NO. A165051

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

PITTSBURG UNIFIED SCHOOL DISTIRCT,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA

Respondent.

MARK S., by and through his guardian ad litem, ANNA S.; ROSA T., by and through her guardian ad litem SOFIA L.; JESSICA BLACK; MICHELL REDFOOT; DR. NEFERTARI ROYSTON,

Real Parties in Interest

SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA – CASE NO. MSN211755
HON. REBECCA C. HARDIE, PRESIDING JUDGE
EDWARD WEIL, JUDGE – TELEPHONE NUMBER (925) 608-1139

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF AND REQUEST FOR IMMEDIATE STAY

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CERTIFICATE OF INTEREST

APP-008

COURT OF APPEAL FIRST **APPELLATE DISTRICT, DIVISION** THREE	COURT OF APPEAL CASE NUMBER: No. A165051
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 307522 NAME: Amanda Schwartz FIRM NAME: Steptoe & Johnson, LLP STREET ADDRESS: One Market Plaza, Spear Tower, Suite 3900 CITY: San Francisco STATE: CA ZIP CODE: 94105 TELEPHONE NO.: 415-365-6745 FAX NO.: E-MAIL ADDRESS: aschwartz@steptoe.com ATTORNEY FOR (*name*): Mark S., et al.	SUPERIOR COURT CASE NUMBER: MSN211755
APPELLANT/ PETITIONER: Pittsburg Unified School District RESPONDENT/ REAL PARTY IN INTEREST: Superior Court of the State of California for the County of Contra Costa Mark S., et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party *(name)*: Mark S., by and through his guardian ad litem Anna S.; Rosa T., by and through her guardian ad litem Sofia L.; Jessica Black; Michell Redfoot; Dr. Nefertari Royston

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [x] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	Mark S., by and through his guardian ad litem Anna S.	Real Party in Interest/Plaintiff
(2)	Rosa T., by and through her guardian ad litem Sofia L.	Real Party in Interest/Plaintiff
(3)	Jessica Black	Real Party in Interest/Plaintiff
(4)	Michell Redfoot	Real Party in Interest/Plaintiff
(5)	Dr. Nefertari Royston	Real Party in Interest/Plaintiff

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 6, 2022

Amanda Schwartz
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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NO. A165051

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

PITTSBURG UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA

Respondent.

MARK S., by and through his guardian ad litem, ANNA S.; ROSA T., by and through her guardian ad litem SOFIA L.; JESSICA BLACK; MICHELL REDFOOT; DR. NEFERTARI ROYSTON,

Real Parties in Interest

SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA – CASE NO. MSN211755
HON. REBECCA C. HARDIE, PRESIDING JUDGE
EDWARD WEIL, JUDGE – TELEPHONE NUMBER (925) 608-1139

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE OR PROHIBITION AND REQUEST FOR IMMEDIATE STAY

INTRODUCTION

Background

Real Parties in Interest ("RPIs") brought a California Constitutional challenge and several California statutory challenges against the Pittsburg Unified School District ("Petitioner"), and the California Department of Education, California State Board of Education, and State Superintendent of Public Instruction Tony Thurmond ("State Petitioners") based on allegations that Petitioner 1) overidentifies Black and English learner

students as having disabilities, including more severe disabilities; 2) disproportionately segregates Black and English learner students into inferior separate classrooms; 3) fails to provide evidence-based instruction tied to California's statewide academic content standards, as a matter of District policy, to disabled students in general and special education classrooms; and 4) disproportionately disciplines and segregates Black, Multiracial, and Native American students with and without disabilities.

This writ petition arises from an unusual procedural posture. Although writ review is almost always denied unless such review could result in a final disposition, Petitioner seeks writ review over only parts of RPIs' lawsuit, the rest of which will proceed to trial in the trial court regardless of this Court's ruling.

Absence of threshold requirements for writ review

Appellate review is inappropriate at this stage of the litigation and the writ petition should be summarily denied for any one of multiple reasons.

First, Petitioner will have an adequate remedy in the normal course of litigation as this case proceeds through discovery and pretrial motions, including summary judgment, toward an appealable judgment or order.

Second, there is no threat of irreparable harm absent writ relief because the trial court's ruling does not require Petitioner to perform any act, refrain from performing any act, or incur any costs. In fact, notwithstanding the ruling on the demurrer, Petitioner is free to conduct business as usual, continuing its persistent and systematic deprivation of students' fundamental right to education.

Third, even if this writ petition were to succeed on the merits—which would be counter to precedent—the case would still be far from over, making this interlocutory appeal a waste of judicial resources. Significant further proceedings will be necessary. Petitioner did not demur

to RPIs' Equal Protection claim, and as explained in RPIs' preliminary opposition to State Petitioners' petition for writ review, State Petitioners only partially demurred to RPIs' Equal Protection claim. This claim will therefore proceed in the trial court notwithstanding this Court's ruling on this petition. Any ruling on the administrative exhaustion issues will also fail to lead to final disposition because RPIs' race discrimination claims are unaffected by exhaustion and RPIs are entitled to proceed through discovery and to trial or summary judgment based on their alternative theories of exhaustion.

Fourth, effective appellate review of all issues will be facilitated by a more complete factual record. By arguing that an alleged statewide practice cannot serve as a statewide standard for Equal Protection purposes and that Petitioner has not engaged in systemic violations, Petitioner seeks writ review over central factual questions without the benefit of discovery.

Fifth, even if the petition presented novel *legal* issues, which RPIs argue it does not, Petitioner seeks writ review over a constitutional issue that can and should be avoided at this time, pursuant to the rule of constitutional avoidance which states that the adjudication of constitutional issues will be avoided until absolutely necessary.

Sixth, the trial court's order rests on reasonable interpretations of decades of established caselaw and therefore does not constitute clear error nor does the order substantially prejudice Petitioner.

PROCEDURAL HISTORY

A. The legal landscape

The California Constitution recognizes education as a "fundamental right," perhaps the most vital of all fundamental rights, to be obstructed *only* upon a showing that there is a compelling interest for doing so. (*Butt v. California* (1992) 4 Cal.4th 668, 692-93 [15 Cal.Rptr.2d 480, 842 P.2d 1240].) The State of California, California Department of Education, State

Board of Education, and State Superintendent of Public Instruction bear the "ultimate authority and responsibility to ensure that their district-based system of common schools provides basic equality of educational opportunity" and intervene in school districts to correct interdistrict disparities. (*Id.* at 685-87.) Petitioner, as an agency of the State, also has a duty to provide basic educational equity to all children enrolled in its schools. (See *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1473 n.14 [47 Cal.Rptr.3d 147].)

A plaintiff may plead an Equal Protection claim for violation of the fundamental right to education under two well-recognized theories. First, the California Supreme Court has held that a plaintiff can state an Equal Protection claim by showing that "the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards." (*Butt v. California*, *supra*, 4 Cal. 4th at 686-87.) "[A] finding of constitutional disparity depends on the individual facts." (*Id.*)

Second, under the California Constitution's Equal Protection Clause, classifications based on protected categories such as race, ethnicity, national origin and wealth trigger strict scrutiny. (Cal. Const. art. I, §7(a), art. IV, § 16(a); *In re Marriage Cases* (2008) 43 Cal.4th 757, 784 [76 Cal.Rptr.3d 683, 183 P.3d 384]; *Serrano v. Priest* (1976) 18 Cal.3d 728, 766 n.45 [135 Cal.Rptr. 345, 557 P.2d 929] [*Serrano II*], suppl. opp. at (1977) 20 Cal.3d 25 [141 Cal.Rptr. 315, 569 P.2d 1303].) Where students' fundamental interest in basic educational equity is also at issue, heightened scrutiny of state action applies where there is a disparate impact between at least two categories of students based on a suspect classification. (*Serrano II*, *supra*, 13 Cal.3d at 766 [holding strict scrutiny applies to state public school financing system in light of students' fundamental interest in education where "educational opportunity on the basis of district wealth

involves a suspect classification"]; *Butt v. California*, *supra*, 4 Cal.4th at 681 [holding that the State is required to take steps to correct disparities between districts "even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents"]; (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896-97 [258 Cal.Rptr.3d 830] [holding that "a claim is [also] stated when a policy adopted in California has a substantial disparate impact on the minority children of its schools, causing de facto segregation of the schools and an appreciable impact to the district's educational quality, and no action is taken to correct that policy when its impacts are identified."].)

California Education Code Section 56000 ("Section 56000") fulfills disabled students' fundamental right to a basic education and establishes the prevailing constitutional statewide standard for these students. Section 56000, which incorporates the federal Individuals with Disabilities Education Act ("IDEA"), guarantees disabled students a Free Appropriate Public Education ("FAPE"), including "specialized education calculated to achieve advancement from grade to grade." (*Endrew F. ex. rel. Joseph F. v. Douglas County School Dist. RE-1* (2017) 137 S.Ct. 988, 1000 [197 L.Ed.2d 335].) Section 56000 identifies two distinct administrative methods to address disputes about a disabled student's education needs. Parents may request a due process hearing at the Office of Administrative Hearings. (Educ. Code, § 56501, *et seq.*; Educ. Code, § 56505(h).) Alternatively, parents may file a complaint directly with California Department of Education through a Complaint Resolution Process ("CRP") complaint—"an administrative mechanism for ensuring state and local compliance with . . . IDEA." (*Christopher S. v. Stanislaus County Officer* (9th Cir. 2004) 384 F.3d 1205, 1210.) Any claim whose gravamen "seeks relief for the denial of a free appropriate public education" is subject to the

IDEA's exhaustion requirements. (*Fry v. Napoleon Community Schools* (2017) 137 S.Ct. 743, 754 [197 L.Ed.2d 46].)

B. The complaint and demurrer

On September 13, 2021, RPIs filed their Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("Complaint"). RPIs include two student plaintiffs through their guardians ad litem and three taxpayer plaintiffs. The Complaint brought a California Constitutional challenge and several California statutory challenges against Petitioner, based on Petitioner's persistent and systematic failure to fulfill its duty of ensuring equal educational opportunity to its students. RPIs asserted six causes of action against Petitioner: (1) the First Cause of Action for denial of equal protection under Art. I, § 7(a) and Art. IV, § 16(a) of the California Constitution; (2) the Third Cause of Action for violation of California Education Code § 56000 *et seq.*; (3) the Fourth Cause of Action for unlawful segregation under California Government Code section 11135; (4) the Fifth Cause of Action for violation of the Unruh Civil Rights Act; (5) the Sixth Cause of Action for declaratory relief; (6) the Seventh Cause of Action for illegal expenditure of taxpayer funds under California Code of Civil Procedure section 526a; and (7) the Eighth Cause of Action for a writ of mandate under California Civil Procedure Code section 1085. (Appendix of Exhibits ("App."), App., Exh. B, pp. 48-61, ¶¶ 105-159.).

RPIs' First Cause of Action is central to this petition. This cause of action includes an Equal Protection claim based on the two theories of the violation of the fundamental right to education described above. First, RPIs alleged that disabled students at Pittsburg Unified School District receive an education that falls fundamentally below prevailing statewide standards and that Petitioner failed to remedy this violation. RPIs identified two sets of prevailing statewide standards: that disabled students 1) have an

opportunity to meet the state academic content standards; and 2) receive a Free Appropriate Public Education. (App., Exh. B, pp. 48, ¶¶106.) Second, RPIs' Equal Protection claim also alleged that Pittsburg Unified School District disproportionately disciplines and segregates disabled *and* non-disabled students based on race and that Petitioner failed to remedy these violations. (App., Exh. B, pp. 34-37, 48-49 ¶¶ 73,75-78, 105-11.) Thus, RPIs brought an Equal Protection claim arising from Petitioner's disproportionate discipline and segregation of non-disabled students of color which does not seek relief for denial of a FAPE, is not subject to IDEA exhaustion requirements, and is unaffected by the issues raised by this petition.

On January 11, 2022, Petitioner filed a demurrer based on multiple grounds, including that the gravamen of RPIs' Equal Protection claim based on a FAPE as a statewide standard sought relief for denial of a FAPE, and therefore RPIs failed to exhaust administrative remedies under the IDEA. (App., Exh. C, pp. 15-25.) That same day, State Petitioners filed their demurrer on multiple grounds, including that 1) RPIs failed to state an Equal Protection claim because a FAPE cannot serve as a statewide standard; 2) The gravamen of this claim sought relief for a denial of a FAPE and RPIs failed to exhaust administrative remedies under the IDEA; 3) RPIs failed to state an Equal Protection claim for disproportionate discipline and segregation of disabled and non-disabled students based on race; and 4) The taxpayer plaintiffs who brought this race discrimination claim failed to exhaust their administrative remedies under the Uniform Complaint Procedure. (App. of State Petitioners, Case No. A165070, Vol. I, Exh. 2, Exh. 3, pp. 8-23.) Petitioner did not demur as to grounds 1, 3, or 4.

On March 9, 2022, the trial court overruled in part and sustained in part Petitioner and State Petitioners' demurrers. (App., Exh. A.) The court

held that RPIs could proceed on both Equal Protection theories. First, the court held that a FAPE could serve as a statewide standard and noted that although RPIs alleged two separate statewide standards, State Petitioners "focused on FAPE as the statewide standard" for its demurrer and "therefore the [trial] Court has not addressed other potential statewide standards." (App., Exh. A, pp. 20:2-21:5.) Second, the trial court held that RPIs stated an Equal Protection claim "where Black, Native American, multiracial, and disabled students, and students at the intersection of those identities, are targeted for harassment and discriminatory discipline." (*Id.* at pp. 19-20 [citing Petition ¶ 109].)

The trial court also held that RPIs successfully exhausted their administrative remedies for both Equal Protection theories. First, it held that RPIs were required to exhaust administrative remedies under the IDEA for their Equal Protection claim based on a FAPE as a statewide standard. (App., Exh. A, pp. 6:9-14.) The court held that RPIs successfully did so by filing a CRP complaint because they challenged policies and generally applicable, systemic practices. (App., Exh. A, p. 9:8-22.)

Second, the trial court held that the California Court of Appeal's holding in *Collins v. Thurmond* required the taxpayer plaintiffs to exhaust their Equal Protection claim based on race discrimination under the Uniform Complaint Procedures. (App., Exh. A, p. 17:8-17.) The court did not hold that this claim sought relief for denial of a FAPE or was subject to the IDEA's exhaustion requirements. The court took judicial notice of documents showing that taxpayer plaintiffs successfully exhausted these administrative remedies and granted them leave to amend to plead exhaustion. (App., Exh. A, p. 18:3-7.)

The trial court also sustained Petitioner's demurrer without leave to amend as to the following claims: 1) California Government Code section 11135; and 2) Unruh Civil Rights Act. (App., Exh. A, p. 4, 21-22.)

Petitioner filed its writ petition in this Court on April 26, 2022. The writ seeks review of only the following select issues: 1) Whether RPIs exhausted their administrative remedies under the IDEA for their FAPE-based claims using a CRP complaint; 2) Whether RPIs completed their CRP administrative remedies; 3) Whether RPIs alleged systemic violations; and 4) Whether a FAPE can serve as a statewide standard for Equal Protection purposes. Petitioner also misrepresents the trial court's order and seeks review of an issue upon which the court did not rule—whether complaints under the Uniform Complaint Procedures can serve as exhaustion under the IDEA. (Compare Petition at 28 with App., Exh. A, p. 17:12-17 [discussing taxpayer plaintiffs' completion of the Uniform Complaint Procedures only as it relates to their race discrimination claims].)

This petition does not seek review of the following issues that will proceed to trial: 1) Whether the opportunity to meet the state academic content standards can serve as a statewide standard for Equal Protection purposes; 2) Whether RPIs are excused from exhausting IDEA administrative remedies for their FAPE-based claims under three exceptions to exhaustion; 3) Whether RPIs stated an Equal Protection claim based on disproportionate discipline and segregation of non-disabled students based on race; and 4) Whether RPIs exhausted this race discrimination claim under the Uniform Complaint Procedures.

LEGAL DISCUSSION

I. THIS WRIT PETITION SHOULD BE SUMMARILY DENIED BECAUSE THE PETITIONER HAS AN ADEQUATE REMEDY AT LAW AND FACES NO THREAT OF IRREPARABLE HARM.

As a prerequisite to appellate review on a petition for writ of mandate, the petitioner must demonstrate two threshold requirements.

First, the petitioner must show there is no "adequate remedy, in the ordinary course of law." (Civ. Proc. Code, § 1086.) Second, the petitioner must demonstrate a threat of irreparable harm if the writ is not granted. (*Los Angeles Gay & Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 300 [125 Cal.Rptr.3d 169].) While the court may secondarily consider whether the trial court's ruling was clearly erroneous or the petition presents issues of widespread interest after establishing these threshold issues, see *Smith v. Superior Court* (1996) 41 Cal.App.4th 1014, 1020 [49 Cal.Rptr.2d 20], writ review should be summarily denied if either of the two threshold requirements is absent. Here, the petition lacks both threshold requirements *and* the additional factors.

Precedent militates against immediate writ review. "[P]erhaps the most fundamental reason for denying writ relief is [when] the case is still with the trial court and there is a good likelihood purported error will be either mooted or cured by the time of judgment." (*Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App. 4th1095, 1100 [46 Cal.Rptr.2d 332] ["*Science Applications*"].) "[S]ome issues may diminish in importance as a case proceeds towards trial. Petitioners seeking extraordinary writs do not always consider that a purported error of a trial judge may (1) be cured prior to trial, (2) have little or no effect upon the outcome of trial, or (3) be properly considered on appeal." (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273 [258 Cal.Rptr. 66] ["*Omaha Indemnity*"].)

Petitioners seem to think that, to obtain writ review, they only need persuade this Court that the case raises issues of first impression that are of general importance to students, parents, LEAs, and taxpayers. (Pittsburg Unified School District Petition for Writ of Mandate or Prohibition [hereinafter "Petition"] at 15. If that were the governing standard, writ review would proliferate. But the existence of an issue of first impression

does not trump the long-settled California statutory and common law of writ review, which requires the threshold showing of the absence of an adequate remedy at law and a threat of irreparable harm. A trial court's ruling on a purported issue of first impression cannot serve as a substitute for the requisite threshold showing—which is wholly absent in this writ petition.

Moreover, Petitioners have failed to demonstrate any "conflicting trial court interpretations of the laws at issue that require resolution of the conflict." (*Omaha Indem.*, *supra*, 209 Cal.App.3d at 1273.) Petitioner raises exhaustion issues that are governed by decades-long federal *and* state caselaw, which the trial court followed carefully in reaching its decision. (App., Exh. A., 13:3-14:20.) Similarly, as to RPIs' Equal Protection claim, the California Supreme Court and various Courts of Appeal have long established the legal threshold to state a claim. Any differences of opinion that remain stem from factual disputes that have yet to garner a ruling by the trial court. And no court has made a ruling contrary to that of the trial court.

A. Petitioner will have an adequate remedy at law in the trial court or this Court.

Most fundamentally, this writ petition should be summarily denied because Petitioner will have an adequate remedy in the normal course of litigation as the case proceeds through discovery and pretrial motions toward an appealable judgment or order. Petitioner fails to explain why it believes it lacks an adequate remedy at law. Indeed, it will have an adequate remedy because the exhaustion and Equal Protection issues raised by Petitioner turn on key questions of fact and any error would be "cured by the time of judgment." (*Science Applications*, *supra*, 39 Cal.App.4th at 1100.)

Writ review of an overruled demurrer is almost always denied unless such review could result in a final disposition. (Petition at 15.) For example, where the trial court improperly overrules a demurrer to *all* causes of action, appellate courts may issue a writ of mandate directing that the demurrer be sustained so that the parties will not be compelled to go through a needless trial. (E.g., *Fair Employment & Housing Comm'n v. Superior Court*(2004) 115 Cal.App.4th 629, 633[9 Cal.Rptr.3d 409] [granting writ review of overruled demurrer based on timeliness of filing where reversal would lead to final disposition]; *Coachella Valley Water Dist. v. Superior Ct. of Riverside Cty*. (2021) 61 Cal.App.5th 755, 766 [276 Cal.Rptr.3d 61], reh'g denied (Apr. 1, 2021), review denied (June 23, 2021) [granting writ review because of "purely legal error" regarding timeliness of plaintiff's underlying challenge where reversal would lead to final disposition]; *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851 [92 Cal.Rptr. 179, 479 P.2d 379] [granting writ review where trial court overruled demurrer despite having legal duty to sustain petitioners' demurrer based on "basic statutory limitation on the availability of [relief sought]" where reversal would lead to final disposition]; *Boy Scouts of America National Foundation v. Superior Court* (2012) 206 Cal.App.4th 428, 438 [141 Cal.Rptr.3d 819] [granting writ review of overruled demurrer to single remaining cause of action, reviewing whether cause of action was time-barred, which would result in final disposition as to the petitioner]; *City of Huntington Park v. Superior Court* (1995) 34 Cal.App.4th 1293, 1297 [41 Cal.Rptr.2d 68] [granting writ review of overruled demurrer related to purely legal question of the application of a tolling statute that had not been addressed by a California court]; *Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182 [123 Cal.Rptr.2d 637] [granting writ review where petition following overruled demurrer raises first-impression issue and resolution may result in final disposition as to petitioner].)

Indeed, the cases upon which Petitioner relies also limited writ review to these narrow circumstances. (Petition at 14 [citing *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738 [68 Cal.Rptr.3d 295, 171 P.3d 20] [granting writ review of overruling of demurrer where reversal based on plaintiff's failure to present a timely claim would bar suit against defendant]; *Audio Visual Services Group, Inc. v. Superior Court* (2015) 233 Cal.App. 4th 481, 488 [182 Cal.Rptr.3d 748] [granting writ review where resolution of the issue in favor of the petitioner would result in final disposition of the action].)

Here, writ review should be denied because review could not lead to final disposition as to Petitioner. Petitioner seeks review of the trial court's order overruling in part and sustaining in part Petitioner's demurrer with leave to amend. Specifically, the writ seeks review of the only the following select issues: 1) Whether RPIs exhausted their administrative remedies under the IDEA for their *FAPE-based claims* using a CRP complaint; 2) Whether RPIs completed their CRP administrative remedies; 3) Whether RPIs alleged systemic violations; and 4) Whether a FAPE can serve as a statewide standard for Equal Protection purposes. Petitioner also misrepresents the trial court's order and seeks review of an issue upon which the court did not rule—whether complaints under the Uniform Complaint Procedures can serve as exhaustion under the IDEA. (Compare Petition at 28 with App., Exh. A, p. 17:12-17 [discussing taxpayer plaintiffs' completion of the Uniform Complaint Procedures only as it relates to their race discrimination claims].)

The petition does not seek review of the following issues that will proceed to trial: 1) Whether the opportunity to meet the state academic content standards can serve as a statewide standard for Equal Protection purposes; 2) Whether RPIs are excused from exhausting IDEA administrative remedies for their FAPE-based claims under three

exceptions to exhaustion; 3) Whether RPIs stated an Equal Protection claim based on disproportionate discipline and segregation of non-disabled students based on race; and 4) Whether RPIs exhausted this race discrimination claim under the Uniform Complaint Procedures. As explained below, even a writ reversing the trial court's ruling on each appealed issue would not lead to final disposition of this case because RPIs will proceed on causes of action not demurred.

First, a mandamus order requiring the trial court to overrule its decision on IDEA exhaustion issues would not lead to final disposition of this cause of action, much less the entire case. RPIs brought an Equal Protection claim based on disproportionate discipline and segregation of non-disabled students based on race. This claim is not subject to the IDEA's exhaustion requirements and therefore would not be affected by this Court's ruling on the IDEA exhaustion issues. (See App., Exh. B, pp. 35-39, 49, ¶¶ 75, 77-78, 81, 110 [alleging that Petitioner disproportionately disciplines and segregates students based solely on race]; App., Exh. C, p. 12:11-23 [Petitioner's demurrer arguing that RPIs' first cause of action for violation of equal protection is subject to the IDEA's exhaustion requirements only insofar as it raises a claim for violation of a FAPE]; App., Exh. A, p. 19:11-19 [stating that RPIs alleged that students within the school district are being subjected to racially discriminatory disciplinary proceedings]; *id*. at 17:12-17 [holding that taxpayer plaintiffs' race discrimination claims are subject to a separate administrative exhaustion process (the Uniform Complaint Procedures) that they exhausted].)

RPIs have also raised four separate bases for exhaustion or excusal of exhaustion of FAPE-based claims subject to the IDEA's exhaustion requirement: 1) that RPIs have exhausted their administrative remedies via a CRP complaint; 2) that administrative remedies are inadequate because Petitioner and State Petitioners have engaged in systemic violations; 3) that

further pursuit of administrative remedies would prove futile; and 4) that Petitioner and State Petitioners have enacted policies and generally applicable practices that are contrary to law. (App., Exh. D, p. 16-29.) While the trial court made a ruling as to the first theory of exhaustion, RPIs are entitled to and are currently pursuing discovery as to all four. Discovery does not depend on the state of the pleadings, *Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1436 [273 Cal.Rptr. 262], and may continue even after a demurrer has been sustained with leave to amend, *Budget Finance Plan v. Superior Court)* (1973) 34 Cal.App.3d 794, 797 [110 Cal.Rptr. 302].

Moreover, because the issue of whether exhaustion is excused raises issues of fact, its resolution necessarily requires RPIs to proceed with discovery and trial. (*Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 692 [67 Cal.Rptr.2d 323] [futility exception to exhaustion requirement "may be an issue of fact in some cases"].) In this case, RPIs pleaded exhaustion and excusal of exhaustion in great detail. (App., Exh. A, p. 9:10-12 [noting that the Complaint "alleges that the District's treatment of students with disabilities is a systemic problem"].) As a result, any issues concerning excusal from exhaustion are "essentially factual in nature," *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 215 [130 Cal.Rptr.2d 564], including whether the Petitioners have engaged in systemic violations, whether further resort to administrative remedies would prove futile, whether the violations stem from policies and practices contrary to law, and whether the same body that considers CRP complaints also handles reconsideration requests. (See App., Exh. A, p. 12:19-25 [stating that issue of fact existed as to whether RPI Rosa T.'s administrative complaint raised systemic issues]; *id.* at 14:7-19 [stating that RPIs raised issue of fact as to whether taxpayer plaintiffs Michell Redfoot and Dr.

Nefertari Royston would have received the same result on subsequent CRP administrative complaints alleging systemic violations as taxpayer Jessica Black]; *id.* at 11:7-20 [noting that whether RPIs were required to seek reconsideration presented issue of fact].) The appellate court's ruling on exhaustion will not affect RPIs' ability to proceed on their race discrimination claim or conduct discovery on their FAPE claims. Petitioner will have an adequate remedy in the trial court after discovery is completed or following a final judgment, at which time an appeal will be available and could more appropriately target fully-briefed and factually-supported arguments.

Second, a mandamus order reversing the trial court's decision on whether a FAPE can serve as a statewide standard would not lead to final disposition of RPIs' Equal Protection claim, much less the entire case. As noted by the trial court, RPIs' first cause of action for violation of Equal Protection based on the fundamental right to education alleged two separate statewide standards, but Petitioners "focused on FAPE as the statewide standard" for their demurrer and "therefore the [trial] Court has not addressed other potential statewide standards." (See App., Exh. A, p. 21:1-5.) RPIs' first cause of action also included an Equal Protection claim based on disproportionate discipline and segregation of non-disabled students based on race. RPIs will therefore be able proceed on this cause of action (on top of the remaining causes of action), regardless of this Court's ruling on the issue raised by Petitioners. Moreover, the issue of whether a FAPE is a statewide standard is an issue of fact that requires RPIs to demonstrate the "prevailing" level of educational resources provided by school districts throughout the State of California. (*Butt v. California*, *supra*, 4 Cal. 4th at 686 ["A finding of constitutional disparity depends on the individual facts."].) Its resolution necessarily requires Plaintiffs to proceed with discovery and trial or summary judgment proceedings.

Petitioner will have an adequate remedy in the trial court once appropriate discovery is completed or after final judgment.

B. There is no threat of irreparable harm because the trial court has not yet ordered Petitioner to do or refrain from doing anything.

"Conditions prerequisite to the issuance of a writ are a showing there is no adequate remedy at law . . . and the petitioner will suffer an irreparable injury if the writ is not granted." (*Los AngelesGay & Lesbian Ctr. v. Super. Ct.*, *supra*,194 Cal.App.4th 288, 299-300.) Petitioner does not allege that it faces irreparable injury, nor could it. The trial court's interim order overruling in part Petitioner's demurrer does not require Petitioner to do or refrain from doing anything. Though the interim order may have persuasive effect, it does not have binding effect on any future case. Petitioner and all other school districts in the state can, and likely will, continue to conduct their education systems as usual; any speculative fear that students will use a non-precedential interlocutory order involving systemic claims to avoid exhausting their individual administrative remedies does not constitute actual harm. (Petition at 15.) Petitioner's contention that the trial court's order leaves "considerable uncertainty in the field of special education jurisprudence" is therefore unsupported. (Petition at 16.)

Petitioner similarly complains that it would face "significant prejudice" if it does not receive a stay because it will "suffer defending itself in unnecessary litigation." (Petition at 18.) But the potential inconvenience of litigation does not qualify as "irreparable harm" sufficient to justify writ relief. "A remedy will not be deemed inadequate merely because additional time and effort would be consumed by its being pursued through the ordinary course of the law." (*Omaha Indemnity*, *supra*, 209 Cal.App.3d at 1269; *accord, Baeza v. Super. Ct.* (2011) 201 Cal.App.4th

1214, 1221 [135 Cal.Rptr.3d 557].) Moreover, RPIs will be able to continue to litigate their unchallenged equal protection theory and pursue discovery on the exhaustion issues, so writ review would not avoid judicial or Petitioner's expense and should be denied. What Petitioner complains of "would constitute, at best, an 'irreparable inconvenience'" to itself. (*Omaha Indemnity*, *supra*, 209 Cal.App.3d at 1274.)

II. THIS WRIT PETITION SHOULD BE DENIED BECAUSE IT IS WASTEFUL, PREMATURE, AND PRESENTS NO JUSTIFICATION FOR EXTRAORDINARY REVIEW.

A. Writ review would result in piecemeal appellate litigation.

An interlocutory appeal would result in piecemeal appellate litigation, with half of some causes of action continuing to final judgment and others being decided now. This would be inconsistent with the reason for the one final judgment rule, a bedrock of judicial economy in appellate review, "that piecemeal appeals are oppressive and costly, and that optimal appellate review is achieved by allowing appeals only after the entire action is resolved in the trial court." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645 [4 Cal.Rptr.2d 689].) "The rule was designed to prevent piecemeal dispositions and costly multiple appeals which burden the court and impede the judicial process." (*Doran v. Magan* (1999) 76 Cal.App.4th 1287, 1293 [91 Cal.Rptr.2d 60].)

B. Effective appellate review requires a more complete factual record.

Another primary reason pretrial writ review is disfavored is that the appellate court may be hobbled by an incomplete factual record. "When review takes place by way of appeal, the court has a more complete record, more time for deliberation and, therefore, more insight into the significance of the issues." (*Omaha Indemnity*, *supra* 209 Cal.App.3d at 1273.)

A full evidentiary record, whether on summary judgment or at trial, will provide this Court with the necessary factual context for deciding the issues in this case on appeal from a final judgment, providing "more insight" for resolving those issues. (*Omaha Indemnity*, *supra*, 209 Cal.App.3d at 1273.) Issues of fact presented in the Petition that are improper for resolution at the demurrer stage, include, but are not limited to, 1) whether Petitioner and State Petitioners have engaged in systemic violations; 2) whether Petitioner and State Petitioners enacted policies and generally applicable practices contrary to law; 3) whether further resort to administrative remedies would prove futile; and 4) whether a FAPE can serve a statewide standard;

C. Petitioner has failed to raise a novel issue of first impression.

Petitioner claims it raises "significant and novel questions of widespread interest." (Petition at 34.) But the existence of novel issues absent a showing of an inadequate remedy at law or irreparable harm cannot serve as a basis for writ review. (See *Los Angeles Gay & Lesbian Center v. Superior Court, supra*, 194 Cal.App.4th at 300.) Further, the questions raised by Petitioners are not novel.

Even if an issue of first impression in and of itself was sufficient to seek writ review, which it is not, the issues presented do not rise to the status of "novel." (See *Omaha Indemnity***,** *supra*, 209 Cal.App.3d at 1273; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816 [210 Cal.Rptr. 211, 693 P.2d 796] [granting writ review where the Courts of Appeal were in conflict and the trial court's ruling "effectively deprived petitioner of the opportunity to present a substantial portion of his cause of action."].) The exhaustion issues raised by Petitioner are governed by decades-long federal *and* state caselaw, which the trial court followed carefully in reaching its decision. (App., Exh. A, p. 7-14 [citing *Hoeft v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298; *Christopher S. v. Stanislaus County*

Officer, *supra*, 384 F.3d 1205; *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489 [87 Cal.Rptr.2d 702, 981 P.2d 543]; *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298 [104 Cal.Rptr.3d 195, 223 P.3d 57]].) The trial court here found that "many of the issues raised in [] [RPIs'] Petition involve alleged systemic problems within the District" and thus RPIs "could exhaust their administrative remedies by completing the CRP process." (App. Exh. A, p. 9:17-22.) This ruling is consistent with the holding from multiple courts that CRP complaints can substitute for due process in cases involving systemic, generally applicable policies and practices. (See, e.g., *Christopher S., supra*, 384 F.3d at 1213 [permitting completion of the CRP process to serve as exhaustion when used to put the defendant on notice of a facially unlawful policy]; *Hoeft*, *supra*, 967 F.2d at 1308 ["The [CRP] procedure may furnish an appropriate administrative remedy where the only purposes served by exhaustion are to notify the state of local noncompliance and to afford it an opportunity to correct the problem."]; *Everett H. ex rel. Havey v. Dry Creek Joint Elementary Sch. Dist*. (E.D. Cal. 2014) 5 F.Supp.3d 1184, 1194 [holding 16 illegal policies and practices identified in plaintiff's complaint with specific factual examples related to the plaintiffs' case presented fact questions about whether CRP complaint satisfied exhaustion that could not be resolved on motion to dismiss]; *Student A. v. Berkeley Unified School Dist.* (N.D.Cal. Oct. 12,) No. 17-cv-02510-JST, 2017 U.S. Dist. LEXIS 169086) at *13 ["Plaintiffs clearly allege that the [school district] did not sufficiently change its policies in response to previous CRPs, and the truth of this allegation cannot be resolved as a matter of law."].) Contrary to Petitioner's framing of the trial court's order as impermissibly permitting CRP procedures to serve as exhaustion because RPIs seek districtwide *remedies*, the trial court correctly based its decision

on allegations of "district-wide practices" and "systemic problems" in the school district. (App., Exh. A, p. 9:15,17.)

Similarly, the trial court's finding that RPIs alleged generally applicable, systemic policies and practices is well grounded in decades of state and federal caselaw and is not novel. (See *J.S. ex rel. N.S. v. Attica Central Schools* (2d Cir. 2004) 386 F.3d 107, 114-15 [allegations that a school district's failure to appropriately train staff and provide and implement types of special education services met "systemic" exception to exhaustion]; *W.H. v. Tennessee Dep't of Educ*. (M.D.Tenn. Jan. 20, 2016, No. 3:15-1014, 2016 U.S. Dist. LEXIS 7206) at *14-17 [students' challenge to districtwide practices that caused plaintiffs to be placed in more restrictive environments met systemic and futility exhaustion exceptions]; *White v. State* (1987) 195 Cal.App.3d 452, 464-65 [240 Cal.Rptr. 732] [excusing exhaustion under the IDEA's predecessor because the hearing scheme was not designed to hear "[l]arger systemic issues"].) RPIs alleged that Petitioner's entire special education program is undermined by assessment, placement, and discipline policies and generally applicable practices which violate law.[1] (App., Ex B., pp. 20, 25-28, 31-33,

[1] The RPIs challenged every component of the District's special education program and identified, through whistleblower testimony, numerous unlawful policies and practices of general applicability relating to the assessment, identification, placement, instruction, and discipline of disabled students, resulting in a program that ranks near the bottom of the State. (App., Exh. B., pp. 20, 25-28, 31-32, ¶¶ 46, 58, 66-67.) These policies and practices include the District's longstanding refusal to provide research-based instruction and intervention, *id.* at pp. 31-32, ¶¶ 66-67; refusal to provide instruction tied to the state academic content standards, *id.*; refusal to assess students in their native language, *id.* at p. 20, ¶ 46; refusal to refer of students for assessments based on behavior or academic performances not indicative of disability, *id.*; refusal to follow legally required placement procedures before segregating students based on administrator perceptions, *id.*; refusal to have available push-in services necessary for integration, *id.* at pp. 25-28, ¶ 58; refusal to adequately train

35-36, ¶¶ 46, 58, 66-68, 75.) The trial court's finding that the pervasive deficiencies identified by RPIs involve "systemic problems" is well within the confines of existing law and does not present a novel issue. Further, whether the numerous alleged unlawful policies and practices would require a top-to-bottom restructuring of the special education program presents a factual question that cannot be a novel question of law appropriate for extraordinary writ review.

Whether RPIs must seek reconsideration on their CRP complaints is not a novel issue. The trial court found that RPI Mark S. was not required to seek reconsideration of his CRP complaint because "the reconsideration process in section 3204 does not allow the Department to consider new information unless it was unknown to the parties at the time of investigation." (App., Exh. A, p. 11:7-15.) This finding constitutes a routine application of the California Supreme Court's decision in *Sierra Club v. San Joaquin Local Agency Formation Com.*, which held that exhaustion did not require a redundant, pro forma request for reconsideration in situations where the complainant would be forced "to raise for a second time the same evidence and legal arguments one has previously raised solely to exhaust administrative remedies …." ((1999) 21 Cal.4th 489, 510 [87 Cal.Rptr.2d 702, 981 P.2d 543].) Petitioners argue that the ruling in *Sierra Club* should not apply because "the appellate procedures afforded RPIs did not involve them providing the same fact and evidence to the same decision-maker—i.e., the CDE." (Petition at 30). This argument presents a factual issue: whether RPIs had new facts or evidence to raise. (See App., Exh. A, p. 11:18-20 [stating that "if it is

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staff in providing positive behavioral interventions and support, writing behavior intervention plans, and conducting mental health and behavioral assessments, *id.*; refusal to adequately train paraprofessionals, *id.*; and failure to have available a sufficient continuum of placements, *id.*

shown subsequently that Mark S. is attempting to raise claims that could have been raised in the reconsideration process, the issue may be reviewed at the time."].) Moreover, RPIs' opposition to Petitioner's demurrer raised a factual question about whether the same agency that investigated the CRP complaints in the first instance also handled reconsideration requests. (App., Exh. D, p. 25:3-5.) Resolution of this issue requires a factual record and is therefore not a novel legal question and inappropriate for writ review at this time.

Finally, the issue of whether a FAPE can serve as a statewide standard for equal protection purposes follows a line of cases stretching back at least thirty years to *Butt v. California*, *supra*, 4 Cal.4th 668. The California Supreme Court in *Butt* explained with unmistakable clarity that a constitutional violation of basic educational equity occurs where "the actual quality of the [school's] program, viewed as a whole, falls fundamentally below prevailing statewide standards." (*Id.* at 686-87.) The *Butt* Court held that "[a] finding of constitutional disparity depends on the individual facts." (*Id.* at 686.) Thus, the *Butt* Court searched the trial court's record for evidence of a prevailing term length in California and reviewed declarations from school district teachers describing the impact on education of a shortened school year. (*Id.* at 687 n.14, 16.) The proper inquiry into whether an educational program that denies disabled students a FAPE falls below prevailing statewide standards is accordingly not an abstract legal question properly posed in an extraordinary writ. Rather, it is one of the factors that requires a trial court to analyze the standard of education throughout California and determine whether the failure to provide that standard makes a real and appreciable impact on a student's fundamental right to education. (See also *Serrano II*, *supra*, 18 Cal.3d at 760 [affirming a trial court's method of issuing voluminous and comprehensive findings in support of its judgment that the State's

education finance system violated California equal protection demands].) Here, the trial court should similarly be permitted to evaluate evidence to determine whether districts across the State provide a FAPE in their educational program and whether that denial of a FAPE at Pittsburg Unified School District appreciably impacts disabled students' constitutional right to education.

Further, even in the rare occasions that an appellate court is willing to grant writ review of a constitutional issue, this is typically only in cases where a constitutional right is in danger of being violated by the underlying proceeding. (See, e.g., *Britt v. Superior Court* (1978) 20 Cal.3d 844, 851-852 [135 Cal.Rptr. 345, 557 P.2d 929] [writ granted where court ordered disclosure of extensive and intimate details of petitioners' political associations, threatening their constitutional right of association]; *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 329 [93 Cal.Rptr.3d 39] [writ granted where court ordered arbitration arguably intruding on petitioner's constitutional authority to establish compensation and terms of employment for county employees].) Here, the trial court's partial overruling of a demurrer does not put Petitioner in immediate danger of having their constitutional rights violated. So extraordinary writ review should be avoided.

D. The rule of constitutional avoidance counsels against immediate writ review.

Even if the Equal Protection issue raised a novel legal issue, which it does not, the rule of constitutional avoidance counsels against prematurely addressing the issue.

Petitioner urges this Court to grant immediate writ review to address whether a FAPE is a prevailing statewide standard for Equal Protection purposes. As a matter of policy, the California appellate courts will "not decide a constitutional question unless . . . absolutely necessary." (*Palermo*

v. Stockton Theatres, Inc. (1948) 32 Cal.2d 53, 65 [195 P.2d 1] [citation omitted].) Given that all remaining causes of action will be litigated to judgment regardless of how the question of whether providing a FAPE is a prevailing statewide standard is decided—so that appellate review will be available on appeal from a final judgment—it is not yet absolutely necessary for this Court to decide the issue, and thus the Court should refrain from voluntarily doing so at this time. Indeed, RPIs have advanced a second statewide standard and race-discrimination claim that will proceed to trial and can grant them full relief, so the FAPE-based constitutional issue may not be determinative by final judgment. Therefore, premature review of the FAPE-based constitutional issue should be avoided.

E. The trial court's order was not clearly erroneous and does not substantially prejudice Petitioner's case.

Petitioner argues that decisions of the trial court were clear error, but no error was made. The trial court followed decades of caselaw governing exhaustion of administrative remedies and students' fundamental right to education to reach its decision. The "clearly erroneous" standard sets a high bar that requires the reviewing court to "affirm the trial court's determinations unless it 'is left with the definite and firm conviction that a mistake has been committed[.]'" (*People v. Louis* (1986) 42 Cal.3d 969, 986 [232 Cal.Rptr. 110, 728 P.2d 180] [citation omitted].) The reviewing court must afford great weight to the trial court's decision, which should not be disturbed unless it has abused its discretion. (*Kumar v. Ramsey* (2021) 71 Cal.App.5th 1110, 1125 [286 Cal.Rptr.3d 876], reh'g denied (Dec. 21, 2021) ["'[a]n abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations] This standard of review affords considerable deference

to the trial court provided that the court acted in accordance with the governing rules of law . . . . '"].)

The trial court's ruling on exhaustion under the IDEA carefully followed longstanding precedent under federal *and* state caselaw. The Ninth Circuit Court of Appeals has repeatedly held that courts have the discretion to accept exhaustion of a CRP complaint, rather than a complaint filed with the Office of Administrative Hearings, to challenge facially invalid policies and generally applicable, systemic practices. (*Christopher S. v. Stanislaus Cty. Officer*, *supra*, 384 F.3d at 1209-10; *Hoeft v. Tucson Unified Sch. Dist.*, *supra*, 967 F.2d at 1308; *Everett H. ex rel. Havey v. Dry Creek Joint Elementary Sch. Dist.*, *supra*, 5 F.Supp.3d at 1194; *Student A. v. Berkeley Unified School Dist.*, *supra*, 2017 U.S. Dist. LEXIS 169086 at *12.) Although Petitioner correctly notes that no court has ever held that a complaint under the Uniform Complaint Procedures can serve as a substitute for exhaustion of special education claims, the trial court never made that ruling. (App., Exh. A, 7:12-16.) The trial court also followed well established caselaw in holding that RPIs alleged generally applicable, systemic policies and practices. (See *White v. State*, *supra*, 195 Cal.App.3d at 464-65; *J.S. ex rel. N.S. v. Attica Central Schools*, *supra*, 386 F.3d at 114-15; *W.H. v. Tennessee Dep't of Educ.*, *supra*, 2016 U.S. Dist. LEXIS 7206 at *14-17.) As previously discussed in *supra*, Section II.C, RPIs identified unlawful policies and practices that implicate Petitioner's entire special education program.

Similarly, in holding that a FAPE constitutes a prevailing statewide standard for Equal Protection purposes, the trial court relied on a reasonable interpretation of California's education jurisprudence. The California Supreme Court in *Butt* explained with unmistakable clarity that a constitutional violation of basic educational equity occurs where "the actual quality of the [school's] program, viewed as a whole, falls fundamentally

below prevailing statewide standards ….” (*Butt v. California*, *supra*, 4 Cal.4th at 686-87.) In *Butt*, schoolchildren sought a preliminary injunction directing the State to ensure that Richmond Unified School District remain open the final six weeks of the school year, despite a severe financial crisis caused by district fiscal mismanagement. (*Id.* at 675-76.) The *Butt* Court followed a long line of earlier cases, including cases that emphasized that the California constitutional right to an education that meets the statewide standards "means more than access to a classroom" (*Serrano v. Priest* (1971) 5 Cal. 3d 584, 607 ["*Serrano I*"]), and cases finding that the constitutional right to education "extends to all activities which constitute an 'integral fundamental part of the elementary and secondary education' or which amount to "necessary elements of any schools' activity."'" (*Hartzell v. Connell* (1984) 35 Cal.3d 899, 905, 909-11.). Accordingly, the Court in *Butt* found the constitutional violation resulting from school closure derived not from the loss of school days per se but from the "real and appreciable impact on the affected students' fundamental California right to basic educational equality," including the loss of "instruction in phonics, reading comprehension, creative writing, [and] handwriting skills . . . ." (*Butt*, *supra*, at 687 n. 16, 688.)

Here, the trial court properly held that, similar to the final six weeks of the school year required throughout the State, a FAPE constitutes a statewide standard because the law "requires public schools in California to provide a FAPE[.]" (App. Exh. A, p. 20:15-19.) This statewide standard is analogous to the standard articulated in *Butt* for a second reason: a FAPE enables disabled students to access the fundamentals of education by requiring specialized instruction tied to the state academic content standards. (See 20 U.S.C. § 1412(a)(11) [expressly linking FAPE to the academic content standards States are required to adopt); § 6311(b)(1)(A)-(D) [same]; 20 U.S.C. § 1400(c)(5); 7 S. Rep. No. 108-185, at 17-18

(2003); see also 20 U.S.C. § 6311(b)(2), (C)(4)(A).) A FAPE therefore requires instruction in "phonics, reading comprehension, creative writing, [and] handwriting skills," all of which are basic educational skills identified by the Court in *Butt* to determine whether a constitutional disparity in "educational service and progress" exists to state a claim. (See *Butt v. California*, *supra*, 4 Cal.4th at 687 & n.16.) A FAPE must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," "'specially designed' to meet a child's 'unique needs,'" and "appropriately ambitious" to enable the child to meet "challenging objectives." (*Endrew F. ex. rel. Joseph F. v. Douglas County School Dist.*, *supra*, 137 S.Ct. at 999-1000.) "[F]or most children, a FAPE will involve . . . individualized special education *calculated* to achieve advancement from grade to grade." (*Id.* at 1000 [emphasis added].) A FAPE ensures disabled students' *access* to the basic building blocks of education; the same mandate of FAPE that the State of California must assure other students in California receive.

The trial court also properly rejected the Petitioner's reliance on U.S. Supreme Court jurisprudence interpreting federal equal protection standards. (Petition at 77). As the trial court explained, "[u]nder the California Constitution there is a fundamental right to an education that is not mirrored in the Federal Constitution." (App., Exh. A, p. 20:24-21:1 [citing *Collins v, Thurmond*, *supra*, 41 Cal.App.5th at 896].) Indeed, U.S. Supreme Court language upon which Petitioner relies unremarkably rejected the argument that a FAPE requires the same types of instruction and services for disabled children as *nondisabled children*. (*Endrew F. ex. rel. Joseph F. v. Douglas County School Dist.*, *supra*, 137 S.Ct. at 995 [A FAPE does not "provide instruction and services that would provide [disabled students] an 'equal educational opportunity' relative to children without disabilities."].) But California's fundamental right to education

jurisprudence is broader than federal constitutional standards and premised on the principle that all children in California are similarly situated in that they are entitled to a basic education. Thus, the only question is whether, for the "affected students[]," "the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards." (*Butt v. California*, *supra*, 4 Cal.4th at 686-88.) The trial court properly held that the prevailing statewide standard *for disabled students* includes a FAPE.

Because the trial court followed reasonable interpretations of federal and state caselaw, petitioner has failed to present a "definite and firm conviction that a mistake has been committed[.]'" (*People v. Louis*, *supra*, 42 Cal.3d at 986.)

Further, Courts of Appeal only grant extraordinary writs for clear error when "the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case." (*Omaha Indemnity*, *supra*, 209 Cal.App.3d at 1273-74.) Here, Petitioner has also failed to demonstrate that it is substantially prejudiced by the trial court's order. Substantial prejudice occurs "where the petitioner may incur prejudice that is not correctable on appeal due to the challenged ruling." (*Ochoa v. Superior Ct.* (2011) 199 Cal.App.4th 1274, 1278 [132 Cal.Rptr.3d 233] [finding substantial prejudice where a lower court ruling forced a warden to choose between "disclosing the identity of confidential informants or defending against a habeas corpus petition without relevant, and potentially pivotal, evidence"].) As discussed above in *supra*, Section I.A, Petitioner will have the opportunity to challenge the Trial Court's ruling in the normal course of litigation. Moreover, as discussed in *supra*, Section I.B, Petitioner will not be irreparably harmed by the trial court's order, which does not require Petitioner to do or refrain from doing anything. Petitioner

cannot show that it has been substantially prejudiced by the trial court's order.

III. THIS COURT SHOULD REFUSE TO STAY PROCEEDINGS IN THE LOWER COURT.

Even if the Court entertains a writ—which precedent and efficiency advise it should not— the Court should not order a stay of the proceedings below. (See Civ. Proc. Code, § 923 [prescribing this Court's power "to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction"].) The writ relief sought by Petitioners would not resolve the matter currently active before the trial court, and discovery and further proceedings would progress the several unchallenged causes of action, theories, and exhaustion exceptions which require factual inquiry. A stay would merely delay the inevitable, frustrating efficiency, without reason.

CONCLUSION

For the foregoing reasons, this Court should summarily deny the writ petition without reaching the merits.[2]

Dated: May 6, 2022

Malhar Shah
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[2] In the unlikely event this court decides to reach the merits on an alternative writ or order to show cause, the RPIs request an opportunity to submit opposition on the merits in the form of a formal, comprehensive, "full scale response." (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.)

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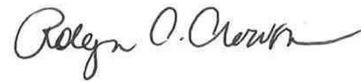

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 8,793 words as counted by the Microsoft Word version 2019 word processing program used to generate the brief.

Dated: May 6, 2022

Malhar Shah

DECLARATION OF SERVICE

Case Name and No.: ***Pittsburg Unified School District v. Superior Court for the County of Contra Costa*, No. A165051**

I, the undersigned, declar1e that I am employed in the offices of Steptoe & Johnson LLP. I am 18 years of age or older and not a party to this matter. My business address is 1330 Connecticut Avenue, N.W., Washington, D.C. 20036. On May 6, 2022, I served, via the Court's TrueFiling System, **REAL PARTIES IN INTEREST'S PRELIMINARY OPPOSITION TO PETITIONER PITTSBURG UNIFIED SCHOOL DISTRICT'S PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPRORIATE RELIEF AND REQUEST FOR IMMEDIATE STAY** upon all parties, all of whom are authorized to receive service via the Court's TrueFiling System. On May 6, 2022, I also served this document via email upon the following:

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