

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

LARRY CALDWELL,
Plaintiff,
v.

NO. CIV. S-05-0061 FCD JFM

MEMORANDUM AND ORDER

ROSEVILLE JOINT UNION HIGH
SCHOOL DISTRICT; JAMES JOINER
and R. JAN PINNEY, in their
official capacities as members
of the Board of Education;
TONY MONETTI in his official
capacity as Assistant
Superintendent for Curriculum
and Instruction, DONALD
GENASCI in his official
capacity Deputy 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.

_____ /

-----oo0oo-----

1 This matter is before the court on defendants' motion to
2 dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1),
3 12(b)(6), 8(a), and 10(a). For the reasons set forth below,¹
4 defendants' motion is GRANTED in part and DENIED in part.

5 **BACKGROUND²**

6 From June 3, 2003 through June 1, 2004, Larry Caldwell
7 ("plaintiff") sought to introduce new material into the science
8 program in defendant Roseville Joint Union High School District
9 ("District"). (Pl.s' Third Am. Compl. ("TAC"), filed July 29,
10 2005, ¶ 14). Teachers from the district teach Darwin's theory of
11 evolution in biology classes. (Id.) Plaintiff sought to have the
12 District adopt his Quality Science Education Policy ("QSEP"),
13 which presents some of the scientific weaknesses of evolution
14 along with the scientific strengths. (Id.) In seeking to
15 persuade public officials of the district to adopt the QSEP,
16 plaintiff engaged in three distinct public processes. (Id. ¶
17 16). Specifically, plaintiff sought 1) to list the QSEP as an
18 agenda item on school board meetings, 2) to participate on the
19 curriculum instruction team, and 3) to participate in the
20 district's "instructional materials challenge" procedure. (Id.
21 ¶¶ 6, 10, 12). Plaintiff alleges the following in support of his
22 claims.

23 /////
24 /////
25 _____

26 ¹ Because oral argument will not be of material
27 assistance, the court orders the matter submitted on the briefs.
E.D. Cal. Local Rule 78-230 (h).

28 ² The factual background of this case is taken from
plaintiff's complaint.

1 **A. School Board Meetings**

2 Plaintiff sought to place items on the school board agenda
3 and have the board vote on his QSEP policy. (See id. ¶¶ 6-10).
4 The School Board regularly holds meetings open to the public.
5 (Id. ¶ 17). Plaintiff requested that the QSEP be placed on the
6 agenda of a regular school board meeting for public debate and
7 potential adoption. (Id.) The school board listed the topic of
8 "supplemental materials" instead. (Id. ¶ 18). Plaintiff
9 questioned R. Jan Pinney ("Pinney"), a member of the Board of
10 Trustees, about the omission of the QSEP from the board's agenda.
11 (Id.) Pinney told plaintiff that the omission was intentional
12 and instructed plaintiff that he would need to obtain approval
13 from each high school council before he would be permitted to
14 place the QSEP on the school board's agenda. (Id.)

15 Despite Pinney's instruction, plaintiff proceeded to seek
16 adoption of his QSEP proposal through the school board, but the
17 school board refused to list the QSEP on the board's agenda.
18 (Id. ¶ 27). In total, the board denied plaintiff's request to
19 place the QSEP on the meeting agenda on 12 occasions. (Id.)
20 On April 19, 2004, plaintiff threatened legal action if the
21 district continued to refuse to place the QSEP on the board's
22 agenda. (Id. ¶ 24). In response, Superintendent Tony Monetti
23 ("Monetti") agreed to place the QSEP on the board's agenda on May
24 4, 2004 (Id. ¶¶ 24-25). The board entertained discussion from
25 the public regarding the QSEP and was prepared to vote on its
26 adoption. (Id. ¶ 25). According to plaintiff, Monetti then
27 "asserted a bogus procedural objection" that prevented the board
28 from voting to adopt the QSEP. (Id.) Plaintiff requested to

1 discuss the QSEP again at a later meeting. The board denied his
2 request. (Id.) Plaintiff alleges that defendants' refusal to
3 place the QSEP on the board agenda and the deprivation of a board
4 vote was motivated by an intent to discriminate against Caldwell
5 and other citizens on the basis of their viewpoint and/or their
6 religious beliefs and affiliations. (Id. ¶ 28).

7 **B. Curriculum Instruction Team**

8 _____Plaintiff also sought to express his views by participating
9 in the Curriculum Instruction Team ("CIT") of his daughter's high
10 school, Granite Bay High School ("GBHS"). (Id. ¶ 29). The CIT
11 is a parent advisory council with the purpose of informing and
12 involving parents in the development of programs at GBHS. (Id. ¶
13 33). A newsletter addressed to parents of students of GBHS
14 invited participation and presented a potential topic: "How is
15 evolution taught in our school? . . . If you have questions like
16 these about curriculum and instruction issues at GBHS, the
17 Curriculum and Instruction team is the place for you." (Id.)

18 Plaintiff viewed the CIT as a potential avenue to address
19 his ideas about the QSEP and asked the school principal, Ronald
20 Severson ("Severson") whether it would be a proper forum. (Id. ¶
21 34). Severson responded that he would prefer to meet and discuss
22 these issues with plaintiff individually rather than at the CIT
23 meeting. He also informed plaintiff that he did not support the
24 QSEP. (Id.)

25 The agenda for the CIT meeting on December 3, 2003, included
26 a topic regarding updating the science curriculum and referred to
27 the QSEP. (Id. ¶ 35). Plaintiff and others supporting
28 plaintiff's views attended the CIT meeting, but Severson told

1 them that they would not be permitted to discuss the QSEP.
2 Severson removed the item from the agenda. (Id.) Plaintiff was
3 not allowed to discuss the QSEP at any later CIT meetings that
4 year. (Id.) Plaintiff believes that defendants' refusal to
5 permit him to discuss the QSEP at CIT meetings was motivated by
6 hostility toward plaintiff's actual and perceived religious
7 beliefs. (Id. ¶ 36).

8 **C. Instructional Materials Challenge**

9 _____ Additionally, plaintiff sought to challenge the use of the
10 Holt Biology Textbook in the district. (Id. ¶ 38). The district
11 has an "instructional materials challenge" procedure for parents
12 and others to object to the use of a particular textbook. (Id.)
13 The challenge provides four levels of review: individual teachers
14 (Level One), school principals (Level Two), Assistant
15 Superintendent of Curriculum Instruction (Level Three), and
16 Superintendent (Level Four). (Id.)

17 In September 2003, plaintiff challenged the Holt Biology
18 Textbook on the grounds that its coverage of evolution was not
19 "accurate, objective, and current" as required by the California
20 Education Code. (Id. ¶ 39). Plaintiff's proposed solution was
21 to supplement the current text with the QSEP materials. (Id.)
22 Because all teachers in the district used the textbook, the
23 District and plaintiff agreed that the Level One challenge could
24 be satisfied through a consolidated challenge as opposed to
25 meeting each teacher individually. (Id.) Plaintiff also
26 believed that this meeting would satisfy the second level of
27 review. (Id.) Most of the district's science teachers attended
28 the meeting, and plaintiff believes that principals and

1 administrators were also in attendance. (Id.) On December 15,
2 2003, nineteen science teachers rejected plaintiff's challenge.
3 (Id.) Plaintiff is unclear whether he was accorded a level two
4 review and alleges that he was not afforded a level three or
5 level four review. (Id. ¶¶ 43-45). Plaintiff believes that the
6 district's failure to comply with its own instructional materials
7 challenge was based on both "religious animus" and viewpoint
8 discrimination. (Id. ¶ 46).

9 **D. Procedural History**

10 Plaintiff filed administrative complaints to the district on
11 behalf of himself and others. (Id. ¶ 47). Genasci had the legal
12 authority to respond to plaintiff's allegations and denied each
13 of the administrative complaints. (Id.) Plaintiff alleges he
14 has exhausted his administrative remedies. (Id. ¶ 51).

15 Plaintiff filed this action in federal court on January 11,
16 2005. He amended the complaint once as of right on January 18,
17 2005. He then sought leave to amend to file a second amended
18 complaint ("SAC"). The court granted plaintiff leave and the SAC
19 was filed on March 10, 2005. Defendants filed a motion to
20 dismiss the SAC for lack of subject matter jurisdiction and for
21 failure to state a short plain statement of relief as required
22 under Rule 8(a). On June 30, 2005, the court issued an order
23 dismissing the SAC under Rule 8(a) and directing plaintiff to
24 file an amended complaint within thirty days. The court vacated
25 defendants' motion to dismiss as moot. On July 29, 2005,
26 plaintiff filed the third amended complaint ("TAC").

27 Plaintiff's TAC alleges the following claims: 1) violation
28 of civil rights under 42 U.S.C. § 1983; 2) violations of state

1 constitutional laws; and 3) waste of tax dollars under California
2 Code of Civil Procedure section 526(a). Plaintiff seeks
3 declaratory and injunctive relief, nominal damages, and
4 attorney's fees and costs. (Pl's. Prayers for Relief ¶¶ 1-24).

5 **STANDARD**

6 **A. Subject Matter Jurisdiction**

7 _____ Under Rule 12(b)(1), a party may by motion raise the defense
8 that the court lacks "jurisdiction over the subject matter" of a
9 claim. Fed. R. Civ. P. 12(b)(1). It is well established that
10 the party seeking to invoke the jurisdiction of the federal court
11 bears the burden of establishing the court's subject matter
12 jurisdiction. Stock West, Inc. v. Confederated Tribes, 873 F.2d
13 1221, 1225 (9th Cir. 1989). The Eleventh Amendment limits the
14 subject matter jurisdiction of the federal courts. See Seminole
15 Tribe of Florida v. Florida, 517 U.S. 44, 53-54 (1996).

16 A motion to dismiss for lack of subject matter jurisdiction
17 may attack the allegations of jurisdiction contained in the
18 complaint as insufficient on their face to demonstrate the
19 existence of jurisdiction ("facial attack"). Thornhill
20 Publishing Co. v. General Tel. & Elec. Corp., 594 F.2d 730, 733
21 (9th Cir. 1979). If the motion constitutes a facial attack, the
22 court must consider the factual allegations of the complaint to
23 be true. Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir.
24 1981).

25 **B. Motion to Dismiss**

26 _____ On a motion to dismiss, the allegations of the complaint
27 must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322
28 (1972). The court is bound to give plaintiff the benefit of

1 every reasonable inference to be drawn from the "well-pleaded"
2 allegations of the complaint. Retail Clerks Int'l Ass'n v.
3 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff
4 need not necessarily plead a particular fact if that fact is a
5 reasonable inference from facts properly alleged. See id.

6 Given that the complaint is construed favorably to the
7 pleader, the court may not dismiss the complaint for failure to
8 state a claim unless it appears beyond a doubt that the plaintiff
9 can prove no set of facts in support of the claim which would
10 entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45
11 (1957); NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th
12 Cir. 1986).

13 Nevertheless, it is inappropriate to assume that plaintiff
14 "can prove facts which it has not alleged or that the defendants
15 have violated the . . . laws in ways that have not been alleged."
16 Associated Gen. Contractors of Calif., Inc. v. Calif. State
17 Council of Carpenters, 459 U.S. 519, 526 (1983). Moreover, the
18 court "need not assume the truth of legal conclusions cast in the
19 form of factual allegations." United States ex rel. Chunie v.
20 Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

21 **C. Rule 8(a)**

22 Rule 8(a) requires that a pleading provide "a short and
23 plain statement of the claim showing that the pleader is entitled
24 to relief." Fed. R. Civ. P. 8(a). The pleading must give the
25 defendant fair notice of what the plaintiff's claim is and the
26 grounds upon which it rests. See Conley v. Gibson, 355 U.S. 41,
27 47 (1957). "[D]ismissal for a violation under Rule 8(a)(2) is
28 usually confined to instances in which the complaint is 'so

1 verbose, confused or redundant that its true substance, if any,
2 is well disguised.'" Gillibeau, 417 F.2d at 431 (citing Corcoran
3 v. Yorty, 347 F.2d 222, 223 (9th Cir. 1965)).

4 **D. Rule 10(a)**

5 _____The Federal Rules of Civil Procedure provide, "[i]n the
6 complaint, the title of the action shall include the names of all
7 the parties." Fed. R. Civ. P. 10(a). "The rule serves to
8 apprise the parties of their opponents, and it protects the
9 public's legitimate interest in knowing all the facts and events
10 surrounding court proceedings." Doe v. Rostker, 89 F.R.D. 158,
11 160 (D. Cal. 1981). If a party is unknown at the time a
12 complaint is filed, federal courts typically will allow the use
13 of a fictitious name in the caption so long as it appears that
14 the plaintiff will be able to obtain the true name through the
15 discovery process. Gillespie v. Civiletti, 629 F.2d 637, 642
16 (9th Cir. 1980).

17 **ANALYSIS**

18 **A. Jurisdiction and Justiciability**

19 **1. Justiciability**

20 Defendants raise a number of arguments relating to the
21 court's jurisdiction over plaintiff's claims, including issues
22 relating to standing, the political question doctrine, and
23 mootness. These arguments are off-point because they address
24 claims not before the court.

25 Defendants repeatedly argue that plaintiff's "real complaint
26 is that the District did not adopt his QSEP." (Defs.' Reply,
27 filed Sept. 16, 2005, at 5). This so-called "real complaint" was
28 never filed by plaintiff. On defendants' motion to dismiss, the

1 court may only address plaintiff's claims, not defendants'
2 claims. Here, plaintiff claims that: (1) defendants are denying
3 him the opportunity to speak at various types of school district
4 meetings, thus violating his rights guaranteed by the First and
5 Fourteenth Amendments; (2) plaintiff was treated differently and
6 unfairly because of his religious beliefs in violation of the
7 Free Speech Clause, his right to petition the government, the
8 Establishment Clause, the Equal Protection Clause, and his rights
9 to procedural due process; and (3) his constitutional rights will
10 continue to be violated by defendants based upon their past
11 pattern and practice. Plaintiff's TAC does not seek an order by
12 this court requiring the adoption of the QSEP in the school
13 curriculum. Defendants' various and extended arguments
14 addressing this non-existent allegation are not germane to
15 defendants' motion and will not be considered by the court.

16 In addition, defendants argue the *merits* of plaintiff's
17 claims, which seek relief for the above alleged violations of his
18 Constitutional rights. On a Rule 12(b) motion to dismiss, the
19 court may only examine the *allegations* of the complaint. The
20 court may not look at the merits of plaintiff's claims or
21 defendants' factual defenses. This does not mean that defendants
22 may not ultimately prevail on a motion for summary judgment. It
23 means that, as a result of defendants' motion to dismiss, the
24 court can only consider the allegations on the face of the
25 complaint, viewed in a light most favorable to the plaintiff.
26 See Fed. R. Civ. Proc. 12(b)(6). Therefore, the court will not
27 address those arguments of defendants more properly made on a
28 motion for summary judgment. See Fed. R. Civ. Proc. 56.

1 **2. Eleventh Amendment Immunity**

2 Plaintiff's TAC alleges claims against the District and
3 against all individual defendants in their official capacities.³
4 Defendants argue that they are entitled to Eleventh Amendment
5 sovereign immunity, and therefore, this court does not have
6 jurisdiction over plaintiff's claims.

7 Defendants argue that plaintiff's claims against the
8 District should be dismissed because the Eleventh Amendment bars
9 a federal court from hearing claims by a citizen against
10 dependant instrumentalities of the state. Cerrato v. San
11 Francisco Comm. College Dist., 26 F.3d 968, 972 (9th Cir. 1994).
12 The Ninth Circuit has established that California school
13 districts are state agencies. See Belanger v. Madera Unified
14 School District, 963 F.2d 248, 251 (9th Cir. 1992) (holding that
15 a school district was a state agency for purposes of the Eleventh
16 Amendment because a judgment against the school district would be
17 satisfied out of state funds and because the district performed
18 central government functions). Under the Eleventh Amendment,
19 agencies of the state are immune from private damage actions or
20 suits for injunctive relief brought in federal court. Mitchell
21 v. Los Angeles Comm. College Dist., 861 F.2d 198, 201 (9th Cir.
22 1988) (citing Pennhurst State Sch & Hosp. v. Halderman, 465 U.S.
23 89, 100 (1984) (Eleventh Amendment proscribes suit against state

24
25 ³ Plaintiff designated that the individual defendants
26 were being sued "in their official capacities" in the TAC.
27 Plaintiff failed to request and receive leave to amend the SAC to
28 properly change the caption. As such, the changes must be
stricken. Nevertheless, in assessing the TAC, the court will
consider this amendment as a demonstration of plaintiff's
intention to sue the individual defendants only in their official
capacities.

1 agencies "regardless of the nature of the relief sought"). Thus,
2 because the District is a state agency, it possesses Eleventh
3 Amendment immunity from plaintiff's claims for damages and for
4 injunctive relief. Id. Defendants' motion to dismiss
5 plaintiff's claims against the District are GRANTED.

6 Defendants also argue that the individual defendants are
7 entitled to immunity under the Eleventh Amendment. Generally, a
8 claim asserted against an officer of the state, acting in his/her
9 official capacity is, as a matter of law, asserted against the
10 State of California itself, Brandon v. Holt, 469 U.S. 464, 471-72
11 (1985), and therefore is generally barred on Eleventh Amendment
12 immunity grounds. See Dittman v. California, 191 F.3d 1020, 1026
13 (9th Cir. 1999) ("The Eleventh Amendment bars actions for damages
14 against state officials who are sued in their official capacities
15 in federal court.") (citations omitted). However, "[i]t is well
16 established that the Eleventh Amendment does not bar a federal
17 court from granting prospective injunctive relief against an
18 officer of the state who acts outside the bounds of his
19 authority." Cerrato, 26 F.3d at 973; Ex parte Young, 209 U.S.
20 123. To the extent that plaintiff seeks declaratory and
21 injunctive relief under federal law against the individual
22 defendants, defendants' motion to dismiss is DENIED.

23 This exception to the general rule granting immunity does
24 not apply when a plaintiff alleges that a state official has
25 violated a state law. Pennhurst, 465 U.S. at 105-06 ("[I]t is
26 difficult to think of a greater intrusion on state sovereignty
27 than when a federal court instructs state officials on how to
28 conform their conduct to state law."). "Ex parte Young allows

1 prospective relief against state officers only to vindicate
2 rights under federal law." Spoklie v. Montana, 411 F.3d 1051,
3 1059 (9th Cir. 2005). To the extent that plaintiff's TAC alleges
4 violations of state law by the individual defendants in their
5 official capacity, defendants' motion is GRANTED.

6 Plaintiff's TAC alleges violations of federal and state
7 constitutional law as well as a state taxpayer claim for
8 wasted/illegally expended municipal funds. Plaintiff seeks
9 declaratory and injunctive relief, nominal damages, and
10 attorney's fees and costs. Under 42 U.S.C. § 1988, one who
11 prevails in a § 1983 action is entitled to recover attorney's
12 fees as costs, not as damages. See Williams v. Vidmar, 367 F.
13 Supp. 2d 1265, 1277 (N.D. Cal. 2005). Thus, plaintiff's only
14 claims for monetary damages are in the form of his request for
15 nominal damages in the amount of \$100. Because a suit for
16 damages against a state official is barred by the Eleventh
17 Amendment, defendant's motion to dismiss plaintiff's claim for
18 nominal damages is GRANTED.

19 **3. Exhaustion of Administrative Remedies**

20 Defendants argue that this case should be dismissed because
21 plaintiff has failed to exhaust his administrative remedies.
22 "[E]xhaustion of state administrative remedies should not be
23 required as a prerequisite to bringing an action pursuant to §
24 1983." Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982)
25 (*superceded* on other grounds); See also Porter v. Nussle, 534
26 U.S. 516, 523 (2002) (*superceded* on other grounds). Accordingly,
27 defendants' motion is DENIED.

28 /////

1 **B. Immunity**

2 **1. Federal Qualified Immunity**

3 Defendants argue that plaintiffs complaint should be
4 dismissed because they are entitled to federal qualified immunity
5 under § 1983. "Qualified immunity is an affirmative defense to
6 damage liability; it does not bar actions for declaratory or
7 injunctive relief." Amer. Fire, Theft, & Collision Managers,
8 Inc. v. Gillespie, 932 F.2d 816, 818 (9th Cir. 1991) (citations
9 omitted). Plaintiff brings this suit for declaratory and
10 injunctive relief, nominal damages, and for attorneys' fees and
11 costs. Therefore, to the extent that plaintiffs assert claims
12 for equitable relief, defendants are not protected by federal
13 qualified immunity. See Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th
14 Cir. 1984) ("[I]mmunity from injunctive relief is generally
15 without foundation. . . . The availability of such injunctive
16 relief is necessary to permit the vindication of important
17 federal rights."). Defendants' motion to dismiss based upon
18 federal qualified immunity is DENIED.

19 **2. State Law Immunity**

20 Defendants argue that they are immune based upon state law
21 absolute or discretionary immunity. State statutory immunity
22 provisions do not apply to federal civil rights actions.
23 Guillory v. Orange County, 731 F.2d 1379, 1382 (9th Cir. 1984).
24 The Ninth Circuit explained, "To construe a federal statute to
25 allow a state immunity defense 'to have controlling effect would
26 transmute a basic guarantee into an illusory promise,' which the
27 supremacy clause does not allow." Id. (citations omitted).
28 Therefore, state law immunity provisions will not guard

1 defendants from plaintiff's § 1983 claims for relief and
2 defendants' motion to dismiss based upon state law immunity is
3 DENIED.⁴

4 **C. Plaintiff's Alleged Failure to State a § 1983 Claim**

5 Turning to the sufficiency of plaintiff's § 1983
6 allegations, defendants contend that plaintiff fails to state
7 sufficient allegations. To state a claim under § 1983,
8 plaintiffs must plead that (1) defendants acted under color of
9 law, and (2) defendants deprived plaintiff of rights secured by
10 the Constitution or federal statutes. Gibson v. U.S., 781 F.2d
11 1334, 1338 (9th Cir. 1986).

12 **1. Plaintiff's Free Speech Rights**

13 Plaintiff alleges that his First Amendment rights were
14 violated because defendants refused to place his QSEP on the
15 agenda. (TAC ¶¶ 17-28). Defendants argue and plaintiff admits
16 that he was able to place the QSEP on the agenda and discuss it
17 at a school board meeting. (Id. ¶ 25). However, plaintiff
18 alleges that he was unable to place the QSEP on the agenda for
19 twelve meetings during the 2003-2004 school year because
20 defendants intended to discriminate against him based on his
21 religious beliefs and affiliations. (Id. ¶ 28). Plaintiff also
22 alleges that, based upon defendants' past conduct, he is likely
23 to be denied his rights to place the QSEP on the meeting agenda
24 in the future. (Id.)

25
26 ⁴ Because plaintiff's state law claims against the
27 individual defendants are barred by the Eleventh Amendment, this
28 court does not address defendants' arguments regarding the
applicability of state law discretionary or absolute immunity to
plaintiff's state law claims.

1 Because this case concerns the government's ability to limit
2 private expression in a public context, it is governed by the
3 public forum doctrine. Levanthal v. Vista Unified Sch. Dist.,
4 973 F. Supp. 951, 956 (S.D. Cal. 1997). The Supreme Court has
5 identified thee distinct types of fora: (1) traditional public
6 fora, "places which by long tradition or by government fiat have
7 been devoted to assembly and debate;" (2) limited public fora,
8 places generally open to the public for expressive activity,
9 "even if [the government] was not required to create the forum in
10 the first place;" and (3) nonpublic fora, "public property which
11 is not by tradition or designation a forum for public
12 communication." Perry Education Assn. v. Perry Local Educators'
13 Assn., 460 U.S. 37, 45-46 (1983). Under this doctrine, the
14 state's ability to regulate speech depends on the nature of the
15 forum. See id.

16 The State of California has designated certain public
17 property for use as public fora. Under the Brown Act and the
18 California Education Code, the California Legislature has
19 designated school board meetings as limited public fora, i.e.
20 fora open to the public in general, but limited to comments
21 related to the school board's subject matter. Cal. Gov. Code §
22 54954.3 (West 2005); Cal. Educ. Code § 35145.5 (West 2005); see
23 Leventhal, 973 F. Supp at 957; Baca v. Moreno Valley Unified Sch.
24 Dist., 936 F. Supp. 719, 729 (C.D. Cal. 1996). The government
25 may impose content neutral regulations on speech in limited
26 public fora if they are reasonable time, place, or manner
27 restrictions. See Perry, 460 U.S. at 46. The government may
28 /////

1 only impose content based prohibition is they are "narrowly drawn
2 to effectuate a compelling state interest." Id.

3 Plaintiff alleges that on numerous occasions he was
4 restricted from placing the QSEP on the agenda and presenting the
5 QSEP at open school board meetings because of his viewpoint.
6 "The public's right to speak at open school board meetings
7 includes the right to place school matters on the agenda of those
8 meetings." Leventhal, 973 F. Supp. at 962 n. 7 (citing Cal.
9 Educ. Code § 35145.5). Because plaintiff has alleged that
10 defendants have restricted his speech in a limited public forum
11 on the basis of its content, plaintiff has sufficiently pled a
12 claim for violation of his First Amendment Right to free speech.⁵
13 Defendants' motion is DENIED.

14 **2. Plaintiff's Petition Rights**

15 Plaintiff alleges that defendants deprived him of his
16 constitutional rights to petition and instruct the government.
17 The First Amendment protects citizens' rights to petition the
18 government for redress of grievances. See Smith v. Arkansas
19 State Highway Employees, Local 1315, 441 U.S. 463, 464 (1979);
20 Evers v. County of Custer, 745 F.2d 1196, 1204 (9th Cir. 1984).
21 "[T]he right to petition extends to all departments of the
22 government, including the executive department, the legislature,
23 agencies, and the courts." White v. Lee, 227 F.3d 1214, 1232

24 /////

25
26 ⁵ To the extent that defendants argue that there is a
27 sufficient justification for restricting plaintiff's speech, they
28 may later assert such a compelling government interest. However,
the assertion or sufficiency of such a government interest cannot
be evaluated at this stage of the litigation.

1 (9th Cir. 2000). However, this right to petition is not
2 absolute.

3 [The] right to petition government afforded by the
4 First Amendment does not include the absolute right to
5 speak in person to officials. Where written
6 communications are considered by government officials,
denial of a hearing does not infringe upon the right to
petition. The right to petition government does not
create in the government a corresponding duty to act.

7 Prestopnik v. Whelan, 253 F. Supp. 2d 369, 375 (N.D.N.Y. 2003)

8 (no violation where a teacher's attorney was given the
9 opportunity to submit her complaint in writing); see Walker-
10 Serrano v. Leonard, 168 F. Supp. 2d 332, 347 (M.D. Pa. 2001) (no
11 violation where plaintiff elementary school student was not
12 allowed to pass petitions to students but was afforded other
13 avenues).

14 Plaintiff alleges that defendants infringed upon his First
15 Amendment right to petition in denying him the opportunity to
16 place items on the school board agenda for discussion. The right
17 to petition does not require that plaintiff be given an
18 opportunity to speak publicly about his petition nor that the
19 government act upon his petition. See Prestopnik v. Whelan, 253
20 F. Supp. 2d at 374; Walker-Serrano, 168 F. Supp. 2d at 347.

21 Plaintiff sent numerous letters to the board regarding the QSEP.
22 (Id. ¶¶ 17, 19, 22, 24, 28). Defendants responded to these
23 letters. (Id. ¶¶ 18, 20, 23, 25). Moreover, on May 4, 2004,
24 plaintiff had the opportunity to publicly debate the QSEP. (Id.
25 ¶ 25.) While plaintiff alleges that the Board did not vote on
26 the adoption of the QSEP, that inaction does not violate
27 plaintiff's constitutional rights. "[T]he First Amendment does

28 /////

1 not impose any affirmative obligation on the government to
2 listen, [or] to respond." Smith, 441 U.S. at 465.

3 Plaintiff alleges that he made written requests and
4 complaints to defendants, that he discussed the situation in
5 person with individual defendants, and that he publicly presented
6 the QSEP at a board meeting. The facts alleged by plaintiff
7 demonstrate that there were opportunities to petition the
8 government, albeit not in the forum that plaintiff desired.
9 Therefore, plaintiff's complaint fails to state a claim for a
10 violation of his right to petition at defendant's school board
11 meetings.

12 Plaintiff further claims that his right to petition was
13 violated when he was not permitted to discuss the QSEP at CIT
14 meetings. (TAC ¶ 29.) Specifically, Severson told plaintiff and
15 others that they would not be permitted to discuss the QSEP at a
16 CIT meeting. (Id. ¶ 36.) However, Severson offered to meet with
17 plaintiff personally to discuss the QSEP. (Id. ¶ 34.) Because
18 plaintiff alleges facts that demonstrate that he was given an
19 avenue to petition the government, his constitutional right was
20 not violated. See Walker-Serrano, 168 F. Supp. 2d at 347.

21 Under Doe v. United States, 58 F.3d 494, 497 (9th Cir.
22 1995), in dismissing for failure to state a claim under Rule
23 12(b)(6) "a district court should grant leave to amend even if no
24 request to amend the pleading was made, unless it determines that
25 the pleading could not possibly be cured by the allegation of
26 other facts." Since the court has found that plaintiff's own
27 allegations demonstrate that he was given avenues to petition the
28 government, he could only cure this pleading by denying his own

1 allegations. Thus, Defendant's motion is GRANTED without leave
2 to amend.

3 **3. Plaintiff's Free Exercise and Establishment Clause**
4 **Rights⁶**

5 Plaintiff asserts that defendants' restriction of his
6 participation in meetings, failure to give full review of his
7 QSEP, and failure to remedy violations of his constitutional
8 rights violate the Establishment Clause of the United States
9 Constitution. The Establishment Clause provides: "Congress shall
10 make no law respecting an establishment of religion"
11 U.S. Const. amend. I, cl. 1. The prohibition of the
12 Establishment Clause applies to state governments through the
13 Fourteenth Amendment. Everson v. Board of Education, 330 U.S. 1,
14 8 (1947). According to the Supreme Court,

15 the Establishment Clause [has come] to mean
16 that government may not promote or affiliate
17 itself with any religious doctrine or
18 organization, may not discriminate among
19 persons on the basis of their religious
20 beliefs and practices, may not delegate a

21 ⁶ Plaintiff brings a claim for relief under § 1983 for
22 violations of his rights under the Establishment and Free
23 Exercise clauses of the First Amendment. It is unclear from the
24 face of the complaint whether plaintiff intended to bring claims
25 under both of these clauses separately. Moreover, in his
26 opposition papers, plaintiff incorporates his argument relating
27 to the Establishment Clause in his argument relating to the Free
28 Exercise Clause and alleges the same violations as under his
Establishment Clause claim. Specifically, plaintiff alleges that
defendants do not allow Christian citizens to participate in
public debates and public policy-making to the same extent as
non-Christians. Because this court cannot discern how these
violations prevent plaintiff from exercising his religion, the
court will address these violations under only the Establishment
Clause. See Braunfeld v. Brown, 366 U.S. 599 (1961) (finding no
Free Exercise violation where the disputed legislation did not
criminalize the holding of any religious belief or opinion, did
not force anyone to embrace any religious belief, or say or
believe anything in conflict with his religious tenets); see also
Johnson v. Robinson, 415 U.S. 361, 383-86 (1974).

1 governmental power to a religious
2 institution, and may not involve itself too
3 deeply in such an institution's affairs.

3 County of Allegheny v. ACLU, 492 U.S. 573, 590-91 (1989)
4 (footnotes omitted), quoted in Alvarado v. City of San Jose, 94
5 F.3d 1223, 1231 (9th Cir. 1996).

6 As decreed by the Supreme Court, and followed in the Ninth
7 Circuit,⁷ claims brought under the Establishment Clause are
8 analyzed under the three-part "Lemon Test." See Lemon v.
9 Kurtzman, 403 U.S. 602 (1971). Under the Lemon analysis, a
10 statute or practice which touches upon religion must (1) have a
11 secular purpose; (2) must neither advance nor inhibit religion in
12 its principal or primary effect; and (3) must not foster an
13 excessive entanglement with religion. County of Allegheny, 492
14 U.S. at 592; see Lemon, 403 U.S. at 612-13.

15 Defendants' argument under the establishment clause fails to
16 address any of plaintiff's allegations in his claim for relief.
17 Instead, defendants assert, generally, that they had discretion
18 to reject plaintiff's QSEP and maintain the current science
19 curriculum. Plaintiff does not claim that defendants did not
20 have such discretion. Rather, plaintiff alleges that defendants
21 violated his First Amendment constitutional rights by exhibiting
22 hostility towards him and his beliefs. (TAC ¶¶ 16, 28, 36-37,
23 43-47). Plaintiff alleges that defendants' actions were
24 motivated by "religious animus" and constituted government
25 disapproval of Christian religious beliefs. (Id.)

26
27 ⁷ See Brown v. Woodland Jt. Unif. Sch. Dist., 27 F.3d 1373,
28 1378 (9th Cir. 1994); Kreisner v. San Diego, 1 F.3d 775, 780
(9th Cir. 1993).

1 "In applying the purpose test, it is appropriate to ask
2 whether government's actual purpose is to endorse or disapprove
3 of religion." Wallace v. Jaffree, 472 U.S. 38, 56 (1985). In
4 this case, the answer to this inquiry is dispositive and the
5 court need not address the second and third elements of the Lemon
6 test. See id.; Lynch v. Donnelly, 465 U.S. 668, 690 (1984)
7 (O'Connor, concurring) ("The purpose prong of the Lemon test
8 requires that a government activity have a secular purpose.").
9 Plaintiff has alleged that defendants inter alia restricted his
10 participation at meetings, did not accord his QSEP appropriate
11 review, and refused to remedy the denial of his constitutional
12 rights based on their "religious animus." (TAC ¶¶ 16, 28, 36-37,
13 43-47). On a motion to dismiss, the court may only evaluate the
14 allegations on the face of the complaint. See Fed. R. Civ. Proc.
15 12(b). Reading the complaint in the light most favorable to the
16 plaintiff and drawing all reasonable inferences therefrom,
17 plaintiff has sufficiently alleged that the primary purpose of
18 the defendant's actions was to disapprove of plaintiff's actual
19 or perceived religious beliefs. Defendants' *alleged* actions do
20 not pass the secular purpose test. Thus, plaintiff has
21 sufficiently pled a violation of his First Amendment rights under
22 the Establishment Clause. Defendants' motion is DENIED.

23 **4. Plaintiff's Equal Protection Rights**

24 Plaintiff alleges a claim for relief against defendants
25 under § 1983 for violations of the Equal Protection Clause. (Id.
26 ¶ 71). Defendants allege that plaintiff has failed to properly
27 allege any "suspect classifications" necessary for stating a
28 claim for violation of his equal protection rights.

1 The Equal Protection Clause of the Fourteenth Amendment
2 provides that no State shall "deny to any person within its
3 jurisdiction the equal protection of the laws." U.S. Const.
4 Amdt. 14, § 1. This is "essentially a direction that all persons
5 similarly situated should be treated alike." City of Cleburne v.
6 Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) (citing
7 Plyler v. Doe, 457 U.S. 202, 216 (1982)). "The guarantee of
8 equal protection is not a source of substantive rights or
9 liberties, but rather a right to be free from discrimination in
10 statutory classifications and other governmental activity."
11 Williams, 367 F. Supp. 2d at 1270 (citing Harris v. McRae, 448
12 U.S. 297, 322 (1980)). "[D]iscrimination cannot exist in a
13 vacuum; it can only be found in the unequal treatment of people
14 in similar circumstances." Id. (quoting Attorney General v.
15 Irish People, Inc., 684 F.2d 928, 946 (D.C. Cir. 1982)). Under
16 the liberal notice-pleading standard, plaintiff need only allege
17 a broadly identified class of similarly situated persons for an
18 equal protections claim. See Williams, 367 F. Supp. 2d at 1271
19 (finding a broadly identified class was sufficient to put
20 defendants on notice where plaintiff sufficiently alleged that he
21 was treated differently from other teachers because he is an
22 "avowed Christian").

23 Again, the court must accept as true all factual allegations
24 made by plaintiff on a motion to dismiss. Plaintiff states that
25 he is a Christian, whom defendants pejoratively refer to as a
26 "right-wing evangelical Christian fundamentalist." (TAC ¶ 16).
27 He alleges that defendants have restricted him and members of the
28 public from exercising their rights under the First and

1 Fourteenth Amendment because of "an intent to discriminate
2 against Caldwell and other citizens on the basis of their
3 viewpoint and/or their religious beliefs and affiliations." (Id.
4 ¶¶ 16, 28, 37). Plaintiff further alleges that "defendants are
5 hostile to Caldwell's actual and perceived religious beliefs and
6 affiliations and . . . have been motivated and continue to be
7 motivated by such antireligious hostility in depriving Caldwell
8 of constitutional rights." (Id. ¶ 28). Plaintiff claims that
9 the defendants' "pattern and practice" violate the Equal
10 Protection Clause.

11 Plaintiff has alleged that he is treated differently from
12 other members of the community based upon his actual or perceived
13 religious beliefs. In the context of the complaint, plaintiff's
14 allegations identify the class of similarly situated persons as
15 those parents and members of the community who participate in
16 school board meetings, the curriculum instruction team, and
17 challenges to the instructional materials. Under the liberal
18 notice-pleading standard, these allegations are sufficient. See
19 Williams, 367 F. Supp. 2d at 1271. Defendants' motion is DENIED.

20 **5. Plaintiff's Procedural Due Process Rights**

21 Plaintiff further alleges that defendants have subjected him
22 to a deprivation of his rights to procedural due process under
23 the Fourteenth Amendment. Specifically, plaintiff alleges that
24 defendants, "motivated by their false presumptions about his
25 perceived religious and political viewpoints," engaged in a
26 "pattern and practice of preventing plaintiff from exercising his
27 constitutional rights. (TAC ¶ 16). Plaintiff argues that
28 defendants acted upon an unwritten, unconstitutionally vague

1 policy in deciding what matters would be placed on the meeting
2 agendas. (See id. ¶ 49).

3 To allege a procedural due process claim on the basis of a
4 vague regulation, a plaintiff must first allege a deprivation of
5 a constitutionally protected interest, and second, allege that
6 the deprivation was achieved by means of a constitutionally vague
7 policy or procedure. Zinerman v. Burch, 494 U.S. 113, 125
8 (1990); Williams, 367 F. Supp. 2d at 1274. As demonstrated
9 above, plaintiff has sufficiently alleged deprivations of his
10 First Amendment rights in his complaint. Plaintiff alleges that
11 all of the adverse conduct by defendants was performed pursuant
12 to "established policies, practices, or customs." (TAC ¶ 49).
13 Again, under a liberal notice-pleading standard, plaintiff's
14 allegations are sufficient because they apprise defendants of the
15 basis for the claims asserted against them. Taking plaintiff's
16 allegations as true and deriving all reasonable inferences
17 therefrom, plaintiff has alleged that the deprivation of his
18 constitutional rights were achieved by unwritten policies and
19 practices that are unconstitutionally vague on their face or as
20 applied to plaintiff. Defendants motion is DENIED.

21 **D. Procedural Defects**

22 Defendants allege procedural defects with plaintiff's TAC
23 under Rule 8(a). Rule 8(a) requires the complaint to provide "a
24 short and plain statement of the claim showing that the pleader
25 is entitled to relief." Plaintiff has amended his complaint to
26 sufficiently allege his claims for relief as well as the factual
27 basis for those claims. Therefore, the TAC meets the
28 requirements of Rule 8(a). Defendant's motion is thus DENIED.

1 Defendants also allege that plaintiff's TAC violates Rule
2 10(a). Defendants point to plaintiff's addition of the 10 "Doe
3 defendants" as well as the addition of the "official capacity"
4 designation following the names of the individual defendants.
5 Plaintiff did not previously seek leave to amend his complaint to
6 add the new defendants or the new designation. Because plaintiff
7 was not granted leave to amend, the 10 Doe defendants as well as
8 the "official capacity" designations of the individual defendants
9 are STRICKEN.

10 **E. Leave to Amend**

11 Pursuant to Rule 15(a), "leave [to amend] is to be freely
12 given when justice so requires." "[L]eave to amend should be
13 granted unless amendment would cause prejudice to the opposing
14 party, is sought in bad faith, is futile, or creates undue
15 delay." Martinez v. Newport Beach, 125 F.3d 777, 785 (9th Cir.
16 1997). Though the court has stricken plaintiff's additions to
17 the caption because plaintiff failed to properly seek leave to
18 amend, plaintiff's TAC does allege claims against the 10 Doe
19 defendants as well as the individual defendants "in their
20 official capacity." Therefore, plaintiff is granted leave to
21 amend the third amended complaint for the limited purpose of
22 amending the caption to include the 10 Doe defendants and the
23 "official capacity" designation following the names of the
24 individual defendants.

25 **F. Request for Sanctions, Attorneys' Fees, and Costs**

26 Defendants request sanctions, attorneys' fees, and costs,
27 alleging that the TAC is "totally without merit, frivolous, and
28 in violation of the Federal Rules of Civil Procedure." (Def.'s

1 Mot. at 47). To the contrary, plaintiff's TAC has alleged
2 colorable claims under § 1983. Therefore, defendants' request is
3 DENIED.

4 **CONCLUSION**

5 1. Defendants' motion to dismiss plaintiff's claims against
6 Roseville Joint Union High School District is GRANTED with
7 prejudice because such claims are barred by the Eleventh
8 Amendment.

9 2. Defendants' motion to dismiss plaintiff's state law
10 claims against all individual defendants is GRANTED with
11 prejudice because such claims are barred by the Eleventh
12 Amendment.

13 3. Defendant's motion to dismiss plaintiff's claims for
14 nominal damages is GRANTED with prejudice because such claims are
15 barred by the Eleventh Amendment.

16 4. Defendant's motion to dismiss plaintiff's § 1983 claims
17 is:

- 18 a. DENIED with respect to plaintiff's First Amendment
19 free speech claims;
- 20 b. DENIED with respect to plaintiff's Free Exercise
21 and Establishment Clause claims;
- 22 c. DENIED with respect to plaintiff's Equal
23 Protection Clause claims;
- 24 d. DENIED with respect to plaintiff's procedural due
25 process claims;
- 26 e. GRANTED with prejudice with respect to plaintiff's
27 First Amendment right to petition claims.

28 /////

