

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S266254

BRENNON B.,
Petitioner,

v.

SUPERIOR COURT OF
CONTRA COSTA COUNTY,
Respondent,

WEST CONTRA COSTA
UNIFIED SCHOOL
DISTRICT, et al.,
Real Parties in Interest.

Court of Appeal of California
First District, Division One
No. A157026

Superior Court of California
Contra Costa County
No. MSC1601005
Hon. Charles Treat

PETITIONER'S ANSWER TO AMICI CURIAE BRIEFS

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Petitioner’s Answer to Amici Curiae Briefs

Everyone agrees Brennon has a cause of action under Part 1, Chapter 2 of Education Code, sections 200–262.4. The question is may Brennon and other victims of disability discrimination in public schools recover the remedies of [Civil Code section 52, subdivision \(a\)](#)—statutory remedies for violations of [Civil Code section 51](#)? The answer must be an unequivocal “yes.”

The statutes are clear. [Government Code section 11135](#) imposes the Americans With Disability Act on public agencies including schools. A violation of the ADA is a violation of the Unruh Act. ([Civ. Code, § 51, subd. \(f\).](#)) The Education Code likewise provides for a civil action to redress disability discrimination in public schools (among other forms of discrimination). ([Ed. Code, § 262.4.](#)) And [Education Code section 201, subdivision \(g\)](#) ties the ADA, the Unruh Act and a host of other anti-discrimination statutes into the Education Code by providing “the remedies provided herein [Title 1, Ch. 2, Educ. Code] shall not be the exclusive remedies, but *may be combined with remedies that may be provided by the above statutes.*”¹ [Civil Code section 52, subdivision \(a\)](#) provides remedies for violations of the Unruh Act that include attorney fees and statutory penalties of at least \$4,000, in addition to actual damages.

¹ Amicus Schools Ins. Auth. argues that this language is merely an “interpretive aid” citing [Donovan v. Poway Unif. Sch. Dist.](#) (2008) 167 Cal.App.4th 567, 591. But *Donovan* was dealing with gender discrimination and [Education Code section 220](#) and the court had no occasion to consider the “combined with remedies” language of [section 201, subdivision \(g\)](#).

The contrary position of the District and its amici reads this remedies language right out of the statute. As did the Court of Appeal, the District and its amici fail recognize that AB 1077 was about *disability* discrimination, not about all forms discrimination in general. With subdivision (f), [Government Code section 11135](#), [Education Code sections 200](#) and [201](#), the Legislature’s commitment to providing remedies to victims of disability discrimination everywhere, including in public schools, could not be clearer.

I. Brennon’s amici confirm the Legislature’s long-standing intent to provide victims of disability discrimination with the broadest remedies possible.

A. The Legislature has had thirty years to address the judicial interpretation of the Act and has not changed it.

Whether or not the Legislature was considering disability discrimination when it first adopted the Unruh Act, its 1992, A.B. 1077 (Stats. 1992, ch. 913), and its 1998, A.B. 499 (Stats. 1998, ch. 914) legislative action confirm its intention to afford disability-discrimination victims in public schools powerful remedies including attorney fees and statutory penalties.

As amicus Disability Rights Education and Defense Fund points out, the seminal federal decision applying the Act to a public school district, [Sullivan v. Vallejo City Unified Sch. Dist.](#) (E.D. Cal. 1990) 731 F.Supp. 947 (*Sullivan*) had been decided for two years when AB 1077 came before the Legislature. The

California Attorney General had participated in the case on the side of the plaintiffs and found the school district's contrary argument "shocking." (DREF Br. 31–33.)

Before the Court of Appeal opinion here, only a single federal magistrate, in an unpublished opinion, had declined to follow *Sullivan*. (*Zuccaro v. Martinez Unified Sch. Dist.* (N.D. Cal. Sept. 27, 2016, No. 16-CV-02709-EDL) 2016 WL 10807692, at *10.) That analysis was later rejected as "readily distinguishable" by yet another federal court. (*Whooley v. Tamalpais Union High Sch. Dist.* (N.D. Cal. 2019) 399 F.Supp.3d 986, 998.) At least one California appellate court has simply assumed the Act applied to the California State University. (*Mackey v. Bd. of Trs. of Cal. State Univ.* (2019) 31 Cal.App.5th 640.)

"[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes 'in the light of such decisions as have a direct bearing upon them.' [Citations.]" (*People v. Overstreet* (1986) 42 Cal.3d 891, 897.) The Legislature has had thirty years in which to address the nigh-unbroken string of federal cases holding the Act applies to public schools. Instead, it has "doubled down" first with AB 1077 and then, as applied directly to public schools, with AB 499 as pertains to disability discrimination. In 2015, legislation passed, in a different discriminatory context, reciting that Unruh Act applies to public schools. (Stats. 2015, ch. 690, § 1, subd. (f).)

The stated purpose of AB 1077 was to make California's disability-discrimination laws the toughest in the country - at least as tough or tougher than the federal ADA. (Stats. 1992, ch. 913, § 1.) The stated purpose of AB 499 was to address "an urgent

need to prevent and respond to acts of hate violence and bias-related incidents that are occurring at an increasing rate in California's public schools.” (Stats. 1998, ch. 914, § 5, subd. (d)) and “to prohibit acts which are contrary to that policy and *to provide remedies* therefor.” (*Id.* at § 7.) Those remedies included those found the Education Code and elsewhere, including the Unruh Act. (*Id.* at § 5, subd. (g).)

B. The public agency and public school interpretation of the Act is consistent with Brennon’s interpretation. It applies to public schools.

Amicus American Civil Liberties Union points out that as recently 2017, the Attorney General issued an interpretive document supporting the application of the Act to public schools. (ACLU Br. 33.) The Fair Employment and Housing Commission has applied the Act to the University of California. (*Id.* at pp. 33–34 citing *Dept. of Fair Emp.'t & Hous. v. Univ. of Calif. Berkeley* (Cal.F.E.H.C. Nov. 18, 1993) 1993 WL 726830.) The Legislature has charged the Department of Fair Employment and Housing with enforcing the Act against local public agencies that violate it. ([Gov. Code, §11136](#).) Public school districts, responding to legislative directives, have promulgated guidelines and policies acknowledging the application of the Act to them. (ACLU Br. 35–36 and fns. 3, 4.)

C. Section 51 subdivision (f) may stand alone from the rest of the Act.

Amicus Consumer Attorneys of California urges the Court to view subdivision (f) as a stand-alone portion of the Act, untethered to the “business establishment” language of subdivision (b). (CAOC Br. 20–21.) The argument makes sense because subdivision (f) was added “stand-alone” as part of AB 1077. (Stats. 1992, ch. 914, § 3.) [Civil Code section 52, subdivision \(a\)](#) imposes liability for damages, penalties and attorney fees on “[w]hoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51.” Subdivision (f) makes a violation of the ADA “discrimination or distinction contrary to Section 51.” CAOC’s interpretation is consistent with the Legislature’s purpose “to strengthen California law in areas where it is weaker than the Americans with Disabilities Act of 1990 (Public Law 101–336) and to retain California law when it provides more protection for individuals with disabilities than the Americans with Disabilities Act of 1990.”

II. The “too costly to schools” arguments of the District’s amici cannot bear the weight of the contrary legislative enactments and policy statements.

The Education Legal Alliance of the California School Boards and the Schools Insurance Authority argue section 52, subdivision (a)’s penalty ought not to apply to public schools because of the “severely underfunded” status of public schools who exist by constitutional mandate. (ELA Br. 18, SIA Br. 19.)

But they acknowledge, as they must, “the state retains plenary power over public education . . . one of the state’s most sovereign powers.” (*Wells v. One2One Learning Found.* (2006) 39 Cal.4th 1164, 1195 (*Wells*)). This means the Legislature remains free to waive the state’s sovereign immunity and impose liability on public agencies notwithstanding the public education mandates. Amici do not point to any constitutional or statutory provision that *bars* the Legislature from imposing on public school the financial responsibility for disability discrimination. The Legislature’s declared intent, written into the statutes themselves, is to stamp out disability discrimination and to impose stern penalties on those persons, public or private, who discriminate. (Stats. 1992, ch. 914, § 1, *Ed. Code*, §§ 200, 201.)

ELA’s extended argument about *Government Code section 11135* as the exclusive authority for public entity liability makes no sense. AB 1077, the same legislation that added section 51, subdivision (f) (Stats. 1992, ch. 914, §§ 3, 18), amended *section 11135* to apply Title II of the ADA to public agencies. *Section 11135* is not self-executing. Direct relief is by way of loss of state funding or by an injunction. (§ 11136, § 11139.) It is not part of the Government Claims Act, *Government Code sections 810–998.3*.

Section 11135 finds some of its teeth in *section 11136*. As amended in 2016,² *section 11136* provides for loss-of-funding penalties to local public agencies who violate the Act.

Whenever a state agency that administers a program or activity that is funded directly by the state or

² Stats. 2016, ch. 870, § 4.

receives any financial assistance from the state has reasonable cause to believe that a contractor, grantee, or *local agency* has violated the provisions of Section 11135, Part 2.8 (commencing with Section 12900) of this code, *Section 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code*, or any regulation adopted to implement these sections or Article 1 (commencing with Section 12960) of Chapter 7 of this code, the head of the state agency, or his or her designee, shall notify the contractor, grantee, or *local agency* of such violation and shall submit a complaint detailing the alleged violations to the Department of Fair Employment and Housing for investigation and determination pursuant to Article 1 (commencing with Section 12960) of Chapter 7 of this code. (Emphasis added.)

[Section 11136](#) evinces the Legislature's intention that the Act apply to public agencies.

The Court has recognized the Legislature's intention to treat ADA-defined disability discrimination differently from other forms of discrimination proscribed by the Act.

The Legislature's intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52.

[\(*Munson v. Del Taco, Inc.* \(2009\) 46 Cal.4th 661, 665 \(*Munson*\)\).](#)

Although *Munson* arose in the context of a ADA Title III violation by a private business, the Court's conclusion was spot-on as to all ADA violations. [Government Code section 11135](#) makes the ADA applicable to public entities. As one court noted

recently addressing [section 11135](#) and [11136](#), “[t]hese code sections are not only interrelated but are tied to other laws.” (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 903 (noting the interplay between [Gov. Code, §§ 11135–11139, 12390](#) and [Ed. Code, § 200](#).)

The statutes amended or added by AB 1077 and AB 499 are *in pari materia*, “of the same matter” or “on the same matter.” (*Altaville Drug Store, Inc. v. Emp.’t Dev. Dep’t* (1988) 44 Cal.3d 231, 236, fn. 4.) As such, they must be interpreted together. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4.)

[A] statute is not to be read in isolation; it must be construed with related statutes and considered in the context of the statutory framework as a whole. [Citation.] A court must determine whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other related provisions.

(*Hicks v. E.T. Legg & Assocs.* (2001) 89 Cal.App.4th 496, 505.)

By cross-referencing the Act with the Education Code, the Government Code and the ADA, Legislature manifest its intentions to provide victims of disability discrimination with robust, enhanced remedies in all walks of life, including in public schools.

III. Section 52, subdivision (a)'s penalties are not “punitive damages” within the meaning of Government Code section 818.

Amicus Schools Insurance Authority argues the provision in for penalty damages³ amounts to punitive damages and cannot be recovered from a public entity under [Government Code section 818](#). It attempts to distinguish [Kiser v. Cnty. of San Mateo \(1991\) 53 Cal.3d 139](#). And it makes a wrong-headed argument that the provision for punitive damages in [section 52, subdivision \(b\)](#), means the provisions in subdivision (a) are punitive damages.

The Insurance Authority’s argument fails to account for the fact that the Court has deemed violations of the Unruh Act and its predecessors “per se injurious.” ([Koire v. Metro Car Wash \(1985\) 40 Cal.3d 24, 33](#).) Interpreting the 1923 version of sections 51–54,⁴ the Court characterized the “additional” damages recoverable (then \$100) as “unquestionably a penalty which the law imposes.” ([Orloff v. Los Angeles Turf Club \(1947\) 30 Cal.2d 110, 115](#).) They are recoverable without proof of intentional misconduct. (*Ibid.*, accord [Munson, supra, 46 Cal.4th at p. 665](#).) Intentional misconduct is the *sine qua non* of punitive damages. ([Civ. Code, § 3294](#).)

³ “[U]p to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000).”

⁴ “Any person who is refused admission to any place of amusement contrary to the provisions of the last preceding section, is entitled to recover from the proprietor, lessee, or their agents, or from any such person, corporation, or association, or the directors thereof, his actual damages, and one hundred dollars in addition thereto.” (Former Civ.Code § 54.)

Insurance Authority's argument that subdivision (b)'s express provisions for punitive damages renders subdivision (a)'s provision for additional damages "up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000)" also punitive damages simply makes no sense. Subdivision (b) refers to [Civil Code section 51.7](#) and [51.9](#), which are not part of the Unruh Act. [Section 51.7](#) is "part of the Ralph Civil Rights Act of 1976, in Chapter 1293 of the Statutes of 1976." (§ [51.7, subd. \(e\).](#)) [Section 51.9](#) (addressing gender discrimination) was not enacted until 1994 and expressly references [section 52, subdivision \(b\)](#). (Civ. Code, § [51.9, subd. \(b\)](#), Stats.1994, ch. 710, § 2.)

Moreover, the incorporation of the ADA into the Unruh Act is found in section [51 \(f\)](#). [Section 52, subdivision \(a\)](#) applies to "[w]hoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51" If the Legislature wanted to make punitive damages available to a victim of [section 51](#) discrimination, it would have done so. Instead it created a remedy of actual damages, minimum penalty damages and attorney fees.

CONCLUSION

The Legislature's 30-year, disability-discrimination oeuvre leaves little question that it intended and has continued to intend California have the strongest anti-discrimination laws in the country. Disability discrimination is pernicious. Its victims, such as Brennon, are the least able to protect themselves.

Implicit in statutes providing for awards of attorney fees in cases that vindicate important rights affecting the public interest “is the recognition that without some mechanism authorizing the award of attorney fees, private actions to enforce important public policies will as a practical matter frequently be infeasible.”⁵ Those important public policies affected here include the state’s overarching policy against discrimination in any form⁶ and the “fundamental public policy favoring measures to ensure the safety of California's public school students.”⁷

⁵ *Serrano v. Unruh* (1982) 32 Cal.3d 621, 632.

⁶ E.g, “Discrimination on the basis of race or color is contrary to the public policy of the United States and of this state. Although the antidiscrimination provisions of the federal Constitution relate to state rather than private action, they nevertheless evidence a definite national policy against discrimination.” (*Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 471.)

⁷ *C.A. v. William S. Hart Union High Sch. Dist.* (2012) 53 Cal.4th 861, 870 fn. 3, citing Cal. Const., art. I, § 28, (a)(7).

Little wonder that the Legislature made a violation of the ADA a violation of the Act, that it made ADA Title II applicable to all public agencies and then amended the Education Code to eliminate any doubt of the Act applicability to public schools. The only reasonable interpretation of the Act, AB 1077 and AB 499 is that the [Civil Code section 52, subdivision \(a\)](#)'s remedies are available to victims of disability discrimination in public schools. The Court should so hold.

Respectfully submitted,

Dated: November 15, 2021

By: /s/ Alan Charles Dell'Ario

Attorney for Petitioner
Brennon B.

CERTIFICATE OF COMPLIANCE

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Dated: November 15, 2021

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Case Number: **S266254**

Lower Court Case Number: **A157026**

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11/15/2021

Date

/s/Alan Charles Dell'Ario

Signature

Dell'Ario, Alan Charles (60955)

Last Name, First Name (PNum)

Law Offices of A. Charles Dell'Ario

Law Firm