Mathew D. Evans, Esq.--State Bar #78771
James B. Carr, Esq.--State Bar #53274
EVANS, WIECKOWSKI & WARD, LLP
745 University Avenue
Sacramento, California 95825
916/923-1600; FAX: 916/923-1616
jcarr@lomde.com

Attorneys for Defendants ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT; JAMES JOINER; R. JAN PINNEY; TONY MONETTI; STEVEN LAWRENCE; DONALD GENASCI; RONALD SEVERSON.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LARRY CALDWELL,

Plaintiff,

vs.

ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT, et al.,

Defendants.

_____/

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

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; FOR FAILURE TO STATE A CLAIM; AND FOR FAILURE TO STATE A SHORT AND PLAIN STATEMENT FOR RELIEF

[Rule 12(b)(1); Rule 12(b)(6); and Rule 8(a)]

DATE:	**September 23, 2005**
TIME:	**10:00 a.m.**
COURTROOM:	**2**
TRIAL:	**None Set**

I.

STATEMENT OF THE CASE

The Plaintiff, LARRY CALDWELL (hereafter "Caldwell"), has filed a Third Amended Complaint (hereafter "TAC") against the Defendants, ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT, and individually named defendants, JAMES JOINER, R. JAN PINNEY, TONY MONETTI, STEVEN LAWRENCE, DONALD GENASCI, and RONALD SEVERSON, who are either members of the District's School Board, Superintendent of the District, Assistant or Deputy Superintendents, and/or are Principals of District High Schools.

Caldwell is asserting that he has suffered deprivation of his federal First Amendment Rights,

including free speech, free exercise of religion, establishment of religion, and right to petition, as well as violations of the Fourteenth Amendment , including equal protection, procedural due process and substantive due process, based on claims predicated on 42 U.S.C. § 1983. He is also apparently (and this is confusing due the lengthy and confusing manner in which his TAC is pled) asking the Court to adjudicate his California State Constitutional and statutory rights, pursuant to 42 U.S.C. § 1983. In addition, he has pled a California pendent lite cause of action for "taxpayer's relief" under California Code of Civil Procedure § 526a. He is seeking damages and prospective injunctive and declaratory relief from the Court.

The facts have been set forth in the District's moving papers [See: Motion to Dismiss, Pages 2-6, inclusive] and by the TAC [See: TAC Paras. 3-50, inclusive]. In the interests of judicial economy, the District will not attempt to restate all of the allegations ("facts") contained in the TAC, but will incorporate them by reference into the District's Reply Brief. In summary, Caldwell is asserting that he has suffered a violation of his First Amendment Rights to Freedom of Speech, to the Free Exercise of his Christian religious faith, to the Establishment of a Religion (evolution) by the District and his Right to Petition the government. In addition, he alleges that he has suffered a Denial of Equal Protection, Procedural and Substantive Due Process, under the Fourteenth Amendment.

His main contention, from his Opposition Brief [See: OB, Pages 10, Lines 9-18; Page 12, Lines 5-8; Page 13, Lines 1-3, 12-13; Page 14, Lines 1-5] is that he has been denied the right to "participate on an equal basis with other citizens in public debates on science curriculum and instructional materials in . . . designated forums and procedures for such public debates by adult citizens . . . ." He is claiming that this was done because of his religious and political viewpoints regarding creation science and its exclusion from the District's science and biology curriculums. [OB, Page 10, Lines 9-19.]

Mr. Caldwell argues that this is a "classic case of viewpoint discrimination and religious discrimination. [OB, Page 12, Lines 5-7; Page 13, Lines 1-3, 12-13.] He also argues that the school board meetings and district wide instructional curriculum meetings are "unlimited public forums" allowing him the right to engage in unlimited political and religious debate. [OB, Pages 3, Lines 1-13; Page 14, Lines 1-5.]

Mr. Caldwell disingenuously argues that the TAC has nothing to do with the fact that the District, on a 3 to 2 School Board vote, refused to adopt proposed Quality Science Education Policy (hereafter "QSE Policy") into the official school science and biology curriculum, or that he is seeking injunctive and declaratory relief to have this Court order the District to adopt the QSE Policy into the District's science and biology curriculums. [OB, Page 10, Lines 1-8.] To listen to Mr. Caldwell's arguments, this case is only about a Christian being denied his rights to advocate his "religious and political beliefs" regarding the inclusion of creationist science into the public school science curriculum in the District; however, the declaratory and injunctive relief that he is requesting in the TAC belies his arguments, and he is in fact alleging that the District subjected him to both political and religious "viewpoint discrimination," because it did not adopt his QSE Policy into the school district's science and biology curriculums.

The Court should note that the QSE Policy is a form of alternative religious science, which seeks to dispute and counter the scientific teaching of evolution, and which Caldwell has tirelessly advocated be included in the District's High School Advanced Placement Science and Biology Curriculum. [See: TAC, Para. Nos. 14-50, inclusive.] Caldwell did in fact make many public and private lobbying efforts in support of his QSE Policy before the District's Board and in various other community meetings involving the public impute into the establishment of the District's curriculum, during the period 2003 thorough 2004. [TAC, Para. Nos. 14-50, inclusive.]

The District eventually voted to rejected inclusion of the QSE Policy into its science and biology curriculum, and Caldwell is upset by the rejection of his QSE Policy. This suit has been filed by Caldwell, not because any of his "constitutional rights" were violated, but because his alternative QSE Policy was not adopted by the District. He now seeks to have this Court inject itself into the legislative function of adoption of a high school science curriculum, which has been delegated to the District by the California State Department of Education and by state statutes, as well as provided for by the California Constitution, and which is in the discretion of the District.

The District has filed its Motion to Dismiss, based on Rule 12(b)(1) and Rule 12(b)(6). In the alternative, the District has requested a More Definite Statement pursuant to Rule 8(a), seeking to have the Court order Caldwell to file a further amended complaint that meets the requirement of a short,

plaint and concise statement. The District has also raised other procedural issues, pursuant to Rule 10(a), regarding amendments as to the capacities of named defendants and the inclusion of Doe Defendants in a 42 U.S.C. § 1983, without leave of Court and in violation of law. Mr. Caldwell filed his Opposition Brief with the Court on September 9, 2005. The District hereby submits this Reply Brief in support of its Motion to Dismiss.

II.

LEGAL ARGUMENT

A. The Relief Sought By Caldwell Is Moot.

Mr. Caldwell has in fact gotten to present the QSE Policy to the District. [OB, Page 14, Lines 16-28; Page 15, Lines 1-11] This matter was in fact presented to the District's Board, and it made a discretionary decision to reject inclusion of the QSE Policy in the high school science and biology curriculum in 2004. Caldwell's Opposition Brief admits this fact, and the numerous and endless "factual" allegations contained in the TAC belie his arguments that he was subjected to "view point discrimination" and/or denied his free speech rights to lobby and advocate for the inclusion of his QSE Policy into the District's high school curriculum. The TAC clearly admits by its allegations that Mr. Caldwell in fact was exercising his First Amendment Rights to Free Speech (both political and religious) and his Right to Petition the government. His claims are now moot.

He was provided the same, if not more free speech rights regarding his political and religious view points, than any other parents, member or citizen of the District. [TAC, Pages 5-19, Para. Nos. 14-53, inclusive.] He was not denied the Equal Protection of the law under the Fourteenth Amendment. His claims that he was discriminated against because of his religious faith is not supported by the facts, as alleged in the TAC and/or as argued in the Opposition Brief.

Caldwell was not denied his free speech rights to express his ideas and beliefs regarding his QSE Policy. He participated in board meetings and in the community impute curriculum meetings. There has been no denial of Caldwell's free speech rights under the First Amendment, or a denial of equal protection or due process under the Fourteenth Amendment. There is nothing for the Court to enjoin, declare or adjudicate. Caldwell is not entitled to any type of prospective injunctive or declaratory relief, and by his own admissions in the Opposition Brief, he is not seeking damages for

any past violations of any of his federal constitutional rights. [OB, Page 10, Lines 1-18.]

There is absolutely no basis for any prospective equitable relief, because the TAC does not allege that there are any continuing or future violations of Mr. Caldwell's federal constitutional rights. Thus, there is no basis for the exercise of Article III jurisdiction regarding the future exercise of federal constitutional rights, because such equitable relief cannot be based upon past conduct; there is no basis for relief for any alleged past violations of federal constitutional rights, because the plaintiff has admitted in his Opposition brief that he his not seeking damages for any past conduct; and the issue of the adoption of the QSE Policy into the District's high school science curriculum is now moot.

B. The District Board Had Discretion To Adopt A Science Curriculum.

Mr. Caldwell's real complaint is that the District did not adopt his QSE Policy, not that he was prevented from politically expressing his views regard this policy or advocating for its inclusion in the high school science curriculum. This discretionary legislative act is not a violation of Caldwell's First Amendment right to free political speech, right to practice (exercise) his religion, right to petition the government, nor does it constitute the establishment of a religion.

The District was acting pursuant to California constitutional authority. The California Constitution, Article IX, Sec. 7 (adopted in 1879) provides in pertinent part that the Local Boards of Education shall adopt a series of textbooks for the use of the common schools within their respective jurisdictions. [People v. Board of Education of Oakland (1880) 55 Cal. 331, 333-334; Engelmann v. State Board of Education (1991) 2 Cal. App. 4th 47, 53-54.] The governing board of every school district shall enforce in its schools the courses of study and the use of textbooks and other instructional materials prescribed and adopted by the proper authority. [California Education Code § 51050] This is a mandatory duty which the District and its Board Members (Individually Named Defendants) were required to follow. [Cal. Government Code § 815.6.]

The federal courts have held that decisions as to how to allocate scarce resources, as well as what curriculum to offer or require, are uniquely committed to the discretion of local school authorities. [Leebaert v. Harrington and FairField Board of Education, 332 F. 3d 134, 141 (2nd Circuit 2003).] The Second Circuit also expressly held that **"a parent had no fundamental**

constitutional right" to tell the School Board what his or her child will be taught, or not taught, or to pick and chose from the courses offered in the curriculum. [Ibid. 141.]

Also, the United States Supreme Court recognizes that school boards have broad discretion in the management and operation of school affairs. [Board of Education v. Pico, 457 U.S. 853, 863 (1982); Edwards v. Aguillard, 482 U.S. 578, 583 (1987); Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 267, 273, (1988)] In addition, it is the policy of the Supreme Court that federal courts should usually refrain from prematurely interfering with the educational policy decision of school boards and administrators. [San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 42 (1973); Selman v. Cobb County School District, 2005 U.S. LEXIS 432 * 30-31 (January 13, 2005).] The Ninth Circuit is of the same accord. [See: Downs v. Los Angeles Unified School District, 228 F. 3d 1003, 1012 (9th Circuit, 2000).]

Therefore, Mr. Caldwell had no fundamental constitutional right to have his QSE Policy adopted by the District. He was able to express his views, both orally and in writing, to the District and to have the QSE Policy considered by the School Board, during the period 2003 through 2004. [See: TAC, Para. Nos. 14-53, inclusive; See: OB, Pages 10-17, inclusive.] Caldwell exercised all the First Amendment Freedom of Speech Rights that he, or any other citizen of the School District, was constitutionally entitled to exercise. There was no "view point discrimination" or any violation of Caldwell's freedom of speech rights under the First Amendment.

C. The QSE Policy Cannot Be Imposed On The District.

1. This Would Have Been the Establishment of an Impermissible Religious Viewpoint.

Mr. Caldwell's expectation in bringing this lawsuit is that he is going to persuade this Court to order the District to adopt his QSE Policy. This, itself, would be a violation of the Establishment Clause of the First Amendment. The District is prohibited from imposing a ***"pall of orthodoxy"*** upon the classroom curriculum, which implicated the state in the ***"propagation of a particular religious or ideological viewpoint."*** [Pratt v. Ind. Sch. District No. 831 of Forest Lake, 670 F. 2d 771, 776 (8th Cir., 1982).]

Mr. Caldwell, in the guise of the QSE Policy is, himself, attempting to impose his religious

view-point upon the students within the District. He claims that the QSE Policy is a "scientific theory," when in reality it is a "creationist religious viewpoint" which attacks the scientific theory of evolution. To have adopted the QSE Policy would have in fact been the adoption of a religious view-point by the District, and this would have involved excessive entanglement with a religious view-point in violation of the **Lemon Test**. [Lemon v. Krutzman, 403 U.S. 602, 612-613 (1971).] The United States Supreme Court has unequivocally held that while the belief in a divine creator of the universe is a religious belief, the scientific theory of evolution is not a religion, nor the teaching of religion. [Edwards v. Aguillard, 482 U.S. 578, 596-597.] The Ninth Circuit of the same accord. [Peloza v. Capistrano Unified School District, 37 F. 3d 517, 521-522 (9th Circuit, 1994).]

In Edwards v. Aguillard, supra 596-597, the Louisiana Creationism Act, which included the "Balance Treatment for Creation-Science and Evolution-Science," in the Public School Instruction Act, violated the Establishment Clause of the First Amendment. The Supreme Court expressly found that the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. [Edwards, supra 593.] It further found that this alternative religious science program severed no secular purpose, but was specifically enacted to provide persuasive advantage to a particular religious doctrine. [Edwards, supra 592.]

Therefore, the refusal of the District to adopt the QSE Policy into the science curriculum was not the ***"establishment of religion"*** that is claimed by Caldwell, and the TAC fails as a matter of law to state any claim for a violation of the ***"Establishment Clause"*** of the First Amendment. [Lemon v. Krutzman, 403 U.S. 602, 612-613 (1971).] To the contrary, to have adopted the QSE Policy would have violated the California State Constitution, Article IX, § 8, and would have been the establishment of Caldwell's religious view-point as part of the science and biology curriculum.

2. The Board had a Duty to Maintain an AP Program.

The Board of Education (the District) had a duty to the community and to its students to provide an Advanced Placement (AP) program for its science and biology curriculum that wold allow the students in the District to compete nationally with all other high school students in the area of science and biology for college scholarships and college admissions, and to have adopted the Caldwell QSE Policy (alternative "creationist science" to Darwin's Theory of Evolution) would have placed

the students in the Roseville High School District at a competitive disadvantage with students nation-wide, because the QSE Policy is not a true accepted scientific theory utilized by the nation-wide Advanced Placement program.

The District was entitled to exercise its discretion provided by the California Constitution and the California State Legislature. There was no violation of the Establishment Clause of the First Amendment based on the use of the scientific theory of evolution in the district's high school curriculum; there was no establishment of a religion by the District, nor did it in any way infringe upon Caldwell's free exercise of his religious rights under the First Amendment.

3 The District did not Violate the First Amendment Establishment Clause by Keeping Evolution Theory in the Science Curriculum.

The District in adopting the High School science and biology curriculum was following the mandates of California State law, which prescribes that the governing board of every school district shall enforce in its schools the courses of study and the use of textbooks and other instructional materials prescribed and adopted by the proper authority. [California Education Code § 51050.]

Likewise, California State law does provide for parent involvement and participation in the public schools, including involvement in activities and programs and collaboration, in order to improve public educational institutions; however, none of this statutory language is "mandatory," nor does it give parents (Larry Caldwell) "veto power" over the selection of the High School science and biology curriculum in the Roseville Joint Unified High School District. The parent involvement statute does not repeal, either expressly or by implication, the mandatory duties given to the School Board and its officials and employees, including their discretion, regarding selection of the High School science and biology curriculum. [Cal. Education Code § 51050 , § 51054, § 51100, § 51102 and § 51120.]

In Brown v. Woodland Joint Unified School District, 27 F. 3d 1373 (9th Circuit 1994) the Ninth Circuit Court of Appeals affirmed the summary judgment entered by Judge, William B. Shubb, (EDCA) dismissing a 42 U.S.C. § 1983 claim against the Woodland School District, wherein the plaintiff claimed that the use of certain materials in the classroom activities relating to witches, involved the teaching of witchcraft and that the District was promoting the religion of witchcraft as

part of the School District's curriculum.

The Ninth Circuit applied the **Lemon Test** and determined that there was no endorsement of witchcraft as a religion and no violation of the First Amendment Establishment Clause. In addition, it held that the California State Constitution, Article IX, § 8, provides that no sectarian or denominational doctrine shall be taught, or instruction thereon be permitted, directly or indirectly, in the common schools of the state. [Brown, supra at 1385.]

The maintaining of the scientific theory of evolution in the District's science and biology curriculum (and the refusal to adopt the QSE Policy) is not the imposition of a religion. There was no violation of the Establishment Clause of the First Amendment, nor a violation of Caldwell's right of free exercise of his particular Christian faith, as a matter of law. [Edwards v. Aguillard, supra at 596-597; Peloza v. Capistrano Unified School District, supra at 521-522.]

Thus, any claim for relief by Caldwell that asks the Court for injunctive or declaratory relief to order the District change its science and biology curriculum to either eliminate the theory of evolution, or to adopt the QSE Policy, would violate the Establishment Clause of the United States Constitution , as well as violate the California State Constitution, Article IX, § 8. Thus, Caldwell is not entitled to any relief (whether it is for damages, declaratory relief and/or injunctive relief) as a matter of law, pursuant to 42 U.S.C. § 1983.

D. The School Board Public Agenda Meetings Are Not Public Forums.

The TAC asks this Court to find that School Board public meetings be declared to be ***"unlimited traditional public fora"***, allowing unlimited political debate and discussion on any topic by any citizens with no limitation by the District Board, and/or to find that the public board meetings are ***"designated public fora"***, created by purposeful and intentional governmental action permitting a nontraditional public forum to become open for public discourse. [Cornelius v. NAACP Legal Defense & Ed. Fund., Inc., 473 U.S. 788, 802 (1985).]

This is not the law of California, because these public school board meetings are nonpublic fora, wherein the government can impose reasonable restrictions as to the determination of agenda items, time limits for public comments and can require order be preserved during the School Board meetings. They are not open for any "political" debate that a member of the public may want to

engage in. The California Brown Act requires that these Board Meeting be open to the public and proper notice be given; however, the Board does have the power to determine the agenda items in advance, and the claim by Caldwell that he can place whatever item he wants on the Board Agenda is not an accurate of California State law.

The Court's attention is requested to a very recent decision of the California Second District Court of Appeal, Division Six, entitled Coalition of Labor, Agriculture &Business, et al. v. County of Santa Barra Board of Supervisors (May 10, 2005) 129 Cal. App. 4th 205, 208-209, wherein the Court held that although California Government Code § 54954.3(a) requires the Board to allow members of the public to address it before or during consideration of an agenda item, this law does not require the Board to allow members of the public to address it on ***"whether to place an item on the agenda.***" The Court found that there is simply nothing in the Brown Act that requires such public comment. [Ibid. 209.] The Court must defer to state law on this issue.

Therefore, Caldwell's claims that he had a constitutional (or statutory) right to place whatever item he wanted to on the School Board's public session agenda for the September 2003 School board meeting is without merit. Caldwell has no such statutory or state constitutional right. Also, the issue of the general "constitutionality" of the Brown Act cannot be considered or decided by this federal District Court in this 42 U.S.C. § 1983 action, because this is an issue for the California courts and it is not properly before this federal court, nor is it necessary in order for the Court to rule on the defendant's Motion to Dismiss.

Also, Caldwell's reliance on the case of Leventhal v. Vista Unified School District (SDCA, 1997) 973 F. Supp. 951, does not support his 42 U.S.C. § 1983 claims raised herein. The Leventhal case is distinguishable, because it involved a personnel issue and the attempted limitation of the topic of a personnel issue from public comment at an open Board Meeting, and involved a Board rule that prohibited any negative public criticism of the Board members related to personnel issues. Also, the ***"avoidance doctrine"*** was not raised by the defendants in that case; however, the ***"avoidance doctrine"*** has been raised in the District's Motion to Dismiss. The Caldwell case involves the ***"discretionary adoption"*** of the Roseville High School's science and biology curriculum, not a "personnel issue" and/or any "prior restraint" on public criticism of Board Members.

1. The Court Should Decline to Consider Caldwell's State law Claims.

If Caldwell' SAC is actually seeking to have the Brown Act declared unconstitutional, and if he is actually seeking ***"prospective"*** injunctive relief based on the Brown Act, then the Court should apply the ***"avoidance doctrine"*** and decline to hear Caldwell's state law claims regarding the Brown Act. The Supreme Court has held that the Eleventh Amendment bars federal courts from granting injunctive relief against state officials for violations of state law. [Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984); Ashker v. California Dept. of Corrections, 112 F. 3d 392, 394 (9th Cir. 1997).]

Thus, the Courts lacks jurisdiction to hear Caldwell's state law claims for any injunctive or declaratory relief related to the Brown Act. This would also be the applicable to any of Caldwell's injunctive or declaratory that may be predicated upon the Cal. Education Code. As indicated above, Caldwell has in fact presented his views to the School Board on the QSE Policy and his anti-evolution view, and he continues to do so to the present time by presenting written statements to the Board and participating in public discussions at School Board meetings. Thus, there are no continuing or present violation of any constitutional or California statutory rights subject to prospective injunctive relief or requiring any declaratory relief.

2. The Board Meetings are not Available as Unlimited Public Fora Pursuant to California law.

Even if the public session Board Meetings are considered "limited public fora," the Board has the right to limit debate to only "school board business." [City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).] The members of the public, including Caldwell, could speak as to the topic's on the Board Agenda and also during time for open public comment. This is prescribed by California statutes, i.e. the Brown Act and the Education Code, and it does not infringe on Caldwell's First Amendment right to free speech, whether it is political or religious speech, and there is no "prior restraint" nor any "view-point" discrimination, nor any violation of the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

The regulations imposed by the District (pursuant to the Brown Act and the Education Code) relating to how the School Board agendas and public discussion and comments session were conduced

were reasonable in light of the purpose served by the nature of the forum, and they were all viewpoint neutral. [Lamb's chapel v. Center Moriches Union Free School District, 508 U.S. 384, 392-393 (1993).]

The California Third District Court of Appeal, in Reeves v. Rocklin Unified School District (2003) 109 Cal. App. 4th 652, recently ruled related to the claims of outsiders that they be given "unlimited free access to high school campuses to distribute literature" (an equivalent First Amendment free speech right) that "school campuses are not public forms." [Ibid . 661.] The courts have found public schools to be "nonpublic forums." [Grattan v. Board of School Comm'rs of Baltimore City, 805 F. 2d 1160 (4th cir. 1986).] The California Court of Appeal in DiLoreto v. Board of Education (1999) 74 Cal. App. 4th 267, 281, stated that Downey High School was a "nonpublic forum" as a matter of law and concluded that the Board of Education retained the right to regulate access and content. [See: Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37, 44 (1983); International Soc'y for Kristna Consciousness v. Lee, 505 U. S. 672, 679-680 (1992); Cornelius, supra at 802-804.]

Therefore, the public session meetings of the Roseville High School Board are ***"nonpublic"*** forums, and/or at the most, ***"limited public fora,"*** where there is no constitutional right to exercise ***"unlimited free speech"*** as to any topic, as is contended by Caldwell. The California Brown Act and appropriate Education Code statutory provisions are not "unconstitutional," and they allow "reasonable" regulation (restriction) of the School Board's agenda items to school business items. The members of the public do not have an unlimited right to determine the school board agenda items, which is determined in the discretion of the School Board, pursuant to state law. [Coalition of Labor, Agriculture &Business, et al. v. County of Santa Barra Board of Supervisors, supra 209.]

Likewise, the public Board Meetings allow only "selective access" to members of the public to speak on school board business, not for "unlimited political or religious' free speech. [Arkansas Educational Television Commission v. Forbes, 523 U.S. 666, 679-680 (1998).] Thus, Caldwell cannot state any First Amendment free speech claims, or any claim of viewpoint discrimination, or prior restraint, because he did not have a fundamental constitutional right to unlimited political or religious free speech at the District's public Board Meetings, relating to public comment on the

adoption of the District's science and biology curriculum.

E. Eleventh Amendment Immunity Applies.

1. The District Entity.

The District is entitled Eleventh Amendment Sovereign Immunity, as raised in the District's moving papers. Even the Plaintiff's authorities admit this. In Leventhal, supra at 955, that court states:

> "As to the District itself, the Court agrees that the Eleventh Amendment bars the Plaintiffs' claims." [Citing: Cerrato v. San Francisco Community College District, 26 F. 3d 968, 976 (9thCir. 1994).] [Leventhal, supra 955.]

Thus, the District is entitled to dismissal from this case, as a matter of law.

In addition, the plaintiff has now alleged in the TAC that the individually named defendants, James Joiner, R. Jan Pinney, Tony Monetti, Steven Lawrence, Donald Genasci and Ronald Severson, were all acting only their "official capacities." For purposes of 42 U.S.C. § 1983 claims, when officials are sued in their "official capacities," they are treated as being the same as the public entity. Since Leventhal, supra, clearly holds that the District was entitled to sovereign immunity from suit in federal court, then the District and all of the individually named defendants (who are treated as part of the public entity) (no vicarious liability) are entitled to a dismissal based upon sovereign immunity.

2. The Public Officials.

The Plaintiff maintains that he can still sue the public officials for "prospective injunctive and declaratory relief," under the Ex Parte Young, 209 U.S. 123 (1908) exception to Eleventh Amendment Sovereign Immunity. [See: Seminole Tribe of Florida v. Florida,517 U.S. 44 (1996).] However, this exception applies if the suit ***only*** seeks prospective injunctive relief. [Ibid.]

However, the is ***"no present violation"*** of any federal law or the federal Constitution by the Defendants that the Court can order enjoined. The plaintiff has already obtained the relief he was seeking, which was to present and have his QSE Policy considered by the Board, which was voted upon by the full School Board and rejected on a three to two vote. Caldwell has gotten his relief. The QSE Policy was considered and rejected by the Board, and Board exercised its discretion under California law to adopt the District's science and AP biology curriculum for the 2004-2005 school year. Mr. Caldwell has been fully exercising his rights to present further information on this matter

to the board, by his continuing written and verbal presentations to the District.

There is nothing that the Court could order or enjoin at this time. As indicated above, the Court cannot intervene in the affairs of the District and order it to "un-adopt" its science and biology curriculum, or to now include the QSE Policy for the reasons set forth above that this would be ordering the District to adopt a religious viewpoint, in violation of the Establishment Clause of the First Amendment. [Edwards v. Aguillard, supra at 596-597; Peloza v. Capistrano Unified School District, supra at 521-522.]

3. The Court Lacks Jurisdiction.

This action has been inappropriately filed in Federal District Court in violation of the Sovereign Immunity of the State of California and its agents, including the District and its officials, officers and employees named herein, and in violation of the Eleventh Amendment. The District Court must dismiss this action, because it has no subject matter jurisdiction over these defendants. [Venegas v. County of Los Angeles (2004) 32 Cal. 4th 820, 831; Pitts v. County of Kern (1998) 17 Cal. 4th 340, 348, 352-353; Natural Resources Defense Council v. California Dept. of Transportation, 96 F. 3d 420, 421 (9th Cir. 1996); Quiroz v. State Board of Education, 1997 U.S. Dist. LEXIS 24154 *3-5 (EDCA 1997).]

Caldwell has inappropriately brought this action in federal District Court, and it should be ordered dismissed for lack of jurisdiction. State immunity extends to sate agencies and state officers who act on behalf of the state and, therefore, can assert the state's Eleventh Amendment immunity from suit in federal court. [Natural Resources Defense Council v. California Dept. of Transportation, 96 F. 3d 420, 421 (9th Cir. 1996); Quiroz v. State Board of Education, 1997 U.S. Dist. LEXIS 24154 *3-5 (EDCA 1997).]

4. State Immunities Also Apply to bar These Claims.

California ***"state agent immunity"*** is applicable to all of the individually named defendants, because they are acting as agents of the State of California. States and state officers sued in their official capacity are not considered persons under § 1983 and are immune from liability under the statute by virtue of the Eleventh Amendment and the doctrine of sovereign immunity. [Venegas, 828-829.] A suit against a state official in his or her official capacity is not a suit against the officer,

but rather a suit against the official' office. As such, it is no different from a suit against the State itself. [Venegas, supra at 829.] This capacity issue is to analyzed under California law. [Venegas, supra 831.]

The individual defendants are exempt from liability under § 1983 if they were acting as state agents with final policymaking authority over the complained-of actions. In our case, the District, its officials and its employees were acting as "state agents" with final policy making authority for the District's High School science and biology curriculum, adoption of which is mandated by the California Education Code. [McMillian v. Monroe County, 520 U.S. 781, 784-785 (1997); Pitts v. County of Kern (1998) 17 Cal. 4th 340, 348, 352-353.]

Under California law, there is ***"absolute discretionary immunity"*** for the actions of the District's School Board Members. [Cal. Government Code § 820.2; Caldwell v. Montoya (1995) 10 Cal. 4th 972, 985-986.] Also, if the Board members are immune, so is the District. [Cal. Government Code § 815.2(b); Kemmerer v. County of Fresno (1988) 200 Cal. App. 3d 1426, 1435-1436; Kayfetz v. State of California (1984) 156 Cal. App. 3d 491, 496.]

F. Federal Qualified Immunity Applies.

The plaintiff's Opposition Brief changes nothing in regard to the fact that the individual board members, officials and employees sued herein are entitled to federal qualified immunity. [Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-691, 694; Wilson v. Lane, 526 U.S. 603, 609, (19990; Mellen v. Bunting (Virginia Military Institute), 327 F. 3d 355 (Fourth Circuit, 2003); Malley v. Briggs, 475 U.S. 335.] The plaintiff's assertion that the Ex Part Young exception applies because he is seeking only prospective equitable relief to enjoin future constitutional violations, is inapplicable because there is no future or continuing violations of any constitutional rights, and the individually named defendants are entitled to federal qualified immunity as a matter of law.

Under Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 694-695 (1978), a local governmental entity may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Rather, there must be a government's policy or custom. The SAC fails to meet this test or to identify any such District **"policy"** or **"custom"** that caused the plaintiff's

injury. The District cannot be held liable as an entity under a theory of respondeat superior (***vicarious liability***) for the acts of its officials and/or employees. [Board of County Commissioners of Bryan County v. Jill Brown, 520 U.S. 397, 403-405 (1997).]

Also, § 1983 cannot be used to seek enforcement of a California Constitutional Right or a state statute. [Peloza v. Capistrano Unified School District, 37 F.3d 517, 523 (9th Circuit, 1994).] Likewise, the publishing of a defamatory statement by a District Board member or employee does not violate the federal Constitution. [Paul v. Davis, 424 U.S. 693, 694 (1976); Siegert v. Gilley, 500 U.S. 226, 232-233 (1991); WMX Technologies, Inc., et al. v. Miller, 80 F. 3d 1315, 1320 (9th Cir., 1996).] Therefore, to the extent that any of Caldwell's claims for relief contained in the TAC are predicated upon the California State Constitution or a state law statute, they fail to state a claim under 42 U.S.C. § 1983. [Peloza, supra at 523.]

In our case, it is unquestionably clear that the District's Board Members, its officials and employees, who are named as individual defendants in this case, **"were acting reasonably"** in their belief that the School Board Meetings were not **"unlimited traditional public forums;"** that rejection of the plaintiff's QSE Policy from inclusion in the District's curriculum was not the establishment of religion in violation of the Establishment Clause; that the teaching of the scientific theory of evolution was not the **"establishment of a religion"** in violation of the First Amendment's Establishment Clause; that the Board had the ultimate discretion under California state law, as well as under federal case authorities, to establish the District's High School science and biology curriculum; and that the District had the right, under state law, to determine the items to be place on the agenda for School Board meetings, and that federal qualified immunity bars this suit.

The **"doctrine of qualified immunity"** safeguards all but the plainly incompetent or those who knowingly violate the law. If officers of reasonable competence would disagree on the issue of whether a chosen course of action is constitutional, immunity should be recognized. [Malley v. Briggs, 475 U.S. 335, 341 (1986).] The Court must examine the conduct of the officials in light of the constitutional right that the plaintiff is attempting to assert, and the contours of the right must be sufficiently clear so that a reasonable official would understand that what he is doing violates that particular constitution right. [Anderson v. Creighton, 483 U.S. 635, 640 (1987); Lytle v. Wondrash,

182 F.3d 1083, 1086-1087 (9th. Cir., 1999).] A government official is entitled to federal "qualified immunity," even where reasonable officials may disagree as to his or her conduct, as long as the conclusion is **"objectively reasonable."** [Gasho v. United States,. 39 F. 3d 1420, 1438 (9th Circuit, 1994).]

G. The Second Amended Complaint Raises Political Questions.

Regardless of the plaintiff's Opposition brief, it is still the District's position that the Court should decline to exercise jurisdiction, because the issues presented in the TAC are ***"political questions,"*** which do not raise a justiciable controversy. [Hazelwood School District v. Kuhlmeier, 484 U. S. 260, 267, 273 (1988).]

The ***"political question doctrine"*** excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches of the government. [Schroder v. Bush, 263 F.3d 1169, 1171-1174-1175 (10th Circuit, 2001).] Dismissal for lack of subject matter jurisdiction is appropriate if the claims for relief fall within an established category of a political question, and each case must be decided on a case-by-case basis. [Ibid. 1173-1174.] Questions which are in their nature **"political"** should never be submitted to the Court.

Clearly, the Caldwell mantra of complaints set forth in the TAC are ***"political"*** questions (including his advocacy of certain religious viewpoints and this anti-evolutionary theories), because they are not capable of resolution by the Court and lack manageable standards for resolution. They involve initial policy determinations clearly for non-judicial discretion, and which have been, by state statute and by the California State Constitution, mandated to the legislative and executive branches of state government. [Baker v. Carr, supra at 211; Peter W. San Francisco Unified School District (1976) 60 Cal. App. 3d 814, 824-825; Wilson v. Board of Education (1999) 75 Cal. App. 4th 1125, 1134-1141.]

In support of its position, the District requests that the Court take judicial notice of the August 1, 2005, speech by President George W. Bush, wherein he stated and advocated that public schools should teach "intelligent design (the new euphemism for creationism) alongside the theory of evolution. [Federal Rules of Evidence, Rule 201(b).] This is clear evidence that the claims being

advanced by the plaintiff in the TAC are in fact "political questions."

The District court simply should not engage and/or intertwine itself in the ***"political debate"*** in the Roseville High School District over the science and biology curriculum, and the inclusion and/or exclusion of the QSE Policy advocated by the plaintiff, Larry Caldwell, all of which are within the legislative discretionary powers delegated to the District by the California Legislature and the California Constitution. These matters are not capable of a "judicial" resolution, and the Court should voluntarily decline to exercise jurisdiction over this political debate.

H. Other Reasons to Voluntarily Decline Jurisdiction.

In addition to raising political questions, it is still the District's contention that there are also a number of other reasons why the Court should consider declining to exercise jurisdiction in this case, and the arguments advanced in the plaintiff's Opposition Brief do not change these reasons, which include: (1) the plaintiff's lack of ***"prudential standing"***; (2) the issues are more appropriately addressed by the legislative branch of state government; (3) the rule against the ***"adjudication of generalized grievances***;" (4) the plaintiff is ***"raising another person's legal rights***", who are not parties to he litigation; (5) the plaintiff's TAC falls does not fall within the ***"zone of interests protected"*** by the law invoked [see: Elk Grove Unified School District v. Newdow, 124 S. Ct. 2301, 2308-2309 (2004)]; (6) the plaintiff's children are ***"necessary parties"*** to this action, they have not been joined as plaintiffs, and no guardian ad litem has been ordered appointed to represent them; and (7) there is no basis for a ***"next-friend suit"*** by the plaintiff. [See: Elk Grove Unified School District v. Newdow, 124 S. Ct. 2301, 2308-2309 (2004).]

The burden is on the plaintiff, who is invoking federal jurisdiction, to show that the three elements of standing are present in his suit. These are: (1) an actual injury in fact that is concrete and particularized; (2) a causal connection between the injury and the conduct complained with the challenged action of the defendant; and (3) it must be "likely" as opposed to "merely speculative" that the injury will be "redressed by a favorable decision." [Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992); Pritikin v. Department of Energy, 254 F. 3d 791, 796-797 (9th Circuit, 2001).]

Mr. Caldwell cannot meet these fundamental jurisdictional requirements of the "case or controversy requirements of Article III." Therefore, he lacks proper standing, and the entire TAC

should be ordered dismissed due to a lack of jurisdiction. [Lujan, supra at 560; Pritikin, supra at 796-797.]

I. No Federal Constitutional Rights Have Been Violated.

In summary and in response to the Plaintiff's Opposition Brief, it is the District's position that there have been not violations of any of Mr. Caldwell's federal constitutional rights under either the first Amendment or the Fourteenth Amendment.

1. First Amendment Free Exercise Clause.

The TAC fails to state a claim for relief for ***"violation of the Free Exercise Clause"*** of the First Amendment, because the selection of the District's science and biology curriculum is pure government speech and/or bears the imprimatur of the government; because the District had the total discretion under California state law to determine the selection of the instructional materials for the Roseville Joint Union High School District.

The education of the Nations' youth is primarily the responsibility of parents, teachers and state and local school officials, and not federal judges. [Hazelwood School District v. Kuhlmeier, supra at 267, 273.] The District's refusal to adopt the QSE Policy advocated by Caldwell was not a violation of any constitutional right, because under Hazelwood, supra, the District had the right to make view-point based determinations, when dealing with the curriculum. [Arkansas v. Forbes, supra at 675.]

Also, public school Board Meetings are not traditional unlimited "public forums" for the purpose of unlimited free speech under the First Amendment, and Caldwell was at no time prohibited from practicing his religion.. [Hazelwood, supra 267; Perry Education Assn. v. Perry Local Educators Assn., supra 47 (1983); Arkansas v. Forbes, supra 669, 675; Downs v. Los Angeles Unified School District, supra 1012); Edwards v. California University of Pennsylvania, supra 491.]

2. First Amendment Establishment Clause.

The TAC fails to state a claim for relief for any ***"violation of the Establishment Clause"*** of the First Amendment, because the teaching of evolutionary scientific theory is not the establishment of a religion, nor the teaching of religion, in the public schools. [Edwards v. Aguillard, supra at 587-597; Peloza v. Capistrano Unified School District, supra at 521; Lock v. Davey, 540 U.S. 712, 718-719, 723-725 (2004).]

3. First Amendment Free Speech Clause.

There is no violation of Caldwell's free speech rights, because he in fact got his say and participated in school board meetings and community meetings. He was not excluded not prohibited from speaking out and advocating his political/religious the inclusion and adoption of the QSE Policy into the high school curriculum. In addition, California public schools are not "public fora" for the purpose of unlimited free speech under the First Amendment. (See: Discussion supra on this issues.)

In Karam v. City of Burbank, 352 F.3d 1188, 1194-1195 (9th Cir., 2003), the plaintiff, a critic of the City Council's policies, regularly attended city council meetings to express opposition to the expansion of the Burbank City Airport. At one meeting, she was asked to leave, but she did not leave, stayed and had her say! She was later charged with trespassing and obstruction of justice, and she there after filed a § 1983 civil rights claim against the City, its police officers and other officials. The Ninth Circuit found that there was no official City policy, practice and/or custom of circulating informal complaints about "gadflies" and "loonies" who regularly attended the City Council Meetings and affirmed the dismissal of the plaintiff's § 1983 First Amendment Claim. [Karam, supra at 1194-1195.]

4. First Amendment Right to Petition Clause.

Mr. Caldwell throughly, freely and often "petitioned" his school board and its officials and employees to advocate his position for the elimination of the teaching of evolution in the public schools and for the inclusion of his religious viewpoint QSE Policy into the District's science and biology curriculum during the period 2003-2004, and he continues to this time doing the same thing by written submissions and oral participation in School Board meetings. He has not been denied his right to petition the government by the District or any of is board members, official and/or employees.

5. Fourteenth Amendment Equal Protection Clause.

The TAC fails to state a claim for relief for violation of the Equal Protection Clause of the Fourteenth Amendment, because the Caldwell must allege that the "classification" of individuals is arbitrary, capricious and lacks a reasonably related governmental purpose. [Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 81-84 (1988).] The TAC fails this test. It does not properly allege any "suspect classifications" showing any violation of the equal protection clause of the Fourteenth

Amendment.

Because Caldwell is not a member of a "protected class" and his claims do not involve a "fundamental right," his federal equal protection claims are subject to "rational basis review." Under this review, a court must reject an equal protection challenge to a statutory classification "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." [Carter v. State of Arkansas, 392 F. 3d 965, 967-969 (8th Circuit 2004.)

A legislative choice, such as the adoption of the District's science and biology curriculum persuade to the statutory discretion of the District's Governing Board, may be based on rational speculation unsupported by evidence or empirical data." [FCC v. Beach Communications, Inc., 508 U.S. 307, 313 -315 (1993).] Thus, all that needs to be shown is any reasonable conceivable state of facts that could provide a rational basis for the classification, and it is not necessary to wait for further factual development, as a District Court may conduct a "rational basis review" on a motion to dismiss. [Ibid. 313] Caldwell's Equal Protection Claim for Relief cannot survive this "rational basis review" test. [Carter v. State of Arkansas, supra at 968.]

6. Fourteenth Amendment Due Process Clause.

The TAC fails to state a claim for relief for "violation of the Procedural Due Process" under the Fourteenth Amendment, because Caldwell must allege a deprivation of "life, liberty or property interest" within the meaning of the Fourteenth Amendment's Due Process Clause. [Board of Regents v. Roth, 408 U.S. 564, 571 (1972).] The TAC fails to do this, because a claim that defamatory statements were made about the plaintiff and/or that his reputation was damaged does not deprive him of any interest in "life, liberty or a property interest," and there insufficient allegation in the SAC to state any other deprivations coming within the ambit of the Fourteenth Amendment. [Siegert v. Gilley, 500 U.S. 226 (1991); Peloza, supra at 523-524.]

Also, there is also no valid basis alleged upon which there can be any substantive due process claims, because the challenged state action survives a "rational basis scrutiny." [Klein v. McGowan, 198 F. 3d 705, 710 (8th Cir. 1999); Carter v. State of Arkansas, supra at 968-969.] Likewise, the allegations contained in the SAC that the "alleged" violations of the **California Brown Act** open meeting statute, and/or of the **California Education Code** statutes, violate the Due Process Clause

of the Fourteenth Amendment are without merit. [Frazer v. Dixon Unified School District (1993) 18 Cal. App. 4th 781, at 799.] There is no legal basis for Caldwell's due process claim absent proof that he was deprived of some protected property interest. [Public Utilities Commission v. United States, 356 F. 2d 236, 240-242 (9th Cir. 1966).]

Allegations of an injury to "reputation" by itself is not the deprivation of a "liberty interest" [Paul v. Davis, 424 U.S. 693, 712 (1976); Peloza, supra at 523.] No fundamental right is alleged by Caldwell that is protected under the Substantive Due Process Clause or the Procedural Due Process Clause of the Fourteenth Amendment. [Reno v Flores, 507 U.S. 292, 301-302 (1993); Griswold v. Connecticut, 381 U.S. 479, 484-486 (1965); Fields v. Palmdale School District, 271 F. Supp. 2d 1217, 1223-1224 (CDCA, Southern Division, 2003).]

J. No Jurisdiction to Hear a California State Taxpayer's Claim.

The TAC fails to properly state any California statutory taxpayers claim, pursuant to Cal. Code of Civil Procedure § 526a, that can be maintained as a 42 U.S.C. § 1983 Claim in this Court. The federal Tax Injunction Act, 28 U.S.C. § 1341, and principles of federal-state comity preclude a federal court from exercising jurisdiction over challenges to the implementation and assessment of taxes based upon Constitutional principals. [Berry v. Alameda Board of Supervisors, 753 F. Supp. 1508, 1509-1511 (1990).] When there is a specific statute that excludes liability, it overrides the applicability of § 1983. In addition, the plaintiff is not entitled to enforce a state law statute under 42 U.S.C. § 1983. [Baker v. McCollan, supra 144 n.3.]

Federal courts are expressly prohibited from granting equitable and declaratory relief by the **Tax Injunction Act** (28 U.S.C. § 1341), where there is a plain, speedy and efficient remedy in the state court. [Berry, supra at 1511.] In our case, Caldwell had a "plain and speedy remedy" in the California courts. He could have easily filed his taxpayer's suit in Placer County Superior Court, wherein he could have properly sought his injunctive relief against the District. Also, the Sixth Claim fails to state a cause of action because taxpayers may not challenge taxes spent in a manner violating their religious beliefs. [United States v. Lee, 455 U.S. 252, 260 (1982).]

Likewise, the plaintiff's contention that the District's expenditure of tax dollars for the discretionary determine and adoption of the high school science curriculum is a waste of public funds

and a violation of Code of Civil Procedure § 526a is without merit, and does not violate the plaintiff's First Amendment Rights, as a matter of law. Mr. Caldwell's claim essentially boils down to a claim that as a taxpayer, he should not have to pay for government activities with which he does not agree. This is not the law. [Keller v. State Bar of California, 496 U.S. 1, 12-13 (1990).] If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited those in the private sector, and the process of government as we know it radically transformed. [Keller, Ibid. 12-13.]

In addition, the California State Constitution, Article XVI, Sec. 5 and Article IX, Sec. 8, prohibit the expenditure of public money for the direct, or indirect, support of any religious sect, church, creed or sectarian purpose or for the teaching of any sectarian or denominational doctrine; therefore, the Caldwell Claim that tax money should be withheld from the District in order to promote his sectarian beliefs relating to his QSE Policy, would itself violate the California Constitution. [California Educational Facilities Authority v. Priest (1974) 12 Cal. 3d 593, 605, fn. 12.] The California Constitution draws a strict separation of church and state, and prohibits the expenditure of state financial resources to advance religious or sectarian purposes. The relief sought by Mr. Caldwell in the Sixth Claim for Relief would violate the California Constitution. This would be in fact the establishment of a religious viewpoint in violation of the United States Constitution First Amendment Establishment Clause. [Committee for Public Education v. Nyquist, 413 U.S. 756, 772-773, 786 (1973).] Any such taxpayer's claim is subordinate to the Establishment Clause. [Diloreto v. Board of Education of the Downey Unified School District (1999) 74 Cal. App. 4th 267, at 280-280.]

Likewise, under California authority, the expenditure of public funds (tax money) for high school curriculums which promote a governmental viewpoint (e.g., the teaching of the scientific theory of evolution in the science curriculum), is not subject to challenge as a waste of public funds, nor is the government required to give equal circulation to an opposing "viewpoint." [Miller v. California Comm. on Status of Women (1984) 151 Cal. App. 3d 693, 697, 700-701.] There is no legal standard against which the Court can enter an order, under Code of Civil Procedure § 526a, that would not trespass into the domain of legislative or executive discretion that is vested by law and statute in the District related to the adoption of a high school science curriculums. California courts do not hear

complaints which seek relief that the courts cannot effectively render, or that involve the exercise of indefinite discretion. [Harman v. City and County of San Francisco (1972) 7 Cal. 3d 150, 160-161.]

Also, regardless of the liberal construction of the taxpayer statute by California courts, the essence of such an action remains an illegal or wasteful expenditure of public funds or damage to public property. The taxpayer action must involve an actual or threatened expenditure of public funds. [Waste Management of Alameda County, Inc. v. County of Alameda (2000) 79 Cal. App. 4th 1223, 1239-1240.] General allegations, innuendo and legal conclusions are not sufficient to state a cause of action under Code of Civil Procedure § 526a, under California law. [Waste Management, Ibid. 1240; Sagaser v. McCarthy (1986) 176 Cal. App. 3d 288, 310; Fort Emory cove Boatowners Assn. v. Cowett (1990) 221 Cal. App. 3d 508, 515.]

Also, the Courts should not take judicial cognizance of disputes which are primarily "political" in nature, nor should they attempt to enjoin every expenditure which does not meet with a taxpayer's approval. [Lucas v. Santa Maria Public Airport District (1995) 39 Cal. App. 4th 1017, 1026.] The allegations contained in the Sixth Claim for Relief do not meet these requirements, and it fails to state a cause of action (claim), as a matter of law. It should be ordered dismissed, without leave to amend.

III.

CONCLUSION

For all of the afore-mentioned reasons, the District is entitled to a dismissal of the TAC, pursuant to Rule 12(b)(1) and Rule 12(b)(6), without leave to amend. In the alternative, due to the vagueness, ambiguity and confusion created by the pleading of the TAC, the District is entitled to an order dismissing the TAC for failure to plead a concise "short and plain" statement, under Rule 8(a), and /or in the alternative for order requiring the Plaintiff to file a more definite statement by way of a Third Amended Complaint. Also, the TAC violates Rule 10(a) and all references to Doe Defendants in this 42 U.S.C. § 1983 action should be ordered stricken from the TAC, and/or in the alternative, the plaintiff ordered to file a Fourth Amended Complaint.

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DATED: September 16, 2005

Respectfully Submitted,

EVANS, WIECKOWSKI & WARD, LLP

By /s/ JAMES B. CARR
James B. Carr
(jcarr@lomde.com)
Attorneys for Defendants ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT; JAMES JOINER; R. JAN PINNEY; TONY MONETTI; STEVEN LAWRENCE; DONALD GENASCI; and RONALD SEVERSON

FEDERAL CERTIFICATE OF SERVICE
(CCP §1011, 1012, 1012.5, 1013 and 1013a)

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within-entitled case. I am an employee of the EVANS, WIECKOWSKI & WARD and my business address is 745 University Avenue, Sacramento, California 95825.

On this date, I served the following document:

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Larry Caldwell, *In Pro Per*
1380 Lead Hill Blvd., #106
Roseville, CA 95661
T: 916/780-6110
F: 916/797-4954
caldwellandassociates@surewest.net

Kevin T. Snider, Esq.
PACIFIC JUSTICE INSTITUTE
9851 Horn Road #115
Sacramento, CA 95827
916/857-6900
FAX: 916/857-6902
Assoc. Atty for Plaintiff
kevinsnider@pacificjustice.org

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I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed at Sacramento, California on September 15, 2005.

/s/ JAMES B. CARR