35145.5 is also protected by the First Amendment of the
6 United States Constitution and provided a blunt warning to the dangers of any local school district
7 policy or official that attempts to restrict or put limits on the subjects that the public can place on
8 regular school board meeting agendas for public debate:
9

10 “The Defendants’ limitation on public criticism is of particular concern in this case,
11 arising as it does in the context of public education. The public entrusts school
12 boards with the education of its children, and the schools play a critical role in the
13 social, ethical, and civic development of those students. *To relegate discussion on*
14 *the education of a community’s children to closed, back-room sessions would*
15 *deprive the public of the most appropriate forum to debate these issues. As Justice*
16 *Jackson warned in West Virginia Bd. Of Educ. v. Barnette, 319 U.S. 624, 637, 63*
17 *S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943): “That [school boards] are educating the*
18 *young for citizenship is reason for scrupulous protection of Constitutional*
19 *freedoms of the individual, if we are not to strangle the free mind at its source and*
20 *teach youth to discount important principles of our government as mere*
21 *platitudes.” See also, e.g., Shelton v. Tucker, 364 U.S. 479, 486, 81 S.Ct. 247, 251,*
22 *5 L.Ed.2d 231 (1960) (“The vigilant protection of constitutional freedoms is*
23 *nowhere more vital than in the community of American schools.”).” *Leventhal, Id.*,*
24 *960-961 (Emphasis added.)*

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

7
8 In view of the above, denying Caldwell the right to place items directly on the school
9 board agenda was not merely a violation of the Education Code but was rather a denial of his right
10 to speech and petition. Indeed, section 35145.5 of the Education Code is merely the "time, place,
11 and manner" procedures whereby a member of the public exercises First Amendment rights. The
12 federal court decisions in *Leventhal* and *Baca* clearly show that the First Amendment is what is at
13 issue in a school board meeting.¹⁰

14
15 **(a) Caldwell does Not Challenge the District's Right to Engage in Government**
16 **Speech**

17 Defendants misread the TAC in that they argue that Caldwell challenges the right
18 of the District to engage in government speech by selecting curriculum and instructional
19 materials. Once more, the Defendants attack facts not alleged in the TAC in violation of
20 fundamental rules for pleading. *Schneider Id.*, 1197. The issue is whether Caldwell, as a
21 member of the public, will be given full procedural, speech and petition rights to present
22 policies to the school despite his actual or perceived religious and political views. It is the
23
24
25

26 ¹⁰ Defendants reference *Coalition of Labor, Agriculture & Business v. County of Santa Barbara*
27 *Board of Supervisors* (2005) 129 Cal.App.4th 205, for the proposition that there is no right under
28 the **Brown Act** to place an item on a board agenda. This is off point in that section 35145.5 of the
Education Code, which does give that right, applies directly to school districts.

1 denial of these rights which Caldwell takes issue with – not the District’s right to choose
2 and use curriculum in the classroom.

3 **(b) Caldwell has Fundamental Constitutional Rights to Speech and Petition**
4 **the Government.**

5 (Caldwell incorporates the preceding discussion (“**Caldwell does Not Challenge the**
6 **District’s Right to Engage in Government Speech**” as though set forth in full.)

7
8 **(c) The District has Discretion to Decide the Curriculum.**

9 (Caldwell incorporates the discussion (“**Caldwell does Not Challenge the District’s**
10 **Right to Engage in Government Speech**” as though set forth in full.)

11 **(d) The District has California Constitutional and Statutory Duty to Select the**
12 **Curriculum.**

13 (Caldwell incorporates the discussion (“**Caldwell does Not Challenge the District’s**
14 **Right to Engage in Government Speech**” as though set forth in full.)

15
16 **4. Caldwell’s Fourth Claim for Relief States a Legally Sufficient Claim under 42**
17 **USC § 1983 for Violations of His Right to Equal Protection Under the Fourteenth**
18 **Amendment**

19 The Northern District of California recently decided the pleading requirements for a
20 § 1983 claim for denial of equal protection against a local school district and its government
21 officials. *Williams v. Vidmar*, 367 F.Supp.2d 1265, 1269-1272 (2005). *Williams* recognized that a
22 teacher who contended that he was treated differently by his supervising school principal and his
23 school district based upon his status as a Christian could state a legally sufficient § 1983 claim for
24 denial of equal protection against the institutional and individual defendants. In *Williams*, the
25 court explained its denial of defendants’ 12(b)(6) motion to dismiss his equal protection claim as
26 follows:
27
28

1 “Under the liberal notice-pleading standard, it seems clear that Plaintiff’s broadly
2 identified class is sufficient to put Defendants on notice. Although the allegation that he is
3 treated differently from teachers who are ‘similarly situated’ is a legal conclusion, the
4 Court finds that in the context of the complaint, Williams has sufficiently alleged that
5 because he is an avowed Christian, he is being treated differently than other teachers in his
6 school with respect to his conduct as a teacher. Those allegations, liberally construed,
7 allege facts which if proven can entitle him to relief. Therefore, the Defendants’ motion to
8 dismiss the Equal Protection claim is denied.” *Williams, Id.*, 1272.

9
10 Similarly, in this case, Caldwell has sufficiently pled a § 1983 claim for denial of equal
11 protection to survive a motion to deny under the liberal notice-pleading standard. Similar to
12 Williams, Caldwell alleges that he has been denied his rights because of his actual or perceived
13 religious views. Indeed, Defendants in this case have admitted that they viewed Caldwell as
14 falling within a class of citizens they perceive as holding a “right-wing evangelical Christian
15 fundamentalist religious” belief. Caldwell alleges that Defendants have treated him, as a member
16 of the class of citizen-parents who are perceived as holding the “right-wing evangelical Christian
17 fundamentalist religious” belief differently from other parents and citizens who are not perceived
18 by Defendants as holding that religious belief. As such, Caldwell has sufficiently stated a claim
19 for relief for violation of the Equal Protection Clause.
20

21 **5. Caldwell’s Fifth Claim for Relief States a Legally Sufficient Claim under 42**
22 **USC §1983 Claim for Denial of Due Process in Violation of His Rights under**
23 **The Fourteenth Amendment**
24

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

1 “To allege a procedural due process claim on the basis of a vague regulation, Williams
2 must first allege a deprivation of a constitutionally protected interest, and second, allege
3 that the deprivation was achieved by means of constitutionally vague policy or procedure.
4 *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).
5 Unconstitutional vagueness implicates dual concerns of fair notice of the line between
6 lawful and unlawful conduct, and sufficiently explicit statutory limitations on the
7 discretion of officials to avoid arbitrary and discriminatory enforcement. *Grayned v. City*
8 *of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). A different standard
9 applies when a challenge to a regulation is based on facial vagueness as opposed to a
10 challenge that the regulation is vague as applied to the plaintiff.” *Williams, Id.*, 1274-75.

11 Caldwell has alleged sufficient facts to state a viable §1983 claim against Defendants for
12 denial of procedural due process. For example, the unwritten policy Defendant Monetti uses to
13 decide what item submitted by citizens are actually included on the agendas of School Board
14 meetings is unconstitutionally vague on its face, since it is unclear from the policy what standards
15 Monetti employs to make his decision on agenda items. In this case, this vague policy resulted in
16 Caldwell being denied enjoyment of his primary constitutional rights of Free Speech, Petition,
17 Equal Protection, and religious liberty under the Establishment Clause, by keeping his QSE Policy
18 off of the agenda for School Board meetings for eight months.

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. Similarly, Caldwell alleges that the unwritten policy Defendant Severson
22 uses to determine which items and which viewpoints are permitted to be discussed at GBHS CIT
23 meetings is unconstitutionally vague on its face, and/or as applied to Caldwell, in that it gives
24 Severson nearly unbridled discretion to decide which viewpoints are permitted to be expressed,
25
26
27
28

1 and which viewpoint are not permitted to be expressed. Caldwell further alleges that the
2 unconstitutionally vague policy Severson and the District employ to make these decisions resulted
3 in a deprivation of Caldwell's primary constitutional rights to Free Speech, Petition, Equal
4 Protection, and religious liberty under the Establishment Clause.

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

11
12 **6. Caldwell's Sixth Claim for Relief States a Legally Sufficient Claim for Relief**
13 **under California CCP §526a**
14

15 CCP §526a gives a California taxpayer such as Caldwell a right to seek an injunction
16 against public expenditures of money for unlawful purposes. Caldwell contends that CCP §526a
17 extends to expenditures by public school officials for activities and actions that violate the United
18 States Constitution. At the least, CCP §526a certainly extends to activities and actions that violate
19 the California Constitution and California statutes. Elsewhere in their moving papers, Defendants
20 contend that violations of the California Constitution and California statute purportedly do not
21 give rise to liability or relief under 42 USC § 1983. Caldwell has included a state claim under
22 CCP §526a for that very reason: so that this Court will have a jurisdictional basis for granting the
23 equitable relief Caldwell seeks with regard to violations of state constitutional and statutory rights
24 that, according to Defendants, is not available under 42 USC § 1983.

25 In the Ninth Circuit, Caldwell has standing as a taxpayer to assert his 42 USC § 1983
26 claims against a local California school district such as the District. (*PLANS, Inc. v. Sacramento*
27 *City Unified School Dist.*, 319 F.3d 504 (9th Cir. 2003)) in any event.

1 Defendants argue incorrectly that the federal Tax Injunction Act prohibits a federal court
2 from hearing taxpayer’s claim under CCP § 526a. 28 USC § 1341 states: “The district courts
3 shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law
4 where a plain, speedy and efficient remedy may be had in the courts of such State.” Defendants
5 again misread the four corners of the TAC. Caldwell is not seeking to prohibit the assessment of a
6 tax under state law; he is seeking to prohibit tax money from being used for illegal purposes by
7 District officials.

8 This Court has pendent jurisdiction to hear Caldwell’s CCP § 526a claim, and as a matter
9 of judicial economy, and as a matter of litigation efficiency for the parties, it makes more sense for
10 this Court to hear that claim in this lawsuit, rather than to force Caldwell to litigate that claim
11 separately, in California state court.

12 Defendants’ motion to dismiss Caldwell’s claim for relief under CCP § 526a should be
13 denied.

14 **G. None of the Purported Immunities and Privileges Cited by Defendants Bars**
15 **any of Plaintiff’s Claims for Relief**

16 Defendants’ “shot gun” style moving papers cite a long laundry list of purported
17 immunities and privileges in an unsuccessful attempt to identify a legal bar to any of Plaintiff’s
18 claims for relief.

19 **1. Defendants’ Federal Qualified Immunity Argument**

20 Federal Qualified Immunity is not applicable when prospective injunctive and
21 declaratory relief is sought. The U.S. Supreme Court explained, “since our decision in *Ex*
22 *parte Young*, 209 U.S. 123 (1908), we have often found federal jurisdiction over a suit
23 against a state official when that suit seeks only prospective injunctive relief.” *Papasan v.*
24 *Allain*, 478 U.S. 265, 278, (1986) (citation omitted).

25 The Ninth Circuit has further explained that “relief that serves directly to bring an
26 end to a present violation of federal law is not barred by the Eleventh Amendment even
27

1 though accompanied by a substantial ancillary effect on the state treasury.” *Natural*
2 *Resources Defense Council v. California Dep’t of Transp.*, 96 F.3d 420, 423 (9th Cir.1996)
3 See also, *Cerrato v. San Francisco Community College Dist.*, 26 F.3d 973 (9th Cir. 1994),
4 *Chaloux v. Killeen*, 886 F.2d 247, 252 (9th Cir.1989), and *Will v. Michigan Dep’t of State*
5 *Police*, 491 U.S. 58 (1989).

6
7 **(a) Defendants’ Direct Entity Liability Argument**

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

14 All the elements of the four part test have been met. There was a deprivation of a
15 constitutional right in that Caldwell was deprived of his rights to free speech, freedom to
16 petition, equal protection, and due process. Second, the school board had a custom of not
17 allowing the public to exercise their right to place pertinent items on the school board
18 agenda in accord with Educ.C. §35145.5. Moreover, the school board’s custom of not
19 allowing Caldwell to place items on the school board’s agenda showed a serious and
20 deliberate indifference to his rights. Finally, in this case the custom of not allowing
21 parents to place items on the school board’s agenda was a moving force behind the
22 constitutional violations of Caldwell’s civil rights. Therefore, there is entity liability.

23
24
25 **(b) Defendants’ Individual Liability Argument**

26 The Defendants argue that there is no individual liability because they have
27 qualified immunity. To determine whether or not qualified immunity should be granted
28

1 the courts use a two-step analysis. (1) Was the law governing the official's conduct clearly
2 established? (2) Under that law, could a reasonable officer have believed the conduct was
3 lawful? As to the first step, in the present case, rights to petition and speech are clearly
4 established and the specific mechanism for exercising these rights in the context of public
5 meetings has been codified in the Brown Act and Educ.C. §35145.5. Concerning the
6 second step, schools are the most democratic institutions in this country. [*Plyler v. Doe*,
7 457 U.S. 202, 102 S.Ct. 2382 (1982)] The rights of the public to speech and petition have
8 been clearly established for many years under the California Education Code and the
9 Brown Act. It stretches credulity for the Defendants to claim that they were unaware of
10 the rules and procedure for public meetings which are the mechanisms for members of the
11 public to engage in First Amendment activities.
12

13 **2. There is No Federal Qualified Immunity for Government Officials**

14 (Caldwell incorporates the discussion immediately above).
15

16 **(a) Caldwell Has Alleged Constitutional Violations**

17 (Caldwell incorporates the prior discussions on constitutional violations).
18

19 Additionally, it must be noted that Defendants again misread the TAC when they state,
20 "...Mr. Caldwell had no constitutional right to tell the District Board what to adopt as its
21 biology and science curriculum, and as such, there is no violation of Mr. Caldwell's free
22 speech rights, nor can he state any claim under 42 USC § 1983." (Defendants' Points and
23 Authorities, pg. 39, lines 14-16.) Defendants' failure to confine themselves to what is
24 written on the face of the TAC requires denial of the motion to dismiss. *Usher, Id.*, 561.

25 **3. District Officials and Employees Are not Entitled to Qualified** 26 **Immunity**

27 In a similar case as is currently before this Court, this same argument was rejected.
28

1 “It is well established that the Eleventh Amendment does not bar a federal
2 court from granting prospective injunctive relief against an officer of the
3 state who acts outside the bounds of his authority.” *Cerrato*, 26 F.3d at 973
4 Accordingly, the Board members are subject to suit under 42 U.S.C. § 1983
5 for prospective injunctive and declaratory relief. See, e.g., *Chaloux v.*
6 *Killeen*, 886 F.2d 247, 252 (9th Cir.1989) (“[A]lthough the Supreme Court
7 held recently [in *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 109
8 S.Ct. 2304, 105 L.Ed.2d 45 (1989)] that the state or state officials are not
9 considered ‘persons’ under § 1983, this holding does not apply when a state
10 official in his or her official capacity is sued for prospective relief.”).
11 *Leventhal v. Vista Unified School District*, 973 F.Supp. 951, 121 Ed. Law
12 Rep. 95 (1997)

13
14
15 In that the school board officials were acting in their official capacity, there is no
16 state agency immunity.

17 **4. Defendants’ Absolute Discretionary Immunity Defense Is Without Merit**

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

21 This allegation is without merit because Caldwell’s case is similar to the case of *Williams*
22 *v. Vidmar*, 367 F.Supp.2d 1265 (ND CA 2005), in which an elementary school teacher brought a
23 civil rights action against a school principal and school district, claiming violations of his
24 constitutional rights arising from restrictions placed on his use of supplemental classroom
25 materials having religious content, and the defendants filed a motion to dismiss. In *Williams* the
26 defendant also relied on § 820.2 of the California Government Code to argue that her actions
27
28

1 against the plaintiff were discretionary acts for which she is absolutely immune from suit, and the
2 Court explained that “[t]he Ninth Circuit has held that state statutory immunity provisions do not
3 apply to federal civil rights actions. *Guillory v. County of Orange*, 731 F.2d 1379, 1382 (9th
4 Cir.1984). To construe a federal statute to allow a state immunity defense ‘to have controlling
5 effect would transmute a basic guarantee into an illusory promise,’ which the supremacy clause
6 does not allow. *Id.*, at 1382 (citations omitted). Therefore, Defendant Vidmar’s motion to dismiss
7 based on discretion immunity is denied.” In view of the above, the Defendants are not eligible for
8 discretionary immunity.
9

10 **5. Defendants’ State Sovereign Immunity Defense Is Without Merit**

11 Here the Defendants assert that there is “state sovereign immunity” from suit for violation
12 of state laws in federal court, and that state officials and agencies cannot be sued in their “official
13 capacities,” when the “state may be financially liable.” However, Caldwell is not suing for
14 damages but for declaratory and injunctive relief.
15

16 Further, under the *Ex parte Young* doctrine, a plaintiff may maintain a suit for prospective
17 relief against a state official in his official capacity, when that suit seeks to correct an ongoing
18 violation of the Constitution or federal law. *Ex Parte Young*, 209 U.S. at 159-60; see also
19 *Armstrong v. Wilson*, 124 F.3d 1019, 1026 (9th Cir.1997) (rejecting the argument that *Ex parte*
20 *Young* applies only to constitutional, not statutory, violations). See also *Cardenas v. Anzai*, 311
21 F.3d 929 (Hawaii 2002).
22

23 **6. Defendants’ Absolute Privilege Defense under California Law Is Without** 24 **Merit**

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 comparison to the expressive rights of the public³and “First Amendment speech guarantees would
28

1 trump the statute.” [*Leventhal v. Vista Unified School District*, 973 F.Supp. 951, 121 Ed. Law Rep.
2 95 (1997)]

3 **7. There Are no Absolute Statutory Privileges Available to Defendants**

4 Defendants’ claim of absolute privilege under California Civil Code § 47 and Government
5 Code § 815.2 cites to no defect in the TAC and provides no analysis. As such, Defendants’ point
6 is so unintelligible that discussion of it is not possible.

7
8 **8. Caldwell’s Pendent State Law Claims Are Proper**

9 Again, Defendants position challenges a premise not appearing in the TAC.
10 Defendants state that there are no properly alleged pendant state law claims “because the
11 District had the complete discretion...to decide and choose curriculum.” (Defendants’
12 Points and Authorities, pg. 45, lines 17-18.) Having failed to address what is on the face
13 of the TAC (*Schneider Id.*, 1197), Defendants’ point is without merit.

14
15 **H. The TAC Constitute A Concise, Short and Plain Statement**

16 This case encompasses a one-year fact situation, which by its nature includes many facts
17 and multiple processes and fora. Further, by stating the facts of the case in the complaint in detail,
18 there is less need for discovery by defendants. The TAC is much shorter than the 155 page
19 pleading in *United States ex rel. Garst v. Lockheed-Martin Corp*, 328 F. 3d. 374, 378 (7th Circuit,
20 2003). Moreover, TAC is a mere 30 pages as opposed to the previous 112 pages.¹¹

21
22 **I. There Are No Other Pleading Defects**

23 Defendants complain that the caption some how violates FRCP 10(a). Rule 10(a)
24 states:

25
26
27 ¹¹ Ironically, Defendants’ moving papers in response to the dramatically shorter complaint have grown from 35 pages
28 to 49 pages. Defendants’ lengthy memorandum of points and authorities was filed without a table of contents and
table of authorities in violation of this court’s local rules.

1 “Every pleading shall contain a caption setting forth the name of the court, the title
2 of the action, the file number, and a designation as in Rule 7(a). In the complaint
3 the title of the action shall include the names of all the parties, but in other
4 pleadings it is sufficient to state the name of the first party on each side with an
5 appropriate indication of other parties.”

6 In that Defendants point to nothing in Rule 10(a) which the TAC violates, their
7 position is frivolous.
8

9 IV.

10 **Defendants’ Request for Sanctions, Attorneys Fees and Costs Should Be Denied**

11 The Defendants allege that the TAC “is totally without merit, frivolous, and
12 violates Federal Rules of Federal Civil Procedure, Rule 11, and was only brought to
13 advance a ‘political’ and ‘religious’ agenda against the District, and to harass its Board
14 Members, Officials and employees, in retaliation for its failure to adopt his QSE Policy
15 into the District’s High School science and biology curriculum.” (Defendants’ Points and
16 Authorities, pg. 47, lines 22-25.) Defendants cite to nothing on the face of the TAC to
17 support the above assertion. This fundamental flaw has been a recurrent problem
18 throughout the forty-nine (49) pages of the motion to dismiss. *Schneider Id.*, 1197.
19

20 It should be noted that there was also no meet or confer attempted by the opposing counsel.
21 Moreover, there is no proper motion before the Court regarding sanctions. Additionally,
22 Defendants seek sanctions against Caldwell who did not sign the TAC. Thus, the request is
23 improper.
24

25 Hence, the Defendants’ request for sanctions, attorney fees and costs is completely lacking
26 in proper legal authority.
27

V.

CONCLUSION

The Defendants' unfocused motion to dismiss is based upon "facts" and premises not found within the TAC and is not supported by applicable law in any event. As such, the motion should be denied in its entirety.

DATED: September 9, 2005

By: /s/ Kevin T. Snider
Kevin T. Snider, Esq.,
Attorney for Plaintiff

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF PERSONAL SERVICE

I, Virginia Boston, 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-captioned action.

3. That, on September 9, 2005, 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; AND FOR PUPORTED VIOLATION OF FRCP 10(a)

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 9th day of September, 2005, in the County of Sacramento, City of Sacramento, State of California.

/s/
Virginia Boston, Declarant