SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

KAWIKA SMITH, through his guardian ad litem LEILANI REED; GLORIA D, through her guardian ad litem DIANA I; STEVEN C., through his guardian ad litem, MARGARET F.; ALEXANDRA VILLEGAS, an individual; CHINESE FOR AFFIRMATIVE ACTION, nonprofit organization; COLLEGE ACCESS PLAN, a nonprofit organization; COLLEGE SEEKERS, a nonprofit organization; COMMUNITY COALITION, a nonprofit organization; DOLORES HUERTA FOUNDATION, a nonprofit organization; and LITTLE MANILA RISING, a nonprofit organization, Plaintiffs, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, in her official capacity as President of the University of California; and DOES 1-100, Defendants.	Case No. RG19046222 ORDER AFTER HEARING ON DEFENDANTS' DEMURRER TO PLAINTIFFS' COMPLAINTS
COMPTON UNIFIED SCHOOL DISTRICT; MICAH ALI, as taxpayer, Plaintiffs, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, in her	Case No. RG19046343

official capacity as President of the University of California; and DOES 1-100, Defendants.	

Defendants The Regents of the University of California and Janet Napolitano, in her capacity as President of the University of California, (together "UC") demur to the complaint ("Complaint") filed December 10, 2019 by Plaintiffs Kawika Smith, Gloria D., Stephen C., Alexandra Villegas, Chinese for Affirmative Action, College Access Plan, College Seekers, Community Coalition, Dolores Huerta Foundation, and Little Manila Rising. UC also demurs to the complaint ("CUSD Complaint") filed December 10, 2019 by Plaintiffs Compton Unified School District and Micah Ali in case number RG19046343, which is consolidated with this action for pretrial proceedings. (*See* Order of Feb. 7, 2020.)

For the reasons discussed below, the demurrer is **SUSTAINED WITH LEAVE TO AMEND** as to the causes of action asserted by Plaintiffs Smith, Steven C., Ali, Chinese for Affirmative Action, College Access Plan, College Seekers, Community Coalition, Dolores Huerta Foundation, and Little Manila Rising and as to both complaints' fourth and CUSC's fifth causes of action. The demurrer is otherwise **OVERRULED**.

I. LEGAL STANDARDS

The standard for construing a complaint on demurrer is long-settled: "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed. [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227.) For the Court to grant leave to amend after sustaining a demurrer, however, the plaintiff must "show a

reasonable possibility of curing the defect in the complaint by amendment." (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 994.) The plaintiff bears "the burden of proving that an amendment would cure the defect." (*Ibid.*)

II. DISCUSSION

A. STANDING TO SEEK RELIEF

California's standing requirements are not the same as the standing requirement to invoke federal jurisdiction under Article III of the U.S. Constitution. "In assessing standing, California courts are not bound by the 'case or controversy' requirement of article III of the United States Constitution, ..." (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1217.) A party may lack federal standing under Article III for want of a concrete and particularized injury yet still be a real party in interest with standing to raise claims in California's courts.

California's standing doctrine derives instead from the statutory requirement that a suit be brought in the name of a "real party in interest, except as otherwise provided by statute." (Code of Civ. Proc. ["CCP"] § 367.) That burden is met when a statute that gives the plaintiff a remedy at law or otherwise allows them to bring suit. (*See ibid.* ["The right to relief . . . goes to the existence of a cause of action . . . . Where the complaint states a cause of action in someone, but not in the plaintiff, a general demurrer for failure to state a cause of action will be sustained."], quoting *Parker v. Bowron* (1953) 40 Cal.2d 344, 351.) The purpose of the real-party-in-interest requirement is to prevent harassment of a defendant by other claimants making the same demand. (*See Redevel. Agency of S.D. v. S.D. Gas & Elec. Co.* (2004) 111 Cal.App.4th 912, 921.) Because of this, "standing" analysis in California is statute-specific and generally requires only that the plaintiff have a right to recover under the substantive law. (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000 ["Standing requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted."], quoting *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1385, 1387, 1389–1390, 1393.) "The prerequisites for

standing to assert statutorily based causes of action are determined from the statutory language, as well as the underlying legislative intent and the purpose of the statute." (*Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1125–1126, quoting *Boorstein v. CBS Interactive, Inc.* (2013) 222 Cal.App.4th 456, 466, 165 Cal.Rptr.3d 669.)

Standing under the Unruh Act (Civ. Code § 51) "is broad." (*Osborne, supra,* 1 Cal.App.5th at p.1127.) "The focus of the [Unruh Act] standing inquiry is on the plaintiff, not on the issues he or she seeks to have determined; he or she must have a special interest that is greater than the interest of the public at large and that is concrete and actual rather than conjectural or hypothetical." (*Ibid.*) A plaintiff has standing to bring suit if he or she suffered damages caused when a "person who denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6." (Civ. Code § 52(a).) Similarly, "any person aggrieved by the conduct [violating the Unruh Act] may bring a civil action" to seek preventive relief. (Civ. Code § 52(c).) A plaintiff must have a direct, non-speculative interaction with the discriminatory practice: a plaintiff is not a "person aggrieved" if he or she "only learns about the defendant's allegedly discriminatory conduct[] but has not personally experienced it . . . ." (*Osborne*, supra, 1 Cal.App.5th at p.1133.)

Standing under the California Disabled Persons Act is broader than the Unruh Act. Plaintiffs who have suffered damages or are "aggrieved or potentially aggrieved" by a violation of their right to access. (Civ. Code §§ 54.3, 55 ["Any person who is aggrieved or potentially aggrieved by a violation of Section 54 or 54.1 of this code, . . . may bring an action to enjoin the violation"].)

The Court has been unable to locate authority specifically laying out the standing requirements for an action under Government Code section 11135 or Education Code 66270. Section 11135 "may be enforced by a civil action for equitable relief, which shall be independent of any other rights and remedies." (Gov. Code § 11139.) Section 66270 "may be enforced through a civil action." (Ed. Code § 66292.4.) A plaintiff has standing to seek injunctive relief

under particular circumstances, such as when he has a right to injunction created by other substantive provisions of law, when the defendants actions threaten to produce waste or incur "great or irreparable injury" to the plaintiff, or when the defendant threatens to take some action in violation of the plaintiff's substantive rights and threatening to render a judgment ineffectual. (Civ. Code § 526(a) & subds. (1)–(3).)

To have standing to seek declaratory relief, a plaintiff must show that "an actual controversy involving justiciable questions relating to [his] rights or obligations." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582.) An "actual controversy" includes a sufficiently probable future controversy between the parties, but does not include controversies that are "conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court." (*Ibid.*)

1. STUDENT PLAINTIFFS' STANDING

The Complaint alleges that Plaintiff Kawika Smith is a 17-year old Black student at Verbum Dei High School and a community advocate and organizer active in several organizations in South Los Angeles focusing on issues of homelessness and poverty. He has experienced significant traumas, including food and housing insecurity and homelessness, violence, and the loss of a brother. Smith's access to SAT and ACT tutoring resources were limited compared to his more affluent peers. Although he took advantage of free programs through Khan Academy, Smith ultimately put off taking the SAT at the same time as his peers because he felt unprepared. Smith wants to attend the University of California at Berkeley or Los Angeles, but "has been stymied by UC's requirement that he submit test scores that fail to measure his true abilities." He nevertheless is scheduled to take the SAT in December 2019.

The Complaint alleges that Gloria D. is a 17-year-old Latinx student who is a senior at a private high school in California. Her first language is Spanish. She is a strong student who took a rigorous course load and has maintained a 4.0 weighted GPA. Outside of school, she volunteers at a hospital and dances. She has taken the SAT twice, but has experienced

difficulties with the phrasing of SAT questions, especially word problems in the math section. Gloria's family did not have the resources to afford a private tutor recommended by family friends, and instead she had to rely on books, Khan Academy programs, and time with a less expensive admissions advisor. Gloria hopes to attend UCLA and eventually attend medical school and become a doctor. Gloria has applied to three UC schools but fears she is unlikely to be granted admission to any, despite her excellent grades, because of her relatively low SAT score. UC concedes that Gloria D. has standing, and her standing is not at issue on this demurrer.

The Complaint alleges that Plaintiff Stephen C. is a 16-year-old sophomore student at a public high school. He plans to apply for admission to several UC campuses. He has a history of disabilities that affect his performance on standardized tests, and he has had an official school accommodations plan (a so-called "504 Plan"), which allows his academic accommodations such as extended time on exams, the ability to take exams in a distraction-reduced setting, and preferential in-class seating. He currently has a 4.0 GPA, takes a rigorous course load, and is a varsity athlete. He will require, and is entitled to, testing accommodations for the SAT or ACT. He has not yet taken either test. He has also suffered social stigma and been accused of "cheating" for seeking accommodations. Stephen's school district recently changed their accommodation policies for those tests. It will no longer apply for SAT and ACT accommodations for its students because of the burden that process imposed on its counseling department. Students like Stephen are less likely to receive the testing accommodations to which they are entitled. They also may not be able to select a preferred testing location or date like students who do not require accommodations.

The Complaint alleges that Plaintiff Alexandra Villegas is an 18-year old Latinx student at the Honors Transfer Program at Pasadena City College. She was raised in a family with six children. She was raised without a father and her mother died when she was 5 years old. She and her siblings had to take on significant family responsibilities, including caring for a brother with Down Syndrome. She graduated from a public high school in Los Angeles with a 3.4 GPA.

She scored a 1040 and 1050 the two times she took the SAT, which does not reflect her academic potential, given her gifts, motivation, and background. She is interested in pursuing a career in which she can work with animals. She dreamed of attending UCLA but was deterred from applying by her low test scores. Instead, she applied for admission to UC's campuses at Davis, Merced, Riverside, and Santa Cruz, of which she was most interested in attending UC Davis because of its nationally renowned College of Agricultural and Environmental Sciences. She was denied admission at Davis, Santa Cruz, and Riverside. She was offered admission at Merced, but she declined and chose instead to attend classes at Pasadena City College. She hoped that, by performing well there, she could transfer to a UC campus closer to her family or more aligned with her academic interests.

UC argues that the Complaint does not allege facts establishing that Smith has standing to assert his claims because had not yet applied for admission to UC and was "forced to focus his application efforts on East Coast colleges with test-optional policies." (Compl. ¶ 16.) Because the Complaint does not allege that he applied to UC and been rejected either because of his SAT scores or his failure to submit SAT scores, UC contends it does not state facts showing that Smith is a "person aggrieved" by UC's policy.

Plaintiffs argue that Smith was injured because he was deterred from applying altogether, analogizing him to the plaintiff in *White v. Square, Inc.* (2019) 7 Cal.5th 1019, who could not sign up for a payments processing service because the terms of use barred bankruptcy attorneys and debt collectors from using the platform. The Court held that the plaintiff in *White* had standing because the defendant's terms of use were analogous to "'persons encountering, as they did in past decades, racially segregated drinking fountains or restroom facilities at an unattended structure' — occasions 'when there was no one present to receive and answer a demand for equal treatment.'" (*Id.* at p.1028.) Plaintiff Smith has alleged standing under the "deterred applicant" test which *White* endorses. He alleges that he had a low PSAT score and a negligible chance of admission by UC as a result. (*See* Compl. ¶¶ 15–16.) Smith has accordingly alleged sufficient

facts to support a claim that taking the SAT or applying to UC would have been a "futile gesture." (*International Brotherhood of Teamsters v. U.S.* (1977) 431 U.S. 324, 366.)

UC argues that the Complaint does not allege Villegas' standing because it admits that she was admitted to UC Merced and declined the offer. The Complaint, however, also alleges that she was deterred from applying to UCLA by its high expectations for applicants' SAT scores and that her applications to UC Davis, UC Santa Cruz, and UC Riverside were denied. From an applicant's perspective, the UC campuses are not fungible—admission to, and degrees from, UCLA and UC Merced are subject to different requirements and are valued differently by graduate schools and employers. Taking the allegations of the complaint as admitted, one could reasonably infer that Villegas' SAT scores were a substantial contributing factor to the denial of her applications to UC Davis, UC Santa Cruz, and UC Riverside. Defendant argues Villegas has not alleged an intent to apply to UC again, but, as noted above, she alleges an interest in the opportunity to transfer. (*See, e.g.*, Compl. ¶ 30.) The Complaint alleges sufficient facts taken as admitted, establish that Villegas is a "person aggrieved" and has suffered a direct, non-speculative injury.

UC concedes that Stephan C has standing under the Disabled Persons Act ("DPA"). (*See* Demurrer at p. 20 n.3.) UC argues he lacks standing for his Unruh Civil Rights Act disability claims, which, according to UC, are unripe. Unlike the DPA, which allows a claim for injunctive relief to an individual who is "potentially aggrieved" (Civ. Code § 55), the Unruh Act requires that the individual suing be "aggrieved," a more demanding standing requirement. (*See* Civ. Code § 52(c).) According to the Complaint, Stephen is a high school sophomore who has not yet taken the SAT or ACT, has not applied for accommodation or been unable to register at his preferred testing location or date. The Complaint does not allege that Stephen has yet personally experienced discrimination by either the SAT and ACT test providers or UC itself, and it therefore fails to allege that he is a person aggrieved by UC's policy of requiring SAT test scores. He accordingly has not alleged sufficient facts to establish standing under the Unruh Civil Rights

Act for disability discrimination, despite alleging facts sufficient to show he is "potentially aggrieved" under the DPA.

The demurrer to the Complaint as a whole therefore is not **OVERRULED** against any of the individual plaintiffs for failure to allege standing to assert a cause of action. The Court therefore addresses the sufficiency of the Complaint's specific counts below.

2. NONPROFIT AND SCHOOL DISTRICT PLAINTIFFS' STANDING

UC argues that Plaintiffs Chinese for Affirmative Action, College Access Plan, College Seekers, Community Coalition, Dolores Huerta Foundation, Little Manila Rising, and Compton Unified School District fail to allege facts establishing standing. UC argues that the facts alleged in the Complaint do not show either that these entities directly experienced a denial of rights or that they assert claims on behalf of their membership.

One way an entity may seek to establish standing is by showing an injury or direct impact to its operations, the same as any other plaintiff. But even if an organization would otherwise lack standing based on its own operations, it might have "associational standing" to assert claims on behalf of its constituent members. (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 920, citing *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003.) "Associational standing exists when: '(a) [the association's] members would otherwise have standing to sue in their own right; (b) the interests [the association] seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" (*Id.* citing same at p.1004.)

The Complaint alleges that the organizational plaintiffs have been forced to "divert" their limited resources to combat UC's standardized testing requirements. (Compl. ¶¶ 33, 35, 37, 38, 40, 41.) Mere diversion of resources to advocacy is not sufficient to allege an entitlement to seek injunctive relief—otherwise, any entity could create its own standing by filing a lawsuit to seek injunctive relief. An organization must, at least, allege a diversion of resources that results from

the defendant's policy. Plaintiff College Access Plan, for example, alleges that it "provides free SAT test preparation courses to students who attend Pasadena's public high schools." (Compl. ¶ 35.) This is not diversion. CAP does not allege, for example, that it has done so as a result of UC's policies and that it would decrease the scope of its test-prep activities if UC's policy changed. Except for CUSD, the other organizational plaintiffs allege no similar programs or program expenditures that might be directly affected if UC's policy were to change. They therefore have not alleged direct standing, and the Court must determine whether they have alleged associational standing.

CUSD is different. The CUSD Complaint alleges that, "[b]ecause the SAT and ACT constitute a barrier to access to higher education for its students, CUSD has spent its limited funds to provide test preparation services in its schools" to the tune of hundreds of thousands of dollars a year. (CUSD Compl. ¶ 12.) CUSD does not allege that it would be able to provide fewer of these services to its students if UC did not require these tests as part of its admissions process, but this is a reasonable inference to draw from the allegations that it is a California public school district with limited resources. Taking the CUSD Complaint's allegations as admitted, CUSD has alleged direct standing to seek relief. While such claims would be insufficient under the Unruh Civil Rights Act because CUSD is not personally "aggrieved," (*Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1386 ["[T]he state Legislature has specifically conferred standing to sue under the Unruh Act upon the victims of the discriminatory practices and certain designated others"]), they are sufficient for the Government Code section 11135 and Education Code section 66270 causes of action, which do not share the statutory language or legislative history relied upon by the court in *Midpeninsula Citizens*.

UC also argues that the Complaint does not allege facts establishing the organization plaintiffs' associational standing for two reasons: first, because the Complaint does not allege that students affected by its admissions-test policies were "members" of the organizations and,

second, because the Complaint does not allege that particular students were affected by the policy. Plaintiffs argue in opposition that the organizations "have standing to seek relief for their student 'members' or constituents." (Opp. Dem. at p.23 lns.17-18.) But although the nonprofit organizations allege that they serve students, none of the nonprofit organizations alleges who constitutes its membership. Plaintiff Chinese for Affirmative Action ("CAA") is the most specific, alleging that "CAA's constituents include individuals who reside in California and pay State taxes." (Compl. ¶ 32.) None of the organizations specifically allege that students make up part of its membership. Without allegations that the organizations' members are injured by the defendant's conduct, the doctrine of associational standing does not apply.

Plaintiffs' citation to *Collins*, is not contrary. In *Collins*, the complaint alleged that "[s]ome of [a non-profit foundation's] members are parents of students or students who reside in [defendant school district's boundaries] who have been subjected or may in the future be subjected to disciplinary action." (*Collins, supra*, 41 Cal.App.5th at pp.920–921.) The Complaint makes no similar allegation here.

The demurrer to the Complaint as a whole must therefore be **SUSTAINED WITH LEAVE TO AMEND** as to Chinese for Affirmative Action, College Access Plan, College Seekers, Community Coalition, Dolores Huerta Foundation, and Little Manila Rising for failure to allege facts showing standing to assert the causes of action pleaded in the Complaint.

3. PLAINTIFF ALI'S STANDING

The CUSD Complaint alleges that Micah Ali is the president of the board of trustees for the Compton Unified School District. It alleges only that he is a national leader on education policy, the he works to ensure that CUSD meets the needs of its community and students, and that he "has witnessed" how UC's test-score requirement prevents well-qualified students from accessing public higher education. Ali does not allege that he had recently and personally been discriminated against on the basis of race or disability by UC in its admissions process.

UC demurs on the grounds that Ali has no standing to assert a cause of action. Plaintiffs argue that, as President of CUSD's board of trustees, UC's policies are "inextricably bound up" with CUSD's operations and Ali's goals for CUSD. The Complaint does not allege that Ali is personally or directly injured by UC's policy. Mere knowledge and disapproval of UC's policy is not enough to entitle Ali to bring an action under the causes of action alleged in the CUSD Complaint. The demurrer to the CUSD Complaint as a whole must therefore be **SUSTAINED WITH LEAVE TO AMEND** as to Plaintiff Ali for failure to allege facts showing standing to assert the causes of action pleaded in the Complaint.

B. FAILURE TO STATE A CLAIM: UNRUH ACT

UC argues that the Complaints fail to state a cause of action under the Unruh Act because they allege, at most, that UC's admissions policies have a disparate impact on applicants from less affluent backgrounds or racial minorities and students with disabilities, but do not allege that UC adopted those policies with the intent of accomplishing discrimination.

The Unruh Act provides that "all persons within the jurisdiction of this state are free and equal, and no matter what their . . . race, color, . . . ancestry, national origin, disability, . . . [or] primary language . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code § 51(b).) There is no cause of action under the Unruh Act for facially neutral policies that nonetheless cause a disparate impact based on a protected class, other than disability. (Civ. Code § 51(c); *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175 ["A disparate impact analysis or test does not apply to Unruh Act claims."], *recognized as superseded by statute only as to disability discrimination, Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 664; *see also, e.g., Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 837-838; *Turner v. Assn. of Am. Med. Colleges* (2008) 167 Cal.App.4th 1401, 1408 [discussing *Harris* and *Koebke* cases].) Still, evidence of a disparate racial impact "may be probative of intentional discrimination in some cases." (*Harris, supra*, 52 Cal.3d at p.1175.)

Plaintiffs argue that their allegations are sufficient to support a reasonable inference that UC acted with discriminatory intent. The Complaint alleges that, in the early 1960s, UC's academic senate committee that formulates undergraduate admission policies (referred to in the Complaint by the undefined acronym "BOARS") studied the SAT's effectiveness as a potential admissions criterion and determined that SAT scores "add little or nothing to the precision with which existing admissions requirements are predictive of success in the University" and rejected an SAT requirement by unanimous vote. (Compl. ¶ 113.) A 1963 study found that the test scores had "only marginal value in predicting academic success." (Compl. ¶ 114.) In 1979, though, UC incorporated SAT and ACT scores into an "eligibility index" that, in effect, required applicants to have a minimum score to be considered for admission. (Compl. ¶ 115.) UC's Regents approved this change over faculty warnings of "disproportionate adverse effects" on low-income and underrepresented minority students. (Compl. ¶ 115.) UC's reliance on test scores has increased over time even though study results have not shown an increase in predictive power. A 2001 study commissioned by BOARD showed that SAT I scores contribute "very little, if any, incremental power in predicting UC freshman grades" after taking into account high school GPA and subject-specific SAT II scores. (Compl. ¶ 118.) Despite recent revisions to the SAT such as a written essay requirement, the predictive power has remained low. (Compl. ¶ 121.) In 2009, however, BOARS justified the use of SAT and ACT scores, despite the negative impacts to low-income groups, the attention that test preparation takes away from students' college-preparatory coursework, and the persistent differences between racial and ethnic groups, because they provide a "uniform reference point" for comparing students from different schools. (Compl. ¶¶ 124-125.)

Taking these allegations as admitted, a reasonable factfinder might conclude UC knew that its policy choice would disproportionately impact minority and low-income applicants. But the factfinder could not reasonably infer on that basis that this impact actually motivated UC's decision—i.e., that it was a "plus" rather than a "minus" when UC weighed the benefits and

downsides of its policy requiring SAT or ACT scores. The closest plaintiffs come is their allegations that UC was aware that the tests "are largely a proxy" for race and socioeconomic status. (Compl. ¶ 4). Even that allegation, though, goes only to UC's awareness of the policy's potential impact. Awareness alone cannot support a reasonable inference of intentional discrimination without some further allegations tending to show that the discriminatory impact was a motivating factor in the defendant's decision-making process. (*Cf., e.g., Koebke, supra,* 36 Cal.4th at p.854 [allowing inference of discriminatory intent when, in addition to evidence of disparate impact of club's prohibition on allowing benefits to same-sex domestic partners in the guise of a ban on allowing "spousal" benefits to "unmarried" members before the legalization of same-sex marriage, because plaintiff same-sex couple also offered "significant evidence that [the club's] directors were motivated by animus toward plaintiffs because of their sexual orientation, including evidence of [the club's] inconsistent application of the spousal benefit policy to its unmarried, heterosexual members while, at the same time, it repeatedly rebuffed plaintiffs' efforts to modify the policy to include them."].)

An express statement of intent is not required to establish intentional discrimination. Circumstantial evidence may be sufficient to infer intent. But the complaints do not allege that discriminatory animus was a motivating factor in the adoption or continued use of the SAT or ACT. Indeed, paragraph 9 of the Complaint alleges that the Regents "have determined that the minimal additional value of SAT and ACT scores in predicting first-year GPA outweighs their harm to underrepresented minority students, students with disabilities, and students with less wealth." (*See also* Compl. ¶¶ 152–153.) That conclusion may be misguided as a matter of policy, but it is inconsistent with a finding of intentional discrimination.

UC's demurrer to the Complaint's fourth cause of action is therefore **SUSTAINED WITH LEAVE TO AMEND.**

C. CALIFORNIA DISABLED PERSONS ACT

The California Disabled Persons Act ("CDPA") (Civ. Code §§ 54 *et seq.*) provides that "[i]ndividuals with disabilities or medical conditions have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places." (Civ. Code § 54.) The focus of the CDPA is on physical access to facilities, but it has been extended by analogy to nontangible locations such as Internet sites. (*See, e.g., Turner v. Assn. of Med. Colleges* (2008) 167 Cal.App.4th 1401, 1412.)

As discussed above, Stephen C. is the only plaintiff who has established standing to assert a cause of action based on disability discrimination. UC argues Stephen C. has not sufficiently alleged he is potentially excluded by UC's policy of requiring SAT or ACT test scores. The parties disagree over whether UC can be held responsible for failures by the College Board or others to accommodate a person with a disability, but the Court need not reach that issue on demurrer because the complaints allege that individuals with disabilities, with or without accommodation, on average score worse on these tests than individuals without disabilities. (*See, e.g.*, Compl. ¶ 177.) UC also suggests that Steven C. has not sufficiently alleged he is otherwise qualified, which it clarified at oral argument to mean that he has not alleged that, as a non-senior, he was at least "on track" to meet UC admissions requirements. UC ignores the Complaint's allegations that Steven C. maintains a 4.0 grade average and a rigorous course load, which admit the quite reasonable inference that he is "on track." (Compl. ¶ 22.) Because the Complaint alleges that UC's policy of requiring SAT or ACT scores may deny Steven "full and free use" of its programs at the same degree afforded the "general public," Steven C. has sufficiently alleged a DPA claim.

UC's demurrer to the Complaint's fifth cause of action is accordingly **OVERRULED** for Plaintiff Stephen C.

D. GOVERNMENT ANTIDISCRIMINATION STATUTES

California law prohibits any state agency (or any program or activity receiving financial support from the state) from denying any person "full and equal access to the benefits of, or" subjecting any person "to discrimination under, any program or activity" funded by the state "on the basis of . . . race, color, . . . ancestry, national origin, ethnic group identification, . . . mental disability, physical disability, [or] medical condition . . . ." (Gov. Code § 11135(a).) The law similarly prohibits subjecting a person to discrimination on those same bases "in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid." (Educ. Code § 66270 [including more prohibited bases for discrimination than Gov. Code § 11135, which are not relevant here].) In this context, the Court construes the two statutes' substantive coverage as coextensive.

UC argues that the Complaint fails to state a cause of action under these statutes because they do not allege intentional discrimination. UC premises this argument on analogy to the Unruh Act. Unlike the Unruh Act, however, Section 11135 allows a private cause of action based on a policy's disparate impact on a protected class. (*See* Cal. Code Regs., tit. 2, § 11154(j)(1)–(2); *see also, e.g.*, *Darensburg v. Metropolitan Transp. Com'n* (N.D. Cal. 2009) 611 F.Supp.2d 994, 1042 ["[A] prima facie case of disparate impact discrimination under section 11135 requires a plaintiff to show: (1) the occurrence of certain outwardly neutral practices; and (2) a significantly adverse or disproportionate impact on minorities produced by the defendant's facially neutral acts or practices."], *aff'd* (9th Cir. 2011) 636 F.3d 511.)

The demurrer to the Complaint and CUSD Complaint's second and third causes of action is **OVERRULED**.

III. ORDER

UC's demurrer is **SUSTAINED WITH LEAVE TO AMEND** as to all causes of action asserted in the Complaint by Plaintiffs Chinese for Affirmative Action, College Access Plan,

College Seekers, Community Coalition, Dolores Huerta Foundation, and Little Manila Rising. UC's demurrer is **SUSTAINED WITH LEAVE TO AMEND** as to all causes of action asserted in the CUSD Complaint by Plaintiff Ali. Additionally, UC's demurrer is **SUSTAINED WITH LEAVE TO AMEND** as to the Complaint's fourth cause of action and CUSD Complaint's fourth and fifth causes of action.

The demurrer is otherwise **OVERRULED**.

An amended complaint that cures the above defects may be filed no later than 10 court days after notice of this ruling. In making this amendment, Plaintiffs may not allege any new causes of action. (*See Patrick v. Alacer Corp.* (2008) 167 Cal. App. 4th 995, 1015.) This order does not preclude Plaintiffs from later filing a noticed motion to amend the pleadings to assert additional meritorious causes of action. If Plaintiffs opt to amend, they should do so with a single consolidated complaint.

Should Plaintiffs opt not to amend their Complaint, UC shall file its answer within 10 court days of Plaintiffs' deadline for amendment.

Dated: May 15, 2020

Brad Seligman
Judge of the Superior Court