

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' ANSWER
TO THE AMICUS BRIEF OF THE
LEAGUE OF EDUCATION VOTERS**

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Note: This case was brought by the McCleary family, the Venema family, and the Network for Excellence in Washington Schools (http://www.waschoolexcellence.org/about_us/news_members) provides the current list of that plaintiff organization's over 360 member entities). The following refers to them as "plaintiffs" (and to the State as "defendant") to avoid confusion between the "Petitioners" below who are now "Respondents" on appeal and the "Respondent" below that is now the "Petitioner" on appeal. Cf. RAP 10.4(e).

I. INTRODUCTION

The amicus brief filed by the League of Education Voters ("LEV") presents four arguments that focus on:

- The significance of Washington's Article IX, §1;
- The trial court's ruling that State funding levels are too low to comply with Article IX, §1;
- The State's decision to flaunt the trial court ruling against it by cutting funding after that ruling; and
- The emptiness of legislative "intentions" such as those suggested in HB 2261.

This Answer provides plaintiffs' position on how the new matters raised in the LEV's amicus brief relate to the 5 issues currently before this Court.

As noted in this case's prior briefing, the 5 issues for review raised in the State's and plaintiffs' briefing can be summarized as follows:

1. State's first issue ("education"): Did the trial court err in ruling that the term "education" in Article IX, §1 has the meaning that it held it has?
2. State's second issue (actual vs. fictional cost): Did the trial court err in ruling that Article IX, §1 requires the State to base its funding on actual costs (*instead of the existing funding formulas*)?

3. State's third issue ("stable & dependable"): Did the trial court err in ruling that Article IX, §1 requires the State to provide "stable and dependable State funding" (*instead of State funding from "regular and dependable tax sources"*)?
4. State's fourth issue (State's failure): Did the evidence at trial support the trial court's ruling that the State is currently failing to comply with Article IX, §1?
5. Plaintiffs' issue (compliance deadline): Did the trial court err in ruling that the legislature can merely proceed with real and measurable "progress" to comply with the court's ruling (*instead of setting a hard compliance deadline*)?¹

As the following pages explain, the LEV's arguments relate to issue #4 (State's failure) and issue #5 (compliance deadline).

II. DISCUSSION

A. The significance of Washington's Article IX, §1

The LEV's amicus brief addresses the unique significance of Washington's paramount duty clause (Article IX, §1).²

This first point relates to issue #5 (compliance deadline) because it confirms that Article IX, §1 imposes too significant of a Constitutional duty – and establishes too significant of a Constitutional right – for this Court to now fail to set a hard deadline for the State government's full and complete compliance with its paramount duty under our State Constitution.

¹ See *Plaintiffs' September 20 Brief* (Plaintiff/Respondents' Brief [with Errata] dated September 20, 2010) at pages 2-6.

² *LEV's amicus brief* at pages 2-3.

B. The trial court's ruling that State funding levels are too low to comply with Article IX, §1

The LEV's amicus brief next discusses the trial court's ruling that the State's funding levels fail to comply with Article IX, §1.³

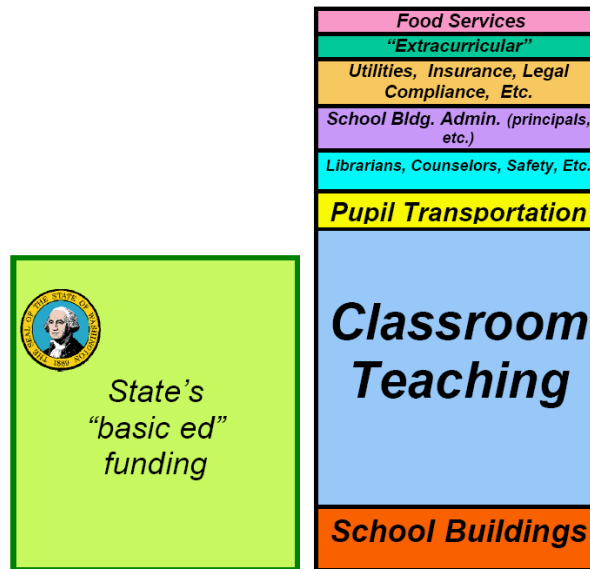
The stacked bar chart that the LEV uses to illustrate its underfunding point is a more detailed version of the stacked bar chart at page 27 of plaintiffs' September 20 Brief⁴ – which illustrated the gap between the State's funding amount (as confirmed by the State's sworn interrogatory answers⁵) and the actual cost of operating the State's public schools (as confirmed by the accounting codes mandated and audited by the State⁶):

³ *LEV's amicus brief at pages 3-6.*

⁴ *Plaintiff/Respondents' Brief [with Errata] dated September 20, 2010, at page 27.*

⁵ *Tr.Exs. 649, 651, 652, 659.*

⁶ *E.g., RP 4144:13-24; 4159:8-4160:11; RP 4144:13-24 (OSPI Director of School Apportionment & Financial Services confirming his OSPI division is the "accounting guidance office for school districts" that provides standards for budgeting and for year-end financial statements); RP 4159:8-4160:11 (OSPI Director of School Apportionment & Financial Services confirming OSPI publishes the State's Administrative Budgeting And Financial Reporting document that directs districts how to prepare their F-195 and F-196 financial statements); RP 4329:5-18 (OSPI Director of School Apportionment & Financial Services confirming OSPI and the State Auditor's Office jointly publish the Accounting Manual For Public School Districts In The State Of Washington [Tr.Ex. 30] to provide the accounting rules school districts must follow to report revenues and expenditures on their F-196 financial statement); RP 4337:5-4338:6 (OSPI Director of School Apportionment & Financial Services confirming the State-mandated F-196 activity codes are explained in that accounting manual [Tr.Ex. 30]); Tr.Ex. 463 at p.2 ("SCHOOLS. The State Auditor's Office audits school districts to determine the accuracy of districts' financial statements."); accord RP 168:16-170:3; 670:17-672:20; 673:9-12; 1801:7-23; 3264:7-11; RP 171:9-271:9 (Chimacum school district superintendent explaining Chimacum's State-audited F-196 financial statement under the State-mandated accounting codes); RP 682:8-787:22 (Colville school district superintendent explaining Colville's State-audited F-196 financial statement under the State-mandated accounting codes); RP 1802:2-1869:2 (Yakima school district superintendent explaining Yakima's State-audited F-196 financial statement under the State-mandated accounting*



The LEV’s second point relates to issue #4 (State’s failure) because it further illustrates the correctness of the trial court’s ruling that State funding is too low to comply with Article IX, §1.

C. The State’s decision to flaunt the trial court ruling against it by cutting funding after that court ruling

The LEV’s amicus brief discusses several ways the State has flaunted the trial court ruling against it by cutting funding after the trial court issued its ruling against the State.⁷

As the evidence at trial confirmed, and as the trial court’s February 2010 ruling accordingly held, the State’s public schools are

codes); RP 3264:12-3337:16, 3699:4-3709:12 (Edmonds school district superintendent explaining Edmonds’ State-audited F-196 financial statement under the State-mandated accounting codes).

⁷ *LEV’s amicus brief at pages 6-16.*

significantly underfunded. (“Woefully underfunded” was the phrase used by the State’s Assistant Superintendent of Public Instruction for Financial Resources.⁸) As the LEV points out, however, the State legislature’s reaction to that trial court ruling was not to increase the State’s K-12 education funding.

Instead, its response was to cut that funding.

Two legislative reports explaining those cuts are the legislature’s 2011-13 Operating Budget Statewide Summary & Agency Detail report (excerpts at Appendix 1) and the legislature’s 2011-13 Operating Budget Overview report (excerpts at Appendix 2).

⁸ RP 4533:3-5 (while testifying about State’s underfunding of Non-Employee Related Costs or “NERCs”). Other examples: RP 4531:25-4539:12 (OSPI Asst. Supt. for Financial Resources confirming the State is currently underfunding basic education by at least a billion dollars each school year); Tr.Ex. 356; Tr.Ex. 357; RP 1188:3-20 & 1189:7-23 (Rep. Priest testifying that the two Legislature studies on pupil transportation funding shows the State is underfunding transportation by approximately \$125 million per year; and that according to the State’s OSPI, the State is currently underfunding NERCs by approximately \$585 million per year); Tr.Ex. 124, p.24 (Basic Education Finance Task Force Report’s \$7.5 to \$10.1 billion per biennium estimate - excluding school construction or pupil transportation - which is a 63% to 85% increase over current funding); Tr.Ex. 364, pp. 64-97 (An Evidence-Based Approach To School Finance Adequacy In Washington study commissioned by Washington Learns, recommending substantial increases in per-pupil funding); RP 4016:20-4017:2 (State’s K-12 Senior Fiscal Analyst acknowledging that the funding increase recommendations in Basic Education Task Force Final Report [Tr.Ex 124, p.24] would be considered significant to a reasonable person); RP 3879:9-21, 3920:3-15, 3941:22-3942:4, 3951:14-3952:2, 4017:8-20 (actual cost calculations done by the K-12 Senior Fiscal Analyst that the State called to testify at trial for the Basic Education Finance Task Force, and for ESHB 2261 based on a set of implementation specifics that the State’s attorney told him to assume some future legislature would eventually adopt); Tr.Ex. 337 (State’s K-12 Senior Fiscal Analyst’s cost calculations for Basic Education Finance Task Force), Tr.Ex. 1483 (State’s K-12 Senior Fiscal Analyst’s cost calculations for State’s counsel regarding ESHB 2261).

For example, comparing the “2011-13 Maintenance Level”, “Total Policy Changes”, and resulting “Total 2011-13 Biennium” amounts stated in those reports shows that after the court’s February 2010 ruling against the State, the State proceeded to:

- cut the amount necessary to maintain the State funding level for the General Apportionment piece of the State’s K-12 funding formula;⁹
- cut the amount necessary to maintain the State funding level for the English Language Learners (ELL) piece of the State’s K-12 funding formula;¹⁰
- cut the amount necessary to maintain the State funding level for the Learning Assistance Program (LAP) piece of the State’s K-12 funding formula;¹¹
- cut the amount necessary to maintain the State funding level for the Special Education piece of the State’s K-12 funding formula;¹²
- cut the amount necessary to maintain the State funding level for Education Reform;¹³
- cut the amount necessary to maintain the State funding level for the State’s Superintendent of Public Instruction and its Statewide programs;¹⁴
- cut (from over \$285 million to \$2,000) the amount necessary to maintain the State funding level for K-12 employee compensation adjustments;¹⁵ and
- cut (from over \$860 million to \$0) the amount necessary to maintain the State funding level for the Student Achievement Program established by Initiative 728.¹⁶

⁹ *Appx. 1, p.204.*

¹⁰ *Appx. 1, p.222.*

¹¹ *Appx. 1, p.224.*

¹² *Appx. 1, p.209.*

¹³ *Appx. 1, p.218.*

¹⁴ *Appx. 1, p.200-201.*

¹⁵ *Appx. 1, p.225.*

¹⁶ *Appx. 1, p.217.*

These two legislative reports also explain the significance of the State's education cuts. For example, they explain the legislature's:

- “saving” over \$860 million by eliminating the I-728 Student Achievement Program, stating: “Initiative 728 ... allocates a per-student dollar amount to districts to be used for class size reduction, extended learning opportunities, early learning programs, or professional development. If not suspended [*the State’s euphemism for “eliminated”*], per-student allocations would have been approximately \$477 per student for the 2011-12 school year and \$484 per student for the 2012-13 school year.”¹⁷
- “saving” over \$215 million by eliminating funding for smaller class sizes in grades K-4, stating: “Funding for lower class sizes in grades kindergarten through grade-4 was eliminated in the December 2010 early action supplemental. [*This is the retroactive cut referenced in the LEV’s amicus brief*] This policy is carried forward into the 2011-13 biennium.”¹⁸
- “saving” over \$474 million by (1) reducing the State’s funding of public school salaries, (2) eliminating the cost-of-living increases for public school employees mandated by Initiative 732, and (3) repealing the 2009 legislature’s enactment that had promised to pay those employees “catch-up” adjustments to make up for the 2009 legislature’s “suspension” of those Initiative-mandated salary increases.¹⁹
- “saving” further millions by making retirement incentive payments to encourage the more experienced teachers to “be replaced with less experienced teachers who receive lower

¹⁷ Appx. 1, p.217 at paragraph labeled “1. Suspend I-728”; accord Appx. 2, p.8 under “Major Savings”.

¹⁸ Appx. 2, p.8 under “Major Savings”; accord, Appx. 1, p.205 at paragraph labeled “3. Eliminate K-4 Class Size Reduction”.

¹⁹ Appx. 2, p.6 under “Major Savings”, paragraphs labeled “Suspension of Initiative 732” and “K-4 Salary Reduction”; accord Appx. 1, p.206 at paragraph labeled “15. K-12 Salary Reduction” and p.225 at paragraph labeled “3. Suspend I-732 COLA”.

salaries, resulting in savings in excess of the incentive payment and other costs.”²⁰

- “saving” further millions as a result of delaying the previously-enacted science and math requirements for high school graduation.²¹
- “saving” even more money by reducing funding for implementing HB 2261, HB 2776, and the State’s Achievement Gap Oversight & Accountability Committee.²²

Comparing the “2011-13 Maintenance Level”, “Total Policy Changes”, and resulting “Total 2011-13 Biennium” amounts stated in these two legislative reports shows the State did increase the amount necessary to maintain its funding level for the Pupil Transportation piece of the State’s K-12 funding formula – increasing the State’s pupil transportation funding by \$647,000/year.²³ That compares to the over \$122 million/year that the State’s 2008 study concluded the Pupil Transportation funding formula was underfunding the State’s school districts.²⁴ To call that pace snail-like would be an understatement. (“Slug-like” might be a more Pacific Northwest appropriate term.) At that

²⁰ Appx. 2, p.7 under “Major Savings” paragraph labeled “Retirement Incentive Savings”.

²¹ Appx. 1, p.220 at paragraph labeled “25. Graduation Requirement Changes” and that same line item 25 on p.218.

²² Appx. 1, p.201 at paragraphs labeled “12. Financial Reform Reduction”, “8. Apportionment System Reduction”, and “3. Achievement Gap Committee”, and those same line items 12, 8, and 3 on p.200.

²³ Appx. 1, p.207 (biennium total of \$1,294,000 divided by two equals \$647,000 a year).

²⁴ E.g., Tr.Ex.356 at p.69.

\$647,000/year pace of phasing every biennium, the State will catch up to fully fund its public schools' 2008 transportation costs in about 377 years.

As another example of the State's snail-like pace of "progress", these two legislative reports show that the State added \$4 million to continue its phasing in of full-day kindergarten programs in the State's high poverty schools – meaning "approximately 21 percent of eligible students will be served in the 2011-13 school year, and 22 percent in the 2012-13 school year."²⁵ At that 1 percentage point a year pace of phasing, the State will be funding full day kindergarten for all eligible students in about the 2090-2091 school year.

In light of the State's cuts, "savings", and snail-paced phasing, it's not surprising that these reports also show this year's legislature added funding for OSPI to help the State plan for school district insolvencies.²⁶

In short, the State changed its K-12 education funding significantly after the trial court's February 2010 ruling against it. And as the two recent legislative reports discussed above confirm, those changes are measurable.

But they are not progress. The LEV's point about the State legislature's taking steps backward after the trial court's February 2010

²⁵ *Appx. 1, p.218 at line item labeled "11. Kindergarten Phase-In" and p.219 at paragraph labeled "11. Kindergarten Phase-In"..*

²⁶ *Appx. 1, p.201 at paragraph labeled "5. School District Insolvency".*

ruling relate to issue #5 (compliance deadline). The State’s post-ruling conduct confirms the need for this Court to finally stop the State’s three and a half decades of delay by setting a hard deadline for the State to fully comply with its paramount duty under our State Constitution.

D. The emptiness of legislative “intentions” such as those suggested in HB 2261

The LEV’s fourth point is that feel-good legislation such as HB 2261 creates a future aspiration – not a current obligation; and future aspirations do nothing for the hundreds of thousand of Washington students being left behind in our State’s classrooms today.²⁷

That is consistent with the evidence at trial which repeatedly confirmed the hollowness of legislative promises such as those suggested in HB 2261.²⁸ Indeed, as noted above, the 2011 legislature even cut

²⁷ LEV’s amicus brief at pp.16-19.

²⁸ E.g., RP 3601:3-12 (OFM Director Victor Moore acknowledging that each legislature can change a prior legislature’s statutes, budgets, etc.); RP 4010:20- 4011:9 (State’s K-12 Senior Fiscal Analyst confirming that HB 2261 requires action by future legislatures and that the existing legislature could not bind those future legislatures: “Q. With respect to 2261, future legislators could amend 2261. They could change it. They can repeal it. They could reject recommendations. They can extend timelines. They can do something completely different; right? A. That is correct.”); RP 4022:9-12 (State’s K-12 Senior Fiscal Analyst confirming that HB 2261 “contemplates recommendations and does not bind the legislature as to adopting those or not”); RP 1236:24-1237:2 (Rep. Priest confirming that legislation can be changed); CP 5666:21-5667:2 (Rep. Anderson acknowledging the laws passed in one legislative session can be changed by the next legislature); RP 5123:11-25 (OFM’s K-12 Budget Analyst confirming that one legislature intending to do something does not mean future legislatures will do it); RP 2409:12-15 (State Board of Education Chair acknowledging a future legislature does not have to follow HB 2261, and can change it); CP 4522:18-22 (Supt. of Public Instruction Dorn, a former legislator, testifying that HB 2261 was enacted by the 2009 legislature and that a future legislature can change it).

funding for the preliminary implementation planning related to the 2009 legislature's aspirations in HB 2261.²⁹ The Chair of the State's Basic Education Finance Task Force, former legislator Dan Grimm, hit the nail on the head when he testified that when one legislature says it intends for a future legislature to do something, it means that that legislature wants to get credit for the proposal but not have to do the dirty work of actually funding or implementing it.³⁰

The LEV's point about the weight that assurances of good intentions should be given is also consistent with the evidence at trial showing Washington's long line of "education governors" who have for three and a half decades been proclaiming the defendant State's good intentions – e.g.:

- Governor Dan Evans' State of the State address: "Now it is important to provide long term, consistent and dependable financing for basic education".³¹
- Governor Dixy Lee Ray's State of the State address: "We have already delayed too long full funding of K-12 is mandated by the courts. We should do it now."³²
- Governor John Spellman's State of the State address: "We must finish the work of meeting our mandate to provide fully for basic education....."³³

²⁹ *Supra* footnote 22.

³⁰ *RP 1722:4-1723:2.*

³¹ *Tr.Ex.577, p.30, 6th paragraph (underline added).*

³² *Tr.Ex.578, p.141, 2nd & 3rd paragraphs (underline added).*

³³ *Tr.Ex.579, p.43, 7th paragraph (underline added).*

- Governor Gary Locke’s State of the State address: “It’s not enough to tell parents that our schools will do better next year.... Last year’s [students] need help now.”³⁴
- Governor Chris Gregoire’s Washington Learns release (early in first term): “It is time for bold, purposeful action. It is time to make some big changes to Washington’s education system.”³⁵

In short, the LEV’s point about the hollowness of the defendant State’s assurance that it intends to some day start amply providing for the education of all Washington children relates to issue #5 (compliance deadline). That hollowness confirms the need for this Court to set a hard deadline for the State to comply – for without such a compliance deadline, the paramount right that our Constitution grants to every child sitting in a public school classroom this school year will continue to ring hollow.

III. CONCLUSION

Plaintiffs’ September 20 brief detailed why this Court should affirm the trial court’s ruling on issue #4 (State’s failure).³⁶ The LEV’s amicus brief provides further support for that conclusion.

Plaintiffs’ September 20 and November 19 briefs detailed why this Court should set the hard compliance deadline requested in plaintiff’s

³⁴ *Tr.Ex.580, p.50, 2nd paragraph (underline added).*

³⁵ *Tr.Ex.16, p.3 (underline added).*

³⁶ Plaintiff/Respondents’ Brief [with Errata] *dated September 20, 2010, at pages 22-35 and 51-59.*

narrow cross-appeal (issue #5).³⁷ The LEV's amicus brief provides further support for that conclusion as well.

The reason "justice delayed is justice denied" is a well known saying is that it's true. The defendant State has for far too long delayed compliance with its paramount duty under our State Constitution. And every year this Court allows that delay to continue, it denies hundreds of thousands of Washington students their paramount Constitutional right to an amply provided education.

Unfortunately, the U.S. Supreme Court's "*at once*" and "*now and hereafter*" rulings cited by the LEV with respect to southern States' dilatory compliance with the federal Constitution's requirement that States desegregate their public schools apply in this case too. To use the U.S. Supreme Court's phrase, "there has been entirely too much deliberation and not enough speed" in our State officials' compliance with our Constitution's mandate regarding our State's public schools.³⁸ The LEV's amicus brief confirms that this Court should uphold and enforce the paramount duty clause of our State Constitution by setting a hard

³⁷ Plaintiff/Respondents' Brief [with Errata] dated September 20, 2010, at pages 35-51 and 59-64; Plaintiff/Respondents' Reply Brief [re: their cross-appeal] dated November 19, 2010, at pages 1-25.

³⁸ See *Griffin v. County School Board of Prince Edward County, Virginia*, 377 U.S. 218, 229 (1964).

compliance deadline requiring the defendant State to amply fund the education of all Washington children *at once* and *now and hereafter*.

The additional matters raised in the LEV's amicus brief accordingly provide further support for the rulings requested in plaintiffs' September 20 and November 19 briefs.

RESPECTFULLY SUBMITTED this 17th day of June, 2011.

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