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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF SANTA BARBARA**

16 FAIR EDUCATION SANTA BARBARA,
17 INC., a 501(c)(3) organization

18 Plaintiff,

19 vs.

20 SANTA BARBARA UNIFIED SCHOOL
21 DISTRICT, a public-school district; CARY
22 MATSUOKA, in his official capacity; and
23 JUST COMMUNITIES CENTRAL
24 COAST, INC., a 501(c)(3) organization,

25 Defendants.

Case No.: 19CV01875

**PLAINTIFF FAIR EDUCATION SANTA
BARBARA, INC.'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANTS
SANTA BARBARA UNIFIED SCHOOL
DISTRICT AND CARY MATSUOKA'S
DEMURRER TO SECOND AMENDED
COMPLAINT**

Date: September 17, 2019
Time: 9:30 AM
Dept.: 3

Date Filed: April 8, 2019
Trial Date: None Yet

[Assigned for all purposes to Hon. Thomas
P. Anderle, SB Dept. 3]

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1 **I. INTRODUCTION**

2 Plaintiff Fair Education Santa Barbara (“FESB”) is a 501(c)(3) organization formed to
3 advocate for and to ensure fair, non-discriminatory and inclusive education policies in the Santa
4 Barbara Unified School District (“SBUSD”).¹ This action concerns SBUSD’s no-bid contracts with
5 a non-profit organization called Just Communities Central Coast, Inc. (“JCCC”) for the provision
6 of so-called “unconscious bias” training for teachers and students at a cost to taxpayers of well over
7 \$1,000,000. SBUSD and JCCC are deeply conflicted, with numerous overlapping employees and
8 board members – including school board members that voted to approve JCCC’s contract, who
9 were themselves until very recently employees of JCCC. SBUSD did not let the JCCC contract for
10 public bidding as required by California law – instead rubber stamping it over the objection of
11 many, many parents and community members.

12 To make matters worse, JCCC’s actual teaching curriculum is a radical and discriminatory
13 program, teaching, for example, that “racism” can only be perpetrated by “white people” and that
14 “white people,” “males” and “Christian people” “target” “People of Color,” “females” and “All
15 other [religions].” In teaching its classes, JCCC also physically separates the participants by race
16 to receive differing “instruction.” Plaintiff FESB accordingly filed this lawsuit for violation of
17 Public Contracts Code § 20111 to require public bidding of the contracts with JCCC and for
18 violation of Government Code § 11135, Education Code §§ 220 and 60044, all of which prohibit
19 SBUSD from discriminating on the basis of race, ethnicity, sex and/or religion, which it does
20 through its contracting with JCCC. SBUSD demurs to each claim alleged against it, none of which
21 are availing and which should be overruled for the following independent reasons:

22 First, SBUSD argues that the First Cause of Action fails because its contracts with JCCC
23 are not subject to the public bidding requirements in Public Contract Code § 20111 because public
24 bidding would result in “no advantage” to SBUSD and because JCCC’s services constitute “special
25 services.” “Special services” however, are by statute limited to “financial, economic, accounting,
26

27 ¹ The abbreviation SBUSD is used throughout this brief to refer collectively to Defendant
28 Santa Barbara Unified School District as well as Defendant Cary Matsuoka, who was sued in his
official capacity as Superintendent only.

1 engineering, legal, or administrative” services. Such services fall within the small group of services
2 excluded from the ambit of the public bidding requirement. Try as it might, SBUSD does not,
3 because it properly cannot, show that JCCC’s services are “financial, economic, accounting,
4 engineering, legal, or administrative” services. Instead, SBUSD remarkably relies on self-serving
5 argument of counsel that it added in the most recent JCCC Contract (which was drafted by the same
6 lawyers who drafted SBUSD’s Demurrers), to argue that JCCC’s services are supposedly “special”.
7 But they are not, and no amount of attorney language written into a contract (to later use to oppose
8 a lawsuit which had already been filed when the contract was drafted), can change that. Certainly
9 the Court is not required to, and should not, accept these self-serving legal conclusions as true.
10 Whether or not JCCC’s services constitute “special services” (and they do not) will ultimately be
11 up to the Court or the fact-finder to determine. The JCCC contracts, providing for SBUSD to pay
12 JCCC hundreds of thousands of dollars, notwithstanding the numerous actual and serious conflicts
13 of interest between the two organizations, are exactly the reason why the public bidding
14 requirements exist in the first place.

15 Second, SBUSD argues that the Second and Third Causes of Action for violation of
16 Government Code § 11135 and Education Code § 220 fail because Plaintiff has not alleged
17 sufficient facts to show that it discriminates on the basis of race, ethnicity, sex, and/or religion.
18 SBUSD is simply wrong and the SAC contains detailed allegations regarding the discriminatory
19 nature and practice of JCCC’s programming, which was adopted by SBUSD, including the
20 denigration of participants of Caucasian ethnicity, males, and Christians and JCCC’s physical
21 segregation of its classes by race to receive differing instruction.

22 Third, SBUSD argues that the Fourth Cause of Action for violation of Education Code §
23 60044 fails as a result of SBUSD’s absurd interpretation of the statute, that would essentially render
24 it meaningless, and because SBUSD purportedly did not “adopt” JCCC’s programming,
25 disingenuously likening it to students receiving a pamphlet on a field trip (despite the fact that JCCC
26 provides at least three week-long, full-day programs to teachers and at least five three day programs
27

28

1 for students per year).² SBUSD’s Demurrer should be overruled in its entirety.

2 **II. ALLEGATIONS IN SAC**

3 **A. The Parties**

4 Plaintiff FESB is an Internal Revenue Code Section 501(c)(3) organization formed to
5 advocate for and ensure fair, non-discriminatory and inclusive education policies in the Santa
6 Barbara Unified School District. (SAC ¶ 12.) FESB is a coalition of approximately 300 members,
7 many of whom have children in SBUSD schools and whom are tax payers and residents in Santa
8 Barbara County and in the school district. (*Id.*)

9 Defendant Santa Barbara Unified School District is a public-school district located in Santa
10 Barbara County, California, created and operating under the laws of the State of California.
11 Defendant Cary Matsuoka is the Superintendent of SBUSD and is sued solely in his official
12 capacity. (SAC ¶¶ 13-15.) Defendant Just Communities Central Coast is an Internal Revenue Code
13 Section 501(c)(3) organization that provides purported “unconscious bias” training to school
14 districts and other public entities. (SAC ¶ 16.)

15 **B. JCCC’s No-Bid Contracts With SBUSD**

16 Since approximately 2013, SBUSD has engaged JCCC to provide training and educational
17 programs to SBUSD teachers and students with respect to “diversity, inclusion, and equity.” (SAC
18 ¶ 20.) To date, SBUSD has paid well over \$1,000,000 to JCCC to provide these programs. (SAC
19 ¶ 27.) On or about October 9, 2018, for the 2018-2019 school year, SBUSD entered into a no-bid
20 contract with JCCC for it to provide its so-called “diversity, inclusion and equity” programs for a
21 total cost to taxpayers of \$294,000. (SAC ¶ 27.) This 2018-2019 JCCC Contract was entered into
22 over vociferous opposition from community members, who pointed out the many, many conflicts
23 of interest between SBUSD and JCCC and questioned the propriety of entering into this contract
24 on a no-bid basis. (SAC ¶ 41.) These conflicts of interest include the following:

- 25 a. Former SBUSD Board member, Ismael Ulloa, who voted to approve the 2018-2019 JCCC

26 _____
27 ² Plaintiff’s Fifth Cause of Action for Declaratory Relief seeks a declaration from the Court
28 that SBUSD has violated the foregoing statutes enumerated in Causes of Action 1 through 4.
Therefore, to the extent the Court overrules SBUSD’s demurrer to Causes of Action 1 through 4,
it should overrule SBUSD’s demurrer to Cause of Action No. 5.

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Contract, was a paid teacher for JCCC in 2016;

- b. Annette Cordero was a two-term member of the SBUSD School Board, serving from 2004 through 2012 and is currently a member of JCCC’s Board of Directors;
- c. Dave Cash was the Superintendent of SBUSD from 2011 through 2016 caused the Board to approve numerous of JCCC’s prior contracts with the district. Dr. Cash was, until only several months ago, a member of JCCC’s Board of Directors;
- d. Monique Limon was a SBUSD Board member from 2014 through 2017 and among other things, currently sits on the Grant Review Committee of the McCune Foundation, which is a major source of funding for JCCC;
- e. Pedro Paz was a SBUSD Board member from 2012 through 2016 (ending his tenure as Vice President) and is the current head of the Fund for Santa Barbara, which is another major contributor to JCCC;
- f. Current SBUSD Assistant Superintendent of Secondary Education, Shawn Carey, was an instructor for JCCC and a major promoter of JCCC within the district;
- g. Current Assistant Superintendent and Head of Student Services, Fran Wageneck, is one of the original founders of JCCC and designed JCCC’s curriculum;
- h. Current SBUSD administrative assistant, Alma Flores, was a paid teacher for JCCC and currently sits on JCCC’s Board of Directors;
- i. Current SBUSD Director of English Learners and Parent Engagement, Maria Larios-Horton, was on JCCC’s Board of Directors as recently as 2017.

(SAC ¶ 53(a)-(i).) None of these conflicts were disclosed, and no conflict of interest statement was ever submitted by JCCC prior to the SBUSD Board’s approval of its 2018-2019 contract. (SAC ¶ 54.) FESB filed a lawsuit regarding JCCC’s 2018-2019 Contract alleging, among other things, that the contract must be let for public bidding pursuant to Public Contracts Code § 20111.

While this lawsuit was pending, SBUSD and JCCC rushed through with only the bare minimum public notice an approval of a new contract between SBUSD and JCCC for the 2019-2020 School year, this time costing the taxpayers another \$258,115. (SAC ¶ 28, Ex. B.) This time, however, SBUSD and JCCC’s lawyers inserted a host of self-serving legal conclusions to attempt an end run around California’s public bidding requirements – parroting back the legal language that is contained in certain otherwise inapplicable exceptions to the public bidding requirement as purported “findings of fact.” (SAC, Ex. B.)

1 **C. JCCC's Discriminatory And Divisive Programming**

2 While JCCC purports to provide “diversity, inclusion and equity” programs, its actual
3 curriculum and programs are anything but. JCCC’s actual programming is a radical, exclusionary
4 and discriminatory curriculum, masquerading under the guise of “advancing justice” and making
5 communities “more inclusive and just for all people.” JCCC’s curriculum and written materials
6 attempt to indoctrinate staff and students with a warped view of the world where racism can only
7 be perpetrated by “white people” and where the success of students in so-called “privileged” groups
8 is due solely to their “unearned access to resources . . .”. (SAC ¶ 32.)

9 JCCC’s teaching materials contain among many others, the following direct quotes:

- 10 a. “Oppression” is “[a] system that benefits some groups (often called ‘privileged
11 groups) and disadvantages other groups (often called ‘target groups’).” (SAC, Ex.
12 C, p. 15.)
- 13 b. “Privileged Groups” include “Men,” “White People,” “Christian People,” and
14 “Wealthy People,” and “Target Groups” include “Women,” “People of Color,” and
15 “Working Class & Poor.” (SAC, Ex. C, p. 17.)
- 16 c. “Racism” is “[a] system of oppression based on race that privileges white people
17 and targets people of color.” (SAC, Ex. C, p. 19.)
- 18 d. “Privilege” is “[u]nearned access to resources that enhance one’s chances of getting
19 what one needs or influencing others in order to lead a safe, productive and fulfilling
20 life.” The subtext of this definition is that a “privileged group’s” success is due to
21 their “unearned access to resources,” as opposed to for example hard work or
22 intelligence. (SAC Ex. C, p 19.)
- 23 e. JCCC’s materials define “Religious Oppression” as “Christian People” targeting
24 “All Others” and “Sexism” as “Men” targeting “Women.” (SAC, Ex. C, p. 15.)

25 Utilizing this ideological framework, JCCC physically separates participants during the
26 actual workshops and training sessions into different racial groups, requiring all individuals that
27 JCCC perceives to be “white” to be segregated in a separate room to receive instruction that differs
28 from all perceived “non-white” participants. In these racially segregated sessions, the “white”

1 participants are instructed that, whether they are conscious of it or not, all “white people” are racist
2 and collude to promote or perpetuate racism against non-whites. JCCC’s program administrator,
3 Jarrod Schwartz, admitted that JCCC splits its participants into separate racial groups to receive
4 differing instruction in an interview with KCRW Santa Barbara. (SAC ¶ 35.)

5 JCCC’s written curriculum further states that “public schools teach ‘skills’ that business
6 owners find useful like competition, obedience and respect for authority,” that “public schools
7 create the illusion that everyone has an equal chance” and that “wealthy people and business shaped
8 the schools to contain and control poor people.” (SAC ¶ 37, Ex. C, p. 87-88.)

9 **III. LEGAL STANDARD**

10 Generally, “a demurrer tests the sufficiency of the plaintiff’s complaint, *i.e.*, whether it
11 states facts sufficient to constitute a cause of action upon which relief may be based.” *McKell v.*
12 *Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1469 (2006). In determining whether the
13 complaint states facts sufficient to constitute a cause of action, the Court may consider all material
14 facts pleaded in the complaint and those arising by reasonable implication therefrom. *Id.* Further,
15 for the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all
16 material facts properly pleaded. *Aubry v. Tri-City Hosp. Dist.*, 2 Cal.4th 962, 966–967 (1992) ;
17 *Serrano v. Priest*, 5 Cal.3d 584, 591 (1971); *Adelman v. Associated Int’l Ins. Co.*, 90 Cal.App.4th
18 352, 359 (2001) . The Court should not sustain the demurrer without leave to amend if the
19 complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable
20 possibility the defect can be cured by amendment. *Id.*

21 **IV. ARGUMENT**

22 **A. The First Cause Of Action For Violation Of Public Contracts Code § 20111**

23 **States A Valid Cause Of Action**

24 Plaintiff’s First Cause of Action for Violation of Public Contracts Code § 20111 alleges that
25 the JCCC Contract was not “let” for public bidding and is thus void and unenforceable as a matter
26 of law. SBUSD does not dispute that the JCCC Contract was not let for public bidding and does
27 not dispute that, if it is subject to Public Contract Code § 20111, it is void and unenforceable.
28 Instead, SBUSD argues that two exceptions apply to remove the JCCC Contract from the ambit of

1 the statute, relying entirely on self-serving legal conclusions that SBUSD and JCCC’s attorneys
2 inserted into the JCCC Contract in anticipation of this litigation that it now claims are binding on
3 the Court. The exceptions relied upon by SBUSD do not apply and SBUSD and JCCC’s
4 underhanded attempt to usurp the Court’s ultimate authority is not well taken.

5 California Public Contract Code § 20111 states:

6 The governing board of any school district, in accordance with any requirement
7 established by that governing board pursuant to subdivision (a) of Section 2000, shall
8 let any contracts involving an expenditure of more than fifty thousand dollars
9 (\$50,000) for any of the following: [...] (B) Services, except construction services.

9 Cal. Pub. Con. Code § 20111.

10 SBUSD argues that it is exempt from the public bidding requirements because (1) following
11 these requirements would not “produce an advantage” to SBUSD and (2) the JCCC Contract calls
12 for so-called “special services,” which are exempt from the public bidding requirements of Public
13 Contracts Code § 20111.

14 First, the public bidding requirements exist to prevent just the sort of favoritism occurring
15 with the JCCC Contract. “Because of the potential for abuse arising from deviations from strict
16 adherence to standards which promote these public benefits, the letting of public contracts
17 universally receives close judicial scrutiny and contracts awarded without strict compliance with
18 bidding requirements will be set aside. [...] The importance of maintaining integrity in government
19 and the ease with which policy goals underlying the requirement for open competitive bidding may
20 be surreptitiously undercut, mandate strict compliance with bidding requirements.” *MCM*
21 *Construction, Inc. v. City and County of San Francisco*, 66 Cal. App. 4th 359, 369 (1998).³ Plaintiff
22 has alleged in its SAC numerous actual and potential conflicts of interest between JCCC and
23 SBUSD – including that sitting SBUSD School Board members that voted to approve the contract
24 were former paid employees of JCCC, among many others. (SAC ¶ 53(a)-(i).) These conflicts are
25 the reason the public bidding requirement exists in the first place.

26
27 ³ *Marshall v. Pasadena Unified School Dist.*, 119 Cal. App. 4th 1241, 1256 (2004) (“Given
28 this strong public policy, any exception to competitive bidding requirements should be strictly
construed.”)

1 Second, the JCCC Contract *does not* involve “special services,” which are limited to
2 “services and advice in financial, economic, accounting, engineering, legal, or administrative
3 matters if such persons are specially trained and experienced and competent to perform the special
4 services required.” Cal. Gov. Code § 53060; *Jaynes v. Stockton*, 193 Cal. App. 2d 47, 51-52 (1961)
5 (internal citations omitted) (finding that legal services offered by a private law firm were not
6 “special services” as the same legal services were equally available from the local district attorney’s
7 office).

8 The JCCC Contract, which provides for teaching and workshops in “unconscious bias”
9 training fits within none of these categories and SBUSD makes no effort to show that it does.
10 Instead, SBUSD points to self-serving language that SBUSD and JCCC purposefully inserted into
11 their new contract in order to obtain an end run around the public bidding requirements.
12 Specifically, after being notified of Plaintiff’s claims that public bidding of the contract is required,
13 SBUSD and JCCC’s attorneys remarkably drafted their new contract to include numerous
14 extraneous legal conclusions that parrot back the statutory language of the Government Code §
15 53060 exception, such as JCCC’s services being “highly specialized” and purportedly requiring
16 “skills and training that are not otherwise available including from SBUSD staff or from any other
17 public entity.” (SAC, Ex. B, pp. 39-41.)

18 The Court is not required to accept these self-serving legal conclusions as fact. *Herman v.*
19 *Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 823 fn. 5
20 (on demurrer, Court need not accept as true legal conclusions contained in materials attached to
21 complaint). Whether or not the JCCC Contract is for “special services” is an ultimate issue of fact
22 and law that will be determined in this litigation – not through self-serving legal conclusions by the
23 offending party.⁴

24 Accordingly, SBUSD’s arguments fail and its demurrer should be overruled.

26 4 SBUSD argues that the self-serving statements that SBUSD and JCCC colluded to insert
27 into their contract to get around the public bidding requirements must be accepted as true because
28 they are part of the administrative record in this case. However, these are not “facts” – they are
legal conclusions. The Court and/or fact finder will be the ultimate arbiter of the facts in this case,
not SBUSD.

1 **B. The Second Cause Of Action For Violation Of Government Code § 11135**
2 **States A Valid Cause Of Action**

3 SBUSD argues that Plaintiff’s Second Cause of Action for violation of Government Code
4 § 11135 fails because Plaintiff has not pled that any person has “suffered severe, pervasive and
5 offensive harassment, that effectively deprived plaintiff of the right of equal access to benefits and
6 opportunities.” (Demurrer, p. 17-18.) However, SBUSD is improperly attempting, without
7 authority, to apply a heightened Title IX pleading standard to a Government Code § 11135 claim
8 and, regardless, Plaintiff has alleged sufficient facts to meet even this heightened standard.

9 Government Code § 11135 provides:

10 No person in the State of California shall, on the basis of sex, race, color, religion,
11 ancestry, national origin, ethnic group identification, age, mental disability,
12 physical disability, medical condition, genetic information, marital status, or sexual
13 orientation, be unlawfully denied full and equal access to the benefits of, or be
14 unlawfully subjected to discrimination under, any program or activity that is
conducted, operated, or administered by the state, or receives any financial
assistance from the state. Notwithstanding Section 11000, this section applies to
the California State University.

15 The implementing regulations for Government Code § 11135 provides numerous examples of
16 unlawful discrimination under Government Code § 11135, stating that “[i]t is a discriminatory
17 practice for a recipient, in carrying out any program or activity directly, or through contractual,
18 licensing, or other arrangements, on the basis of ethnic group identification, religion, age, sex, color,
19 or a physical or mental disability:

20
21 (a) to deny a person the opportunity to participate in, or benefit from an aid, benefit
or service;

22 (b) to afford a person the opportunity to participate in or benefit from an aid, benefit
23 or service that is not equal to that afforded others;

24 (c) to provide a person with an aid, benefit or service that is not as effective in
25 affording an equal opportunity to obtain the same result, to gain the same benefit,
26 or to reach the same level of achievement as that provided to others. In some
situations, identical treatment may be discriminatory;

27 (d) to provide different or separate aid, benefits or services to a person, or to any
28 class of persons, than is provided to others ...;

1 (e) to aid or perpetuate discrimination by transferring State support to another
2 recipient that discriminates in providing any aid, benefit or service; [...]

3 (g) to otherwise limit a person in the enjoyment of any right, privilege, advantage
4 or opportunity enjoyed by others receiving any aid, benefit or service resulting from
the program or activity; [...]

5 (i) to utilize criteria or methods of administration that:

6 (1) have the purpose or effect of subjecting a person to discrimination on
7 the basis of ethnic group identification, religion, age, sex, color, or a
8 physical or mental disability;

9 (2) have the purpose or effect of defeating or substantially impairing the
10 accomplishment of the objectives of the recipient's program with respect to
11 a person of a particular ethnic group identification, religion, age, sex, color,
12 or with a physical or mental disability;

13 (3) perpetuate discrimination by another recipient on the basis of ethnic
14 group identification, religion, age, sex, color, or a physical or mental
15 disability.”

16 Cal. Code Regs. tit. 2, § 11154.

17 Plaintiff's SAC (and the Exhibits attached thereto) alleges all of these forms of unlawful
18 discrimination under Government Code § 11135. The SAC alleges that JCCC's instructional
19 materials teach that “Men,” “White People,” and “Christian People” are so-called “Privileged
20 Groups” and actively “target” “Women,” “People of Color,” and “All Others [as to religion].”
21 (SAC ¶ 34, Ex. C, p. 15.) The SAC further alleges that JCCC teaches that the term “racism” is “[a]
22 system of oppression based on race that privileges white people and targets people of color” – in
23 other words, only “white people” can be racist. (SAC ¶ 34, Ex. C, p. 17.)

24 JCCC's materials further define “Religious Oppression” and “Christian People” targeting
25 “All Others” and “Sexism” as “Men” targeting “Women.” (SAC ¶ 34, Ex. C, p. 15.) The SAC
26 further alleges that, in its actual programming, JCCC physically separates the participants by race,
27 requiring all “white people” to be segregated into a separate group from the “people of color” and
28 to receive differing instruction and differing treatment during the programming. (SAC ¶ 35.)
Specifically, the segregated “white people” are instructed that “whether they are conscious of it or
not, all ‘white people’ are racist and collude to promote or perpetuate racism against non-whites.”

1 (SAC ¶ 36.) The SAC alleges that, if any Caucasian person voices any question or dissent to
2 JCCC's programming, he or she is labeled by JCCC as a racist. (SAC ¶ 36.) Segregating
3 participants by race to receive differing treatment is per se unlawful discrimination.

4 Contrary to SBUSD's argument, there is no legal authority (SBUSD cites to none) holding
5 that to state a claim for violation of Government Code § 11135 a plaintiff must demonstrate the
6 heightened pleading standard that he or she "suffered severe, pervasive and offensive harassment,
7 that effectively deprived plaintiff of the right of equal access to benefits and opportunities."
8 However, even if there were, Plaintiff's allegations stated immediately above satisfy this standard.
9 Caucasian, Christian and/or male participants in JCCC's programming suffer stigmatic injuries,
10 believing they are inherently and inescapably flawed due to their race, ethnicity, religion and/or
11 sex. SBUSD argues that this is impossible because participation in JCCC's programs is "voluntary"
12 (which in and of itself is a fact question for later Court determination). However, SBUSD cites no
13 evidence other than the self-serving, attorney-drafted conclusions in the contract between SBUSD
14 and JCCC (that SBUSD's attorneys drafted specifically in anticipation of this lawsuit), which can
15 be disregarded as legal conclusions. *Herman, supra*, 71 Cal.App.4th at 823.

16 Further, there is no evidence or allegation that any of these "volunteers" had any idea
17 beforehand that they would be subject to this discrimination, so whether their participation is truly
18 "voluntary" is a question of fact that cannot be resolved at the pleading stage.

19 **C. The Third Cause Of Action For Violation Of Education Code § 201 and 220**

20 **States A Valid Claim**

21 Education Code § 220 states that:

22 No person shall be subjected to discrimination on the basis of disability, gender,
23 gender identity, gender express, nationality, race or ethnicity, religion, sexual
24 orientation, or any other characteristic that is contained in the definition of hate
25 crimes set forth in Section 422.55 of the Penal Code, including immigration status
26 in any program or activity conducted by an education institution that receives, or
benefits from, state financial assistance, or enrolls pupils who receive state student
financial aid.

27 To prevail on a claim under this section, the plaintiff must prove the following elements: "(1) he or
28 she suffered severe, pervasive and offensive harassment, that effectively deprived plaintiff of the

1 right of equal access to educational benefits and opportunities; (2) the school district had actual
2 knowledge of that harassment; and (3) the school district acted with deliberate indifference in the
3 face of such knowledge.” *Donovan v. Poway Unified Sch. Dist.*, 167 Cal. App. 4th 567, 579 (2008).
4 SBUSD does not dispute that the SAC satisfies elements (2) and (3). Instead, SBUSD argues that
5 the SAC does not sufficiently allege element (1), based on the same arguments SBUSD advanced
6 in connection with Plaintiff’s First Cause of Action for Violation of Government Code § 11135.

7 However, based on the allegations in the SAC cited by Plaintiff in response to SBUSD’s
8 argument above, Plaintiff has alleged facts that show that SBUSD and JCCC’s discriminatory
9 actions have resulted in severe, pervasive and offensive harassment, that effectively deprive staff
10 and students of the right of equal access to educational benefits and opportunities. Accordingly,
11 Plaintiff’s Second Cause of Action for Violation of Education Code § 220 states a valid claim.

12 **D. Plaintiff’s Fourth Cause Of Action For Violation Of Education Code § 60044**

13 **States A Valid Claim**

14 Education Code § 60044 states:

15 A governing board shall not adopt any instructional materials for use in the schools
16 that, in its determination, contain:

17 (a) Any matter reflecting adversely upon persons on the basis of race or ethnicity,
18 gender, religion, disability, nationality, or sexual orientation, occupation, or
because of a characteristic listed in [Education Code] Section 220.

19 SBUSD argues that Plaintiff cannot state a claim under this statute because (1) the prohibition on
20 discriminatory material only applies if the board determines in its sole and absolute discretion that
21 the materials are discriminatory and (2) SBUSD has purportedly not “adopted” JCCC’s
22 programming (relying on a hyper-technical and unsupported interpretation of the term “adopt”).
23 Neither of these arguments have merit.

24 First, SBUSD argues that under Education Code § 60044 only prohibits the adoption of
25 discriminatory instructional materials if the governing board first makes a determination (in its sole
26 discretion) that the materials are, in fact, discriminatory. This non-sensical, recursive reading of
27 the statute would render it completely meaningless. Under SBUSD’s reading of the statute, any
28

1 school board would be able to adopt discriminatory instructional materials as long it made some
2 perfunctory “determination” that the materials are not discriminatory. However, a school board’s
3 exercise of discretion in making its “determination” under Education Code § 60044 must not be
4 applied in an “arbitrary manner toward those [against whom the materials are discriminatory].” *See*
5 *California Parents for Equalization of Educational Materials v. Noonan* 600 F.Supp.2d 1088, 1109
6 (E.D. Cal. 2009) (plaintiff demonstrated injury in fact for standing purposes in connection with
7 school district’s adoption of allegedly discriminatory instructional materials where adoption
8 process under Education Code § 60044, among other statutes, was conducted in an arbitrary manner
9 vis a vis plaintiff).

10 Thus, SBUSD’s reading of the statute is incorrect and would result in an absurdity.
11 Regardless, even if SBUSD’s reading is correct, whether the SBUSD School Board made a
12 determination as to the discriminatory nature of JCCC’s programming is ultimately a question of
13 fact that cannot be resolved at the pleading stage. It is sufficient that Plaintiff has alleged it. (SAC
14 ¶¶ 78-81.)

15 Second, SBUSD argues that this statute is not applicable as SBUSD has not “adopted”
16 JCCC’s programming as “instructional materials.” “Instructional materials” is broadly defined by
17 statute as “all materials that are designed for use by pupils and their teachers as a learning resource
18 and help pupils to acquire facts, skills, or opinions or to develop cognitive processes. Instructional
19 materials may be printed or nonprinted, and may include textbooks, technology-based materials,
20 other educational materials, and tests.” Cal. Ed. Code § 60010(h). JCCC’s programming certainly
21 falls under this broad definition, as it consists of printed and nonprinted materials used by both
22 pupils and teachers as a purported learning resource.

23 With respect to the term “adopted,” it is not defined in Chapter. However, it is clear that it
24 is not so narrowly construed as to include only the “adoption” of math, science, language arts or
25 social science subjects as argued by SBUSD. For example, § 60042 of the Chapter requires the
26 board to “adopt” “instructional materials” that “encourage thrift, fire prevention and the humane
27 treatment of animals and people.” Cal. Ed. Code § 60042.

28 Further, even if SBUSD’s narrow interpretation is accepted, JCCC’s programming would

1 conceivably fall under the social sciences category. Additionally, JCCC’s programming is not
2 simply an “occasional” program – it consists of numerous programs, including a full week, 8 hour
3 per day program offered three times per year, a three day intensive student program offered to 245
4 students 7 times per year, among several other programs. (SAC, Ex. B., pp. 31-37.) JCCC’s
5 programming is certainly more than a “handout” given to students on a field trip, as SBUSD
6 disingenuously analogizes. Accordingly, SBUSD’s argument fails and the demurrer should be
7 overruled.

8 **E. Plaintiff’s Fifth Cause of Action For Declaratory Relief States A Valid Claim**

9 Plaintiff’s Fifth Cause of Action seeks a declaratory ruling that SBUSD has violated the
10 statutes set forth in Causes of Action Nos. 1 through 4. Therefore, because SBUSD’s Demurrers
11 to Causes of Action No. 1 through 4 should be overruled, its Demurrer to Cause of Action No. 5
12 should be overruled as well on the same grounds.

13 **V. CONCLUSION**

14 For the foregoing reasons, Plaintiff respectfully requests that the Court overrule SBUSD’s
15 Demurrer in its entirety.

16
17 Dated: September 4, 2019

EARLY SULLIVAN WRIGHT
GIZER & McRAE LLP

18
19 By: /s/ Peter Scott _____

Eric P. Early

Peter Scott

Attorneys for Plaintiff

FAIR EDUCATION SANTA BARBARA, INC.

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28

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California; I am over the age of 18
4 and not a party to the within action; my business address is 6420 Wilshire Boulevard, 17th Floor,
5 Los Angeles, California 90048.

6 On September 4, 2019, I served the foregoing document(s) described as: **PLAINTIFF
7 FAIR EDUCATION SANTA BARBARA, INC.’S MEMORANDUM OF POINTS AND
8 AUTHORITIES IN OPPOSITION TO DEFENDANTS SANTA BARBARA UNIFIED
9 SCHOOL DISTRICT AND CARY MATSUOKA’S DEMURRER TO SECOND AMENDED
10 COMPLAINT** on the interested parties to this action by placing a copy thereof enclosed in a sealed
11 envelope addressed as follows:

12 Sarah E. Piepmeier, Esq.
13 Kirkland & Ellis LLP
14 555 California St,
15 San Francisco, CA 94104
16 Phone Number: (415) 439-1976
17 Fax Number: (415) 439-1500
18 Email: sarah.piepmeier@kirkland.com
19 ***Attorneys for Defendant JUST
20 COMMUNITIES CENTRAL COAST, INC.***

21 Joseph M. Sholder, Esq.
22 Griffith & Thornburgh, LLP,
23 8 E Figueroa St 3rd Fl,
24 Santa Barbara, CA 93101
25 Phone Number: (805) 965-5131
26 Fax Number: (805) 965-6751
27 Email: sholder@g-tlaw.com
28 ***Attorneys for Defendants
SANTA BARBARA UNIFIED SCHOOL
DISTRICT and CARY MATSUOKA***

- 29 BY MAIL: I am readily familiar with the business practice for collection and processing
30 of correspondence for mailing with the United States Postal Service. I served the following
31 document(s) by enclosing them in an envelope and placing the envelope for collection and
32 processing correspondence for mailing. On the same day that correspondence is placed for
33 collection and mailing, it is deposited in the ordinary course of business at our Firm’s office
34 address in Los Angeles, California within the United States Postal Service in a sealed
35 envelope with postage fully prepaid. Service made pursuant to this paragraph, upon motion
36 of a party served, shall be presumed invalid if the postal cancellation date of postage meter
37 date on the envelope is more than one day after the date of deposit for mailing contained in
38 this affidavit.
- 39 BY PERSONAL DELIVERY: I caused such envelope to be delivered by hand to the
40 offices of the above named addressee(s).
- 41 **BY ELECTRONIC SERVICE:** Via electronic transmission, by use of the One Legal
42 electronic filing platform.
- 43 BY E-MAIL: I caused to be e-mailed a true copy to the e-mail addresses listed above.

44 Executed on September 4, 2019, at Los Angeles, California.

45 I declare under penalty of perjury under the laws of the State of California that the foregoing
46 is true and correct.

47 */s/ Robie Ann Atienza-Jones*

48 **ROBIE ANN ATIENZA-JONES**