

NO. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

**STATE OF WASHINGTON'S MEMORANDUM TRANSMITTING
THE LEGISLATURE'S 2015 POST-BUDGET REPORT**

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I. INTRODUCTION

The State has made real and measurable progress in meeting its constitutional obligations to Washington's schoolchildren. That progress is detailed in the attached *2015 Report to the Washington Supreme Court by the Joint Select Committee on Article IX Litigation (2015 Report)*. As directed in this Court's prior orders, the *2015 Report* is transmitted to the Court as an attachment to this memorandum.

Since 2012 the State has increased biennial operating funding for K-12 education by nearly \$5 billion—from \$13.4 billion to \$18.2 billion. *2015 Report* at 38 (Chart A). This amounts to an increase of nearly \$2,500 per pupil per year. *Id.* (Chart B). The 2015 Legislature not only increased K-12 funding by approximately \$2.9 billion over the prior biennium, but also appropriated \$811 million for capital construction supporting K-12 education.

The State has met every deadline established in SHB 2776 (Laws of 2010, ch. 236) for implementing the reforms in ESHB 2261 (Laws of 2009, ch. 548). The 2015-17 operating budget fully implements and funds three of the four elements set out in those bills. The Legislature has committed to completing the fourth element by the 2018 deadline. The State is well along the path toward the constitutional compliance this

Court ordered in its 2012 decision. *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012).

The State also is making progress toward completing the final task remaining from the Court's 2012 decision: paying for basic education salaries entirely with state funds rather than partly with local excess levies. This is the most contentious of the requirements the Court identified. It will require the Legislature not only to choose how to come up with the money—through taxation, revenue growth, cutting other programs, transferring taxing authority, or some combination of these options—but also to make difficult policy decisions such as establishing limits on raising and using local levies and determining whether staff salaries should vary based on local market forces. There are no easy solutions to these questions; indeed, even local school district officials, teachers, and others in the education community—many of whom are members of Respondents' coalition in this lawsuit—disagree as to the proper approach. But three things are clear: (1) these are quintessentially legislative choices; (2) the 2015 Legislature took important steps towards resolving them; and (3) sufficient time remains before this Court's 2018 deadline for the Legislature to reach agreement. The Court should not dictate these fundamental policy choices.

Last September the Court held the State in contempt for failing to submit a plan explaining how the State would achieve constitutional compliance by 2018. Although work remains to be done, the 2015 Legislature's actions move the State closer to ultimate constitutional compliance than any written plan would have done, and continuing to demand a plan at this point would serve no useful purpose. The contempt order should be dissolved.

II. STATEMENT OF ISSUES

1. Should the Court dissolve its order finding the State in contempt?
2. If the Court determines the State has not purged contempt, should it continue to refrain from imposing any sanction?

III. STATEMENT OF THE CASE

ESHB 2261 and SHB 2776. The Legislature substantially revised and updated the Basic Education Act in 2009 in ESHB 2261.¹ The following year, in SHB 2776, the Legislature adopted a new funding distribution formula and established deadlines for phasing in implementation of the education funding reforms enacted in ESHB 2261. The Legislature had begun implementing these funding reforms when the

¹ The Basic Education Act defined the minimum education program to be made available to all students in public school and shifted the funding responsibility for that program from local excess levies to the State. Laws of 1977, 1st Ex. Sess., ch. 359.

Court issued its decision in this case on January 5, 2012. *McCleary*, 173 Wn.2d 477.

The *McCleary* plaintiffs challenged the adequacy of the K-12 funding system that was in place *prior to* the enactment of ESHB 2261. In the *McCleary* decision, the Court held the State’s 30-year-old system for funding basic education did not comply with its duty under article IX, section 1 of the Washington Constitution to make ample provision for K-12 education. *McCleary*, 173 Wn.2d at 539. However, the Court described the new program of basic education adopted in ESHB 2261 as a “promising reform package . . . which, if fully funded, will remedy deficiencies in the K-12 funding system.” *McCleary*, 173 Wn.2d at 484; *see also id.* at 543-44 (describing ESHB 2261 as a “promising reform program” and citing trial testimony that “full implementation and funding for ESHB 2261 will remedy the deficiencies in the prior funding system”).

The Court endorsed the reforms enacted in ESHB 2261 and the implementation schedule in SHB 2776 and reiterated that it defers to the Legislature’s choice of means to discharge its duty under article IX, section 1. But, the Court retained jurisdiction to “monitor implementation of the reforms under ESHB 2261,” to “foster[] dialogue and cooperation between coordinate branches of state government,” and to “help ensure

progress in the State’s plan to fully implement education reforms by 2018.” *McCleary*, 173 Wn.2d at 545-47.

The 2012 Legislative Session. The *McCleary* decision was issued on the eve of the 2012 legislative session. Because that was a “short session” (Const. art. II, § 12(1)), the Legislature could not develop and adopt a biennial budget.² Instead, the Legislature took preparatory steps and, in response to the Court’s request for inter-branch dialog and cooperation, (*McCleary*, 173 Wn.2d at 546), the Legislature passed HCR 4410 (2012), which established the Joint Select Committee on Article IX Litigation.

The 2012 Legislature also was responding to the worst national economic recession since the Great Depression. That recession began in 2008. By the 2009 legislative session, the State faced a combined budget deficit and projected revenue shortfall of approximately \$9 billion, which the Legislature had to address in writing the 2009-11 biennial budget. When the Legislature convened at the beginning of the 2010 short session, it faced an additional shortfall of \$2.8 billion. Before the biennium concluded, projected revenues dropped yet again, by another \$1.4 billion.³

² The biennial budget development process was summarized at pages 34-38 of the *2014 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Legislation* (Apr. 29, 2014).

³ The State’s fiscal plight during this period was set out at pages 24-25 in the *2012 Report to the Washington State Supreme Court by the Joint Select Committee on*

When the Legislature began to craft the 2011-13 biennial budget, a \$3.7 billion shortfall in revenue already was projected. By the time that budget was enacted, the anticipated shortfall had grown to \$5 billion. The Legislature addressed that shortfall, but at the beginning of the 2012 legislative session, when the *McCleary* decision was issued, the Legislature still faced a projected \$1.4 billion revenue shortfall. Faced with an ongoing fiscal crisis, the 2012 Legislature rejected proposals to balance the budget by making reductions to the program of basic education.

The Court’s Response to the 2012 Legislative Session. In July 2012—after the legislative session ended—the Court ordered the State to submit a report summarizing the progress made in 2012 to comply with the *McCleary* decision. Order, *McCleary v. State*, No. 84362-7 (Wash. July 18, 2012) (July 2012 Order). The State did so, carefully explaining that its first report was intended to establish a baseline for assessing progress toward compliance with the 2018 deadline established in ESHB 2261 and SHB 2776 and adopted by the Court:

Given the timing of the [Court’s decision], the critical need for an effective implementation plan, the need to close this deficit in a supplemental budget year, and uncertainty over the form of judicial supervision, the Legislature did not take further steps to implement the reforms established in

Article IX Legislation (Sept. 17, 2012). The summary in this subsection is drawn from that report.

ESHB 2261 and SHB 2776 beyond those already enacted in 2011. . . .

Because this is the first of several anticipated reports, and because the Legislature did not make changes to basic education funding during the 2012 legislative session, this report provides a baseline description of the K-12 budget and information on recent legislative activities in order to provide context for future reports.

2012 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Legislation at 1 (Sept. 17, 2012).

The Court was critical of the State’s response to its decision. Citing its July 2012 Order, issued *after* the 2012 legislative session adjourned, the Court faulted the State for not having demonstrated “steady progress according to the schedule anticipated by the enactment of the program of reforms in ESHB 2261” that was “real and measurable” and “designed to achieve ‘full compliance with article IX, section 1 by 2018.’” Order at 1, *McCleary v. State*, No. 84362-7 (Wash. Dec. 20, 2012) (December 2012 Order).⁴ The Court ordered the State to set out a plan for implementing ESHB 2261 in the report to be submitted following the 2013 legislative session. *Id.* at 3.

The 2013 Legislative Session. The 2013 Legislature adopted an operating budget for 2013-15 that increased K-12 education spending by

⁴ The July 2012 Order had observed that “it is not realistic to measure the steps taken in each legislative session between 2012 and 2018 against full constitutional compliance.” July 2012 Order at 3.

\$1.9 billion above the 2011-13 level. *2015 Report* at 38 (Chart A). The increased funding included \$982 million in enhancements to the program of basic education. *2013 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Legislation* at 10-17 (Aug. 27, 2013) (*2013 Report*). It also contained \$47 million in new appropriations for non-basic education. *Id.* The *2013 Report* explained how these new appropriations were enacted to phase in the reforms enacted in ESHB 2261 consistent with the schedule enacted in SHB 2776, as directed in the July 2012 Order. *Id.* And it explained how the Legislature had fully implemented the new student transportation formula in SHB 2776 for the 2014-15 school year—meeting the deadline established in SHB 2776. *Id.* at 12-13; *see* RCW 28A.160.192(1) (requiring fully implemented student transportation formula by 2013-15 biennium). In other words, the Legislature used the schedule in SHB 2776 as its plan for implementation.

The Court’s Response to the 2013 Legislative Session. Although the Court acknowledged that the State had taken “meaningful steps” to meet its constitutional obligation, it criticized the State for not setting benchmarks for assessing its progress in doing so. Order at 2-3, *McCleary v. State*, No. 84362-7 (Wash. Jan. 9, 2014) (January 2014 Order). The Court directed the State to submit, on an accelerated schedule, a “complete plan for fully implementing its program of basic education for each school

year between now and the 2017-18 school year” that addressed “each of the areas of K-12 education identified in ESHB 2261, as well as the implementation plan called for by SHB 2776” and that included a “phase-in schedule for fully funding each of the components of basic education.” January 2014 Order at 8. The Court did not explain how SHB 2776, which included both targets and deadlines, did not constitute an implementation plan.

The 2014 Legislative Session. The 2014 supplemental budget increased state funding for MSOC by an additional \$58 million, bridging approximately 43 percent of the gap between the 2012 baseline and the 2015-16 target. *2014 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Legislation* at 15-16 (Apr. 29, 2014) (*2014 Report*). The 2014 Legislature also updated key elements of the revised definition of basic education under ESSH 2261, increasing the number of credits required for high school graduation from 20 to 24, modifying the prototypical school funding formula to support an increase from one to two laboratory science credits, and expanding flexibility for students choosing career and technical education fields to achieve proficiency in academic subjects through career and technical education program equivalencies. E2SSB 6552 (Laws of 2014, ch. 217). It directed

full implementation of these changes beginning in the 2015-16 school year. E2SSB 6552.

The 2014 Legislature did not enact a new plan in response to the Court's January 2014 Order. It did, however, report to the Court on the estimated cost of meeting the deadlines established in SHB 2776 (*2014 Report* at 16, 27, updating estimates in the *2013 Report* at 12-14). It also summarized several proposed bills that showed the meaningful legislative discussions that were taking place, laying groundwork for significant progress in the 2015 budget-writing legislative session. *2014 Report* at 27-31.

The Court's Response to the 2014 Legislative Session. Focusing on the State's failure to provide the plan ordered in the Court's January 2014 Order, the Court responded to the *2014 Report* by ordering the State to show cause why it should not be held in contempt for violating the January 2014 Order. Order to Show Cause at 2-3, *McCleary v. State*, No. 84362-7 (Wash. June 12, 2014).

The State responded, arguing that the purpose of a civil contempt order is remedial, not punitive, that the Legislature was not purposefully defying the Court's January 2014 Order but was engaged in the very political process necessary to achieve a funding agreement, and that an order of contempt was unnecessary to secure progress toward

constitutional compliance in 2018. State of Washington’s Opening Brief Addressing Order to Show Cause at 7-14, *McCleary v. State*, No. 84362-7 (Wash. July 11, 2014).

The Court nevertheless held the State in contempt. Order at 2-3, *McCleary v. State*, No. 84362-7 (Wash. Sept. 11, 2014) (September 2014 Order). It held in abeyance any decision whether to issue sanctions or other remedial measures based on the State’s assurance “that the legislature is determined to (and the State expects it to) take meaningful action in the 2015 budget session” and “[i]n the interest of comity and continuing dialog between the branches of government.” *Id.* at 4. The Court stated that if the State did not purge contempt by complying with the Court’s January 2014 Order by the adjournment of the 2015 legislative session, the Court “will reconvene to impose sanctions and other remedial measures as necessary.” *Id.* at 5.

The 2015 Legislative Session. After three special sessions, the 2015 Legislature adjourned on July 10, 2015. The 2015-17 operating budget increased K-12 funding by approximately \$2.9 billion over the prior biennium. *2015 Report* at 7 (table). That amount includes \$1.3 billion targeted at completing the implementation of the reforms identified in SHB 2776, which places the State on a trajectory to achieve constitutional compliance by the deadline established in the *McCleary*

decision. The 2015-17 operating budget also continues prior biennia funding reforms and includes sufficient funding to account for caseload increases and inflation. In addition, the Legislature appropriated \$618 million for compensation-related increases, including an I-732 cost of living adjustment.⁵ *2015 Report* at 7 (table). In the capital budget the Legislature appropriated \$811 million for capital construction supporting K-12 education, including \$200 million for a new grant program to support K-3 class size reduction. *Id.* at 35-37.

Part I of the *2015 Report* provides background. Part II summarizes the 2015 Legislature's enacted budget items for the 2015-17 biennium and explains the increases in funding for K-12 education. Part III describes ongoing work of the Legislature toward ultimate compliance with article IX, section 1 of the Washington Constitution. Part IV summarizes new investments in school construction. Part V references the deferral of timelines in I-1351.

Since the *McCleary* decision in 2012, the State has increased biennial funding for K-12 education in the operating budget by nearly \$5 billion—from \$13.4 billion to \$18.2 billion. *2015 Report* at 38 (Chart A). This corresponds to an increase of nearly \$2,500 per pupil during the same period. *Id.* (Chart B).

⁵ The Court expressed concern over the suspension of cost-of-living increases in the 2013-15 budget. January 2014 Order at 6.

IV. ARGUMENT

The pace of the State's compliance has accelerated since 2012. Significantly, the State has met every implementation benchmark established in SHB 2776 and is on a trajectory to achieve constitutional compliance by the deadline established in the *McCleary* decision. The Legislature is engaged in serious and ongoing discussion about how to assume state responsibility for costs of basic education salaries currently paid by local levies.

The Court's stated purpose in requiring a plan was to increase the pace of the State's progress. The purpose has been fulfilled through the Legislature's concrete actions and forward momentum, even though a written plan was not submitted. Imposing a punitive sanction for failing to produce a plan, the purpose of which has been satisfied, could derail that momentum.

A. The Legislature Has Met Every Benchmark in SHB 2776 and Is on Course to Meet the 2018 Deadline

The Court described ESHB 2261 as a "promising reform program" that, when fully implemented and funded, would remedy the constitutional deficiencies in the prior funding system. *McCleary*, 173 Wn.2d at 543-44. SHB 2776 enacted an implementation schedule for those reforms. That is the implementation schedule the Court referred to in setting the 2018

deadline for constitutional compliance when retaining jurisdiction. *McCleary*, 173 Wn.2d at 545-47. And that is the implementation schedule the Legislature has adhered to since 2012. In the two biennial budgets enacted since the Court’s decision, the Legislature has met every benchmark established in SHB 2776 and is on track to meet the last remaining deadline.

Student transportation. SHB 2776 required the Legislature to phase in the new transportation funding formula beginning in the 2011-13 biennium and to achieve full funding in the 2013-15 biennium. SHB 2776 § 8(1) (*codified as* RCW 28A.160.192(1)). The Legislature met that benchmark in the 2013 legislative session, fully funding student transportation under the new funding formula as of fiscal year 2014-15, and it is fully funded into the future, as shown in Table 1:

Table 1. New student transportation formula	
Deadline in SHB 2776:	Begin in 2011-13 biennium. Complete by 2013-15 biennium. ⁶
Status:	<i>Met deadline</i> —Full funding in 2013-2015 biennium. ⁷
History of progress:	FY2013-14: 40% of difference funded. ⁸ FY2014-15: 100% funded. ⁹ FY2015-16: 100% funded. ¹⁰ FY2016-17: 100% funded. ¹¹

⁶ RCW 28A.160.192(1).

⁷ *2013 Report* at 2; Laws of 2013, 2d Sp. Sess., ch. 4, § 505 (3ESSB 5034).

⁸ *2013 Report* at 12-13; Laws of 2013, 2d Sp. Sess., ch. 4, § 505 (3ESSB 5034).

Materials, supplies, and operating costs (MSOC). SHB 2776 required the Legislature to phase in increased funding for MSOC beginning in the 2011-13 biennium and to achieve full funding by the 2015-16 school year. The 2015 Legislature met that benchmark by fully funding MSOC, as shown in Table 2:

Table 2. Maintenance, supplies, and operating costs (MSOC) increased to \$1,082.76 per student FTE, adjusted for inflation	
Deadline in SHB 2776:	Begin in 2011-13 biennium. Complete by 2015-16 school year (SY). ¹²
Status:	<i>Met deadline</i> —Full funding in 2015-16 school year. ¹³
History of progress:	SY2013-14: 28% of difference funded. ¹⁴ SY2014-15: 43% of difference funded. ¹⁵ SY2015-16: 100% funded. ¹⁶ SY2016-17: 100% funded. ¹⁷

⁹ 2013 Report at 12-13; see also 2014 Report at 11-14 (explaining application of the pupil transportation funding formula); 2014 Report at 46-50 (explaining relationship between fiscal years and school years when funding the pupil transportation expected cost model).

¹⁰ 2015 Report at 10-11; Laws of 2015, 3d Sp. Sess., ch. 4, §§ 505, 1503 (ESSB 6052). The Legislature provided additional funding in the 2015 supplemental budget and the 2015-17 operating budget to meet new expected costs generated by the formula. *Id.*

¹¹ 2015 Report at 10-11; Laws of 2015, 3d Sp. Sess., ch. 4, § 505 (ESSB 6052).

¹² RCW 28A.150.260(8)(b).

¹³ 2015 Report at 8; Laws of 2015, 3d Sp. Sess., ch. 4, § 502(8) (ESSB 6052).

¹⁴ 2013 Report at 12; Laws of 2013, 2d Sp. Sess., ch. 4, § 502(8) (3ESSB 5034).

¹⁵ 2014 Report at 15-16; Laws of 2014, ch. 221, § 502(8) (ESSB 6002).

¹⁶ 2015 Report at 8; Laws of 2015, 3d Sp. Sess., ch. 4, § 502(8) (ESSB 6052).

¹⁷ *Id.*

All-day kindergarten. SHB 2776 required the legislature to continue phasing in all-day kindergarten, setting the 2017-18 school year as the deadline for full statewide implementation. The 2015 Legislature fully funded all-day kindergarten for the 2016-17 school year—one year before the deadline established in SHB 2776, as shown in Table 3:

Table 3. All-day kindergarten	
Deadline in SHB 2776:	Begin in 2011-13 biennium, with highest poverty schools. Complete by 2017-18 school year. ¹⁸
Status:	<i>Met deadline</i> —Full funding in 2016-17 school year (one year before deadline).
History of progress:	FY2011-12: 21% of kindergarten enrollment funded. ¹⁹ FY2012-13: 22% funded. ²⁰ FY2013-14: 43.75% funded. ²¹ FY2014-15: 43.75% funded. ²² FY2015-16: 71.88% funded. ²³ FY2016-17: 100% funded. ²⁴

¹⁸ RCW 28A.150.315(1).

¹⁹ *2012 Report* at 27; Laws of 2011, Sp. Sess., ch. 50, § 502(11) (2ESHB 1087). The allocations went first to children in low-income school districts. *Id.*

²⁰ *Id.*

²¹ *2013 Report* at 13; Laws of 2013, 2d Sp. Sess., ch. 4, § 502(11) (3ESSB 5034).

²² *Id.*

²³ *2015 Report* at 8-9; Laws of 2015, 3d Sp. Sess., ch. 4, § 502(12) (ESSB 6052).

²⁴ *Id.*

K-3 class sizes. SHB 2776 required the Legislature to allocate funding sufficient to reach an average class of size in 17 students in K-3 classes by 2018. The State is on track to meet that deadline. SHB 2776 did not establish yearly benchmarks for class size in each grade; rather, it required the Legislature to provide funds to reduce class sizes by focusing first on high poverty schools. The Legislature has done so. Before the 2011-13 biennium, the State funded K-3 class sizes of 25.30 students. The Legislature provided funds to reduce class size in every subsequent biennium, and it funded the target class size of 17 students in kindergarten and first grade in high poverty schools as of the 2016-17 school year. The funding for class-size reductions for all schools is on a trajectory to fund K-3 class size of 17 students by the 2017-18 school year—the deadline established in SHB 2776—and the Legislature has committed to meeting that deadline and is assuming the necessary funding in its required four-year balanced budget projection.²⁵ The funding for class size reductions to date is shown in Table 4, on the next page:

²⁵ *2015 Report at 4-5*; RCW 43.88.055; RCW 82.33.060.

Table 4. Funding to reduce K-3 class size to 17 student full-time equivalents (FTE)																																	
Deadline in SHB 2776:	Begin in 2011-13 biennium, with highest poverty schools. Complete by 2017-18 school year. ²⁶																																
Status:	<i>On track to meet deadline.</i>																																
History of progress:	<p>SY2011-13: Funded to reduce K-3 class size in high poverty schools from 25.30 to 24.10.²⁷</p> <p>SY2013-14: Funded to reduce K-1 class size in high poverty schools to 20.85.²⁸</p> <p>SY2014-15: Funded to reduce K-1 class size to 24.10, with enhanced funding to reduce K-1 class size in high poverty schools to 20.30.²⁹</p> <p>SY2015-16:</p> <p style="padding-left: 40px;">Funded to reduce K-3 class sizes to the following³⁰:</p> <table style="margin-left: 80px; border: none;"> <tr> <td>Grade K</td><td>22.00</td> <td>Grade 2</td><td>24.00</td> </tr> <tr> <td>Grade 1</td><td>23.00</td> <td>Grade 3</td><td>25.00</td> </tr> </table> <p style="padding-left: 40px;">Funded to reduce K-3 class sizes in high poverty schools to the following³¹:</p> <table style="margin-left: 80px; border: none;"> <tr> <td>Grade K</td><td>18.00</td> <td>Grade 2</td><td>22.00</td> </tr> <tr> <td>Grade 1</td><td>19.00</td> <td>Grade 3</td><td>24.00</td> </tr> </table> <p>SY2016-17:</p> <p style="padding-left: 40px;">Funded to reduce K-3 class sizes to the following³²:</p> <table style="margin-left: 80px; border: none;"> <tr> <td>Grade K</td><td>19.00</td> <td>Grade 2</td><td>22.00</td> </tr> <tr> <td>Grade 1</td><td>21.00,</td> <td>Grade 3</td><td>22.00</td> </tr> </table> <p style="padding-left: 40px;">Funded to reduce K-3 class sizes in high poverty schools to the following³³:</p> <table style="margin-left: 80px; border: none;"> <tr> <td>Grade K</td><td>17.00</td> <td>Grade 2</td><td>18.00</td> </tr> <tr> <td>Grade 1</td><td>17.00</td> <td>Grade 3</td><td>21.00</td> </tr> </table>	Grade K	22.00	Grade 2	24.00	Grade 1	23.00	Grade 3	25.00	Grade K	18.00	Grade 2	22.00	Grade 1	19.00	Grade 3	24.00	Grade K	19.00	Grade 2	22.00	Grade 1	21.00,	Grade 3	22.00	Grade K	17.00	Grade 2	18.00	Grade 1	17.00	Grade 3	21.00
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Grade K	18.00	Grade 2	22.00																														
Grade 1	19.00	Grade 3	24.00																														
Grade K	19.00	Grade 2	22.00																														
Grade 1	21.00,	Grade 3	22.00																														
Grade K	17.00	Grade 2	18.00																														
Grade 1	17.00	Grade 3	21.00																														

²⁶ RCW 28A.150.260(4)(b).

²⁷ 2012 Report at 27; Laws of 2011, Sp. Sess., ch. 50, § 502(2)(c) (2ESHB 1087).

²⁸ 2013 Report at 13; Laws of 2013, 2d Sp. Sess., ch. 4, § 502(2)(c) (3ESSB 5034).

Other basic education programs. In addition to the four elements of SHB 2776 called out in the Court’s January 2014 Order, the Legislature increased its investment in other components of basic education in response to increased caseloads and inflation. For example, the Legislature appropriated \$143.1 million of new money in the Learning Assistance Program for the 2013-15 biennium, increasing the number of state-funded instructional hours per week per student by 58 percent, and broadened the permitted uses of the Program.³⁴ It invested \$18.9 million of new money in 2013-15 biennium to add three hours per week of state-funded supplemental instruction for students exiting from the Transitional Bilingual Instructional Program.³⁵ These programs, and others such as the Special Education Program and the Highly Capable Program, are funded through enhancements to the prototypical school model and all of these appropriations are carried forward into the 2015-17 biennium and

²⁹ *2013 Report* at 2-3, 10; Laws of 2013, 2d Sp. Sess., ch. 4, § 502(2)(c) (3ESSB 5034).

³⁰ *2015 Report* at 9-10; Laws of 2015, 3d Sp. Sess., ch. 4, § 502(2)(c) (ESSB 6052).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *2013 Report* at 15.

³⁵ *Id.* at 16-17

increased to account for caseload increases and inflation as part of the maintenance budget for K-12 education.³⁶

Other K-12 programs. The 2015 Legislature also provided additional funding beyond the basic education formulas to support the implementation of K-3 class-size reductions and all-day kindergarten. The *2015 Report* lists three examples:

- To support the expected increase in hiring beginning teachers in response to the increased funding for all-day kindergarten and K-3 class size reductions, the Legislature increased funding for the Beginning Educator Support Team (BEST) program from \$6 million to \$11 million. This program provides grants to school districts to provide additional support and professional development for new teachers.³⁷
- To support the expansion of state-funded all-day kindergarten, the Legislature increased funding from \$3.5 million to \$5.6 million to support the expansion of the Washington Kindergarten Inventory and Development Skills (WaKIDS) program. This program allows an assessment of individual children at the beginning of the school

³⁶ For example, compare the following sections in Laws of 2015, 3d Sp. Sess., ch. 4 (ESSB 6052) with Laws of 2013, 2d Sp. Sess., ch. 4 (3ESSB 5034); § 507 (Special Education Programs), § 511 (Programs for Highly Capable Students), § 514 (Transitional Bilingual Instructional Program), and § 515 (Learning Assistance Program).

³⁷ *2015 Report* at 12.

year to support teachers, parents, and other early learning providers in tailoring instruction to children.³⁸

- The 2015 Legislature provided \$158.7 million in new funding for early learning programs and services, based on research showing that investments in pre-K education lead to improved K-12 outcomes.³⁹

In its January 2014 Order at page 5, the Court noted the need for additional capital expenditures to support all-day kindergarten and K-3 class size reductions. The 2015 Legislature responded. In the capital budget, the Legislature appropriated \$611 million for the School Construction Assistance Program, which is a matching grant program for school districts.⁴⁰ In addition to that program, the capital budget includes \$200 million for a new program of grants intended specifically to support K-3 class size reduction and all-day kindergarten.⁴¹

The State has met every benchmark established by SHB 2776. The State has fully funded—or is on track and committed to fully fund by 2018—all elements of ESHB 2261 this Court has identified. As explained

³⁸ *2015 Report* at 12

³⁹ *Id.* at 12-13.

⁴⁰ *Id.* at 35; Laws of 2015, 3d Sp. Sess., ch. 3, § 5013 (2EHB 1115).

⁴¹ *2015 Report* at 35-37; Laws of 2015, 3d Sp. Sess., ch. 3, § 5028 (2EHB 1115); Laws of 2015, 3d Sp. Sess., ch. 41 (SESSB 6080).

in the next section of this memorandum, the Legislature has taken steps to begin the difficult and complicated process necessary to eliminate the use of local excess levies to pay for basic educational staff and replace that revenue with state funding.

B. The 2015 Legislature Took Steps to Address the Complicated Issues That Must Be Resolved to Eliminate the Use of Local Levies to Pay for Basic Education Salaries

The Legislature devoted substantial time in the 2015 session to grappling with how the State will assume all basic education staffing costs. The task involves an enormous level of complexity. Each proposal has a different effect on each of the state's 295 school districts. Each of these districts has different needs due to student characteristics such as poverty and limited English proficiency; due to unique characteristics such as geography and property value; and due to local priorities reflecting individual communities. A statewide legislative solution to over-reliance on local levies requires the Legislature to balance the diverse needs of these 295 districts.

The *2015 Report* details a number of work sessions and bills devoted to resolving the various implementation challenges.⁴² Those efforts have identified a number of tasks and policy decisions that need to be carefully choreographed. For example, the Legislature needs to

⁴² *2015 Report* at 13-17, 26-30.

determine the appropriate State salary levels and incorporate them into a new salary schedule or other allocation model. Proposals introduced in the 2015 legislative session would implement a revised salary allocation model. One proposal would first conduct a study to quantify basic education salaries.⁴³ Other proposals prescribed a new state salary allocation model for certificated instructional staff that is aligned to educators' certification progression.⁴⁴ All proposals also considered including a "localization factor" to recognize market differences in different parts of the State.⁴⁵ The Legislature heard testimony in support of and against such a factor by various public school stakeholders, who raised a variety of concerns about fairness, practicality, ability to hire, and variations in impact on districts.⁴⁶

The Legislature also needs to consider structural changes to safeguard against the possibility that school districts might resume using local levies to pay for basic education, which could result in the same

⁴³ ESHB 2239 §§ 1, 8, 64th Leg., 3d Sp. Sess. (Wash. 2015).

⁴⁴ SB 6130 § 303, 64th Leg., 2d Sp. Sess. (Wash. 2015); SB 6109 §§ 101-103, 64th Leg., Reg. Sess. (Wash. 2015).

⁴⁵ ESHB 2239 § 6; SB 6130 § 306; SB 6109 § 101.

⁴⁶ Hr'g on H.B. 2239 Before House Appropriations Comm., 64th Leg., 1st Sp. Sess. (Apr. 30, 2015) (work session on SB 6109, SB 6104, SB 6103), *audio recording by TVW*, Washington State's Public Affairs Network, http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2015040186; Hr'g on S.B. 6130 Before Senate Ways and Means Comm., 64th Leg., 2d Sp. Sess. (June 11, 2015), *audio recording by TVW*, Washington State's Public Affairs Network, http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2015060048.

constitutional infirmity found in this case. To ensure that the State’s support for basic education is not supplanted by local levy revenues going forward, the Legislature must draw some lines between permissible and impermissible local levy expenditures. The task requires balancing school districts’ need for flexibility to implement local priorities with the State’s need to provide for and demonstrate its full funding for basic education. Some of the 2015 legislative proposals included attempts to distinguish basic education from “enhancements outside of the program of basic education.”⁴⁷ Another bill proposed an effort to study and determine the scope of activities that school districts are currently supporting with supplemental contracts.⁴⁸ To further safeguard against future supplanting of the state’s funding obligation, the Legislature also is considering measures to add transparency and accountability for relative expenditures of state, federal, and local revenues.⁴⁹ These measures would be in addition to those already implemented under ESHB 2261.⁵⁰

The Legislature faces another complex challenge in determining how to reform the local levy system to reflect full state funding for basic

⁴⁷ SB 6130 § 401; SB 6109 § 102.

⁴⁸ ESHB 2239 § 5.

⁴⁹ *2015 Report* at 20, 25; ESHB 2239 § 5; SB 6130 §§ 201-209; SB 6109 §§ 101(5), 201, 105(6).

⁵⁰ *See* ESHB 2261 § 201 (*codified as* RCW 43.41.400), § 202 (*codified as* RCW 28A.655.210), § 203 (*codified as* RCW 28A.300.507).

education salaries, while preserving room for local priorities. One proposal in 2015 would reduce each district's maximum levy revenue over time in conjunction with state salary enhancements and change the calculation of a maximum levy rate from a formula based on the previous year's revenue to one based on a dollar rate per \$1,000 of assessed valuation of property in the district, with a higher rate for property-poor districts.⁵¹ Any adjustment to the current local levy system also has a domino effect on the state levy equalization program, which must be examined and potentially adjusted to ensure it continues to serve its underlying policy purpose to equalize all school districts' access to local levies.⁵² In recognition of the complexity of reforming the local levy system, there were several legislative proposals to establish work groups to study, recommend, and monitor implementation, specifically to identify and avoid unintended inequities that might be created.⁵³

Another important consideration concerns whether state funding support requires changes to tax laws. Various bills identified a variety of potential revenue sources, with two of the proposals creating workgroups to review and recommend any changes to state tax laws.⁵⁴ Any change to

⁵¹ SB 6130 § 502(10).

⁵² ESHB 2239 § 1(7)(d).

⁵³ ESHB 2239 § 5; SB 6130 § 601.

⁵⁴ ESHB 2239 § 8; SB 6130 § 601.

tax laws requires careful timing in conjunction with the other components described above. For example, school districts budget for the following year in spring and early summer. RCW 28A.505.040. The school fiscal year runs from September through August. RCW 28A.505.030. State appropriations are budgeted on the state fiscal year, July through June. State and local property taxes are levied on a calendar year basis. RCW 84.36.005; RCW 84.40.020. Thus, any solution that involves a change to tax laws must be implemented in such a way as to anticipate the time lag before the revenue is available for appropriation and coordinated with any reduction in local levy property tax collection to ensure that districts do not experience a funding gap or decrease.

The considerations listed above are not intended to seek the Court's endorsement of any approach, but to illustrate how complex the task is and how many layers of policy decisions are interconnected and must be coordinated. Each component affects others. For example, determining the scope of permissible levy use informs how to formulate a maximum levy threshold and vice versa. Any change to a levy base or levy lid affects districts differently because they are all situated differently in terms of property valuation, size, and student mix. Many stakeholders testified at legislative hearings that decisions concerning supplemental

contracts, levy reforms, and compensation levels involve balancing competing considerations of fairness to differently situated districts.⁵⁵

The House approached the issue of compensation and levy reform with a call for further deliberation, study, and recommendations, followed by a series of action dates. Senators addressed compensation and levy reform by introducing a series of iterative bills, refining the solutions. That work is not done: even the last bill of that iterative process, SB 6130, provided mechanisms for continued feedback and refinement. Much public testimony from the public school community on both House and Senate bills applauded the efforts and urged lawmakers to move forward, but witnesses also asked to provide further input and called for further public deliberation and care before the Legislature moves ahead.⁵⁶ Testimony also established a lack of consensus among school administrator and teacher representatives on how to go forward.⁵⁷

The plans put forth in the bills introduced in 2015 show both depth of thought and commitment to resolving the issue by legislators. But the

⁵⁵ Hr’g on H.B. 2239 Before House Appropriations Comm., 64th Leg., 1st Sp. Sess. (Apr. 30, 2015) (work session on SB 6109, SB 6104, SB 6103), *audio recording by TVW*, Washington State’s Public Affairs Network, http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2015040186; Hr’g on S.B. 6130 Before Senate Ways and Means Comm., 64th Leg., 2d Sp. Sess. (June 11, 2015), *audio recording by TVW*, Washington State’s Public Affairs Network http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2015060048.

⁵⁶ Hr’g on H.B. 2239, *supra*, beginning at 1:45:30; 2:07:20; 2:13:30; Hr’g on S.B. 6130, *supra*, at 1:07:30; 1:12:30; 1:21:03 sec.; 1:43:45.

⁵⁷ *Id.*

transition to state funding cannot be done piecemeal, and more input is needed from the public school community. The work did not end with the 2015 session. The Senate Early Learning and K-12 Education Committee has planned a listening tour of the State using the various Senate bills described in the 2015 Report as the baseline for discussion.⁵⁸

C. Initiative 1351 Is Not Part of This Case

After the Court issued its September 2014 Order finding the State in contempt, the voters approved Initiative 1351 (2014), which amended the statute setting out the prototypical school funding formula to reduce class size in all K-12 grades and increase numbers of both teaching and nonteaching staff. That initiative has not been litigated or briefed in this case, it has not been identified at any time as part of the remedy necessary to cure a constitutional infirmity, and it is not relevant to any response to the Court's order of contempt.

Moreover, the 2015 Legislature enacted EHB 2266 (Laws of 2015, 3d Sp. Sess., ch. 38), which deferred the implementation of I-1351 until after the Legislature has completed implementing the reforms and state funding necessary to respond to this Court's decision in *McCleary*. That deferral also will allow the Legislature to properly assess whether the

⁵⁸ See Senate Committee Services 2015 Interim Work Plan, at 11, <http://leg.wa.gov/Senate/Committees/Documents/Reports/InterimPlans/2015.pdf>.

revisions to the funding and staffing formulas adopted in I-1351 are the best means of providing for the educational needs of Washington students, or whether they should be revised to better serve the needs of students. *See McCleary*, 173 Wn.2d at 484 (“The program of basic education is not etched in constitutional stone. The legislature has an obligation to review the basic education program as the needs of students and the demands of society evolve.”).

D. The Order of Contempt Should Be Dissolved

Last September, the Court found the State in contempt—not based on any failure to meet its 2018 deadline, but rather for failing to produce a plan this Court required in January 2014. The purpose of that plan, the Court said, was to force the State “to demonstrate, through immediate, concrete action, that it is making real and measurable progress, not simply promises.” January 2014 Order at 8. The State has now taken concrete action that demonstrates real and measurable progress. The State is well on its way to implementing the reforms in ESHB 2261, on the timeline the Legislature established in 2010 in SHB 2776. *See McCleary*, 173 Wn.2d at 546 (stating that the Court’s objective in retaining jurisdiction was to “monitor implementation of the reforms under ESHB 2261”). The Legislature is on track to reach full implementation and funding in 2018. The contempt order should be dissolved.

When the Court ordered the submission of a plan in January 2014, it did not have the benefit of seeing the actual implementation of SHB 2776 that has occurred. When the Court found the State in contempt in September 2014, it did not have the benefit of seeing the progress achieved in the 2015 Legislature: the \$2.9 billion increase in appropriation for K-12 education in the operating budget; the continued timely implementation of SHB 2776; the hard work of preparing to correct the use of local levies as a revenue source for basic education salaries.

It is true that the State has not submitted a plan—beyond SHB 2776—listing specific benchmarks for assessing the pace of progress toward the 2018 deadline. But it also is true that the State instead has taken actions that have eclipsed the need for such a plan. Instead of *planning*, the Legislature *acted* by implementing and funding the reforms it enacted in compliance with the schedule it established in 2010. The Court’s stated objective in requiring a plan—to force “real and measurable progress, not simply promises,” is being satisfied. Progress is occurring.

Accordingly, there is no need to continue the contempt order and no need to impose any sanction. The remaining task—fully funding basic education salaries with state funds rather than local levies—is difficult and complex. But sophisticated efforts toward that goal already are underway. Continuing to require the plan described in the January 2014 Order would

be unproductive and would distract from the hard work needed to achieve resolution by 2018. The contempt order should be dissolved.

If the contempt order is dissolved, then the question of possible sanctions disappears. There should be no sanction.

But if the Court continues to hold the State in contempt, the State respectfully suggests that imposing a sanction for failure to produce a plan would slow the real progress being made toward constitutional compliance. Instead, if the Court is resolved to leave the contempt order in place, it should simply do so until either (1) the Court is satisfied that the State will achieve compliance with its article IX, section 1 duty by 2018, or (2) the 2018 deadline is not met. The order of contempt provides more than sufficient evidence of the Court's continuing vigilance and determination as the State continues its momentum toward constitutional compliance. Any sanction would be counterproductive.

V. CONCLUSION

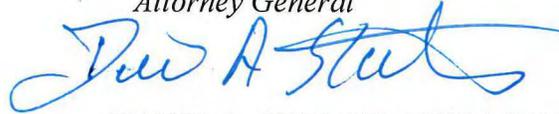
The Court should dissolve the order holding the State in contempt for failure to submit a plan. The Court's purpose in requiring a plan—to force real and measurable progress—has been achieved. As of the 2015 legislative session, the State has met every funding deadline established in SHB 2776. The Legislature is taking sophisticated and significant steps to complete the transition to full state funding for basic education salaries.

The State is on schedule to comply with the 2018 deadline the Court established in *McCleary*, 173 Wn.2d at 477.

RESPECTFULLY SUBMITTED this 27th day of July 2015.

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