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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

California Parents for the Equalization of Educational Materials, Plaintiff, v. The California State Department of Education; The California State Board of Education; Glee Johnson, President; Kenneth Noonan, Vice President; Alan Bersin; Ruth Bloom; Yvonne Chan; Donald G. Fisher; Ruth E. Green; Joe Nunez; Bonnie Reiss; and Tom Adams, Defendants.	Case No. 2:06-CV-00532-FCD-KJM DEFENDANTS' REPLY TO OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT Date: July 21, 2006 Time: 10 a.m. Courtroom: 2 Honorable Frank C. Damrell, Jr.

INTRODUCTION

California Parents for the Equalization of Educational Materials' (hereinafter Plaintiff or CPEEM) Opposition to Defendants' Motion to Dismiss (Opposition) attempts to alter the allegations and arguments contained in its First Amended Complaint (hereinafter Complaint or FAC) to correct or inappropriately bolster claims that, as contained in the actual FAC, are insufficient to support the causes of action contained therein. Defendants will not provide the

Court with another recitation of the facts; however, it is important to point out that the facts as represented in the Opposition, in many instances misstate or contradict the facts contained in the FAC. For example, section II, entitled "FACTUAL BACKGROUND" misstates or expands on the allegations contained in paragraphs 4.6, 4.8-4.10, 4.41, 4.43, 4.47, 4.50, and 4.52 of the FAC. Defendants, therefore, would ask the Court not to consider the "Factual Background" as set forth in the Opposition and instead refer to the FAC or the Motion to Dismiss in order to understand the facts as pled. In any event, this attempt to revise or re-cast the factual allegations contained in the FAC is unavailing for even assuming, arguendo, the revised facts are true, the causes of action cannot stand. Consequently, for the reasons described below, dismissal of CPEEM's FAC should be granted.

First, CPEEM has failed to explain away the clear and irrefutable truth that the first, second, and third causes of action are based upon alleged First and Fourteenth Amendment violations against all Defendants. Plaintiff does not disagree with Defendants that there is no direct cause of action for constitutional violations, but insists that it "cited section 1983 throughout the FAC." (Opp at 6:4-6) However, a simply reading of the first, second, and third causes of action will clearly show that CPEEM made no such reference to section 1983.

Second, CPEEM has failed to meet its burden to show standing to bring this action. CPEEM does not dispute that it did not come into existence until after the sixth grade textbooks with edits and corrections were adopted by the State Board of Education (SBE). Instead, CPEEM tosses up vague references to its members, none of which are parties to this suit, and to their supposed involvement in the textbook adoption process. However, the only individual the Plaintiff references by name in either the FAC or Opposition (Abhijit Kurup) is not even alleged to be a member of CPEEM and will never use the sixth grade textbooks at issue because he is currently a college student.

Third, even if the Court determines that CPEEM has alleged section 1983 in the first, second and third causes of action, no action can stand against the California Department of Education (CDE) or the SBE because neither is a "person" subject to suit under section 1983.

Likewise, no cause of action can stand against the State officers acting in their official capacities, except for actions involving prospective relief.

Fourth, pursuant to the Eleventh Amendment, CDE and SBE are immune from suit for alleged Constitutional violations. In addition, the Eleventh Amendment provides immunity to State officials acting in their official capacities, except for causes of action for prospective relief.

Fifth, the individual Defendants have qualified immunity as to all the causes of action.

ARGUMENT

I. PLAINTIFF'S FIRST, SECOND, AND THIRD CAUSES OF ACTION FAIL TO STATE A CLAIM BECAUSE CPEEM DOES NOT HAVE A DIRECT CAUSE OF ACTION UNDER THE U.S. CONSTITUTION

CPEEM's first, second, and third causes of action are based upon alleged First and Fourteenth Amendment violations. Specifically, CPEEM's first cause of action is against all Defendants and alleges a violation of the Equal Protection Clause of the Fourteenth Amendment. CPEEM's second cause of action is against all Defendants and alleges a violation of the Establishment Clause of the First Amendment. Finally, CPEEM's third cause of action is against all Defendants and alleges a violation of the Free Speech and Free Association Clauses of the First Amendment. None of these causes of action directly reference section 1983. Nor do they allege facts necessary to state a cause of action under section 1983.

Plaintiff argues that it has alleged "facts sufficient to put Defendants on notice of the asserted violations and cites to section 1983." (Opp at 6:14-16.) Plaintiff cites *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1992), for the proposition that its mention of 42 U.S.C. § 1983 in the section titled "Jurisdiction and Venue" at paragraph 3.1 of the FAC and incorporation of that paragraph in subsequent paragraphs was sufficient from a pleading standpoint. However, this is less than what was required in *McCalden*. The court in *McCalden* stated, "appellant explicitly mentions 42 U.S.C § 1983 in the first paragraph of his complaint, which is incorporated by reference in his fourth claim, **and his fourth claim tracks the language of § 1983**." *McCalden*, 955 F.2d at 1223-1224 (emphasis added). None of CPEEM's first, second, or third causes of action track the language of section 1983. The fact that the only cause

of action that clearly references section 1983 is against the "Individual Defendants" supports Defendants' argument that Plaintiff did not intend to invoke section 1983 in the first, second, and third causes of action as is further supported by Plaintiff's failure to allege facts consistent with a section 1983 claim in those causes of action.

II. CPEEM DOES NOT HAVE STANDING TO BRING THIS ACTION

Even if this Court determines that a section 1983 claim has been properly pled against one or more of the Defendants, CPEEM lacks standing to bring this lawsuit. Standing is a jurisdictional limitation and is an "essential and unchanging part of the case-or-controversy requirement of Article III" of the United States Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The party seeking the exercise of jurisdiction in its favor bears the burden of alleging facts that show that it is the proper party to invoke judicial power to resolve the dispute. *United States v. Hays*, 515 U.S. 737, 742 (1995). To establish a "case or controversy," a plaintiff must show: (a) a concrete injury in fact, (b) a causal connection between the injury and defendant's conduct or omissions, and (c) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560.

Plaintiff bears the burden to demonstrate standing for each claim and form of relief it seeks. *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001). Therefore, in order to state a claim under 42 U.S.C. § 1983, Plaintiff's complaint must provide sufficient information to enable this Court to determine that the Plaintiff has been injured, that there is a link between the Defendants' conduct and the likelihood of redress by this Court, in order to invoke the subject matter jurisdiction of the court. Plaintiff has not done so.

A. No Direct Standing

Plaintiff cites *Havens Realty Corporation v. Coleman*, 455 U.S. 363, 378-379 (1982) in the Opposition for the proposition that "[d]irect standing is shown where the defendants' practices have 'perceptibly impaired' the organizational plaintiff's ability to provide the services it was formed to provide. (Opp 14:25-27.) However, the FAC contains no allegations regarding the types of services CPEEM provides. Additionally, as noted in the Motion to Dismiss, CPEEM was not created until after the SBE adopted the textbooks and edits and corrections at issue. (Motion to

Dismiss 8:17-19.) CPEEM does not dispute this fact in its Opposition. All of the factual allegations contained in the FAC relate to the process that was followed by SBE prior to CPEEM's formation. CPEEM fails to allege in the FAC any injury suffered by it, and therefore, lacks direct standing.

CPEEM argues that CPEEM will be "forced to expend resources asserting the rights of its members here…." (Opp 15:10-11.) However, the "mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994). A plaintiff cannot be permitted to "bootstrap standing by expending its resources in response to actions of another." *Id.*

B. No Association Standing

The Supreme Court has held that "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

To establish associational standing, CPEEM must first show that its members have standing to sue on their own behalf. Plaintiff has alleged in the introductory paragraph at page 2 of the Complaint that its members are "parents who have children attending public schools in the State of California and who will be attending public schools in the State of California in the first through sixth grades." There are no other allegations in the Complaint that further identify these parents or that indicate when a student of one of these member parents might actually be using a sixth grade History-Social Science textbook. As such, it is impossible to determine if even one of Plaintiff's members would have standing to bring this action.

In its Opposition, CPEEM cites *Grove v. Mead School Dist.*, 753 F.2d 1528, 1532 (9th Cir. 1985), and argues that in the Ninth Circuit "a plaintiff may challenge the use of educational materials which offend constitutional restrictions if they 'are directly affected' by use of the

materials." (Opp 8:26-28.) CPEEM's reference to the language in *Grove* is oversimplified. *Grove* states, "Appellants have standing to challenge alleged violations of the establishment clause of the First Amendment if they are directly affected by use of *The Learning Tree* in the English Curriculum." *Id*. In the *Grove* case, there was presumably an allegation that Grove's child (or children) would be using the book in question. In the case at hand, we have no such allegation. The textbooks at issue in this case are sixth grade History-Social Science textbooks. While CPEEM alleges at page 2 of the FAC that its members are "parents who have children attending public schools in the State of California and who will be attending public schools in the State of California in the first through sixth grades," it does not allege that its members, or its members' children, will be using the sixth grade textbooks in question. A close look at the allegation highlights this point. To say that CPEEM's members are "parents who have children attending public schools in the State of California" is meaningless because these particular children may have already passed the sixth grade. Additionally, to allege that CPEEM has members that are parents who have children "who **will** be attending public schools in the State of California in the first through sixth grades" is equally meaningless. (Emphasis added.) These children who **will** be attending California public schools may currently be infants. As CPEEM alleges in its FAC at paragraph 4.1, the SBE adopts textbooks and instructional materials for use in public schools every six years. A new sixth grade History-Social Science textbook adoption may well be in place prior to any of the CPEEM member children utilizing them in the sixth grade. Therefore, without a specific allegation that CPEEM's members will be using the sixth grade History-Social Science textbooks in question, the FAC fails to allege facts sufficient to meet the first prong of the *Hunt* test. (See *Allen v. Wright*, 468 U.S. 737, 757, n. 22 (1984), denying standing to parents who brought an equal protection suit: the "stigmatic injury thus requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment.")

Under the second prong of the *Hunt* test, a plaintiff must show that the interests the organization seeks to protect are germane to its purpose. Plaintiff makes no allegations with regard to its purpose. It is, therefore, impossible to determine based upon the face of the Complaint

whether CPEEM meets this requirement. (See *Individuals for Responsible Government, Inc. v. Washoe County By and Through the Bd. of County Com'rs,* 110 F.3d 699, 702 (9th Cir. 1997): ["the record in this case does not specify who are the members of Individuals for Responsible Government, Inc., nor does it specify the organization's purpose. Absent both purpose and members, it lacks any standing to sue."].)

Finally, Plaintiff has failed to satisfy the third prong of the *Hunt* test because the causes of action brought by CPEEM require the "participation of the individual members in the lawsuit." In *Harris v. McRae,* 448 U.S. 297 (1980), the Supreme Court explained that associational standing is not automatically appropriate simply because an association is seeking injunctive or prospective relief on behalf of its members.[1] Although CPEEM has avoided pleading a Free Exercise Clause violation, its allegations line up closely with Harris' analysis where the Court stated that where one needs to show "the coercive effect of the enactment as it operates against him in the practice of his religion," the claim "ordinarily requires individual participation." *Id*., at 321. Moreover, because the rights secured by section 1983 are personal to those purportedly injured, **the Second Circuit has outright refused to permit associations to bring section 1983 cases on behalf of their members**. *Aguayo v. Richardson*, 473 F.2d 1090 (2nd cir. 1974); *League of Women Voters v. Nassau County Board of Supervisors*, 737 F.2d 155, 160 (2nd Cir. 1984).

Since CPEEM, a corporation, has no religious beliefs, did not participate in the textbook adoption and edits process, and does not use the instructional materials at issue, it will be necessary to obtain proof from its members. This fact is clear based on the allegations in the FAC and the arguments contained in CPEEM's Opposition. The FAC and Opposition constantly refer to the treatment of CPEEM's members presumably because CPEEM did not come into existence until after the textbook adoption process was complete. (FAC Para. 4.6, 4.76; Opp 5:5-7, 9:2-6, 10:1-2, 10:12-15, 11:13-15.)

It is only common sense that for the causes of action alleged by CPEEM that participation of the members will be necessary. As CPEEM itself states in its Opposition at section II (E)

entitled "CAPEEM's CLAIMS," CPEEM alleges "its member who participated in the process were treated disparately by Defendants and that the members will be harmed by the Materials." (Opp 5:5-7.) Because the participation of individual members is required, the Plaintiff also fails to satisfy the third prong of *Hunt* and lacks associational standing to pursue its claims on its members' behalf.

Because CPEEM lacks standing, the FAC should be dismissed with prejudice.

III. PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION UNDER SECTION 1983 BECAUSE SECTION 1983 CREATES NO REMEDY AGAINST A STATE OR AGAINST STATE OFFICIALS, RETROSPECTIVELY, WHO ACTED IN THEIR OFFICIAL CAPACITY

Even if the court concludes that CPEEM has sufficiently pled a section 1983 claim against some of the Defendants, no section 1983 action against state entities or against state officials, retrospectively, who acted in their official capacities can be maintained. Section 1983 "creates no remedy against a State." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997). "`States or governmental entities that are considered "arms of the state" for Eleventh Amendment purposes' are not `persons' under § 1983."[2] *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989)). Therefore, because CDE and SBE are clearly state agencies, there can be no section 1983 cause of action against either of them, and both should be dismissed with prejudice from this suit.[3]

Likewise, state officials may not be sued for damages or other retrospective relief in there official capacities. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71. However, a state official may be sued under section 1983 for prospective injunctive relief in his or her official capacity. *Id*. at 71 n. 10; *Doe*, 131 F.3d 836, at 839. Or, a state official may be sued under section 1983 in his or her individual capacity.

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[1] In addition, Defendants note that CPEEM's assertion that it is not seeking monetary damages (see Opp 14:14-15) is inaccurate to the extent its FAC clearly seeks nominal damages against the individual Defendants.

[2] "State" means "the State and any office, officer, department, division, bureau, board, commission, or agency of the State claims against which are paid by warrants drawn by the Controller." (Cal. Govt. Code § 900.6.)

[3] While discussing the Eleventh Amendment, CPEEM implicitly concedes that CDE and SBE are not proper defendants: "Defendants are correct that the Eleventh Amendment bars suits against a state or a state agency regardless of the type of relief sought." (See Opp 18:23 through 19:1.)

The FAC lacks clarity as to what capacity CPEEM has named the individual Defendants. The FAC not only fails to identify whether individual Defendants are being sued in their official or individual capacities but also fails to tie any of the alleged wrongs to any of the specific "individual" Defendants. CPEEM appears to assert in its Opposition that individual Defendants have been named in both their official and individual capacities. (Opp 19:18-19; 20:6-8.) To the extent the Court does not dismiss the FAC in its entirety or grants CPEEM leave to amend, CPEEM should be required to expressly assert in what capacity or capacities the individual Defendants are being sued and to assert the facts upon which such claims are made. Making the Defendants and the Court guess at CPEEM's contentions serves no legitimate purpose and hinders the Defendants' ability to efficiently defend themselves. Naturally, the individual Defendants' defenses hinge upon what types of claims are asserted and in what capacity the Defendants are alleged to have acted.

IV. THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BARS SUIT IN FEDERAL COURT AGAINST A STATE OR AGAINST STATE OFFICIALS, RETROSPECTIVELY, WHO ACTED IN THEIR OFFICIAL CAPACITY

CPEEM agrees in its Opposition that under the Eleventh Amendment, a state's sovereign immunity is a jurisdictional bar to suit in federal court. (See Opp 18:23 through 19:1.) This bar to suit exists regardless of the type of relief sought. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996). Therefore, the suit against CDE and SBE cannot stand, and each must be dismissed. (See *Porter v. Board of Trustees of Manhattan Beach Unified School District*, 123 F.Supp.2d 1187, 1198 (C.D. Cal. 2000), *reversed on other grounds*, in which the court dismissed CDE and SBE with prejudice stating, "Plaintiffs' § 1983 claim must be dismissed in its entirety against the CDE and the California Board of Education because both entities are state agencies and therefore cloaked by Eleventh Amendment immunity.")

With regard to the individual Defendants, it is unclear whether each is being sued in his or her official or individual capacity or both, as mentioned above. A claim for prospective relief compelling a state official in his or her official capacity to comply with an on-going or threatened violation of federal law is generally not barred by the Eleventh Amendment. *Ex Parte Young*, 209

U.S. 123 (1908). However, CPEEM fails to note the limitations on the *Young* exception to the Eleventh Amendment. *Young* held that the Eleventh Amendment did not prevent federal courts from granting prospective injunctive relief under the following circumstances: when the suit was directed against a state official with some duty to enforce the alleged unconstitutional act or proceeding and when the suit involved a threatened, imminent, or ongoing proceeding or act that was in violation of the United State Constitution. *Id*., at 155-156.

Although it is unclear what allegations CPEEM is making specifically against the individual Defendants, CPEEM appears to be seeking injunctive relief based upon the past actions of SBE. Numerous, if not a majority of, passages in the FAC complain about the process of the textbook adoption. (E.g., see FAC, ¶ 5.11, among many.) A plaintiff may not use the *Young* doctrine to adjudicate the legality of past conduct. *Papasan v. Allain*, 478 U.S. 265, 277-278 (1986).

Furthermore, the Court in *Ex Parte Young* placed the following additional limitation on the scope of its holding:

> "There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty." *Young*, 209 U.S. at 158 (see also the Court's discussion of *Young* in *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

Accordingly, to the extent CPEEM is complaining about the discretion exercised by the SBE members in adopting the textbooks, which is not a mere ministerial act, the *Young* exception to the Eleventh Amendment does not apply, and the individual Defendants' Eleventh Amendment immunity stands.

V. THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "This is an objective standard." *Albers v. Whitely*, 743 F.2d 1372, 1376 (9th Cir. 1984). A rebuttable presumption exists

at law that qualified immunity protects public officials performing discretionary functions. *Scheuer v. Rhodes*, 416 U.S. 232, 245-250 (1974).

To determine whether an official is entitled to qualified immunity, the Court must consider the following two part test: (1) Was the law governing the official's conduct clearly established? If not, the official is entitled to immunity. Only if the law was clearly established is the test continued by addressing the second prong; (2) Under the law, could a reasonable officer have believed the conduct was lawful in the light of the facts known to him or her at the time? If so, the official is entitled to immunity. *Act up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993); see also, *Thompson v. Souza*, 111 F.3d 694, 698 (9th Cir. 1997).

In this case, the Defendants are accused of numerous abusive actions related to the process and procedures used to adopt sixth grade History-Social Science textbooks. The FAC does not differentiate between the acts allegedly committed by the respective Defendants nor does it tie the alleged wrongs to specific "individual" defendants. (See, for example, FAC at ¶¶ 5.4, 5.5, 5.6, 5.7, 5.9, 5.10, 5.11, 6.3, 6.4, 6.7, 6.8, 7.4, 7.5, 7.7, 7.8, 8.3.) Therefore, because Plaintiff has failed to plead facts showing that any of these specific individual defendants violated rights clearly established under law, the FAC against the individual Defendants should be dismissed because the first prong of the test, outlined above, cannot be established.

CONCLUSION

In light of the above, Defendants respectfully request that the Court dismiss Plaintiff's First Amended Complaint.

Dated: July 14, 2006

Respectfully submitted,

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