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9  
10 UNITED STATES DISTRICT COURT  
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

13 California Parents for the Equalization of  
Educational Materials,

14 Plaintiff,

15 v.

17 The California State Department of Education;  
18 The California State Board of Education; Glee  
Johnson, President; Kenneth Noonan, Vice  
19 President; Alan Bersin; Ruth Bloom; Yvonne  
Chan; Donald G. Fisher; Ruth E. Green; Joe  
20 Nunez; Bonnie Reiss; and Tom Adams,

21 Defendants.

) Case No. 2:06-CV-00532-FCD-KJM  
)  
)  
) NOTICE OF MOTION AND MOTION TO  
) DISMISS FIRST AMENDED COMPLAINT;  
) MEMORANDUM OF POINTS AND  
) AUTHORITIES IN SUPPORT THEREOF  
)  
) [FRCP 12(b)(1) and 12(b)(6)]  
) Date: July 21, 2006  
) Time: 10 a.m.  
) Courtroom: 2  
)  
) Honorable Frank C. Damrell, Jr.  
)

22  
23 PLEASE TAKE NOTICE that, on July 21, 2006, at 10 a.m., or as soon thereafter as the  
24 matter may be heard in the above-referenced Court, courtroom 2, located at the United States  
25 District Court, Eastern District, 501 I Street, in Sacramento, California, Defendants California  
26 Department of Education; California State Board of Education; Glee Johnson, President; Kenneth  
27 Noonan, Vice President; Alan Bersin; Ruth Bloom; Yvonne Chan; Donald G. Fisher; Ruth E.  
28 Green; Joe Nunez; Bonnie Reiss; and Tom Adams will move the Court pursuant to Federal Rules



**MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION**

California Parents for the Equalization of Educational Materials (hereinafter Plaintiff or CPEEM) is a newly formed entity, apparently originated for the sole purpose of challenging the manner in which California Department of Education (CDE); California State Board of Education (SBE); 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 (Collectively Defendants) recently adopted sixth grade History-Social Science textbooks. Plaintiff incorrectly alleges that the adoption and rejection of certain proposed edits, the substance of other approved edits, and the procedures followed by Defendants to adopt the edits violate Plaintiff's First and Fourteenth Amendment rights under the U.S. Constitution. However, Plaintiff has failed to state a claim upon which relief can be granted in each of its four causes of action, and its First Amended Complaint (hereinafter Complaint or FAC) is subject to dismissal pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1).

**STATEMENT OF FACTS<sup>1</sup>**

Every 6 years SBE and CDE adopt and approve textbooks and instructional materials for use in public schools in California. (FAC at ¶ 4.1.) In 2005, History-Social Science textbooks that were under consideration for adoption and approval by the SBE were made available for public review and comment. (FAC at ¶ 4.4.) In September 2005, proposed changes and edits to the textbooks were considered by an advisory body, the Curriculum Commission. (FAC at ¶¶ 4.4-4.5.)

A number of "Hindu Groups" as identified by Plaintiff expressed concern regarding the way in which Hindus and Hinduism was depicted in the textbooks and as a result submitted numerous comments (entitled by plaintiff as the "Initial Revisions") to an Ad Hoc Committee created by the Curriculum Commission. (FAC at ¶¶ 4.12 - 4.39; 4.6; 4.7.) The Hindu Groups'

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<sup>1</sup> The facts stated herein are based on the facts as alleged in Plaintiff's First Amended Complaint and are set forth herein only to provide the Court with a basic understanding of the timeframe associated with the textbook adoption process. Defendants in no way accept these facts as a complete and accurate depiction of the process at issue.

1 concerns centered in part on the textbooks' discussion of such topics as the Origins of Hinduism  
2 (FAC at ¶¶ 4.12-4.17); the depiction of how woman are treated in the Hindu culture (FAC at  
3 ¶¶ 4.18-4.24); and Hindu Conceptions of the Devine (FAC at ¶¶ 4.30-4.35).

4 The Ad Hoc Committee made several recommendations to the Curriculum Commission,  
5 who submitted those recommendations to the SBE for approval. (FAC at ¶ 4.10.) In November  
6 2005, the SBE received a letter from Harvard Professor, Michael Witzel, who disagreed with many  
7 of the Initial Revisions submitted by the Hindu Groups. (FAC at ¶ 4.40, Exhibit A to FAC.) The  
8 SBE requested additional evaluation of the edits proposed by the Hindu Groups. (FAC at  
9 ¶¶ 4.47-4.48.)

10 Following the November 2005 SBE meeting, a second panel of content experts were  
11 convened to provide input on the necessary edits and corrections to the textbooks' discussions of  
12 Ancient India and Hinduism. (FAC at ¶ 4.50.) On November 22, 2005, the CDE proposed final  
13 recommendations, which were considered by the Curriculum Commission on December 2, 2005.  
14 (FAC at ¶¶ 4.55-4.56.) At the March 8, 2006 SBE meeting, the SBE adopted "final edits" to the  
15 textbooks (FAC at 4.66) which adopted some but not all of the recommendations of the Hindu  
16 Groups. (FAC at ¶ 4.68.)

17 Plaintiff alleges that the failure to adopt all of the Hindu Groups recommendations will  
18 give rise to damages to Hindu and Indian students, who are not members of its organization,  
19 because these students will be embarrassed, degraded and will receive a lesser quality education  
20 (FAC at ¶¶ 4.71-4.72.) As such Plaintiff brings this action alleging violations of the equal  
21 protection clause, the establishment clause, free speech and free association clauses of the U.S.  
22 Constitution and violations of 42 U.S.C. §1983.

23 **Textbook Adoption Process:**

24 The SBE is charged under the California Constitution (Cal. Const., art. IX, § 7.5) and the  
25 Education Code (Ed. Code §§ 60200, et seq.; true and correct copies of the relevant State statutes  
26 are attached to the Request for Judicial Notice [RJN], Exhibit A) with the responsibility of  
27 adopting textbooks and other instructional materials for use in grades kindergarten (K) through 8  
28 in California. An advisory body, the Curriculum Commission, is likewise established by statute to

1 assist the SBE with this function. (Ed. Code, § 33530.) The SBE operates on a six-year cycle (for  
2 history-social science, mathematics, reading/language arts, and science) or eight-year cycle (for all  
3 other subjects) in developing curriculum frameworks that govern the adoption of instructional  
4 materials by the SBE for use in California classrooms. (Ed. Code, § 60200(b)(1).)

5 SBE has adopted regulations (Cal. Code of Regs., tit. 5, §§ 9510-9524; true and correct  
6 copies of the relevant regulations are attached to the RJN, Exhibit B) concerning adoption of  
7 instructional materials which further describe the process and requirements. Adoptions of  
8 instructional materials (textbooks) are based on content standards, curriculum framework, and  
9 criteria previously approved by the SBE for a given subject area. (Cal. Code of Regs., tit. 5,  
10 § 9511.) The content standards describe what students should know and be able to do by the end  
11 of each grade level. The framework elaborates on those standards, describes the curriculum and  
12 instruction necessary to help students achieve levels of mastery, and includes criteria for the  
13 evaluation of instructional materials needed to implement the types of programs recommended in  
14 the framework. These criteria are used by publishers in the development of instructional materials  
15 submitted to the SBE for adoption. (Ed. Code § 60200 (c)(1).) Pursuant to an Invitation to Submit  
16 from the SBE, publishers submit instructional materials that should be consistent with the  
17 standards, framework and criteria. (Ed. Code § 60200, Cal. Code of Regs., tit. 5, § 9517.)

18 The Curriculum Commission conducts its own independent reviews of the submitted  
19 materials. It then approves a list of items, with recommendations for adoption of instructional  
20 materials programs for each grade level in the subject matter area under consideration, if possible,  
21 along with a rationale for the recommendations, and forwards the lists to the SBE for  
22 consideration. (Ed. Code § 60204, Cal. Code of Regs., tit. 5, § 9521.)

23 Materials recommended for adoption are publicly displayed and subject to a thirty (30) day  
24 notice and comment period prior to deliberation of the SBE regarding adoption. (Ed. Code  
25 § 60202, Cal. Code of Regs., tit. 5, § 9519.) Thereafter, the SBE conducts a public hearing on the  
26 adoption, determines the contents of the list of instructional materials in its final form, and votes  
27 on the adoption. (Cal. Code of Regs., tit. 5, § 9521.)

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1 As indicated in Plaintiff's Complaint, the SBE conducted a public meeting on March 8,  
2 2006, at which the SBE adopted final edits to the adopted sixth grade textbooks for History-Social  
3 Science. (FAC ¶ 4.66; RJN ¶ 5, Exh. E.) It is the textbook adoption process as outlined above and  
4 the SBE's final action on March 8, 2006, which is the subject of Plaintiff's Complaint.

5 **STANDARD OF REVIEW**

6 Dismissal is appropriate under Federal Rule of Civil Procedure 12(b) when the court lacks  
7 subject matter jurisdiction or when a complaint fails to state a claim upon which relief can be  
8 granted. (Fed. Rules. Civ.Proc., Rules 12(b)(1) and 12(b)(6), 28 U.S.C.) In analyzing a motion to  
9 dismiss, the court must assume that plaintiff's allegations are true and construe the complaint in  
10 the light most favorable to them. *United States v. City of Redwood City*, 640 F.2d 963, 966  
11 (9<sup>th</sup> Cir. 1981). The court should dismiss a claim when it appears beyond doubt that the plaintiff  
12 can prove no set of facts in support of its claim which would entitle it to relief.

13 **ARGUMENT**

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

17 CPEEM's first, second, and third causes of action are based upon alleged First and  
18 Fourteenth Amendment violations. Specifically, CPEEM's first cause of action is against all  
19 Defendants and alleges a violation of the Equal Protection Clause of the Fourteenth Amendment.  
20 CPEEM's second cause of action is against all Defendants and alleges a violation of the  
21 Establishment Clause of the First Amendment. Finally, CPEEM's third cause of action is against  
22 all Defendants and alleges a violation of the Free Speech and Free Association Clauses of the First  
23 Amendment.

24 However, there is no direct cause of action under the United States Constitution. Thus, a  
25 litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983. *Azul-*  
26 *Pacifico, Inc. v. City of Los Angeles*, 973 F.2d. 704, 705 (9<sup>th</sup> Cir. 1992) [see cases cited therein;  
27 also see *Molina v. Richardson*, 578 F.2d 846 (9<sup>th</sup> Cir. 1978) holding that the plaintiff's  
28 constitutional claims were precluded by the availability of relief under § 1983.] Likewise, in  
*Ward v. Caulk*, 650 F.2d 1144 (9<sup>th</sup> Cir. 1981) the court specifically considered whether Plaintiff's

1 claims against the county could proceed on constitutional grounds. *Id.* at 1147-1149. After a full  
2 discussion of the existing case law, the court held: "There is no basis for permitting a  
3 constitutionally based suit against state defendants where the plaintiff has a statutory remedy under  
4 § 1983." *Id.* at 1148.

5 Since CPEEM has failed to allege 42 U.S.C. § 1983 as the source for its private right of  
6 action for its first, second, and third causes of action against all Defendants, these claims fail as a  
7 matter of law.

8 **II. PLAINTIFF'S FOURTH CAUSE OF ACTION FAILS BECAUSE**  
9 **CPEEM DOES NOT HAVE STANDING TO BRING THIS ACTION**  
10 **AGAINST THE INDIVIDUAL DEFENDANTS FOR A VIOLATION OF**  
11 **42 U.S.C. § 1983**

12 Plaintiff does assert a violation of 42 U.S.C. § 1983 as its fourth cause of action, alleging  
13 that the actions of the "individual"<sup>2</sup> defendants violated its rights guaranteed by the First and  
14 Fourteenth Amendments to the United States Constitution. The Complaint is not clear as to which  
15 First or Fourteenth Amendment rights are allegedly violated, but in any event, Plaintiff does not  
16 have the requisite standing to bring such a claim.

17 Standing is a jurisdictional limitation and is an "essential and unchanging part of the  
18 case-or-controversy requirement of Article III" of the United States Constitution. *Lujan v.*  
19 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The party seeking the exercise of jurisdiction in  
20 its favor bears the burden of alleging facts that show that it is the proper party to invoke judicial  
21 power to resolve the dispute. *United States v. Hays*, 515 U.S. 737, 742 (1995). To establish a "case  
22 or controversy," a plaintiff must show: (a) a concrete injury in fact, (b) a causal connection  
23 between the injury and defendant's conduct or omissions, and (c) a likelihood that the injury will  
24 be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560.

25 Plaintiff bears the burden to demonstrate standing for each claim and form of relief it seeks.  
26 *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9<sup>th</sup> Cir. 2001). Therefore, in order to state a claim  
27

28 <sup>2</sup> At page 2 of the Complaint, lines 2-4, Plaintiff explains that "individual" defendants are the  
named defendants other than SBE and CDE.

1 under 42 U.S.C. § 1983, Plaintiff's complaint must provide sufficient information to enable this  
2 Court to determine that the Plaintiff has been injured, that there is a link between the Defendants'  
3 conduct and the likelihood of redress by this Court, in order to invoke the subject matter  
4 jurisdiction of the court. Plaintiff has not done so.

5 The Complaint alleges a series of actions taken by Defendants regarding the adoption of  
6 the sixth grade History-Social Science textbooks. The actions complained of included the  
7 following: (1) SBE delayed the approval of "Initial Revisions" after receiving a letter from  
8 Professor Michael Witzel (FAC at ¶ 4.47); (2) SBE appointed a second panel of experts to review  
9 the "Initial Revisions" in violation of criteria required by the Curriculum Commission (FAC at  
10 ¶ 4.52); (3) SBE and CDE failed to provided notice that the second panel of experts was being  
11 retained (FAC at ¶ 4.54); (4) SBE conducted a closed door meeting on January 6, 2006, at which  
12 representatives of the "Hindu Groups" were denied access (FAC at ¶ 4.61); and (5) SBE at its  
13 March 8, 2006 meeting adopted final edits to the textbooks that failed to adequately address the  
14 concerns of the "Hindu Groups." (FAC at ¶¶ 4.65 and 4.69).

15 Plaintiff fails to explain how any of the above actions harm it as a corporation.  
16 Additionally, as the complaint makes clear, all of the actions complained of took place on or  
17 before March 8, 2006. Inasmuch as Plaintiff did not become a legal entity until March 9, 2006  
18 (RJN at ¶¶ 3 and 4, Exhs. C and D), it is clear that Plaintiff did not have any constitutionally  
19 protected rights until it came into existence. Thus, Plaintiff corporation does not have standing to  
20 assert a claim under 42 U.S.C. § 1983 for violation of its constitutional rights as they are asserted  
21 in its Complaint.

22 To the extent that Plaintiff alleges in its Complaint that the constitutional rights of its  
23 members were violated, Plaintiff also lacks standing to assert a claim under 42 U.S.C § 1983. The  
24 Supreme Court has held that "an association has standing to bring suit on behalf of its members  
25 when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it  
26 seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor  
27 the relief requested, requires the participation of individual members in the lawsuit." *Hunt v.*  
28 *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).



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

9 Under the second prong of the *Hunt* test, a plaintiff must show that the interests the  
10 organization seeks to protect are germane to its purpose. Plaintiff makes no allegations with regard  
11 to its purpose. It is, therefore, impossible to determine based upon the face of the Complaint  
12 whether CPEEM meets this requirement. (See *Individuals for Responsible Government, Inc. v.*  
13 *Washoe County By and Through the Bd. of County Com'rs*, 110 F.3d 699, 702 (9<sup>th</sup> Cir. 1997): [“the  
14 record in this case does not specify who are the members of Individuals for Responsible  
15 Government, Inc., nor does it specify the organization's purpose. Absent both purpose and  
16 members, it lacks any standing to sue.”].)

17 Finally, Plaintiff has failed to satisfy the third prong of the *Hunt* test because the causes of  
18 action brought by CPEEM require the “participation of the individual members in the lawsuit.”  
19 In *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court explained that associational standing  
20 is not automatically appropriate simply because an association is seeking injunctive or prospective  
21 relief on behalf of its members. In that case, the Women's Division of the Board of Global  
22 Ministries of the United Methodist Church sought to assert the rights of its members in a suit  
23 seeking to invalidate restrictions on the expenditure of Medicaid funds for abortions. The Supreme  
24 Court determined the organization did not have standing, explaining:

25 “[t]he Women's Division does not satisfy the standing requirements  
26 for an organization to assert the rights of its membership. One of  
27 those requirements is that ‘neither the claim asserted nor the relief  
28 requested requires the participation of individual members in the  
lawsuit.’ *Hunt v. Washington Appeal Advertising Comm'n*, 432 U.S.  
333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383. Since “it is  
necessary in a free exercise case for one to show the coercive effect

1 of the enactment as it operates against him in the practice of his  
2 religion,' *Abington School Dist. v. Schempp*, 374 U.S. 203, 223, 83  
3 S.Ct. 1560, 1572, 10 L.Ed.2d 844, the claim asserted here is one  
that ordinarily requires individual participation." *Id.* at 321.

4 Since CPEEM, a corporation, has no religious beliefs, did not participate in the textbook  
5 adoption and edits process, and does not use the instructional materials at issue, it will be  
6 necessary to obtain proof from its members. Because the participation of individual members is  
7 required, the Plaintiff lacks associational standing to pursue its § 1983 claim on its members'  
8 behalf.

9 Furthermore the Second Circuit has held that there is no association standing in a § 1983  
10 case. The court in *Aguayo v. Richardson*, 473 F.2d 1090 (2<sup>nd</sup> cir. 1974), stated: "Neither [the]  
11 language nor the history... [of § 1983] suggests that an organization may sue under the Civil  
12 Rights Act for the violations of rights of members." *Id.* at 1099. (See also *League of Women*  
13 *Voters v. Nassau County Board of Supervisors*, 737 F.2d 155, 160 (2<sup>nd</sup> Cir. 1984).)

14 **III. EVEN IF CPEEM COULD OVERCOME THE STANDING BARRIER**  
15 **TO ITS 42 U.S.C. § 1983 CAUSE OF ACTION, THE COMPLAINT**  
16 **FAILS TO STATE A CLAIM UNDER THE EQUAL PROTECTION**  
**CLAUSE OF THE FOURTEENTH AMENDMENT**

17 The Equal Protection Clause of the Fourteenth Amendment commands that no State shall  
18 "deny to any persons within its jurisdiction the equal protection of the laws," which is essentially a  
19 direction that all person similarly situated should be treated alike. *City of Cleburne v. Cleburne*  
20 *Living Center, Inc.*, 473 U.S. 432, 439 (1985). The guarantee of equal protection is not a source of  
21 substantive rights or liberties, but rather a right to be free from discrimination in statutory  
22 classifications and other governmental activity. *Williams v. Vidmar*, 367 F.Supp.2d 1265, 1270  
23 (2005), citing *Harris v. McRae*, 448 U.S. 297, 322 (1980).

24 Plaintiff appears to be relying upon a theory that Defendants have treated Plaintiff  
25 differently from other corporations or have treated Plaintiff's members differently from other  
26 persons. The comparisons for equal protection purposes set forth in the Complaint, however, do  
27 not make comparisons between Plaintiff and its members and others. Instead, the Complaint sets  
28 up a comparison of the manner in which Defendants' textbook adoption process and the resulting

1 approved sixth grade History-Social Science textbooks treat the history of religions. (FAC at  
2 ¶¶ 4.12-4.39.) The Complaint compares the texts' treatment of Hinduism with the treatment of  
3 Judaism and compares the manner in which input was sought from experts or scholars and the  
4 manner in which input was sought from Hindu scholars (FAC at ¶¶ 4.40- 4.55).

5 While Plaintiff may not agree with the description of Hinduism in the textbooks, the  
6 Fourteenth Amendment makes no guarantee that state textbooks will treat the histories of religions  
7 equally. The equal protection clause protects against the unequal treatment of people, not the  
8 unequal treatment of thoughts, philosophies, histories, or religions. There is no injury in fact of  
9 which Plaintiff can complain because there is no direct injury to Plaintiff.

10 Furthermore, Plaintiff's criticism of the textbook adoption process is a matter of state law.  
11 As briefly described above, the adoption process is one governed by various State statutes and  
12 regulations. (RJN, Exhs. A and B.) To the extent Plaintiff is attacking the adoption process, its  
13 claim is not proper in federal court. States and its officials are immune under the Eleventh  
14 Amendment from suits in federal court for alleged violations of state law. *Pennhurst State School*  
15 *& Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). As the Supreme Court explains,

16 "A federal court's grant of relief against state officials on the basis of state  
17 law, whether prospective or retroactive, does not vindicate the supreme  
18 authority of federal law. On the contrary, it is difficult to think of a greater  
19 intrusion on state sovereignty than when a federal court instructs state  
20 officials on how to conform their conduct to state law." *Id.* at 106.

21 Federal courts should be particularly wary of infringing on state sovereignty where public  
22 education is at issue. "Judicial supervision of public education is limited to the resolution of  
23 conflicts that **clearly** involve constitutional values." *Grove v. Mead School Dist. No. 354*, 753  
24 F.2d 1528, 1533 (9<sup>th</sup> Cir. 1985)(bolding added). Accordingly, Plaintiff's equal protection cause of  
25 action should also be dismissed because of the Eleventh Amendment.

#### 26 **IV. PLAINTIFF'S FOURTH CAUSE OF ACTION IS BARRED BY THE 27 ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

28 Under the Eleventh Amendment, a state's sovereign immunity is a jurisdictional bar to suit  
in federal court. *Hans v. Louisiana*, 134 U.S. 1, 10 (1890). The Eleventh Amendment provides:

1 “The judicial power of the United States shall not be construed to  
2 extend any suit in law or equity, commenced or prosecuted against  
3 one of the United States by citizens of another State, or by citizens  
4 or subjects of any foreign State.”

5 The Eleventh Amendment bars a suit in federal court against a State or one of its agencies  
6 or departments by citizens of that State.<sup>3</sup> *Pennhurst State School and Hospital v. Halderman*,  
7 465 U.S. 89, 100 (1984). This bar to suit exists regardless of the type of relief sought. *Seminole*  
8 *Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996).

9 With regard to a claim under 42 U.S.C. § 1983, the general rule is that “[s]tate officers in  
10 their official capacities, like states themselves, are not amendable to suit for damages. *Arizonans*  
11 *for Official English v. Arizona*, 520 U.S. 43, 69 fn. 24 (1997). There is no indication in the  
12 allegations contained in CPEEM’s Complaint that the individual defendants are being sued in  
13 anything other than their official capacities. In fact, the only reference to the individual defendants  
14 is at paragraphs 2.3 and 2.5 which identify each individual in their official capacity as either a  
15 “board member” or “CDE” employee.

16 **V. THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED  
17 IMMUNITY**

18 Government officials “are shielded from liability for civil damages insofar as their conduct  
19 does not violate clearly established statutory or constitutional rights of which a reasonable person  
20 would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). “This is an objective  
21 standard.” *Albers v. Whitely*, 743 F.2d 1372, 1376 (9<sup>th</sup> Cir. 1984). A rebuttable presumption exists  
22 at law that qualified immunity protects public officials performing discretionary functions.  
23 *Scheuer v. Rhodes*, 416 U.S. 232, 245-250 (1974).

24 To determine whether an official is entitled to qualified immunity, the Court must consider  
25 the following two part test: (1) Was the law governing the official’s conduct clearly established? If  
26 not, the official is entitled to immunity. Only if the law was clearly established is the test

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27 <sup>3</sup> “State” means the State and any office, officer, department, division, bureau, board, commission, or  
28 agency of the State claims against which are paid by warrants drawn by the Controller. (California Gov.  
Code §900.6)

1 continued by addressing the second prong; (2) Under the law, could a reasonable officer have  
2 believed the conduct was lawful in the light of the facts known to him or her at the time? If so, the  
3 official is entitled to immunity. *Act up!/Portland v. Bagley*, 988 F.2d 868, 871 (9<sup>th</sup> Cir. 1993); see  
4 also, *Thompson v. Souza*, 111 F.3d 694, 698 (9<sup>th</sup> Cir. 1997).

5 In this case, the Defendants are accused of numerous abusive actions related to the process  
6 and procedures used to adopt sixth grade History-Social Science textbooks. The Complaint does  
7 not differentiate between the acts allegedly committed by the respective Defendants nor does it tie  
8 the alleged wrongs to specific “individual” defendants. (See, for example, FAC at ¶¶ 5.4, 5.5, 5.6,  
9 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  
10 to plead facts showing that any of these specific individual defendants violated rights clearly  
11 established under law, the Complaint against the individual defendants should be dismissed  
12 because the first prong of the test outlined above cannot be established.

13 **CONCLUSION**

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

16 Dated: June 12, 2006

Respectfully submitted,

17 MARSHA A. BEDWELL  
18 General Counsel  
19 AMY BISSON HOLLOWAY  
20 Assistant General Counsel

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