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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF CONTRA COSTA**

16 MARK S., by and through his guardian ad litem,
17 Anna S.; ROSA T., by and through her guardian
ad litem Sofia L.; and JESSICA BLACK,
18 MICHELL REDFOOT, and DR. NEFERTARI
ROYSTON, as taxpayers,
19
20 Plaintiffs and Petitioners,
v.
21 STATE OF CALIFORNIA; TONY
THURMOND, in his official capacity as STATE
22 SUPERINTENDENT OF PUBLIC
INSTRUCTION; STATE BOARD OF
23 EDUCATION; CALIFORNIA DEPARTMENT
OF EDUCATION; and Pittsburg Unified
24 SCHOOL DISTRICT, DOES 1-100,
INCLUSIVE,
25
26 Defendants and Respondents.

FILED
MAR 09 2023
K. WEEKE, CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA
By: [Signature]
A. Stewart, Deputy Clerk

Case No. MSN21-1755
UNLIMITED JURISDICTION
[PROPOSED] ORDER REGARDING
THE RENEWED DEMURRER OF
PITTSBURG UNIFIED SCHOOL
DISTRICT TO THE SECOND
AMENDED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY RELIEF
Hearing Date: January 19, 2023
Time: 9:00 A.M.
Department: 12
Judge: Hon. Charles Treat

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1 On January 19, 2023, in Department 12 of the above-entitled Court, the Honorable
2 Charles S. Treat held a hearing on Defendant Pittsburg Unified School District's Motion for
3 Renewal of Demurrer to Plaintiffs' Second Amended Verified Petition for Writ of Mandate and
4 Complaint for Declaratory and Injunctive Relief.

5 Malhar Shah of the Disability Rights Education and Defense Fund, Linnea Nelson of the
6 ACLU Foundation of Northern California, Ana G. Nájera Mendoza of the ACLU Foundation of
7 Southern California, and Amanda Schwartz and Geoffrey Warner of Steptoe & Johnson LLC
8 appeared on behalf of the Plaintiffs. Katherine Alberts of Leone Alberts & Duus appeared on
9 behalf of Defendant Pittsburg Unified School District. Virginia Cale of the California
10 Department of Education and Jennifer Bunshoft of the State of California appeared on behalf of
11 the State Defendants.

12 After consideration of the Demurrer and Opposition papers, and having heard argument
13 of counsel, the Court adopted its Tentative Ruling, attached hereto as **Exhibit 1**, and finds and
14 orders as follows:

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1 Defendant Pittsburg Unified School District's motion for renewal of demurrer and
2 requests for judicial notice are denied without prejudice. Plaintiffs' request for judicial notice is
3 granted. Plaintiffs are granted leave to file an amended pleading by February 2, 2023.
4 Defendants are granted 30 days to respond to Plaintiffs' amended pleading. Plaintiffs' discovery
5 requests to Defendant Pittsburg Unified School District that would not be relevant under the
6 standard adopted by the U.S. Ninth Circuit Court of Appeals in *Martinez v. Newsom*, 46 F.4th
7 965 (9th Cir. 2022) such as, but not limited to, Individualized Education Programs of individual
8 students in Pittsburg Unified School District or other individualized student documents, are
9 stayed. Counsel for Plaintiffs and Defendant Pittsburg Unified School District are directed to
10 meet and confer on the details of the category of documents for which discovery is stayed
11 pursuant to this Order.

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13 IT IS SO ORDERED.

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15 Dated: 3/8, 2023


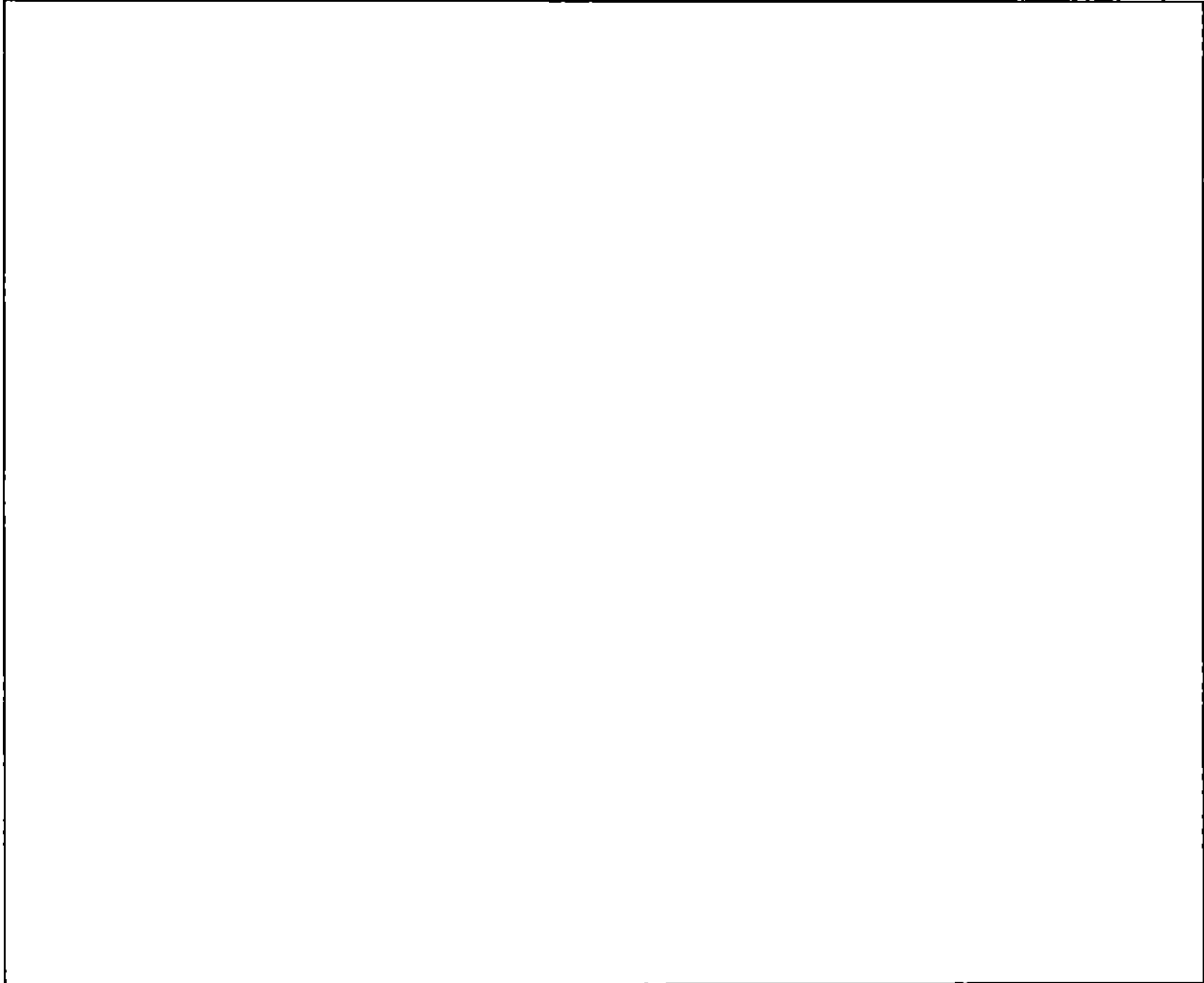

16 HONORABLE CHARLES S. TREAT
17 Judge of the Superior Court of Contra Costa County
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EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 12
JUDICIAL OFFICER: CHARLES S TREAT
HEARING DATE: 01/19/2023



11. 9:05 AM CASE NUMBER: MSN21-1755
CASE NAME: MARK S. VS STATE OF CALIFORNIA
HEARING ON DEMURRER TO: RENEWAL OF DEMURRER TO OPERATIVE PETITION (FILED BY PUSD) -
CONTINUED FROM 1/12/23 CALENDAR

FILED BY:

TENTATIVE RULING:

Defendant Pittsburg Unified School District's motion for renewal of demurrer is denied.

The District has filed a motion for renewal of a demurrer to the second amended petition pursuant to Code of Civil Procedure § 1008(b). Subsection (b) provides that "a party whose original motion was

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 12
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HEARING DATE: 01/19/2023

denied in whole or in part may make a new application for the same order if supported by an affidavit detailing when and to what judge it was made; what was sought; what orders or decisions were made; and what new or different facts, law or circumstances would support a different outcome. (§ 1008, subd. (b).) (*Andrus v. Estrada* (1995) 39 Cal.App.4th 1030, 1042.)

A renewal motion under § 1008(b) must be based on new or different facts, law or circumstances that would support a different outcome. *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, provides an example of a renewal motion based on new law. There, the trial court had originally denied a motion to compel arbitration based on California law, including a California Supreme Court case. Later, the United States Supreme Court found that the rule express in the California case was preempted by federal law. The trial court granted a renewed motion to compel arbitration, finding that the United States Supreme Court had resulted in a significant clarification of federal and a major change in California law. (*Id.* at 769.) *Phillips* affirmed the trial court's decision, explaining that the trial court properly considered the circumstances of the case, including "the extent of the preparation that has already occurred in the trial court proceedings and the proximity of a trial date are properly taken into account, along with the materiality of the change that has been made in the state of the law and the potential for prejudice to any of the parties." (*Id.* at 769.)

The District argues that this Court should grant the motion for renewal of the demurrer based on *Martinez v. Newsom* (9th Cir. 2022) 46 F.4th 965. This motion seeks a different ruling on Judge Weil's March 9, 2022 order where he found that the Plaintiffs had sufficiently alleged an exemption to the exhaustion of claims requirement. Judge Weil's order discussed the systemic exception to the exhaustion requirement, including citing to *Hoelt v. Tucson Unified Sch. Dist.* (9th Cir. 1992) 967 F.2d 1298, one of the main cases discussed in *Martinez*.

The District argues that *Martinez v. Newsom* (9th Cir. 2022) 46 F.4th 965 requires the Court to reconsider the demurrer and find the systemic exemption has not been alleged. In *Martinez*, the court concluded "that to fall within the systemic exception, a plaintiff must, at a minimum, identify an 'agency decision, regulation, or other binding policy' that caused his or her injury. *Doe [v. Arizona Dep't of Educ.* (9th Cir. 1997) 111 F.3d 678] at 684." (*Martinez, supra*, 46 F.4th at 974.)

It does appear that *Martinez*, if it were a binding precedent in this Court, would call for a different result, at least in part. The distinction drawn in *Martinez* is between a formal decision, regulation, or binding policy (which may be the basis for the systemic exemption), versus a less formal pattern or practice (which, under *Martinez*, apparently cannot). Here, plaintiff's petition fairly clearly attacks only a non-formal pattern or practice. Judge Weil nevertheless held that the systemic exemption applies here.

The Court declines to reconsider Judge Weil's ruling on the demurrer. The Court is reluctant to review another judge's rulings in this case absent a strong reason for doing so. *Martinez* is not binding

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 12
JUDICIAL OFFICER: CHARLES S TREAT
HEARING DATE: 01/19/2023

precedent. (See *Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 327-328 [California courts are not required to follow federal circuit or district courts on interpretation of federal statutes].) In addition, *Martinez* has narrowed the systematic exception, but not caused a drastic change in the law, such as finding that the exception does not exist.

Furthermore, meaning no disrespect to the Ninth Circuit, the Court has some concerns about the feasibility of OAH handling systemic problems in a particular district. It is by no means clear that the OAH process can or would give relief on a system-wide basis for a system-wide, but informal, pattern or practice of discrimination. Thus, the Court still has some reservations about applying or not applying an exhaustion requirement based only on the formal/informal distinction, as the Ninth Circuit has apparently done.

The being said, it would be useful to know if the California Court of Appeal would adopt the *Martinez* rule and require plaintiffs identify an agency decision, regulation, or other binding policy in order to allege the systemic exception to exhaustion. The parties are invited to take a writ seeking clarification on whether the *Martinez* rule on exhaustion applies to California state cases.

The District's request for judicial notice of the 2019 email is denied. This renewal motion is based on a change in law, not a change in facts and the Court sees to reason to consider this email at this time. The Court may, however, take judicial notice of this document in the future given a different procedural posture.

Plaintiffs' request for judicial notice of the transcript from the February 24, 2022 hearing is granted.

The District's second request for judicial notice of documents filed in *E.E. v. State of California* (N.D. Cal.) Case No. 3:21-cv-07585 is denied.

12. 9:05 AM CASE NUMBER: MSN21-1755
CASE NAME: MARK S. VS STATE OF CALIFORNIA
*FURTHER CASE MANAGEMENT CONFERENCE
FILED BY:
TENTATIVE RULING:

Counsel to appear, by zoom if preferred.

PROOF OF SERVICE

I am a resident of, or employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to this action. My business address is: Steptoe & Johnson LLP, 633 West Fifth Street, Suite 1900, Los Angeles, California 90071.

On March 7, 2023, I served the following listed document(s): **[PROPOSED] ORDER REGARDING THE RENEWED DEMURRER OF PITTSBURG UNIFIED SCHOOL DISTRICT TO THE SECOND AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF** by the method indicated below, on the parties in this action:

State of California Deputy Attorney General California Department of Justice 455 Golden Gate Avenue # 11000 San Francisco, CA 94102	Jennifer.Bunshoft@doj.ca.gov
Tony Thurmond, in his official capacity as State Superintendent of Public School Instruction 1430 N Street, Suite 5111 Sacramento, CA 95814	
State Board of Education 1430 N Street, Suite 5111 Sacramento, CA 95814	VCale@cde.ca.gov LGarfinkel@cde.ca.gov
California Department of Education 1430 N Street, Suite 5111 Sacramento, CA 95814	
Pittsburg Unified School District c/o Katherine Alberts 1390 Willow Pass Rd #700, Concord, CA 94520	kalberts@leonealberts.com jjohnson@leonealberts.com service@leonealberts.com

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused the document(s) to be sent by email to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 7, 2023, at Los Angeles, California.

s/s Inez Brown
INEZ BROWN