

No. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Defendant/Appellant,

v.

MATHEW & STEPHANIE McCLEARY, on their own behalf and on behalf of Kelsey & Carter McCleary, their two children in Washington's public schools;

ROBERT & PATTY VENEMA, on their own behalf and on behalf of Halie & Robbie Venema, their two children in Washington's public schools; and

NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Plaintiffs/Respondents.

**PLAINTIFF/RESPONDENTS'
REPLY BRIEF**

[re: their cross-appeal]

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Note: this brief refers to the parties as “plaintiffs” and “defendant” (or “the State”) to avoid confusion between the plaintiff “Petitioners” below who are the “Respondents” here, and the defendant “Respondent” below that is the “Petitioner” here. Cf. RAP 10.4(e). “Plaintiffs” are, collectively, the McCleary family, the Venema family, and the Network for Excellence in Washington Schools (current members listed at “http://www.waschoolexcellence.org/about_us/news_members”)

I. INTRODUCTION

(confirming the limited scope of this Reply)

The trial court ruled that the State is – and long has been – violating its paramount education duty under Article IX, §1. The State’s August 20 Opening Brief identified four specific issues for its appeal, and plaintiffs’ September 20 Response specifically addressed the law and facts relating to each of the State’s four issues. This Court will determine if the State’s October 20 Reply addressed and refuted plaintiffs’ Response to the four issues raised in the State’s Opening Brief.

The following pages do not address the State’s four issues.

Instead, this Reply addresses the arguments in the State’s October 20 brief that might relate to plaintiffs’ cross-appeal. The issue in that cross-appeal is whether the judicial branch should set a firm deadline for the State to comply with our Constitution.

II. SUMMARY OF THIS REPLY

For over 30 years, the defendant State has talked about complying with Article IX, §1 in the future while simultaneously failing to amply provide for its public schools in the present.

More precisely, that's what the State's legislative and executive branches have been doing.

This Court could emulate them. This Court could gaze at the horizon and say a bunch of hopeful words about the future, while simultaneously ignoring the large number of students currently moving through our State's public schools who continue to be left behind today.

The State's response to plaintiffs' cross-appeal boils down to the notion that such emulation is what this Court should do – with the State claiming there is no “constitutional imperative” for this Court to do anything here other than watch.

This Reply outlines why the State is wrong.

It is not the Washington Supreme Court's role to be a spectator watching the other branches violate our Constitution.

Nor is it the Supreme Court's role to simply admonish the other branches to comply with our Constitution at whatever time in the future those other branches find it easy or convenient to do so.

To be an effective check and balance, this Court must assert itself as a check and balance. Especially when it comes to protecting the Constitutional rights of citizens with little or no power at the ballot box. Like the hundreds of thousands of public school students too young to vote who are persistently left behind by the other two branches' inaction.

This Court's role is to uphold and enforce what the People of our State have established as the State's *paramount* duty under our State Constitution. Plaintiffs' cross-appeal accordingly requested that this Court set a hard compliance deadline to (finally) put an end to the defendant State's three decades of talk and delay.

One of the arguments in the State's October 20 brief is that an enforcement order is "superfluous" because the State has already done the studies it needs to be able to comply with Article IX, §1. That argument does not refute the reasonableness of this Court's setting the end of next school year as a firm deadline for the State's compliance with the enforcement order in this case. To the contrary, that argument confirms the reasonableness of such a firm deadline to enforce Article IX, §1 for today's public school students.

III. DISCUSSION

A. The State's Brief Does Not Refute The Constitutional Imperative In This Case.

The State has accurately declared to this Court that this case “involves fundamental and urgent issues of broad public import”.¹ Its October 20 brief nonetheless claims there is no “constitutional imperative” for a firm deadline.² But as explained below, the State does not refute the facts or law confirming the Constitutional imperative³ at stake.

1. **The State does not dispute that the education of all children is imperative to our State in today's world.**

“The constitutional right to have the State ‘make ample provision for the education of all (resident) children’ would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas.”

Seattle School District v. State, 90 Wn.2d at 517-18.

The State's Response does not dispute any of the many reasons the trial court found the education mandate in Article IX, §1 imperative to:

- ◆ individual freedom, and
- ◆ equality, and
- ◆ our State's democracy, and
- ◆ our State's future economic well being.

Plaintiffs' Sept. 20 Brief at pp. 12-15 & pp. 54-55.

¹ State's April 9, 2010 Statement of Grounds for Direct Review at 10:15-16 (underline added).

² State's Oct. 20 Brief at 12:18-19. The State's claim that there is no “constitutional imperative” for this Court to actually do anything (other than watch) is a repeating theme in its briefing. E.g., at 9:19-20 and 9:8-10.

³ The dictionary definition of “imperative” includes: “not to be avoided or evaded. URGENT, OBLIGATORY, BINDING, COMPULSORY”, “NECESSITY, NEED”, and “an unavoidable fact compelling or insistently calling for action”. WEBSTER'S THIRD NEW INT'L DICTIONARY (1993) at 1132-1133. (WEBSTER'S THIRD NEW INT'L DICTIONARY is the dictionary this Court used in Seattle School District. 90 Wn.2d at 511, 512, n.12).

2. The State does not dispute the Constitutional status of that education imperative.

“[T]he framers declared only once in the entire document that a specified function was the State’s paramount duty. That singular declaration is found in Constitution Article IX §1. Undoubtedly, the imperative wording was intentional.”

Seattle School District v. State, 90 Wn.2d at 510.

The State does not dispute that the education mandate in Article IX, §1 is the only duty our State Constitution identifies as the State’s paramount duty.⁴

Nor does it dispute that our State Constitution places its education mandate on a higher pedestal than any other State – for no other State’s Constitution imposes a higher education duty than ours does.⁵

3. The State does not dispute this Court’s duty to enforce our Constitution’s education mandate.

“There is no higher duty of any judicial officer than to ensure the government’s adherence to our Constitution.”

Montoy v. State⁶

The State does not dispute that:

- ◆ It is this Court’s role and duty to interpret, construe, and enforce our Constitution.
- ◆ This Court must exercise that duty – even when it serves as a check on the activity (or inactivity) of another branch, or disagrees with another branch’s view of the constitution.
- ◆ The defendant State has no discretion in whether or not to comply with our Constitution, for the provisions of our Constitution are mandatory.

⁴ *Plaintiffs’ Sept. 20 Brief at p. 16.*

⁵ *Plaintiffs’ Sept. 20 Brief at p. 16.*

⁶ *Montoy v. State of Kansas* 2003 WL 22902963 (Kan.Dist.Ct.) at *51 (quoted at *Plaintiffs’ Sept. 20 Brief. p. 59*).

- ◆ Article IX, §1 imposes upon the State an affirmative, mandatory, and judicially enforceable education duty.

Plaintiffs' Sept. 20 Brief at pp. 38-39 & pp. 59-61.

4. The State's claim that only "some" kids are being left behind does not refute the gravity of the State's Constitutional violation.

"No man is an island entire of itself. Every man is a piece of the continent, a part of the main. Therefore never send to know for whom the bell tolls. It tolls for thee."

John Donne
Meditation XVII (1624)

The State's October 20 brief attempts to downplay the gravity of its Constitutional violation by repeatedly asserting that only "some" students fail to learn what the State has determined all students must know in today's world, and that only "some" students drop out of high school.⁷

This Court should not accept the State's notion of "some".

For example, the State does not dispute that 63% of its public school students lack the minimum math skills the State has determined all kids need in today's world (with certain segments even worse – e.g., 85% of our Latino students in Yakima).⁸ The State similarly does not dispute that 25% of its public school students lack the minimum reading skills the State has determined all kids need in today's world (with certain segments

⁷ *State's October 20 Brief at 13:6-7 ("some students do not succeed"), 15:11 ("some students fail to pass WASL or graduate from high school"), 16 n.13 ("some students had failed a WASL test or did not graduate from high school"), 5:14-15 ("some students do not pass WASL or graduate from high school" (citing ¶231a)) (underline added to all above quotes).*

⁸ *Plaintiffs' Sept. 20 Brief at p. 30 (State's own Report Card on its public schools, which is Tr.Ex. 689).*

even worse – e.g., 34% of our Latino students in Yakima).⁹ And figures such as these understate the gravity of the situation because they omit students who drop out instead of graduate from high school (about 25% of public school students statewide).¹⁰

This is not just “some” students.

By way of analogy, the State has minimum structural standards that it has determined all road bridges need in order to be safe under today’s vehicle loads.¹¹ Would this Court really declare that only “some” State bridges are unsafe if 63% of them did not meet the State’s own minimum standards? If one out of every four (25%) failed? Or would this Court declare that only “some” bridges in minority or low income sections of our State are unsafe if 85% of those bridges did not meet the State’s minimum standards?

In short, the State’s repeatedly asserting that it is leaving only “some” of its public school students behind does not credibly refute or cover up the gravity of the State’s ongoing Constitutional violation in this case. And as the trial confirmed, the State’s continually leaving these large groups of its public school students behind hurts us all.

⁹ *Plaintiffs’ Sept. 20 Brief at p. 30 (State’s own Report Card on its public schools, which is Tr.Ex. 689).*

¹⁰ *The State’s Report Card on its public schools (Tr.Ex. 689) at cover stats (statewide).*

¹¹ *E.g., the Washington State Department of Transportation Bridge Design Manual.*

5. The State’s claim that its funding formulas are “historical” and “account for” inflation does not refute the State’s long-standing Constitutional violation.

“The Emperor has no clothes.”
Hans Christian Anderson
The Emperor’s New Clothes (1837)

The State’s October 20 brief also attempts to downplay the gravity of this situation by assuring this Court that the State’s funding formulas “produce allocations based on historical experiences of the State and its school districts, brought forward over the years to account for inflation and other factors.”¹²

But the State’s assertion glosses over the fact that the “historical” experience upon which its funding formulas are based has nothing to do with current reality – for they are instead founded on truly “historical” snapshots taken of the education world that existed back in the mid-1970s.¹³

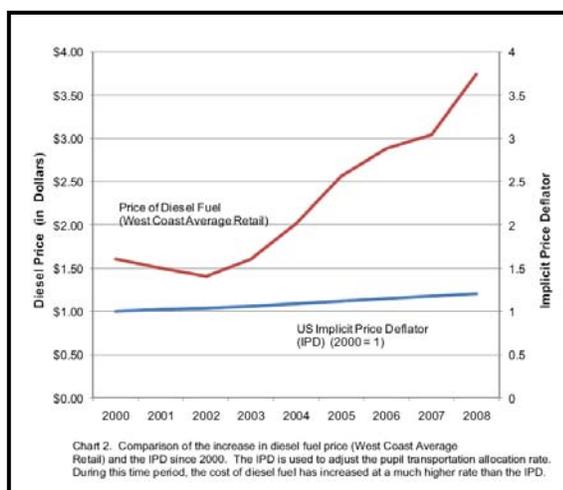
And despite the State’s repeated mischaracterizations to the contrary, the trial court did not hold that Article IX, §1 requires the State to pay whatever school districts spend. Instead, it found that the total amount of funding districts are currently able to scrape together is not sufficient to provide all children a realistic or effective educational opportunity, and that the State funds far less than that insufficient total.¹⁴

¹² *State’s Oct. 20 Brief at 18:3-7.*

¹³ *Plaintiffs’ Sept. 20 Brief at pp. 22-23.*

¹⁴ *Plaintiffs’ Sept. 20 Brief at pp. 26-28.*

The State’s assertion that its formulas “account for” inflation likewise glosses over the fact that its formulas do not account for actual inflation.¹⁵ The graph below is just one illustration from the trial. It was created by the State to compare the actual price of school bus diesel fuel (steep red line) to how its funding formulas “account for” that inflation (flatter blue line).¹⁶



In short, this case’s trial publicly exposed a naked truth that our State’s education officials and elected representatives have long known about the State’s education funding formulas: those formulas have no correlation to reality. The trial court’s findings publicly declared that truth. And that truth confirms, rather than refutes, the need to promptly put a stop to the State’s long-standing Constitutional violation in this case.

¹⁵ E.g., RP 1454:22-1455:17; RP 1470:9-1471:11.

¹⁶ Tr.Ex. 359 at p.4; RP 5117:2-5118:11; RP 1461:23-1462:15; RP 1465:10-1467:22.

6. The State’s “opportunity” mantra does not refute the need to promptly end the State’s Constitutional violation.

“Pay no attention to that man behind the curtain”
The Wizard in the Wizard of Oz (1939)

The State repeatedly objects that Article IX, §1 requires “opportunities” rather than “guarantees”. But that is entirely consistent with the trial court’s decision – for as that decision succinctly explained:

When this ruling holds the State is not making ample provision for the equipping of all children with the knowledge, skills, or substantive “education” discussed in this ruling, that holding also includes the court’s determination that the State’s provisions for education do not provide all children residing in our State with a realistic or effective opportunity to become equipped with that knowledge, skill, or substantive “education”.¹⁷

The State’s “opportunity” mantra accordingly does not negate the need to promptly put an end to the State’s long-standing Constitutional violation.

Indeed, the State’s October 20 brief admits that Article IX, §1 requires the State to amply provide all children a realistic and effective opportunity to learn the “essential skills” identified in this Court’s *Seattle School District* decision – i.e., the skills needed to compete in today’s economy and meaningfully participate in our State’s democracy.¹⁸ But the State does not even address (never mind refute) the fact that it does not provide its public schools the resources to provide all children a realistic

¹⁷ *FOF/COL* ¶231(a) (underline added).

¹⁸ *E.g.*, *State’s Oct. 20 Brief* at 24:10-11, 5:17-19, 6:1-2 (citing trial court decision ¶231(a)), 6:16-17, 1:9-13; *Plaintiffs’ Sept. 20 Brief* at pp. 16-17 & pp. 39-40.

or effective opportunity to learn the “essential skills” identified in this Court’s *Seattle School District* ruling.¹⁹

The State does not refute that it subsequently studied and adopted substantive content for the knowledge and skills it determined kids need to compete in today’s economy and meaningfully participate in our State’s democracy – i.e., the four numbered provisions in HB 1209 (now RCW 28A.150.210(1)-(4)).²⁰ The State does not address (or refute) the fact that it does not provide its public schools the resources to provide all children a realistic or effective opportunity to learn this substantive content specified by the legislature.²¹

Nor does the State refute that pursuant to HB 1209, the State then engaged in even more study to further identify the knowledge and skills all kids need to compete in today’s economy and meaningfully participate in our State’s democracy – which the State then adopted as its Essential Academic Learning Requirements.²² The State does not address (or refute) the fact that it does not provide its public schools the resources to

¹⁹ *Plaintiffs’ Sept. 20 Brief at pp. 32-35.*

²⁰ *Plaintiffs’ Sept. 20 Brief at pp. 17-19 & pp. 40-45. The legislature’s years of study and ultimate adoption of that substantive content complied with the Seattle School District Court’s direction to the State (supra pp. 17-19 & pp. 40-45). **The Seattle School District Court’s providing for the legislature to further define substantive content for the “essential skills” kids need in today’s world was also consistent with the State’s argument that courts should not micromanage education details.***

²¹ *Plaintiffs’ Sept. 20 Brief at pp. 32-35.*

²² *Plaintiffs’ Sept. 20 Brief at pp. 19-22 & pp. 40-45.*

provide all children a realistic or effective opportunity to learn the knowledge and skills established by the State’s Essential Academic Learning Requirements.²³

In short, the State’s “opportunity” mantra does not address or refute the fact established at trial that the State is not providing all Washington children with a realistic or effective educational *opportunity*:

When this ruling holds the State is not making ample provision for the equipping of all children with the knowledge, skills, or substantive “education” discussed in this ruling, that holding also includes the court’s determination that the State’s provisions for education do not provide all children residing in our State with a realistic or effective opportunity to become equipped with that knowledge, skill, or substantive “education”.

. . . .

[T]he State will ensure that all children will not perform up to their capabilities if it does not give them the educational *opportunity* to achieve. The State is failing to provide that opportunity.²⁴

The fundamental fact remains that an entire generation has passed through the State’s public schools since this Court issued its *Seattle School District* ruling against the defendant State.

Plaintiff Stephanie McCleary from Jefferson County was 13 when the *Seattle School District* Court ordered the State to comply with Article IX, §1. Her daughter Kelsey was 13 when this case was filed. A

²³ *Plaintiffs’ Sept. 20 Brief at pp. 32-35.*

²⁴ *FOF/COL ¶231(a) (underline added) & ¶234 (italics in original).*

full generation passed – but the lack of textbooks, dilapidated facilities, and preoccupation with fundraising rather than teaching still exists today in her kids’ schools.²⁵

Plaintiff Patty Venema from Snohomish County was in high school when this Court issued its *Seattle School District* ruling. Her daughter Halie was in high school when this case was filed. A full generation passed – but the outdated teaching materials and equipment, and inadequate facilities in her kids’ public schools, still exist today (e.g., one 5-stall girls bathroom for a school with over 700 kids).²⁶

The State’s “opportunity” mantra is simply a diversion that asks this Court to pay no attention to the State’s proven, longstanding failure to provide a realistic or effective educational opportunity to large segments of its public school students. The State’s “opportunity” mantra does not even address – never mind refute – the gravity of the State’s continuing Constitutional violation. As the trial court’s findings succinctly summarized regarding the defendant State’s conduct these past 30 years: “the State has passed legislation, it has ordered countless studies, it has commissioned a multiplicity of reports. And yet there remains one harsh reality – it has not and is not amply and fully funding basic education.”²⁷

²⁵ *The facts in this paragraph are at FOF/COL ¶¶16, 105-07, 113-14, 116.*

²⁶ *The facts in this paragraph are at FOF/COL ¶¶20, 108-110, 113-14, 116.*

²⁷ *FOF/COL ¶264 (discussed at Plaintiffs’ Sept. 20 Brief, p. 61).*

B. The Excuses Offered In The State’s Brief Do Not Negate The Constitutional Imperative Here.

1. ESHB 2261 did not create a credible excuse for this Court to avoid setting a firm deadline for the State to comply with our Constitution.

“It’s like deja-vu all over again.”

Yogi Berra

The State argues a firm deadline isn’t needed because the 2009 legislature passed a bill saying that future legislatures will comply with Article IX, §1 by 2018.²⁸ That argument has at least two fatal flaws.

First, it requires this Court to ignore what such a representation is worth. As just a few examples, the trial in this case showed that:

- ◆ The 1977 legislature passed a bill (the Basic Education Act) promising student transportation funding “shall be at one hundred percent or as close thereto as reasonably possible” by no later than the 1980-81 school year.²⁹ Three decades later, the State’s own studies confirm that subsequent legislatures still fund less than 66%.³⁰
- ◆ The 1993 legislature passed a bill (HB 1209) promising to implement an education accountability system by the end of 1998.³¹ Sixteen years later, a subsequent legislature instead passed a new bill (ESHB 2261) promising to implement an accountability system.³²
- ◆ The 2005 legislature passed a bill (E2SSB 5441) promising its Washington Learns Commission would, by the end of 2006, develop recommendations for how the State should provide stable K-12 funding.³³ The Washington Learns Final Report confirms that it did not do that – so the 2007 legislature passed

²⁸ *State’s Oct. 20 Brief at, e.g., 10:12-13 (arguing that ESHB 2261 “calls for complete implementation by 2018”).*

²⁹ *Plaintiffs’ Sept. 20 Brief at pp. 37, 46, & 61.*

³⁰ *Plaintiffs’ Sept. 20 Brief at pp. 37, 46, & 61.*

³¹ *HB 1209 (Tr.Ex. 133), p. 9, lines 26-39; accord FOF/COL ¶189.*

³² *ESHB 2261 (Tr.Ex. 239), section 510.*

³³ *E2SSB 5441 (Tr.Ex. 19), section 3(1)(d).*

a new bill (SB 5627) promising a new commission (the Basic Education Finance Task Force).³⁴

- ◆ The 2007 legislature passed a bill (SB 5627) promising its Basic Education Finance Task Force would, with the assistance of the State's public policy institute, develop a new K-12 funding structure by September 2008 (start of the State's 2009 budget process).³⁵ Its January 2009 Report did not do that – so the 2009 legislature passed a new bill (ESHB 2261) promising a new commission (the Quality Education Council).³⁶

Second, the State's argument requires this Court to forget that ESHB 2261 is a hollow facade for students in the State's public schools today. The State does not in any way challenge or dispute that, in fact:

ESHB 2261 does not require future legislatures – or governors – to do anything. Rather, the legislation is the expressed intent of a current legislature as to what future legislatures should or might do.³⁷

The State responds that the hollowness of ESHB 2261 is irrelevant because every subsequent legislature's ability to ignore the 2009 legislature's enactment is "a fact of constitutional life".³⁸

But another fact of constitutional life is that the State of Washington must comply with the Constitution of Washington. The State's point that each year's legislature can freely ignore ESHB 2261

³⁴ *Washington Learns Final Report (Tr.Ex. 16) at p. 51; RP 1148:10-1149:24; RP 1155:21-1157:6; Anderson Dep. 83:10-84:16; SB 5627 (Tr.Ex. 129).*

³⁵ *SB 5627 (Tr.Ex. 129), §2(1) and (5)(c). As the Chair of that Basic Education Finance Task Force testified at trial, this new Task Force's assignment was basically a repeat of the assignment completed by the State's Paramount Duty commission he served on a quarter century earlier. Plaintiffs' Sept. 20 Brief at p. 37.*

³⁶ *Basic Education Finance Task Force Final Report (Tr.Ex. 124); ESHB 2261 (Tr.Ex. 239); RP 2408:6-21; RP 2908:12-2911:1.*

³⁷ *FOF/COL ¶274 (discussed in Plaintiffs' Sept. 20 Brief at pp. 37-38 & pp. 62-63).*

³⁸ *State's Oct. 20 Brief at 11:10-12.*

confirms that the existence of that bill cannot justify this Court's failing to set a firm deadline for the State to comply with our Constitution.

In short, despite the State's attempt to positively spin ESHB 2261, the facts established in this case confirmed that that bill is merely another example of what the State has been doing for the past three decades: lots of talk about ample funding for its public schools "tomorrow", coupled with excuses for failing to provide it for the children in its public schools today. Wishful talk about possible compliance in the future does not negate the need for actual enforcement today.

2. "Trust Me" is not a credible defense for the State to evade a firm deadline to comply with our Constitution.

*Fool me once, shame on you.
Fool me twice, shame on me.
American Proverb*

The State quotes sentences from the part of the 1978 *Seattle School District* decision where this Court explained it would not retain jurisdiction in that suit because it would trust the legislature to fully comply with Article IX, §1 by that decision's July 1, 1981 deadline.³⁹

The State also relies upon the trial court findings in this case explaining how the State eventually complied with at least one part of the *Seattle School District* ruling in 1990s. That is the part providing for the

³⁹ E.g., *State's Oct. 20 Brief at 11:17-12:1 and 12:15-16 (citing Seattle School District, 90 Wn2d at 538-39)*.

State to further define the substantive content of the essential skills kids need in today’s world – which the State eventually did with its adoption of the four numbered provisions in HB 1209 and ensuing Essential Academic Learning Requirements.⁴⁰

The State argues, therefore, that this Court should simply “trust” the State to finish complying with Article IX, §1 some time in the future.

Over 30 years have passed since this Court “trusted” the State to obey this Court’s order to comply with Article IX, §1. Yet, the State does not refute that its current funding of its public schools has no correlation to reality – forcing too many of its schools to operate in triage mode, and to rely heavily on unstable, non-State funds like local levies to keep their doors open.⁴¹ Nor does the State refute that its public schools fail to provide significant segments of our State’s children a realistic or effective opportunity to become equipped with the basic knowledge and skills that the State itself has determined every child must have to compete in today’s economy and meaningfully participate in our State’s democracy.⁴²

⁴⁰ E.g., *State’s Oct. 20 Brief at 21:20-22:03 (citing FOF/COL ¶¶182-192); accord Plaintiffs’ Sept. 20 Brief at pp. 39-45 & pp. 16-22. As noted earlier, the Seattle School District Court’s providing for the legislature to further define substantive content for the “essential skills” kids need in today’s world is consistent with the State’s argument in this case that courts should not micromanage education details.*

⁴¹ *Plaintiffs’ Sept. 20 Brief at pp. 22-29 & pp. 45-50.*

⁴² *Plaintiffs’ Sept. 20 Brief at pp. 29-35.*

And that situation is getting worse.

For example, based upon their detailed 18-month study of K-12 education funding, the members of the State's Basic Education Finance Task Force unanimously declared in their January 2009 Final Report:⁴³

We are aware of the state's financial circumstances and the difficult choices facing state leaders. However, the Task Force believes that all current K-12 funding should be retained. Numerous studies have demonstrated that the state's K-12 system is underfunded. To make cuts to the education of the state's children would be contrary to the paramount duty that is so clearly stated in our Washington State Constitution.

But the same State that is now asserting this Court should simply "trust" it to comply with Article IX, §1 did not retain that funding. The State's response does not dispute that it has instead cut K-12 funding after receiving that Final Report.⁴⁴ (The State "compensated" for some of its K-12 funding cuts by increasing its school districts' levy lid, so districts with favorable property values could ask local voters to provide those districts even more of their needed education funding.⁴⁵)

⁴³ *Tr.Ex. 124 at second page (Task Force statement attached to Chairman's cover letter); RP 1579:5-24; RP 1263:8-1264:16.*

⁴⁴ *See Plaintiffs' Sept. 20 Brief at pp. 62-63. Accord, e.g., Laws of 2008, ch. 329, §515 (State annual appropriation for STUDENT ACHIEVEMENT PROGRAM of \$444,970,000); Laws of 2009, ch. 564, §516 (reduced to \$104,101,000); Laws of 2010, Spec. Sess., ch. 37, §516 (reduced to \$25,730,000); accord Laws of 2008, ch. 329, §503(7) (funding two learning improvement days per school year); Laws of 2009, ch. 564, §503(7) (reducing to one learning improvement day per school year); Laws of 2010, Spec. Sess., ch. 37, §503(7) (reducing to zero learning improvement days per school year).*

⁴⁵ *SHB 2893 (Laws of 2010, ch. 237) at sec. 1(6)(a). That bill also effectively increased the levy lid further by changing the lid calculation base to include State funds which had been cut as if they had not been cut. Sec. 4(a)(ii), (5), 7(c), and 7(d).*

Unconstitutional underfunding last school year.

Unconstitutional underfunding this school year.

Unconstitutional underfunding next school year.

But “trust me”. Someday, somebody else will make the tough decisions needed to make that unconstitutional underfunding stop.

That is not a credible defense for the State to evade this Court’s setting a firm deadline for compliance with our Constitution.

3. The State’s objection that it has already done all the studies it needs confirms the reasonableness of this Court setting a firm compliance deadline.

*“Everybody wants to go to Heaven.
But nobody want to go now.”*

#1 country song (Kenny Chesney 2008)
written by Jim Collins/Marty Dodson

The State objects that it “has already extensively studied education funding” and that it is therefore “redundant” and “superfluous” for this Court to set a firm deadline for the State “to do something that has already been accomplished.”⁴⁶

The State’s objection confirms plaintiffs’ point that after 30 years of studies, the State already has the information it needs to comply now.⁴⁷

For example, the State does not dispute that its most recent study of the cost of transporting students to and from school for class determined

⁴⁶ *State’s Oct. 20 Brief at 11:5-9 and n.9.*

⁴⁷ *Plaintiffs’ Sept. 20 Brief at pp. 36-37.*

– to the dollar, and separately for each of the State’s 295 school districts – the amount the State is shortchanging each school district every year.⁴⁸

The State’s objection is therefore correct in that the State does not need any more time to comply with its Constitutional duty to fully fund the cost of transporting the State’s public school students to and from school for class. A firm compliance deadline of today is not only reasonable, it is also proper if our Constitution is to be enforced with respect to the students currently in our State’s public schools.

As another example, the State’s most recent study of the actual market salaries its school districts must pay to attract and retain competent teachers and staff confirms that the State is underfunding this aspect of its public schools by several billion dollars.⁴⁹

The State’s objection is therefore correct in that the State does not need any more time to comply with its Constitutional duty to fully fund the actual (rather than hypothetical) salaries its public schools must pay in

⁴⁸ *Plaintiffs’ Sept. 20 Brief at pp. 37, 46, 61 (citing Tr.Ex. 356, pp. 69-74).*

⁴⁹ *E.g., Tr.Ex. 124 at p. 24. The State suggests that the fact its salary formulas fund far less than the market salaries its school districts must pay to attract and retain competent teachers in the real world does not matter because the State passed a statute saying it’s illegal for that fact to be true. State’s Oct. 20 Brief at p.7 n.5 (citing RCW 28A.400.200). But that statute does not say what the State suggests. See RCW 28A.400.200(4) and its limitation to the common school fund (art. 9, sec. 3). Nor can a tautological legislative pronouncement hide what is actually true in the real world. The State’s suggestion on this point has the same type of legal validity as the proposal to address the State’s failures in educating at-risk youth by changing State law to call those students “kids at hope” instead. SB 6249 (2010 Legislative Session; not ultimately enacted).*

today's market. A firm compliance deadline is not only possible, it is also proper if our Constitution is to be enforced for the benefit of the students in our State's public schools today.

As just one more example, the State indicates that pages 7-10 of its Basic Education Finance Task Force Final Report (Tr.Ex. 124) specify what the State plans to implement under ESHB 2261.⁵⁰

If that's true, then the State does not need any more time to immediately start complying with Article IX, §1 (instead of just talking about it). Not only did that State Task Force determine the dollar cost of implementing its plan, but at trial the State also called one of its budget analysts to confirm the dollar costs of that plan.⁵¹ A firm compliance deadline is not only possible, it is also proper if our Constitution is to be enforced for the students in our State's public schools today.

In short, the State's objection to the trial court's enforcement Order confirms that the State already has the information it needs to determine the cost of amply providing for the education of all children in our State. The State just doesn't want to make that ample provision right now.

Our Constitution, however, requires the State to comply with its Constitutional duties – even if the State doesn't want to comply right now.

⁵⁰ See *State's Oct. 20 Brief at 17:16-18:1*.

⁵¹ *Tr.Ex. 124 at p. 24; RP 3940:14-3942:4; Tr.Ex. 1483, RP 3951:14-3953:2, RP 4018:7-4020:21*.

IV. CONCLUSION

“Never...was so much owed by so many to so few.”

Winston Churchill

(August 20, 1940 speech to the British House of Commons regarding the Battle of Britain)

It is easy for us lawyers to comfortably sit back and think there is no urgency here – for regardless of whether or when the State gets around to complying with its paramount Constitutional duty to amply provide for the education of all children, the kids in **our** families will be just fine.

But that’s precisely why there is an urgency. An imperative Constitutional urgency. To paraphrase the trial testimony of one of the State Legislators who served on both Washington Learns and the Basic Education Finance Task Force (Rep. Skip Priest): Every day, every week, every month, every year that we delay means that additional students drop out, and additional students who don’t drop out are left unable to meet the requirements of today’s society. It’s easy to talk about numbers. It’s easy to talk about statistics. But when it comes right down to it, every kid we lose is something that is very, very real. The great tragedy of the State’s long debate and delay is that we’re not talking about numbers. We’re talking about real world kids. Kids for whose failure we all pay the price.⁵²

⁵² RP 1168:12-1170:5. *Since Representative Priest did not run for re-election in 2010, he will be former Representative Priest by the time this Court resolves the State’s appeal.*

This is not an academic ivory tower hypothetical. As the testimony and evidence at trial from the “boots on the ground” in our State’s public schools confirmed, this is a real world tragedy which is currently playing out this year in schools all across our State. One with serious, irreparable, life-altering consequences for hundreds of thousands of our State’s youngest citizens in every corner of Washington.

Today.

Not some distant time in the future.

Today.

The People of our State unequivocally declared when they created this State that:

It is the *paramount* duty of the State to make *ample* provision for the *education* of *all* children residing within its borders....

Article IX, §1.

Over 30 years ago, this Court unequivocally told the defendant that:

The constitutional right to have the State “make ample provision for the education of all (resident) children” would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas.

Seattle School District v. State, 90 Wn.2d 467, 517-18 (1978).

An entire generation has passed through the defendant State’s public schools since that ruling. Yet, as the 8-week trial in this case

confirmed, the above Constitutional right still continues to ring hollow for far, far too many citizens in our State. Especially those in the more vulnerable and under-educated segments of our State's democracy.

It is this Court's duty to do more than merely talk about enforcing the Constitution at some indeterminate time in the future. This Court should firmly act to enforce our Constitution for today's public school students.

The State's objection that its has already done all the studies it needs confirms plaintiffs' point that it is entirely reasonable for this Court to set the end of next school year as a hard deadline for the State to satisfy the two steps towards Constitutional compliance specified in the trial court's order – namely:

- (1) establish as closely as reasonably practicable the actual cost of amply providing all Washington children with the education mandated by the court's interpretation of Article IX, §1, and
- (2) establish how the State will fully fund that actual cost with stable and dependable State sources.⁵³

Setting a firm deadline does not dictate the means of how the State's other two branches must amply provide for the education of all children. But it does dictate when they must complete at least these first two steps towards complying with Article IX, §1 of our State Constitution.

⁵³ *Judgment at p. 2, ¶2 and that Judgment's attached Findings & Conclusions, ¶275.*

Thirty years of talk and the long parade of State commissions, task forces, and councils have been enough. It is too late for the students in our public schools at the time of this Court's *Seattle School District* ruling. A generation later, it's now too late for many of those students' children. The State's October 20 Brief does not refute the fundamental point that the State's ongoing violation of its paramount duty under our State Constitution needs to stop. And stop now.

When all is said and done, one stark reality remains. The future of literally hundreds of thousands of students currently in our State's public schools depends upon what the nine members of this Court do in this case. So many depend so much on so few.

RESPECTFULLY SUBMITTED this 19th day of November, 2010.

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