

No. 84362-7

MADSEN, C.J. (concurring/dissenting)—I agree with Justice Stephens’ articulation of the State’s duty to fund education under article IX, section 1 of the Washington Constitution and the conclusion that the current system is not operating at its constitutionally mandated levels. However, I disagree with the majority that the judiciary should retain control over this case.

As we noted in resolving prior school funding challenges, our “traditional judicial function[]” is to interpret article IX, section 1 of our state constitution and to determine whether our state is meeting its constitutional responsibility. *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 508, 585 P.2d 71 (1978). In the current case, we have defined “education,” “paramount,” “all,” and “ample” and ordered the State to carry out its constitutional duty. We have done our job; now we must defer to the legislature for implementation.

Indeed, there is precedent for judicial deference to the legislature with regard to the execution of article IX, section 1. In *Seattle School District*, we held that once the constitutional ends have been defined by the courts, the means of compliance are firmly

within the realm of the legislative power. *Id.* at 520 (“[w]hile the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature”). We described the trial court’s decision to retain jurisdiction in that case as “inconsistent” with the assumption that the legislature, as a sworn “constitutional body, would comply with the constitutional mandate” under article IX, section 1. *Id.* at 538-39. Although the majority is ostensibly “defer[ing] to the legislature’s chosen means of discharging its article IX, section 1 duty[,]” it has taken the extraordinary step of “retain[ing] jurisdiction over [a] case to help facilitate progress in the State’s plan to fully implement the reforms by 2018.” Majority at 4.

The majority claims that by retaining jurisdiction, the judiciary will “facilitate progress” within the legislative branch, but it fails to discuss how it will fulfill such a role. Generally, in cases where a court retains jurisdiction, the court sets forth clear benchmarks and ascertainable standards against which to measure compliance. For example, the federal courts’ supervision of school desegregation used identifiable factors to determine if a school district had achieved its mandate. To aid the federal district courts in implementing their desegregation order, the United States Supreme Court identified six factors that “are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown [v. Board of Education]*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).” *Freeman v. Pitts*, 503 U.S. 467, 486, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992) (citing *Green v. County Sch. Bd.*, 391 U.S. 430, 435, 88 S. Ct. 1689, 20 L.

Ed. 2d 716 (1968)). The factors constituting specific aspects of a school system are the assignment of students by race, physical facilities, extracurricular activities, faculty and staff assignments, transportation, and resource allocation. *See Green*, 391 U.S. at 436; *Freeman*, 503 U.S. at 497-98. District courts then weighed the effectiveness of a school district's desegregation plans under these factors and directed action to remedy specific areas of noncompliance. *See Freeman*, 503 U.S. at 485.

In contrast, the majority here fails to define the desired outcomes or to provide criteria or benchmarks against which a court, special master, or other oversight entity can measure the legislature's compliance. In fact, as in *Seattle School District*, the majority has *declined* to identify specific requirements or goals, such as required deployment of staff, student to staff ratios, or minimum employee salaries, which would objectively indicate whether the State has complied with its constitutional duties. *See* majority at 72-77; *Seattle Sch. Dist.*, 90 Wn.2d at 520-21. In addition, the majority vacated the trial court's order to the legislature to "establish the actual cost of amply providing all Washington children with" the constitutionally mandated education and "establish how the Respondent State will fully fund that actual cost." Majority at 72. Without clear, identified goals, judicial supervision will be unhelpful, can assure no compliance, and, at worst, will be obstructive.

But, in any event, I do not believe this court should attempt to establish goals or benchmarks for the legislature to meet. Rather, as we held in *Seattle School District*, it is the legislature's duty to define what constitutes basic education and how to adequately

fund education at that level. Adopting specific standards or guidelines for defining and funding basic education is a legislative responsibility; it is not a judicial function.

The sentiment behind the majority's decision is understandable. Thirty years after our decision in *Seattle School District* the legislature has failed to adequately fund basic education. Nevertheless, the majority correctly identifies ESHB 2261 as "promising reform." Majority at 74. This court should exercise judicial restraint and permit the legislature to implement the statute without the burden to confer and report to the judiciary at every step.

I believe the majority's largely symbolic decision disturbs the comity enjoyed between the judiciary and the legislative branch without providing any effective guidance to the legislature. To decline to retain jurisdiction is not an "abdication" of our responsibility, rather, it is recognition of the limits of our institution's role and competency. If the legislature fails to carry out its constitutional duty as directed, this court has the appropriate tools to compel compliance, including recalling its mandate, *see* RAP 12.9, or issuing a writ of mandamus to the legislature, *see, e.g., Walker v. Munro*, 124 Wn.2d 402, 408, 879 P.2d 920 (1994) ("Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance.").

In deciding the issues presented, we have met our constitutional responsibility; we should allow the legislature to do the same. With these concerns, I respectfully concur.

AUTHOR:

Chief Justice Barbara A. Madsen

---

WE CONCUR:

Justice James M. Johnson

---

---

---

---

---