

THE SUPREME COURT OF WASHINGTON

BY RONALD R. CARLINDER

CLERK

MATHEW and STEPHANIE McCLEARY, et al., Respondents/Cross-Appellants, v. STATE OF WASHINGTON, Appellant/Cross-Respondent.

ORDER

Supreme Court No. 84362-7

King County No. 07-2-02323-2 SEA

“It is the paramount duty of the state to make ample provision for the education of all children residing within its borders.” WASH. CONST. art. IX, § 1. This is the only “paramount duty” our founders inscribed in our constitution. ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION, A REFERENCE GUIDE 169 (2d ed. 2013). Two years ago, this court held unanimously that the State is not meeting its paramount duty. McCleary v. State, 173 Wn.2d 477, 269 P.3d 227 (2012). Recognizing that the legislature had enacted a promising set of reforms, the court deferred to its efforts but retained jurisdiction over this case to ensure timely and full compliance with the mandate to amply fund education. Last year, we recognized that the 2013 legislative session would provide the first full opportunity for the State to “lay out a detailed plan and then adhere to it.” Order, McCleary v. State, No. 84362-7, at 2 (Wash. Dec. 20, 2012). Our order dated December 20, 2012 directed the State to set out its plan for implementing education reforms in “sufficient detail to allow progress to be measured according to periodic benchmarks

681/150

between now and 2018” and reiterated that “[y]ear 2018 remains a firm deadline for constitutional compliance.” *Id.*

Today, this matter is before the court following the State’s filing of the 2013 “Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation” (hereinafter Report) and the plaintiffs’ response. The Report summarizes steps taken in 2013, using the 2012 flat level of basic education funding as the baseline for measurement. Report at 5.¹ The Report also continues to rely on the reports of the Quality Education Council (QEC) and the Joint Task Force on Education Funding (JTFEF), which made recommendations to the legislature on how to implement the reforms enacted in 2009 in ESHB 2261 and 2010 in SHB 2776. Report at 7. By the State’s calculation, the 2013-15 operating budget achieves an 11.4 percent increase in basic education funding over 2011-13 estimated expenditures. Report at 2. Measured against maintenance level funding, the \$982 million allocated to K-12 basic education for the 2013-15 biennium translates into a 6.7 percent increase over the constitutionally inadequate level of funding. *Id.* The State also indicates that it has enhanced funding for programs beyond the elements specified in SHB 2776 and continues to “review, revise, and enhance other components within the basic education formulas.” Report at 3.

One thing is obvious from the State’s Report: unlike in 2012, meaningful steps were taken in the 2013 legislative session to address the constitutional imperative of amply providing for basic

¹ The Report acknowledges that the legislature made no changes to basic education funding during the 2012 session. Report at 5. Thus, it describes its 2012 report as establishing a “baseline description of the K-12 budget” and offering information about legislative activities in order to “provide context for future reports.” *Id.*

education. Recognizing there is debate over whether the State can claim a total of \$982 million in enhancements to the program of basic education,² the 2013-15 operating budget is undeniably an improvement over the last biennial budget. Moreover, implementing education reform has become a higher priority for the State, as even a casual observer of the 2013 legislative session could not fail to appreciate.

What is not clear, however, is how the State is measuring success when it asks us to “find that the State is making progress toward implementing the reforms initiated in ESHB 2261 and achieving full compliance with article IX, section 1 by 2018.” State of Washington’s Resp. to the Court’s Orders dated July 18, 2012 and December 20, 2012: The Legislature’s 2013 Post-Budget Report at 5. Looking at the gross numbers, the overall increased investment in basic education is only a modest 6.7 percent above current funding levels that violate the constitution, and there are not even two full budget cycles left to make up the sizable gap before the school year ending in 2018. The Report confirms that the State remains committed to ESHB 2261 and SHB 2776 and intends to fully fund its reforms, consistent with the reports of the QEC and JTFEF. At the same time, the Report claims substantial progress and even “full implementation” of transportation funding by relying on cost figures that are lower than the projections of its own committee and task force, as well as the Office of the Superintendent of Public Instruction (OSPI). See Report at 12-13.

Transportation, for example, is funded at \$131.7 million for the 2013-15 biennium, with a phase in plan that leaves \$109.7 million for the 2014-15 school year. Report at 12-13, 21. As we

² The plaintiffs identify education funding shifts and cuts, such as striking K-12 staff cost-of-living increases in the amount of \$295.5 million, and claim the actual biennial education budget increase was only \$649 million. Pls./Resp’ts’ 2013 Post-Budget Filing (Pls.’ Resp.) at 14 & n.41.

noted in our opinion in this case, the 2010 QEC report estimated that state funding of transportation would *fall short* by nearly this amount during the 2009-10 school year. *McCleary*, 173 Wn.2d at 509. Moreover, the December 2012 JTFFEF Final Report indicated that \$141.6 million would be needed in 2013-15 to stay on target toward full transportation funding, with substantial increases again in 2015-17. JTFFEF Final Report at 3. The plaintiffs' rightly complain that the State appears to have revised the cost estimates based on a formula that its own analysis shows falls short. Pls./Resp'ts' 2013 Post-Budget Filing (Pls.' Resp.) at 23-24 & nn.74, 75 (discussing RCW 28A.160.192 and 2013 OSPI Transportation Update). We cautioned in 2012 that revised funding formulas cannot be used to declare "full funding," when the actual costs of meeting the education rights of Washington students remain unfunded. *See McCleary*, 173 Wn.2d at 532.

Even more troubling is the apparent lack of progress toward fully funding essential materials, supplies and operation costs (MSOCs). The JTFFEF identified MSOCs as the area requiring the greatest increase in state funding, estimating a need for \$597.1 million in 2013-15, followed by \$1.410.9 billion in 2015-17 and \$1.554.7 billion in 2017-19. JTFFEF Final Report at 3. The State's 2013-15 operating budget includes \$374 million for MSOCs. Report at 12. By its own estimates, this leaves a gap of about \$857 million to make up in the 2015-17 biennium, *id.*, and the JTFFEF figures suggest the gap is even wider, JTFFEF Final Report at 3. We agree with the plaintiffs that "[e]stimating the size of the shortfall in the next biennium is not a plan." Pls.' Resp. at 28 n.85. Underfunding MSOCs places an unsustainable burden on school districts. That burden is exacerbated when at the same time nonemployee related costs are underfunded, the State funds instructional and class-size reduction programs that incur additional costs to local districts. Consider,

for example, full-day kindergarten and early elementary class-size reduction. The 2013-15 education budget invests \$89.8 million in full-day kindergarten, anticipating an increase in enrollment from 22 percent to 43.75 percent. Report at 2, 14. It also provides \$103.6 million for K-3 class-size reduction in high poverty schools, with a goal of reducing class size to about 20 students in the 2014-15 school year. *Id.* at 13-14.³ The plaintiffs cite OSPI's 2013 Facilities Capacity Report to note that school districts are strapped for the physical space to meet these goals. Pls.' Resp. at 32, 36. OSPI estimates that additional capital expenditures are required of approximately \$105 million for full-day kindergarten and \$599 million for K-3 class-size reduction by 2017-18. *Id.* Make no mistake, enhanced funding for full-day kindergarten and class-size reduction is essential, but the State must account for the actual cost to schools of providing these components of basic education. We recognized long ago that the paramount duty to amply fund education under article IX, section 1 must be borne by the State, not local school districts. *See generally Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 536-37, 585 P.2d 71 (1978).

Another area in which the State's Report falls short concerns personnel costs. Quality educators and administrators are the heart of Washington's education system. The Report outlines increased state funding for instructional hours, the learning assistance program, and some counseling programs. Report at 15-16. But it skims over the fact that state funding of educator

³ The State acknowledges that the estimated cost of reaching full implementation of the reduced class-size law by the 2017-18 school year is \$1.096 billion for the 2017-19 biennium. Report at 14. The JTFEF had recommended spending \$219.2 million in the 2013-15 biennium to stay on target to reaching this goal. JTFEF Final Report at 3. A minority alternative proposal to the JTFEF Final Report would have put an immediate priority on K-3 class-size reduction, investing \$575 million to fund the first half in 2013-15 and another \$576 million in 2015-17. *Id.* at App. E-3.

and administrative staff salaries remains constitutionally inadequate. Our decision in this case identified salaries as a significant area of underfunding by the State, noting OSPI data suggesting that sizable salary gaps remain to be filled at the district level. *McCleary*, 173 Wn.2d at 536; see also *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 522 & n.11, 219 P.3d 941 (2009) (noting with respect to state pay for administrator salaries that “[t]hese figures have no correlation to the real cost of hiring administrators”). The State notes that its 2013-15 budget restores previous temporary salary reductions (1.9 percent for certificated instructional and classified staff and 3 percent for administrators), but at the same time it suspends the cost-of-living increases imposed by Initiative 732, which totaled \$295.5 million. Report at 10, 17. The Report identifies this salary cut as part of “savings and reductions in non-basic education,” Report at 10, but nothing could be more basic than adequate pay. The inescapable fact is that salaries for educators in Washington are no better now than when this case went to trial. This despite the report of the ESHB 2261 compensation work group concluding that the State needs to invest at least a billion dollars a year—above inflationary adjustments—to bring salary funding in line with actual costs. See 2012 Compensation Technical Working Group Final Report (June 30, 2012) at 47. It is deeply troubling that the State’s Report does not address this component of ESHB 2261 or offer any plan for meeting its goals.

Overall, the State’s Report demonstrates that it understands what progress looks like, and unlike in 2012, it has taken some steps toward fulfilling its constitutional mandate. But, it cannot realistically claim to have made significant progress when its own analysis shows that it is not on target to implement ESHB 2261 and SHB 2776 by the 2017-18 school year. A rough comparison

of the funding levels for core areas identified in the JTFFEF Final Report and provided in the 2013-15 biennial budget suggests the need for a greater immediate investment. Broken down by category, the JTFFEF Final Report proposed a spending plan for implementing SHB 2776 that would require the 2013-15 budget to include \$141.6 million for transportation, \$597.1 million for MSOCs, \$219.2 million for K-3 class-size reduction, and \$89.3 million for full-day kindergarten. The 2013-15 biennial budget provides \$131.7 million for transportation, \$374 million for MSOCs, \$103.6 million for class-size reduction, and \$89.8 million for full-day kindergarten.⁴ Thus, the current level of funding falls short of the JTFFEF plan in every category except full-day kindergarten, and, as noted, the funding for that category does not account for the additional capital investment needed to implement full-day kindergarten. Moreover, the JTFFEF spending plan projects a steep upward curve in funding levels in the next two biennia, requiring \$3.35 billion in 2015-17 and \$4.48 billion in 2017-19. In order for the court to find the legislature is making progress toward full compliance with its constitutional responsibility, the State must address each of these core areas of basic education and provide a timetable for funding its plan.

⁴ The JTFFEF spending plan also includes \$66.5 million for accountability, evaluation and common core, and \$169.8 million for classified and administrative salary allocations, neither of which is specifically identified as an enhancement in ESHB 2261 or SHB 2776, as well as \$140.4 million for the career and college ready plan. And, the 2013-15 budget includes funding for several other enhancement programs. Our comparison of the core categories identified in the *McCleary* decision and our 2012 order should not be interpreted as suggesting that funding in these other areas is unimportant to fulfilling the State's constitutional mandate. Nor does our reference to the funding recommendations in the JTFFEF Final Report suggest that it provides the only constitutionally viable plan. Rather, these figures illustrate at a minimum the budgeting priorities that would demonstrate real and measurable progress designed to achieve full compliance with article IX, section 1 by 2018.

One reason we retained jurisdiction over this case is to foster dialogue and cooperation in reaching a goal shared by all Washingtonians. The legislature is embarking on a short session in 2014, where it has an opportunity to take a significant step forward. We are aware that OSPI has submitted a supplemental budget request of approximately \$544 million, with \$461 million addressing basic education funding. The need for immediate action could not be more apparent. Conversely, failing to act would send a strong message about the State's good faith commitment toward fulfilling its constitutional promise. This court also made a promise to the school children of Washington: We will not "idly stand by as the legislature makes unfulfilled promises for reform." *McCleary*, 173 Wn.2d at 545. Our decision in this case remains fully subject to judicial enforcement.

We have no wish to be forced into entering specific funding directives to the State, or, as some state high courts have done, holding the legislature in contempt of court. But, it is incumbent upon the State to demonstrate, through immediate, concrete action, that it is making real and measurable progress, not simply promises. Toward that end, it is hereby ordered: the State shall submit, no later than April 30, 2014, a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year. This plan must address each of the areas of K-12 education identified in ESHB 2261, as well as the implementation plan called for by SHB 2776, and must include a phase-in schedule for fully funding each of the components of basic education. We recognize that the April 30, 2014 deadline shortens the time for the State's report, but it is clear that the pace of progress must quicken. In order to facilitate

judicial oversight, this court may also require more periodic reports detailing the State's strategy for fully meeting the mandate of article IX, section 1.

IT IS SO ORDERED.

DATED at Olympia, Washington this 9th day of January, 2014.

Madsen, C. J.
CHIEF JUSTICE

WE CONCUR:

Johnson

Parsons

Fainhurst, J.

Stephens, J.

Wiggin, J.

Corrales, J.

Geel McLeod, J.