



Pushing Legislature on McCleary? Supreme Court considers nuclear option

Invalidate all state tax breaks. Throw out the budget. Demand a special session. Justices are considering it all in their battle to make lawmakers increase education spending.

By John Stang

September 03, 2014.

There are the "going nuclear" options. And there's the "trust us" scenario.

Washington's Supreme Court quizzed attorneys Wednesday about the best ways for the court to make sure state legislators will comply with its 2012 ruling that the state meet its constitutional duty to provide a "basic education" for Washington's kids. So far, lawmakers have tackled only the easy, non-controversial fix-it measures, but remain deadlocked on if and how they should raise enough money to improve teacher-student ratios in Grades K-3, the most expensive fix-it measure required by the court's 2012 decision.

The current K-3 ratio is one teacher per 25.3 students (in a non-poverty school). In its 2012 "McCleary ruling," the Supreme Court ordered Washington to comply with the one-teacher-per-17 students goal set by a 2009 state. Complying with that lowered ratio would mean hiring many more teachers, and building additional classrooms by the 2018-2019 school year.



Attorney Thomas Ahearne (above), representing the McCleary family and other plaintiffs, and Deputy Solicitor General Alan D. Copey, representing the Legislature, argued before the court Wednesday on whether justices should punish the Legislature for lagging on compliance. "The question has been where is the money going to come from," said Copey, explaining the delay. "That question takes time to resolve."

"What's the purpose of separation of powers [between the Legislature and the court]," countered Ahearne, "if it is to protect public officials who violate the constitutional system?"

Wednesday's exchange between attorneys and justices focused on the court's enforcement options. Other than one case in New Jersey, instances of a state supreme

court forcing a Legislature to comply with an education fix-it ruling are rare. Indeed, this is uncharted legal territory. Still there are several options for the court to consider.

It could invalidate all the state's tax breaks. Associate Chief Justice Charles Johnson floated that trial balloon at Copsey and Ahearne. The court could declare each of the state's 650 tax breaks — worth mega-billions annually — illegal because they make it impossible for the state to fulfill its constitutional duty to provide a basic education. Democrats, noted Johnson, proposed eliminating a number of tax breaks during the 2013 and 2014 legislative sessions as a way to fund much of the McCleary fix-it work, but the Republican-oriented Senate Majority Coalition Caucus stopped those proposals cold.



Johnson's trial balloon called for legally nullifying all tax breaks, letting the Legislature use the additional revenue to cover all the McCleary obligations, and then allowing lawmakers to reinstate as many tax breaks as it wants. "I'm not sure that is a constitutional remedy," Copsey (at left) replied.

Another option for the court is to invalidate all or part of the state's 2015-2017 operating budget. In this scenario, the Supreme Court would sit

back until the end of the 2015 legislative session. If lawmakers fail to resolve the McCleary funding issue by then, the court would nullify all or part of the \$32-\$35 billion 2015-2017 biennial operating budget until the Legislature comes up with a McLeary-friendly plan. In this way, said Ahearne, the Supreme Court would be eliminating a law that is creating an unconstitutional situation.

Delaying action until the end of the 2015 legislative session would put off any discussion of Supreme Court sanctions until late spring or summer of next year in hopes that the Legislature will find revenue solutions by then. Justice Charles Wiggins was not enthusiastic about this wait-and-see approach. Lawmakers, he noted, have made no progress on the funding issue for two sessions. "Usually, the definition of insanity is to do the same thing over and over and expect something different to happen," said Justice Wiggins to Copsey. "Why should we think you are going to do something different?"

Why, wondered Justice Mary Fairhurst, couldn't lawmakers hold a special legislative session to tackle only McCleary? After all, special legislative sessions were held in 1995 to ensure that the Mariner's new stadium got built in Seattle and in 2013 to create the \$8.7 billion long-range tax break package for Boeing. Later, Jaime Smith, a spokesperson for Gov. Jay Inslee, said the governor would only call a special session on McCleary if Republican and Democratic leaders manage to negotiate a solution beforehand.

Finally, the Supreme Court could order that a specific dollar figure be set aside in the state budget for the McCleary work. No one, on or off the bench, appeared to support that option.

After the hearing, Sen. David Frockt, D-Seattle, and Rep. Cyrus Habib, D-Kirkland, allowed that each of the options discussed presented complicated legal and political problems. "Invalidation not only creates a constitutional crisis," said Habib. "It would upset the delicate political deliberations [on a funding solution]." The appropriate Republican legislators could not be reached for comment on Wednesday.

The cost of the court-mandated McCleary work from 2013 to 2019 requires an extra \$4-\$4.5 billion. So far, lawmakers have raised about \$1 billion for 2013-2015. That leaves \$3-\$3.5 billion in extra steady revenues still to be found for 2015-2019. And that does not

include the additional cash needed to revive long-dormant cost-of-living raises for teachers, which voters already approved. Consequently, the Legislature finds itself behind in its legal obligations to raise new money.

Republicans want to change administrative procedures in education, especially empowering principals to hire and fire teachers, as an alternative to meeting the Supreme Court order. They'd also prefer to meet the McCleary obligations without closing tax breaks or installing new taxes. That means cuts to social services. On Wednesday, both the justices and attorneys Ahearne and Copsey focused on the funding impasses, avoiding any mention of changing administrative procedures.

Justices did not say when to expect their ruling on sanctions.

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Printed on September 04, 2014