No.: S266254

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRENNON B., Petitioner, *vs.*	)	Court of Appeal First District, Division One No.: A157026
SUPERIOR COURT, CONTRA COSTA, Respondent, WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT, etc., et al., Real Parties in Interest.	)	Contra Costa Superior Court No.: MSC16-01005

On Review of an Order Sustaining a Demurrer
Honorable Charles Treat, Judge

OPENING BRIEF ON THE MERITS

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Brennon B. is a special needs student who was enrolled at De Anza High School (DAHS) in the West Contra Costa Unified School District (district). His disability required a heightened level of attention to protect against sexual assault.[1] Rather than discharge these duties, school officials so grossly neglected Brennon that he was sexually assaulted by other students and DAHS staff multiple times over a four-year period.[2]

The district failed to take his and his mother's complaints about this misconduct seriously because of his disability, causing it to recur and recur. He filed suit and the district retaliated by dropping him from its extended transition program for special needs students.[3]

The misconduct of which Brennon complains falls squarely within the proscriptions of the Unruh Civil Rights Act, Civil Code section 51. It is disability discrimination, pure and simple. Violators of section 51 are subject to the enhanced penalties of section 52, including attorney fees. But the Court of Appeal concluded Brennon and those public school children with the misfortune to suffer similar misconduct are not entitled to section 52's enhanced remedies because public schools are not subject to

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[1] EX 4, 6. Because the matter is before the court following the sustaining of a demurrer without leave to amend, the court must accept all well-pleaded allegations of fact as true. (*Beacon Residential Cmty. Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 571.)

[2] EX 8-16.

[3] Second Amended Complaint, EX 7-22.

the Act. They are not among those "business establishments of every kind whatsoever" the Legislature intended the Act to reach in 1959.[4]

The court was mistaken. Everyone agrees the 1959 Unruh Act was intended to expand the Act's coverage in response to cases that found, among other things, a private school was not a "public accommodation" within the meaning of the prior version.[5] Despite the obvious similarities between public and private schools, the Court of Appeal concluded they were to be treated differently under the Act.[6] The constitutional proscriptions on school discrimination were enough.[7] Indeed, the court concluded that the Act does not apply to public entities at all.[8]

To accept the court's reasoning, this Court must conclude places owned or controlled by public entities cannot be places of "public accommodation," even where they perform identical

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[4] *Brennon B. v. Superior Court* (2020) 57 Cal.App.5th 367, 369 *(Brennon)*.

[5] Horowitz, The 1959 California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Application (1960) 33 So.Cal.L.Rev. 260, 265 (Horowitz) citing *Reed v. Hollywood Prof. Sch.* (1959) 169 Cal.App.2d Supp. 887 *(Reed)*, see *Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1130 *(Osborne)*.

[6] "[A]secular private school, charging tuition and generally open school-age children, is likely a business establishment for purposes of the Act." (*Brennon*, *supra*, 57 Cal.App.5th at p. 391.)

[7] *Brennon*, *supra*, 57 Cal.App.5th at p. 378 [no "pressing need" to address public school discrimination due *Brown v. Bd. of Educ.* (1954) 347 U.S. 483].

[8] *Brennon*, *supra*, 57 Cal.App.5th at p. 390.

functions as do other private places. The other courts of appeal and federal courts considering the question have found otherwise.[9]

The Court of Appeal noted Brennon was not without remedy.[10] He just could not avail himself of the Act's enhanced remedies. At the heart of this inquiry is the remedy. The court seemingly did not consider that Education Code remedies the court noted are non-exclusive and cumulative.[11]

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.'"[12] Those important public policies affected here include the state's overarching policy against discrimination in any form[13] and the "fundamental public policy favoring measures to ensure the safety of California's public school students."[14]

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[9] *Mackey*, *supra*, 31 Cal.App.5th 640, *Gatto v. Cnty. of Sonoma*, *supra*, 98 Cal.App.4th 744.

[10] *Brennon*, *supra*, 57 Cal.App.5th at pp. 396–397.

[11] Ed. Code, § 201, subd. (g).

[12] *Serrano v. Unruh* (1982) 32 Cal.3d 621, 632.

[13] 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 *(Burks)*.)

[14] *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) (*William S. Hart*).

The Court has admonished that the Act is to be interpreted "in the broadest sense reasonably possible."[15] Yet the Court of Appeal has restricted its application to private entities. This is contrary to California's policy against discrimination in all walks of life. The Court should reverse with directions to grant Brennon's writ petition.

STATEMENT OF FACTS[16]

I. Brennon B. is repeatedly sexually assaulted at school and on the school bus by students and staff over a four-year period.

Brennon suffers from autism, low verbal skills and obesity. (EX 8.) From 2012 to 2016, he attended DAHS and operated at the mental and emotional capacity of a six-to-seven year-old child. (*Ibid.*) He was a special-education student with an IEP. (EX 11.)

On September 24, 2012, Brennon was sexually assaulted by another special-needs student while unsupervised in the restroom. His assailant, another special-needs student, had an IEP which required he be supervised at all times. (EX 8–10.) Brennon brought an action against the district that resulted in a

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[15] *Isbister*, *supra*, 40 Cal.3d at p. 76.

[16] The Court of Appeal did not discuss the facts, apparently deeming them immaterial to the decision. Of course, "the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts." (*Brown v. Kelly Broad. Co.* (1989) 48 Cal.3d 711, 734–735 *(Brown)*.) As Brennon will demonstrate in his following discussion about amending his complaint, the facts *do* matter.

judgment against it. (EX 10.) Following this incident, Brennon's IEP was amended to require continuous supervision while on campus and in the restroom. (EX 11.)

On March 28, 2013, Brennon reported he had been "kissed" on the bus by a different special-needs student. (EX 11.) His IEP was amended to require supervision on the bus. (EX 12.) Notwithstanding, Brennon was again subjected to forced kissing by a fellow student while left unsupervised on the bus in March 2014. (EX 12.)

Meanwhile, the district assigned an aide to supervise Brennon. From January 2012 through December 2014, the aide lured Brennon into the weight-training room at DAHS and forced Brennon to orally copulate him on at least four occasions. (EX 12–13.) Ultimately, the aide confessed to police that he had forced Brennon to do so. He was charged with eight felonies resulting from these assaults. (EX 21–22.)

In February 2015, another student, known to DAHS authorities as a bully, assaulted Brennon by striking him in the head so hard that Brennon complained to his mother that his head "hurt a lot." (EX 13–14.) Just a week later, Brennon was unsupervised in the hallway and assaulted by the same student who had kissed him on the bus in 2014. (EX 14.)

And shortly after that, in March, Brennon was again assaulted in the restroom while he was unsupervised – in contravention of his IEP. (EX 16.) DAHS and the district failed to investigate and report these incidents. The offending students were not disciplined. (EX 11, 12, 14, 15, 17–18.)

II. Brennon's guardian files a Government Code claim on his behalf. The district retaliates by dropping Brennon from the post-high-school transition program his IEP requires.

In July 2015, Brennon's guardian Brenda B. filed a claim on his behalf under Government Code sections 900–915.4 (EX 7.) The district denied the claim, after which the parties entered into a tolling agreement through May 31, 2016.

On May 27, 2016, the district accepted Brennon into extended-school transition programs for summer 2016. He expected, and his IEP provided, the programs would also extend through the 2016–2017 school year. (EX 19.) On May 31, Brennon commenced this litigation. (*Ibid.*) One week later, the district rejected Brennon for the extended transition program for the 2016–2017 school year despite the existence of vacancies in it. (*Id.*)

STATEMENT OF THE CASE

I. The trial court sustains the district's demurrer to Brennon's Unruh Act claim without leave to amend.

Brennon filed suit, through his guardian, on May 31, 2016. (EX 19.) He filed a Second Amended Complaint on October 3, 2018 alleging negligence, negligent hiring and supervision, intentional infliction of emotional and distress, negligent infliction of emotional distress, violation of right to petition and violation of the Unruh Act (EX 3.) He named the district and several individual staff members. (*Ibid.*)

The district demurred to the Unruh Act cause of action on the ground the district was not a "business establishment" within the meaning of the Act. (EX 39.) The trial court agreed and sustained the demurrer without leave to amend. (EX 94–98.)

II. Brennon commences these original proceedings to challenge the order. While they are pending, the parties settle but the Court of Appeal denies the request to dismiss. Following oral argument, it issues its opinion denying Brennon's petition and the Court grants review.

Brennon filed his petition for writ of mandate on April 23, 2019. The court issued an order to show cause on September 5, 2019. By February 21, 2020, the matter was fully briefed.

The court set the matter for oral argument by order filed August 31, 2020. On September 1, Brennon requested dismissal of the petition. The next day, by order, the court denied the request and the matter proceeded to oral argument on October 1.

The court filed its opinion on November 13, 2020 denying the petition. This Court granted Brennon's subsequent Petition for Review to address two questions:

1. Is a K-12, public-school victim of prohibited discrimination entitled to [the] enhanced penalties of Civil Code section 52 because either 1) the Unruh Act applies to public schools directly or 2) its remedies are incorporated into the relevant provisions of the Education Code?
2. Does Brennon B's Second Amended Complaint[17] state a cause of action against defendants under the Unruh Act or Education Code, and if not, can it be amended to do so?

ARGUMENT

I. The Act must be interpreted in the "broadest sense sense reasonably possible."[18]

This case tasks the Court to engage in statutory interpretation. Statutory interpretation requires the Court to determine the legislative intent in adopting a particular measure. "Our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." (*People v. Pennington* (2017) 3 Cal.5th 786, 795 [internal punctuation omitted].) "We view the statutory language in context, and do not determine its meaning " 'from a single word or sentence.'" (*Ibid.*)

The Court has counseled the term "business establishment of any kind whatsoever" is not to be given its literal meaning. The "reach of section 51 cannot be determined invariably by reference to the apparent 'plain meaning' of the term 'business establishment.'" (*Warfield v. Peninsula Golf & Cnty. Club* (1995) 10 Cal.4th 594, 616 *(Warfield)*.) Public entities cannot be excluded from its operation on that basis alone.

Where the statute's language is unclear or ambiguous, a court may resort to other interpretive aids, including the statute's legislative history and " ' "the wider historical circumstances of its enactment." ' " (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 850.) Courts may also consider the purpose of the statute, the evils to be remedied, and the public policy sought to be achieved. (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198.) The

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17 EX 3-37.

18 *Burks*, *supra*, 57 Cal.2d at p. 468.

Court independently reviews a lower court's statutory interpretation. (*1305 Ingraham, LLC v. City of Los Angeles* (2019) 32 Cal.App.5th 1253, 1259.)

II. The application of the Act to public schools implicates several fundamental public policies – anti-discrimination, school safety and the private enforcement of those policies.

Little question can exist that the discrimination of which Brennon complains contravenes several fundamental public policies. Perhaps foremost is the state's policy against discrimination. "[D]iscrimination based on disability, like sex and age discrimination, violates a 'substantial and fundamental' public policy." (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1161.) As long as discrimination exists, "we are *all* demeaned." (*Rojo v. Klinger* (1990) 52 Cal.3d 65, 90 [referring to sex discrimination, emphasis original].)

Brennon was forced to find legal counsel to enforce and vindicate his rights. As this Court has explained, the aim of fee-shifting statutes is 'to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific ... laws. Hence, if plaintiffs ... find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 583.) Without the enhanced remedies of section 52, victims of public-school-based discrimination may be unable to seek redress.

Brennon "has a mental and cognitive impairment that substantially limits one of more of his major life activities." (EX 8.) His complaint centers on the district's failure to provide him with a safe school environment. He was assaulted by students and staff. (EX 7–17.) Then he was discriminated against in the defendants' failure to address his mistreatment. (EX 17–19.)

High school students, including Brennon, have a "special relationship" with their schools. (*William S. Hart*, *supra*, 53 Cal.4th at p. 869.) Defendants failed to provide Brennon with the safe campus environment he was constitutionally entitled to expect in light of the "fundamental public policy favoring measures to ensure the safety of California's public school students." (*Id.* at p. 870 fn. 3.)

These fundamental public policies all augur in favor of an interpretation of the Act the includes public schools within its ambit.

III. The Court's prior Unruh Act decisions and the law review articles on which the Court of Appeal relied do not control.

A. The Court's decisions do not control the issues presented.

A review of the Court's prior Unruh Act decisions reveals one feature clearly. They were all decided narrowly and restricted to their facts. As such they cannot be said to control the outcome. A central principle of California stare decisis is that an opinion is authority only as to issues "actually involved and actually decided." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.) "[T]he

language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.'(*Brown*, *supra*, 48 Cal.3d at pp. 734–735.)

The principles that emerge are:

- "[N]o reason [exists]to insist that profit-seeking be a *sine qua non* for coverage under the act. (*O'Connor v. Vill. Green Owners Assn.* (1983) 33 Cal.3d 790, 796 [homeowners' association].)
- An entity's "status as a 'business establishment' covered by the act arises from its "public" nature." (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 84 *(Isbister)*.)[19]
- [A] truly private social club generally would not constitute a "business establishment" for purposes of this provision [but]. . . [a] club that engaged in a variety of 'business transactions with nonmembers on a regular basis . . . fall[s] within the very broad terms of section 51."(*Warfield*, *supra*, 10 Cal.4th at p. 599.)
- "[M]embership decisions" of private social groups are not "within the reach of the Act." (*Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 701 *(Curran)*.)

These principles do not control the outcome. Rather, there is only the admonition that the Unruh Act be "interpreted 'in the broadest sense reasonably possible." (*Burks*, *supra*, 57 Cal.2d at p. 468.)

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[19] *Isbister's* analysis comes closest in showing the way.

B. The law review articles are of historical interest but, likewise, do not control the outcome.

The Court of Appeal relied heavily on two historic law review articles to support its analysis. (*Brennon*, *supra*, 57 Cal.App.5th at pp. 370–371.) The first, Horowitz, The 1959 California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Application (1960) 33 So.Cal.L.Rev. 260, has, indeed, been cited with approval by the court. (E.g., *Isbister*, *supra*, 40 Cal.3d at pp. 78, 81 [Horowitz is the "principal commentator"].) But Professor Horowitz never addressed public schools. And the *Burks* court, while noting his article, came to a different conclusion regarding the significance of the Legislature's narrowing of the list of entities covered by the bill. "These deletions can be explained on the ground that the Legislature deemed specific references [in the prior versions] mere surplusage, unnecessary in view of the broad language of the act as finally passed." (*Burks*, *supra*, 57 Cal.2d at p. 469.) The Horowitz article was merely a reference "[f]or the various versions of the bill." (*Ibid.*)

The other article cited by the Court in its prior opinions, Tobriner & Grodin, The Individual and the Public Service Enterprise in the New Industrial State (1967) 55 Cal.L.Rev. 1247, 1250 (Tobriner & Grodin), was cited with the signal "see generally." (*Warfield*, *supra*, 10 Cal.4th at p. 607.) As the California Style Manual (4th ed. 2000) § 1.4, p. 10 instructs, "'See generally' introduces helpful background authority." The Tobriner & Grodin article was directed at the "common law" and did not purport to address statutory interpretation, generally, or

the Act, particularly. "[T]his Article discusses only changes within the common law." (Tobriner & Grodin, *supra,* 55 Cal.L.Rev. at p. 1248.)

To the extent the Court should choose to examine the law reviews, Radin, A Case Study in Statutory Interpretation (1945) 33 Cal.L.Rev. 219, 224, cited by *Burks*, is of interest. (*Burks, supra,* 57 Cal.2d at p. 469.) At the page cited by the Court, Professor Radin suggests:

> The successive stages of the bill, the deletions here, the striking out there, the failure to strike out somewhere else, prove precisely that the bill had several stages, that some things were stricken out and other things were not. So far as legislation is a human activity, they are instructive data for social psychology, but they tell us nothing about what we are to do in order to carry out purposes of the statute.

(At p. 224.)

"While these materials can help inform us, they do not compel a particular result." (*People v. Wilcox* (2013) 217 Cal.App.4th 618, 626.) Rather, the Court must fall back on its usual means for divining legislative intent that include examining the public policies at play.

IV. The Act applies to places of public accommodation. Schools are places of public accommodation. The Act applies to all schools, public and private.

A. The Act applies to places of public accommodation.

> In the 1950s, a string of cases held that certain businesses, such as a cemetery, a dentist's office, and a private school, were not "places of public accommodation or amusement," and therefore were not subject to the provisions of sections 51 and 52. (*Long v. Mountain View Cemetery Asso*. (1955) 130 Cal.App.2d 328, 278 P.2d 945 [cemetery]; see *Coleman v. Middlestaff* (1957) 147 Cal.App.2d Supp. 833, 305 P.2d 1020 [dentist's office]; *Reed v. Hollywood Professional School* (1959) 169 Cal.App.2d Supp. 887, 338 P.2d 633 [private school].) Sections 51 and 52 were therefore expanded in 1959 to become the modern Unruh Civil Rights Act, which prohibited discrimination on the basis of race, color, religion, ancestry, or national origin. (Citing Horowitz, *supra*, 33 S.Cal.L.R. at p 265.)

(*Osborne*, *supra*, 1 Cal.App.5th at p. 1130.)

"The Act serves to guarantee access to public accommodations on the part of all persons regardless of race, sex, religion, or other

characteristics. . . .” (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1168 *(Harris)*.[20]) This principle seems to be beyond dispute.

B. A school, public or private, is a place of public accommodation.

The Court of Appeal accepted the notion that, “our public accommodation laws, including in its most recent form, have been, and remain, directed at private, rather than state, conduct.” (*Brennon*, *supra*, 57 Cal.App.5th at p. 388.) To be sure, this Court’s cases, on which the Court of Appeal relied, were limited to facilities owned by non-public entities. But nothing in those cases indicates just why that would be so. None addressed the “public” question. Cases are only authority on points actually presented and decided. (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 620.)

As the Court of Appeal noted, “[A] secular private school, charging tuition and generally open to school-age children, is

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[20] *Harris* held an Unruh Act plaintiff needed to prove intentional discrimination. In *Munson v. DelTaco, Inc.* (2009) 46 Cal.4th 661, 678 *(Munson)*, the Court held the subsequent 1992 amendment, making a of violation the federal Americans With Disabilities Act (ADA) (42 U.S.C. §§ 12131 et seq.) a violation of the Act eliminated the “intentional” requirement for disability discrimination.

likely a business establishment for purposes of the Act." (*Id.* at p. 391.[21]) As a matter of "plain meaning" it makes no sense to distinguish between public and private schools.

Public entities by their very nature provide public accommodations. Private entities, sometimes, but not always, do so. As the Court held in *Isbister*, the character of the entity's interaction with the public controls. (*Isbister*, *supra*, 40 Cal.3d at p. 83.) Nothing in the way a public school interacts with the public differs from that of a private school. If anything, it is more public.

The sister states have not interpreted "public accommodations" as being limited to those in non-public ownership. In *Isbister*, the Court pointed to the New Jersey law which includes public schools within its definition of "public accommodation." (*Isbister*, *supra*, 40 Cal.3d at p. 80 citing N.J.S.A. § 10:5–5.)

Other states have similar laws or have interpreted their "public accommodation" laws to include public entities. For example, in *W.H. v. Olympia Sch. Dist.* (2020) 195 Wash.2d 779, 787, the court held a public school district is subject to strict liability for the discriminatory acts of its employees in places of public accommodation. In *R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.* (Mo. 2019) 568 S.W.3d 420, 426, the Missouri high court held a school's restrooms and locker rooms constitute public accommodations as defined in its statute. (See also *Doe v.*

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[21] *Reed*, *supra*, 169 Cal.App.2d Supp. 887 , involving a private school, was one of the cases all the commentators and cases agree the Legislature intended to reach in 1959. (*Osborne*, *supra*, 1 Cal.App.5th at p. 1130.)

Reg'l Sch. Unit 26 (Me. 2014) 86 A.3d 600, 604 [same], *Israel by Israel v. West Virginia Secondary Sch. Activities Com'n* (1989) 182 W.Va. 454, 463 [public funding and authorization result in a "public accommodation"].)

The ADA does not exclude public entities from its orbit on the ground they are not "public accommodations." Rather, it expressly provides for public-entity liability in a separate title (Title II) of the act. (42 U.S.C. § 12131, et seq.)

The Court of Appeal noted not all private schools were places of public accommodation. (*Brennon*, *supra*, 57 Cal.App.5th at p. 391.) But the only private school found to not be a place of "public accommodation" was a religious school where "a significant aspect of the school's educational mission was furthering the religious tenants of the church." (*Ibid.* citing *Doe v. California Lutheran High Sch. Assn.* (2009) 170 Cal.App.4th 828 *(Doe)*.) "Just like the Boy Scouts, the School 'is an expressive social organization whose primary function is the inculcation of values in its youth members.'"(*Id.* at p. 838 citing *Curran*, *supra*, 17 Cal.4th at p. 699.)

None of the characteristics of the Lutheran school (or the Boy Scouts) that placed it beyond the reach of Act are present at DAHS. Brennon's high school is a place of public accommodation and subject to the Act.

V. The Court of Appeal largely ignores the decisions of its sister courts applying the Act to public entities.

In *Mackey v. Bd. of Trs. of Cal. State Univ.* (2019) 31 Cal.App.5th 640 *(Mackey)*, the court reversed a summary

judgment in favor of Cal State on an Unruh Act claim by several African-American athletes. (*Id.* at pp. 646, 675.) Cal State did not challenge the application of the Act to it, a public school, and the court held the plaintiffs could proceed to trial on their Unruh Act claims. Although amicus Consumer Attorneys of California called the case to the appellate court's attention, the opinion does not address it. Among other things, *Mackey* noted the absence of a remedy under the federal civil rights statutes because public universities and school districts are arms of the state and enjoy the state's immunity to suits under 42 U.S.C. §§ 1981, 1983. (*Id.* at p. 654.) The appellate court and the parties assumed the Unruh Act claim was proper.

In *Gatto v. Cnty. of Sonoma* (2002) 98 Cal.App.4th 744, the court rejected the argument that the Act "applies only to private venues." (*Id.* at p. 768.) Because "the equal access in accommodations provision of the Unruh Civil Rights Act applies to 'all business establishments of every kind whatsoever,'" . . ."[t]he analysis of that provision . . . is therefore as applicable to a county fair as to a private drinking establishment." (*Id.* at p. 769.) No dispute seems to exist that the Act applies to private schools. (*Brennon*, *supra*, 57 Cal.App.5th at p. 891.) *Gatto* supports the proposition urged by Brennon here. Where a public entity operates what is otherwise a "public accommodation," the Act applies. In a footnote, the Court of Appeal dismissed *Gatto's* discussion of the issue as a "one-liner" (*Id.* at p. 391 fn. 9.[22])

[22] The court also incorrectly indicated that Brennon had raised *Gatto* for the first time at oral argument.

VI. All but one of the federal courts that have considered the question have come a different conclusion from the Court of Appeal.

All but one of the federal courts that have considered the question have come to opposite conclusions from the Court of Appeal.

The earliest decision appears to be *Sullivan v. Vallejo City Unified Sch. Dist.* (E.D. Cal. 1990) 731 F.Supp. 947, 952 *(Sullivan)*.

> Defendants contend that plaintiff's Unruh Act claim fails because a public high school is not a "business establishment" within the meaning of the statute. While this argument has the appeal of "plain meaning," it cannot prevail. The California Supreme Court has taught that the "Legislature's desire to banish [discrimination] from California's community life has led [that] court to interpret the Act's coverage 'in the broadest sense reasonably possible.' " *Isbister v. Boys Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 76,[] (1985), citing *Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 468,[](1962). Under a parity of the reasoning adopted in *Isbister*, it appears relatively certain that it is "reasonably possible" that "business establishments" as used in the statute includes public schools.

(*Ibid.*)

> Under this interpretation, the California Supreme Court has found that a non-profit homeowners' association, *O'Connor*, and a non-profit boys club, *Isbister*, qualified as "business establishments" under Unruh. In like fashion, since public schools were among those organizations listed in the original

> version of the Unruh Act, it must follow that for purposes of the Act they are business establishments as well. In view of the California Supreme Court's broad reading of the statutory language as well as its understanding of the intention of the Legislature as read against the historical background, the motion to dismiss plaintiff's Unruh Act claim must be denied.

(*Sullivan*, *supra*, 731 F.Supp. at pp. 952–953.)

Sullivan has been followed extensively in the federal courts. Twenty cases cite it (See *R.N. by and through Neff v. Travis Unified School District* (E.D. Cal. 2020, No. 2:20-cv-00562-KJM-JDP) 2020 WL 7227561, at *10 [collecting cases].) The Ninth Circuit, without citing *Sullivan,* and without discussion, has applied the Unruh Act to a public school. (*K.M. ex rel. Bright v. Tustin Unified Sch. Dist.* (9th Cir. 2013) 725 F.3d 1088, 1103 n.1. *(K.M)*.) The Court of Appeal dismissed these cases as "bereft of any depth." (*Brennon*, *supra*, 57 Cal.App.5th at pp. 392–393.[23])

Instead, the Court of Appeal endorsed the reasoning of the magistrate judge in *Zuccaro v. Martinez Unified School District*

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[23] As federal Judge William Alsup noted, a distinguished array of federal judges, including himself, have found public schools to be "business establishments" within the meaning of the Act. (*Z. T., etc. v. Santa Rosa City Sch.* (N.D. Cal. Oct. 5, 2017, No. C 17-01452 WHA) 2017 WL 4418864, at *6 citing *K. T. v. Pittsburg Unified Sch. Dist.* (N.D. Cal. 2016) 219 F. Supp. 3d 970, 983 Judge Charles Breyer); *Walsh v. Tehachapi Unified Sch. Dist.* (E.D. Cal. 2011) 827 F.Supp.2d 1107, 1123 (Judge Lawrence O'Neill); *Nicole M., etc. v. Martinez Unified Sch. Dist.* (N.D. Cal. 1997) 964 F.Supp. 1369, 1388 (Judge Marilyn Patel); *Doe, etc. v. Petaluma City Sch. Dist.* (N.D. Cal. 1993) 830 F.Supp. 1560, 1581–82 (Judge Eugene Lynch); *Sullivan*, *supra*, 731 F.Supp. at 952–53 (E.D. Cal. 1990) (Chief Judge Lawrence Karlton).) To this list, Chief Judge Kimberly Mueller must be added. (*R.N., supra*.)

(N.D. Cal. Sep. 27, 2016) 2016 WL 10807692. (*Brennon*, *supra*, 57 Cal.App.5th at pp. 391–392.) Relying on *Doe*, *supra*, 170 Cal.App.4th at pp. 838–841, the court concluded "the entity at issue [must] resemble an ordinary for-profit business." (*Zuccaro v. Martinez Unified School District*, *supra*, at *12.)

R.N. in turn, rejected *Zuccaro*. Noting *Zuccaro* had relied on *Doe* which in turn had relied on cases involving public sidewalks and animal shelters, the court concluded:

> The analysis in *Zuccaro* does not consider that a public school is "readily distinguishable" from city sidewalks or a county animal shelter, which do not have the same "quintessential character of providing public accommodations and services to students" as do public schools. (Citations.) Additionally, finding that a public school qualifies as a "business establishment" under the Unruh Act aligns the Unruh Act's jurisdiction with that of the ADA, which also applies to public schools.

(*R.N.*, 2020 WL 7227561 at p. *10.)

In other words, schools are "public accommodations." And "public accommodations" are "business establishments" within the meaning of the Act. The Court of Appeal dismissed these cases out of hand. Brennon submits their analysis more fully embraces the policy considerations at play here.

VII. Title II of the ADA applies to public schools. A violation of the ADA is a violation of the Act.

In *Fry v. Napoleon Cmty. Sch.* (2017) 137 S.Ct. 743, parents sued local and regional school districts and their principals,

alleging they violated Title II of ADA and the Rehabilitation Act when they refused to allow their child, who had cerebral palsy, to bring a service dog to school. The Court confirmed what had long been understood.

> Of particular relevance to this case are two antidiscrimination laws—Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 et seq., and § 504 of the Rehabilitation Act, 29 U.S.C. § 794—which cover both adults and children with disabilities, in both public schools and other settings.

(*Fry v. Napoleon Cmty. Sch.*, *supra*, 137 S.Ct. at p. 749.)

Even if the 1959 Legislature did not intend to include public schools within the definition of "business establishments," the amendment to section 51 in 1992 as part of AB 1077 must be read as expanding the reach of the statute to public agencies in general, including schools as regards disability discrimination. AB 1077 added subdivision (f) to Section 51. "A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101–336) shall also constitute a violation of this section."

Assembly Bill 1077 affected numerous sections of the Business and Professions Code, Civil Code, Code of Civil Procedure, Education Code, Evidence Code, Government Code, Health and Safety Code, Labor Code, Penal Code, Public Utilities Code, Streets and Highways Code, and Vehicle Code, relating to disabled persons and discrimination.

The Third Reading analysis prepared by the Office of Senate Floor Analyses described Assembly Bill 1077 as last amended on August 29, 1992:

> DIGEST: This bill seeks to conform state law with the provisions of the ADA. It modifies state anti-discrimination laws relating to disabled individuals in the public accommodations, public access, transportation and the use of guide, signal or service dogs. It generally places protections afforded the disabled under the ADA into state law.

The analysis for the Senate Committee on Judiciary noted, "In addition, this bill would make a violation of the ADA a violation of the Unruh Act thereby providing persons injured by a violation of the ADA with the remedies provided by the Unruh Act (e.g. right of private action for damages, including punitive damages.)" (Sen. Comm. on Judiciary, analysis of AB 1077 (1991–1992 Reg. Sess.) 5.)

The Court of Appeal noted some of this history (*Brennon*, *supra*, 57 Cal.App.5th at p. 398) but nonetheless concluded the amendment made no change in the scope of the entities subject to the Act.

> We thus see no indication the Legislature intended, as to disability discrimination only, to transform the Unruh Act into a general anti-discrimination statute making any violation of the ADA by any person or entity a violation of the Act. On the contrary, throughout the legislative process, the Unruh Act was consistently described as prohibiting discrimination by business establishments.

(*Brennon*, *supra*, 57 Cal.App.5th at p. 399.)

The Court made only passing reference to the Legislature's express intention, noted by this Court in *Munson:*

> The general intent of the legislation was expressed in an uncodified section: "It is the intent of the Legislature in enacting this act 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." (Stats.1992, ch. 913, § 1, p. 4282.)

(*Munson*, *supra*, 46 Cal.4th at p. 669.)

The plain language of the amendment and the legislatively-declared intent doesn't contain the limitations the Court of Appeal has read into it. If the Legislature had intended to incorporate violations of the ADA's Title III (public accommodations) *only,* it certainly could have said so. With its discussion of *Munson,* the court circles back to its a "public school" is not a "public accommodation" argument that misses the point of the amendment. (*Brennon*, *supra*, 57 Cal.App.5th at pp. 403–404.)

The Court of Appeal concluded that, for purposes of the Act, disability discrimination under the ADA was not to be treated differently from other forms of discrimination under the Act. But this Court has already concluded otherwise in finding that

intentional discrimination need not be proven under section 51, subdivision (f) but that other forms *do* require proof of such intent. (*Harris*, *supra*, 52 Cal.3d at p. 1175.[24])

> The effect [of subdivision (f)] was to create an exception to *Harris's* holding that "a plaintiff seeking to establish a case under the Unruh [Civil Rights] Act must plead and prove intentional discrimination..."

(*Munson*, *supra*, 46 Cal.4th at p. 672 .)

The point on which everyone seems to agree is that the Legislature was seeking to strengthen state disability-discrimination law where there was stronger federal law and in doing so elected to treat disability discrimination as did the federal ADA. The ADA prohibits disability discrimination in public schools and section 51, subdivision (f) does also.

VIII. The Education Code has incorporated the remedies of the Act.

As enacted in 1982, Assembly Bill 3133 added Education Code sections 200, et seq. as a new Chapter 2 entitled "Prohibition of Discrimination on the Basis of Sex." "This bill would consolidate a variety of state and federal laws prohibiting sex discrimination in public and private educational institutions receiving state funds and declare a state policy of non-discrimination." (Sen. Comm. on Education, analysis of AB 3133 (1981–1982 Reg. Sess.) 1.)

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[24] "[W]e hold that a plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional discrimination in public accommodations in violation of the terms of the Act."

In 1998, Assembly member Sheila Kuehl introduced AB 499. Among other things, "[t]he bill would specify that the provisions on discrimination may be enforced through a civil action." (Legis. Counsel's Dig., AB 499 (1997–1998 Reg. Sess.).) Section 262.3 was amended to clarify that after a 60-day cooling off period, a party complaining of discrimination could seek civil remedies. (Stats. 1998, ch. 914, § 37.) New section 262.4 stated simply, "This chapter may be enforced through a civil action." (Stats. 1998, ch. 914, § 38.)

Of particular significance to the inquiry before the Court, the Legislature declared its intentions in the bill itself.

> It is the intent of the Legislature that this chapter shall be interpreted as consistent with Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code, Title VI of the federal Civil Rights Act of 1964 (42 U.S.C. Sec. 1981, et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681, et seq.), Section 504 of the federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)), the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), the federal Equal Educational Opportunities Act (20 U.S.C. Sec. 1701, et seq.), the *Unruh Civil Rights Act* (Secs. 51 to 53, incl., Civ. C.), and the Fair Employment and Housing Act (Pt. 2.8 (commencing with Sec. 12900), Div. 3, Gov. C.), except where this chapter may grant more protections or impose additional obligations, and that the remedies provided herein shall not be the exclusive remedies, *but may be combined with remedies that may be provided by the above statutes*.

(Stats. 1998, ch. 914, § 5, subd. (g) (emphasis added).)

With this language, the Legislature would seem to be declaring its intention to take a "belt and suspenders" approach to all forms of discrimination in public K-12 schools. The Legislature intended the Unruh Act's remedies apply to public education as an extension of the Education Code's anti-discrimination provisions found in Chapter 2. The Court of Appeal quotes but does not distinguish the italicized language. The Education Code amendments did not purport to expand the Unruh Act but evince a clear legislative intent to make the remedies available for the conduct proscribed by the code in an action under section 262.4.

The Court of Appeal rejected this argument, too. Rather than accepting the Legislature's own declaration of intent, the court looked to a letter by the bill's author, Assembly member Sheila Kuehl, to then-Governor Pete Wilson. (*Brennon*, *supra*, 57 Cal.App.5th at p. 395.) This was a mistake.

"[T]he expressions of individual legislators generally are an improper basis upon which to discern the intent of the entire Legislature." (*People v. Farrell* (2002) 28 Cal.4th 381, 394.) "We have repeatedly declined to discern legislative intent from comments by a bill's author because they reflect on the views of a single legislator instead of those of the Legislature as a whole. (*Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal.4th 828, 845.)

The Court of Appeal also raised the specter of fiscal harm for school districts should they face exposure to the Act's remedies, reasoning the Legislature likely took this into account in drafting the Education Code amendments. (*Brennon*, *supra*, 57 Cal.App.5th at p. 396.) But, as the court would point out, the punitive damage remedy would be unavailable under

Government Code section 818, leaving the attorney-fee provision of section 52 as the sole enhancement. (*Id.* at pp. 396–397.)

The courts have long recognized the availability of an attorney-fee remedy in litigation against public entities where a statute so provides. For example, "when a plaintiff has proven unlawful [employment] discrimination, the plaintiff may be eligible for 'reasonable attorney's fees and costs.' ([Gov. Code,] § 12965, subd. (b).)" (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 235.) This is a far cry from the potential fiscal harm to school districts the Court identified under the state false claims act in the case cited by the Court of Appeal, *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1193 (*Wells*). (*Brennon, supra*, 57 Cal.App.5th at p. 397.)

The words the Legislature used are the best expressions of its intent. With this bill, the Legislature told the courts what it intended – the remedies of the Unruh Act may be combined with those in the Education Code. The Court of Appeal's interpretation would make the remedies in the Education Code *exclusive*. A violation of the Act would simply not be actionable. The egregious misconduct of the district and its employees here is precisely the conduct the Legislature sought to remedy.

IX. To the extent it does not already do so, the complaint can be amended to state a cause of action under the Act and the Education Code.

The Court of Appeal was reviewing an order sustaining a demurrer without leave to amend. In doing so, it failed to apply the governing principles or consider the question at all.[25]

> In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (Citation.) Where the demurrer was sustained without leave to amend, we consider whether the plaintiff could cure the defect by an amendment. The plaintiff bears the burden of proving an amendment could cure the defect.

(*T.H. v. Novartis Pharm. Corp.* (2017) 4 Cal.5th 145, 162 *(Novartis)*.)

A. The complaint states a cause of action under the Education Code.

The district does not claim Brennon's complaint fails to state a cause of action under the Unruh Act. The sole ground for its demurrer was that the Unruh Act did not apply to it. (EX 39.) Even if the Unruh Act were deemed not to apply to public schools such as the district, the conduct Brennon complains of constitutes multiple violations of Education Code section 220.

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[25] In his letter brief filed at the invitation of the court on September 21, 2020, Brennon raised this issue.

> No person shall be subjected to discrimination on the basis of disability . . . in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid.

California governmental liability practice requires that "a statute or 'enactment' claimed to establish the duty must at the very least be identified." (*Searcy v. Hemet Unified Sch. Dist.* (1986) 177 Cal.App.3d 792, 802.) But this rule is subject to the general rule that courts liberally allow pleading amendments, even when requested for the first time on appeal. (*Keyes v. Santa Clara Valley Water Dist.* (1982) 128 Cal.App.3d 882, 885.) Brennon could properly have amended his complaint to identify the controlling statutes.

B. To the extent the complaint fails to detail the "business" activities of the district, it can be amended to do so.

An examination of the public information about the district from its website reveals that its activities involve the public well beyond delivering education to its students. In the first place, the district operates more than merely DAHS where Brennon attended. Altogether, it operates 50 schools, including six high schools.[26]

It runs senior centers where they

> offer topical speakers, resource information, some health screening, exercises, table games, handicrafts,

[26] https://www.wccusd.net/domain/96 (as of 4/19/21).

> needlework, special occasion celebrations, a variety of entertainment, occasional field trips, fellowship, friendship, massage, snacks, and cultural activities. In addition, instruction is available in foreign languages (Spanish and German), computer skills, internet access, arts and crafts, t'ai chi, current events and dance. A low-cost lunch is also available.[27]

It offers Microsoft office testing and specialist certification for a fee.[28] It also offers adult education for a fee.[29] It provides free lunches to students and non-students.[30]

More significantly, it operates, with the City of Richmond, the Richmond Swim Center on its Kennedy High School campus. The center is open to the public.[31] When these activities are considered the district looks more and more like the Boys' Club in *Isbister* than the Boy Scouts in *Curran*.

To be sure, Brennon has not raised previously the possibility of amendment for a Unruh Act cause of action. But leave to amend may be requested for the first time on appeal. (E.g., *Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 992.) And the court tests the sufficiency of the complaint as against any theory. (*Novartis, supra,* 4 Cal.5th at p. 162.) With the parties having settled, the question may be moot as to them. The more important point is that the question of whether a public entity,

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[27] http://www.wccae.info/older.html (as of 4/17/21).

[28] https://wccae.asapconnected.com/#Products (as of 4/17/21).

[29] http://www.wccae.info/adultdisabil.html (as of 4/17/21).

[30] https://www.wccusd.net/mealfoodoptions (as of 4/17/21).

[31] https://www.radiofreerichmond.com/richmond_swim_center_offers_new_design_amenities_to_public (as of 4/17/21).

including a school, can be a "business establishment" within meaning of the Act is more nuanced than the Court of Appeal's analysis would suggest.

CONCLUSION

The Court of Appeal failed to identify any policy considerations of sufficient moment to countervail the anti-discrimination, school safety and private enforcement policies that support Brennon. The Legislature has indicated disability discrimination does not require intentional misconduct. The Legislature has indicated the remedies for disability discrimination in schools are cumulative. The Court should give voice to these policies.

Brennon has stated a cause of action under the Unruh Act. The Court should so hold, reverse the Court of Appeal and remand with directions to grant his petition.

Respectfully submitted,

Dated: April 21, 2021 By: /s/ Alan Charles Dell'Ario

Attorney for Petitioner
Brennon B.

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Dated: April 21, 2021 By: /s/ Alan Charles Dell'Ario

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