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No.: S266254

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRENNON B.,
Petitioner,

vs.

SUPERIOR COURT, CONTRA COSTA,
Respondent,

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

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

Contra Costa
Superior Court
No.: MSC16-01005

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

REPLY BRIEF ON THE MERITS

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Reply Brief on the Merits

Petitioner Brennon B. has demonstrated how the reach of the Unruh Act properly extended to public schools, either through its initial enactment or through subsequent amendment. He also pointed to the Legislature's statutorily-expressed intent that the Education Code incorporate the Act's remedies.

As did the Court of Appeal, the district responds with the assertion that the Act as enacted in 1959 or amended later does not apply to public entities at all. The district essentially ignores the argument concerning the reach of Education Code section 201, asserting the argument is outside the scope of review.

Nothing in the Court's jurisprudence or in such legislative history as exists stands for the proposition that public entities are categorically excluded from the ambit of the Act. Public entities that perform a "functional equivalent" of a business establishment are subject to the Act[1] just as are similarly-operating private-membership clubs and fraternal societies. The seemingly-conflicting court of appeal decisions may be harmonized by examining them under this lens.

The 1992 amendments to Civil Code section 51, part of AB 1077, reflect the Legislature's commitment to California having the strongest possible disability-discrimination laws.[2] Contrary to the district's and the Court of Appeal's interpretation of AB 1077,

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[1] *Warfield v. Pennisula Golf & Country Club* (1995) 10 Cal.4th 594, 622 *(Warfield)*.

[2] "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

the Legislature did intend to make a sweeping change outlawing disability discrimination in all walks of California life including employment and education.

To the extent the original Act and the 1992 amendment were not enough, the 1998 amendments to Education Code spell out the Legislature's intention that the Education Code remedies, "may be combined with remedies that may be provided by the above statutes," including the Unruh Act.[3] This declaration of intent makes no sense if the Unruh Act or its remedies do not apply to public schools at all.

Whether by virtue of the Unruh Act or the Education Code or both, the Legislature intended victims of disability discrimination to have the full panoply of the Act's remedies including attorney fees and penalty damages. The Court should so hold.

I. Public schools such as those operated by the district perform the functional equivalent of a commercial business establishment.

Children between ages 6 and 18 are subject to compulsory public education. (Educ. Code, § 48200.) Alternatively, they may attend private schools that are properly certified. (Educ. Code, § 48415.) No one seems to doubt that private schools come within the ambit of the Act. (*Brennon B. v. Superior Court* (2020) 57 Cal.App.5th 367, 391 *(Brennon)*, see Horowitz, The 1959

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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.)

[3] Educ. Code., § 201, subd. (g).

California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Application (1960) 33 So.Cal.L.Rev. 260, 292–293 (Horowitz).)

In *Warfield,* the Court examined its prior decisions and concluded a private club "operating in a capacity that is the functional equivalent of a commercial enterprise" was covered by the Act. (*Warfield, supra,* 10 Cal.4th at p. 622.) The Court noted "the reach of section 51 cannot be determined invariably by reference to the apparent 'plain meaning' of the term 'business establishment.'" (*Id.* at p. 616.[4]) Even though aspects of the club's operation were "private," the business aspects "must be viewed as an integral part of the club's overall operations." (*Warfield, supra,* at p. 616) This result was dictated by the "of every kind whatsoever" language in the Act. (*Id.* at p. 623; see also *Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 468 *(Burks)* [Act must be "interpreted 'in the broadest sense reasonably possible"], Horowitz, *supra*, 33 So. Cal. L. Rev. at p. 293 ["every kind" language indicated any "ambiguity should be resolved by holding that the particular entity would be a 'business establishment' for the purposes of Sections 51 and 52"].)

A public school operates as the functional equivalent of a private school and vice-versa. (Ed. Code, § 48200, § 48415.) Moreover, the district, like the Peninsula Golf & County Club in *Warfield,* offers for-fee activities to the general public, including

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[4] In *Sullivan v. Vallejo City Unified School Dist.* (E.D. Cal. 1990) 731 F.Supp. 947, 952 (*Sullivan*), the court applied this reasoning to reach its conclusion the Act applied to public schools.

operating a public swimming pool with the City of Richmond. (See OBM 38–40 citing internet sources.) It is a business establishment within the meaning of the Act.

A. The Court of Appeal decisions may be reconciled by applying the functional-equivalent analysis.

Brennon cited two Court of Appeal decisions applying the Act to a public entity. The first, *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744 (*Gatto*), applied the same "functional equivalent" rationale as did *Warfield*. 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.) In the second, *Mackey v. Bd. of Trs. of Cal. State Univ.* (2019) 31 Cal.App.5th 640 *(Mackey)*, the appellate court and the parties simply assumed the Unruh Act claim was properly applied to the state university.[5]

In addition, the Fair Employment and Housing Commission used the same reasoning as *Gatto* to find the University of California to be a "business establishment." (*Dept. of Fair Employment and Housing v. Univ. of Calif. Berkeley*, (Cal.F.E.H.C., Nov. 18, 1993), 1993 WL 726830 at *12–13

[5] And they were correct to do so. AB 1077, which added Civil Code section 51, subdivision (f), also amended Government Code section 11135 which specifically incorporates and applies 42 U.S.C. § 12132 to all state agencies and those receiving state financial assistance. (Stats. 1991, Ch. 913, § 18.) Section 12132 is part of Title II of the ADA.

[“respondent University has many businesslike attributes, including a complex structure, extensive publishing activities and a large staff and budget.”].)

For its part, the district cites *Burnett v. San Francisco Police Dept.* (1995) 36 Cal.App.4th 1177 *(Burnett)*, *Qualified Patients Ass’n. v. City of Anaheim* (2010) 187 Cal.App.4th 734 *(Qualified Patients)*, *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 868 *(Carter)*, and *Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162 *(Harrison)*. But in each case, the activity in which the discrimination was alleged to have occurred was a legislative or governmental one, not the “functional equivalent” of a business activity.

In *Burnett*, the question was whether San Francisco violated the Act in adopting an ordinance that made age discriminations among adults attending after-hours night clubs. “Nothing in the Act precludes legislative bodies from enacting ordinances which make age distinctions among adults.” (36 Cal.App.4th at p. 1191–1192.) In *Qualified Patients,* the question was whether legislation restricting cannabis dispensaries violated the Act. “[T]he Unruh Act does not apply to the city's enactment of legislation.” (*Qualified Patients*, *supra*, 187 Cal.App.4th at p. 764.) In *Carter,* non-ADA-compliant sidewalks were not the result of a City business activity, noting it was not the “functional equivalent of a commercial enterprise” and citing *Warfield.* (*Carter*, *supra*, 224 Cal.App.4th at p. 825.) And in *Harrison,* “amending an already existing municipal code section to increase the minimum age of a responsible person from the age of 21 years to 30" was legislative activity outside the scope of the Act. (*Harrison*, *supra*, 243 Cal.App.4th 162

The Legislature did not restrict application of the Act to private entities and not one of this Court's cases has done so. Viewed together, these decisions[6] confirm that public entities are within the scope of the Act at least when engaged in the functional equivalents of a business establishment "of every kind whatsoever."

B. The district's business aspects must be viewed as an integral part of its overall operations.

A school district is in the business of providing education, just as is a private school. Defendant district, like most public districts, operates a number of other activities that are open to the general public.[7] Since the district does not challenge Brennon's opening-brief showing, he does not restate that showing here except to note that the districts activities with the

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[6] *Los Angeles Cnty. Metro. Transp. Auth. v. Superior Court* (2004) 123 Cal.App.4th 261 cited by the Court of Appeal (*Brennon*, *supra*, 57 Cal.App.5th at p. 390 fn. 9) is not an Unruh Act case at all but dealt with the Civil Code section 51.7 (the Ralph Act) and its remedies. The Second District's references to the Unruh Act are in error as only sections 51 and 52, are the Unruh Act. The court's more recent opinion, *Los Angeles Unified Sch. Dist. v. Superior Court* (2021) 64 Cal.App.5th 549, [279 Cal.Rptr.3d at p. 66] review filed (June 30, 2021)recognizes the error in its prior analysis.

[7] The district argues that because its schools are today closed campuses, the pupils are "members" akin to "members" of a country club. Of course, parents may still come on campuses and those old enough to remember know that campuses in 1959 or even in 1992 were not closed to the public as they are today.

non-student general public are strikingly similar to those present in *Warfield* that subjected the otherwise private country club to the Act. (OBM 38–40.)

To paraphrase:

> [T]he business transactions that are conducted regularly on the [school's] premises with persons who are not [students] are sufficient in themselves to bring the [school] within the reach of section 51 's broad reference to "all business establishments of every kind whatsoever."

(*Warfield*, *supra*, 10 Cal.4th at p. 621.)

C. The district's status as a state agent is not determinative.

In an effort to bolster its opinion, the Court of Appeal emphasized that a school district is "an agent of the state performing a state constitutional obligation." (*Brennon*, *supra*, 57 Cal.App.5th at p. 369, see also *Belanger v. Madera Unified School Dist.* (9th Cir. 1992) 963 F.2d 248, 253.) The district, trying to follow suit, claims it is a "state actor." (ABM 5, 27.)

The Court of Appeal looked to the U.S. Supreme Court decision in *Brown v. Bd. of Educ.* (1954) 347 U.S. 483, 495 *(Brown)*, striking down separate-but-equal public education. The court surmised:

> while there was a pressing need for state legislation to prohibit discrimination by private schools, and particularly vocational and technical schools that offered a path to employment, charged tuition, and

> offered their services to the general public, there was not a correlative need with respect to state public school systems.

(*Brennon, supra,* 57 Cal.App.5th at pp. 368–369.)

But, of course, there was such a need. *Brown*'s reach did not extend beyond racial discrimination.[8] The 1959 version of the Act goes much further – to religion, ancestry and national origin.

Moreover, *Brown* and the Fourteenth Amendment provided no remedy against states agencies as does the Act. 42 U.S.C. section 1983, first enacted in 1871, provides the civil remedy for federal constitutional violations by "every person" acting "under color" of state law. But, "state and federal courts have uniformly held that California school districts, . . ., are state agencies and thus not "persons" for purposes of [42 U.S.C.]section 1983." (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 386 (*Julian*).)[9]

In 1959, the state largely enjoyed governmental immunity from tort liability. (*Talley v. Northern San Diego County Hospital*

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[8] "[W]e hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment." (*Brown, supra,* 347 U.S. at p. 495.)

[9] The district's characterization of itself as a "state actor" reflects its misunderstanding of the term. A "state actor" is a private party who may nonetheless have liability under section 1983 when "'he is a willful participant in joint action with the State or its agents.' (Citation.)" (*Julian, supra,* 11 Cal.App.5th at p. 396.)

Dist. (1953) 41 Cal.2d 33, 36 overruled by *Muskopf v. Corning Hosp. Dist.* (1961) 55 Cal.2d 211[10].) But, even then "[t]he state and its instrumentalities and subdivisions [were] not immune from liability for torts committed while engaged in proprietary or business activities." (*Guidi v. State* (1953) 41 Cal.2d 623, 625.) This exemption from sovereign immunity tracks and is consistent with an interpretation of the Act that subjects state agencies to it when performing the "functional equivalent" activities of a business.

In the end, there is simply nothing to indicate the Legislature's thinking beyond the prior versions of the statute. As the Court noted in *Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, the final version's elimination of the specifically-enumerated establishments in the prior versions reflects the Legislature's view the prior specification was "merely surplusage." (*Id.* at p. 469.) Yet this, too, is not conclusive. (*Warfield*, *supra*, 10 Cal.4th at pp. 614–615.)

The purpose of the statute was to prohibit and redress discrimination wherever found. As Professor Horowitz suggests:

> Once it is decided that the particular words in the statute can be given either of the contended-for meanings in the particular fact situation, the process is, in essence, (a) a search for reasons for and purposes of the statutory principle, as formulated by an analysis of cases of clear application of the principle and of other relevant criteria which make up the context in which the words were used,

[10] The 1963 Government Claims Act, Gov. Code, §§ 810, et seq., was largely a response to *Muskopf.* (Gov. Code, § 810, Law Rev. Comm. Comment (1963).)

> followed by (b) a determination of the extent to which the reasons for the principle are present in the case before the court.

(Horowitz, *supra,* 33 So.Cal.L.Rev. at p, 305.)

The Legislature intended to outlaw discrimination by all actors and the Court should interpret the Act accordingly.

II. AB 1077 placed the protections afforded the disabled under the ADA into state law, including into the Act.

Largely reiterating the Court of Appeal's analysis, the district states, "In *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 673, this Court recognized that the Unruh Act is the state's equivalent of Title III of the ADA." (ABM 15.) Nothing in the opinion so states.

The Court's holding is found at the beginning of its opinion. "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." (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 *(Munson)*. While *Munson* arose in the context of what would have been an ADA Title III violation, the Court did not purport to limit its reasoning to Title III violations.

The Court of Appeal's and district's argument that the Legislature could not have intended a wholesale revision of the disability-discrimination law founders on the very language of the statute. Section 51, subdivision provides "(f) A violation of the

right of any individual under the Americans with Disabilities Act of 1990 (*Public Law 101–336*) shall also constitute a violation of this section." (Emphasis added.)

> By adding subdivision (f) to section 51, making all ADA violations—whether or not involving intentional discrimination—violations of the Unruh Civil Rights Act as well, the Legislature included ADA violations in the category of "discrimination" contrary to section 51, thus making them remediable under section 52.

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

Public Law 101–336 is the entirety of the ADA, not just Title III. Throughout AB 1077 (Stats. 1992, ch. 913) the references to ADA consistently include the complete federal legislation. When the Legislature wanted to reference a specific title of the ADA, it did so. For example, in amending Civil Code section 54.1, the Legislature specifically referred to Title II and Title III. (Stats. 1992, ch. 913, § 5.)

Moreover, AB 1077 also amended Government Code section 11135,[11] making the proscriptions of 42 U.S.C. § 12132 applicable to:

> any program or activity that is conducted, operated, or administered by the state or by any state agency,

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[11] Brennon has not previously argued the effect of section 11135. Although claims raised for the first time on appeal, and certainly those raised for the first time in an appellant's reply brief, are ordinarily deemed waived (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794 fn 3,*Estate of Westerman* (1968) 68 Cal.2d 267, 279), the Court discretion to consider such issues where (as here) they are pure questions of law. (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.)

> is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.[12]

Section 12132 is part of Title II of the ADA. The specific application of that section to state agencies and state-assisted activities makes clear section 51's reference the ADA is to all of the ADA and to all the parties covered by it, including state-funded schools.

As the *Munson* Court observed, the reference to the ADA first appears in Section 1 of AB 1077.

> This amendment [to the Act] was but one part of a broad enactment, originating as Assembly Bill No. 1077 (1991–1992 Reg. Sess.), that sought to conform many aspects of California law relating to disability discrimination (in employment, *government services,* transportation, and communications, as well as public accommodations) to the recently enacted ADA, which was soon to go into effect. (See Assem. Com. on Judiciary, Rep. on Assem. Bill No. 1077 (1991–1992 Reg. Sess.) as amended Jan. 6, 1992, pp. 1–4 [digest] (hereafter Assembly Judiciary Report on Assembly Bill No. 1077).) The general intent of the legislation was expressed in an uncodified section: "It is the intent of the Legislature in enacting this act to

[12] Subdivision (b) provides: "With respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions."

> 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.)

(*Munson, supra*, 46 Cal.4th at pp. 668–669 [emphasis added].)

The very point of AB 1077 was to provide victims of disability discrimination with remedies. Any overlap of remedies between the Unruh Act and other acts such the Disabled Persons Act (Civ. Code, § 54.1, subd. (d)) was no reason to limit the reach of the Unruh Act. (*Munson, supra,* 46 Cal.4th at p. 675 ["This acknowledged overlap, therefore, does not require us to restrict, artificially and contrary to the statutory language, the types of ADA violations remediable under the Unruh Civil Rights Act."].)

The Court of Appeal's conclusion that the Legislature could not have intended to overrule the decisions finding the Act inapplicable to employment contexts does not withstand scrutiny under the *Munson* reasoning and a close reading of all of AB 1077. (*Brennon, supra*, 57 Cal.App.5th at p. 401 citing *Alcorn v. Anbro Engineering, Inc*. (1970) 2 Cal.3d 493, 500.)

AB 1077 amended the Fair Employment and Housing Act, too. (Stats. 1992, ch. 913, §§ 21 et seq.) And Legislature made clear nothing in those amendments would limit the operation of the Act.

Amending Government Code section 12993 the Legislature provided:

> (c) While it is the intention of the Legislature to occupy the field of regulation of discrimination in

> employment and housing encompassed by the provisions of this part, *exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state,* this part does not limit or restrict the application of Section 51 of the Civil Code.

(Stats. 1992, ch. 913, § 25 (emphasis added).)

Section 52, subdivision (f) already authorized the Department of Fair Employment and Housing to enforce/remedy violations of the Act:

> Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code.

In other words, the fact that one wrong could contravene more than one statute and provide for more than one remedy is not a reason to disregard the Legislature's directions that a violation of the ADA is a violation of the Act. (*Munson, supra,* 46 Cal.4th at pp. 675–676 [noting the overlap between the Act, Civ. Code., § 54.3 and Bus. & Prof. Code., § 17200, et seq.) If the Act as adopted in 1959 did not reach disability discrimination by public agencies, including school districts, the Legislature's 1992 amendments made clear that it did.

III. The Legislature intended victims of disability discrimination in public schools to have a panoply of cumulative remedies.

The district agrees Brennon's complaint could be amended to state a cause of action under the Education Code. (ABM 24 fn. 12.) The question before the Court then is what remedies might Brennon be entitled to? Specifically are attorney fees and penalty damages as provided in section 52, subdivision (a) available? Have those remedies been incorporated into the Education Code?[13]

> While section 51 's statement of the substantive scope of protections afforded and section 52 's statement of the remedies available have both changed over the course of time, section 51 has always provided substantive protection against invidious discrimination in public accommodations, without specifying remedies, and section 52 has always provided remedies, including a private action for damages, for violations of section 51.

(*Munson, supra*, 46 Cal.4th at p. 667.)

[13] The district treats the question as being outside the scope of review and does not address the Education Code except as it bears on the interpretation of the Act directly. (ABM 22 fn. 10.) This is incorrect. The Questions Presented govern the scope of review unless otherwise limited by the Court. (Cal. Rules of Court, rule 8.516.)

A. Section 201, subdivision (g) incorporates the Act's remedies.

The operative language appears in Education Code section 201 where the Legislature expressly declared its intentions in enacting AB 499, largely rendering superfluous any analysis of legislator's comments or committee reports. (See *Donovan v. Poway Unified School Dist*. (2008) 167 Cal.App.4th 567, 620 [trial court properly instructed jury using language of § 201 because "statute expresses the Legislature's declarations and intent of the applicable law."].)

At the outset, the Legislature declared its over-arching intent regarding the 1998 amendments to the Education Code. As then amended, Education Code section 200 provided:

> It is the policy of the State of California to afford all persons in public schools, regardless of their disability equal rights, and opportunities in the educational institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor.

(Stats. 1998, ch. 914, § 7.)

The first two subdivisions of section 201 provide:

> a) All pupils have the right to participate fully in the educational process, free from discrimination and harassment.
>
> (b) California's public schools have an affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity.

Remedies are provided by various other, existing statutes:

> (g) 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.

The manifest intent of this subdivision is to provide California school children with the most robust anti-discrimination protection in the country. Like other provisions of the Education Code it is to "be liberally construed, with a view to effect its objects and to promote justice." (Ed. Code, § 2.)

Government Code section 11135, with its reference to 42 U.S.C. § 12132, makes Title II of the ADA applicable to "any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state." This includes public schools.

The Education Code anti-discrimination provisions are to be interpreted consistently with “Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code,” “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.” (Ed. Code, § 201, subd. (g).)

The plain language of section 201 controls the outcome here. Although the Court of Appeal recognized subdivision (g), instead of giving it its plain meaning, it looked to a transmittal letter from Assembly member Sheila Kuehl to Governor Pete Wilson to ascribe a different meaning. (*Brennon*, *supra*, 57 Cal.App.5th at pp. 395–396.) But the Court of Appeal's interpretation would read the reference to Government Code section 11135 and to the Unruh Act right out of section 201. The “combined with remedies” language would also make no sense if the Unruh Act did not apply.

To the extent public schools were not already subject to the Unruh Act, its remedies were available to victims of the discrimination prohibited by the Education Code.

B. The remedies available to victims of discrimination in schools include the Act's "actual damages," penalty damages and attorney fees.

Section 52, subdivision (a), the remedies section of the Act, imposes liability for:

> actual damages, *and* any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage *but in no case less than four thousand dollars ($4,000)*, and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6. (Emphasis added.)

The district, following the Court of Appeal, asserts these additional damages are punitive damages and may not be recovered against a public entity. (ABM 18–24.) The district is wrong because the additional damages are a penalty, which may be recovered from the public entity.[14] (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 145 (*Kizer*).)

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[14] In his opening brief, Brennon did not make a specific challenge to the Court of Appeal's observation that the Act's additional damages were punitive damages barred by Government Code section 818. (*Brennon, supra,* 57 Cal.App.5th at pp. 396–397.) Notwithstanding, the district has set forth an extensive discussion of the Act's additional-damages provision, contending such damages are punitive damages barred by the Government Code section 818. (ABM 18-24.) Having injected the additional-damages provision into the issues, the district cannot complain of Brennon rebutting that showing to demonstrate the contrary – the additional damages are a penalty which may be recovered from the public entity.

The district relies heavily on *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164 (*Wells*) which held '[p]ublic school districts are not 'persons' who may be sued under the CFCA [California False Claims Act, Govt. Code §§ 12650 et. seq.]" (*Wells, supra,* 39 Cal.4th at p. 1179.) But as the holding indicates, *Wells* has little to do with the liability of public entities for punitive damages. The Court's rationale for finding public schools not to be "persons" included its conclusion that the Legislature could not have intended to permit one public agency to be liable to another. "[T]he language, structure, and history of the particular statute before us—the CFCA—strongly suggest that public entities, including public school districts, are not "persons" subject to suit under the law's provisions." (*Id.* at p. 1193.)

The Court rested its conclusion on the fact that the CFCA purpose would not be served by exposing school districts to liability under it at all.

> We note that " '[t]he ultimate purpose of the [CFCA] is to protect the public fisc.' " (Citation.) Given that school district finances are largely dependent on and intertwined with state financial aid (Citation), the assessment of double and treble damages, as well as other penalties, to school districts would not advance that purpose.

(*Wells*, *supra*, 39 Cal.4th at p. 1196.)

The opinion contains virtually no discussion of punitive damages or Government Code section 818. The latter is relegated to two footnotes. (*Id.,* at p. 1195 fn. 20 [setting forth the text of the statute], 1216, fn. 28 [same].)

In *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, the Court held liability under the Unruh Act required intentional discrimination. It noted, without analysis, "the damages provision allowing for an exemplary award of up to treble the actual damages suffered with a stated minimum amount reveals a desire to punish intentional and morally offensive conduct." (*Id.* at p. 1172.) But the Court backtracked in *Munson* and held the Act's provisions importing the ADA into the Act also eliminated the intent element of a violation insofar as a disability-discrimination claim was concerned.

> 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, supra*., 46 Cal.4th at p. 665.)

If a plaintiff asserting a violation of subdivision (f) need not prove intentional discrimination, then penalty damages provided in section 52, subdivision (a) need not be established under the usual standards applicable to punitive damages.

The Legislature's intent that the additional "damages" be considered a penalty rather than punitive extends to the pre-1959 versions of the Act. In 1947, when the additional damages were a minimum of $100, the Court noted:

> The statute, it is true, allows to the plaintiff one hundred dollars in addition to his actual damage. This sum is unquestionably a penalty which the law imposes, and which it directs shall be paid to the

> complaining party. But it will be noted that it is a penalty imposed in any and in every case, whether the rejection or refusal of admission was or was not done under circumstances of oppression or violence. The courteous refusal as much exposes a defendant to this penalty of the law as would a brutal expulsion.

(*Orloff v. Los Angeles Turf Club* (1947) 30 Cal.2d 110, 115 *(Orloff)*.)

In *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 *(Koire)*, the Court cited *Orloff* and concluded, "by passing the Unruh Act, the Legislature established that arbitrary sex discrimination by businesses is per se injurious. Section 51 provides that all patrons are entitled to equal treatment. Section 52 provides for minimum statutory damages of $250 for every violation of section 51, regardless of the plaintiff's actual damages."[15](*Id*., at p. 33.)

In 1991, the Legislature added subdivision (h) to section 52. "(h) For the purposes of this section, 'actual damages' means special and general damages. This subdivision is declaratory of existing law." (Stats. 1991, ch. 607, § 2.) Over the years, the Legislature has steadily increased the minimum penalty to its present amount – $4,000. (Stats. 1994, ch. 535, §1 [$1,000]. Stats. 2001, ch. 261, § 1 [$4,000].)

In other words, for violations of section 51 and the corresponding Education Code sections, a plaintiff is entitled to

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[15] In 1985, section 52 provided that violators of section 51 were "liable for each and every such offense for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage, but in no case less than two hundred and fifty dollars ($250)." (*Koire, supra*, 40 Cal.3d at p. 28 fn.5.)

their actual damages as defined by the statute plus a penalty of a minimum of $4,000 and a maximum of three times the actual damages. These additional damages "are punitive in nature, but are not simply or solely punitive in that they fulfill legitimate and fully justified compensatory functions, have been held not to be punitive damages within the meaning of Government Code section 818." (*Kizer*, *supra*, 53 Cal.3d at p. 145.) Violations of the Act are "per se injurious."[16] (*Koire*, *supra*, 40 Cal.3d at p. 33.)

Nothing in section 52, subdivision (a) speaks to punitive damages. Subdivision (b) makes clear the Legislature understood the difference between a penalty and punitive damages because subdivision (b) does provide for punitive damages for violations of sections 51.7 and 51.9.[17]

The False Claims Act at issue in *Wells* or the enhanced damages in Code of Civil Procedure section 340.1 at issue in *Los Angeles Unified*, on which district also relies, are a far cry from the situation where the Legislature has enacted the broadest

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[16] The Court's conclusion in *Koire* is difficult to reconcile with its holding in *Harris,* "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." (*Harris, supra,* 52 Cal.3d at p. 1175.) Perhaps the *Harris* Court was speaking of"general intent" as that term is used in the criminal law - the defendant need only intend to do the acts constituting the violation. (See, e.g. *People v. Moses* (2020) 10 Cal.5th 893, 904.)

[17] "(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages."

anti-discrimination statutory scheme possible. The Legislature would have been well aware that the Unruh Act provided for a penalty in the amount no less than $1,000 and up to three times actual damages when it enacted the 1998 amendments to Education Code section 201. Victims of disability discrimination outlawed by the Act and the Education Code may recover this penalty and attorney fees in addition to actual damages.

CONCLUSION

A consideration of the 1991 AB 1077 and of the 1998 AB 499 in their entireties leads, ineluctably, to the conclusion that the Legislature intended disabled California school children to have the broadest rights and protection possible. Those disabled children were likewise to have the broadest remedies against those, including school districts, who violated their rights. Whatever the Court concludes about the original Unruh Act of 1959, the current state of the law provides public school children with the rights and remedies of the Act.

The judgment of the Court of Appeal should be reversed and its opinion ordered not published.

Respectfully submitted,

Dated: August 16, 2021 By: /s/ Alan Charles Dell'Ario

Attorney for Petitioner
Brennon B.

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