



EQUAL JUSTICE SOCIETY



October 29, 2019

VIA HAND DELIVERY AND EMAIL

Regents of the University of California
c/o Office of the General Counsel
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Dear Regents of the University of California:

We represent three students and several entities and organizations, including College Access Plan, College Seekers, Community Coalition, the Compton Unified School District, the Dolores Huerta Foundation, and Little Manila Rising. Our organizational clients represent diverse communities whose members have been historically marginalized and disparately impacted by the University of California’s adherence to the SAT and ACT gatekeeper entrance exams. Collectively, these organizations serve thousands of talented students and reflect the broad diversity of California’s youth. Our individual clients are well-qualified students who have been subject to unlawful discrimination on the basis of race, disability, and wealth as a result of the requirement that applicants to the University of California submit either SAT or ACT scores in order to be considered for admission to any campus.

We write to demand that the University of California immediately stop this discriminatory practice. We understand that the Academic Senate is currently considering the issue, as it has done several times in the past two decades, and that it may (or may not) have a recommendation in or around spring of 2020. But this is not a discretionary policy decision; it is a legal obligation, and it is urgent. The use of these exams is an unlawful practice in violation of the California Constitution’s equal protection clause and numerous State anti-discrimination statutes, and it is barring our clients from equal access to higher education.

As the State’s foremost public institution of higher education, the University of California must, and should, furnish all students equal opportunity to access its benefits. Its continued use of the SAT and ACT—descendants of discriminatory IQ tests that pose unlawful barriers to underrepresented students—is fundamentally at odds with its obligation to provide access to all qualified students. As Governor Newsom correctly stated earlier this month, the use of the SAT and ACT “exacerbates the inequities for underrepresented students, given that performance on these tests is highly correlated with

race and parental income, and is not the best predictor for college success.”¹ In fact, the results are meaningless, all the more so because of disparities in access to expensive test prep services.

I. The SAT and ACT discriminate against underrepresented minority students, multilingual learners, and students with disabilities.

Research demonstrates that the SAT and ACT systematically prevent talented and qualified students with less accumulated advantage—including students with less wealth, students with disabilities, and underrepresented minority students—from accessing higher education at the University of California.² As explained below, despite knowing that SAT and ACT scores have minimal predictive value with respect to college performance, the University of California persists in requiring all applicants to submit a metric that is biased against the state’s least privileged students. For the sake of administrative convenience, the University of California has chosen to ignore ample evidence that, rather than reflecting differences in students’ abilities to succeed in college, disparate SAT and ACT scores mirror and reinforce social and educational inequality. In doing so, it is knowingly excluding high-performing, less advantaged students from the benefits of a University of California education.³

Meaningless Results

The SAT and ACT fail to deliver on their chief purpose: the prediction of student performance in college. Put simply, the scores do not provide any meaningful information about a student’s likelihood of college success. The College Board, for instance, defends the use of the SAT primarily by asserting that SAT scores are a strong predictor of first-year grades. That is already a dubious metric: no person attends college in order to get first-year grades, and no university should seek to design its student body around that measure.

Even accepting the data as presented, the College Board’s assertion that the SAT contributes to a more accurate prediction of first-year grades than high school grades alone is faulty because it intentionally fails to take a student’s socioeconomic status into account. It is well accepted that high school grades are an equal if not better predictor of first-year grades than SAT scores standing on their own.⁴ The College Board asserts that combining SAT scores with high school grade point average yields a more valid prediction of first-year college grades than high school GPA alone. Independent researchers have long demonstrated that this conclusion derives from flawed methodology. When socioeconomic

¹ Governor Gavin Newsom, AB 751 Veto Message (Oct. 12, 2019), available at <https://www.gov.ca.gov/wp-content/uploads/2019/10/AB-751-Veto-Message.pdf>.

² See generally Saul Geiser, *Norm-Referenced Tests and Race-Blind Admissions: The Case for Eliminating the SAT and ACT at the University of California* (Dec. 2017), available at https://cshe.berkeley.edu/sites/default/files/publications/2.rops.cshe.15.2017.geiser.testsrace-blind_admissions.12.18.2017.pdf.

³ See *id.* at 10 (“Underrepresented minorities are less than half as likely to rise to the top of the [UC applicant] pool when ranked by test scores in place of high-school grades.”).

⁴ See, e.g., *id.* at 7-8 & n.11.

status and race are taken into account, the contribution of test scores to predicting first-year grades dwindles to insignificance. SAT and ACT scores are an even weaker predictor of persistence to second year. As for the critical metric of four-year college outcomes, high school grade point average is consistently the strongest predictor.⁵

Ultimately, SAT and ACT scores are but a proxy for socioeconomic status and race. This trend has only been increasing over the past several years. With its mission of educating Californians, whether rich, poor, or middle class, the University of California would never choose to openly admit students based on their parents' income or demographics. Yet that is effectively what it is doing by using SAT and ACT scores. SAT and ACT scores distort the admissions process such that affluence instead of individual merit serves as the touchstone.

Finally, validity studies take as their point of departure scores that are all too often inflated from expensive test preparation courses, which makes their conclusions even more dubious.

Bias in the Exam

The fact that SAT and ACT scores measure socioeconomic status and race—rather than ability or mastery of curriculum—results in part from biases built into the development of the exams themselves. The test development process tends systematically to exclude items on which minority students perform well and to include items on which they do not do well.⁶ In fact, University of California psychometricians have found that up to 10% of all items are biased against underrepresented minority groups.⁷ Because the SAT and ACT are designed to emphasize small differences in test scores, they have spawned a lucrative test preparation industry which capitalizes on students' desire to secure even incremental increases in their scores.

Moreover, the extensive use of word-heavy math problems discriminates against multilingual learners, who have to spend more time on each math problem and face a greater chance of misunderstanding the problem in its entirety—a disparity that has increased with the latest iteration of the SAT exam.

⁵ See, e.g., Saul Geiser & Maria Veronica Santelices, *Validity of High School Grades in Predicting Student Success Beyond the Freshman Year: High-School Record vs. Standardized Tests as Indicators of Four-Year College Outcomes*, available at <https://cshe.berkeley.edu/publications/validity-high-school-grades-predicting-student-success-beyond-freshman-yearhigh-school>, at 1.

⁶ See Geiser, *supra* note 2, at 10-11 (citing William C. Kidder and Jay Rosner, *How the SAT Creates Built-in-Headwinds: An Educational and Legal Analysis of Disparate Impact*, 43 Santa Clara L. Rev. 131, 159 (2002)).

⁷ *Id.* at 11.

Bias in Exam Conditions

Students with disabilities who require accommodations to take the exam experience discrimination with respect to the SAT and ACT exams because not all test sites permit accommodations such as Braille, certain time extensions, reader, or extended or extra breaks (such as for a student requiring insulin). Those students must find their own location to take the test and if they cannot find a school that will accommodate them, they cannot take the test at all.

While approximately 14% of California students qualify for special education, less than 5% of students take the SAT or ACT with accommodations. Oftentimes, underserved students with disabilities cannot be identified soon enough or evaluated frequently enough by their public schools to qualify for SAT or ACT accommodations. Students with resources can obtain private evaluations to supplement their school evaluations or to initiate the special education process. Many students with disabilities are not properly served by the accommodations they do receive, and students with disabilities who use the accommodations they need are experiencing unprecedented levels of suspicion and discrimination.

Students belonging to underrepresented racial minorities are also subject to what social scientists have termed “stereotype threat,” the effect by which experiences tied to a racial and ethnic identity artificially depress standardized test performance and affect the test’s ability to predict performance in higher education for such students.⁸

Disparate Outcomes

For the reasons discussed above, and as you have long been aware, the SAT and ACT tests are highly discriminatory, and have resulted in starkly disparate student outcomes. According to College Board’s 2018 data for students taking the SAT in California, 44% of White students scored 1200 or above, compared to only 10% of Black students and 12% of Latinx students.⁹ Only 1% of Black students and 2% of Latinx students scored in the top score bracket, compared to 11% of White students. In contrast, 59% of Black students and 54% of Latinx students scored in the lowest score brackets, compared to 17% of White students.¹⁰ These disparities are replicated on the national scale, where only 1% of Black students and 2% of Latinx students were in the top scoring bracket, as compared to 8% of White students.¹¹ 64% of Black students and 53% of Latinx students were in the lowest three scoring

⁸ Claude M. Steele, Expert Report of Claude M. Steele, 5 Mich. J. Race & L. 439 (1999), available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1219&context=mjrl>; Jerry Kang, Rachel D. Godsil & John V. Wintermute, Brief of Experimental Psychologists as Amici Curiae in Support of Respondents, at 4, *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (Nov. 2, 2015) (No. 14-981), 2015 WL 6774020, at **7-8.

⁹ College Board, SAT Suite of Assessments Annual Report: California (2018), available at <https://reports.collegeboard.org/pdf/2018-california-sat-suite-assessments-annual-report.pdf>.

¹⁰ *Id.*

¹¹ College Board, SAT Suite of Assessments Annual Report: Total Group (2018), available at

brackets, compared to 25% of White students.¹² Although Asian students have the highest scores when grouped together by the College Board, such a grouping masks the demographic diversity of Asian American and Pacific Islander populations and obscures the fact that certain subgroups score much lower than average.¹³

The ACT exhibits similar disparities. In 2018, the average scores were 16.9 for Black students and 18.8 for Latinx students, as compared to 22.2 for White students and 20.8 for students overall.¹⁴

These disparities are longstanding. The Brookings Institute estimates that in 2016, only 5% of the top scoring students in Mathematics were Latinx and 2% were Black, although 21% of test takers were Latinx and 14% were Black.¹⁵ In contrast, among those scoring in the lowest bracket (300-350), 37% were Latinx and 35% were Black.¹⁶ Data reported by the College Board through 2015 show wide racial gaps in SAT scores that have remained “virtually unchanged over the last fifteen years.”¹⁷

II. Discrimination is exacerbated by unequal access to exam preparation.

In light of the stakes of SAT and ACT, it is no surprise that a billion dollar industry has arisen around test preparation. Nor is it surprising that students have unequal access to test preparation courses, which can cost up to \$8,000. The College Board promotes test preparation by selling its own study guide and by contracting with Khan Academy, a provider of online test prep. Khan Academy test preparation is free but does not include any test-taking strategy preparation because that would contradict the College Board’s insistence that the only way to score well is to learn content. It can also come as no surprise that the online program, which is leveraged only with access and assistance, is used more by affluent white students whose parents have advanced degrees, furnishing those students with yet one more tool for preparation. Some schools and school districts are spending vast funds from limited resources and valuable time trying to prepare their students for tests they will take only once or twice but will define

<https://reports.collegeboard.org/pdf/2018-total-group-sat-suite-assessments-annual-report.pdf>.

¹² *Id.*

¹³ Robert Teranishi et al., *iCount: A Data Quality Movement for Asian Americans and Pacific Islanders in Higher Education* 18 (2013),

https://aapip.org/sites/default/files/publication/files/2013_icount_report.pdf (reporting that 48.3% of California test-takers received a total SAT score greater than 1500, whereas only 7.6% of test-takers at a predominantly Hmong high school and 12.8% of a predominantly Filipino high school test-takers received a score in the same range).

¹⁴ Scott Jaschik, *ACT Scores Drop*, Inside Higher Ed (Oct. 22, 2018), available at

<https://www.insidehighered.com/admissions/article/2018/10/22/act-scores-drop-only-asian-americans-saw-gains>.

¹⁵ Richard V. Reeves & Dimitrios Halikias, *Race gaps in SAT scores highlight inequality and hinder upward mobility* (Feb. 1, 2017), <https://www.brookings.edu/research/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/>.

¹⁶ *Id.*

¹⁷ *Id.*

their future, at the expense of providing them substantive education to prepare them for college and beyond.

III. Use of the SAT and ACT violates the California Constitution and several statutes.

The use of the SAT and ACT exams in UC admissions violates students' rights under several constitutional and statutory sections including, without limitation, the following:

- Violation of the right to equal protection under the California Constitution, art. I, § 7.

The UC's continuing use of SAT and ACT in admissions, despite knowing of the well-established racial disparities in the development and results of the tests, constitutes intentional discrimination on the basis of race, wealth, and disability, in violation of the fundamental right to an education and to pursue an occupation of one's choice guaranteed by the California Constitution.

- Violation of California Government Code § 11135.

The UC's use of SAT and ACT in admissions violates Government Code § 11135, which provides that "[n]o person in the State of California shall, on the basis of race, color, . . . national origin, ethnic group identification, . . . mental disability, physical disability, [or] medical condition . . . be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination" under any State program. This statute prohibits both intentional discrimination and disparate impact. *Darensburg v. Metropolitan Transp. Com'n*, 636 F.3d 511 (2011). Here, plaintiffs can show both intentional discrimination and disparate impact based on the disparate outcomes in their SAT and ACT scores. Because SAT and ACT scores have negligible predictive validity once race and socioeconomic status are taken into account, the scores add nothing to a student's application beyond what is already contained in his or her file, and the State can have no business necessity for using the scores in its admissions practices.

- Violation of the Unruh Act, California Civil Code § 51.

The Unruh Act states that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their . . . race, color . . . national origin, disability, medical condition. . . primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civil Code § 51(b). Like public schools generally, the University of California is a "business establishment" under the Act. *See In the Matter of the Accusation of the Dep't of Fair Employment & Housing*, FEHC Dec. No. 93-08 (Nov. 18, 1993) ("Respondent University of California, Berkeley, is a business establishment within the meaning of Civil Code section 51."); *see also Doe By & Through Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1581–82 (N.D. Cal. 1993); *Sullivan By & Through Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 953 (E.D. Cal. 1990). By continuing to make admissions decisions on the basis of the SAT and ACT, the Regents have denied applicants to the UC system equal accommodations, advantages, facilities, and services on the basis of race, disability and primary language, among other protected statuses.

- Violation of California Education Code § 66270

The Education Code prohibits discrimination “on the basis of disability, . . . nationality, race or ethnicity” by postsecondary institutions. Cal. Educ. Code § 66270. The Regents have violated and continue to violate this statute by using the SAT and ACT in University of California admissions decisions and thereby discriminating against underrepresented minority students and students with disabilities.

IV. A far less discriminatory alternative exists.

With SAT and ACT scores removed, UC admissions officers still have everything they need in a student’s application file to make a reasoned decision regarding the student’s ability to succeed in a UC or a particular UC campus. Putting more weight on quantitative metrics such as high school grade point average and qualitative evaluations by counselors and teachers is a far less discriminatory way to select students who are likely to succeed in college and enrich a college environment. The growing number and diversity of schools that no longer require such SAT and ACT scores—from large research universities like the University of Chicago to liberal arts colleges like Bowdoin and Smith—demonstrate that such scores are not the lynchpin of college admissions decisions.¹⁸ Omitting these scores can increase the presence of underrepresented minority students in both the applicant pool and the freshman class and thus reap the benefits of diversity for all students.¹⁹

Accordingly, we demand that the Regents instruct all admissions offices in the University of California to stop requiring SAT and ACT scores from prospective applicants. We suggest that the Regents entirely stop considering such scores as part of student files because they offer no more information than can already be found in the remainder of a student’s file. Specifically, we demand that the Regents place consideration of and response to this demand letter on the agenda of the November 13-14, 2019 Regents Meeting.²⁰

¹⁸ See FairTest, *More Than 1000 Accredited Colleges and Universities That Do Not Use ACT/SAT Scores to Admit Substantial Numbers of Students Into Bachelor-Degree Programs* (2019), <https://www.fairtest.org/university/optional>.

¹⁹ Steven T. Syverson et al., *Defining Access: How Test-Optional Works* 3 (2018), available at <https://www.nacacnet.org/globalassets/documents/publications/research/defining-access-report-2018.pdf>.

²⁰ Regents of the Univ. of Cal., Bylaw 27.1(b) (“Any Regent is entitled to have an item placed on the agenda . . . of the full Board, . . . The Chair of the Board . . . , in consultation with the President of the University, shall determine the scheduling of the item, provided that such scheduling must occur in sufficient time to afford the Regent a meaningful opportunity to have the proposal heard by the Board[.]”).



As UC President Richard Atkinson said as he recommended eliminating the use of the SAT I in UC admissions, and warned against “standards that unfairly discriminate against any students”: “Students should be judged on the basis of what they have made of the opportunities available to them. In other words, in America, students should be judged on what they have accomplished during four years of high school, taking into account their opportunities.”²¹

Please respond within ten working days to schedule a meeting. We sincerely hope that litigation is unnecessary and look forward to your response.

Sincerely,



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Public Counsel



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²¹ Richard Atkinson, Robert H. Atwell Distinguished Lecture at the Annual Meeting of the American Council on Education: Standardized Tests and Access to American Universities (Feb. 18, 2001), available at <https://escholarship.org/uc/item/6182126z>.