Sarah E. Piepmeier (SBN 227094)
sarah.piepmeier@kirkland.com
Elise S. Edlin (SBN 293756)
elise.edlin@kirkland.com
May Eaton (SBN 298123)
may.eaton@kirkland.com
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 439-1400
Facsimile: (415) 439-1500

Attorneys for Defendant Just Communities Central Coast, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FAIR EDUCATION SANTA BARBARA, Inc., a 501(c)(3) organization

Plaintiff,

v.

SANTA BARBARA UNIFIED SCHOOL DISTRICT, a public school district; and JUST COMMUNITIES CENTRAL COAST, INC., a 501(c)(3) organization

Defendants.

CASE NO. 2:18-cv-10253-SVW-PLA

DEFENDANT JUST COMMUNITIES CENTRAL COAST, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS COUNTS I–IV AND VI OF PLAINTIFF'S COMPLAINT

The Honorable Stephen V. Wilson

Date: February 25, 2019
Time: 1:30 pm
Courtroom: 10A

Trial Date: None Yet

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. INTRODUCTION

FESB's attorney argument cannot cure the fundamental deficiencies in its Complaint. Rather than addressing the salient legal standards on which JCCC's Motion relies, FESB peppers its Opposition with repeated derogatory allegations about JCCC's educational materials—none of which have any bearing on whether FESB has standing, whether it has properly pled its discrimination claim, and whether the Court can exercise supplemental jurisdiction over Count VI.

First, FESB argues that its members (and by extension, itself as an organization) should have standing because they have children who attend SBUSD schools, where JCCC's educational materials are taught. But that is not the legal test: FESB must plead *how these members' student-children are personally denied* equal treatment due to the alleged discrimination. And FESB *has not pled any personal connection* to the alleged discriminatory materials by those children. FESB's allegations of a "hostile educational environment" are similarly unavailing because there are no allegations that any of its members or their student-children have been affected by such an environment. Without that critical link, its parent-members have no basis to assert the rights of their minor children, as it has not pled an injury *particular* to those children. And without standing for its members, FESB itself lacks standing as well, under either an associational or organizational standing theory.

Second, FESB fails to demonstrate that its § 220 claim meets the requisite legal standard, at least because it has not pled that any of its members' student-children were personally subjected to JCCC's trainings or were the subject of the purported harassment. Further, its primary assertion—that JCCC's teachings cause "Caucasian, Christian and/or male students to believe they are inherently flawed based on their race, religion or sex"—is simply attorney argument made without the benefit of a single citation to its Complaint.

Finally, FESB has failed to demonstrate that the alleged violation of California Public Contract Code § 20111 has a common nucleus of operative facts with any of its

federal discrimination claims. Thus, this Court does not have supplemental jurisdiction over Count VI, which forms the sole basis of its co-pending Motion for Preliminary Injunction.

For the reasons set forth below and in JCCC's Motion to Dismiss, JCCC respectfully requests that the Court dismiss all claims against JCCC.

II. ARGUMENT

A. Counts I-III: FESB Has Not Sufficiently Pled Facts to Suggest Its Members' Student-Children Personally Experienced Discrimination

1. *A Parent's Ability to Sue on Behalf of a Minor Child Does Not Cure FESB's Fundamental Pleading Defect*

FESB alleges that standing is appropriate because under Federal Rule of Civil Procedure 17(c), a parent may bring suit on behalf of his or her minor children. Dkt. 36 at 7-8. But even so, the minor child still must demonstrate the requisite concrete and particularized injury required to demonstrate standing in federal court. *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817, 822 (9th Cir. 2002) (citing *Allen v. Wright*, 468 U.S. 737, 755 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)) (citing *Allen* for proposition that discrimination does not afford standing "when none of those alleged discriminatory practices 'personally subject[ed]' ***the plaintiff-parents or their children*** to discrimination").[1] Here, as discussed below, FESB has failed to make that showing.

Similarly, FESB's reliance on *Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R.*, 906 F.2d 25, 34 (1st Cir. 1990) to support its assertion that it need not demonstrate that *every* member of an association has standing is beside the point. Dkt. 36. at 8. The issue is that FESB has failed to demonstrate that *any* member (via their minor child) has standing to bring its federal discrimination claims in this Court. Dkt. No. 33 at 6.

[1] Emphasis added throughout, except as otherwise noted.

2. *FESB Has Not Pled a Concrete and Particularized Injury for Any of Its Members' Children*

The parties appear to agree that Constitution requires a party to suffer a "concrete ***and particularized***" injury for that party to have standing in Federal Court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). FESB attempts to meet this Constitutional mandate by asserting a "concrete" injury in three ways: (1) by virtue of the fact that public school students enjoy a "cluster of rights" that "removes them from the sphere of "concerned bystanders;" (2) allegations that FESB's member-parents and their minor children have been "directly exposed" to JCCC's teachings; and (3) that JCCC's teachings allegedly "resulted in stigmatic injuries to the student children of plaintiff's members[.]" Dkt. No. 36 at 9–11. But FESB's *arguments* are irrelevant because they rely on the wrong standards from foreign cases and in any event are not rooted in, and do not reflect, its *Complaint*.

a. "Concerned Bystanders"

FESB invokes cases in the context of religious programs in schools to argue that students and parents enjoy "a relationship which removes them from the sphere of 'concerned bystanders[.]'" Dkt. No. 36 at 9 (citing *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 240 F. 3d 462, 466–67 (5th Cir. 2001) and *School Dist. Of Abington Tp. Pa. v. Schempp*, 374 U.S. 203, 225 (1963)). But both cases on which it relies are inapposite here because they were decided outside of the context of discrimination. Moreover, they cannot erase the standards set out by the Supreme Court in *Allen*, which requires plaintiffs to be "*personally subject* to the challenged discrimination." *See* 468 U.S. at 755 (holding that "claims based on the stigmatizing injury often caused by racial discrimination" "accords a basis for standing only to 'those persons who are *personally denied* equal treatment" by the challenged discriminatory conduct'").

b. "Direct Exposure"

Next, FESB asserts that "exposure" to a school's discriminatory practices can establish an injury in fact for purposes of standing. Dkt. No. 36 at 10. But each case on which it relies arises in the context of *school segregation*. *Ad Hoc Comm. Of Concerned*

Teachers ex rel. Minor & Under-Age Students v. Greenburgh, No. 11 Union Free School Dist., 873 F.2d 25, 28 (2d Cir. 1989) ("It is well settled that students have standing under the Fourteenth Amendment to challenge faculty segregation because it denies them equality of educational opportunity."); *Women's Equity Action League v. Cavazos*, 879 F. 2d 880, 885 (D.C. Cir. 1989) [hereinafter "*WEAL I*"]; *see also Freedom Republicans, Inc. v. Fed. Election Comm'n*, 13 F.3d 412, 416 (D.C. Cir. 1994) ("WEAL I . . . presented a challenge to federal funding of racially segregated public schools."); *Otero v. Mesa Cty. Valley Sch. Dist. No. 51*, 568 F.2d 1312, 1315 (10th Cir. 1977) ("[T]he trial court reasoned that because the plaintiffs did not even argue that there was *segregation* . . . they somehow lost standing to challenge the *hiring practices* of the school district. With such reasoning we are not in accord.").[2] And in *WEAL I*, the D.C. Circuit spent significant time contrasting *Allen*—where the plaintiffs had not pled they were "'personally denied equal treatment' by the challenged discriminatory conduct"—from the plaintiffs in that case who had sufficiently pled such personal denial, which confirms that *Allen* sets out the proper standard for evaluating standing in the context of discriminatory policies or stigmatic injuries. *Id.; see also Allen*, 468 U.S. at 755.[3]

c. Direct Stigmatic Injury

FESB then argues its members have suffered both "direct" and "stigmatic" injuries. But its Complaint lacks the details necessary to connect either type of alleged injury to its

---

[2] The Tenth Circuit decided *Otero* in 1977, before the Supreme Court's 1984 decision in *Allen*. While JCCC does not agree with the proposition that *Otero* speaks to standing based on discriminatory educational policies or stigmatic injuries, even if such discussion existed, it would be superseded by the Supreme Court's subsequent ruling in *Allen*.

[3] Importantly, *WEAL I* considered claims that Federal funds were improperly dispersed to racially-segregated school, and subsequent case law within the D.C. Circuit has questioned whether *WEAL*'s holding applies outside of its specific facts. *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 121 (D.D.C. 2003) ("Moreover, the D.C. Circuit has more recently limited the *WEAL I* holding to its facts."); *see also Freedom Republicans, Inc. v. Fed. Election Comm'n*, 13 F.3d 412, 417 (D.C. Cir. 1994) ("Despite its broad language, we do not believe that *WEAL I* obviates our duty to scrutinize closely the relationship between convention funding and the alleged discrimination at issue in this case.").

members or their student-children. For example, FESB argues its members have suffered "direct injury" "in the form of SBUSD's and JCCC's discriminatory instruction and programming and denial of equal treatment based on race, religion and sex." *See* Dkt. No. 36 at 9–11. But FESB never pleads that its members or their student-children *actually attended* JCCC's voluntary programming or were personally subjected to the allegedly-discriminatory materials. *Id.*; *see also* Dkt. No. 1. Indeed, FESB's allegation that "SBUSD refused to allow parents to examine JCCC's instructional materials" implies the opposite—*i.e.*, that its members and their children did not attend JCCC's trainings to receive or be "exposed" to those materials. *See* Dkt. No. 36 at 2. Instead of identifying any *direct connection* between its members or their student-children and JCCC's allegedly-discriminatory training materials, FESB rehashes the content allegedly contained *within* those training materials, which is insufficient under *Allen*. *Id.* at 10–11.

FESB further argues that "these discriminatory actions have resulted in stigmatic injuries to the student children of Plaintiff's members." Dkt. No. 36 at 11. But this argument is similarly unavailing because FESB has pled no facts specific or personal to those student children, and there is no mention of any alleged stigmatic injury to anyone in FESB's Complaint. *Id.*; *see also* Dkt. No. 1. To the extent that FESB does attempt to demonstrate that students who may (or may not) be children of its members have been personally affected, it can do so only via attorney argument that provides no citation to its Complaint. *See* Dkt. No. 36 at 11. Indeed, the crux of its argument—i.e., that "so-called 'privilege group' students" "believe they are inherently flawed, racist and 'less than' their peer students"—*never cites to the Complaint*. *See id.*

To be clear, FESB's Complaint never identifies who its members are and how those members' students have been personally denied equal treatment. While FESB argues that JCCC's teachings have "increased racial animosity within the school" resulting in "anti-White graffiti" and "anti-white racial epithets" being hurled at "SBUSD teachers and students," (Dkt. No. 36 at 11), FESB is not comprised of teachers and at no point does

FESB allege that these actions were directed at any of the student-children of any of its members. *Id.* at 9–11. Moreover, such a personal connection to the alleged discrimination is especially important given the behavior is alleged in the context of schools, where students often engage in unacceptable conduct that is nevertheless nonactionable. *See Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651–52, 119 S. Ct. 1661, 1675, 143 L. Ed. 2d 839 (1999) (in the Title IX context, Courts "must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. . . . It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it" but not actionable). This point is further buttressed by the fact that FESB does not even specify any facts illuminating the circumstances of the "anti-White" graffiti or slurs, which obviously lack the historical context and weight carried by other racial slurs directed at racial minorities who have historically faced discrimination. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998) (referring to the n-word as "the most noxious racial epithet in the contemporary American lexicon").

Finally, FESB makes no attempt to rebut or even address the significant case law presented in JCCC's Motion to Dismiss that stigmatic injuries require a personal connection to the alleged discriminatory conduct.[4] *See Allen*, 468 U.S. at 755–57 ("In each of those cases, the plaintiffs alleged official racial discrimination comparable to that alleged by respondents here. Yet standing was denied in each case because the plaintiffs were not personally subject to the challenged discrimination."); *Nat'l Ass'n for Advancement of*

[4] Moreover, it is difficult to see how FESB satisfies the "causation" and "redressability" prongs requisite for standing without pleading how the allegedly-discriminatory materials particularly affects its members and/or their student children. *See Warth v. Seldin*, 422 U.S. 490, 505 (1975) (noting that "the indirectness of the injury . . . may make it substantially more difficult to meet the minimum requirement of Art. III," namely, that "the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm")*; see also Allen*, at 757-58; Dkt. No. 33 at 7 n.4.

Colored People v. Horne, 626 F. App'x 200, 201 (9th Cir. 2015); *Jones v. Beverly Hills Unified Sch. Dist.*, No. WDCV087201JFWPJW, 2010 WL 11549365, at *3 (C.D. Cal. Feb. 23, 2010); *Crawford v. Kern Cty. Cty. Sch. Dist. Bd. of Trustees*, No. 1:10CV-0425-OWW-JLT, 2010 WL 1980246, at *3 (E.D. Cal. May 12, 2010), *report and recommendation adopted sub nom. Crawford v. Kern Cty. Sch. Dist. Bd. of Trustees*, No. 1:10CV-0425-OWW-JLT, 2010 WL 2555637 (E.D. Cal. June 21, 2010). This standard, set out by the Supreme Court, requires FESB to allege facts that are *personal* to its members or their children when making claims of discrimination in the context of schools. *Id.* Other than a cursory string cite to *Allen* (Dkt. 36 at 9), FESB does not even mention any of these cases, much less address or attempt to distinguish them. *See id.* at ii–v.

In sum, FESB has failed to plead or articulate facts that are specific and personal to its members or their children, and as such lacks standing to bring its discrimination claims.

3. *FESB Cannot Meet the Additional Pleading Requirements for Its Title VI and Cal. Gov. Code § 11135 Claims*

FESB's Title VI and Cal. Gov. Code § 11135 Claims cannot survive for an additional reason: FESB has not complied with the additional pleading requirements under Title VI and California Education Code § 11135, which require that FESB plead plausible facts demonstrating that "(1) there is a racially hostile environment; (2) the district had notice of the problem; and (3) it 'failed to respond adequately to redress the racially hostile environment.'" *Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1033 (1998) (quoting 59 Fed. Reg. at 11449); *see also* Dkt. No. 33 at 9. FESB briefly argues that SBUSD and JCCC had "notice" of both "SBUSD's and JCCC's discriminatory conduct and the resulting hostile educational environment[.]" Dkt. No. 36 at 11 n.1 (citing Dkt. No. 1 ¶¶ 28–32). But FESB fails to plead that SBUSD was aware of any of the alleged incidents that purportedly comprise the "hostile educational environment" under Cal. Educ. Code § 220. In fact, FESB never asserts that the school was ever notified of, much less failed to resolve, any specific instance of any issues it alleges constitute such an environment, including the "anti-White graffiti" or "anti-White racial slurs." Dkt. No. 36

at 15. Instead, FESB argues that the school received complaints only about JCCC's educational materials during a single board meeting and focuses on concerns regarding JCCC's educational materials and the bidding process surrounding them, not the allegedly resulting hostile educational environment. *Id.* Because FESB never alleges that JCCC or SBUSD received notice of the *hostile educational environment* or the supporting facts now alleged or that the school then allowed those problems to continue unresolved (see Dkt. No. 1 ¶¶ 28–32), its Title VI and Cal. Gov. Code § 11135 claims must be dismissed.

4. *FESB Was Founded to Pursue Litigation, Which Is Not Sufficient to Demonstrate Organizational Purpose Requisite for Organizational Standing.*

Unable to cure its failure to plead the requisite injury for associational standing, FESB asserts that it has been *directly injured as an organization* and is thus entitled to organizational standing. Dkt. No. 36 at 13 (the complained-of acts "thwart FESB's goals of advocation for and establishing educational policies in SBUSD that benefit all Americans." This bare assertion, however, is not enough to articulate "***a concrete and demonstrable injury to its activities, not simply a setback to the organization's abstract social interests***." *Project Sentinel v. Evergreen Ridge Apartments*, 40 F. Supp. 2d 1136, 1138 (N.D. Cal. 1999) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)); *see also Kessler Inst. for Rehab. v, Essex Fells Mayor*, 876 F.Supp. 641, 656 (D.N.J. 1995) (standing is not established by the organization's mere allegation that "it has an ideological or abstract social interest that is adversely affected by the challenged action.").

FESB further argues that its ideological disagreement with JCCC "required [it] to use its resources to prosecuting [sic] the instant lawsuit to correct and challenge these policies by SBUSD and JCCC" thus injuring FESB. *See* Dkt. No. 36 (Opposition) at 13. But this, too, falls short of articulating an injury sufficient to confer organizational standing. In order "[t]o constitute an injury under this theory, a defendant's conduct must do more than offend the priorities and principles of the organization; it must result in ***an***

actual impediment to the organization's real-world efforts on behalf of such principles." *Jimenez v. David Y Tsai*, No. 5:16-CV-04434-EJD, 2017 WL 2423186, at *11 (N.D. Cal. June 5, 2017). FESB fails to identify even a single real-world effort on behalf of its purported mission—aside from the present litigation—much less the necessary impediment or injury to any such real-world effort.

FESB cannot "demonstrate that the defendants' allegedly unlawful conduct somehow affected plaintiff's ability to operate, thereby giving rise to the need to divert funds to litigation" because FESB was formed to pursue this litigation. *Project Sentinel*, 40 F. Supp. 2d at 1141. By its own admission, FESB was "formed to advocate for fair education policies in the Santa Barbara Unified School District" through "legal actions." Dkt. No. 1 ¶ 11. Because "defendants' alleged conduct did not obstruct plaintiff's mission, it created plaintiff's mission," FESB cannot argue that it was injured by diversion of resources to the very litigation it was formed to litigate. *Project Sentinel*, 40 F. Supp. 2d at 1141 ("By the mere bringing of his suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. Presumably every such plaintiff would prefer to allocate elsewhere the resources spent on such litigation. *And, although a litigant may derive great comfort and joy from the vindication of a perceived wrong inflicted upon another, neither that psychic satisfaction nor the diverted cost of the litigation can generate an Article III case or controversy because neither constitutes a cognizable Article III injury*.") (citing *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 1018–19, 140 L.Ed.2d 210 (1998)).

Further, in making its argument for organizational standing, FESB relies heavily on (mischaracterized) dictum from two cases that are inapposite here because they actually involved plaintiffs whose *non-litigious activities were frustrated* by the actions of the defendants. First, FESB points to *El Rescate* to assert that organizational standing is proper "where defendant's alleged policies frustrate plaintiff's declared goals and require the organization to expend resources in representing members they otherwise would spend in

other ways." Dkt. No. 36 (Opposition) at 12. But this precise argument, premised on the same sentence FESB cites, has been debunked by a court in this circuit. In *Project Sentinel*, the court denied standing to a plaintiff organization specifically formed, as here, to pursue the instant litigation, criticizing the plaintiff's misplaced reliance on the same dictum on which FESB relies:

> ***The unfortunate language of the above sentence is indeed susceptible to plaintiff's reading. Plaintiff, however, ignores the facts of the underlying case.*** The plaintiff organization in *El Rescate* provided legal assistance to non-English speaking clients. The failure of the defendants to provide translators at immigration court proceedings directly frustrated the organization's ability to provide legal services. ***Thus, despite the loose wording of the dictum cited by plaintiff, the organizational plaintiff in El Rescate was in fact a typical Havens plaintiff***: The organization's diversion of resources to litigation was the result of ***harm inflicted directly upon its ability to provide its services, not merely upon its abstract social interests or goals***.

Project Sentinel, 40 F. Supp. 2d at 1140 (N.D. Cal. 1999). Just as in *Project Sentinel*, FESB's overly broad "reading of *El Rescate* ignores this critical distinction and would, as noted above, completely eviscerate Article III's requirement of an injury in fact." *Id.*

The second case on which FESB relies is similarly inapposite. In *Gay-Straight All. Network v. Visalia Unified Sch. Dist.*, the plaintiff organization performed tangible services for its members, "fight[ing] homophobia and intolerance in schools by empowering gay, lesbian, bisexual, transgender and heterosexual members in high schools to form and maintain local, school-based, student-run clubs called 'GSAs.'" *Visalia Unified Sch. Dist.*, 262 F. Supp. 2d 1088, 1092 (E.D. Cal. 2001). In that case, plaintiff's student members were subjected to severe physical and verbal harassment, including "death threats" and "anti-gay epithets," "humiliation by peers and teachers," and forced transfer out of the school to independent study programs. *Id.* at 1093–94. In order to combat the discrimination and harassment of its members, plaintiff "devoted significant monetary and staffing resources to address the problems of alleged discrimination, harassment, and homophobia in VUSD schools through its Fresno office." *Id.* at 1105. This is decidedly

distinct from the situation here, where *FESB has failed to articulate even a single activity from which its resources were allegedly diverted* by the litigation it was formed to pursue. Because FESB has not pled any direct injury to it as an organization, FESB also lacks organizational standing to bring the discrimination claims, and they should be dismissed.

A. Count IV: FESB Has Not Sufficiently Pled the "Severe, Pervasive and Offensive Harassment" Required by Cal. Educ. Code § 220

FESB contends generally that it has demonstrated "severe, pervasive and offensive harassment" in the form of JCCC's educational materials. Dkt. No. 36 at 14–15. But, as discussed above in Section II.A.2, FESB failed to plead that any of its members or their student-children were the subject of the purported harassment or suffered its effects directly. Indeed, FESB presents its primary argument—that JCCC's teachings cause "Caucasian, Christian and/or male students to believe they are inherently flawed based on their race, religion or sex"—*without a single citation to its Complaint*. *Id.* at 14. Similarly unavailing is FESB's other argument that alleged "anti-White graffiti" or "anti-White racial slurs" have appeared in the community, as nothing in FESB's Complaint even suggests these incidents were at all causally connected to JCCC's curriculum or programs. FESB also fails to plead any facts that would allow the court to draw an inference that the incidents were sufficiently hostile and severe to sustain a claim under Cal. Educ. Code § 220. *See* Dkt. No. 33 (Motion to Dismiss) at 8–11. Tellingly, in its opposition, FESB makes no attempt to grapple with either JCCC's explanation as to why these vague allegations are insufficient to confer standing or the substantial case law cited by JCCC in support of its position. *See Donovan v. Poway Unified Sch. Dist.*, 167 Cal. App. 4th 567, 579 (Cal. Ct. App. 2008) (internal quotations omitted); *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 652 (1999) ("[T]he behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity."); *Monteiro*, 158 F.3d at 1033–34 ("This is especially so when we also consider . . . the victim's age."); *see also Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1115 (E.D. Cal. 2011) (dismissing Plaintiff's Title IX complaint for failure to "allege

any facts surrounding the circumstances in which the harassing comments were allegedly made," leaving court unable to determine whether harassment "was sufficiently hostile and severe"); *Davis*, 526 U.S. at 651 (emphasizing harassment must be severe and persistent because "schools are unlike the adult workplace" and "at least early on, students are still learning how to interact appropriately with their peers."); *see also* Dkt. 33 at 8–11.

Further, FESB's argument regarding the school's purported "deliberate indifference" is also deficient, as it fails to even suggest that SBUSD was aware of any of the above incidents that purportedly comprise the "hostile educational environment" under Cal. Educ. Code § 220. In fact, FESB makes no argument that the school was ever notified of, or failed to resolve, any of the issues it alleges constitute such an environment, including the "anti-White graffiti" or "anti-White racial slurs." Dkt. No. 36 (Opposition) at 15. Instead, FESB argues that the school received complaints only about JCCC's educational materials during a single board meeting. *Id.* Because FESB never pleads that its members or their children were exposed to these educational materials or suffered deleterious effects as a result of any such exposure, it cannot demonstrate the underlying severe harassment necessary to show deliberate indifference. Accordingly, FESB's claims under Cal. Educ. Code § 220 should be dismissed.

B. Count VI: FESB Has Not Sufficiently Demonstrated That Its California Contract Code § 20111 Claim Shares a Common Nucleus of Operative Fact with Other Federal Claims

FESB has not identified a common nucleus of operative facts between FESB's federal claims and its state law, public-contract-bidding claim. FESB does not dispute that federal supplemental jurisdiction is only available when state and federal claims are so related that they form "the same case or controversy under Article III," which only occurs when a state claim "shares a 'common nucleus of operative fact' with the federal claim." Dkt. No. 36 at 16 (citing 28 U.S.C. § 1367(a) and *Bahrampour v. Lampert*, 356 F.3d 969,

978 (9th Cir. 2004)).[5] A common nucleus of operative fact means that the "operative facts that will drive the resolution" of the state-law claim are the same (or at least substantially overlap with) those that "drive the resolution" of the federal-law claim. *Pruco Life Ins. Co. v. Pollack*, No. 2:12-cv-05501-SVW-JEM, 2013 WL 12142596, at *2 (C.D. Cal. Jan. 4, 2013) (Wilson, J.) (comparing facts needed to prove elements of federal and state claims); *Buttz v. Mohsenin*, No. 5:15-cv-01666-HRL, 2016 WL 1462135, at *2 (N.D. Cal. Apr. 14, 2016) (claims for violating the federal Fair Debt Collection Practices Act (FDCPA) shared a common nucleus of operative facts with state-law counterclaim for breach of lease because both arose from the same facts surrounding the underlying debt).

FESB also ignores the core of the jurisdictional question—*i.e.*, what facts are needed to prove the elements of each claim. According to FESB's Complaint, the elements of a claim alleging a violation of California Public Contract Code § 20111 include whether: (1) a contract existed with a school district; 2) the contract was for more than $50,000; and 3) the contract was required to be put out to bid. *See* Dkt. No. 1 ¶¶ 64–72. ***None*** of these elements share a "common nucleus of operative fact" with the allegedly discriminatory content of JCCC's educational programming that forms the basis of FESB's federal claims.

---

[5] FESB cites to *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). But that case arose before Congress passed 28 U.S.C. § 1367, which now governs supplemental jurisdiction. FESB also includes irrelevant quotes from cases *where courts already decided that they had supplemental jurisdiction* (as proscribed in 28 U.S.C. § 1367(a)), and were deciding whether to decline to exercise that jurisdiction pursuant to 28 U.S.C. § 1367(c). Those quotes are irrelevant to the threshold question here, dictated by § 1367(a), of whether the Court may exercise supplemental jurisdiction. *See* Dkt. No. 36 at 18 (citing *Woodrow v. Satake Family Tr.*, No. C 06-2155 WDB, 2006 WL 2092630, at *2 (N.D. Cal. July 27, 2006) ("Plaintiffs urge the court to decline to exercise supplemental jurisdiction in this case under 28 U.S.C. § 1367(c).")).

And FESB's cite to *Executive Software N. Am., Inc. v. U.S. Distr. Court for the N. Dist. Of Cal.* is doubly misleading because the cited quote is discussing § 1367(c), not § 1367(a), ***and*** FESB cites to a standard that the Court rejects ***in that very case***. 24 F.3d 1545, 1558-59 (9th Cir. 1994) (explaining that *Gibbs* and *Carnegie-Mellon* have been superseded by statute). FESB argues that because "the assertion of pendent jurisdiction in this case best accommodates the values of economy, convenience, fairness and comity[,] [e]ach of the claims should be tried together." Dkt. No. 36 at 18 (citing *Executive Software*). This standard is completely inapposite for a § 1367(a) inquiry.

The "operative facts that will drive the resolution" of Count VI are entirely different from those "that will drive the resolution" of FESB's federal discrimination claims. *See Pruco Life Ins. Co.*, 2013 WL 12142596 at *2. These facts do not give rise to supplemental jurisdiction.

The lack of a common nucleus of operative facts is best demonstrated by FESB's attempt to list them. Dkt. No. 36 at 17. FESB alleges that its "claims have the same common nucleus of facts" because "all [of its] claims concern" a list of four items: (1) the JCCC contract; (2) the alleged unlawful discrimination arising from the services provided pursuant to the JCCC contract; (3) whether the JCCC contract is void as a matter of law; and (4) the damages arising from the services provided pursuant to the JCCC contract. *Id.* But instead of demonstrating a common nucleus, FESB's list emphasizes just how distinct Count VI is from FESB's federal-law claims.

First, while "the JCCC Contract" is relevant to its § 20111 claim, FESB never explains how the existence of a contract is relevant to (much less necessary to prove) any of FESB's federal claims. *Id.* This is not sufficient to create supplemental jurisdiction. While a contract between two adverse parties might "provide[] background" as to non-contract claims between them, the contract cannot be used as a hook with which to hoist state-law claims into federal court when those claims "arise out of two different instances" and "involve[] their own set of facts." *Tranik Enters. Inc. v. AuthenticWatches.com, Inc.*, No. 2:16-cv-02931-SVW-JC, 2016 WL 11002491 at *3 (C.D. Cal. Oct. 28, 2016) (Wilson, J.).

Second, FESB asserts that "the unlawful discrimination arising from the services provided pursuant to the JCCC Contract" is a common operative fact. Dkt. No. 36 at 17. But the facts surrounding the alleged discrimination have nothing to do with any element of Count VI concerning public bidding, and FESB does not even attempt to relate them. The salient issue for § 20111—whether the contract should have been put out for public bid—has nothing at all to do with whether services provided under a prior contract with

JCCC resulted in discriminatory actions. These situations involve entirely different operative facts.

Third, FESB lists "whether the JCCC Contract is void as a matter of law for failure to have been submitted for public bidding and for being the basis of teachings which illegally discriminate." *Id.* Of course, the question of "whether the JCCC Contract is void as a matter of law" is not a question of fact—it is, on its face, a question of law. And again, it has nothing to do with whether the services provided under a prior contract with JCCC resulted in discriminatory actions. Moreover, the forward-looking contract (void or valid) has nothing to do with whether prior teachings were discriminatory.

Fourth, FESB claims a common nucleus of operative facts from the "damages arising from the services provided pursuant to the JCCC Contract." *Id.* But this is not relevant because, other than attorney's fees and costs, FESB has not requested any damages. Dkt. No. 1 ¶ 19. Even if it were, the damages from federal claims relate to specific allegedly discriminatory practices that have previously occurred, while the state-law claim under § 20111 relates to the cost of the forward-looking contract as a whole. The facts necessary to determine damages under those two distinct theories are not even overlapping, much less the same.

Finally, FESB argues that "SBUSD's failure and refusal to let the JCCC Contract for public bidding . . . establishes SBUSD's deliberate indifference" under its federal claims. Dkt. No. 36 at 17. But this final attempt also fails. First, the fact that SBUSD did not put the contract out for public bidding is not in dispute. Second, the two operative facts in this theory are (1) that SBUSD ***contracted with JCCC*** (2) even after parents allegedly complained. FESB's theory of deliberate indifference does not turn on whether SBUSD chose JCCC without bidding or whether it chose JCCC from a pool of a dozen possible contractors. Finally, this argument does not explain how the operative facts under § 20111 relate at all to FESB's federal claims. The key questions under § 20111 involve whether California law ***required*** the JCCC contract to be put out to bid—not SBUSD's motivations

(or indifference) when deciding not to put out the contract for public bidding. In short, the facts needed to answer the core questions relevant to § 20111 have nothing to do with FESB's federal claims.

III. CONCLUSION

For the above reasons, JCCC respectfully requests that this Court dismiss FESB's claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, via 41 U.S.C. § 1983; Cal. Gov. Code § 11135 for failing to plead sufficient facts demonstrating standing; Cal. Educ. Code § 220 for failure to state a claim under that section's heightened pleading standard; and Cal. Pub. Con. Code § 20111 for lack of supplemental jurisdiction.

DATED: February 11, 2019

KIRKLAND & ELLIS LLP

/s/ Sarah E. Piepmeier

Sarah E. Piepmeier (SBN 227094)
sarah.piepmeier@kirkland.com
Elise S. Edlin (SBN 293756)
elise.edlin@kirkland.com
May Eaton (SBN 298123)
may.eaton@kirkland.com
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 439-1400
Facsimile: (415) 439-1500

Attorneys for Defendant Just Communities Central Coast, Inc.