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UNITED STATES DISTRICT COURT
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 Nuñez; Bonnie Reiss; and Tom Adams,

Defendants.

Case No.: 2:06-CV-00532-FCD-KJM

CAPEEM'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date: July 21, 2006
Time: 10:00 am
Courtroom: 2

Honorable Frank C. Damrell, Jr.

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I. INTRODUCTION

Plaintiff, California Parents for the Equalization of Educational Materials ("CAPEEM") challenges the most recent California state textbook review and adoption process. Specifically, CAPEEM alleges Defendants effected the process in a discriminatory manner and approved materials for textbooks which denigrated the Hindu religion and the religious beliefs of its members. Defendants argue CAPEEM lacks standing. Defendants do not cite to any authority that CAPEEM's allegations do not state legally cognizable causes of action. Defendants do not address CAPEEM's Establishment Clause or Free Expression claims. On the merits, Defendants only address CAPEEM's Equal Protection claim, arguing that "the Fourteenth Amendment makes no guarantee that state textbooks will treat the histories of religions equally," and that "the equal protection clause protects against the unequal treatment of people, not the unequal treatment of thoughts, philosophies, histories, or religions." Defendants' arguments are untenable. Educational materials must comport with constitutional restrictions, whether imposed by the First or Fourteenth Amendments. The administrative process must similarly comport with constitutional restrictions.

Defendants belittle CAPEEM's efforts to ensure equal treatment of its members and their religious beliefs in California schools and educational materials. Courts recognize the important role played by education in society. Courts also recognize that inequality in education is something – in the modern era – inimical to the American experience. CAPEEM adequately alleges violations of the rights of its members under the First and Fourteenth Amendments to the United States Constitution. Accordingly, Defendants' Motion to Dismiss ("Motion") (Dkt. No. 33.) CAPEEM's First Amended Complaint ("FAC" or "Complaint") (Dkt. No. 18) should be denied.

II. FACTUAL BACKGROUND[1]

A. THE TEXTBOOK PROCESS

Every six years the State Board of Education ("SBE") and the Department of Education ("CDE") adopt and approve textbooks and instructional materials for use in California schools. In most cases, the SBE and CDE revisit existing textbooks and approve revisions and edits to existing textbooks (the "Materials"). (*See* FAC, ¶¶ 4.1-4.3.) The Curriculum Development and Supplemental Materials Commission (the "Curriculum Commission"), an advisory body, makes recommendations for edits and corrections to the textbooks. (Id.) Defendants adopt or reject these recommendations. Defendants generally conduct the corrections process in a public manner, and allow interested groups the opportunity to comment and participate. Numerous groups, including religious groups (*e.g.*, Jewish, Buddhist and Muslim groups) have long participated in this process. (Id.)

B. INITIAL REVISIONS

Members of Plaintiff, along with various other groups of Hindus (the "Hindu Groups,")[2] participated in California's most recent textbook review and adoption process in order to correct gross mischaracterizations of the Hindu religion and material inaccuracies in the portrayal of the Hindu religion. (Id. at ¶ 4.6.) After consulting with, and retaining Dr. Shiva Bajpai as a content review consultant, Defendants accepted the majority of the edits

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[1] For purposes of the Motion, CAPEEM agrees with Defendants' statement of facts (Motion, pp. 3 (line 16) -4 (line 22)), with two exceptions: CAPEEM alleges (1) Professor Witzel did not see the Initial Revisions but instead attacked the Hindu Groups (*compare* Motion, p. 4, lines 6-7, *with* FAC, ¶ 4.44) and (2) adoption of the Materials caused harm to students, including its members. (*Compare* Motion, p. 4, lines 17-18, *with* FAC, ¶ 4.75.) However, where the two materially differ, CAPEEM's allegations must be taken as true.

[2] For purposes of simplicity, CAPEEM often refers to the Hindu Groups to denote various groups, as well as individuals who participated. (*See* FAC, ¶ 4.6.) Some of these individuals are members of CAPEEM. Therefore references to Defendants' actions vis a vis the Hindu Groups, refer also to Defendants' actions vis a vis members of CAPEEM.

submitted by CAPEEM's members and by the Hindu Groups (the "Initial Revisions"). (Id. at ¶¶ 4.8-4.10.) However, prior to formal adoption of the Initial Revisions, Defendants received a letter from Professor Michael Witzel, of Harvard University. (*See* FAC, Ex. A.)

C. THE WITZEL LETTER; DEFENDANTS' REVERSAL AND APPOINTMENT OF THE SECOND PANEL

Professor Witzel, who had not participated in the process, or followed requirements with respect thereto, attacked CAPEEM's members and the Hindu Groups, and their motivations. (Id. at ¶ 4.41.) He had not seen the Initial Revisions or the original text – indeed his letter contained no specific references to either. (Id. at ¶ 4.43.) Professor Witzel accused the Hindu Groups of harboring political and religious motivations. Among other things, he called on Defendants "to reject the demands by nationalist Hindu ('Hindutva') groups that California textbooks be altered to conform to their religious-political views." (*See* FAC, Ex. A.) According to him, the "proposed revisions [were] . . . of a religious-political nature." (Id.) Without explanation, solely based on the letter, Defendants decided to delay approval of the Initial Revisions.[3] (Id. at ¶ 4.47.) Defendants then appointed a panel of Professors Witzel, Wolpert and Heitzman (all affiliated with Witzel's letter) to review the Initial Revisions. Defendants appointed this panel notwithstanding the panel's expressed antagonism towards Indians and the Hindu religion and existing conflicts of interest. (Id. at ¶ 4.50.) One of the appointees to the panel published a book with one of the textbook publishers, which under Defendants' own standards would have disqualified him from consulting with Defendants. (Id. at ¶ 4.52.) Defendants gave no substantive reason for delaying approval of the Initial Revisions. (Id. at ¶ 4.48.) Nor did

[3] Simultaneously, Defendants continued to reject the requests of Professor Bajpai for additional time to review the Materials.

Defendants cite any substantive reasons for reconsideration of the Initial Revisions. (Id.) At this time, Defendants approved in full the Curriculum Commission recommended edits and changes urged by other groups, including religious groups. (Id. at ¶ 4.49.)

Professors Witzel, Wolpert, and Heitzman had expressed antagonistic sentiments towards Indians, Hinduism, and the Hindu Groups. (Id. at ¶ 4.53.) They sought the outright rejection of all the Initial Revisions. (Id.) Defendants failed to provide notice (to the Hindu Groups) that Defendants were considering retaining a second panel of consultants. (Id. at ¶ 4.54.) Defendants then released a memorandum containing new recommendations, as determined by Professors Witzel, Wolpert, and Heitzman. (Id. at ¶ 4.55.) Despite repeated requests, the Hindu Groups were not afforded an opportunity to rebut the charges of the second panel. Nor were they afforded input into this process. (Id.)

D. ADOPTION OF FINAL REVISIONS

On January 6, 2006, Defendants conducted a closed-door meeting with Professors Bajpai and Witzel. The representatives of the Hindu Groups were not invited, despite requests to be present. (Id. at ¶ 4.61.) Defendants provided no further details regarding the follow up recommendations of the Curriculum Commission or the private meeting between Defendants, Professors Bajpai and Witzel, held on January 6, 2006. Defendants then conducted a public meeting on March 8-10, 2006. (Id. at ¶ 4.65.) At this meeting Defendants adopted final edits (the "Final Revisions") to the textbooks. (Id. at ¶ 4.66.) The Final Revisions leave unaddressed the salient concerns of the Hindu Groups. The Final Revisions reject many of the Initial Revisions, and fail to address the concerns of the Hindu Groups regarding (1) the so-called Aryan Invasion Theory; (2) description of the treatment and status of women in Hinduism; (3) conflation of untouchability with Hindu

beliefs; (4) inaccurate descriptions of core Hindu beliefs; and (5) derogatory references or remarks about Hinduism. (Id. at ¶ 4.69.) The Final Revisions perpetuated many inaccuracies in the portrayal of the Hindu religion.

E. CAPEEM'S CLAIMS

CAPEEM initiated the instant suit on March 14, 2006. CAPEEM alleges its members who participated in the process were treated disparately by Defendants and that the members will be harmed by the Materials.

III. ARGUMENT

A. STANDARD OF REVIEW

Motions to dismiss for failure to state a claim "are generally viewed with disfavor." Gilligan v. Jamco Dev. Corp., 108 F.3d 246 (9th Cir. 1997). The federal rules require "[e]ach averment of a pleading [to] be simple, concise, and direct." *See* FED. R. CIV. P. 8(e)(1). Under this standard, "a complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A Rule 12(b)(6) dismissal is proper only where there is either a "lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

The Supreme Court and Ninth Circuit adhere to liberal pleading standards for section 1983 actions. The Ninth Circuit has, along with all other circuits, "disapproved any heightened pleading standards in cases other than those governed by Rule 9(b)." Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125 (9th Cir. 2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

B. CAPEEM DOES NOT ASSERT A "DIRECT" CAUSE OF ACTION UNDER THE FIRST AND FOURTEENTH AMENDMENTS

Defendants argue CAPEEM's claims should be dismissed because no

"direct" cause of action exists under the Constitution. (Motion, p. 6.) However, CAPEEM does not allege any direct causes of action under the Constitution. CAPEEM seeks to vindicate its constitutional rights via 42 U.S.C. section 1983. CAPEEM cited section 1983 in the FAC, and incorporated the paragraph citing section 1983 throughout the FAC. This is sufficient from a pleading standpoint.

1. CAPEEM satisfies liberal pleading standards under the Rules.

"[Section] 1983 does not itself grant any substantive rights." Alex G. v. Bd. of Trstees of Davis Joint Unified Sch. Dist., 332 F. Supp. 2d 1315, 1316-1317 (E.D. Cal. 2004). Rather, section 1983 "provides a vehicle for vindicating rights provided by the Constitution." Braley v. City of Pontiac, 906 F.2d 220, 223 (6th Cir. 1990). Thus, CAPEEM's Complaint does not fail because it cites to the constitutional provisions relevant to each claim, rather than to section 1983. (*See*, *generally*, FAC.) CAPEEM alleges facts sufficient to put Defendants on notice of the asserted violations, and cites to section 1983 – its claims are grouped with reference to the particular constitutional provision violated. Cases have held this well satisfies the pleading standards under the federal rules. *See*, *e.g.*, McCalden v. California Library Ass'n, 955 F.2d 1214, 1223 (9th Cir. 1992), *cert. denied sub nom*, Simon Wiesenthal Ctr. for Holocaust Studies v. McCalden, 504 U.S. 957(1992). McCalden found that mention of section 1983, and incorporation of the paragraph referencing section 1983 were sufficient from a pleading standpoint. McCalden, 955 F.2d at 1224. As in McCalden, CAPEEM cited to section 1983, and incorporated this paragraph in its subsequent allegations.

2. The FAC should not be dismissed for asserting a "direct" cause of action under the Constitution.

In any event, a complaint should not be dismissed for failure to identify the legal theory under which a plaintiff seeks recovery. *See* Crull v. GEM Ins.

Co., 58 F.3d 1386, 1391 (9th Cir. 1995); McCalden, 955 F.2d at 1223. Other than a statement identifying the basis for jurisdiction and a claim for the relief sought, "a complaint need contain only a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). The plaintiff "is not required to state the statutory or constitutional basis for his claim, only the facts underlying it." McCalden, 955 F.2d at 1223. Indeed, even a citation to an incorrect statutory provision does not warrant dismissal. McCalden, 955 F.2d at 1223. Accordingly, Defendants' arguments that CAPEEM's claims must be dismissed because of CAPEEM's alleged failure to invoke section 1983 do not support dismissal.

C. CAPEEM SATISFIES ARTICLE III STANDING REQUIREMENTS

Defendants next argue that the Complaint should be dismissed because CAPEEM lacks standing. (Motion, pp 7- 10.) The standing inquiry looks to whether the particular litigant is entitled to have the court decide the merits of the dispute. Warth v. Seldin, 422 U.S. 490, 498 (1975). As Defendants acknowledge, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977), sets forth the standards for determining whether associational standing exists. In Hunt the Court held that the standing inquiry in the associational context "depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." Hunt, 432 U.S. at 344. Associational standing is particularly appropriate where the entity seeks declaratory, injunctive, or other form of prospective relief. Id.

An association has standing to bring an action on behalf of its members where: "(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, 432 U.S. at 343. The first two Hunt criteria are mandated by Article III's "case or controversy" requirement, while the third is merely prudential, promoting administrative convenience and efficiency. *See* Ecological Rights Foundation v. Pacific Lumber Company, 230 F.3d 1141, 1147 n.6 (9th Cir. 2000). Courts have generally found the second prong, or germaneness test, to be "undemanding". Gay-Straight Alliance Network v. Visalia Unified Sch. Dist., 262 F. Supp. 2d 1088, 1100 (E.D. Cal. 2001) ("GSA") (citing Presidio Golf Club v. National Park Service, 155 F.3d 1153, 1159 (9th Cir. 1998)).

1. CAPEEM alleges immediate or threatened injury.

To meet Hunt's first prong, the "association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." Hunt, 432 U.S. at 342. Individual members would have standing in their own right under Article III if they have suffered an "injury in fact" that is concrete and particularized, actual and imminent, where the injury is fairly traceable to the challenged action of the defendant, and it is likely (as opposed to merely speculative) that the injury will be redressed by a favorable decision. *See* Ecological Rights Foundation, 230 F.3d at 1147. An "abstract concern," or "special interest" in a public issue, is legally insufficient to confer standing. GSA, 262 F. Supp. 2d at 1100.

a. CAPEEM alleges injury in fact

i. CAPEEM alleges injury to its members

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. Grove v. Mead School Dist., 753 F.2d 1528,

1532 (9th Cir. 1985). This right extends to parents as well as to children. Id. Here, CAPEEM alleges its members – parents of students who attend the school system in California and whose children will utilize the Materials (adopted by Defendants) – are suffering, and will continue to suffer, ill effects in the school system as a result of the educational materials approved and adopted by Defendants. The parents assert their own rights and the rights of their children – *i.e.*, the students.[4] CAPEEM's allegations must be taken as true at this stage, *see* Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996), and it alleges harm that is actual, not merely threatened or abstract.

GSA provides an appropriate analogy as to why CAPEEM's allegations satisfy the injury in fact requirement. The plaintiff in GSA asserted its members were current and prospective students at schools within the defendants' school district. It alleged the defendants failed to prevent discrimination against its members in schools and maintain an environment free of hostility. It alleged that as a result of defendants' failures to act, its members had been "spit on, threatened, their property damaged, attacked, harassed by students and teachers and administrators, and actively encouraged to transfer from the normal high school curriculum, in effect denying them a free public education." GSA, 262 F. Supp. 2d at 1100. GSA held these alleged injuries "[constituted] injury in fact that is 'immediate or threatened' injury to [plaintiff] and its members sufficient to confer associational standing." Id.

This is precisely one type of injury alleged by CAPEEM. CAPEEM alleges that Hindu students suffer "embarassment and degradation" as a result of "the negative portrayal of Hinduism" in educational materials. (*See*

[4] Thus, when referring to "members," CAPEEM refers to both parents and students, as the context requires.

FAC, ¶ 4.71.) Additionally, it alleges that this "embarrassment and degradation . . . [negatively] affects the education obtained by [its] members." (Id. at ¶ 4.72.) As an illustrative example, CAPEEM cited to Abhijit Kurup, who attended Claremont middle school. Mr. Kurup characterized the textbook portrayal of Hinduism as "a religion of monkey and elephant gods, rigid caste discrimination and oppression of women." (Id. at ¶ 4.73.) Mr. Kurup said the textbooks "degraded" his religion. Upon reading these materials Mr. Kurup said he "felt a mixture of anger, embarrassment and humiliation." (Id. at ¶ 4.74.) As in GSA, this is sufficient to constitute injury in fact.

ii. CAPEEM alleges injury to participants in the Process

In addition to the harm to students, CAPEEM also alleges that participants in the textbook review process (which include members of CAPEEM) were treated disparately because of their religious beliefs, political beliefs, or national origin.

In the equal protection setting, "injury in fact" may be demonstrated by allegations that a litigant is being treated differently than others on an impermissible basis, such as religion. The denial of equal protection is itself the injury required to bring a claim: "The 'injury in fact' in an equal protection case . . . is the denial of equal treatment resulting from the imposition of [a] barrier, not the ultimate ability to obtain the benefit." Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993). All a plaintiff need allege to satisfy injury-in-fact in the equal protection context is that the plaintiff was denied equal treatment on an imperissible basis (*e.g.*, religion). *See* Allen v. Wright, 468 U.S. 737, 755 (1984). CAPEEM makes this allegation.

CAPEEM also asserts Establishment Clause violations. Courts have not defined Establishment Clause violations in public schools "so narrowly as

to limit standing to only those students immediately subjected to the offensive content." Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 710 (M.D. Pa. 2005) (citing Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290, 313-14 (2000)). The very adoption or passage of a policy that violates the Establishment Clause represents a constitutional injury. Id. CAPEEM satisfies injury in fact based on its Establishment Clause allegations. Its members will be "immediately subjected to the offensive content." Regardless, Defendants' adoption of materials that denigrate the Hindu religion and promote other religions constitutes Establishment Clause injury.

iii. CAPEEM's date of formation is irrelevant

Defendants argue that CAPEEM lacks standing because it came into existence after the textbook review process. This argument misapprehends CAPEEM's standing on several levels. CAPEEM primarily asserts the rights of its members, who participated in the process and who were injured thereby. It is legally irrelevant when CAPEEM came into existence and whether it was even injured at all. *See* United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 552 (1996) ("Under the prudential standing doctrine of associational standing, an association satisfying the proper prerequisites may sue to redress its members' injuries, **even without a showing of injury to the association itself**.") (emphasis added). Additionally, as argued in Section C, 4, below, CAPEEM alleges harm to its interests independent of the adoption process.

b. The harm suffered is fairly traceable to Defendants' actions

Defendants do not dispute the "fairly traceable" requirement. In any event, it is satisfied here. Defendants acknowledge they are charged with approving and adopting the Materials. (Motion, pp. 4-5.) The harms alleged by CAPEEM are fairly traceable to Defendants' actions – *i.e.*, to the Materials. *See generally*, GSA, *supra*. Additionally, CAPEEM alleges harm

relating to the process itself.

c. A favorable decision is likely to redress the injury alleged by CAPEEM and its members

The third part of the first prong requires an associational plaintiff to show that a favorable decision is likely to redress the injury. A plaintiff need not show that a favorable decision will inevitably redress the injury. *See* Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1178 (9th Cir. 2000). As in GSA, in this case, CAPEEM seeks declaratory relief that Defendants' actions violated its constitutional rights. CAPEEM also seeks an injunction ordering Defendants to bring their actions in conformity with the First and Fourteenth Amendments. In GSA, plaintiff requested an injunction "ordering Defendants to take action and to develop policies to alleviate the allegedly hostile and intolerant environment in public schools within the [district]." GSA noted that an injunction in favor of plaintiff in that case would remedy the hostile educational environment – *i.e.*, "[g]ay and lesbian students would be more likely to attend class full time; teachers and administrators would be more responsive to illegal harassment and discrimination against gay or lesbian students." As in GSA, in this case, an injunction would alleviate the injuries suffered by CAPEEM's members. An injunction would require Defendants to adopt and approve educational materials portraying the Hindu religion in an accurate manner and not denigrating the Hindu religion. As a result of a favorable decision, the students in classrooms using these textbooks will no longer feel the ill effects of having their religion belittled and denigrated in the classroom. A favorable decision is thus likely to remedy the harm asserted.

2. The interests CAPEEM asserts are germane to its purpose.

The second Hunt prong requires a showing that the interests sought to be protected are germane to the association's purpose.

In GSA, plaintiff alleged its purpose as "a youth-led nonprofit organization made up of gay, lesbian, bisexual, transgender and heterosexual students and supportive adults who are dedicated to eliminating homophobia and intolerance in schools." The plaintiff in GSA was formed to combat homophobia and intolerance towards "gay, lesbian, bisexual, transgender and heterosexual members in high schools[,] to form and maintain local, school-based, student-run clubs, called 'GSAs,' in high schools throughout California." GSA, 262 F. Supp. 2d at 1088. In GSA the interests sought to be protected were the rights of its members, other gay and lesbian students, and those perceived as gay and lesbian students within the defendant school district. These interests were found to be germane to the organization's purpose of combating homophobia and promoting tolerance towards the gay and lesbian communities. Similarly, CAPEEM was formed to "promote the accurate portrayal of the Hindu religion in the education system of the State of California." (*See* Defendants' Request for Judicial Notice (Dkt. #32), p. 19.) CAPEEM alleges that students, including its members, have suffered taunts and insults and have received a sub-par educational experience as a result of the slanted portrayal of the Hindu religion in the textbooks. CAPEEM seeks injunctive relief against Defendants to remedy these harms. As in GSA, the interest CAPEEM seeks to protect are germane its purpose.

3. Individual participation is not necessary.

The third prong looks to the necessity of individual participation. Defendants claim that the third Hunt prong is not satisfied because "the causes of action brought by [CAPEEM] require the participation of the individual members of the lawsuit." (Motion, p. 9.) Defendants fail to articulate why individual participation is necessary.

Whether individual participation is necessary depends on the nature of the relief sought – where the relief sought is particular to the individual

concerned, individual participation will be required. For example, individual participation is necessary where plaintiff asserts a claim for damages. *See*, *e.g.*, United Union of Roofers v. Insurance Corp. of America, 919 F.2d 1398, 1400 (9th Cir. 1990) (denying standing because individual members will have to participate at the proof of damages stage). Individual participation can also be necessary where in order to determine whether rights have been violated, the court needs to examine the effect of the government action on each particular plaintiff. Harris v. McRae, 448 U.S. 297, 321 (1980) (individual participation required in a Free Exercise case). In cases involving injunctive or declaratory relief, the interests of individual members are not likely to be "peculiar to the individual member concerned," so as to require individualized proof. Lake Mohave Boat Owners Assoc. v. Nat'l Park Serv., 78 F.3d 1360, 1367 (9th Cir. 1995).

Here, CAPEEM only requests declaratory or injunctive relief and no monetary damages. Additionally, the rights asserted are not peculiar with respect to CAPEEM's individual members. CAPEEM's members have alleged they were treated disparately for improper reasons (based on religion, national origin or political affiliation), and that the actions of Defendants result in a negative educational experience to these students. CAPEEM does not allege any harm that is unique or peculiar to a member. Examination of individual interests is not necessary to determine whether any constitutional rights have been violated. Accordingly, CAPEEM satisfies the third Hunt prong.

4. CAPEEM has direct standing.

Direct standing is shown where the defendants' practices have "perceptibly impaired" the organizational plaintiff's ability to provide the services it was formed to provide. *See* Havens Realty Corporation v. Coleman, 455 U.S. 363, 378-379 (1982) (petitioners' alleged practices found to

perceptibly impair plaintiff's ability to provide counseling and referral services for low- and moderate-income home seekers, with the consequent drain on the organization's resources); El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review, 959 F.2d 742, 748 (9th Cir. 1992) (standing found where defendant's policies frustrated organizational plaintiff's goals and required expenditure of resources in representing members they would have been spent in other ways). Here, CAPEEM was formed to promote a fair portrayal of Hinduism in California educational materials. It alleges Defendants' actions are contrary to, and frustrate, this purpose. CAPEEM will be forced to expend resources asserting the rights of members here that it would otherwise expend in other ways (*e.g.*, counseling students or educating the public regarding the accurate portrayal of the Hindu religion in educational materials). Accordingly, CAPEEM has direct standing to pursue its claims.

5. Courts commonly recognize associational standing in the 1983 context.

Defendants claim that the Second Circuit "has held that there is no [associational] standing in a § 1983 case." (Motion, p. 10.) This is incorrect. First, associational standing is available in the second circuit. *See*, *e.g.*, M.O.C.H.A. Society, Inc. v. City of Buffalo, 199 F. Supp. 2d 40, 48-49 (W.D.N.Y. 2002) (non-profit organization promoting the advancement of African American firefighters had standing to bring 42 U.S.C. § 1983 claim based on discriminatory enforcement of drug testing policy). Second, regardless of the law in the Second Circuit, the Ninth Circuit commonly allows entities and associations to proceed on behalf of members in section 1983 cases. *See*, *e.g.*, White Mountain Apache Tribe v. Williams, 810 F.2d 844, 865 (9th Cir. 1984) (holding that plaintiff "would clearly be entitled to bring a section 1983 action based upon alleged violations of its members' due

process and equal protection rights . . . .").

D. CAPEEM States a Valid Equal Protection Claim

Defendants argue CAPEEM does not state a valid equal protection claim because "the Fourteenth Amendment makes no guarantee that state textbooks will treat the histories of religions equally." (Motion, p. 11.) Defendants further argue that "[the] equal protection clause protects against the unequal treatment of people, not the unequal treatment of thoughts, philosophies, histories, or religions." (Id.) These arguments are unavailing.

1. Equal Protection background.

In evaluating a plaintiff's claims under the Equal Protection Clause, the Court must first inquire as to whether plaintiffs have been treated in an unequal manner relative to similarly situated persons or entities. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). A plaintiff asserting an equal protection claim can show either that a law is applied in a discriminatory manner or the law (explicitly or implicitly) imposes different burdens on different classes of people. Christy v. Hodel, 857 F.2d 1324, 1331 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989). A plaintiff may assert differential treatment based on "membership in a protected class." A plaintiff may also allege: (1) she was treated differently from other similarly situated individuals, and (2) "that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Harlen Assocs. v. Vill. of Mineola, 273 F.3d 494, 498 (2d Cir. 2001). The standards required to be satisfied at the pleading stage differ from the standards required of a prima facie case. Williams v. Vidmar, 367 F. Supp. 2d 1265, 1271 (E.D. Cal. 2005) (distinguishing between evidentiary burden at summary judgment stage and pleading requirements for an equal protection claim).

2. CAPEEM satisfies equal protection pleading standards.

Here CAPEEM alleges it and its members (who are Hindus or of Indian origin) have been subject to differential treatment, because (among other reasons) Defendants: (1) imposed special hurdles on edits suggested by, and the participation of, its members, (2) thwarted the transparency of the process, (3) appointed antagonistic consultants, (4) took a much more favorable stance to edits suggested by other groups. CAPEEM also alleges that Defendants' adoption of Materials results in differential educational experience for its members. Defendants imposed differential treatment on the members of CAPEEM and others, all of whom were Hindus or of Indian origin[5] and who were seeking to promote an equal portrayal of the Hindu religion. This satisfies the pleading requirements of an equal protection challenge. *See*, *e.g.*, Williams, 367 F. Supp. 2d at 1271.

3. Deviation from administrative procedure can support an equal protection claim.

Courts have held that deviation from established administrative procedure without any explanation can provide sufficient evidence of improper animus. Flores v. Pierce, 617 F.2d 1386, 1389 (9th Cir. 1980). If the rigors of the governmental or administrative process are imposed upon certain persons with an intent to burden, hinder, or punish them by reason of their protected status (*e.g.*, race, religion, or national origin), then this imposition constitutes a denial of equal protection, notwithstanding the right of the affected persons to secure the benefits they seek by pursuing further legal procedures. Hunter v. Erickson, 393 U.S. 385, 389 (1969). For example, in Flores v. Pierce the court noted:

> It was shown that the **defendant city officials deviated from previous procedural patterns, that they adopted an ad hoc**

[5] Professor Witzel characterized these participants (including members of CAPEEM) as "Hindu fundamentalists." (*See* FAC, Ex. A.)

> **method of decision making without reference to fixed standards, that their decision was based in part on reports that referred to explicit racial characteristics**, and that they used stereotypic references to individuals from which the trier of fact could infer an intent to disguise a racial animus.

Flores, 617 F.2d at 1389.

Here, CAPEEM alleges Defendants deviated form established and mandated procedure for improper reasons. For example, Defendants allowed Professor Witzel who had not previously submitted any comments or participated in the public comment process. Defendants appointed a signatory to the Witzel letter as a consultant notwithstanding his failure to satisfy criteria required of the other consultant (Professor Bajpai). Defendants employed Witzel as a consultant notwithstanding his expressed antagonism towards the Hindu religion. Defendants conducted closed door meetings. As in Flores, Defendants' actions were imbued with "stereotypic references" regarding members of CAPEEM. As in Flores, Defendants' deviation from established procedure and procedures required by Defendants' enabling regulations and Defendants' own rules – with no explanation for this deviation – is sufficient to make out an equal protection claim.[6]

E. CAPEEM'S CLAIMS ARE NOT BARRED BY THE ELEVENTH AMENDMENT

Defendants argue that "[t]he Eleventh Amendment bars a suit in federal court against a State or one of its agencies . . . regardless of the type of relief sought." (Motion, p. 12.)

1. The Eleventh Amendment does not bar CAPEEM's claim for injunctive relief or nominal damages.

Defendants are correct that the Eleventh Amendment bars suits

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[6] Defendants argue that CAPEEM, as "a corporation, has no religious beliefs." (Motion, p. 10.) It is well accepted that in the non-profit context, associational standing allows an entity to vindicate the anthropomorphic rights of its members. Even in the for profit context, in the Ninth Circuit, an entity can – for purposes of asserting civil rights violations – take on anthropomorphic characteristics such as race and religion. *See* Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1059 (9th Cir. 2004) (plaintiff-corporation "has acquired an imputed racial identity" for standing purposes).

against a state or a state agency regardless of the type of relief sought. Fireman's Fund Ins. Co. v. City of Lodi, California, 302 F.3d 928, 957 n.28 (9th Cir. 2002). However, under the well entrenched rule of Ex Parte Young, 209 U.S. 123 (1908), "the Eleventh Amendment does not bar actions seeking only prospective declaratory or injunctive relief against state officers in their official capacities." Id. An "official capacity suit" (*i.e.*, the Ex Parte Young-type suit) is a "legal fiction," since as a practical matter an injunction binds the state or the state agency. Bair v. Krug, 853 F.2d 672, 675 (9th Cir. 1988). An official capacity suit "is simply a matter of form, however, as prospective relief that, in substance, operates against the state may be granted . . . so long as the plaintiff has named the appropriate state official as a party defendant." 1B Schwartz & Kirklin, SECTION 1983 LITIGATION § 8.4 (Third Ed. 1997) at 161. Thus, under the well established doctrine of Ex Parte Young, a suit against a state official for an injunction may proceed even when a suit against the state itself would not. Id. The Eleventh Amendment does not bar suits seeking damages against state officials in their personal capacity. Ashker v. Cal. Dep't of Corr., 112 F.3d 392, 394-95 (9th Cir. 1997).

As Defendants admit in their Motion, CAPEEM asserts official capacity claims against the individual Defendants. (*See* Motion, p. 12 ("no indication in the . . . Complaint that the individual defendants are being sued in anything other than their official capacities").) CAPEEM seeks to enjoin these Defendants from violating the First and Fourteenth Amendment rights of its members. Defendants acknowledge that the CDE and SBE officials are the state officials charged with approving and adopting the materials to be used in California textbooks. (*See generally*, Motion pp, 4-6 ("SBE is charged . . . with the responsibility of adopting textbooks . . . for use in . . . California"); Request for Judicial Notice (Dkt. # 32).) The SBE and CDE officials decided on the Materials. CAPEEM has named the appropriate parties, and only

seeks prospective, injunctive relief against these parties. The Eleventh Amendment does not bar its claims for injunctive relief against these parties. Chaloux v. Killeen, 886 F.2d 247, 252 (9th Cir. 1989) (the Eleventh Amendment "does not bar actions against state officers in their official capacities if the [plaintiff seeks] only a declaratory judgement or injunctive relief"). Nor does the Eleventh Amendment bar CAPEEM's claims for nominal damages against the SBE and CDE executives in their individual capacities. Ashker, 112 F.3d at 394-95.

2. CAPEEM does not assert claims based on violations of state law.

Defendants argue "Plaintiff's criticism of the textbook adoption process is a matter of state law . . . [t]o the extent Plaintiff is attacking the adoption process, its claim is not proper in federal court." (Motion, p. 11.) CAPEEM is not attacking the process itself. Rather, CAPEEM alleges Defendants strayed from the usual and statutorily mandated adoption process, treated its members differently based on their religious beliefs, national origin, and political affiliation, and in so doing violated their constitutional rights. CAPEEM is neither alleging a violation of state law; nor is it attacking the state law which sets up the process. "Conduct of state officials that is violative of federal law is within the Young doctrine even though that conduct also violates state law." Schwartz & Kirklin, § 8.4 at 160. Defendants' arguments that CAPEEM's claims must be dismissed because its allegations make out a claim under federal **and** state law are without merit.

F. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED RIGHTS

1. Qualified immunity background.

"Qualified immunity does not pertain to claims for injunctive or declaratory relief because these claims are considered to be official-capacity claims against the relevant governmental entity." Schwartz & Kirklin, § 9.14

at 342. Only "state and local officials who carry out executive and administrative functions and are sued for monetary relief in their personal capacities may assert this defense." Schwartz & Kirklin, § 9.13 at 336. Qualified immunity involves a two step inquiry: (1) whether the plaintiff's constitutional rights have been violated and (2) whether those rights were clearly established. Saucier v. Katz, 533 U.S. 194, 201 (2001). In order to find that the law was clearly established, there need not be a prior case with identical, or even "materially similar," facts. Hope v. Pelzer, 536 U.S. 730, 738 (2002). Rather, the issue is whether preexisting law provided defendants with "fair warning" that their conduct was unlawful. Id. At the motion to dismiss stage, defendants are entitled to dismissal based on qualified immunity where the reasonableness of their actions is apparent from the face of the pleadings. Harris v. Roderick, 126 F.3d 1189, 1202-05 (9th Cir. 1997).

2. Pre-existing law provided Defendants with fair warning.

Here, the preexisting law provided defendants with "fair warning". First, First and Fourteenth amendment rights in a school setting were clearly established at the time of Defendants' actions. *See*, *e.g.*, Williams, 367 F. Supp. 2d at 1278. Second, equal protection rights of participants in the administrative process were clearly established at the time of Defendants' actions. Flores, 617 F.2d at 1389. Third, cases hold that curriculum decisions are subject to constitutional restraints. *See*, *e.g.*, Kitzmiller, 400 F. Supp. 2d at 710 (rejecting inclusion of Intelligent Design in curriculum based on Establishment Clause challenge). This body of precedent provided Defendants "fair warning" that their actions violate the First and Fourteenth Amendments.

Several other factors are germane to the qualified immunity analysis, and all warrant denial of qualified immunity. First, Defendants violated their own procedural rules and California laws governing the administrative

process. Defendants (among other things) (1) empaneled a content review panel consisting of individuals who did not conform to Defendants' own standards, (2) conducted closed door meetings, and (3) deviated from established procedure. Defendants also violated California statutes prohibiting adoption of educational materials which denigrate the religious or ethnic heritage of students. (*See* FAC, ¶ 6.5, n.5.) Defendants chose to proceed, despite being apprised of the substantive and procedural issues in the process. Accordingly, qualified immunity should be denied.

Defendants argue that public officials who perform discretionary functions are entitled to a "rebuttable presumption" of qualified immunity. (Motion, p. 12.) This is contrary to Ninth Circuit law. In the Ninth Circuit, as in most other circuits, public officials who perform discretionary functions are entitled to immunity to the extent they do not violate plaintiff's clearly established rights. *See*, *e.g.*, Flores, 324 F.3d at 1130. The relevant two-step inquiry is whether there was a constitutional violation and whether the right was clearly established. Id. Courts do not apply any rebuttable presumption.

G. CAPEEM SHOULD BE PERMITTED TO AMEND THE COMPLAINT

To the extent the Court grants Defendants' Motion, CAPEEM requests leave to amend the Complaint. Leave should be freely granted when justice requires. *See* FED. R. CIV. P. 15. Here, Defendants will not be prejudiced by any amendment. Leave to amend is routinely granted in similar situations. *See*, *e.g.*, Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1108-09 (9th Cir. 2003) (leave to plead fraud with particularity). Dismissal without leave to amend is generally "improper unless it is clear that the complaint could not be saved by any amendment." Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005). That is not the case here.

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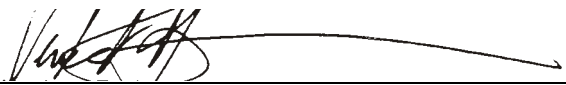
IV. CONCLUSION

Defendants' Motion lacks any authority that CAPEEM's allegations do not state legally cognizable causes of action. Rather, Defendants argue CAPEEM lacks standing. Defendants also attempt to rely on affirmative defenses such as Eleventh Amendment immunity, and argue CAPEEM failed to invoke the proper statute. These arguments are unavailing. CAPEEM has the requisite standing, both on behalf of its members and on its own behalf. Defendants ignore CAPEEM's Establishment Clause and First Amendment arguments. Defendants' Equal Protection Clause argument – that "the equal protection clause protects against the unequal treatment of people, not the unequal treatment of thoughts, philosophies, histories, or religions" – is untenable. CAPEEM is alleging its members were treated unequally because of religion, national origin, or political affiliation. CAPEEM is also alleging that the denigration of their religion in the educational materials adopted by Defendants violates the Establishment Clause and results in a sub-par education in violation of the Equal Protection Clause. School curricula must comport with constitutional restrictions. Administrative agencies must treat participants in an even handed manner. Accordingly, CAPEEM respectfully requests the Court deny Defendants' Motion.

Dated this 6th day of July, 2006.

Respectfully Submitted,

BALASUBRAMANI LAW

By: 

Venkat Balasubramani (State Bar No. 189192)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of July, 2006, I caused the foregoing OPPOSITION TO DEFENDANTS' MOTION TO DISMISS to be hand delivered (via legal messenger service) to:

counsel for Defendants:

Todd M. Smith
Amy B. Holloway
Marsha A. Bedwell
California Dept. of Education
1430 N Street, Room 5319
Sacramento, California 95814

and a copy to be filed via the Court's electronic (ECF) filing system.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that this declaration was executed on July 6th, 2006, at Seattle, Washington.

Venkat Balasubramani