

65036-0

650360

NO. 65036-0

RECEIVED
COURT OF APPEALS
DIVISION ONE

JUL 21 2010

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

DA-ZANNE PORTER, MARTHA MCLAREN, AND CLIFFORD
MASS,

Plaintiffs/Respondents,

v.

SEATTLE SCHOOL DISTRICT NO. 1, in King County, State of
Washington, BOARD OF DIRECTORS OF SEATTLE SCHOOL
DISTRICT NO. 1, and MARIE GOODLOE-JOHNSON, Superintendent
and Secretary of the Board,

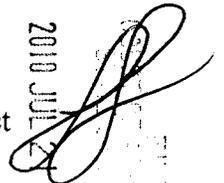
Defendants/Appellants.

REPLY BRIEF OF APPELLANTS

JEFFREY A.O. FREIMUND
WSBA No. 17384
Freimund Jackson Tardif & Benedict
Garratt, PLLC
711 Capitol Way South, Suite 602
Olympia, WA 98501
(360) 534-9960

Attorneys for Appellants

2010 JUL 21 PM 4:29



 ORIGINAL

TABLE OF CONTENTS

I. REPLY STATEMENT OF FACTS.....1

A. Respondents’ Allegation There Are No Competing Expert Reports on Mathematical Soundness in the Record Is False.....1

B. Respondents’ Claim that the District and the Board “Ignored” OSPI’s Recommendation of the *Holt* Series Is Factually Unsupported.....2

C. Respondents’ Misplaced Reliance on Charts Mr. Dempsey Created Purporting to Show Use of Alleged “Inquiry-Based” Textbooks Caused Lower WASL Scores at Two High Schools5

 1. National Trends and Uncertainty of Causation5

 2. Dubious Reliability of Mr. Dempsey’s Charts.....8

D. Respondents’ Misplaced Reliance on Fourth Grade WASL Data.....10

E. Respondents’ Misplaced Reliance on Other WASL Data for Their Claim that “Inquiry-Based” Instruction Will Cause an Achievement Gap and Lower Test Scores.....11

F. No Evidence in the Record Supports Respondents’ Mischaracterization of the History of Teaching Math.....12

G. Respondents’ Speculation that the Instructional Materials Committee Was Biased Is Factually Unsupported13

H. Respondents’ Claim that the Selection Criteria Favored “Inquiry-Based” Textbooks Is Factually Unsupported13

I. Respondents’ Claim that a Board Member and an Adoption Committee Member Approved the *Discovering* Series Based Solely on Their Experiences Using the Books with Their Children Is Factually Unsupported14

II.	REPLY ARGUMENT.....	16
A.	Article IX, Section 1 of the State Constitution Imposes Duties on the State, Not on Local School Boards	16
B.	The Superior Court Improperly Substituted Its Judgment for that of the Elected School Board.....	18
C.	The School Board’s Decision Adopting Math Textbooks Was Not Made in Willful Disregard of the Facts and Circumstances.....	22
III.	CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>Alpha Kappa Lambda Fraternity v. Washington St. Univ.</i> , 152 Wn. App. 401, 216 P.3d 451 (2009).....	19
<i>Citizens Against Mandatory Bussing v. Palmason</i> , 80 Wn.2d 445, 495 P.2d 657 (1972).....	19-20
<i>Heinmiller v. Department of Health</i> , 127 Wn.2d 595, 903 P.2d 433 (1995).....	18, 22
<i>Johnson v. Department of Health</i> , 133 Wn. App. 403, 136 P.3d 730 (2006).....	22
<i>Parents Involved in Community Schools v. Seattle School District No. 1</i> , 149 Wn.2d 660, 72 P.3d 151 (2003), <i>reversed</i> , 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007)	17
<i>Teter v. Clark County</i> , 104 Wn.2d 227, 704 P.2d 1171 (1985).....	19
<i>Tunstall v. Bergeson</i> , 141 Wn.2d 201, 5 P.3d 691 (2000), <i>cert. denied</i> , 532 U.S. 920 (2001).....	16-18

Constitutional Provisions

Washington Constitution, Article IX, Section 1.....	16-17
---	-------

Statutes

RCW 28A.320.230.....	21, 23
----------------------	--------

I. REPLY STATEMENT OF FACTS

Respondents focus their brief on arguing that no reasonable school board would adopt “inquiry-based” high school mathematics textbooks instead of “direct instruction” textbooks. There are “dueling experts” and other conflicting evidence regarding the best available material for teaching high school math, and the Seattle School Board (“the Board”) gave due consideration to both sides of the debate before reaching its quasi-legislative decision to adopt the *Discovering* series and other textbooks on a 4-3 vote. The trial court erred by substituting its judgment for the Board’s in determining how much weight to place on the conflicting evidence.

Several of the “facts” alleged in the Brief of Respondents (“BR”) are inaccurate, misleading, or lack any citation to the record in violation of RAP 10.3(a)(4). The Court should have an accurate view of the facts in the record to decide the important legal issues in this case. The Board is, therefore, compelled to correct any misimpressions that could arise from an unwary reading of respondents’ characterization of the facts.

A. Respondents’ Allegation There Are No Competing Expert Reports on Mathematical Soundness in the Record Is False

Respondents assert “[t]he District’s claim that there were competing expert reports on mathematical soundness is not supported by

the record.” BR at p. 35. This claim is false. The record before the Board contains conflicting expert opinions on mathematical soundness, as well as other issues. *E.g., compare* TE 625-36, 818, 900-16 *with* TE 608-20.

Refuting their own assertion, respondents criticize several experts’ opinions that the *Discovering* series is mathematically sound. BR at pp. 35-39. In so doing, respondents effectively concede, as they must, that there are “dueling experts” on both sides of the soundness issue with competing views on the effectiveness of the *Discovering* series. *See id.*

Respondents’ actual challenge is to the alleged biases, qualifications and rigor of the experts favoring the *Discovering* series. *Id.* Merely claiming the Board erred by not placing more weight on two experts who respondents believe are more qualified is a far cry from the assertion there are no competing experts’ opinions in the record. The Board undeniably was aware there is room for two opinions on the mathematical soundness of the *Discovering* series and considered this and other divergent evidence. *E.g.,* TE 625-36, 900-916, 1084-86.

B. Respondents’ Claim that the District and the Board “Ignored” OSPI’s Recommendation of the *Holt* Series Is Factually Unsupported

Respondents repeatedly claim the District and the Board “ignored” the March 11, 2009 *High School Mathematics Curriculum Study* written by two members of “Strategic Teaching” criticizing the mathematical

soundness of all four textbooks recommended by the Office of the Superintendent of Public Instruction (“OSPI”), as well as OSPI’s subsequent non-binding recommendation of the *Holt* series. BR at pp. 5, 11, 33-34 (respondents refer to the March 11, 2009 study as the “Soundness Study”). For example, respondents claim the District Superintendent’s April 8, 2009 “Action Report” to the Board (TE 521-48) “inexplicably contains no mention of the Soundness Study’s findings.” BR at p. 34.

This claim is false. The so-called “Soundness Study,” which the District referred to as the “Strategic Teaching Report,” is expressly referenced in the Superintendent’s April 8, 2009 “Action Report” and presentation to the Board at TE 529. The “Soundness Study” was also provided to the Board and discussed at a work session on March 25, 2009, along with responses critical of the “Soundness Study.” TE 502. On April 8, 2009, the Superintendent provided Board members with notebooks containing copies of the “Soundness Study,” written criticisms of that study by other experts, and a wealth of other sometimes conflicting information. TE 553-942.¹ The Board publicly discussed these “dueling experts” views on the *Discovering* series mathematical soundness during

¹ Respondents claim that the reports criticizing the “Soundness Study” are not in the record. BR at pp. 37-38. However, this material is in the record and was among the material in the notebooks provided to the Board. *See, e.g.*, TE 625-36, 900-916.

three public meetings. TE 1084-86.²

Contrary to respondents' suggestion, the Superintendent also notified the Board and provided it with copies of OSPI's May 6, 2009 report recommending only the *Holt* series, along with OSPI's caveats that its recommendation was not binding and "successful mathematics programs may exist with virtually any of the reviewed curricula," including the *Discovering* series. TE 1057-65, 1086. Respondents misrepresent the record by suggesting the District hid the "Soundness Study" from the Board and that the Board "ignored" the study and OSPI's non-binding recommendation of the *Holt* series.

Respondents also overstate the record by claiming the *Holt* series "was rated mathematically sound by the Soundness Study." BR at p. 43. Actually, none of the textbooks reviewed in the "Soundness Study" were found to meet the highest category of "mathematically sound." TE 610, 824. The *Holt* series was found to be the least unsound of the four texts reviewed, falling in the lower category of "mathematical soundness meets

² Respondents repeatedly accuse appellants of misleading the Court by "fail[ing] to disclose a key change in the information available to the various committees, as opposed to that available to the Board," referring to the Soundness Study. BR at pp. 11, 33. The truth is appellants' opening brief discusses OSPI's initial recommendation, the so-called Soundness Study, and OSPI's final recommendation of the *Holt* series, all of which were provided to the Board. *See, e.g.*, Brief of Appellants at pp. 7, 11-12, 14, 17-22, 24, 26, 33, 35, 39-41. Also, the Soundness Study was provided to the "various committees" before they made their final selections. CP 56-57. Respondents are incorrect on this point as well.

minimum standards.” *Id.*³

C. Respondents’ Misplaced Reliance on Charts Mr. Dempsey Created Purporting to Show Use of Alleged “Inquiry-Based” Textbooks Caused Lower WASL Scores at Two High Schools

Respondents rely on two charts internet blogger Dan Dempsey created purporting to show alleged “inquiry-based” math textbooks (not the *Discovering* series) caused lower Washington Assessment of Student Learning (“WASL”) scores at two high schools, particularly among “low income and racial minorities.” BR at pp. 1, 4-6, 19, 21-23, 27, 31-32, 35-36, 43-44 (relying on CP 48 and 227; which also are marked TE 1131 and 1310). According to respondents, these two charts prove adoption of direct instruction math books is the only reasonable decision local school boards can reach without violating the State Constitution and acting arbitrarily and capriciously. *See id.* There are two flaws with this central premise of respondents’ brief.

1. National Trends and Uncertainty of Causation

First, proficiency in mathematics has declined nationwide, not just in Seattle, particularly among “low income and racial minorities.” CP 19, 25, 27 (TE 1102, 1108, 1110). Yet, no evidence-based study has causally

³ As an aside, respondents criticize the *Discovering* series for using pictures and diagrams that are more accessible to English Language Learners (“ELL”), claiming they are useless to students “without the English skills to read the text.” BR at pp. 31-32. One must ask how the *Holt* series would be more useful to students “without the English skills to read the text.”

connected that decline to a particular textbook or learning methodology. CP 29, 30, 33, 44 (TE 1112-13, 1116, 1127).

The U.S. Department of Education's 2008 "Final Report of the National Mathematics Advisory Panel" ("the 2008 NMAP") concluded that only 32% of eighth graders nationwide are proficient in mathematics, and that number declines to 23% by twelfth grade. CP 19 (TE 1102). "Moreover, there are large, persistent disparities in mathematics achievement related to race and income" resulting in even lower percentages of proficiency among these groups. *Id.* "Unfortunately, most children from low-income backgrounds enter school with far less knowledge than peers from middle-income backgrounds, and the achievement gap in mathematical knowledge progressively widens throughout their PreK-12 years." CP 25 (TE 1108); *see also* CP 27 (TE 1110) (noting that "research demonstrates that the engagement and sense of efficacy of African-American and Hispanic students in mathematical learning contexts . . . tends to be lower than that of white and Asian students"). Washington state data on WASL scores similarly shows a statewide achievement gap exists across all grade levels and all tested subjects (reading, writing, math and science) between white students and many minority students, and between higher income students and lower income students. CP 289-315 (TE 1372-95).

The 2008 NMAP concluded there is a dearth of evidence-based studies establishing “causation or causal mechanisms” for these declines and gaps in mathematics achievement nationwide. CP 44; TE 1127. *See also* CP 33 (TE 1116) (bemoaning the lack of “methodologically rigorous scientific research in crucial areas of national need, such as the teaching and learning of mathematics” and specifically noting the lack of research identifying math textbooks and teaching methods that result in improved student achievement). The Board shared this concern about the lack of evidence-based research to aid decision-making. TE 1084-86.⁴

One conclusion was clear to the 2008 NMAP, however: “[h]igh-quality research does not support the exclusive use of either” direct instruction or inquiry-based teaching methodologies. CP 29 (TE 1112). Even for the learning disabled and the lowest performing math students, exclusive use of direct instruction methods is not recommended. CP 30 (TE 1113).

Importantly, respondents concede the *Discovering* series offers both “inquiry-based” and direct instruction material (although they

⁴ Respondents disingenuously criticize the Board for not insisting on “statistically valid evidence showing the efficacy of the [inquiry-based] methodology with disadvantaged learners,” and not requiring that the selected textbooks had been shown through studies to have improved math achievement on standardized tests. BR at p. 25. The truth is, as the 2008 NMAP and the Board concluded, there currently are no such unbiased, evidence-based studies, as much as the Board would have preferred to have had guidance of that sort. *See* TE 1084-86.

advocate for adoption of pure direct instruction textbooks). BR at pp. 14-16. In accord with the 2008 NMAP, a majority of the Board concluded the *Discovering* series' balanced approach would best serve the needs of the Seattle School District's ("the District's") large, diverse student body. TE 1084-86. The trial court disagreed with the Board's judgment, however, and found the *Discovering* series was a pure "inquiry-based" program that no reasonable school board would adopt. CP 397.

2. Dubious Reliability of Mr. Dempsey's Charts

A second flaw in relying on Mr. Dempsey's two charts purporting to show a pure "inquiry-based" textbook caused lower WASL scores and an achievement gap is the charts' dubious reliability. *See* BR at pp. 21-22. There is no evidence in the record establishing a foundation of expertise for Mr. Dempsey, the accuracy or sources of his data, the sample sizes involved, his statistical methodology, or that the textbook(s) allegedly used at two high schools were of the type(s) he claims.⁵ Also, Mr. Dempsey is biased in favor of pure direct instruction textbooks. *See, e.g.*, CP 48-52, 59-61, 63-88, 91-101, 134-39, 194-95, 209-10, 217-33, 237-47,

⁵ The chart on page 22 of respondents' brief adds a column entitled "Program" purporting to show the type of textbooks used, but that column is not based on any evidence in the record, including the cited source (*i.e.*, TE 1310; CP 227). Also, the chart on page 22 of respondents' brief lists alleged percentages for Cleveland High School that Mr. Dempsey's chart attributed to Garfield High School, and vice versa. *Compare* BR at p. 22 *with* CP 227 (TE 1310).

249-50, 275-80, 286-88 (TE 1131-34, 1142-44, 1146-71, 1174-84, 1217-23, 1277-78, 1292-93, 1300-16, 1320-30, 1332-33, 1358-63, 1369-71).⁶

Even assuming Mr. Dempsey's data is unbiased and accurate, his charts show WASL scores substantially improved at Cleveland High School after an alleged "inquiry-based" textbook began being used compared to prior scores in the 1998-99 through 2003-04 school years when presumably some other unidentified textbook was used. *See* BR at p. 21; CP 48 (TE 1131).⁷

At best, Mr. Dempsey's charts are equivocal, limited in duration and sample size, not specific to the *Discovering* series' balanced approach, and of dubious accuracy and reliability. Thus, there is no merit to respondents' theory that the Board acted unconstitutionally, arbitrarily and capriciously by considering Mr. Dempsey's two charts, but not blithely accepting the charts as decisive, evidence-based proof that adoption of different textbooks (the *Discovering* series) will cause a decline in WASL scores and an achievement gap among students.

//

⁶ Citing TE 1129-1371, respondents state that "[t]he record is rife with public comments, from a variety of sources, criticizing the *Discovering* texts." BR at p. 40 n.16. The vast majority of these comments, however, come from one person: Dan Dempsey. *See* TE 1131-34, 1142-44, 1146-71, 1174-84, 1217-23, 1277-78, 1292-93, 1300-16, 1320-30, 1332-33, 1358-63, 1369-71. The remaining pages in TE 1129-1371 are mostly attachments to Mr. Dempsey's emails. *See id.*

⁷ Respondents offer no explanation why Mr. Dempsey's chart shows WASL scores were anomalously higher at Cleveland High School during the 2004-05 school year, and admit to uncertainty about the cause of this alleged brief increase. BR at p. 21.

D. Respondents' Misplaced Reliance on Fourth Grade WASL Data

Respondents allege WASL data for District fourth graders shows achievement levels declined between 2004 and 2009, and claim the District began “primarily” using “inquiry-based learning” in the 2007-08 school year. BR at p. 22. Respondents cite TE 1373 to support this proposition, but this document provides statewide WASL scores (not District specific) showing a steady improvement in WASL math scores among fourth graders statewide, and provides no evidence of the various textbooks or teaching methods used.⁸ Contrary to respondents’ claim, this WASL data is not “[e]vidence in the record unequivocally demonstrat[ing] that inquiry-based learning does not work for students with challenges in learning math.” Cf. BR at p. 22.

Data regarding fourth graders’ math achievement levels, with no indication of the teaching methods used sheds little, if any, light on the effectiveness of the *Discovering* series for high school math students. This fourth grade data provides no factual support for respondents’ claim that the Board acted unconstitutionally, arbitrarily and capriciously by adopting the *Discovering* series for high school students.

⁸ Although not cited by respondents, some WASL data specific to District fourth graders shows Hispanic students consistently scored higher than the statewide passage rate, and substantially higher in the 2008-09 school year, the year after respondents allege “inquiry-based learning” began being used. CP 107 (TE 1190).

E. Respondents' Misplaced Reliance on Other WASL Data for Their Claim that "Inquiry-Based" Instruction Will Cause an Achievement Gap and Lower Test Scores

Respondents allege "[o]ther WASL data available to the Board demonstrates a generally stagnant or increasing achievement gap between elementary-age white and minority children, most of whom were taught using inquiry-based methods of instruction." BR at p. 23 (citing TE 1372-95). The cited material, which is statewide not District specific, indeed shows a statewide achievement gap exists across all grade levels and all tested subjects (reading, writing, math and science) between white and some minority students, and between higher income and lower income students. CP 289-315 (TE 1372-95).

Again, however, this WASL data provides no evidence whatsoever that most math students in the state, let alone the District, "were taught using inquiry-based methods of instruction." *See id.* There is no reference at all in this material to the method of math instruction used. *See id.*⁹ The evidence respondents rely on for repeatedly claiming that WASL data "unequivocally" shows inquiry-based math instruction is the cause of an achievement gap and lower scores actually shows no such thing.

⁹ However, other evidence in the record shows many algebra and geometry students in the state are taught using direct instruction textbooks (*see* TE 1186-87), but the achievement gap respondents cite to still exists in math, as well as all other tested subjects (TE 1372-98). Perhaps with this evidence in mind, Mr. Dempsey commented to the Board that "I still think the 10th Grade WASL math tells us very little." CP 59 (TE 1142).

F. No Evidence in the Record Supports Respondents' Mischaracterization of the History of Teaching Math

Without any citations to the record, respondents purport to describe the District's alleged "long, unsuccessful experiment with alternate methods of teaching math" and claim most of the math textbooks the District has used over the past decade are "inquiry-based." BR at pp. 2-4, 12-13. With no evidence in the record to support respondents' revisionist history these claims should be disregarded.

Similarly, respondents claim there has been a "burgeoning realization across the nation that the various 'new math' 'reform' methods of instruction are less effective than the traditional method of direct instruction" BR at p. 2, n. 2. Respondents cite TE 1204-14 to support this claim, yet this partisan article merely criticizes the lack of reliable research demonstrating "reform math" (the currently prevailing teaching method used nationwide according to the article) is more effective than direct instruction, and cites the 2008 NMAP report commenting on the dearth of unbiased, evidence-based research supporting any teaching method. Respondents again overstate their factual claims based on half-truths and supposition.

//

//

G. Respondents' Speculation that the Instructional Materials Committee Was Biased Is Factually Unsupported

Respondents claim the District's Instructional Materials Committee ("IMC") deliberately "excluded teachers or community members willing to publicly question reform methodology" when blindly selecting members of the Adoption Committees.¹⁰ BR at pp. 32-33. (citing TE 1129). The sole evidence respondents rely on to support this accusation, TE 1129, is an e-mail written by the self-proclaimed "most vocal high school critic of reform math" (Ted Nutting) who states he was selected for the Adoption Committee that chose the advanced mathematics textbooks, but complains he was not selected for the "core committee" that chose the algebra and geometry textbooks. This is hardly persuasive evidence of a conspiracy to exclude "critics of reform math" from the Adoption Committees.

H. Respondents' Claim that the Selection Criteria Favored "Inquiry-Based" Textbooks Is Factually Unsupported

Respondents claim the IMC created biased selection criteria that made it so anyone "would have been hard-pressed to pick any book that

¹⁰ Along the same line, respondents contend the core Adoption Committee and the IMC that appointed them and approved their textbook recommendations acted arbitrarily and capriciously by recommending adoption of the *Discovering* series to the Board. BR at pp. 25-34. Since the Board was the final decision-maker on whether to approve or reject the Adoption Committees' and the IMC's recommendations, this argument misses the mark. Respondents acknowledge as much in stating "it is the School Board that has the final determination on whether to purchase a recommended set of textbooks, and the Board's decision that is subject to review for whether it is arbitrary, capricious, or contrary to law." *Id.* at p. 11.

was not inquiry-based.” BR at pp. 24-25.¹¹ However, the core Adoption Committee’s initial top three selections included *Algebra 1*, *Geometry*, and *Algebra 2* published by Prentice Hall. TE 965. Respondents concede the Prentice Hall series uses “explicit instruction,” not inquiry-based instruction. BR at p. 43. Consequently, respondents’ claim that two of the selection criteria instilled a bias against “explicit instruction” textbooks is dispelled by the fact that application of the criteria resulted in initial selection of “explicit instruction” textbooks.

I. Respondents’ Claim that a Board Member and an Adoption Committee Member Approved the *Discovering* Series Based Solely on Their Experiences Using the Books with Their Children Is Factually Unsupported

Respondents suggest that a Board member and an Adoption Committee member both willfully disregarded all other information and approved the *Discovering* series based solely on their respective experience using the textbooks with their children. BR at pp. 5-6, 16-17, 26, 42-43. The record does not support these accusations.

The Adoption Committee member actually said:

Selecting Key Press [*Discovering* series] was not my first choice but it is a decision I can support. My first choice, Prentice Hall, was also laden with reservations. This is not to say that these are not both quality products, but the

¹¹ Actually, the Adoption Committees created the selection criteria, not the IMC; although the IMC approved the Adoption Committees’ criteria. TE 4, 7, 558, 572-75; *see also* TE 477-78 (initial screening criteria), 479-84 (comprehensive screening criteria), and 485-86 (culturally relevant screening criteria).

diversity of needs in the district makes this a nearly impossible task.

TE 592. He then gave a lengthy explanation of his views on the strengths and weaknesses of both textbook series, including a comparative analysis of how the texts present quadratic forms, definitions of math terminology, explanations of theorems and proofs, concept and skill development, and intellectual rigor. TE 592-95. In the course of this explanation, he mentioned his experience using the *Discovering* series with his special needs son (who has language deficits, but is “mathematically gifted”) was one factor among many that caused him to support the Adoption Committee’s recommendation of the *Discovering* series. TE 593.

Similarly, in response to an e-mail from a constituent, Board member Sherry Carr explained that she “invested significant time in coming to my decision.” CP 216 (TE 1299); *see also* TE 1085 (Ms. Carr’s public comments about her vote). In her e-mail response, she said the *Discovering* series “is a balanced curriculum offering both inquiry based and direct instruction” and briefly mentioned her experience performing a lesson with her daughter, noting “[t]his hands-on experience addressed the remaining concerns I had” because “[t]he lesson was not much different than the traditional math lesson when I took advanced algebra, and the parent help with homework was quite usable.” *Id.*

Respondents applaud the trial court for “working through the texts” (BR at p. 6), but criticize an Adoption Committee member and a Board member for doing the same. There is no evidence performing lessons individually or with teenagers was the sole basis for anyone’s final decision. To suggest people willfully disregarded all other evidence and information just because they used the material with their children is an unreasonable inference.

II. REPLY ARGUMENT

A. Article IX, Section 1 of the State Constitution Imposes Duties on the State, Not on Local School Boards

Respondents claim the Board’s approval of the *Discovering* series violated Article IX, section 1 of the State Constitution. BR at pp. 9-10, 19-21. This claim is meritless.

Article IX, section 1 provides: “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.” (Emphasis added.) Local “school districts have no duty under Washington’s constitution. Article IX makes no reference whatsoever to school districts.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 232, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001) (affirming dismissal of a claim against local school districts alleging the districts

were constitutionally mandated by Article IX, section 1 to provide education to children in prison). In light of this binding precedent, respondents are unable to meet their heavy burden of proving beyond a reasonable doubt that a local school district's adoption of the *Discovering* series was unconstitutional. *See also id.* at 220, 222 (holding that nothing in Article IX, section 1 mandates the state to provide an identical education to all students); and at 223 (“As we have often held, it is not this court’s role to micromanage education”).

Respondents citation to *Parents Involved in Community Schools v. Seattle School District No. 1*, 149 Wn.2d 660, 72 P.3d 151 (2003), *reversed*, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007), is inapposite (BR at pp. 20-21). That case focused on whether a school district’s use of race as a tiebreaker when making school assignments violated the state’s anti-discrimination statute, RCW 49.60.400. *See* 149 Wn.2d at 665. In finding no statutory violation, the court did not reach the state constitutional question. *Id.* at 682. The U.S. Supreme Court reversed, holding use of race as a tiebreaker violated the equal protection clause of the federal Constitution. *See* 551 U.S. at 747-48.

Respondents do not allege that adoption of the *Discovering* series violated the equal protection clause of either the state or federal Constitution. “It is well established that this court will not address

constitutional issues ‘without benefit of citation to appropriate supporting authority.’” *Tunstall*, 141 Wn.2d at 224.¹² Accordingly, there is no merit to respondents’ unsupported claim that a local school board violates the Constitution by adopting the *Discovering* series.

B. The Superior Court Improperly Substituted Its Judgment for that of the Elected School Board

Respondents argue the trial court did not substitute its judgment for that of the Board; it merely ordered the Board to reconsider its selection of the *Discovering* series on remand. BR at pp. 7-8. This cursory argument overlooks the trial court’s remand for reconsideration “consistent with this [court’s] opinion” that the *Discovering* series is a pure “inquiry-based math program” and “there is insufficient evidence for any reasonable Board member to approve the selection of the Discovering Series.” CP 397. Plainly, after re-weighing the evidence, the trial court believed the Board’s decision adopting the *Discovering* series was erroneous.

“Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 609, 903 P.2d

¹² It warrants mention that respondents’ do not specify whether their Article IX, section 1 claim is an “as applied” or an “on its face” challenge. *See Tunstall*, 141 Wn.2d at 220. Nor do they provide supporting legal authority establishing that a university professor, a parent and a grandparent of children of unspecified race, caste, or gender (*see* BR at p. 8) are members of a protected class, or individuals to whom the State owes a duty under Article IX, section 1.

433 (1995). The record below and the divided vote of the Board amply demonstrate there is room for two opinions on the effectiveness of inquiry-based instruction as compared to direct instruction, and whether one method (or a balance of the two) is more likely to cause a widening achievement gap or lower test scores than any other instructional method. Yet, after comparing textbooks, the trial court found the majority of elected Board members erred by selecting the *Discovering* series and sided with the dissenting Board members by overruling the majority's vote.¹³

The Board's determination of how much weight to place on conflicting opinions and evidence is entitled to substantial deference. See *Alpha Kappa Lambda Fraternity v. Washington St. Univ.*, 152 Wn. App. 401, 418, 422, 216 P.3d 451 (2009). The deference accorded on judicial review is especially strong when a quasi-legislative decision is challenged rather than a quasi-judicial decision. *Teter v. Clark County*, 104 Wn.2d 227, 234-35, 704 P.2d 1171 (1985) ("A legislative determination will be sustained if the court can reasonably conceive of any state of facts to justify that determination." [emphasis in original]); *Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445, 448, 495 P.2d 657 (1972) ("The court has a broader role to play in reviewing administrative acts

¹³ Respondents quote at length Board President Michael DeBell's public comments to the Board opposing adoption of the *Discovering* series. BR at pp. 17-18. The majority of the Board did not willfully disregard its president's comments or the views of the other two dissenters; it just disagreed as is the majority's prerogative.

which are of a judicial nature than it has where the act in question is of a legislative character”).

The trial court improperly substituted its judgment for that of the Board’s majority by deciding how much weight to place on conflicting experts’ opinions, Mr. Dempsey’s charts, inconclusive WASL data, the Adoption Committees’ recommendations, the IMC’s recommendations, the initial and final OSPI recommendations, the 2008 NMAP, and the unanimous recommendation of all District high school principals. The trial court placed little, if any, weight on the undisputed fact that several other school boards in Washington have adopted the *Discovering* series, as have school boards in other states. CP 101-02; TE 539-41, 652-800, 900-16, 1084. Significantly, the trial court placed no weight on OSPI’s conclusion after the so-called Soundness Study that “successful mathematics programs may exist with virtually any of the reviewed curricula,” including the *Discovering* series (TE 1057-65).

The trial court’s findings also supplant the Board majority’s judgment that the *Discovering* series offers both inquiry-based and direct instruction (a fact respondents now concede, *see* BR at pp. 14-16) consistent with the 2008 NMAP’s recommendation. To be consistent with the trial court’s opinion, the Board could not choose the *Discovering* series

on remand and would have to completely restart the RCW 28A.320.230 process to select textbooks other than those already purchased.

Even on a remand there would be insufficient evidence of any unbiased, evidence-based research showing that any series of high school mathematics textbooks (whether direct instruction, inquiry-based, a balance of both, or some other methodology) actually cause improvement in achievement gaps and test scores among students as a whole, ELL students, minority populations, or any other subgroup. *See, e.g.*, CP 33, 44; TE 1084-86, 1116, 1127. If consideration of such nonexistent research is what the trial court had in mind when ordering a remand to select textbooks other than the *Discovering* series, the Board can not fulfill that expectation.

Room for multiple opinions on which textbook series would best serve thousands of teenagers of varying abilities undeniably exists. A nationwide, polarized debate on this topic has been ongoing for many years. There is evidence to support adoption of either inquiry-based or direct instruction texts. The trial court overstepped the narrow, deferential scope of judicial review appropriate to complex quasi-legislative decisions and embarked on micromanaging the method of instruction for teaching math to a large, diverse group of high school students. This non-deferential substitution of judgment was reversible error.

C. The School Board’s Decision Adopting Math Textbooks Was Not Made in Willful Disregard of the Facts and Circumstances

Respondents overstate the test for determining whether agency action is arbitrary and capricious. They say that “[a]lthough the School Board is entitled to discretion [sic] in weighing competing information, an action is arbitrary and capricious if it is made without consideration of and in disregard of the facts and circumstances, or if it omits without explanation material facts.” BR at p. 10 (emphasis added; citing *Johnson v. Dep’t of Health*, 133 Wn. App. 403, 414, 136 P.3d 730 (2006)). The underlined phrase is not part of the deferential test for determining arbitrary and capricious action, nor did the *Johnson* court say or imply that it was. No authority supports respondents’ veiled attempt to add an additional layer to the narrow arbitrary and capricious standard.

To withstand judicial review of their decisions, quasi-legislative agencies are required to give due consideration to facts material to their decisions, but they are not required to give itemized explanations for why more or less weight was placed on particular opinions or pieces of evidence. *See, e.g., Johnson*, 133 Wn. App. at 414; *Heinmiller*, 127 Wn.2d at 609. If the record shows there is room for two opinions, an agency decision is not arbitrary and capricious even though a reviewing court may believe an erroneous conclusion was reached and the agency

did not itemize its reasoning for placing more weight on some pieces of evidence than others. *See id.*

The Board did not engage in willful and unreasoning action by adopting the IMC's recommendations to adopt five high school mathematics textbooks, but rather took a reasoned action following lengthy consideration of the facts, circumstances and conflicting information. The Board desired to improve student math scores in the WASL and other tests, including minority and ELL students' scores, but knew there are no reliable outcome-based studies demonstrating that any particular textbook series or teaching methodology would accomplish that result. *See, e.g.*, TE 522-23, 539-41, 1084-86. OSPI determined the *Holt* and *Discovering* series both aligned well with OSPI's new learning standards, which would be the focus of state testing. TE 652-820. No experts or others disputed this alignment with OSPI's learning standards, although experts disagreed on the mathematical soundness of these and other texts. *See, e.g.*, TE 610, 652-800, 824, 900-16.

In a publicly transparent and impartial fashion required by RCW 28A.320.230, the IMC selected a committee of specialists in the field of high school mathematics instruction to develop and apply criteria for selecting a textbook series that best matched the needs of the District's large, diverse student body. The District solicited and considered input

from students, teachers, parents, school administrators, the community, other school districts, textbook publishers, OSPI, and mathematics experts. *E.g.*, TE 582-83, 1083-86. The Board was advised of the strengths and weaknesses of the recommended textbooks, as well as conflicting studies and expert opinions about the effectiveness of the textbooks. *E.g.*, TE 553-942, 1083-85.

Rather than willfully disregarding these facts and circumstances, the Board publicly discussed the conflicting opinions and evidence before taking a closely divided vote on the IMC's package of recommendations. *E.g.*, TE 1083-86. Board members publicly expressed their frustrations with the "dueling experts" and lack of objective, empirical studies of student outcomes based on use of particular textbooks or teaching methods. *Id.* There was room for multiple opinions about which textbook series best met the diverse needs of the District's high school students, and the Board considered the facts and circumstances underlying those multiple opinions. *Id.*

After significant study and debate over ten months, and being fully advised of the *Discovering* series' perceived flaws, a slim majority of the Board decided to approve its adoption, along with the other textbooks recommended by the IMC. Although respondents and the trial court believed a portion of the majority's decision showed poor judgment

about how much weight to place on various pieces of evidence, the decision was made after due consideration, not willful disregard, of conflicting information. The superior court erred by concluding the Board's May 9, 2009 decision to adopt the IMC's recommendations was arbitrary and capricious.

III. CONCLUSION

Even if the Court shares the trial court's and respondents' view that the Board reached an erroneous conclusion, the Board's decision should be affirmed because there is room for multiple opinions concerning the best available material to use for teaching high school mathematics, and the Board exercised its discretion openly and honestly after due consideration of the conflicting evidence. The trial court erred by substituting its judgment for the Board's in determining how much weight to place on the divergent opinions and other evidence in the record. The trial court's order should be reversed and the Board's quasi-legislative decision should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of July, 2010.

FREIMUND JACKSON TARDIF &
BENEDICT GARRATT, PLLC



JEFFREY A.O. FREIMUND
WSBA No. 17384
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I certify that on the 21st day of July, 2010, I caused a true and correct copy of this Reply Brief of Appellants to be served on the following in the manner indicated below:

Keith P. Scully
Gendler & Mann, LLP
1424 Fourth Avenue, Suite 1015
Seattle, WA 98101

<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/>

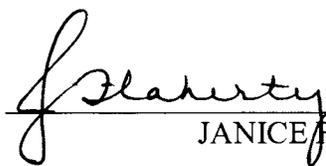
U. S. Mail
Hand Delivery
Facsimile
E-Mail
Legal Messenger

Washington State Court of Appeals
Division I
One Union Square
600 University Street
Seattle, WA 98101-1176

<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input checked="" type="checkbox"/>

U. S. Mail
Hand Delivery
Facsimile
E-Mail
Legal Messenger

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.



JANICE FLAHERTY

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 JUL 21 PM 4:29