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NO. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et. al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

SUPERINTENENT OF PUBLIC INSTRUCTION'S AMICUS CURIAE BRIEF IN RESPONSE TO THE COURT'S ORDER DATED JULY 14, 2016

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I. INTEREST OF AMICUS CURIAE

Randy Dorn is Washington's Superintendent of Public Instruction, a nonpartisan elected state officer whose constitutional duty is to "have supervision over all matters pertaining to public schools." Const. art. III, § 22. As the State's chief school officer, the Superintendent plays a unique role. He is the sole statewide elected official constitutionally responsible for supervising public education, and he heads up Washington's state education agency, the Office of Superintendent of Public Instruction ("OSPI").

By letter dated August 11, 2016, Deputy Commissioner Walter Burton informed the Superintendent that the Chief Justice granted his motion to file this brief.

What are the costs of funding the major components of basic education and how much of these costs are funded by the State and how much by local school districts?

H. ARGUMENT

A. The Court Should Not Dismiss the Contempt Order and Should Impose More Stringent Contempt Sanctions if the Legislature Does Not Keep Its Commitment to Take Action in 2017

The Court's Order dated July 14, 2016 primarily directs the parties to provide factual information about the cost of providing basic education and what part of those costs are paid by the State and local school districts. However, the Court also asked "whether this court should dismiss the contempt order or continue sanctions[.]" Order dated July 14, 2016 (1)(g)

at 4. The Superintendent will not address contempt questions except to reiterate his position that the actions of the 2015 and 2016 Legislature did not make sufficient progress to comply with *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012). *See* Superintendent of Public Instruction's Amicus Brief Addressing 2015 Legislature's Compliance With *McCleary* (Superintendent's 2015 Br.) and Superintendent of Public Instruction's Amicus Brief Addressing 2016 Legislature's Compliance With *McCleary* (Superintendent's 2016 Br.) The Court should not dismiss the contempt order and should continue sanctions.

Furthermore, the State assures the Court that the Legislature made the commitment "to take Legislative action 'by the end of the 2017 session' to eliminate school district dependency on local levies for the implementation of the state's program of basic education. E2SSB 6195, § 4." State of Washington's Brief Responding To Order dated July 14, 2016 at 38 (State's 2016 Br.). If the Legislature fails to live up to this commitment, the Court must impose more stringent sanctions such as those proposed by the Superintendent. *See* Superintendent's 2016 Br.

B. Costs Of Providing Basic Education and Sources of Basic Education Funding

The Court's request for additional briefing is unusual because it requests factual information from the parties that is obviously outside the record. This brief will focus on providing the best evidence of the costs of the major components of basic education and funding provided by the State and the total expenditures provided by local school districts.

1. The Best Hard Evidence of the Costs and Sources of Funding is the Financial Information Provided by School Districts for the 2014–15 School Year

It is difficult to provide the Court with meaningful numbers. As the State points out, the cost of compensation going forward is unknown. 2016 State Br. at 4, 26. The Legislature has properly identified through task forces and legislative bill proposals a need for a change to the funding drivers used to determine the compensation amount. However, these changes have not yet been defined. The total cost of compensation depends on these assumptions that go into the calculation. For example, the State explains that the Compensation Technical Working Group (CTWG) estimated a total additional annual cost of approximately \$2 billion to fully implement its recommendations. 2016 State Br. At 26. But this was in 2012 and does not include the additional salary for the increased staffing levels and class size reduction required by Initiative 1351 (RCW)

28A.150.260). The State contrasts this number with the lower cost of \$681.5 million estimated by the Joint Task Force on Educational Funding. 2016 State Br. at 26. However, as the State admits, this was the market based salary for "classified and administrative full-time equivalent staff units[.]" 2016 State Br. at 26. The number did not include certificated staff—which includes teachers. Obviously, compensation costs will be lower if the estimate excludes the majority of staffing in a school—teachers.

Finally, the State contrasts these numbers with the Superintendent's 2014 compensation recommendation of \$3.3 billion. 2016 State Br. at 26-27. While the assumptions and analysis used for this cost estimate are very similar to the CTWG estimate, the \$3.3 billion also includes the cost-of-living increases since 2012 (which was required by Initiative 732), the increased salary amounts above the current allocation for the increased K-12 staffing units required by the class size reduction in Initiative 1351, and a do-no-harm-provision for locally funded staff.¹

Rather than listing a number of assumptions and costing them out, it makes more sense here to provide the Court with evidence-based numbers that are not based on assumptions. The Legislature has authorized the Superintendent to adopt rules for the proper administration of K-12

¹ http://www.k12.wa.us/LegisGov/2016documents/AA-FullyFundingBasicEducation-McCleary.pdf. (Visited August 29, 2016.)

schools. This includes the authority to "require such reports as may be necessary to carry out his or her duties." RCW 28A.150.290(1). Based on this authority, the Superintendent has adopted rules requiring school districts to issue reports regarding a district's finances, student enrollment, and staffing. See WAC 392-117-020. Using this data, the Superintendent is in the position to provide the Court with accurate factual answers to the Court's questions. The most up-to-date reporting data that the Superintendent has collected is for the 2014–15 school year. For the 2014–15 school year, the Superintendent knows the actual cost of the major components of basic education. The Superintendent also knows the amount the State paid, and the amount local school districts paid. The figures in this brief represent the 2014–15 school year.

2. School District Expenditures Exceed the State's Allocation for the Cost of the Major Components of Basic Education for the 2014–15 School Year

The most important part of funding basic education is the certificated and classified staff who operate the school. RCW 28A.150.260(4)-(6), (11) sets out the classified and certificated staff allocation for the prototypical school. In 2014–15, the total instructional staff was 61,420. Of this number, 58,776 were allocated by the State pursuant to RCW 28A.150.260(4)-(6), (11). Local school districts provided another 2,420. App. A. The total FTE for classified staff was 32,026. The

State allocated 19,124 FTEs and local school districts allocated 12,902. App. A.

The local school district average salary cost per instructional staff was \$66,598. The State's average allocation per instructional staff was \$52,944. School districts provided an additional average allocation of \$13,654 above the State's allocation. App. B. The average salary paid by local school districts per administrative staff was \$144,569. The average State allocation was \$59,954. On average, school districts paid out an additional \$54,615. App. B. With regard to classified staff, local school districts' average salary cost per full-time equivalent was \$44,423. The State average allocation was \$32,423 which is \$12,089 less than the total average salary paid. App. B.

The Legislature has defined the program of basic education to include a special assistance program for underachieving students; transitional bilingual education; special education for students with disabilities; and programs for highly capable students. RCW 28A.150.220(3)(d)-(g); App. C. The total expenditure reported by school districts for the highly capable program was \$16.5 million. Of this amount, the State paid \$10 million and school districts paid \$6.5 million. App. C.

For special education, local school districts paid \$1,171 million. However, the State only paid \$905 million of this amount through the basic education funding formula and safety net award. RCW 28A.150.392. This shortfall required school districts to pay an additional \$266 million. App. C. Local school districts reported expenditures for bilingual education of \$124 million. The State paid \$110 million of this amount requiring school districts to pay an additional \$14 million. App. C. School districts expended \$213 million for the learning assistance program. This amount matches the State allocation for this program. App. C.

However, the fact that school district expenditures match the State allocation does not mean that the State has met its constitutional obligation. For example, in the learning assistance program, the State allocated, in the 2014–15 school year, 3,050.46 teachers. But school districts funded only 1,369.55 teachers. App. H. Thus, to stay within the State's allocation for the learning assistance program, school districts had to reduce the number of teachers by 1,608.91. Certificated teachers were replaced by classified instructors. In fact the actual staff school districts hired, including teachers, other certificated support staff, certificated administrative staff, and classified staff totaled 2,325.59 FTEs. This is 724.87 fewer FTEs than the State allocated. Although school districts stayed within the state allocation,

they did not provide the learning assistance to underachieving students that the program of basic education intended.

A school's material, supplies, and operating costs (MSOC) are also part of basic education. RCW 28A.150.260(8). In the 2014–15 school year, the State had not yet fully funded this component and provided \$833 per student. School districts paid an additional \$418 for a total of \$1,252 per student. The State has since "fully funded" this formula driver in the 2015–16 school year at \$1,210 per student. This amount one year later is still \$42 per student less than the amount paid by school districts in the prior year. App. D.

Pupil transportation to and from school is also included as basic education. RCW 28A.160.150 to 28A.160.180. In 2014–15, the total local school districts spent on transportation was \$442 million. The State paid \$411 million as calculated by the "fully funded" pupil transportation funding formula. Even though transportation was "fully funded" by the State, school districts had to pay an additional \$11 million. App. E.

Vocational education is also part of the basic education funding formulas. RCW 28A.150.260(7). This includes career and technical education programs as well as skill centers. The total amount local school districts spent on career and technical education was \$348 million. The State allocated \$322 million, causing school districts to pay an additional

\$25 million. App. F. The skill center allocation from the State almost matches the local expenditures. The total amount was \$40 million. Of this amount, the State paid \$38 million and school districts paid only \$2 million. App. F.

The actual costs of the major components of basic education for the 2014–15 school year establish that basic education was substantially underfunded. And while some progress was made in the 2015 Legislative Session, it is not nearly enough. There is also a question of whether a program is really fully funded when the State says it is. For example, pupil transportation was "fully funded" during the 2014–15 school year, yet school districts still had to pay an additional \$11 million. App. E.

3. It Will be a Substantial Challenge for the Legislature to Comply With *McCleary* in the 2017 Session

The State assures the Court that the 2017 Legislature will complete the task of complying with *McCleary*. 2016 State Br. at 34-36. This will be very difficult given the magnitude of the problem. Especially, in the areas of compensation and staffing. *McCleary* concluded that "[s]ubstantial evidence at trial also showed that the State consistently underfunded staff salaries and benefits. Testimony revealed that the State allocation for salaries and benefits fell far short of the actual cost of recruiting and retaining competent teachers, administrators, and staff." *McCleary*, 173

Wn.2d at 535-36. In 2012, the CTWG recommended that the starting salary for a beginning teacher with a B.A. be raised to \$48,687.² Compensation Technical Working Group Final Report, June 30, 2012, at 13 (Compensation Rpt).³ The 2015–17 Operating Budget allocates only \$35,069 to pay the same teacher. Laws of 2015, ch. 4, § 503(4)(a). The CTWG also recommended that a teacher with an advanced degree, a professional/continuing certificate, and nine years of experience be paid \$81,775. Compensation Rpt. at 18. In 2015–17, the salary allocated for a more experienced teacher with a Ph.D. and 16 or more years of experience is \$66,099. Laws of 2015, ch. 4, § 503(4)(a).

To attract and retain highly qualified staff, school districts must pay more than the State allocates. During the 2014–15 school year, school districts paid instructional staff on average \$12,654 of additional salary; for administrative staff it was \$54,569; for classified staff it was \$12,098. App. B. In the 2014–15 school year, 58 percent levy and levy equalization dollars were spent on additional compensation and staffing. App. G.

The same is true for staffing levels. In *McCleary*, this Court was satisfied that staffing levels were inadequate to provide basic education.

² The CTWG salary recommendations do not include any adjustments for inflation or the COLA required by Initiative 732 beyond 2012.

³ Available at http://www.k12.wa.us/Compensation/ (Visited August 29, 2016.)

McCleary, 173 Wn.2d at 532 ("[T]he Quality Education Council likewise found that funding studies have already confirmed that our state pays for too few instructional and operating staff[.]" (internal punctuation omitted)). In SHB 2776, the Legislature defined the framework for the prototypical school funding model. SHB 2776 § 2(4)-(6) (Laws of 2010, ch. 236). However, the staffing allocations provided for the prototypical school were a revenue neutral crosswalk from the prior 2009–10 State funding levels. See SHB 2776 § 1 (providing that the numeric values adopted in the prototypical school funding formula represent the translation of 2009–10 State funding levels for the basic education act into the formula's funding factors). The 2009-10 funding values were substantially similar to the values adopted by the Basic Education Act, which was "based on a snapshot of actual staffing levels of and school district expenditures in the mid-1970's, not the level of resources needed to allow students to meet the new performance-based standards." McCleary, 173 Wn.2d at 530.

Except for grades K-3, the 1970s era staffing levels for certificated and classified staff allocated by the State's funding formula remain woefully inadequate. For example, in 2011 class size for Grades 4-6 was 27 students per teacher. For Grades 7-8 it was 28.53. For Grades 9-12 it was 28.74. Laws of 2011, ch. 50, § 502(2)(c)(i) (2011). The 2015 operating budget was based on *exactly the same class sizes*. Laws of 2015, ch. 4,

§ 502(2)(c)(i)(A)-(ii)(A). These are the same class sizes that were set out in SHB 2776's revenue neutral prototypical school values—representing staffing levels that this Court found unconstitutionally inadequate in *McCleary*.

School districts simply require more instructional and classified staff for the program of basic education than the State allocates. During the 2014–15 school year, school districts provided 2,644 additional instructional staff and 12,902 classified staff in the programs of basic education. App. A.

The requirement for additional staff also needs to take into account Initiative 1351 that reduced class sizes. Although the Legislature pushed back the initial implementation of the initiative from September 1, 2017 to September 1, 2021, Laws of 2015, 3rd Spec. Sess., ch. 38 § 2, it remains a funding consideration that must be accounted for.

Even if it appears the state allocation pays for an entire basic education program, it does not mean that the program is adequately funded. If the funding is inadequate, the local school district will have to make the difficult choice between spending local dollars to adequately fund the program or reducing the scope of the program.

For example, the State allocation matches local school district expenditures of the skill centers and learning assistance programs. App. C

and F. Skill centers provide regional career and technical education to provide access to comprehensive industry-defined career and technical programs of study. RCW 28A.245.010. Skill centers are created by a cooperative of multiple school districts and are very rarely provided local levy revenues from the cooperative districts. Therefore, all funding comes from state and federal sources.

Despite the fact that the State pays the costs of skill centers, school districts offering the program have been forced to choose to make staffing decisions to keep their expenditures within the allocation provided by the State. For example, in the 2014–15 school year, the State allocated 308.9 FTEs for teachers at skill centers, but the actual hired staff FTE was 211.93. And the State allocated 100.17 for classified staff. But the actual classified staff FTE was 65.87. App. H. Additionally, the State allocated \$7.3 million for MSOC, but these high cost programs expended \$12.7 million for MSOC. App. H. If the compensation levels for these K–12 employees were at a level to recruit and retain staff and the MSOC matched the actual expenditures, these skill centers would be able to provide the Legislature's intended staffing levels for these program.

The same is true for the learning assistance program. The State allocated 3,050.46 FTEs for teachers statewide. The actual certificated staff FTE hired was 1,369.55. Instead, school districts hired 912,77 classified

staff FTE, typically paraeducators. App. H. School districts are not able to fulfill the intention of the Legislature to hire certificated instructional staff for this program due to the low compensation allocations provided by the State.

The bottom line is that the basic education that the State is constitutionally required to provide is badly underfunded and understaffed. The Legislature has known this since 2012 when *McCleary* was decided. Despite this fact, the Legislature has consistently put off the most expensive part of the solution—adequate compensation and staffing. Given this fact, the Superintendent is not optimistic that the 2017 Legislature will succeed where prior legislatures have failed.

III. CONCLUSION

The Court should not dismiss the contempt order and should continue sanctions against the Legislature. If the Legislature fails to live up to its commitment to address the compensation and staffing requirements of

McCleary during the 2017 Legislative Session, the Court must impose more stringent sanctions such as those proposed by the Superintendent.

RESPECTFULLY SUBMITTED this 29th day of August 2016.

WILLIAM B. COLLINS

Special Assistant Attorney General

WSBA #7853

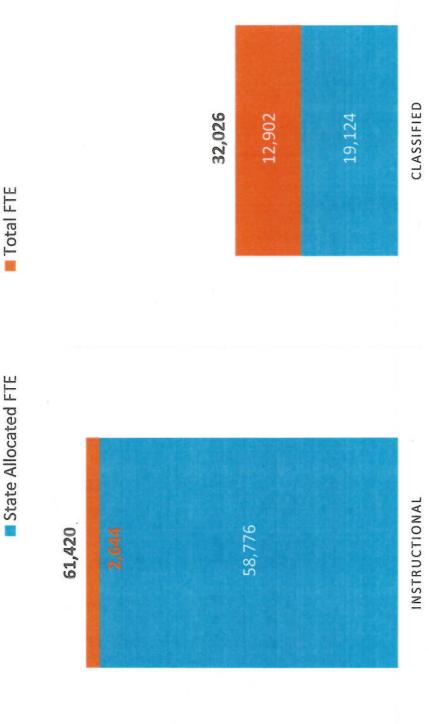
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STATE ALLOCATED VERSUS ACTUAL DISTRICT UNITS BASIC EDUCATION PROGRAMS



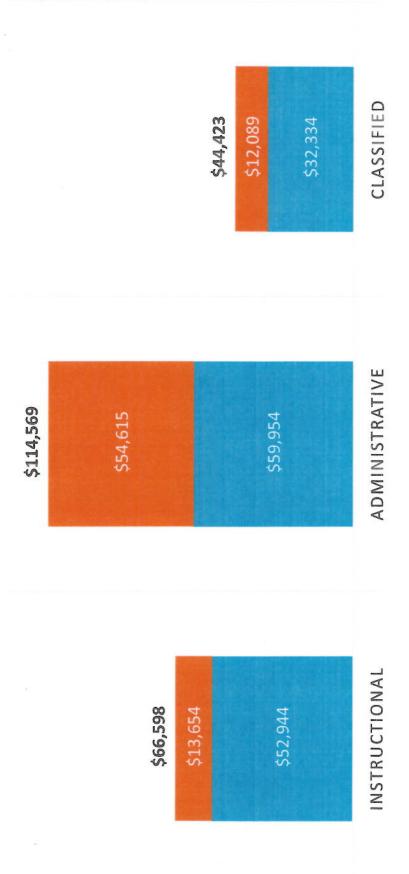


15. Basic education program accounting codes captured in this data are 01-Basic Education, 02-Alternative Learning Experiences, 03-Dropout Reengagement, 21-Special Education, 31&34-Vocational, 45-Skill Center, 55-Learning Assistance Program, 65-Transitional Bilingual, 74-Highly Capable, 97-Districtwide Support, and 99-Pupil Transportation. State Allocated units includes a calculated number of Special Education staff (http://k12.wa.us/safs/rep/app/1415/00000app.pdf). OSPI has final S-275 and 1191 data for all school years through school year 2014-Source: School district certificated and classified employee full-time equivalent counts are reported by school districts to the Office of Superintendent of Public Instruction (OSPI) using the S-275 report (http://k12.wa.us/safs/PUB/PER/1415/ps.asp). This information is compared against the statewide general education allocation by staffing type from the 1191 Report based on the Special Education state allocation provided.

AVERAGE ANNUAL SALARY BY STAFF TYPE

SCHOOL YEAR 2014-15





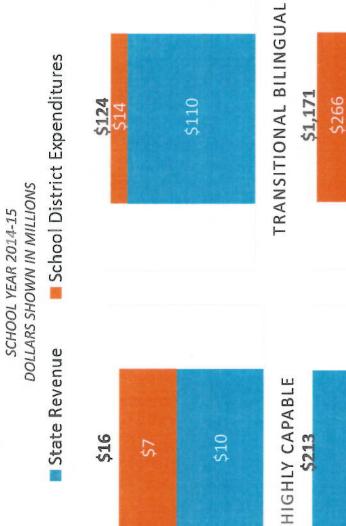
(http://k12.wa.us/safs/rep/app/1415/00000app.pdf) to determine the difference of salary, which is paid above the state allocation. OSPI has final S-275 data Source: School district certificated and classified employee compensation amounts are reported by school districts to the Office of Superintendent of Public Instruction (OSPI) using the S-275 report (http://k12.wa.us/safs/PUB/PER/1415/ps.asp). This report includes the total final salary paid to each K-12 employee. This information is compared against the statewide average allocation by staffing type from Report 1191

Basic education program accounting codes captured in this data are 01-Basic Education, 02-Alternative Learning Experiences, 03-Dropout Reengagement, 21-Special Education, 31&34-Vocational, 45-Skill Center, 55-Learning Assistance Program, 65-Transitional Bilingual, 74-Highly Capable, 97-Districtwide Support,

and 99-Pupil Transportation.

for all school years through school year 2014-15.





LEARNING ASSISTANCE PROGRAM

SPECIAL EDUCATION

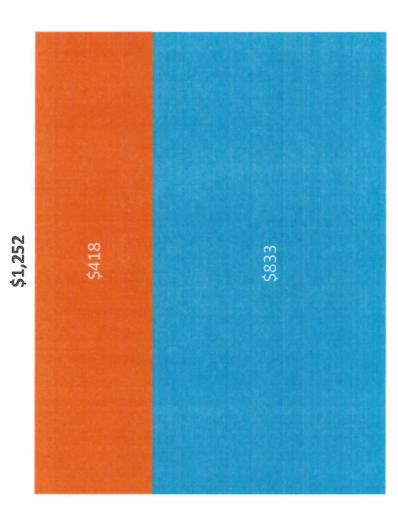
\$905

\$213

Source: School district actual expenditures and revenues are reported by school districts to the Office of Superintendent of Public Instruction (OSPI) using the F-196 report (http://k12.wa.us/safs/PUB/FIN/1415/fs.asp). This information is compared against the statewide allocation from the 1191 report (http://k12.wa.us/safs/rep/app/1415/0000app.pdf). OSPI has final F-196 and 1191 data for all school years through school year 2014-15.

GENERAL EDUCATION MSOC PER PUPIL

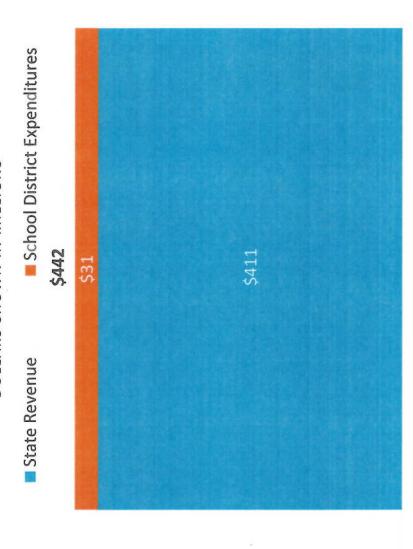
SCHOOL YEAR 2014-15
State Allocation School District Expenditures



2014-15

these three sources, OSPI has determined the per pupil expenditures for general education MSOC. OSPI has final reporting Instruction (OSPI) using the F-196 report (http://k12.wa.us/safs/PUB/FIN/1415/fs.asp), annual average full-time equivalent enrollments are reported using the 1251 report (http://k12.wa.us/safs/rep/enr/1415/s1251s.pdf), and contracted teacher salary amounts are reported on the S-275 report (http://k12.wa.us/safs/PUB/PER/1415/ps.asp). Using information from Source: School district actual expenditures are reported by school districts to the Office of Superintendent of Public for all school years through school year 2014-15.

PUPIL TRANSPORTATION SCHOOL YEAR 2014-15 DOLLARS SHOWN IN MILLIONS

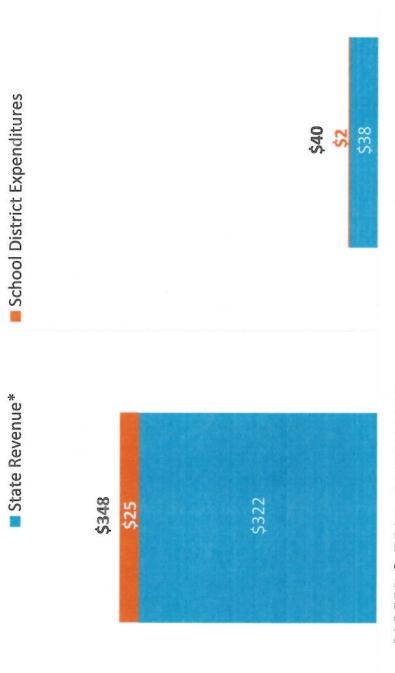


2014-15

Source: School district actual expenditures and revenues are reported by school districts to the Office of Superintendent of Public Instruction (OSPI) using the F-196 report (http://k12.wa.us/safs/PUB/FIN/1415/fs.asp). This information is compared against the statewide allocation from the 1191 report (http://k12.wa.us/safs/rep/app/1415/00000app.pdf). OSPI has final F-196 and 1191 data for all school years through school year 2014-15.

CAREER TECHNICAL EDUCATION

SCHOOL YEAR 2014-15 DOLLARS SHOWN IN MILLIONS



CAREER & TECH. EDUCATION

SKILL CENTERS

*Revenue for CTE is less the 15% of indirect expenditures, this represents the amount available by law to be spent directly on the program.

Source: School district actual expenditures and revenues are reported by school districts to the Office of Superintendent compared against the statewide allocation from the 1191 report (http://k12.wa.us/safs/rep/app/1415/00000app.pdf). of Public Instruction (OSPI) using the F-196 report (http://k12.wa.us/safs/PUB/FIN/1415/fs.asp). This information is OSPI has final F-196 and 1191 data for all school years through school year 2014-15.

Appendix G

In SY 2014-15, 58% of Levy/LEA dollars were spent on additional staff and additional Salaries

Program and Expenditure Purpose (Levy, LEA, Misc. Revenue)		Local Fund \$'s	Local Funds Expended \$'s in Millions
Add'l Classified Salaries		\$298.00	9.80%
Add'l Administrative Salaries		\$269.80	8.90%
Add'l Instructional Salaries		\$743.10	24.50%
Add'l Classified Staff		\$229.50	7.60%
Add'l Instructional Staff		\$209.10	6.90%
MSOC		\$405.20	13.40%
State Special Education		\$269.50	8.90%
Pupil Transportation		\$41.30	1.40%
Extracurricular/Community		\$100.90	3.30%
Child Nutrition		\$12.00	0.40%
Other*	and the second of the second o	\$454.40	14.90%
	Total	\$3,032.80	100.00%

58%

Source: 2014-15 F-196 (http://k12.wa.us/safs/PUB/FIN/1415/fs.asp), Final 2014-15 S-275 (http://k12.wa.us/safs/PUB/PER/1415/ps.asp), and Report 1191 (http://k12.wa.us/safs/rep/app/1415/00000app.pdf).

^{*}Other are all expenditures above state allocation not attributed to above categories or identified on the F-196.

Appendix H

Excerpt from The Office of Superintendent of Public Instruction School District Allocation of State Resources for School Year 2014-15 – Statewide Summary (http://k12.wa.us/SAFS/INS/2776/Portal.asp)

2014-15 District Level Reported Staffing and Salary Information Skill Centers

Staffing	State Allocation	Actual Staff FTE	Students per Actual FTE
Teachers	308.89	211.93	27.64
Other Certificated Support	17.93	3.70	1,583.35
Certificated Admin & Support	28.13	28.80	203.42
Classified	100.17	65.87	88.93

MSOC				
Mainte	enance, Supplies, and Oper	ating Costs (Skills Center)		
Sta	ate Funded		Actual Cost	Cost per student
\$	7,383,961	\$	12,696,106	\$ 2,167.17

Categorical Programs			
Learning Assistance Program	State Allocation	Actual Staff FTE	Students per Actual FTE
Teachers	3,050.46	1,369.55	82.20
Other Certificated Support		6.92	16,273.34
Certificated Administration		36.35	3,096.74
Classified		912.77	123.34

FTE: Full-Time Equivalent. The number of total hours worked divided by the maximum number of compensable hours in a work year. An FTE of 1.0 means that the person is equivalent to a full-time worker, while an FTE of 0.5 signals that the worker is only half-time. An FTE of 0.5 could also signal that the person worked full-time for half of the year.

Source.

Staff Information: Personnel Summary Report S0275 2014-15 http://www.k12.wa.us/safs/PUB/PER/1415/ps.asp

State Allocation: Statewide Apportionment Reports Report 1191 2014-15 http://k12.wa.us/safs/rep/app/1516/00000app.pdf

Other costs: Financial Reporting Summary Report F-196 2014-15 http://www.k12.wa.us/SAFS/default.asp