THE SUPREME COURT OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et al.,	)	**ORDER**
Respondent/Cross-Appellant,	)	
v.	)	Supreme Court No. 84362-7
STATE OF WASHINGTON,	)	King County No. 07-2-02323-2 SEA
Appellant/Cross-Respondent.	)	

This matter came before the court on its December 6, 2012, en banc conference following the parties' submissions in response to this court's July 18, 2012 order. *See* Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation; Pl./Resp'ts' 2012 Post-Budget Filing. The question before us is whether, in remedying the constitutional violation of the State's paramount duty under article IX, section 1, current actions "demonstrate steady progress according to the schedule anticipated by the enactment of the program of reforms in ESHB 2261." Wash. Supreme Court Order (July 18, 2012) at 3 (Order). Consistent with ESHB 2261, 61st Leg., Reg. Sess. (Wash. 2009), such progress must be both "real and measurable" and must be designed to achieve "full compliance with article IX, section 1 by 2018." *Id.*

The State's first report falls short. The report details some of the same history set out in this court's opinion, *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), and it identifies committees in place and the funding task force's assignment. But, the report does not

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sufficiently indicate how full compliance with article IX, section 1 will be achieved. Indeed, since the passage of ESHB 2261 in 2009, significant cuts to education funding have been made. Some of these cuts have been partially restored, but the overall level of funding remains below the levels that have been declared constitutionally inadequate.

Steady progress requires forward movement. Slowing the pace of funding cuts is necessary, but it does not equate to forward progress; constitutional compliance will never be achieved by making modest funding restorations to spending cuts.

It continues to be the court's intention to foster cooperation and defer to the legislature's chosen plan to achieve constitutional compliance. *See McCleary*, 173 Wn.2d at 541-42, 546. But, there must in fact be a plan. Each day there is a delay risks another school year in which Washington children are denied the constitutionally adequate education that is the State's paramount duty to provide.

Year 2018 remains a firm deadline for full constitutional compliance. Whether this is achieved by getting on track with the implementation schedule anticipated in ESHB 2261 or whether it is achieved by equivalent measures, it is incumbent upon the State to lay out a detailed plan and then adhere to it. The upcoming legislative session provides the opportunity for the State to do so. While the State's first report to the court identified the standing committees that have been formed and the additional studies that have been undertaken, the second report must identify the fruits of these labors.

Accordingly, by majority, it is hereby ordered: the report submitted at the conclusion of the 2013 legislative session must set out the State's plan in sufficient detail to allow progress to be measured according to periodic benchmarks between now and 2018. It should indicate the

phase-in plan for achieving the State's mandate to fully fund basic education and demonstrate that its budget meets its plan. The phase-in plan should address all areas of K-12 education identified in ESHB 2261, including transportation, MSOCs (Materials, Supplies, Other Operating Costs), full time kindergarten, and class size reduction. Given the scale of the task at hand, 2018 is only a moment away—and by the time the 2013 legislature convenes a full year will have passed since the court issued its opinion in this case.[1]

In education, student progress is measured by yearly benchmarks according to essential academic goals and requirements. The State should expect no less of itself than of its students. Requiring the legislature to meet periodic benchmarks does not interfere with its prerogative to enact the reforms it believes best serve Washington's education system. To the contrary, legislative benchmarks help guide judicial review. We cannot wait until "graduation" in 2018 to determine if the State has met minimum constitutional standards.

IT IS SO ORDERED.

DATED at Olympia, Washington this 20th day of December, 2012.

For the Court,

Madsen, C.J.
CHIEF JUSTICE

[1] On a minor point, the State's 2013 postbudget report and any response should be filed as a pleading with the court. This case remains open and it is important that all communications between the parties and the court be part of the open court file.

No. 84362-7

J.M. JOHNSON, J. (dissenting)—Today's order clearly violates two important provisions of our constitution: the separation of powers and the explicit delegation of education to the legislature. This order purports to control the Washington State Legislature and its funding for education until 2018. The order ultimately impairs the implementation of newly designed best available education techniques for our school children. I dissent.

SEPARATION OF POWERS

This case was originally brought as a declaratory action alleging that the State was violating the Washington State Constitution by failing to adequately fund the K-12 school system.[1] RCW 7.24.010 authorizes Washington courts to declare rights, status, and other legal relationships under declaratory judgment actions. Here, the majority actually orders the legislature to take certain specific actions by

[1] *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012).

a specified date, which sounds more in mandamus than declaratory judgment. It also disregards the multitudinal facets of a budget.

A writ of mandamus is used "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled . . . ." RCW 7.16.160. Although this court has limited authority to issue writs of mandamus, it seldom controls state officers, much less the legislature. Furthermore, "such a court order must be justified as an extraordinary remedy." *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 598-99, 229 P.3d 774 (2010) (denying mandamus).

As the remedy lies in equity, courts must exercise judicial discretion to issue the writ. *Id.* at 601. "'[W]hen directing a writ to the Legislature or its officers, a coordinate, equal branch of government, the judiciary should be especially careful not to infringe on the historical and constitutional rights of that branch.'" *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994)).

Here, the court is issuing what appears to be a writ of mandamus without calling it by its proper name or justifying it as an extraordinary remedy. Further, writs of mandamus must be directed at an "inferior tribunal, corporation, board or

person." RCW 7.16.160. The legislature is separate and equal, not an "inferior . . . board." *Id.*

The majority's order directs the legislature to create a specific educational plan by the end of the 2013 legislative session with further steps to 2018. Considering that the new legislators have not yet been sworn in, and the body to which we are issuing this direction is consequently not even in existence, the order is improper. At the least, the new legislature should be allowed to consider the issue, in good faith, without this court's orders held to its head.

The Washington State Constitution does not express its separation of powers. "'Nonetheless, the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.'" *Brown*, 165 Wn.2d at 718 (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). The separation of powers doctrine exists "to ensure that the fundamental functions of each branch remain inviolate." *Carrick*, 125 Wn.2d at 135.

We have recognized that "[t]he spirit of reciprocity and interdependence requires that if checks by one branch undermine the operation of another branch or undermine the rule of law which all branches are committed to maintain, those checks are improper and destructive exercises of the authority." *In re Salary of*

Juvenile Director, 87 Wn.2d 232, 243, 552 P.2d 163 (1976). Today's order is precisely that—a destructive exercise of authority. Effects on other state funded programs, such as those for the needy, are disregarded. The extensive history of educational studies and reform described in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), illustrates the legislature's comparative advantage at identifying policy goals and implementing them.[2] Although the majority in *McCleary* claimed that this court would not "dictat[e] the precise means by which the State must discharge its duty,"[3] today's order no doubt contemplates this court's future assessment of the merits of the legislature's benchmarks, as well as the contents of its plan.[4] Because we are isolated from the legislative mechanisms

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[2] Examples of such studies and reforms include the Washington Basic Education Act of 1977 (LAWS OF 1977, 1st Ex. Sess., ch. 359), the Levy Lid Act of 1977 (LAWS OF 1977, 1st Ex. Sess., ch. 325), the Remediation Assistance Act (LAWS OF 1979, ch. 149), the Transitional Bilingual Instruction Act of 1979 (LAWS OF 1979, ch. 95), the Education for All Act of 1971 (LAWS OF 1971, 1st Ex. Sess., ch. 66), the Governor's Council on Education Reform and Funding, the Commission on Student Learning, ESHB 1209, the development of EALRs and the Washington Assessment of Student Learning, the Washington Learns study, E2SSB 5841, the Transportation Funding study, the Basic Education Finance Task Force, E2SSB 5627, the creation of the Quality Education Council, and SHB 2776. *McCleary*, 173 Wn.2d at 486-510. A recent example of how educational reforms are constantly evolving is the announcement of Washington State Superintendent of Public Instruction Randy Dorn's proposal to reduce five required testing areas down to three. Press Release, State of Washington Office of Superintendant of Public Instruction, Dorn Proposes Changes in State Assessment System (Dec. 13, 2012), http://www.k12.wa.us/Communications/PressReleases2012/DornProposesChanges-Assessment.aspx (last visited Dec. 18, 2012).

[3] 173 Wn.2d at 541.

[4]The order appears to be predicated on the misinformation that more funding is the solution to all problems in education. American students' recent scores on 12th grade National Assessment of Educational Progress (NAEP) tests highlight the mediocrity in K-12 schools. Matthew Ladner et

for gathering public input, such as hearings and committees, courts are undeniably unsuited to decide these policy judgments.

WASHINGTON STATE CONSTITUTION ARTICLE IX, SECTION 2

The constitution enshrines in article IX, section 2 that "[t]he legislature shall provide for a general and uniform system of public schools." This is supported both by statewide representation in the legislature and by the legislature's control over the budget. Today's order is a clear usurpation of the legislature's constitutionally mandated duty.

Judges sometimes have delusions of grandeur. Our decision-making deals with thousands of criminal and civil cases through one model. Our state constitution allows other major problems to be resolved through elected representatives from the entire state. This includes the committee process, two houses, a governor, and the use of initiatives and referenda as prods.

The United States Supreme Court has long recognized "that judicial inquiries into legislative or executive motivation represent a substantial intrusion

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al., *Report Card on American Education* 4 (16th ed. 2010). For example, only 23 percent of 12th graders scored "'Proficient'" in math (39 percent scored "'below Basic'"). *Id.* Similarly, only 35 percent of 12th graders scored "Proficient" in reading. *Id.* Nationally, per student annual expenditures have increased from $4,060 in 1970 to $9,266 in 2006 (in constant 2007 dollars). *Id.* at 8. Meanwhile, NAEP scores have remained fairly constant and high school graduation rates have dropped slightly. *Id.* What this means is that United States taxpayers are paying more than double per student than they were 40 years ago without seeing any measurable increases in educational outcomes.

into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). We should accordingly presume that legislators act in good faith in discharging their constitutional duties. In *McCleary*, the majority clarified the legislature's duty under article IX, section 1 of the Washington State Constitution and expressed that we expect to see full implementation of educational reforms. 173 Wn.2d at 547. Because I would continue to presume that the legislature will act in good faith in implementing these reforms, this order oversteps the bounds of proper judicial action.

I agree with and signed Chief Justice Madsen's concurrence/dissent in *McCleary*, in which she expressed that "[w]e have done our job; now we must defer to the legislature for implementation." *Id.* at 548 (Madsen, C.J., concurring/dissenting). For this reason, I respectfully dissent.