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~~SUPREME COURT~~ OF THE STATE OF WASHINGTON
CLERK

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'
BRIEF

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I. SUMMARY OF THIS BRIEF

The 55 witnesses and 566 exhibits in this suit's 8 week trial confirmed what our State's education officials and elected representatives have long known.

The defendant State's public schools are failing to provide significant segments of our State's children a realistic or effective opportunity to become equipped with the basic knowledge and skills that the State has determined every child must have to compete in today's economy and meaningfully participate in our State's democracy – and thus leaving them behind their more affluent or privileged peers. Instead of being the great equalizer that equips all citizens to participate on a level playing field, far too many of our State's public schools operate as a great perpetrator for our under-educated citizens, to our State's overall detriment.

This is one of the many unfortunate results of the fact that the defendant State's funding of its public schools has no correlation to actual costs in today's market – forcing too many of its public schools to operate in triage mode, and to rely heavily on unstable, non-State funds like local levies to keep their doors open.

Based on the testimony and evidence at trial, the trial court accordingly ruled that the defendant State is violating its paramount duty under Article IX, §1 to make ample provision for the education of all its children.

The State has appealed because, to be blunt, full compliance with Article IX, §1 would divert funds from the many non-paramount things State officials would prefer to spend State revenues on instead.

The trial court's decision, however, should be affirmed. This Court should also set a firmer deadline for the State to comply with its paramount duty under our State Constitution than the mere "progress" timeline contained in the trial court's order.

State's Issue #1 ("education"): This Court's *Seattle School District* decision described the knowledge and skills needed to compete in today's economy and meaningfully participate in our democracy as being the "essential skills" encompassed within the contemporary meaning of "education" under Article IX, §1. Noting that its description of those essential skills was not "fully definitive", however, this Court also directed the legislature to provide further substantive content to give those essential skills further definition in today's world.

The evidence at trial confirmed that the State subsequently determined the essential skills that every student must be equipped with to compete in today's economy and meaningfully participate in our State's democracy. The evidence confirmed those skills are described in the four numbered provisions of HB 1209 and the State's ensuing Essential Academic Learning Requirements. Those are facts.

The trial court accepted the State's determination. Consistent with this Court's direction that the State provide additional substantive content to further define the essential skills this Court had ruled are encompassed within an "education" under Article IX, §1, the trial court ruled that the "education" encompassed within Article IX, §1 includes those skills the State had determined all children need in today's world. That ruling was correct – not "erroneous".

State's Issue #2 (actual vs. fictional cost): The evidence at trial confirmed not only that the State expects all its public school children to learn the essential skills noted above, but that all children can learn those skills. The evidence also established, however, that the State has never determined what it would cost to provide its students a realistic or effective opportunity to learn those skills. Instead, the State "allocates" funding to its public schools using arithmetic equations (program "funding

formulas”) that have no correlation to actual costs and market prices in the real world today. Those are facts.

As a simple matter of logic, one cannot make ample provision for something if one doesn’t know how much it costs. The trial court accordingly did not err by requiring the State to take an action it has not taken – namely, determine “as closely as reasonably practicable” the actual cost of providing all children in our State the education encompassed within Article IX, §1.

State’s Issue #3 (“stable & dependable”): The reason the *Seattle School District* Court required the State to provide a “regular and dependable tax source” for funding its public schools is that Article IX, §1’s education mandate becomes meaningless if State funding is not stable and dependable. But as the evidence at trial confirmed, the State’s public school funding has not been stable and dependable. The trial court did not err in ruling that State funding under Article IX, §1 must be stable and dependable.

State’s Issue #4 (State’s failure): The 55 witnesses and 566 exhibits considered by the trial court confirmed the unfortunate fact that the defendant State is failing – miserably – to amply provide for the education of all children residing within our State, and that the State is

miserably failing to provide large segments of its public school children with a realistic or effective opportunity to learn the essential skills that the State has determined they need to compete in today's economy and meaningfully participate in our State's democracy. The trial court's ruling that the State is not currently complying with its paramount education duty under Article IX, §1 was correct – not “unsupported”.

Plaintiffs' Issue (compliance deadline): The State has already delayed over 30 years since the *Seattle School District* Court ordered it to comply with its paramount constitutional duty under Article IX, §1. There has already been too much delay. The error in the trial court's decision was its merely requiring the State to proceed with real and measurable “progress” instead of setting a hard deadline for the State to comply with its paramount duty under our Constitution.

II. CROSS-REVIEW'S ONE ASSIGNMENT OF ERROR
(deadline for compliance)

Plaintiffs' Cross-Review presents a single Assignment Of Error:

1. The trial court committed error in entering that part of Conclusion Of Law 275 which concluded the Legislature must merely proceed with real and measurable “progress” to establish (1) the actual cost of amply providing all Washington children with the education mandated by the court's interpretation of Article IX, §1, and (2) how the State will fully fund that actual cost with stable and dependable State sources.

III. THE FIVE ISSUES PERTAINING TO PARTIES' ASSIGNMENTS OF ERROR

Stripped of bias or advocacy in either side's favor, the five issues raised in the parties' briefs are:

1. State's Issue #1: 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 Issue #2: 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 Issue #3: 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 Issue #4: 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: 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*)?

IV. STANDARDS RELATING TO THIS REVIEW

A. Assignments Of Error Without Supporting Argument: *They Are Not Considered On Appeal.*

Although the State's Assignments Of Error often mischaracterize the finding or conclusion being challenged, its Opening Brief does not provide supporting citation to the trial record or other argument to support

many of its Assignments Of Error. Unsupported assignments of error are not considered on appeal.¹

B. Unchallenged Factual Findings: *Verities On Appeal.*

The State's 18 Assignments Of Error identify challenges to specific facts within multi-fact paragraphs of the trial court's decision. Each fact found by the trial court that the State did not challenge stands as a verity in this appeal.²

C. Challenged Factual Findings: *Appellate Courts Do Not Second-Guess The Trial Judge's Balancing Of The Overall Testimony At Trial.*

Representing the State as the Respondent in another education-related appeal, the State's counsel objected that:

[T]he appellants want you to overlook the standards of review concerning appeals from bench trials, in effect asking you to try the case all over again. they're really asking you to act as a trial court of second resort.³

The State's counsel was (and still is) correct that it is not the appellate court's role to re-weigh the evidence or re-assess the relative credibility of witnesses.⁴ Thus, even challenged findings of fact are binding on appeal if

¹ *Cowiche Canyon Cons'ry v. Bosley*, 118 Wn.2d 801, 808-809, 828 P.2d 549 (1992).

² *In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000).

³ *School Dist. Alliance v. State*, 36294-5-II, May 6, 2008 recording at 18:20-18:54.

⁴ *Davis v. DOL*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980); accord, *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994); *Maehren v. Seattle*, 92 Wn.2d 480, 486 and 501, 599 P.2d 1255 (1979) (when the trial judge was presented with conflicting evidence, appellate court will not disturb the judge's findings based on that evidence). This makes sense because the trial judge is the one in the best position to observe the witnesses' demeanor, verbal cues, and body language, assess their credibility (as well as weigh it against the relative credibility of other witnesses), and weigh the testimony they gave.

there is any substantial evidence in the record to support them – with “substantial evidence” being simply a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the factual finding.⁵

**D. Trial Judge’s Factual Determinations:
*Preponderance Of The Evidence Standard.***

The State acknowledges that “the trial court correctly applied the civil burden of proof to factual issues.”⁶ As the trial court explained:

To prove the existence of a fact, the party alleging that fact must show that that fact is more likely than not true. In other words, that fact must be proven by a preponderance of the evidence at trial.⁷

**E. Failure To Take The Action Required By Article IX, §1:
*Preponderance Of The Evidence Standard Applied; Trial Court Also Found Beyond A Reasonable Doubt Standard Was Met.***

On the question of whether it is complying with Article IX, §1, the State argues the “beyond a reasonable doubt” standard should apply because everything it has done is in one or another statute.

But this case is about what the State has not done. For example, it has not taken the step of determining the cost of providing all children a realistic or effective opportunity to learn the “essential skills” set forth in this Court’s *Seattle School District* ruling or the State’s fuller definition of those essential skills in HB 1209 and the ensuing Essential Academic

⁵ *In re Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000); *Hollingbery v. Dunn*, 68 Wn.2d 75, 81-82, 411 P.2d 431 (1966).

⁶ *State’s Opening Brief* at p.61, last paragraph.

⁷ FOF/COL ¶101.

Learning Requirements. Nor has the State taken the subsequent step of determining a stable and dependable source to fund that cost.

The “preponderance of the evidence” standard applies since plaintiffs’ fundamental contention is that in the over 30 years which have passed since this Court’s *Seattle School District* ruling against the State, the State still has not taken the action required to fully comply with its paramount Constitutional duty under Article IX, §1. E.g., *Seattle School District v. State*, 90 Wn.2d 476, 528 (1978) (when the court is “concerned with legislative compliance with a specific constitutional mandate ... the normal civil burden of proof, i.e., preponderance of the evidence, applies”); accord, FOF/COL ¶101.

The State argues this Court’s above burden of proof ruling does not apply here because there were no school funding laws to declare unconstitutional at the time of that ruling. But that is not accurate. What the State had done with respect its provision for education under Article IX, §1 was in State law at that time.⁸ What was at issue there – like what is at issue here – is what the State had not done.

⁸ E.g., *Chapter 28A.41 RCW (1976) (funding schools on a “weighted student enrolled” basis, and providing funds for transportation and other operational costs) (later amended by the 1977 Basic Education Act, Laws of 1977, 1st Ex. Sess., ch. 359); Laws of 1975, ch. 269, §§149-163 (1975-1977 Biennium Budget’s general apportionment for student education, as well as specific apportionments for “handicapped excess costs”, transportation, vocational institutes, gifted students and other programs).*

The State's burden of proof argument is not only legally incorrect, it is also irrelevant – for the trial court also found the plaintiffs “have proven the even the higher standard of ‘beyond a reasonable doubt.’”⁹

V. STATEMENT OF THE CASE

The State defeated two rounds of summary judgment motions (original and reconsideration) by insisting (presumably in good faith) that the issues raised in this case require the testimony of witnesses at a trial to establish the full historical and factual context necessary to evaluate the significance, meaning, and application of Article IX, §1 in today's world.¹⁰ Since the State's Opening Brief omits the bulk of the facts established by that trial testimony, the following pages outline who the witnesses were and what their testimony showed.

A. **The Fifty-Five Witnesses.**

The trial witnesses included (but were not limited to):

- Plaintiff Kelsey and Carter McCleary's mom (Stephanie), who with their dad Mathew are a public school family in Jefferson County.¹¹
- Plaintiff Halie and Robbie Venema's mom (Patty), who with their dad Robert are a public school family in Snohomish County.¹²

⁹ FOF/COL ¶256.

¹⁰ E.g., CP 568 (State insisting summary judgment improper because “the factual and legal issues are too complex to be decided on an incomplete record that typically accompanies summary dispositions of entire cases”); CP 915 (State insisting summary judgment on the meaning of “education” improper because “there are disputed fact issues about the meaning of, and intent behind, the [Basic Education] statute that are not resolvable on summary judgment”); cf. FOF/COL ¶11.

¹¹ FOF/COL ¶¶13-16; RP 408-502, RP 513-563.

¹² FOF/COL ¶¶17-20; RP 2107-2193.

- The President and Vice-President of Plaintiff “NEWS” (Network for Excellence in Washington Schools), a State-wide coalition of over 75 community groups, education organizations, and school districts of assorted demographics and sizes from all across Washington.¹³
- Civil rights leaders from our State’s minority and low income communities.¹⁴
- Rule 30(b)(6) designees of State studies on the failings of the State’s public schools with minority and low income students.¹⁵
- The University of Washington Professor whose research and publications specialize on the role that public education plays in a democracy – especially one like the democracy in our State.¹⁶
- Rule 30(b)(6) designees of the State Community and Technical Colleges and Work Force Training Boards.¹⁷
- The State’s chief elections official under our State Constitution (Secretary of State Sam Reed).¹⁸
- Superintendants of the 13 “focus districts” the State agreed to as a representative sample of its school districts [*Colville, Yakima, Edmonds, Chimacum, Moses Lake, Battle Ground, Renton, Royal, Clover Park, Mt. Adams, Issaquah, Sunnyside, and Bethel*].¹⁹

¹³ FOF/COL ¶21-97; RP 84-408 (*Blair*); RP 2490-2567 (*Kelly*).

¹⁴ *El Centro de la Raza* founder Roberto Maestas (FOF/COL ¶24; RP 2570-2661, Tr.Ex. 571, 573, 574); *Urban League* President James Kelly (FOF/COL ¶25); RP 2490-2567 (*Kelly*)

¹⁵ *Jones (African Am. study)* RP 1401-1411, RP 2669-2741 & Tr.Ex. 293; *Contreras (Hispanic Am. study)* Contreras Dep. 4-97 & Tr.Exs. 296 & 297.

¹⁶ Professor Roger Soder (RP 1977-2107, Tr.Exs. 316, 560, 561, 564, & 662).

¹⁷ *Yoshiwara (State Community & Technical College Board’s CR 30(b)(6) designee)*, CP 1422:1-1497:25, Tr.Exs. 96, 98, 99; *Wilson (State Workforce Training & Coord. Board’s CR 30(b)(6) designee)*, CP 1901:1-1967:6 & Tr.Exs. 104, 105, 106, 107, & 108.

¹⁸ CP 2049-2531, Tr.Exs. 661, 662, 663, 664, 665, 667, 668, 669, 670, & 671.

¹⁹ CP 1019 (*State’s Trial Brief*); accord, CP 1045-46 (*Plaintiffs’ Trial Brief*). FOF/COL at Ex.A: *Blair (Chimacum, also RP 84-408)*; *Brossoit (Edmonds, also RP 3220-3345, 3685-3862)*; *Emmil (Colville, also RP 563-910)*; *Soria (Yakima, also RP 1743-1977)*; *Bria (Battle Ground)*; *Chestnut (Moses Lake)*; *Cole (Sunnyside)*; *Foss (Mt. Adams)*; *Heuschel (Renton)*; *LeBeau (Clover Park)*; *Rasmussen (Issaquah)*; *Search (Royal)*; *Seigel (Bethel)*.

- Members of the State's various studies on the State's funding of its public schools.²⁰
- The Director of the State's Office of Financial Management, as well as education analysts from the legislature and Governor's office.²¹
- The State Auditor's Office responsible for auditing the State school districts' financial reports.²²
- The State's chief education officer under our Constitution (the current and former State Superintendents of Public Instruction).²³
- The State's longtime Assistant Superintendent of Public Instruction For School Financial Resources.²⁴
- The Chairman of the State Board of Education.²⁵
- The three out-of-State "experts" upon whom the State's Opening Brief relies (Messrs. Hanushek, Armor, and Costrell).

B. The Trial Court Findings On Why Education Matters
(the real world importance of Article IX, §1 in our State).

The above witnesses' testimony established why the education mandate in Article IX, §1 is so important. FOF/COL ¶¶118-143. The State does not challenge a single one of those findings and conclusions.

²⁰ E.g., *Rep. Priest (RP 1109-1401) (BEFTF, also Washington Learns); Grimm RP 1550-1735 (Basic Education Finance Task Force ["BEFTF"], also Paramount Duty Study); Aos (RP 2261-2482, Tr.Exs. 57, 124, 269, 270, 271, 272, 273, 274, 275, 276, 277, 283, 287, & 288) (WSIPP); Bergeson (CP 1972-2048) (BEFTF, also Wa. Learns); Rep. Anderson (Anderson Dep. 1-128)) (BEFTF, also Wa.Learns, K-12 School Construction Workgroup); Daley (Daley Dep. 1-72) (Washington Learns); Rep. Hunter (Hunter Dep. 1-155) (BEFTF); Sen. Jarrett (Jarrett Dep. 1-133) (BEFTF); Sen. Tom (Tom Dep. 1-89) (BEFTF).*

²¹ E.g., *OFM Director V. Moore (RP 3497-3672, Tr.Exs. 16, 347, 617, 342, 343, 344, 345, 348, 350, 352, 353, 354); B.Moore (CP 2532-2637); Salvi (RP 3672-3681, 4054-4132, 5082-5192)*

²² *Adams (State Auditor's Office Rule 30(b)(6) designee), FOF/COL, Ex. A.*

²³ *Dorn (CP 4463-4584); Bergeson (CP 1972-2048, Tr.Exs. 2, 4, 5, 6, 7, 14, 15, 16, 17, 18, 19 & 20); Billings (RP 915-1109, Tr.Exs. 2, 133, 360, 577, 578, 579, 580, & 685).*

²⁴ *Priddy (RP 1417-1538 & 4379-4546, Tr.Exs. 30, 32, 66, 67, 68, 71, 74, 79, 83, 261, 262, 263, 266, 380, 385, 390, 407, 412, 417, 427, 505, 510, 515, 520 & 616).*

²⁵ *Ryan (RP RP 2201-2256, 2391-2432, 2746-2939, Tr.Ex. 238, 235, & 233).*

1. Freedom & Equality

“The only way that you can be free is to be fully educated”
*José Martí*²⁶

The founder of El Centro de la Raza expounded on this point when explaining why they had named their pre-school program after the above hero in our State’s Latin American community:

He [Martí] elaborates on what he means by fully educated. You need to have the fundamental skills to compete for a job, to contribute to society, and you have to know the economics, political social processes, becoming involved in them to shape the future of the homeland of your community for your people and yourself. That is why we selected José Martí.²⁷

Based upon various witnesses’ testimony at trial, the court’s unchallenged findings include the fact that education “plays a critical civil rights role in promoting equality in our democracy”, and that

[P]ublic education operates as the great equalizer in our democracy, equipping citizens born into the underprivileged segments of our society with the tools they need to compete on a level playing field with citizens born into wealth or privilege.²⁸

2. Washington’s Democracy.

“A healthy democracy depends on educated citizens.”
*State’s written admission in this case*²⁹

The trial court found that the trial testimony “confirmed the factual accuracy of [the above] statement, especially in the type of broad populist

²⁶ RP 2597:16-18.

²⁷ RP 2597:19-2598:1.

²⁸ FOF/COL ¶132, accord ¶134 (even Newt Gingrich and Al Sharpton agree that education “is the number one civil right of the 21st century”).

²⁹ FOF/COL ¶119.

democracy established in this State” – detailing, for example, how Washington is one of only two States where citizens legislate by both Initiative and Referendum (a right our citizens exercise with increasing frequency at both the State and local level); how our citizens routinely amend their Constitution by popular vote; and how our citizens elect more of their State and local officials than the citizens of most other States.³⁰

Based upon the various witnesses’ testimony on this point at trial, the court’s unchallenged findings include the fact that:

For a citizen of this State to meaningfully participate in this State’s democratic process and intelligently cast his or her vote on the broad array of State and local government offices and ballot measures noted above, that citizen must be meaningfully equipped to learn about, understand, and evaluate the candidates, ballot measures, positions, and issues being debated and decided in that election. Having an educated citizenry is accordingly critical to this State’s democracy.³¹

³⁰ FOF/COL ¶¶120-128.

³¹ FOF/COL ¶129; accord unchallenged FOF/COL ¶¶ 130-131 regarding the vital role education plays in the operation of our State’s justice and jury system, and in preserving the cohesiveness of our State’s pluralistic society by providing all citizens a shared knowledge and understanding; accord unchallenged FOF/COL ¶¶138-142 establishing our **founding fathers** recognized the same (“Madison admonished us: ‘A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.’”), our **courts** recognize the same (e.g., Brown v. Board of Education, 347 U.S. 483, 493 (1954) and Seattle School District v. State, 90 Wn.2d 476, 517 (1978)); and **Washington statutes** recognize the same (e.g., RCW 28A.150.210, “civics and history, including different cultures and participation in representative government” included in the knowledge and skills all Washington students should be equipped with); Professor Soder (RP 2016-2107 & Tr.Exs. 316, 560, 561, 564, 662); Sec. of State Reed (CP 2049-2531, Tr.Exs. 661, 662, 663, 664, 665, 667, 668, 669, 670, & 671); Tr.Ex. 125, p.2; RP 1566-1567, 1562; RP 3687-3688; accord, FOF/COL ¶136 (former Supreme Court Justice O’Connor’s recent lament that “Two-thirds of Americans

3. Washington's Economy.

“The new economy is based on knowledge,
and knowledge is based on education.”
*Washington Learns Final Report*³²

The trial testimony (including the State's own economic analyses) repeatedly confirmed today's economic necessity for well-educated citizens, with the court's unchallenged findings including the fact that:

Education also plays a critical role in building and maintaining the strong economy necessary to support a stable democracy.... For example, broad public education builds the well educated workforce necessary to attract more stable and higher wage jobs to this State's economy, and provides living wage jobs and employment necessary to provide gainful employment to this State's citizens, and lessening the burdens on this State's citizens of social services, crime, and incarceration.³³

And with respect to students the State fails to educate, the court's unchallenged findings further found that:

Society will ultimately pay for these students. The State will pay for their education now, or society will pay for them later through unemployment, welfare, or incarceration.³⁴

know at least one of the judges on the Fox TV show 'American Idol', but less than one in ten can name the Chief Justice of the United States Supreme Court").

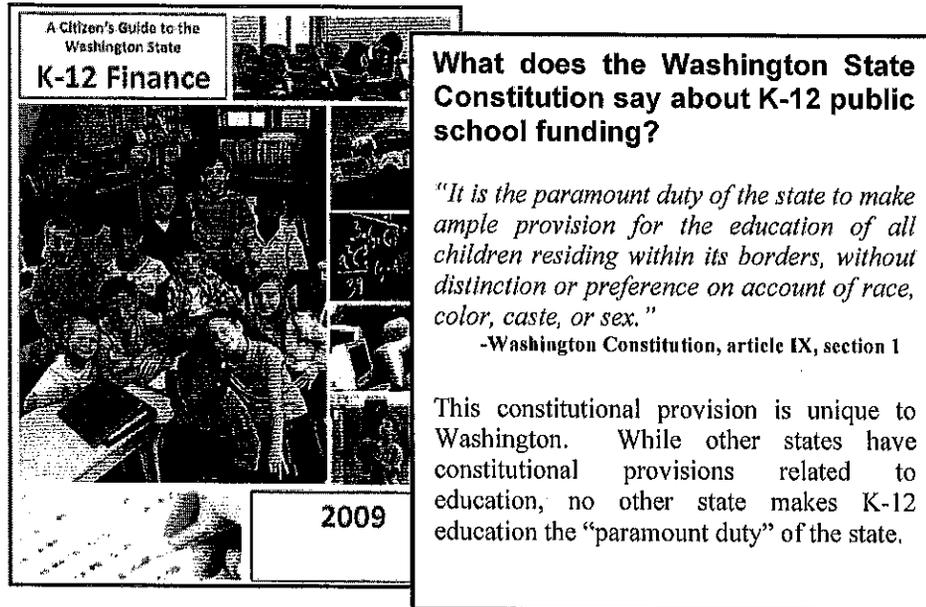
³² *Tr.Ex. 16, p.4.*

³³ *FOF/COL ¶133; accord, e.g., Tr.Ex. 465, p.1 (OSPI: "Increased resources for public schools are not only essential for our State's financial future, but also for maintaining and creating jobs in all of our communities"); Tr.Ex. 283 (WSIPP analysis of benefits); Tr.Ex. 16, p.13 (Wa.Learns: "We know that investing in education pays big dividends – for individuals, for communities, and for the State as a whole"). Add'l record cites in Appx A.*

³⁴ *FOF/COL ¶265.*

C. The Trial Court Findings On Why Our Constitution's Education Mandate Is So Unique.

The State emphasizes that Article IX, §1 is unique in its Citizen's Guide explaining public school finance to Washington citizens:³⁵



The State accordingly does not challenge the trial court's explanation of how unique our State Constitution's education mandate is (e.g., no other State Constitution imposes a higher education duty upon the State, and the education duty in Article IX, §1 is the only duty our State Constitution identifies as the State's paramount duty).³⁶

D. The Trial Court Findings On The State's Development Of Minimum Education Standards For Washington Students.

Trial Exhibit 2 was a photocopy of the *Seattle School District* Court's description of the skills encompassed within Article IX, §1:

³⁵ *Tr. Ex. 192, cover and p.2.*

³⁶ *FOF/COL ¶¶145-46.*

[T]he State's constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas. Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to ensure that system's survival. It must prepare them to exercise their First Amendment freedoms both as sources and receivers of information; and, it must prepare them to be able to inquire, to study, to evaluate and to gain maturity and understanding. The constitutional right to have the State "make ample provision for the education of all (resident) children" would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas.³⁷

As the trial court's unchallenged paragraph 174 also shows, that passage goes on to explain that:

The effective teaching ... of these essential skills make up the *minimum* of the education that is constitutionally required.³⁸

1. State Studies Culminate In The State's Enactment Of House Bill 1209.

The trial court's unchallenged findings include the following facts about the State's next steps:

After the Washington Supreme Court's 1978 *Seattle School District* ruling, the [defendant] State engaged in many years of study to determine substantive standards for the education that children need in order to be adequately equipped for their role as citizens in our State's democracy, and as potential competitors in our State's open political system, in today's labor market, and in the market place of ideas.

³⁷ *Trial Exhibit 2 (photocopy of 90 Wn.2d at 517-18).*

³⁸ *FOF/COL ¶174 (quoting 90 Wn.2d at 517-18; bold italics in this Court's decision).*

In 1993, the State Legislature enacted House Bill 1209 as a result of those many years of study.³⁹

Witnesses involved with those State studies confirmed that the substantive education standards developed by the State are the basic knowledge and skills specified in the four numbered provisions of House Bill 1209 – i.e.,:

- (1) Read with comprehension, write with skill, and communicate effectively and responsibly in a variety of ways and settings;
- (2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history; geography; arts; and health and fitness;
- (3) Think analytically, logically, and creatively, and to integrate experience and knowledge to form reasoned judgments and solve problems; and
- (4) Understand the importance of work and how performance, effort, and decisions directly affect future career and educational opportunities.

Tr.Exs.14 and 133 (HB 1209, section 101 (1)-(4))⁴⁰

In 2007, the Final Report of the State's 18-month *Washington Learns* study recommended the legislature "redefine basic education" by amending the previously-cited section of HB 1209 (a/k/a "§.210 of the Basic Education Act").⁴¹ The 2007 legislature slightly redefined the basic skills specified in those four numbered provisions as follows:

- (1) Read with comprehension, write ~~with skill~~ effectively, and communicate ~~effectively and responsibly~~ successfully in a variety of ways and settings and with a variety of audiences;

³⁹ FOF/COL ¶¶181 & 183.

⁴⁰ E.g., RP 971:10-23; RP 960:3-6; RP 976:7-977:12; CP 1990:1-1992:8.; accord FOF/COL ¶¶185-187.

⁴¹ Tr.Ex. 16, pp.48-49; RP 3574:23-3576:8; CP 2041:10-2042:25; accord FOF/COL ¶193.

- (2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history, including different cultures and participation in representative government; geography; arts; and health and fitness;
- (3) Think analytically, logically, and creatively, and to integrate ~~experience~~ different experiences and knowledge to form reasoned judgments and solve problems; and
- (4) Understand the importance of work and finance and how performance, effort, and decisions directly affect future career and educational opportunities.

Redline of E2SSB 5841, Sec. 1.⁴²

Based on the evidence at trial concerning the State's development and its subsequent implementation of the above provisions from HB 1209, the court found as a matter of fact that:

The knowledge and skills originally specified in the four numbered provisions of House Bill 1209 (now codified in §.210 of the Basic Education Act) are in fact the substantive content of what drives education in this State. Those four numbered provisions specify basic knowledge and skills that the State has determined a child needs to possess to be equipped to succeed in today's world.⁴³

2. More Studies Culminate In The State's Adoption Of Essential Academic Learning Requirements (EALRs) For All Washington Students.

As the court's unchallenged findings of fact further explain, the State's 1993 enactment of HB 1209 also set in motion a multi-year process that included the development of Essential Academic Learning Requirements ("EALRs") in nine core academic subjects:

⁴² E2SSB 5841 is Trial Exhibit 687; accord FOF/COL ¶¶193-194; Dorn Dep. 44:4-20.
⁴³ FOF/COL ¶195; accord, e.g., CP 1993:19-1994:21, RP 977:4-12. Add'l record cites in Appx A.

- (1) Science;
- (2) Mathematics;
- (3) Reading;
- (4) Writing;
- (5) Communication;
- (6) Social Studies: civics, economics, geography, & history;
- (7) Arts;
- (8) Health & Fitness; and
- (9) Educational Technology.⁴⁴

Witnesses involved with the State's development of its Essential Academic Learning Requirements confirmed that they specify what the State determined every student needs to know to become reasonably equipped for today's world.⁴⁵ For example, the State's Essential Academic Learning Requirements for 10th grade specify what the State has determined every student needs to know by the end of 10th grade to be prepared to learn in 11th and 12th grade the additional knowledge and skills they need in today's world.⁴⁶

⁴⁴ FOF/COL ¶184 and 196.

⁴⁵ E.g., Tr.Exs. 144 & 678; RP 972:25-974:7.

⁴⁶ E.g. RP 974:21-975:17, RP 1074:9-20; Tr.Ex. 360, p.22.

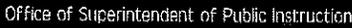
The State's published explanations to its citizens further confirmed the witnesses' testimony. For example (from Tr.Ex. 144 and Tr.Ex. 678):



WASHINGTON
State Standards

**Essential Academic Learning Requirements
and Grade Level Expectations**

The Essential Academic Learning Requirements (EALRs) for all content areas were initially developed beginning with the Basic Education Act of 1993. These standards define what all students should know and be able to do at each grade level.



Essential Academic Learning Requirements

Before 1993, there were no statewide learning goals for children. Students graduated from high school with varying levels of skills and knowledge. Academic standards differed from district to district.

The solution was to create a set of statewide learning standards. Hundreds of teachers, principals and other educators worked with parents, business leaders and community leaders to create "essential academic learning requirements" (often referred to as an acronym - EALRs). Their goal: *To specify the skills and knowledge in core subjects that all students are expected to master as they move through Washington's public schools.* EALRs have been created for the following subjects: reading, writing, mathematics, communications, science, social studies, the arts, and health and fitness.

Washington set rigorous learning standards for a reason: our high school graduates must have the level of knowledge and critical thinking skills needed to survive and thrive in today's competitive, technologically sophisticated society. The EALRs will continue to be reviewed and updated to ensure the statewide standards in all subjects are in line with the knowledge and skills students must have to be prepared for all post-high school options, from college to direct entry into the workforce.

Based on the evidence at trial concerning the State's development of its Essential Academic Learning Requirements, the court found as a matter of fact that:

The [defendant] State adopted this State's Essential Academic Learning Requirements (EALRs) in order to more specifically describe the basic skills established by the four numbered provisions of Basic Education Act §.210. The State's Essential Academic Learning Requirements (EALRs) are part of the academic instruction that the State requires for all Washington students. They specify basic skills and knowledge in core subject areas that the State expects all students to master as they move through Washington's public schools, so those children can be equipped to compete in today's world. The State's Essential Academic Learning Requirements specify basic knowledge and skills that the State has determined a child needs to possess to be equipped to succeed in today's world.⁴⁷

E. The Trial Court Findings Regarding The State's Funding Formulas.

The State (e.g., OFM) uses arithmetic equations known as program "funding formulas" to determine the dollar amount it provides to educate its public school students each year.⁴⁸

1. Funding Formulas Are Based On Snapshots Taken 30 Years Ago.

The State's formulas were originally based on the Miller Report, which took a snapshot of existing staffing levels, salaries, and costs in the

⁴⁷ FOF/COL ¶197; accord RP 1995:21-1997:9; RP 972:25-974:7. *Add'l record cites in Appx A.*

⁴⁸ E.g., FOF/COL ¶220 (although the State challenges part of ¶220, it does not challenge the first sentence explaining that the State "uses arithmetic equations (program 'funding formulas') to calculate a dollar number for an annual dollar 'allocation' to the [defendant] State's public schools."

1974-1975 school year.⁴⁹ For example: the formulas' staffing level for public school "classified" staff (non-teachers like maintenance, bus drivers, legal, etc.) was set at the "16.67 employees per 1000 students" ratio which resulted from that Miller Report snapshot.⁵⁰ Despite staffing needs that did not exist in the mid-1970s (e.g., IT and school security), the State's funding formula still has that same 16.67 staffing level.⁵¹

The State similarly uses funding formulas dating originally back 30 years to determine the dollar amount it provides its school districts for utilities and supplies (the so-called Non-Employee Related Costs or "NERCs"), transportation of students to and from school, and other discrete programs such as the Learning Assistance Program ("LAP") and English Language Learners ("ELL").⁵²

The funding formulas do not provide for any construction costs to build the State's public school facilities.⁵³

2. Funding Formulas' Application Today.

The witnesses involved in Washington's public education system confirmed that the State's above funding formulas have no correlation to

⁴⁹ E.g., *Tr.Ex.* 333; *RP* 4315:9-19, *RP* 4326:21-4327:15, *RP* 1452:12-1452:3, *RP* 3997:1-3998:21, *RP* 1451:12-1452:3. *Add'l record cites in Appx A.*

⁵⁰ E.g., *Tr.Ex.* 333, p.2 bottom bullet; *Laws of 1977, 1st ex. sess., ch. 359, §5; RCW 28A.150.260(2)(b)(iv); RP* 4066:6-4067:21; *RP* 4483:3-23.

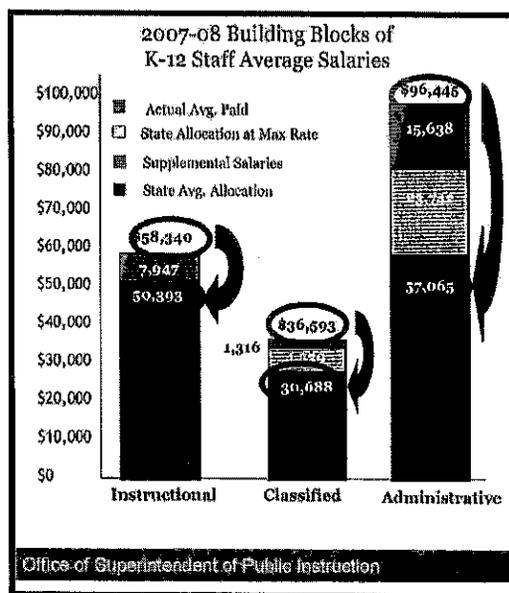
⁵¹ *Supra* footnote 50.

⁵² *RP* 4317:11-23; *RP* 5113:23-5114:1.

⁵³ E.g., *RP* 4334:19-4335:3; *Anderson Dep., 39:9-15; Tr.Exs. 647-659. Add'l record cites in Appx A.]*

the real world our public schools are in today, and accordingly provide far less than what it actually costs to operate the State's public schools.⁵⁴ As the Director of the State's Office of Financial Management confirmed, the State's funding determination does not consider actual market costs.⁵⁵

Some examples were in the Assistant Superintendent of Public Instruction's public presentation regarding those formulas – which included diagrams such as the following to illustrate that the hypothetical salary in the State's formulas is not the actual salary its public schools face in our State's labor market.⁵⁶



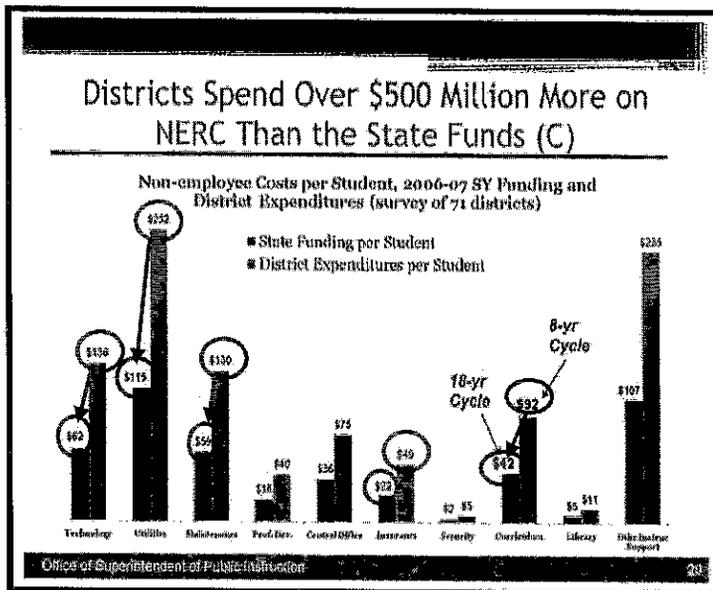
⁵⁴ RP 1183:2-3, 1260:13-1262:16; Jarrett Dep. 70:13-19; CP 1701:24-1704:15 Add'l record cites in Appx. A.

⁵⁵ RP 3583-3587; RP 3603; Tr.Ex. 347. Add'l record cites in Appx. A.

⁵⁶ Tr.Ex. 67, p.11 (circles and arrows added to exhibit to mark the differences); RP 1471:12-1477:9. Add'l record cites in Appx. A.

The trial court further found that as a result: “the consistent evidence was that school districts routinely supplement the State funding for teacher salaries and benefits in order to attract and retain quality teachers.”⁵⁷

Another example was the Assistant Superintendent’s demonstration that the hypothetical amount in the State’s formula for NERCs (utilities, books, technology, etc.) is not the amount its schools must actually pay in today’s market:⁵⁸



As the State’s Assistant Superintendent explained in response to the trial judge’s questioning, the State formulas’ above lack of correlation to real

⁵⁷ FOF/COL ¶236; FOF/COL ¶237; RP 1474:17-25, Hunter Dep. 30:7-12. Add'l record cites in Appx A.

⁵⁸ Tr.Ex. 67, p.20 (circles and arrows added to exhibit to mark the differences) accord, Tr.Ex. 616, p.1; RP 1481:19-1483:9. Add'l record cites in Appx A.

world costs leaves the State's public schools "woefully underfunded" and dependent on local levies to keep their doors open.⁵⁹

After seeing and hearing the wide variety of witnesses noted earlier, the trial court found that the consistent testimony from the "boots on the ground" in our State's public schools confirmed the fact 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," and that the State's funding formulas "leave the State's public schools to rely heavily on local levies to be able to operate ... and to fund their teaching of the basic knowledge and skills mandated by this State's minimum education standards (e.g., the State's Essential Academic Learning Requirements)."⁶⁰

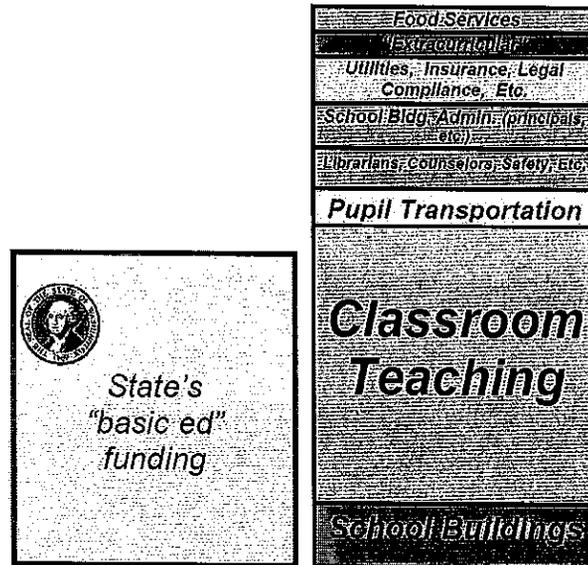
These facts were further confirmed at length by the four focus district superintendants who testified live at trial (Colville, Yakima, Edmunds, and Chimacum).⁶¹ The stacked bar chart below illustrates just one part of their testimony – namely, the part where each superintendent

⁵⁹ E.g., RP 4531:25-4539:12; RP 4533:3-5; *supra* footnote 54; *Add'l record cites in Appx. A.*

⁶⁰ FOF/COL ¶222 and 229; accord RP 1489:6-1490:6, 561:14-15, 1864:23-1866:1, 1832:5-16; *Bria Dep.* 24:21-25:7. *Add'l record cites in Appx. A.* While the State objects to FOF/COL ¶223 *citing* the State's January 2010 QEC report, the State's Opening Brief does not (because the evidence at trial confirms the State cannot) represent to this Court that the facts in ¶223 by the State's QEC are in any way inaccurate.

⁶¹ *Supra* footnote 19.

compared the amount provided by the State's funding formulas to the cost of operating his district's public schools.



The left hand box is the funding formula amount confirmed by the State's sworn interrogatory answers.⁶² The right hand bars are the expense amounts reported in the school district's audited financial statements pursuant to the school accounting codes mandated by the State.⁶³ (The State Auditor audits those financial statements to verify their accuracy.⁶⁴)

Although the specific numbers varied from district to district, the basic picture those numbers painted was the same: the State's funding

⁶² Tr.Exs. 649, 651, 652, 659.

⁶³ E.g., RP 4144:13-24; RP 4159:8-4160:11. Add'l record cites in Appx. A.

⁶⁴ E.g., 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.

formulas provide far less than the actual cost of running its public schools.⁶⁵

[Despite the State's suggestion to the contrary, the point of the above diagram was not that Article IX, §1 requires the State to pay whatever a school district spends. Instead, the testimony of each superintendent confirmed at length that the total on the right side was insufficient to provide all students in that district a realistic or effective opportunity to learn the knowledge and skills described by the *Seattle School District* Court (Tr.Ex. 2) or those set forth in HB 1209 or the State's Essential Academic Learning Requirements (e.g., Tr.Ex. 144).⁶⁶ The point of this diagram was to illustrate that the State's basic ed funding formulas do not even come anywhere close to funding that insufficient total.]

Based upon the testimony and evidence at trial, the trial court ultimately found the following facts concerning the State's formulas:

The [defendant] State uses arithmetic equations (program "funding formulas") to calculate a dollar number for an annual dollar "allocation" to the [defendant] State's public schools. Those arithmetic equations, however, are not correlated to what it actually costs to operate this State's public schools. Those arithmetic equations are not correlated to what it would cost this State's public schools to equip all children with the basic knowledge and skills mandated by this State's minimum education

⁶⁵ RP 171-271; RP 682-787; RP 1802-1869; RP 3264-3337; RP 3699-3709.

⁶⁶ *Infra*, footnotes 76-78.

standards (e.g., the State's Essential Academic Learning Requirements). Those arithmetic equations are not correlated to what it would currently cost this State's public schools to equip all children with the basic knowledge and skills included within the substantive "education" mandated by Article IX, §1. In short, the [defendant] State's arithmetic equations do not determine the amount of resources actually required to amply provide for the education of all children residing within this State's borders.⁶⁷

The three out-of-State "national" experts that the State's Opening Brief relies upon did not address the Washington witnesses' testimony supporting the court's factual findings about Washington's funding formulas – for those "experts" admitted on the stand that they did not know about Washington's basic ed funding or Washington's education standards.⁶⁸

F. The Trial Court Findings Relating To Washington Students' Failure To Meet This State's Minimum Education Standards.

The State's education officials, members of the State's education studies and task forces, and the superintendents of this case's focus districts testified at length about the fact that our State's public schools are failing to equip significant segments of our State's children with the knowledge and skills the State has determined all of them must know in today's world.⁶⁹

⁶⁷ FOF/COL ¶220; accord FOF/COL ¶224-229 & 263; accord *supra* footnote 54; RP 5087:10-20; RP 266-268; RP 779-780; RP 1866-1867; RP 3705-3706

⁶⁸ *Hamushek* (RP 3125:4-3127:6; RP 3132:17-3134:10; RP 3128:6-3129:9); *Armor* (RP 3441:6-3442:3; RP 3453:15-3454:8); *Costrell* (RP 4636:6-19; RP 4640:10-17; RP 4633:20-22; RP 4631:13-4633:6).

⁶⁹ E.g., RP 2677:4-11; RP 2241:11-18; *Tr.Ex. 98*; *Jarrett Dep. 26:14-27:14*. *Add'l record cites in Appx A.*

As just one example, the State maintained throughout the trial that its Washington Assessment of Student Learning (“WASL”) is one of the “most rigorous and reliable assessments of student achievement in the country”.⁷⁰

That “rigorous and reliable assessment” confirmed the significant failure of the State’s public schools.⁷¹ Three illustrative examples are:⁷²

All students (Statewide)

- 62%** don't have the basic **science** skills the State determined all 10th graders need to have in today's world.
- 63%** don't have the basic **math** skills the State determined all 10th graders need to have in today's world.
- 25%** don't have the basic **reading** skills the State determined all 10th graders need to have in today's world.

Low Income students (Edmonds School District)

- 71%** don't have the basic **science** skills the State determined all 10th graders need to have in today's world.
- 68%** don't have the basic **math** skills the State determined all 10th graders need to have in today's world.
- 22%** don't have the basic **reading** skills the State determined all 10th graders need to have in today's world.

Latino students (Yakima School District)

- 87%** don't have the basic **science** skills the State determined all 10th graders need to have in today's world.
- 85%** don't have the basic **math** skills the State determined all 10th graders need to have in today's world.
- 34%** don't have the basic **reading** skills the State determined all 10th graders need to have in today's world.

⁷⁰ Tr.Ex. 678, p.2.

⁷¹ E.g., Tr.Ex. 689. RP 1828:9-1831:9; RP 213-214; RP 3310-3313; CP 1770:4-10; CP 1834:2-21; Search Dep. 101:19-104:5

⁷² Tr.Ex. 689, at cover stats (Statewide), Tab 6 stats (Edmonds), Tab 13 (Yakima).

As just one more example, the State's Washington Learns Commission confirmed at the conclusion of its 18-month study that:⁷³

Right now in Washington:

- Only 74 percent of ninth graders graduate from high school with their peers.
- Only 60 percent of black and Hispanic students graduate from high school with their peers.
- The younger working age population is less educated than their older counterparts.
- Nearly one-quarter of employers report difficulty finding qualified job applicants with occupation-specific skills

These facts cannot be ignored. Education is the key to success in the global economy, and our education system is not preparing our students to compete. . . .

The State accordingly does not challenge the trial court's factual findings regarding the performance of the defendant State's public schools:

[T]he State's public schools are failing to equip all children residing in this State with the basic knowledge and skills mandated by this State's minimum education standards (e.g., the State's Essential Academic Learning Requirements). The State's public schools are failing to equip all children residing in this State with the basic knowledge and skills included within the substantive "education" mandated by Article IX, §1. These facts are confirmed by the [defendant] State's own testing of the education that has been provided to this State's public school children (the Washington Assessment of Student Learning, or "WASL"). These facts are confirmed by the high school drop out rates in the State's public schools. These facts are confirmed by the significant gaps in the education of lower

⁷³ *Tr.Ex. 16, p.5.*

income and minority students in the [defendant] State's public schools compared to the education of those students' more privileged counterparts. These facts are confirmed by the [defendant] State's studies and public documents. These facts are confirmed by the [defendant] State's education personnel. And, as another example, these facts are confirmed by Superintendents of focus districts in this case, and by the current and past Superintendents of the Office of Public Instruction.⁷⁴

G. The Trial Court's Finding That The State Is Failing To Provide Its Students A Realistic Or Effective Opportunity To Meet This State's Minimum Education Standards.

The witnesses at trial, including the State's own officials, repeatedly confirmed that for an educational "opportunity" to have any meaning, it must be a realistic or effective opportunity.⁷⁵

The testimony at trial repeatedly confirmed that the resources provided by the State:

- do not allow the State's public schools to provide all children a realistic or effective opportunity to become equipped with the "essential skills" this Court identified as part of the Constitutional *minimum* in its *Seattle School District* ruling (Tr.Ex. 2);⁷⁶
- do not allow the State's public schools to provide all children a realistic or effective opportunity to become equipped with the

⁷⁴ FOF/COL ¶230. *The State's Assignment Of Error No. 6 limits the State's challenge to the part of ¶230 finding that school districts have to cobble together their funds to operate. Accord, FOF/COL ¶235, FOF/COL ¶238 ("The fact is that Washington students are underperforming and failing to achieve in large numbers."). Accord, e.g., supra footnote 69 (Add'l record cites in Appx A); Tr.Exs. 689, 492, 491.*

⁷⁵ RP 3630:13-18; RP 1202:14-17; RP 1073:22-1074:2; Jarrett Dep. 29:23-30:3; RP 3307:15-3309:22; RP 3700:10-3702:1; RP 1568:13-15.

⁷⁶ E.g., RP 982:9-983:1; RP 222:8-225:5; RP 263:10-266:22; RP 270:20-271:9; RP 747:2-750:22; RP 775:20-779:12; RP 781:25-786:18; RP 1840:4-1843:12; RP 1861:21-1863:25; RP 1868:6-22; RP 3321:5-3323:1; RP 3702:17-3704:10; RP 3707:10-3709:12.

knowledge and skills specified by the Legislature in the four numbered provisions of HB 1209 (listed on Tr.Ex. 144);⁷⁷ and

- do not allow the State's public schools to provide all children a realistic or effective opportunity to become equipped with the knowledge and skills adopted by the State in its Essential Academic Learning Requirements (described in Tr.Ex. 144).⁷⁸

The three out-of-State "national" experts that the State's Opening Brief relies upon did not (and could not) address such testimony – for as noted earlier, they did not know what funding this State provides or what this State's education standards are.⁷⁹

Plaintiffs subpoenaed the array of previously-noted witnesses who work here in this State with this State's public schools – including this State's education officials, members of this State's education studies and task forces, and this State's focus district superintendents. They repeatedly confirmed that all Washington students can learn the skills in Washington's minimum education standards if the State's public schools are provided the proper resources.⁸⁰ Rejecting the State's notion that socioeconomic 'predictive factors' like poverty and race doom Washington students from those segments of our society to failure, the trial court found that the witnesses subpoenaed by plaintiffs

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Supra* footnote 68.

⁸⁰ *E.g.*, RP 983:9-983:15; Anderson Dep. 94:11-17; RP 1831:10-1832:4. *Add'l* record cites in Appx. A.

presented evidence of student after student who were able to overcome these 'predictive factors' through individualized attention or alternative opportunities.⁸¹

The court found the superintendents also supported their professional opinion that all of their students could learn the skills in Washington's minimum education standards by giving concrete examples of

individual success stories resulting from resources that would require additional funding: smaller class sizes for struggling students, availability of co-curricular activities (such as sports, theatre, art), and vocational training, and individualized attention. Thus, notwithstanding disadvantaging predictive factors, given proper and adequate resources, these students can succeed.⁸²

In a similar vein, the court's unchallenged findings explain that while the State's paid "experts" said simply throwing money at schools does not "*ipso facto* translate into educational achievement results", plaintiffs' witnesses provided "compelling testimony that individualized attention on challenged learners has yielded great successes."⁸³

Based on evidence such as the trial testimony noted above, the court ultimately found that

The overwhelming evidence is that the State's students are not meeting [the State's academic] standards and that the State is

⁸¹ FOF/COL ¶236. One example of alternative opportunities are alternative schools. The testimony repeatedly confirmed they play a significant role in increasing high school graduation rates and meeting State standards (e.g., RP 147:12-149:2; RP 369:9-370:21; RP 94:19-95:13; RP 882:8-885:3;). The fact that the current funding system forces school districts like Chimacum to use local levy money and donations to fund such schools is not relevant to whether the current funding system's doing that is Constitutional. Add'l record cites in Appx A.

⁸² FOF/COL ¶234; accord FOF/COL ¶233; see also *supra* footnote 81.

⁸³ FOF/COL ¶271.

not fully funding the programs, even currently available, to meet such standards.⁸⁴

The court found as a matter of fact that the State is not providing all Washington children with a realistic or effective educational *opportunity*:

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”.

[T]he State will ensure that all children will not perform up to their capabilities if it does not give them the educational *opportunity* to achieve. The State is failing to provide that opportunity.⁸⁵

H. Trial Court Findings About The State’s Conduct These Past 30 Years.

1. Elected Officials’ Promises Of Good Intent.

The testimony at trial confirmed that our State’s elected officials have been promising to comply with Article IX, §1 for over 30 years.⁸⁶

For example, the unchallenged findings of fact confirm that after the trial court decision in the *Seattle School District* case,

⁸⁴ FOF/COL ¶235; accord RP 664:5-666:13; RP 164:2-165:10; see also *supra* footnote 81. *Add'l record cites in Appx A.*

⁸⁵ FOF/COL ¶231(a) and ¶234 (*italics in original*). See also *supra* footnote 81.

⁸⁶ E.g., RP 943:21-944:13 & Tr.Ex. 577, p.30, 6th para. (Gov. Evans State of the State Address); RP 949:23-950:10 & Tr.Ex. 578, p.141, 2nd & 3rd paras. (Gov. Dixie Lee Ray State of the State Address); RP 951:11-952:5 & Tr.Ex. 579, p.43, 7th para. (Gov. Spellman State of the State Address); 952:23-953:24 & Tr.Ex. 580, p.50, 2nd para. (Gov. Locke State of the State Address); Tr.Ex. 16, p.3 (Gov. Gregoire letter to Washingtonians).

Governor [Dan Evans] characterized school finance as “a ticking time bomb.” He admonished the Legislature “to provide long-term, consistent, and dependable financing for basic education. Adequate financial support means that administrators can return to administering, 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.”⁸⁷

The trial court’s unchallenged findings of fact also confirm that Governor Evans was not the last Governor to talk the talk, highlighting that:

Over the past 30 years, Washington State Governors from Dan Evans and Dixie Lee Ray through Gary Locke and Christine Gregoire have declared to the People of this State their desire and intent to bring the Respondent State into compliance with Article IX, §1 of our State Constitution.⁸⁸

2. Hundreds Of State Studies.

The evidence also confirmed that the State has done literally hundreds of studies, covering virtually every aspect of its public schools from actual costs to funding to dropout reduction to achievement gaps to transportation to student performance to construction and more.⁸⁹ As the trial court’s unchallenged findings of fact explain:

In the years after the Supreme Court’s *Seattle School District* ruling against the [defendant] State, the Legislature has conducted over 17 studies (not including research for specific legislation or projects) to address the school financing concerns of the State’s public schools.

⁸⁷ FOF/COL ¶173.

⁸⁸ FOF/COL ¶259.

⁸⁹ E.g., Tr.Exs. 333; 125; 360; 262 at p.171; 262 at p.161; 262 at p.119; 357; 16; 262; 215; 261; 356; 124; 106; 241; 248; 269; 271; 272; 293; 297; 466; 559; 126; 203; 262; Jarrett Dep. 112:24-113:1; RP 1146:7-1147:6.

Since 1990 alone, the [defendant] State has also conducted over 100 K-12 education finance studies.⁹⁰

The evidence at trial confirmed that those education studies repeatedly came to similar conclusions. For example, the State's studies repeatedly concluded that its transportation funding formula fails to provide anything close to the 100% cost reimbursement that the 1977 legislature promised in the Basic Education Act would be implemented by the 1980-1981 school year.⁹¹ Another example was highlighted by the Chairman of the State's most recent study (the Basic Education Finance Task Force), who confirmed that that study was "basically the same" as the one assigned to the Paramount Duty task force he had served on as a State Legislator in 1982-1985.⁹²

3. ESHB 2261

The education fiscal analyst that the State called at trial wrote to his colleagues before the start of the 2009 legislative session that "On a lighter note, I should tell you that the legislature will be a veritable cornucopia of ideas on no cost options!!!"⁹³

⁹⁰ FOF/COL ¶¶260-261.

⁹¹ E.g., Tr. Ex. 356, p. 64; RP 4094:17-4095:10; Tr. Ex. 357, p. 31.

⁹² RP 1564:19-24; Tr. Ex. 124 (BEFTF); Tr. Exs. 125, 126 (Paramount Duty Comm.).

⁹³ Tr. Ex. 338.

The evidence at trial confirmed that the 2009 legislature's enactment of ESHB 2261 was such a "no cost" option – for as the trial court's unchallenged findings of fact explain:

No funding is provided for the future execution or implementation of ESHB 2261 by future legislatures. In other words, future legislatures are under no mandate to fund, execute on, or continue implementation of ESHB 2261, as may be contemplated by the current legislature.

. . . .

... ESHB 2261 does not require future legislatures – or governors – to do anything. Rather, the legislation is the expressed intent of a current legislature as to what future legislatures should or might do.⁹⁴

VI. LEGAL DISCUSSION

A. **The trial court did not err in ruling that the term "education" has the meaning it held it has.**

The State does not challenge the trial court's legal conclusion that "it is the proper function of the judiciary to interpret, construe, and enforce our Constitution."⁹⁵ That is because this Court has unequivocally declared

the judiciary has the ultimate power and the duty to interpret, construe and give meaning to words, sections and articles of the constitution. It is emphatically the province and duty of the judicial department to say what the law is. This duty must be exercised even when an interpretation serves as a check on the

⁹⁴ FOF/COL ¶¶202 and 274; accord, e.g., RP 3601:3-12; RP 1722:4-1723:2. *Add'l record cites in Appx A.*

⁹⁵ FOF/COL ¶¶153-154, citing *Seattle School District*, 90 Wn.2d at 482 (it "is the proper function of the judiciary to interpret, construe and enforce the constitution of the State of Washington"), also at 503-04 and 496-97.

activities of another branch of government or is contrary to the view of the constitution taken by another branch.⁹⁶

Here, the trial court interpreted, construed, and gave meaning to word “education” in Article IX, §1 of our State Constitution. The court exercised its emphatic province and duty to say what the law is. And it did so even though its ruling serves as a check on the activities (or in this case, the relevant inactivity) of another branch.

As noted earlier, the State insisted that the issues in this case cannot be determined without trial testimony concerning the current meaning of an “education” under Article IX, §1 in today’s world. The facts found by the trial court after hearing that testimony are summarized above in Part V.D (“Trial Court Findings On The State’s Development Of Minimum Education Standards For Washington Students”). And based on such facts, the court explained its interpretation of the word “education” in today’s world. FOF/COL ¶ 203-212.

The trial court properly began with this Court’s holding in the *Seattle School District* case that the education mandated by Article IX, §1 embraces the skills needed to equip children for their role as citizens and competitors in today’s world, that “[t]he constitutional right to have the State ‘make ample provision for the education of all (resident) children’

⁹⁶ *Seattle School District*, 90 Wn.2d at 503-504 (citations omitted, underline added), similarly at 496-97; accord, FOF/COL ¶¶ 154 & 203.

would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas”, and that “[t]he effective teaching ... of these essential skills make up the *minimum* of the education that is constitutionally required.”⁹⁷

The trial court also explained that the *Seattle School District* Court had acknowledged its description of the knowledge and skills needed in today’s world (Tr.Ex. 2) was not “fully definitive of the State’s paramount duty”.⁹⁸ The *Seattle School District* Court had accordingly provided that the State was to (1) define additional substantive content for the knowledge and skills needed for a basic education in today’s world, and (2) define a basic program of education to provide that substantive content to all Washington children.⁹⁹ [The *Seattle School District* decision also provided that the State was to (3) fully fund the program defined in part (2).¹⁰⁰]

The four numbered provisions of HB 1209 and its ensuing Essential Academic Learning Requirements do, in fact, define additional

⁹⁷ FOF/COL ¶¶204-206 (quoting *Seattle School District*, 90 Wn.2d at 517-18 (**bold italics** in this Court’s decision, underline added)).

⁹⁸ FOF/COL ¶207(citing *Seattle School District*, 90 Wn.2d at 518-19).

⁹⁹ FOF/COL ¶¶175-176 (citing *Seattle School District*, 90 Wn.2d at 482, 518, 537); accord, State’s Opening Brief at 36:13-14 (“The [*Seattle School District*] Court directed the legislature to provide substantive content to basic education”).

¹⁰⁰ FOF/COL ¶164(citing *Seattle School District*, 90 Wn.2d at 518, 537, 520).

substantive content for the knowledge and skills that the State has determined all children need for their role as citizens and competitors in today's world. *Supra*, Part V.D (“Trial Court Findings On The State’s Development Of Minimum Education Standards For Washington Students”).

Although the State now suggests on appeal that maybe it did not adopt the four numbered provisions of HB 1209 and its ensuing EARLs because of this Court’s ruling against the State in the *Seattle School District* case, that suggestion is not consistent with the testimony.¹⁰¹

Moreover, the State’s new suggestion about its possible motive for doing what it did does not change the fact of what it did. The four numbered provisions of HB 1209 and its ensuing Essential Academic Learning Requirements do, in fact, define the knowledge and skills that the State has determined all children need for their role as citizens and competitors in today’s world.¹⁰² Consistent with that fact, the State adopted them as Essential Academic Learning Requirements – not Aspirational Academic Learning Suggestions.

The State also suggests that this Court’s *Seattle School District* ruling held that the “education” promised by Article IX, §1 does not

¹⁰¹ *E.g.*, RP 960:3-6; RP 971:10-972:7.

¹⁰² *Supra*, Part V.D (“Trial Court Findings Relating To The State’s Development Of Minimum Education Standards For Washington Students”)

encompass any actual skills or substance, but instead means merely whatever “program” of education the legislature deigns to fund.

But that is not what this Court held. As the trial court correctly explained, pages 517-518 of this Court’s *Seattle School District* decision described the type of “essential skills” encompassed within an Article IX, §1 education (Tr.Ex. 2).¹⁰³ The *Seattle School District* Court noted that its description of those essential skills was not “fully definitive of the State’s paramount duty”.¹⁰⁴ And thus as the trial court correctly explained, the *Seattle School District* Court provided that the State should give further definition to the substantive content of those essential skills, as well as define a basic “program” of education to deliver that substantive content:

That 1978 Supreme Court ruling accordingly provided that the [defendant] State was to (1) define additional substantive content for the above-described “basic education”, and (2) define a “program of basic education” to provide that substantive content to all Washington children. The Supreme Court’s language repeatedly made it clear that “basic education” and “basic program of education” are not synonyms. Instead, they are two distinct terms. E.g., 90 Wn.2d at 482 (“The Legislature must act to carry out its constitutional duty by defining and giving substantive content to ‘basic education’ and a basic program of education”) (underline added), at 519 (noting that in 1978 the legislature had not yet passed legislation “defining or giving substantive content to ‘basic education’ or a basic program of education. Thus, the

¹⁰³ FOF/COL ¶¶204-206 (quoting *Seattle School District*, 90 Wn.2d at 518-19); accord FOF/COL ¶174.

¹⁰⁴ FOF/COL ¶207(citing *Seattle School District*, 90 Wn.2d at 518-19).

Legislature must hereafter act to comply with its constitutional duty by defining and giving substantive meaning to them.”) (underlines added), and at 537 (“We have great faith in the Legislature and its ability to define ‘basic education’ and a basic program of education”) (underline added).

In short, “basic education” is substance – the *minimum*, basic knowledge and skills described by the Supreme Court’s above quoted ruling. A “basic program of education”, on the other hand, is exactly what it’s called – a program instituted to deliver that substance. This distinction is important. And as [FOF/COL ¶¶178-197] explain, this court finds that in the years following the 1978 *Seattle School District* decision, the [defendant] State did in fact define additional substantive content for a “basic education” in Washington that goes beyond the *minimum*, basic knowledge and skills described by the Supreme Court’s above quoted ruling.¹⁰⁵

The State’s “education” = “program” interpretation also does not make sense. This Court clearly described education under Article IX, §1 in terms of substance – the “essential skills” that a child needs to “compete adequately in our open political system, in the labor market, or in the market place of ideas”.¹⁰⁶ It makes no sense to say that the State’s program to deliver that substance – e.g., sitting in a classroom 180 days a year – defines one of the “essential skills” need in today’s world. To be meaningful, an education must be skills learned (substance) – not seat time (program).

In short, this Court’s description of the “essential skills” encompassed within Article IX, §1 (Tr.Ex. 2) specifies substance

¹⁰⁵ FOF/COL ¶¶175-176 (*emphasis added*).

¹⁰⁶ FOF/COL ¶¶204-206 (*quoting Seattle School District, 90 Wn.2d at 518-19*).

concerning the basic knowledge and skills needed to compete in today's economy and meaningfully participate in our State's democracy. The trial court accordingly did not err when it ruled that

The word "education" in Article IX, §1 is substantive. It means the basic knowledge and skills needed to compete in today's economy and meaningfully participate in this State's democracy.¹⁰⁷

Nor did the trial court err when it then went on to rule that:

Today, the current definition of that requisite knowledge and skill under Washington law is defined by the following:

(a) at minimum, the substantive skills specified by the Washington Supreme Court in the *Seattle School District* ruling that is quoted in [FOF/COL ¶¶204-206] (90 Wn.2d 476, 517-18 (1978));¹⁰⁸

Consistent with this Court's direction to the legislature in its *Seattle School District* ruling, the four numbered provisions of HB 1209 and its ensuing Essential Academic Learning Requirements do, in fact, define the knowledge and skills that the State determined kids need in order to compete in today's economy and meaningfully participate in this State's democracy.¹⁰⁹ The trial court therefore did not err when it further ruled that Washington's current definition of the "education" encompassed within Article IX §1 includes:

(b) the basic knowledge and skills enacted by the State in the four numbered provisions of House Bill 1209 that are

¹⁰⁷ FOF/COL ¶212.

¹⁰⁸ FOF/COL ¶212.

¹⁰⁹ Part V.D.

discussed in [FOF/COL ¶¶207-209] (now §.210(1)-(4) of the Basic Education Act, RCW 28A.150.210(1)-(4)); and

- (c) the basic knowledge and skills established by the State in the Essential Academic Learning Requirements that are discussed in [FOF/COL ¶¶210-211] (the State's "EALRs").¹¹⁰

The only way to conclude otherwise is to hold that the over the past 30 years, the defendant State simply ignored this Court's direction to provide additional substantive content to further define the essential skills in today's world that are encompassed within an "education" under Article IX, §1.

B. The trial court did not err in ruling that Article IX, §1 requires the State to base funding "as closely as reasonably practicable" on actual costs (instead of the existing funding formulas).

As previously explained in Part V.E of this Brief, the program funding formulas used by the State to fund its public schools have no correlation to the actual costs its public schools face in today's world. The trial court's decision accordingly included the provision that State funding "must be based as closely as reasonably practicable on the actual costs of providing the education mandated by this court's interpretation of Article IX, §1."¹¹¹

To make ample provision for something, one must provide for that something in the real world – not a hypothetical world with no correlation

¹¹⁰ FOF/COL ¶212.

¹¹¹ Page 2 of the FOF/COL's Final Judgment at lines 7-9.

to reality. The trial court's ruling that State funding be based as closely as reasonably practicable on actual cost therefore makes sense.

The trial court's "as reasonably as practicable" language is also consistent with language the Legislature itself has used for education funding. For example, the 1977 Legislature dictated in the Basic Education Act that by the 1980-81 school year, future legislatures must reimburse each school district's student transportation costs "at one hundred percent or as close thereto as reasonably possible."¹¹²

The State's characterization of the opinions of its paid "experts" suggests that the State might be arguing on appeal that it is impossible to try to determine actual costs. But as noted earlier in Part V.H.2, the State has done it many times. And each time, the State's study establishes an actual cost number significantly higher than the State's artificial "funding formula" level.¹¹³ For example, the State's 2008 study of student transportation costs determined – to the dollar, and separately for each of the State's 295 school districts – the amount that the State's artificial transportation funding formula is shortchanging each district every year.¹¹⁴

¹¹² RCW 28A.41.160. As the State's own studies have repeatedly confirmed, however, subsequent legislatures never complied with that requirement. See *Supra* Part V.D.

¹¹³ E.g., *Tr.Ex.* 124, p.24. *Add'l record cites in Appx A.*

¹¹⁴ *Tr.Ex.* 356, pp.69-74.

In short, the fact that determining actual cost “as closely as reasonably practicable” is hard does not mean it cannot be done. Nor does the Washington Constitution give the State a “pass” if complying with a constitutional duty is hard. The trial court accordingly did not err in ruling that State funding must be based as closely as reasonably practicable on the actual costs of providing the education mandated by Article IX, §1.

C. The trial court did not err in ruling that Article IX, §1 requires “stable and dependable State funding” (instead of funding from “regular and dependable tax sources”).

This Court has recognized the necessity of stable and dependable funding, holding that an “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.”¹¹⁵

The testimony at trial re-affirmed that necessity.¹¹⁶ The State accordingly does not dispute that stable and dependable funding is necessary in order to effectively run this State’s public schools.

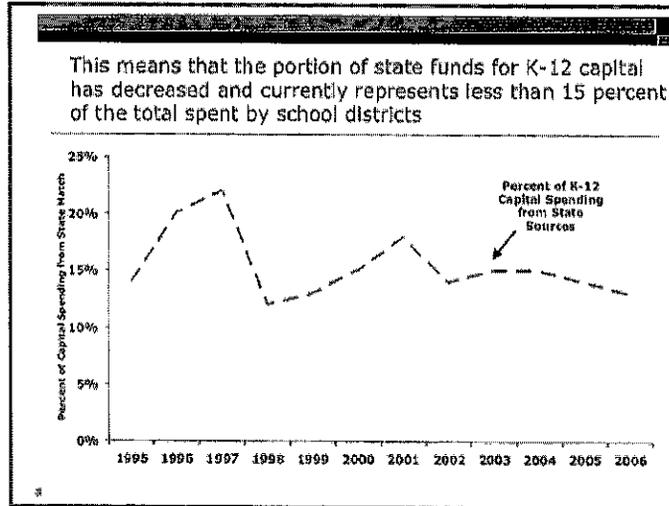
The testimony at trial also established, however, that the funding provided to our State’s public schools is not stable and dependable from year to year.¹¹⁷ For example, the State’s report on construction funding

¹¹⁵ *Seattle School District*, 90 Wn.2d at 525; quoted in FOF/COL ¶255.

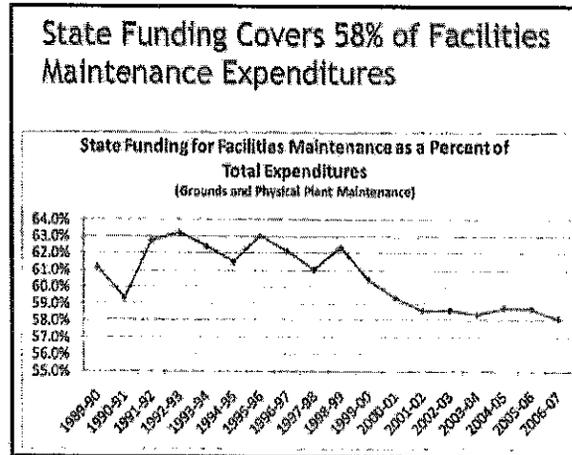
¹¹⁶ E.g., CP 1981:18-1982:4; RP 230:19-231:21.

¹¹⁷ E.g., RP 164:2-165:10; RP 230:14-18; RP 757:22-759:4; RP 785:22-786:2. Add’l record cites in Appx A.

confirms that State funding has fallen to cover less than 15% of the cost of building its public schools:¹¹⁸



As just one more example, the State's analysis regarding school building maintenance confirms that State funding has fallen to cover only 58% of its public schools' maintenance costs:¹¹⁹



Based on the testimony at trial, the court expressly found that:

¹¹⁸ Tr. Ex. 262, p.15. RP 3626:13-3628:7; RP 4334:19-4335:3; RP 1422:16-22; RP 1423:3-17.

¹¹⁹ Tr. Ex. 71, 3rd page. Add'l record cites in Appx. A.

The level of resources provided to the [defendant] State's public schools, moreover, is not stable and dependable from year to year. These facts are confirmed by the [defendant] State's studies and public documents. They are confirmed by the [defendant] State's education and finance personnel. And, as another example, they are confirmed by Superintendents of focus districts in this case, and by both the current and past Superintendents of the Office of Public Instruction.¹²⁰

The trial court did not err in recognizing the legal significance of the State's failure. Indeed, the *Seattle School District* Court held that Article IX, §1 prohibits the State from requiring school districts to rely on levy measures because levies do not provide stable and dependable funding – explaining that levies are outside the control of the school district (or even the State), and are instead “wholly dependent upon the whim of the electorate”.¹²¹ That same “whim of the electorate” defect exists today with all the ballot measures the State's school districts are now forced to rely upon: e.g., Maintenance & Operations (“M&O”) levies, Technology (“Tech”) levies, and Facilities bond measures.

The witnesses at trial similarly confirmed the unstable and undependable nature of the federal funding many districts receive, with that funding being outside the control of the district (or even the State) and

¹²⁰ FOF/COL ¶228.

¹²¹ *Seattle School District*, 90 Wn.2d at 525; accord FOF/COL ¶255; State's Opening Brief at p.53, middle paragraph (in *Seattle School District*, the levies' "exclusion was due to the 'irregular' manner in which they were raised: voters could turn them down.").

subject to the whim of federal officials – the vast majority of whom are from other States and sit in offices on the other side of the country.¹²²

The State does not dispute that the obligations of Article IX, §1 fall upon the State – not others. It accordingly does not challenge the trial court’s conclusion that:

The State likewise cannot avoid the question of whether it is currently complying with its legal duty under Article IX, §1 by delegating responsibility to others such as the State’s school districts. Article IX, §1 imposes its paramount education duty upon the State – not upon others such as the State’s school districts. E.g., *Tunstall v. Bergeson*, 141 Wn.2d 201, 232 (2000) (“school districts have no duty under Washington’s constitution. Article IX makes no reference whatsoever to school districts.”).¹²³

Instead of disputing that the funding duty created by Article IX, §1 falls solely upon the State, the State implies there is no need for requiring its funding to be “stable and dependable” because its General Fund could be a stable and dependable funding source.

Plaintiffs do not dispute that the General Fund is currently large enough to fully fund the State’s paramount duty under Article IX, §1. The dilemma, of course, is instead that the General Fund is not large enough to also fund all the non-paramount stuff elected officials would rather spend money on. The General Fund’s being large enough to provide stable and

¹²² E.g., RP 246:19-248:18; RP 1846:3-5; RP 3328:7-10; *Search Dep.* 115:11-25. (The State’s bald assertion that school districts can use federal funds to cover State basic education obligations also ignores the federal limitations on federal funds (e.g., supplement/not supplant) that prohibit such use. E.g., RP 1425:6-1426:7.)

¹²³ FOF/COL ¶254.

dependable funding does not negate the necessity of the State actually providing stable and dependable funding. Having enough money in your wallet to pay a speeding ticket does not negate the necessity of actually paying that speeding ticket.

In short, the trial testimony of the witnesses, and the legal rationale of this Court's *Seattle School District* ruling, both confirm the necessity of stable and dependable State funding under Article IX, §1. The trial court accordingly did not err in ruling that Article IX, §1 requires the State to provide stable and dependable State funding.

D. The evidence at trial supported the trial court's ruling that the State is currently failing to comply with Article IX, §1.

1. "Paramount Duty"

The Director of its Office of Financial Management ("OFM"), confirmed the State's understanding of the meaning of "paramount" in our State Constitution – repeatedly affirming on the stand that the State's duties with respect to public safety, human services, health care, natural resources, etc. are all "inferior to the State's constitutional duty to make ample provision for the education of all children residing within our State."¹²⁴

¹²⁴ *Tr. Ex. 350, pp.15-24 and RP 3651:22-3653:12*

Consistent with not only the law but also the State's own testimony concerning its "paramount" education duty under Article IX, §1, the trial court's decision correctly applied "paramount" when it explained:

During the trial, the [counsel for the] State cross-examined many of the [plaintiffs'] education witnesses as to whether they would prioritize education at the expense of other worthy causes and services, such as health care, nutrition services, and transportations needs. But this is not the prerogative of these witnesses – or even the Legislature – that decision has been mandated by our State Constitution.¹²⁵

The trial court then more fully explained that "paramount" meaning:

This court concludes that the word "paramount" in Article IX, §1 means what it says. It means having the highest rank that is superior to all others, having the rank that is preeminent, supreme, and more important than all others. It is not a mere synonym of "important". The word "paramount" means that the State must fully comply with its duty under Article IX, §1 as its first priority before all others. Article IX, §1 accordingly requires the [defendant] State to amply provide for the education of all Washington children as the State's first and highest priority before any other State programs or operations.¹²⁶

The State provides no argument or support for a suggestion that the trial court's above interpretation of "paramount" in this case is erroneous.

2. "Ample Provision"

The State's chief education officer under our State Constitution, Superintendent of Public Instruction Randy Dorn, illustrated the commonly understood meaning of "ample" with a straightforward

¹²⁵ FOF/COL ¶160

¹²⁶ FOF/COL ¶161 (*underline added*); fuller background at FOF/COL ¶¶153-161.

example: If you're the mayor of a town, would you rather have an "ample" water supply for your citizens or an "adequate" one? You'd rather have an "ample" one because "ample" is more than just "adequate".¹²⁷ The trial court also quoted the Webster's dictionary definition that is consistent with that common-sense illustration: "AMPLE always means considerably more than adequate or sufficient".¹²⁸ It thus held:

This court concludes that the word "ample" in Article IX, §1 means what it says. It means considerably more than just adequate or merely sufficient. Article IX, §1 accordingly requires the State's provision for the education of all Washington children to be considerably more than just adequate or merely sufficient to scrape by.¹²⁹

The trial court also confirmed that:

Consistent with this meaning, the Washington Supreme Court has held that Article IX, §1 requires the [defendant] State to provide "fully sufficient funds" and a "level of funding that is fully sufficient" to provide for the education of all Washington children. *Seattle School District v. State*, 90 Wn.2d at 518 & 537. Further confirming this broad meaning of "ample", the Washington Supreme Court expressly held that it was therefore unconstitutional for the [defendant] State to rely on local levies to fund any part of the education mandated by Article IX, §1. *Seattle School District v. State*, 90 Wn.2d at 526.¹³⁰

The trial court accordingly emphasized that its interpretation of the term "ample" required the State's funding to in fact be fully sufficient:

¹²⁷ *Dorn Dep.*, 47:1-9

¹²⁸ *FOF/COL* ¶162-163.

¹²⁹ *FOF/COL* 165; fuller explanation at ¶¶153-156 & ¶¶162-165.

¹³⁰ *FOF/COL* ¶162-164 (*underline added*).

.... Article IX, §1 requires the [defendant] State's provision for the education of Washington children to be ample so no public school has to turn to or rely upon local levies, PTA fundraisers, private donations, or other non-State sources to provide all of its children the "education" specified in Article IX, §1.¹³¹

The State provides no argument or support for now suggesting the trial court's above interpretation of "ample" in this case is erroneous.¹³²

3. "All Children"

The State's chief elections officer under our State Constitution, Secretary of State Sam Reed, illustrated the importance of "all" citizens being equipped to meaningfully participate in our democracy when he reminded the court that the 2004 Governor's race was ultimately decided by just 133 out of more than 2.8 million votes.¹³³ Other testimony provided similar illustrations of why "all" really means "all" in our State's democracy – such as school bonds failing by a single vote, jury decisions that can turn on a single vote, and the wide array of notifications regarding

¹³¹ FOF/COL 165; fuller explanation at ¶¶153-156 & ¶¶162-165.

¹³² The comment at State's Brief p.51, n.12 that "ample" means liberal, unrestrained, and without parsimony does not prove the trial court's interpretation erroneous. This Court used Webster's Third New International Dictionary in its Seattle School District decision. 90 Wn.2d at 511, 512 n.12. That dictionary's definitions include the following (at pp.1302, 2508, & 1645), liberal: "marked by generosity." & "ABUNDANT, BOUNTIFUL"; unrestrained: "not restrained" & "UNCONTROLLED"; parsimony: "carefulness in the expenditure of money or resources". The State's pointing out that ample means "without parsimony" - i.e., without carefulness in the expenditure of money or resources – does not support a claim that the trial court's interpretation of ample in this case was impermissible or erroneous.

¹³³ CP 2054:21-2055:12.

assorted legal rights that this State requires employers to post for all employees in Washington to read and comprehend.¹³⁴

Consistent with such testimony, the trial witnesses confirmed that the State's Essential Academic Learning Requirements are what the State determined all Washington students need to know in today's world, and that all children can in fact meet those State standards.¹³⁵

After quoting common dictionary definitions of the word "all", the trial court accordingly held:

This court concludes that the word "all" in Article IX, §1 means what it says. It means "every" and "each and every one of". It encompasses each and every child since each will be a member of, and participant in, this State's democracy, society, and economy. Article IX, §1 accordingly requires the [defendant] State to amply provide for the education of every child residing in our State – 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.¹³⁶

The State provides no argument or support for a suggestion that the trial court's above interpretation of "all" in this case is erroneous.

4. **Violation.**

The State's *first* main argument is circular: the "education" Article IX, §1 requires the State to fully fund is the education program the

¹³⁴ E.g., RP 91:11-92:6; RP 745:21-746:15; *Add'l record cites in Appx. A.*

¹³⁵ *Supra Part V,D of this Brief.*

¹³⁶ FOF/COL 168 (*underline added*); fuller explanation at ¶¶153-156 & ¶¶166-168.

State's formulas fund. But as both the testimony and the trial court itself confirmed, that's a tautology.¹³⁷ It's like saying "due process" for depriving a citizen of life, liberty, or property is whatever process the State funds. Or saying "just compensation" for a taking is whatever compensation the State funds.

As explained earlier in this Brief, the facts and law established in this case confirm that the "education" mandated by Article IX, §1 encompasses substance – the knowledge and skills this State's kids need to compete in today's economy and meaningfully participate in our State's democracy. That is what this Court held in its *Seattle School District* decision (Tr.Ex. 2), and what the State then re-affirmed with the substantive content it established in the four numbered provisions of HB 1209 and its ensuing Essential Academic Learning Requirements. Supra Part V.D.

The evidence at trial confirmed that the State's public schools are failing – miserably – to equip all children with that minimum knowledge and skill the State has determined all kids need in today's world.¹³⁸

The evidence at trial similarly confirmed that the resources provided by the State are failing – miserably – to provide all children in

¹³⁷ E.g., *Hunter Dep.* 72:4-6 and 91:7-15; *FOF/COL* ¶180.

¹³⁸ *Supra Part V.E of this Brief.*

the State's public schools a realistic or effective *opportunity* to become equipped with that minimum knowledge and skill.¹³⁹

The State's *second* principle argument distills down to the notion that the State is not violating Article IX, §1 of the Washington Constitution because this State is not doing worse than other States (e.g., college-bound students' SAT scores).

But as a legal matter, the State's comparison is irrelevant. No other State has the paramount duty mandate in its Constitution that this State has.¹⁴⁰ (Nor have other States adopted the minimum educational standards that this State has.)

The State's notion that "failing less than someone else isn't failing" also makes no sense. The Colville School District Superintendent illustrated this point when it was noted that the high school in his district has a lower drop out rate than other high schools, and he was asked:

Q: Doesn't that mean that you are doing relatively well?

A: Because we have less kids who are dropping out than other people? That just means to me that our house is burning down slower than everybody else's house is burning down. I mean, I am supposed to be happy about that?¹⁴¹

The Edmonds School District Superintendent gave a similarly common sense answer when it was pointed out that his district's high

¹³⁹ *Supra Part V.F of this Brief.*

¹⁴⁰ *Supra Part V.B of this Brief.*

¹⁴¹ *RP 739:2-18.*

school graduation rate is 80% [higher than the Statewide average], and he was asked why he didn't think his district's relatively high graduation rate was acceptable:

Q: Why not?

A: Again, I'm struggling with the question. If you take 100 kids on a field trip and you bring back 80, is that acceptable? And who are the kids that we leave behind?¹⁴²

The Kansas court in another education case was much more blunt when it rejected a defense similar to the one suggested in the State's Opening Brief (pp.31-32) that the poor performance of minority and low-income students in Washington is "reflective of national results".

Even more troublesome is [the State's] well-phrased and superficially attractive argument that even if one chooses to examine alarming student failure rates of Kansas minorities, poor, disabled, and limited English, one finds these failure rates compare "favorably" with similar failure rates for such persons elsewhere. Reduced to its simplest and clearest terms, this argument suggests that there is "no problem" in Kansas since our vulnerable and/or protected students aren't performing any worse than such students are performing elsewhere. This argument seems to the Court to be on a par with the following statement: "Persons of color should be comforted by the fact that lynchings in Kansas are no more frequent than lynchings in many other states."¹⁴³

In short, the State's characterizations about Washington kids failing less than those in other States are simply irrelevant to the issue in this case.

¹⁴² RP 3316:5-3319:2.

¹⁴³ *Montoy v. State of Kansas* 2003 WL 22902963 (Kan. Dist. Ct.) at *43.

Nor is there any loophole in the Washington Constitution that allows the State's provision for the education of all children to be "slightly unconstitutional". The State's current system of providing for the education of all children is either constitutional, or it's not. As the court noted in a constitutional challenge to another State's education system:

This case involves the fundamental law of our land and this Court has no discretion whatsoever in whether it will be enforced and preserved. There is no higher duty of any judicial officer than to see to the adherence of government to our Constitutions. There is no such thing as "a little bit pregnant" and there is no such thing as "slightly unconstitutional."¹⁴⁴

The same Constitutional principle holds true here. This case involves the fundamental Constitutional law of our State, and the trial court had no discretion whatsoever in whether the mandate of Article IX, §1 should be enforced and preserved. There is no such thing as "a little bit pregnant", and there is no such thing as "slightly unconstitutional" under Article IX, §1. Based upon the facts established at trial, the trial court did not err in ruling that the State is currently failing to comply with its paramount Constitutional duty under Article IX, §1.

E. The trial court did, however, err in ruling the Legislature can merely show "progress" towards complying with Article IX, §1 (instead of setting a hard deadline).

The trial court correctly ruled that the State of Washington must comply with the Constitution of Washington, explaining that:

¹⁴⁴ *Montoy v. State of Kansas* 2003 WL 22902963 (Kan. Dist. Ct.) at *51.

The provisions of the Washington State Constitution are mandatory. Article I, §29 (“The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.”); *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 434 (2006); *City of Seattle v. Mighty Movers*, 152 Wn.2d 343, 372 (2004). The [defendant] State has no discretion in whether or not it will comply with the duties mandated by the Washington State Constitution. *Benjamin v. Washington State Bar Association*, 138 Wn.2d 506, 549 (1999) (“Mandatory means *mandatory*.”) (italics in original). Simply put, the State of Washington must comply with the Constitution of Washington.¹⁴⁵

The trial court was similarly correct when it held that Article IX, §1 imposes a judicially enforceable affirmative duty upon the State:

Washington law holds that Article IX, §1 grants each child residing in this State a constitutional right to the “education” specified in that provision. The Washington Supreme Court has thus held with respect to Article IX, §1 that “all children residing within the borders of the State possess a ‘right’, arising from the constitutionally imposed ‘duty’ of the State, to have the State make ample provision for their education”. *Seattle School District v. State*, 90 Wn.2d at 511-512.

Washington law holds that the right to the “education” specified in Article IX, §1 is the paramount right granted to each child by our State Constitution. The Washington Supreme Court has accordingly held with respect to the mandate of Article IX, §1 that “since the ‘duty’ is characterized as Paramount the correlative ‘right’ has equal stature.” *Seattle School District v. State*, 90 Wn.2d at 511-512.

Washington law holds that Article IX, §1 imposes an affirmative, judicially enforceable duty upon the State. The Washington Supreme Court has thus held that Article IX, §1 “is mandatory and imposes a judicially enforceable affirmative duty” upon the State. *Seattle School District v. State*, 90 Wn.2d at 482; accord, *Brown v. State*, 155 Wn.2d 254, 258

¹⁴⁵ *FOF/COL* ¶250 (underline added); accord *FOF/COL* ¶267.

(2005) (Article IX, §1 “is substantive and enforceable” in the courts).¹⁴⁶

The trial court was also correct when it concluded:

This case involves the fundamental constitutional law of our State, and this court has no discretion in whether the mandate of Article IX, §1 must be enforced and preserved. There is no higher duty of any judicial officer than to ensure the government’s adherence to our Constitution.¹⁴⁷

As the testimony and evidence outlined in Part V of this Brief confirm, the trial court was also correct when it found that, in the over 30 years since this Court’s *Seattle School District* ruling against the State,

the State has passed legislation, it has ordered countless studies, it has commissioned a multiplicity of reports. And yet there remains one harsh reality – it has not and is not amply and fully funding basic education.¹⁴⁸

The State’s enactment and “implementation” of the Basic Education Act serves as but one illustration. In that Act, the 1977 legislature expressly mandated with respect to student transportation funding that “commencing with the 1980-81 school year, reimbursement shall be at one hundred percent or as close thereto as reasonably possible.” RCW 28A.41.160. But three decades later, State studies confirm the subsequent legislatures’ reimbursement is still less than 66%.¹⁴⁹

¹⁴⁶ FOF/COL ¶147-149 (underlines added).

¹⁴⁷ FOF/COL ¶252.

¹⁴⁸ FOF/COL ¶264.

¹⁴⁹ RP 5093;10-5094:1; Dorn Dep. 51:16-52-17; *supra* footnote 91.

The 2009 legislature's enactment of ESHB 2261 is similarly hollow – for as the trial court's unchallenged findings of fact explain:

No funding is provided for the future execution or implementation of ESHB 2261 by future legislatures. In other words, future legislatures are under no mandate to fund, execute on, or continue implementation of ESHB 2261, as may be contemplated by the current legislature.

. . . .

ESHB 2261 does not require future legislatures – or governors – to do anything. Rather, the legislation is the expressed intent of a current legislature as to what future legislatures should or might do.¹⁵⁰

Thus, despite the State's suggestion that ESHB 2261 might cure all ills, the established fact is that ESHB 2261 is just another example of what the State has been doing for three decades since this Court's ruling in the *Seattle School District* case: lots of loud talk about ample funding for its public schools "tomorrow", coupled with excuses for failing to provide that funding for the children in its public schools today. As the trial court accurately concluded:

Without funding, reform legislation for basic education may be an empty promise. Absent a court mandate, the residents of this State, and their children, risk another 30 years of underfunding of basic education.¹⁵¹

Current events confirm the accuracy of that conclusion, for the State has been using the challenging economic times it currently faces as an excuse

¹⁵⁰ FOF/COL ¶202 and 274; see also *supra* footnote 94.

¹⁵¹ FOF/COL ¶272.

to cut its school funding outside of the previously discussed program funding formulas.

The fundamental fact remains that an entire generation has passed through the State's public schools since this Court issued its *Seattle School District* ruling against the State.

The trial court did not err in its ruling that the State must comply with its paramount duty under our State Constitution.

But especially in light of the State's established track record for inaction and delay these past three decades, the trial court did err in not setting a hard deadline for the defendant State's compliance. The State has spent 30 years studying this. It has the information it needs. It is entirely reasonable for this Court to set the next school year as a firm deadline for compliance with the court order in this case.

VII. CONCLUSION

The constitutional right to have the State "make ample provision for the education of all (resident) children" would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas.

Seattle School District v. State, 90 Wn.2d 467, 517-18 (1978).

The testimony and evidence at trial confirmed that this constitutional right is in fact hollow for far, far too many children in our

State – especially for those in the more vulnerable and under-educated segments of our State’s democracy.

Plaintiffs respectfully request that this Court uphold and enforce what the People of our State have established as the State’s paramount duty under our State Constitution. This Court should accordingly affirm the trial court’s decision – but set the end of next school year as a hard deadline for the State’s compliance with the court’s order.

RESPECTFULLY SUBMITTED this 20th day of September, 2010.

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