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SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Appellant,

v.

MATTHEW & STEPHANIE McCLEARY, on their own 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,
Respondents.

BRIEF OF AMICI CURIAE,
WASA, AWSP AND WASBO,
IN SUPPORT OF RESPONDENTS

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I. INTRODUCTION

The Washington Association of School Administrators (“WASA”), the Association of Washington School Principals (“AWSP”), and the Washington Association of School Business Officials (“WASBO”) (collectively, the “Amici”) urge the Court to affirm the trial court’s conclusion that the State has a constitutional duty to provide a realistic and effective opportunity for all students in all of Washington’s 295 school districts to be equipped with the knowledge and skills of a basic education.

The State attempts to avoid its constitutional duty by mischaracterizing or ignoring the trial court’s careful analysis in this case in at least three ways. First, the State repeatedly mischaracterizes the trial court’s holding regarding educational “outcomes” versus educational “opportunities.” Second, the State attempts to mislead the Court into believing that ample funding of schools will necessarily mean a loss of local control over education. Finally, the State disregards the fact that it has perpetuated, and widened, the inequity in the State’s current levy-dependent public school funding system. Each of these three issues—educational opportunity, local autonomy, and equitable funding—present critical questions that school superintendents, principals, and other school administrators grapple with every day. The Amici urge the Court to affirm

the thoughtful findings of fact and conclusions of law that the trial court reached on these issues.

II. STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Respondents.

III. ARGUMENT

A. The State mischaracterizes the trial court's decision regarding educational "outcomes" versus educational "opportunities."

In both its opening and reply brief in this appeal, the State repeatedly describes the trial court's decision as a misinterpretation of Article IX, §1 of the state constitution, alleging that the trial court read this section as a duty to guaranty that students will achieve certain educational "outcomes." *See, e.g.*, Brief of Appellant, Assignments of Error Nos. 10 and 15, and Part VI.C; Reply Brief of Appellant at 16-18. The State mischaracterizes the trial court's ruling to sidetrack this case into an irrelevant policy debate over whether additional funding of schools leads to increased student achievement, *see* Brief of Appellant, Part IV.H.2., and to raise the specter of future litigation when students fail to pass state achievement tests, *see* Reply Brief of Appellant at 17.

As school administrators and education leaders, Amici members are fully familiar with both the policy dispute and the litigation risks referenced

by the State. The trial court, however, never held that the State had a duty to ensure that all students achieve a particular outcome. Rather, the trial court explicitly based its decision on the State's failure to provide opportunities:

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

FF 231(a) (emphasis added).¹

The trial court found, and no party or witness in the case seriously disputed, that many students are not reaching the achievement standards set by the State. However, the trial court's references to student achievement levels were accompanied by factual findings that the State has failed to make ample provision for the *opportunities* for students to achieve those standards. See, e.g., FF 235 ("The overwhelming evidence is that the State's students are not meeting those standards *and that the State is not fully funding the programs, even currently available, to meet such standards.*") (emphasis

¹ Throughout this brief, the Amici will designate references to the trial court's findings of fact with "FF" and the corresponding paragraph number. References to the trial court's conclusions of law will be designated with "CL" and the corresponding paragraph number.

added). These findings are based on substantial evidence, entitled to deference on appeal, and wholly consistent with this Court's previous explanations of the Article IX, §1 duty to provide educational opportunity. *Tunstall v. Bergeson*, 141 Wn.2d 201, 236, 5 P.3d 691 (2000) (J. Talmadge, concurring); *Federal Way Sch. Dist. v. State*, 167 Wn.2d 514, 524, 291 P.3d 941 (2009); *Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 518, 585 P.2d 71 (1978).

B. The State overstates the threat providing ample funding would have on local control of public school districts.

In addition to mischaracterizing the trial court's factual findings regarding educational opportunity, the State also raises the false bogeyman that the trial court's decision threatens local autonomy. See Reply Brief of Appellant at 19. This argument is legally irrelevant and factually unsupported.

The State's argument is legally irrelevant because the constitution does not guaranty local control of schools. Rather, the State has a duty under Article IX, §1 to make ample provision for the education of all children; local school districts with local autonomy are merely one means to discharge this duty. See, e.g., *Tunstall*, 141 Wn.2d at 232 ("Article IX makes no reference whatsoever to school districts."); *Bellevue Sch. Dist. No. 405 v.*

Brazier Constr. Co., 103 Wn.2d 111, 116, 691 P.2d 178 (1984) (“The state has . . . made the local school district its agency for the administration of a constitutionally required system of free public education.”) If the State is violating a constitutional duty, as the trial court found in this case, the State cannot avoid responsibility by claiming allegiance to a policy preference that is not constitutionally required.

The State’s threat that additional State funding of schools will lead to the loss of local educational autonomy is also unsupported by historical fact. The source of funding for public schools has no direct correlation with how much local autonomy exists in public schools. The State has funded numerous school programs over the years that give school districts wide local discretion to determine the means to achieve a particular goal. See, e.g., RCW 28A.505.210 (L-728 student achievement funds). The converse is also true: school districts have funded numerous programs over the years with local revenue and yet the State has exercised a high degree of control over the program. See, e.g., RCW 28A.400.210 (employee attendance incentive program); RCW 28A.400.200 (teacher salaries and benefits, including those funded by local levies).

In fact, even under the current model of local educational autonomy, there are few public entities with as much State regulation as the

public schools in Washington. The State already provides exhaustive and detailed regulations on the number and type of courses that must be offered in schools (Chapters 180-51 and 392-410 WAC); regulates the number of school days and hours of instruction offered each year (RCW 28A.150.220); establishes the number of staff that must be provided (RCW 28A.150.260); regulates where and how those staff are assigned (Chapters 181-77 through 181-82A WAC); and sets teacher base salaries that must be offered and not exceeded (RCW 28A.400.200). Moreover, even within these numerous regulations, the State does not limit itself to broad educational system parameters. Among the hundreds of pages of State statutes regulating public schools, the legislature has seen fit to control everything from the minimum and maximum number of sick leave days that may be offered a school bus driver (RCW 28A.400.300) to the specific day all schools must annually observe "Temperance and Good Citizenship Day" (RCW 28A.230.150).

C. The current state funding system robs students of equitable educational opportunities.

In addition to disregarding the State's attempts to divert attention from the legal issues in this case, this Court should affirm the trial court's identification of the current funding system's fatal flaw: inequality of opportunity for all students in Washington to be equipped with the

knowledge and skills necessary to function in our democracy. "All" means "each and every child . . . not just those children who enjoy the advantage of being born into one of the subsets of our State's children who are more privileged, more politically popular, or more easy to teach." CL 168. The existing inequality of opportunity is primarily the result of the same local levy problem condemned by this Court in 1978.

1. **Insufficient state funding makes school districts dependent upon local levies.**

The State's funding formulas "leave the State's public schools to rely heavily on local levies to fund their teaching of the basic knowledge and skills mandated by this State's minimum education standards" FF 229. This is not a political or statistical theory, but rather, a finding of fact backed by substantial evidence, and thus, entitled to deference on appeal. The trial court weighed all of the evidence presented in an eight-week trial and determined that "year in and year out school districts, schools, teachers and parents have to 'cobble together' sufficient funding to keep their basic education programs operational." FF 222.

The gap being filled by local levies is substantial. At the time of trial in 2009, State funding only covered 50-70% of the actual costs of operating public schools. See Tr. Exs. 649, 651, 659; RP 4144:13-24; RP 4159:8-

4160:11. School districts relied on local levies to cover a \$1.3 billion gap in costs associated with providing basic education. See RP 1190.

2. **The current state funding system suffers from the same unjust inequities as the system declared unconstitutional by this Court in 1978.**

The reliance on local levies to fund basic education is both unconstitutional and unjust. In *Seattle School District*, this Court declared that forcing school districts to rely upon local levies is unconstitutional because levies are not “dependable and regular” sources of sufficient tax funds to provide basic education in a general and uniform system of public schools. Such a system, therefore, fails to comply with Article IX, §§ 1 and 2 of the Washington Constitution. *Seattle School District*, 90 Wn.2d at 522. Such a system also contributes to gross inequities in educational opportunities between school districts.

First, as explained by this Court in 1978, local levy systems inherently favor well-to-do districts with higher property values.

the levy system's instability is demonstrated by the special excess levy's dependence upon the assessed valuation of taxable real property within a district. Some districts have substantially higher real property valuations than others thus making it easier for them to raise funds. Such variations provide neither a dependable nor regular source of revenue for meeting the State's obligation.

Seattle School District, 90 Wn.2d at 525-26. Nothing has changed in this regard over the intervening thirty-three years. As was explained at trial in this case by State Representative Skip Priest, a member of the Basic Education Finance Task Force:

When you have a levy lid of a certain amount of the property tax dollars that can be received by the School District in the form of a levy, if you have major commercial or industrial areas, then the impact, for example, on the homeowner in Bellevue is a lot less than it is on the homeowner in Federal Way. It is the nature of inequality that occurs that the levy produces.

RP 1115:25-1116:8.

Second, in addition to disparate property values and tax bases, school districts suffer from disparate local support for levies:

The special excess levy . . . is wholly dependent upon the whim of the electorate and is then available only on a temporary basis. A levy defeat ensures that needed funds will not be available. This unstable statutory system destroys a district's ability to plan for a known or definite funding base for either the current year or for future years.

Seattle School District, 90 Wn.2d at 525. This problem also has not changed in the thirty-three years since this Court's decision in *Seattle School District*. Certain districts are simply unable to pass large enough levies to cover necessary operation costs. This inequity can be severe enough to sink a disadvantaged school district:

The Vader School District dissolved. It was absorbed by the neighboring school districts, because they could not operate on the funds—the State funds and the federal funds that they received. And they couldn't pass the levy. They tried to pass a levy the last year that they operated, and that failed.

RP 1469:15-21. Some of the inequities in passing levies are geographic in nature:

I would say that one of the things that is different in Eastern Washington as opposed to Western Washington, I learned right away, is the difference in the tax base; the difference in getting folks to provide local dollars and support, the economy tended in Kettle Falls to be lower. There was some industry there, but I would say that I noticed that that particular difference. It was a little more low income or remote. Therefore, it necessitated more work in terms of getting our local levies passed and things like that up there, I did notice that.

RP 90:16-91:5; 91:16-92:7. For other districts, the community is willing to approve local levies, but well below the Legislature's lid limit:

To be frank, you know, the levy that we run, the average in the State is like 23.5 percent levy. We run a 11.8, I think or 12 percent levy. That is the largest levy that we have ever passed.

...

We ran the largest levy we felt like we could run and get people to support in our community.

RP 773:16-774:11. And in some places, running local levies creates political strife:

In my community, when you run a levy, it is a civil war. It is family against family and neighborhood against neighborhood.

RP 760:17-19.

In addition to disparate tax bases and disparate local support, the legislature itself contributes to inequities by maintaining grandfathered local levy lids. After the *Seattle School District* decision, the legislature purported to adopt a 10% lid on the amount of local levy dollars a district could raise above and beyond its state and federal revenue. However, 91 of the State's current 295 school districts were grandfathered with lids above this amount. As the Legislature increased the 10% lid over the next decades to 24% at the time of trial in this case, the levy lid for the grandfathered districts increased as well, with some school districts permitted to ask almost 10% above the levy lid. RP 1214:22-1215:14; *see also* SHB 2893 (Final Bill Report).

The trial court in this matter identified a final undesirable result of a levy-funded basic education system: the necessity of pursuing levy funds diverts resources from basic education. The trial court explained:

[S]uperintendents and other school officials repeatedly testified about the substantial resources and efforts employed to ensure that local levies pass. These are resources that otherwise could be expended on education itself so that "administrators can return to administrating, teachers can return to teaching, parents and students can be

involved in the learning process, rather than spending inordinate amounts of time passing special levies.”

CL 255 (*quoting* Governor Dan Evans).

The disparity among districts begets a disparity among students. Privileged children tend to come from privileged districts with higher tax bases, greater public support for levies, and grandfathered levy lids. And unfortunately, the converse is true as well. FF 230. The trial court found credible and substantial evidence that smaller class sizes, co-curricular activities, vocational training, and individualized attention—all benefits that require additional funding—help disadvantaged students to succeed. FF 234. Yet, a property-poor district, or one with a less-supportive electorate, has a reduced ability to levy such funds. In failing to provide stable, dependable funding, the State deprives students with disadvantaged predictive factors “the educational opportunity to achieve.” *Id.*

3. The State exacerbated the problem after the trial court judgment by widening the fault line between “have” and “have not” school districts.

During the 2010 legislative session—only weeks after Judge Erlick’s decision that overreliance on local levies was unconstitutional—the Legislature took steps to widen the gap between privileged and disadvantaged school districts. The Legislature’s 2010-11 annual budget included a \$120 million reduction in state funding for the education of

public school children. See ESSB 6444 (Laws of 2010, Spec. Sess., ch. 37).² At the same time as the Legislature cut education spending, the Legislature passed SHB 2893, which “granted” school districts an additional 4% levy capacity, raising the lid to 28% for 204 school districts, and varying amounts above that for the grandfathered 91 districts. See SHB 2893 (Laws of 2010, Reg. Sess., ch. 237), codified in relevant part as RCW 84.52.0531(6)(a).

Based on the language of the bill, it is clear that the Legislature enacted SHB 2893 in coordination with the State’s reduced education funding. The Final Bill Report explicitly references the reductions in the 2009-11 biennial state budget, which included reductions in programs such as career and technical education and focused assistance for districts struggling to meet the State’s student achievement standards. And the bill allows school districts to include in their levy base the amounts that the districts would have received under the K-4 enhancement formula, I-728 (student achievement fund) and I-732 (employee COLAs) if the State had not reduced or eliminated its funding for these programs.

² This reduction was on top of the 2009-11 biennial budget’s existing \$1.4 billion reduction in education funding that coincided with the enactment of BSHB 2261 (Laws of 2009, Reg. Sess., ch. 548), which the State heavily relies upon to argue that the State is making progress on school finance reform

In effect, then, the Legislature simply passed on to local school districts the responsibility for funding, with a revenue source that is neither regular nor dependable, more of what the trial court had already determined was insufficient to provide a program of basic education. Those districts with favorable tax bases, willing electorates and resources for running levy elections were allowed to collect additional local dollars.³ The students in school districts who lack those advantages were left behind with less funding for their education.

Raising the levy lid does not fix the funding problem; it simply forces the State's agents for delivering a program of basic education to rely even more on local funds. Accordingly, the great lengths the State goes to in its briefing to highlight the strides the Legislature has taken toward achieving an amply funded system of public education fall flat. See Brief of Appellant at 9-22. The 2010 increase in the levy lids represents a step backward toward the inequitable state of affairs declared unconstitutional in *Seattle School District*.

³ SHB 2893 also allowed school districts the option to return to voters in the middle of a levy cycle for additional levy funds.

IV. CONCLUSION

A system that starves the State's school districts of funding for basic education and forces districts to rely upon local levies was unconstitutional in 1978, and it is unconstitutional today. Rather than allocating ample funding to provide realistic and effective opportunities for students to learn the knowledge and skills necessary for a basic education, the State has gradually raised the amount school districts can seek from their local voters to do the same on their own. Such a response fails to meet the State's paramount constitutional duty. As school administrators and education leaders who serve the disparate educational needs of both privileged and underprivileged students in every geographical corner of Washington, Amici members urge this Court to affirm the trial court's determination that the current inequitable funding system is unconstitutional.

RESPECTFULLY SUBMITTED this 27th day of May 2011.



By: Lester "Buzz" Porter, Jr., WSBA #23194
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent via E-mail a true and accurate electronic copy of the Motion for leave to file Brief of Amici Curiae, WASA, AWSP and WASBO, in Support of Respondents and Brief of Amici Curiae, WASA, AWSP and WASBO, in Support of Respondents to the following:

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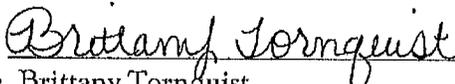
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Dated this 27th day of May 2011.


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