

STATE OF MINNESOTA

DISTRICT COURT

RICE COUNTY

THIRD JUDICIAL DISTRICT

CASE TYPE: OTHER CIVIL
Civil File No. CX-99-793

Rodney LeVake,

Plaintiff,

v.

Independent School District #656;
Keith Dixon, Superintendent;
Dave Johnson, Principal; and
Cheryl Freund, Curriculum Director,

Defendants.

**DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

INTRODUCTION

Defendants Independent School District #656 (“District”), Keith Dixon, superintendent (“Dixon”), Dave Johnson, principal (“Johnson”) and Cheryl Freund, Executive Director of Student Services (“Freund”), (collectively “Defendants”), bring this summary judgment motion pursuant to Minn. R. Civ. P.56.03 seeking an order of this Court dismissing with prejudice all of Plaintiff’s claims against them.

Plaintiff, Rodney LeVake, (“Plaintiff”) a District teacher, taught 10th grade biology for the 1997-1998 school year. Because he did not teach evolution, part of the School Board’s established biology curriculum, he was assigned to teach 9th grade natural science the next year. Despite admitting he failed to teach part of the curriculum, Plaintiff alleges his reassignment was because of his religious views opposing evolution. Plaintiff’s position is unfounded.

Defendants are entitled to summary judgment as a matter of law. Plaintiff's 42 U.S.C. § 1983 claims fail because there is absolutely no evidence that the District had a policy, custom or regulation of reassigning biology teachers because of their religious views or that the individually named defendants were acting in accordance with such a policy.

Plaintiff has not established that the Defendants deprived him of any constitutionally guaranteed rights. Plaintiff has no cause of action under the First Amendment for violation of his right to free speech or to academic freedom. The public school classroom is not a public forum and a high school teacher's academic freedom is not absolute. Thus, the District can reasonably restrict Plaintiff's classroom expression. Because the United States Supreme Court has stated that evolution is not a religion, requiring that it be taught in the District's 10th grade biology classes does not violate the Establishment Clause. Finally, Plaintiff has not established that his right to exercise his religion has been inhibited by any action of these Defendants.

Plaintiff's claims that the Defendants violated his right to free speech and freedom of conscience as guaranteed by the Minnesota constitution fail for the same reasons that his Federal claims fail.

Plaintiff's cause of action under the Fifth Amendment due process clause fails as he has alleged no action by the federal government. Finally, Plaintiff cannot establish the basic elements of his Fourteenth Amendment due process claim as he can establish no loss of a protected right and he was reassigned in accordance with his contract.

Defendants rely upon the pleadings, depositions, affidavits and exhibits attached thereto as the record upon which this motion is based.

STATEMENT OF THE ISSUES

1. Plaintiff cannot sustain a cause of action for violation of his right to free exercise of religion or freedom of conscience where he has no absolute right to practice his religion in a public school classroom.
2. Because evolution is not a religion, requiring it to be taught in the District's schools did not violate the Establishment Clause.
3. A public school teacher does not have absolute freedom of speech or academic freedom in the public school classroom, therefore Defendants did not violate Plaintiff's rights by reassigning him for failure to teach the established curriculum.
4. Plaintiff has no cause of action under the Fifth Amendment due process clause because he has alleged no federal action by Defendants.
5. Plaintiff has alleged no loss of constitutionally protected liberty or property and therefore has no viable claim under the Fourteenth Amendment due process clause.
6. The Defendants are afforded qualified immunity for exercising their discretionary authority in reassigning Plaintiff.

STATEMENT OF THE FACTS

Plaintiff is a District teacher.

Plaintiff is a teacher employed by the Faribault School District. (R. LeVake deposition, pp. 154-155, Ex. 1, Affidavit of Sheila A. Bjorklund¹). His teaching contract provides that he can be assigned to teach any topic for which he has licensure. (Ex. 2.)

He is licensed to teach mathematics, life science and physical science. (LeVake depo., pp. 45-46, 94; Plt's Complaint, ¶ 7, Ex. 3).

When he was initially hired by the District, Plaintiff applied for a combined science-math position. (Id., p. 96). While he claims teaching biology was his "life's goal", he does not recall telling anyone, during his thirteen years as a seventh grade science teacher, that he wanted to teach biology. (Id., pp. 96-97).

¹All exhibits will be attached to the Affidavit of Sheila A. Bjorklund unless otherwise indicated.

Plaintiff was offered the 10th grade biology position during the summer of 1997 after a biology teacher retired. (Id.). Before accepting the position, Plaintiff discussed the course with Ken Hubert, co-chairman of the high school science department and Dave Johnson, the high school principal. (LeVake depo., p. 98; Ken Hubert deposition, p. 8, Ex. 4; Dave Johnson deposition., pp. 7, 14, Ex. 5). Plaintiff also talked to Dave Wieber, the other chair of the high school science department, about the job. (Dave Wieber deposition, p. 9, Ex. 6). Mr. Wieber explained the biology curriculum generally and that all teachers were expected to follow it. (Id.).

Evolution is an established part of the biology curriculum.

As adopted by the District's School Board, the teaching of evolution is required as part of the biology curriculum. The course syllabus and registration guide list evolution as a required subject. (10th grade Biology Curriculum, Ex. 7). The required textbook, "Biology Visualizing Life" by George B. Johnson, contains three chapters dealing with aspects of evolution, chapters 9, 10 and 11. (Textbook, Ex. 8). Chapter 9 must be covered while Chapters 10 and 11 were optional. Plaintiff admits he knew chapter 9 was not optional. (LeVake depo., p. 107; See Ex. 7). Minnesota's state graduation standards also require evolution to be taught as part of high school biology. (Cheryl Freund depo. pp. 48, 49, 52, 53, Ex. 9).

Plaintiff accepted a job he knew he could not do.

Plaintiff admits that evolution is the framework and foundation of modern biology. (LeVake depo., pp. 45-48). He admits that none of the formal science education he received at St. John's University or in studying for his masters in science education at Mankato State University included what he claims are criticisms of evolution. (Id.). He admits this is a minority position. (Id.). He is unaware of a single non-religious institution that presents these "criticisms." (Id.)

Plaintiff understood before taking the position that the 10th grade biology curriculum included the teaching of evolution. (LeVake depo., p. 101). He knew he had reservations regarding teaching evolution. (Id. pp. 138-9). In fact later during the school year he confessed to Mr. Hubert, "I can't teach evolution. (Id. p. 64). Yet, he accepted the position and did not tell Mr. Hubert, Mr. Johnson or Mr. Weiber that he had any reservations about teaching evolution when he took the position. (Id.)

Plaintiff admits he failed to teach the required curriculum.

Plaintiff prepared outlines for each chapter he taught. (Plaintiff's Chapter Outlines, Ex. 10). He prepared his outlines just before he was going to present the material in class. (LeVake depo., pp. 38-39). He never prepared outlines, for Chapters 9, 10 or 11. (Ex. 9).

Plaintiff admits he knew Chapter 9 was required. He admits that he skipped Chapters 9, 10 and 11. (Id., pp. 40, 107, 108). He also omitted all references to evolution from the test form covering taxonomy. ('97 versus '98 test forms, Ex. 11).

Plaintiff offers as his explanation for skipping the theory of evolution that the school year was shortened and he did not have time to cover those chapters. (LeVake depo., p. 116). Fatal to Plaintiff's "explanation" is that he told his classes at the beginning of the school year

that he would not cover the chapters devoted to evolution. (See Sandra Ellison Affidavit; Joel Benbrooks Affidavit). Mr. Benbrooks recalls that Plaintiff told the class he would not cover the section on the theory of evolution because he was “strongly against the theory of evolution” and had a “strong belief that conflicted with evolution.” (Benbrooks Aff.). Mr. Benbrooks further recalls Plaintiff told the class he would not cover evolution because he was “not allowed to cover the criticisms and weaknesses in the theory.” (Id.) In addition, he admits that even though the school year was shortened by a month, each class period had been lengthened so that the “seat time” was almost identical to a regular school year. (Id., pp. 116). The other biology teachers covered at least the required Chapter 9. (Hubert depo., pp. 17-18).

In the spring, Mr. Hubert had observed that while both he and Mr. Koehler, the other biology teacher, had already covered Chapter 9 on evolution, Plaintiff appeared to have skipped it. (Hubert depo., p. 17). Mr. Hubert noticed the book “Life - How Did We Get Here? By Evolution or Creation?” in the common prep room and open on Plaintiff’s desk.² (Hubert depo. p. 33). This religious publication contained the section on the peppered moth covered by Plaintiff. (Ex. 12).

Sometime in February or March of 1998, Mr. Hubert asked Plaintiff how he was going to handle the topic of evolution. (LeVake depo., p. 64). Mr. Hubert expressed to Plaintiff that evolution was part of the District’s established curriculum and Minnesota graduation standards, and that students completing the 10th grade biology course needed to have a working knowledge of evolution. (LeVake depo., p. 64; Hubert depo., p. 16). Plaintiff told Mr. Hubert, “I can’t teach evolution.” (LeVake depo., p. 64).

²This book is published by Watchtower Bible and Tract Society of New York, Inc., International Bible Students’ Association. (See Ex. 12).

District investigates Plaintiff's failure to teach the biology curriculum.

Mr. Hubert approached Dave Johnson, the high school principal, about his concern that Plaintiff was not teaching the biology curriculum. (Hubert depo., p. 16). He also informed Cheryl Freund, the Executive Director of Educational Support Services for the District, of his concerns. (Freund depo., pp. 9, 23). Ms. Freund was responsible for District curriculum. (Freund depo., pp. 9-10).

Plaintiff, Mr. Hubert, Ms. Freund and Mr. Johnson met on April 1, 1998. (Johnson deposition, p. 26). The purpose of the meeting was to discuss how Plaintiff was teaching evolution to his biology classes. (Freund depo., p. 35, Johnson depo., p. 26). Mr. Johnson told Plaintiff he was concerned that Plaintiff was avoiding the subject of evolution and was not teaching the concept as required by the curriculum. (Johnson depo., p. 26).

Plaintiff did not deny he was avoiding the subject of evolution with his students. (Johnson depo., p. 28). He told Defendants he had a problem with teaching the theory of evolution, that he did not believe evolution to be possible, and could not teach evolution as a truth. (Freund depo., p. 37; Hubert depo., p. 26). Plaintiff stated it was his "hobby" to read about the weaknesses of the theory of evolution. (Freund depo., p. 38; Johnson depo., p. 33).

Plaintiff admits his religious beliefs were never discussed. (LeVake depo., pp. 139-140). He admits that he never told Johnson, Freund and Hubert that he was a "creationist". He claims Ms. Freund asked him if he mentioned the Bible or God in his class but acknowledges she would have asked only to insure that he was not discussing religion in class or trying to convert the students to his way of thinking. (LeVake depo., p. 140-141).

Plaintiff, Mr. Johnson, Ms. Freund, Mr. Hubert met again on April 7, 1998 with the rest of the members of the science department. (LeVake depo., p. 141). At that meeting the

department members affirmed that evolution was a basic tenet of biology and part of the core curriculum for the 10th grade course. (Freund depo., pp. 48-49). The staff emphasized that teaching evolution was part of the state graduation standards, national standards and thus, required to be taught. (Id.). Plaintiff again told the group that he had concerns about teaching the theory of evolution and was adamant that he wanted to teach what he perceived as weaknesses. (Freund depo., p. 49; Hubert depo., p. 26). Mr. Johnson asked Plaintiff to write a position paper outlining how he would balance the teaching of evolution with his “hobby” of reading materials on the weaknesses of the theory. (Johnson depo., p. 36).

Plaintiff discloses his position on teaching evolution.

At the request of Mr. Johnson, Plaintiff prepared a position paper outlining his position on teaching evolution. (See Position Paper, Ex. 13). In this paper, he discloses his position that the “theory of evolution was impossible from a biochemical, anatomical and physiological standpoint” and that “the complexity of life ... as it is currently handled in our text, is impossible.” (Position Paper, p. 2). He further discloses that he “will teach, should the department decide that it is appropriate, the theory of evolution. I will also accompany that treatment of evolution with an honest look at the difficulties and inconsistencies of the theory ...”. (Position Paper, p. 5).

Decision to reassign Plaintiff.

Mr. Johnson and Ms. Freund shared in the decision to reassign Plaintiff to a 9th grade natural science position. (Freund depo., p. 54; Johnson depo., p. 20). Ms. Freund and Mr. Johnson each testified that they did not decide to reassign Plaintiff until after Plaintiff submitted his position paper on or about April 15, 1998. (Freund depo., pp. 54, 63; Johnson depo., pp. 20, 29, 59).

After reading the position paper, Mr. Johnson states it was clear that “Rod was not going to be able to hold back from teaching or putting an undue emphasis on the inconsistencies” of evolution. (Johnson depo., p. 59). Ms. Freund testified that “everything taken in total led to the decision.” (Freund depo., p. 63). She was concerned by Plaintiff’s position that he would “teach evolution if the department decided it was appropriate”, but would also teach his views of the “difficulties and inconsistencies of the theory.” (Freund depo., p. 69). The School Board had already decided evolution was to be a part of the established curriculum. As Freund said, Plaintiff’s statements confirmed that he would “have difficulty teaching evolution the way we expected it to be taught.” (Freund depo., p. 71).

The decision to reassign a teacher is the building principal’s responsibility. (Keith Dixon deposition, p. 16, Ex. 14). As Mr. Dixon explained, the building principal has the responsibility to determine how to utilize human resources, financial resources and accomplish the goals of the School Board. (Id.). The yearly contract signed by each teacher clearly states they may be assigned to teach any class for which they hold a license. (Teacher Contract, Ex. 2).

Plaintiff's religious views not the issue in the decision.

It never occurred to Mr. Johnson, Ms. Freund or to the other members of the science department that Plaintiff's issues with evolution related to his religious beliefs. (Freund depo., p. 71; Hubert depo., p. 11; Johnson depo., p. 19). Dave Weiber confirmed that no one, at these meetings, ever asked Rod or anyone what their religious beliefs were. (Weiber depo., p. 22). He explained the whole purpose [of meeting with Plaintiff] was that "Rod wasn't teaching the curriculum as required." (Id., p. 20).

Plaintiff admits that he never made his religious beliefs known to the Defendants and affirms he was never asked what his religious or world beliefs were. (LeVake depo., pp. 99, 139, 143, 159). Plaintiff later testified as part of this lawsuit that he has a conflict between his religious views and evolution. (LeVake depo., p. 163).

Plaintiff asked for a review of the decision to reassign him by the District's superintendent, Keith Dixon. (LeVake depo., p. 156). After reviewing Plaintiff's position paper and meeting with Plaintiff, Mr. Johnson and Ms. Freund, Mr. Dixon upheld the decision to reassign Plaintiff. (Dixon depo., p. 26). In his letter to Plaintiff affirming the reassignment decision, Mr. Dixon concurred that it was appropriate to reassign Plaintiff because he clearly had demonstrated he could not teach the prescribed curriculum. (Dixon letter to Plaintiff, Ex. 15; Dixon depo., p. 19). Mr. Dixon was unaware of Plaintiff's religious views. (Dixon depo., pp. 32, 22).

No District policy influenced Plaintiff's reassignment.

Plaintiff admits that he has no information that only non-religious teachers were allowed to teach biology by the District. (LeVake depo., pp. 75, 191). He cannot identify a

single District employee he believes was treated differently because of their religious beliefs. (Id. p. 75).

When he was hired by the District in 1984 he understood that the District could assign him to teach any class for which he had a license. (Id., pp. 92-93). He affirms that each contract he signed since then contained the same provision regarding teacher assignment. (Id., Teacher Contract Ex. 2). Plaintiff agrees that the assignment of teachers is a discretionary decision within the sole province of the District. (LeVake depo., p. 100). He further agrees that it is not a demotion to teach one class, be assigned to another and then reassigned to the former. (Id., pp. 95-96). He has no information that Mr. Dixon, Mr. Johnson or Ms. Freund acted in any way outside of their official positions with the District. (Id., p. 188).

Plaintiff's actual goal is to discredit evolution and to advance his religious views.

Plaintiff was recently interviewed for a CNN documentary exploring the debate between teaching evolution and creationism in the public schools of America. He identified himself as a creationist and a Christian fundamentalist. (See Transcript of CNN program, Ex. 16). His church does not accept evolution. (LeVake depo., p. 82).

Plaintiff gave Defendants and other members of the science department samples of literature he had collected which present what he claims are criticisms of evolution, including "Bone of Contention: Is Evolution True?" published by the Creation Science Foundation³. (See Ex. 12, LeVake depo., p. 87). He acknowledges that the purpose of this book is to show that evidence supports the Bible and disproves the theory of evolution. (LeVake depo., p.

³The Creation Science Foundation is an organization which promotes "creation science." "Creation" Magazine is one of their publications. "Creation" Magazine is advertised as a "journey into a world of scientific discoveries that show God's greatness . . . "Creation Magazine helps you counteract evolution's damaging influences while showing the relevance of creation to your daily life." (Ex. 12).

173). Plaintiff admits that he does not know of any non-religious educational institutions that are critical of evolution. (LeVake depo., p. 47).

He belongs to the Institute for Creation Research, which he describes as a “group of scientists ... that do research at different areas of science to help substantiate ideas that God created the earth.” (LeVake depo., p. 83; ICR Tenets of Creationism, Ex. 17). He has purchased approximately a dozen books recommended by this group. (LeVake depo., p. 86).

While he denies using books such as “Life - How did we get here? By Evolution or Creation?” in the course of his classroom teaching, he does not deny that it was in his classroom. (Id., p. 173). He admits that he did use the book “The Evolution of a Creationist” in the teaching of the biology class. (LeVake depo., pp. 200-201). Chapter 6 of this book, which Mr. LeVake used in class, is captioned “Marvel of God’s Creation”. (Ex. 18). He also used many other pages of this book in class. Id. These sections of the book argue that the specialization and complexity of the animals discussed demonstrate that evolution is a fallacy and that only God could have created these animals: “The only possibility is that God created the Angler fish with all the fully-functional equipment it needed to survive at great depths.” (Ex. 19).

“Ask an evolutionist how a deep-sea fish could evolve the ability to produce high-tech light on an artificial bait dangled over the fish’s mouth? God has made His creation to display His glory and power. No one could look at the Angler fish and say it is the result of the “impersonal plus time plus chance,” unless that person had already decided to refuse to believe in the God of the Bible (Romans I). The vain speculations of evolution lead to foolish thinking and impossible conclusions.”

(Id.).

While Mr. LeVake claims he didn't have time to cover evolution, he did have time to add these materials and taught them even though they were not a part of the established curriculum. (LeVake depo., pp. 208-209).

These same materials were used by Plaintiff in preparing his "position paper on the teaching of evolution". (LeVake depo., pp. 147-148). In fact, he used the Angler fish as an example of what he claims is evolution's "absence of explanation for the incredible complexity we see around us". (Plaintiff's position paper, Ex. 13). His position paper lists additional "proofs" against evolution such as the gazelle's brain "radiator", the woodpecker's tongue, a giraffe's heart, birds' respiratory system, and others. While Mr. LeVake claims he didn't have time to teach evolution, he taught this, and even tested his students on this information. (LeVake depo., pp. 207-208 - depo Ex. 34). Mr. LeVake acknowledges that this is the same material referred to in his position paper. (Id.).

Mr. LeVake also allowed at least one of his students to receive extra credit for writing a summary of an article out of Creation magazine. (Ex 20 - Exs. 31, 32 & 33 from LeVake depo; LeVake depo., p. 204). "Creation" magazine is designed to "Keep your family informed on the latest easy-to-understand evidences for creation and against evolution! This unique full-color family magazine gives God the glory, refutes evolution and gives you the answers to defend your faith." (Ex. 21). Plaintiff knew the particular topic and the source of the article that the student was going to be relying on, and approved the project. (LeVake depo., pp. 204-207).

Plaintiff claims evolution as taught in the biology text is impossible. (LeVake depo., pp. 70-71). He asserts that teaching students that we are here as a result of evolution and natural processes is hard on a high school student's self-esteem. (Id. p. 70). He asserts that he

does not want to teach a religious class, but admits “if you discredit evolution then I guess it would be up to the student to fill in the blank”. (Id., p. 73).

Plaintiff has solicited the assistance of the American Center for Law and Justice in bringing this lawsuit. This organization is dedicated to “defending the rights of believers” and is “dependent upon God” and the “resources he provides”. (LeVake depo., pp. 164-165; Ex. 22). Mr. LeVake had contacted a number of religious organizations for assistance in bringing this lawsuit. Id.

Plaintiff has no compensable damages.

Plaintiff admits that he has not sustained any personal monetary loss, any loss of benefits nor has he lost any seniority by his reassignment. (LeVake depo., p. 169). There has been no changes to his teaching contract. He further admits that no one in the department has treated him differently because of his reassignment. (Id., p. 170). Plaintiff has withdrawn his claims of impairment of reputation, and disparate treatment by other staff. (Id., pp. 178, 187). He admits that he has received no medical or psychological care for any “injuries” related to his reassignment and has sustained no permanent damages. (Id., pp. 183, 187). He further admits he has not lost any earning capacity. (Id.). Plaintiff acknowledges he is still practicing his religion of choice. (Id.). Plaintiff’s sole intention in bringing this lawsuit is to “have my biology teaching job back”, including the right to teach what he feels to be criticisms of the theory of evolution. (Id., p. 167).

ARGUMENTS

I. STANDARD FOR GRANTING SUMMARY JUDGMENT.

Pursuant to Minn. R. Civ. P., Rule 56.03, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03 (1999); Schumacher v. Heig, 454 N.W.2d 446 (Minn. Ct. App. 1990); DLH, Inc. v. Russ, 566 N.W.2d 60, 68 (Minn. 1997). Summary judgment is favored by the courts to secure a just, speedy and inexpensive termination of actions. Celotex Corp. v. Catrett, 477 U.S.317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).“One of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims.” Celotex at 323.

While the court must view the facts in a light most favorable to the nonmoving party, the nonmoving party may not simply rely upon his general statements of fact or averments in his pleadings to defeat the summary judgment. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1980) citing Celotex Corp. supra. The court must grant the motion when the

nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.

DLH, 566 N.W.2d at 71.

II. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY FOR REASSIGNING PLAINTIFF.

“Government officials performing discretionary functions are shielded from liability for civil damages and are entitled to qualified immunity unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.” Samuels v. Meriwether, 94 F.3d 1163, 1166 (9th Cir. 1996), citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct 2727, 2738 (1982). No Minnesota or Eighth Circuit case has addressed the issue of teacher reassignment and qualified immunity.

One court has held that individual school defendants were entitled to qualified immunity for the reassignment of a tenured teacher/principal because the law was not clearly established at the time of their action that reassignment violated his constitutional rights. See, Peterson v. Minidoka County School Dist. No. 331, 118 F.3d 1351, 1356 (9th Cir. 1997) (the individual defendants in this matter were dismissed on summary judgment. The issue of their qualified immunity was not before the Appeals Court).

The individual Defendants are entitled to qualified immunity for their decision to reassign Plaintiff. The law is not clearly established that reassigning a teacher pursuant to contract is a violation of a teacher’s constitutional rights.

It is undisputed that the decision to reassign a teacher is the discretionary function of the District. This is clearly stated in the contract that each teacher signs each year. Plaintiff testified this is a discretionary decision of the District. Keith Dixon, the District superintendent, affirmed this when he said, “it is the building principal’s responsibility to determine how to utilize human resources, financial resources and accomplish the goals set by the school board.” (Dixon depo., p. 16). The Defendants are entitled to qualified immunity as to all of Plaintiff’s claims.

III. DEFENDANTS HAVE NOT VIOLATED PLAINTIFF'S FIRST AMENDMENT RIGHTS.

Plaintiff asserts four claims of alleged violation of his federal First Amendment rights.

All four claims are based on his reassignment from teaching 10th grade biology to 9th grade natural science. Plaintiff's First Amendment claims are:

1. Defendants' action violated his right to the free exercise of religion by placing undue burden on his exercise of his religion and by discriminating against him in terms of his employment on the basis of his religion. (Complaint ¶ 32).
2. Defendants' actions violated the Establishment Clause because requiring him to teach evolution requires him to subscribe to a "certain religious or philosophical belief." (Complaint ¶ 33).
3. Defendants violated his right to free speech because their decision was based on his expressed views of evolution.(Complaint ¶ 35).
4. Defendants have violated his right to academic freedom by not permitting him to express his views on evolution in the classroom in the future. (Complaint ¶ 37).

Plaintiff brings each of his First Amendment claims, except the Establishment Clause claim, under 42 U.S.C. § 1983. (Complaint ¶¶ 32, 35, 37). 42 U.S.C. § 1983 does not establish substantive rights. It merely establishes a means by which a person can enforce the constitution. Goss v. City of Little Rock, Ark., 151 F.3d 861, 865 (8th Cir. (Ark.) 1998).

A. Plaintiff cannot establish the essential elements of a 42 U.S.C. § 1983 claim.

To establish a *prima facie* case under § 1983, Plaintiff must show that each Defendant is a "person" who has "acted under color of state law" to "deprive him of his rights protected by the U.S. Constitution or federal laws." Keckeisen v. Independent School Dist., 509 F.2d 1062 (8th Cir. (Minn.) 1975); Cybyske v. Independent School Dist. No. 196., 347 N.W.2d 256 (Minn. 1984); Sweeney v. Special School Dist. No. 1, Minneapolis, 368 N.W.2d 288, 291-92

(Minn. Ct. App. 1985). A school district and its officials, sued individually or in their official capacity, are “persons” under § 1983. Keckeisen, supra.

Plaintiff cannot establish the second element of his § 1983 claim - that the District had a policy, regulation or custom that violates his constitutional rights and that this policy, regulation or custom was officially adopted and promulgated by the District’s officials. Jane Doe “A” v. Special School Dist., 901 F.2d 642, 645 (8th Cir. (MO) 1990). Plaintiff has admitted he is unaware of any policy, regulation or custom adopted by the District and promulgated by its officials that persons with certain religious beliefs are prohibited from teaching 10th grade biology. (LeVake depo., pp. 75, 191). Moreover, as discussed below, Plaintiff cannot establish that Defendants’ decision to reassign him was based upon his exercise of constitutionally protected rights and freedoms, or that Defendants’ decision deprived him of any constitutional rights.

B. Defendants have not violated Plaintiff’s right to the free exercise of his religion.

There is no question that “the free exercise of religion – the putting into practice of a person’s religious beliefs – is guaranteed against congressional impairment by the Bill of Rights and insured against intrusion by state or municipal authority through the incorporation of the First Amendment’s guarantees into the Fourteenth Amendment.” Peterson v. Minidoka County School Dist. No. 331, 118 F.3d 1351 (9th Cir. (Idaho) 1997). However, this right is “not so absolute that its exercise may be enjoyed without collateral consequences if, in exceptional circumstances, that exercise impacts a compelling state interest.” Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sullivan v. Meade Independent School Dist. No. 101, 530

F.2d 799, 804 (8th Cir. 1976) (teacher's rights are not absolute and when they conflict with the state's legitimate concerns, a balance must be struck).

Plaintiff admits he still practices his religion of choice. (LeVake depo., p. 187). On this basis alone, Plaintiff cannot establish that his right to practice religion was unduly restricted by Defendants in this case. Plaintiff wants to be able to teach the "inconsistencies" in the theory of evolution to public school biology classes. (LeVake depo., p. 56). He claims that not being able to teach his criticisms of evolution has burdened his ability to freely practice his religion. (Complaint ¶ 32). The evidence does not support Plaintiff's claim. But more significantly, the District's compelling interest in assuring that religion and religious beliefs are not introduced into the public school biology classroom also defeats Plaintiff's claim.

As stated by the U.S. Supreme Court in Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573 (1987),

Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.

Edwards, 482 U.S. at 584. "Public schools must keep scrupulously free from entanglement in the strife of [religious] sects." McLean v. Arkansas Board of Education, 529 F.Supp. 1255, 1258 (E.D.Ark 1982). "Concepts concerning God or a supreme being of some sort are manifestly religious. ... These concepts do not shed that religiosity merely because they are presented as a philosophy or a science." Edwards, 107 S.Ct. at 2586.

The U.S. Supreme Court has addressed the issue of teaching the origins of life in public school classrooms in two landmark decisions: Epperson v. State of Ark., 89 S. Ct. 266, 393

U.S. 97 (1968) and Edwards v. Aguillard, 107 S. Ct. 2573, 482 U.S. 578 (1987). In each case, the issue was whether evolution or creation should form the framework of school science curriculums. The Supreme Court ruled that any attempt to introduce or require the teaching of creation, creation science or that a supernatural being created humankind impermissibly endorses religion. Edwards, 107 S. Ct. at 2574 (declaring unconstitutional Louisiana's Balance Treatment for Creation-Science and Evolution-Science in Public School Instruction Act); Epperson, 89 S. Ct. at 271-72 (declaring Arkansas Act forbidding teaching of evolution in public schools impermissibly promoted religion).

In their concurring opinions, Justices Powell and O'Connor in Edwards applied the plain meaning of the terms creation⁴ and evolution⁵ to conclude that under the Louisiana Act, schools were being unconstitutionally required to present information that supported divine creation whenever they presented information on evolution. They determined the Act impermissibly advanced religious beliefs. Edwards at 2585-86.

All of Plaintiff's alleged "inconsistencies" in the theory of evolution are based on religious concepts and are religiously motivated. Plaintiff acknowledges that he is unaware of any non-religious educational organization that teachers criticisms of the theory of evolution. (LeVake depo., p. 47). He freely acknowledges that the references he relies upon to support his position that these criticisms should be taught are intended to show that scientific evidence supports the Bible and disproves the theory of evolution. (Id., p. 163). He calls himself a creationist.

⁴"doctrine or theory of creation" is commonly defined as holding that matter, the various forms of life, and the world were created by a transcendent God out of nothing." Edwards, at 2585.

⁵Evolution is defined as "the theory that the various types of animals and plants have their origin in other pre-existing types, the distinguishable differences being due to modifications in successive generations. Edwards at 2585.

Defendants have a compelling constitutionally-mandated interest in keeping these manifestly religious concepts out of the classroom. Even if Defendants based their decision to reassign Plaintiff on his religious beliefs, which they did not, the constitution absolutely mandates that public schools keep classrooms religiously neutral. This mandate overrides Plaintiff's desire to exercise his religion in the classroom. Plaintiff's claim fails.

C. Defendants have not violated the Establishment Clause.

Plaintiff asserts that by “conditioning his ability to pursue his chosen profession on his adherence or non-adherence to certain religious or philosophical beliefs” the Defendants have violated the Establishment Clause of the First Amendment. (Complaint, ¶ 33). “To withstand an Establishment Clause challenge, a state statute, policy or action (1) must have a secular purpose; (2) must, as its primary effect, neither advance nor inhibit religion; and (3) must not foster an excessive government entanglement with religions.” Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111 (1971).

The U.S. Supreme Court utilizing the Lemon test has already pronounced that evolution is not a religion, therefore, a requirement that evolution be taught does not violate the Establishment Clause. McLean v. Arkansas Board of Education, 529 F. Supp. 1255, 1273 (E.D. (Ark.) 1982) citing Epperson v. Arkansas, *supra*.

Employing the Supreme Court's analysis, the Ninth Circuit has also rejected this argument. Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994). In Peloza the Court dismissed a high school biology teacher's claim that “by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific theory”, the school district had violated the Establishment Clause. Peloza v. Capistrano Unified School Dist., 37 F.3d 517, 520 (9th Cir. 1994). Peloza characterized the theory of evolution as

postulating that higher life forms ... evolved from the lower life forms ... and that life itself evolved from non-living matter. ... It is therefore based on the assumption that life and the universe evolved randomly and by chance with no Creator involved in the process.

Id. He further argued that evolution was “not a valid scientific theory because it is based on events which occurred in the non-observable and non-recreatable past and hence was not subject to scientific observation.”⁶ Id. The court noted, “Charitably read, Peloza’s complaint at most makes this claim: the school district’s actions establish a state-supported religion of evolutionism or more generally of “secular humanism.”” Id., at 521.

The Ninth Circuit rejected plaintiff’s argument explaining, “neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are “religions” for Establishment Clause purposes.” Id. Relying upon the U.S. Supreme Court decision in Edwards v. Aguillard⁷, the Peloza court stated,

Indeed, both the dictionary definition of religion⁸ and the clear weight of case law are contrary [to plaintiff’s contention]. The Supreme Court has held unequivocally that while the belief in a divine creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not.

Peloza at 521.

The District School Board adopted evolution as a part of the 10th grade biology curriculum. They have done so in accordance with Minnesota’s State graduation standards,

⁶Plaintiff here makes this same argument that evolution is not based on observation. (LeVake depo. pp. 48-50). However, Plaintiff admits the theory of evolution itself is not based on religion. Id. p. 50.

⁷In Edwards v. Aguillard, the U.S. Supreme Court struck down as unconstitutional the Louisiana “Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act”. 107 S.Ct. 2573, 482 U.S. 578 (1987). Utilizing the Lemon test, the Court held that the Louisiana Creationism Act violated the Establishment Clause because it sought to employ the symbolic and financial support of government to achieve a religious purpose. Edwards at 2584.

⁸The Peloza court cited Webster’s II New Riverside University Dictionary 993 (1988) for the following definition of religion, “belief in and reverence for a supernatural power accepted as the creator and governor of the universe.”

National Academy of Science recommendations, the National Science Teacher Association recommendations and the National Science Frameworks recommendations. (Freund depo., p. 52). Evolution is a basic tenet of biology, and a respected, scientific theory. (Hubert depo., pp. 9, 24; Weiber depo., p. 20). The Defendants' action to assure that the 10th grade biology curriculum is taught passes the Lemon test. Plaintiff admits he failed to teach evolution. He even told his class at the beginning of the year that he would not teach evolution. Defendants acted for a secular purpose which had the effect of neither advancing nor inhibiting religion.

D. Defendants have not violated Plaintiff's right to free speech.

Plaintiff claims that "removing him from his position teaching biology because of his views on the theory of evolution and especially his past expression of those views" violated his federal constitutional right to free speech. (Complaint ¶ 35). In order to establish that an adverse employment action violated Plaintiff's First Amendment free speech rights, Plaintiff must show that the speech for which he was disciplined was constitutionally protected and that the protected speech motivated the adverse employment decision. Mount Healthy City School District Board of Education v. Doyle, 97 S. Ct. 568 429 U.S. 274 (1977). If Plaintiff meets his burden, the District must demonstrate by a preponderance of the evidence that the same decision would have been made absent the protected speech. Id. Plaintiff cannot meet his burden.

1. There were no adverse employment decisions.

Fatal to his claim is the District's contractual right to assign any of its teachers to teach any subject for which the teacher has licensure. (LeVake depo., pp. 93-94). Plaintiff admits that the District's decision to assign a teacher to teach something else is not an adverse

employment decision. Id. p. 95. He admits this is a discretionary decision of the District. Id. p. 100. Thus, Plaintiff's claim fails.

2. Plaintiff was assigned to teach ninth grade science as he failed to teach the biology curriculum, not for his speech.

The decision to reassign Plaintiff was not based upon his alleged protected speech. Rather, Plaintiff was reassigned from teaching 10th grade biology, because he demonstrated an inability to teach the biology curriculum. He specifically stated, he "can't teach evolution." (LeVake depo. p. 64). He admits he totally skipped the textbook chapters addressing evolution. (LeVake depo., pp. 40, 107, 108). He deleted references to evolution from tests and handouts. (Ex. 11). He told his classes at the beginning of the year he would not cover evolution. (Ellison Aff., Benbrooks Aff.) Plaintiff's actions were totally contrary to the District's established curriculum, the State graduation standards and to National Standards.

Plaintiff demonstrated he would not teach evolution as required by the 10th grade biology curriculum. This was the sole reason for his reassignment. Plaintiff cannot establish he was reassigned in violation of his right to free speech. Plaintiff's claim must be dismissed.

3. Plaintiff's free speech rights are limited and have not been violated.

While "neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate", Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969), "speech that would be protected on the street corner does not automatically deserve protection in the classroom." Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356, 1366 (9th Cir. 1985). "The school environment is unique due to its physically confining nature, the immaturity of its population, and the special demands and needs of the educational purpose." Fraser at 1367.

In Miles v. Denver Public Schools, a ninth grade government teacher claimed that his first amendment free speech rights were violated when he was disciplined for statements made in the classroom. 944 F.2d 773 (10th Cir. 1991). Relying on the Supreme Court’s reasoning in Hazelwood v. Kuhlmeier, the Miles court stated, “the ordinary classroom is not a public forum” and held the district could reasonably restrict the teacher’s classroom expression. Miles at 776. The court noted,

A state’s regulation of speech in a public school setting is often justified by peculiar responsibilities the state bears in providing educational services: to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.

Miles, at 777, citing Hazelwood. (citations omitted) (emphasis added).

The District is entitled to ensure that its biology curriculum be taught and to assure that its students learn the “lessons the activity is designed to teach.” Plaintiff failed to teach the curriculum. Defendants are entitled to assign its teachers as is most appropriate to meet this goal. Plaintiff’s claim fails.

4. Plaintiff is not entitled to express his religiously derived criticism of evolution at school.

It is well established that a “high school classroom is not a public forum where religious views can be freely aired.” Brandon v. Bd. Of Educ. of Guilderland Central School. Dist., 635 F.2d 971, 980 (2nd Cir. 1980) citing, Niemotko v. Maryland, 340 U.S. 268 (1951) and Kunz v. New York, 340 U.S. 290 (1951); Miles v. Denver Public Schools, 944 F.2d 773, 776 (10th Cir 1991). The Brandon court stated:

While students have First Amendment rights to political speech in public schools, [] sensitive Establishment Clause considerations limit their right to air religious doctrines.

...

Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.

Brandon, 645 F.2d at 978, and 980, citing Roemer v. Board of Public Works, 426 U.S. 750 (1976).

“The interest of the State in avoiding an Establishment Clause violation may be a compelling one justifying an abridgement of free speech otherwise protected by the First Amendment.” Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S.Ct. 2141, 2148 (1993).

In the case at bar, it is clear that Plaintiff wants to use the public school biology classroom as a forum to discuss his particular views of the “inconsistencies” in the theory of evolution. It is unrefuted that the source of information upon which Plaintiff relies for these “inconsistencies” is religious oriented literature. Religious speech is not afforded unfettered freedom or expression in the classrooms of America’s public schools. The District can reasonably restrict Plaintiff’s religious speech to assure students learn the curriculum and to assure Plaintiff’s individual views were not erroneously attributed to the school.

E. Plaintiff had no constitutional right to alter the District’s established curriculum.

Plaintiff alleges that his reassignment from teaching 10th grade biology violated his First Amendment right to academic freedom. (Complaint ¶ 37). What Plaintiff is actually stating by this claim is that he was not permitted to introduce “anti-evolution” materials into the biology curriculum. In essence, Plaintiff is stating that he has a right to alter the curriculum as he sees fit. His assertion is contrary to well-established case law.

Academic freedom per se, is not specifically enumerated in the First Amendment but has been found to be a “special concern” of the First Amendment. Keyishian v. Board of Regents of University of State of N.Y., 385 U.S. 589, 603, 87 S.Ct. 675, 683 (1967).

Academic freedom, however, is not absolute. In re Proposed Termination of James E. Johnson’s Teaching Contract with Independent School District No. 709, 451 N.W.2d 343, 346 (Minn. Ct. App. 1990); Webster v. New Lenox School Dist No. 122, 917 F.2d 1004, 1007 (7th Cir. 1990); Miles v. Denver Public Schools, *supra*.

“The first amendment is not a teacher’s license for uncontrolled expression at variance with established curricular content.” Webster, 917 F.2d at 1007; Miles, *supra* (teacher does not have unlimited liberty as to structure and content of the courses, at least at the secondary level).

In Webster, a junior high school social studies teacher sued his district for prohibiting him from teaching a non-evolutionary theory of origins of life. He argued that the First Amendment guaranteed him the right to determine the curriculum content of his junior high class. Webster, at 1007. In rejecting his claims, the Webster court held, “a school board has the authority and responsibility to ensure that teachers do not stray from the established curriculum by interjecting religious advocacy into the classroom”. Id. Citing the U.S. Supreme Court in Edwards v. Aguillard, the court noted,

Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family.

Webster at 1007, citing Edwards v. Aguillard, citations omitted. Because of the immature stage of intellectual development of secondary school students, the Webster court held the school board had a heightened responsibility to control the curriculum. Id. The court noted,

secondary school teachers occupy a unique position for influencing secondary school students, thus creating a concomitant power in school authorities to choose the teachers and regulate their pedagogical methods. The state exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.

Id.

In Johnson, *supra*, the Minnesota Court of Appeals upheld a school district's decision to terminate a teacher for failure to teach the required mathematics curriculum. The court stated, "the district adopted a specific curriculum for achieving [its] objective" and noted that it was the responsibility of the classroom teacher to provide that basic information to his students. Johnson at 346.

The great weight of authority directs that this Court must dismiss Plaintiff's academic freedom claim. He does not have an unfettered First Amendment right to determine the curriculum in his classroom. He had an absolute obligation to follow the District's established biology curriculum. He failed to do so and was appropriately reassigned.

IV. DEFENDANTS HAVE NOT VIOLATED PLAINTIFF'S FREE SPEECH OR FREEDOM OF CONSCIENCE RIGHTS AS ESTABLISHED BY MINNESOTA'S CONSTITUTION.

Plaintiff alleges that Defendants' actions have violated his rights of free speech and freedom of conscience under the Minnesota State Constitution. (Complaint ¶¶ 39, 41). Plaintiff cites Article 1, Section 3 of the Minnesota Constitution for his freedom of speech claim and Article 1, Section 16 for his freedom of conscience claim.

A. Plaintiff’s free speech rights under the Minnesota Constitution are no greater than those under the Federal Constitution.

While states may adopt constitutional protections that are more expansive than are accorded under comparable provisions of the Federal Constitution, the Minnesota Supreme Court has held that there is “nothing inherent in the language of Article I, Section 3 which requires more expansive protection for free speech than does the First Amendment.” State v. Wicklund, 589 N.W.2d 793, 798 (Minn. 1999). Accordingly, absent some compelling reason to expand the protections afforded by the Federal Constitution, Minnesota courts are bound by the precedents set by the U.S. Supreme Court regarding freedom of speech in public school classroom settings. Plaintiff’s free speech claims under Article 1, Section 3 must fail for the same reasons as stated above.

B. There has been no violation of Plaintiff’s right to freedom of conscience.

Minnesota has historically provided broader protections for the exercise of religion than those afforded under the Federal Constitution. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990); State v. Schwartz, 598 N.W.2d 7, 9 (Minn. Ct. App. 1999). In pertinent part, Article 1 Section 16 of the Minnesota Constitution states,

... The right of every man to worship God according to the dictates of his own conscience shall never be infringed; ... [nor shall] any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state... nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries.

Art. 1 § 16 Minnesota Constitution.

Minnesota has adopted a four-part, compelling state interest balancing test to determine whether or not a state action is in violation of the freedom of conscience clause. Hill-Murray

Federation of Teachers, St. Paul, MN v. Hill-Murray School, Maplewood, MN, 487 N.W.2d 857 (Minn. 1992). This test asks, (1) is objector's belief sincerely held; (2) does the state regulation burden the exercise of [his] religious beliefs; (3) is the state's interest in the regulation overriding or compelling; and (4) does the state regulation use the least restrictive means. Id., 865.

Applying this test to the undisputed facts of this case, Plaintiff cannot meet his burden under elements two and three. As discussed above, Plaintiff cannot demonstrate that the District's requirement that he teach the biology curriculum as established burdens the free exercise of his religious beliefs. In fact, he has testified that he still practices his religion of choice. (LeVake depo., p. 187). He has identified no areas in which his ability to practice and believe as he desires have been abridged by the Defendants' actions.

Moreover, Defendants' compelling interest in avoiding excessive entanglement of the District in a religious viewpoint of evolution override Plaintiff's freedom to exercise his religion. In State by McClure v. Sports and Health Club, Inc., 370 N.W.2d 884 (Minn. 1985), the Minnesota Supreme Court rejected a private sports and health club owners' claims that their practice of hiring and firing employees based upon their religious beliefs was justified and protected under Article 1, Section 16 of the Minnesota Constitution because their religious beliefs prohibited them from working with anyone who was opposed to their religious convictions. The court stated, "by engaging in a secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise [their] religious beliefs." Sports and Health, at 853.

So too in the instant case, Plaintiff is engaged in a secular endeavor. Defendants' compelling interest in avoiding the advancement of a religious view of the origins of life

overrides Plaintiff's right to freedom of conscience as established by the Minnesota Constitution. Plaintiff's freedom of conscience claim fails.

V. PLAINTIFF HAD NO PROTECTED INTEREST IN TEACHING BIOLOGY, THEREFORE HIS REASSIGNMENT DID NOT VIOLATE HIS DUE PROCESS RIGHTS.

Plaintiff alleges that the District violated his Fifth Amendment and Fourteenth Amendment due process rights by reassigning him in an “arbitrary, capricious, unreasonable and discriminatory manner.” (Complaint ¶ 43). Plaintiff has no claim for deprivation of due process rights under the Fifth Amendment to the U.S. Constitution because the Fifth Amendment applies only to federal government actions. Caponi v. Carson, 392 N.W.2d 591, 594 (Minn. Ct. App. 1986); Welfare of J.A.J., 545 N.W.2d 412, 420 (Minn. Ct. App. 1996).

A. Plaintiff had no protected interest in teaching biology.

To state a claim under 42 U.S.C. § 1983 for violation of due process, Plaintiff must establish that he has been deprived of a liberty or property interest within the meaning of the Fourteenth Amendment's due process clause. Sweeney v. Special School Dist. No. 1, 368 N.W.2d 288 (Minn. Ct. App. 1985); Pelozo v. Capistrano Unified School Dist., 37 F.3d 517, 523 (9th Cir. 1994). The injury Plaintiff claims here is his reassignment from 10th grade biology to 9th grade science. (Complaint ¶ 43). Plaintiff's position of biology teacher is not a recognized liberty or property interest protected by the Fourteenth Amendment due process clause.

Property interests do not arise from the U.S. Constitution but “are created and their dimensions are defined by existing rules or understandings that stem from an independent

source such as state law.” Sweeney, at 292, citing Loehr v. Ventura County Community College District, 743 F.2d 1310, 1314 (9th Cir. 1984). While tenure has been held to be a property right protected by due process, Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), Plaintiff has not been deprived of his tenure.

There is no property interest in teaching the same subject year after year. The District’s contract with each of its teachers clearly provides the District can assign a teacher to any court for which he is licensed. (Ex. 2). Plaintiff acknowledges he understood at the time he was hired that he could be assigned to teach any subject for which he had a license. (LeVake depo., pp. 92-93). This provision was contained in each of the yearly contracts he signed with the District. (Id., Plaintiff’s contract). He understood teacher assignment to be at the discretion of the District. (Id.).

Plaintiff admits he has not lost salary, tenure or seniority by his reassignment. Nothing in his contract with the District has changed. He is teaching a subject for which he is licensed. Accordingly, Plaintiff has no loss of liberty or property that is afforded protection under the due process clause of the Fourteenth Amendment.

B. Plaintiff received more process than his contract required.

Plaintiff acknowledges that the contract he signed yearly with the District included the following language:

[Plaintiff] agrees to teach in the schools of the District as assigned in such grades of subjects for which he the necessary license.

(Contract, Ex. 2; LeVake depo., pp. 92-93).

On the basis of Plaintiff’s admitted failure and refusal to teach the biology curriculum, Mr. Johnson reassigned Plaintiff to teach 9th grade science. No notice or hearing were required

as Plaintiff was licensed to teach this subject and reassignment was within the District's discretion.

In this case, however, prior to reassignment he had two meetings with Defendants and fellow science teachers in which the biology curriculum and teacher expectations were discussed. Plaintiff was asked to submit a position paper outlining how he intended to teach biology in the future. In his paper, Plaintiff clearly identified that he would not teach the biology curriculum as established unless he was also permitted to teach the "inconsistencies" in the theory.

A simple breach of contract does not rise to a level of a constitutional deprivation. Dover Elevator Co. v. Arkansas State University, 64 F.2d 442, 446 (8th Cir. 1995). Here there was not even a breach of contract upon which Plaintiff can rely for his claim.

Plaintiff cannot establish that he was deprived of a liberty or property interest in violation of his Fourteenth Amendment due process rights. This claim must be dismissed.

CONCLUSION

For all of the foregoing reasons and conclusions Defendants are entitled to summary judgment as to all of Plaintiff's claims against them.

Dated: March 24, 2000

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