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Call time out on McCleary

By Richard S. Davis

The state Supreme Court is supremely unhappy with the Legislature. On June 12 the justices ordered lawmakers to come before them and explain why the court should not find the state in contempt for failing to produce an education funding plan.

It's the latest volley in the back-and-forth since the court issued its January 2012 McCleary decision. The court ruled that the state had not met its constitutional obligation to fully fund basic education and ordered full funding by the 2018 school year. To keep the heat on lawmakers, the court retained jurisdiction of the case and required lawmakers to file annual progress reports. The relationship began poorly and has deteriorated. Somebody should grab the ball and call a time out. This will not end well.

Last January, two years after the original decision, eight members of the nine-member court showed their frustration by ordering lawmakers to boost funding in the 2014 session and to set out a detailed annual funding plan for hitting the 2018 target. And if lawmakers didn't step up, the court, ever so reluctantly, might have to hold lawmakers in contempt.

Lawmakers complied with the requirement to report back at the end of April. But the response, short form, was, "Wait until next year."

I'm with the Legislature on this. Lawmakers pointed out that the budget written in 2013 was for two years. The 2014 session was for drafting a supplemental budget, minor adjustments to accommodate changed conditions. Lawmakers also noted the difficulty of producing a plan when the members hold "profoundly different political and policy perspectives..." A bunch of proposals were floated in 2014, only to sink swiftly. Despite widespread agreement on the need to satisfy the court, there's no consensus on how to proceed.

Even if there were, no legislature can bind the next. Any plan adopted in 2014 could be shredded in 2015 by a Legislature with a host of new members.

This impasse need not have happened.

As Justice Jim Johnson (now retired) wrote in dissent last January, the court erred in retaining jurisdiction of McCleary. He calls the continued involvement an unconstitutional violation of separation of powers. It falls to the Legislature, not the court, to define and fund education.

Johnson dismisses the court's ability to impose sanctions, noting "the founders presciently left us without a tool" for punishing lawmakers.

A contempt finding would be untenable, he writes. It raises too many questions. Which legislators? All of them? The governor or superintendent of public instruction? Fines or imprisonment?

Similar objections surface for Johnson when it comes to dictating school funding. The court lacks the

information to make informed budget decisions. The consequences of withholding school funding or cutting other areas of spending are beyond their ken.

By retaining jurisdiction, he says, the court places itself in “territory far unsuitable for the judicial hand.”

Yet, here we are. By retaining jurisdiction, the court risks looking either impotent or arrogant.

In a few months, lawmakers are to show cause why they should not be held in contempt and explain why some remedies proposed by the advocates who brought the case should not be applied. They include: monetary sanctions, ordering specific funding, shutting the schools until they're fully funded, prohibiting other spending, and ordering the sale of state property.

These judgments are outside the court's competence or purview.

Last week on TVW, House Ways and Means Chair Rep. Ross Hunter, D-Medina, said he expects a contempt ruling.

“What's interesting,” he adds, “is how is the court going to apply pressure ... and are they going to do it in a way that's constructive rather than goofy.”

The timing is already goofy. School will be in session when oral arguments are held. There's no reason for the court to assume bad faith on the part of the state and no reason to act before the 2015 session begins.

The constructive response would be for the court to step back and let the legislative process work. Ordering tax increases or spending cuts won't resolve the matter. In our state, taxes trigger initiatives and decisions are made at the ballot box.

I'm not sure anyone wants to discover whom the voters hold in contempt.

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