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No. 66312-7-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

GLORIA BRIGGS, et. al.,
Appellants

vs.

SEATTLE SCHOOL DISTRICT NO. 1

Respondent/Appellee

APPEAL FROM SUPERIOR COURT
FOR KING COUNTY

APPELLANTS' OPENING BRIEF

2011 FEB 13 PM 4:13
COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON

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I. INTRODUCTION

This appeal involves the authority of a Superior Court to decide the substantive merits of an appeal of School Board decisions closing schools where the School Board refuses to comply with the administrative record requirements imposed by the Legislature. The Legislature has given Superior Courts appellate jurisdiction to decide appeals of School Board decisions pursuant to RCW Chapter 28A.645. The provisions of that Chapter state in pertinent part:

28A.645.010

Appeals — Notice of — Scope — Time limitation.

Any person, or persons, either severally or collectively, aggrieved by any decision or order of any school official or board, within thirty days after the rendition of such decision or order, or of the failure to act upon the same when properly presented, may appeal the same to the superior court of the county in which the school district or part thereof is situated, by filing with the secretary of the school board if the appeal is from board action or failure to act, otherwise with the proper school official, and filing with the clerk of the superior court, a notice of appeal which shall set forth in a clear and concise manner the errors complained of.

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28A.645.020

Transcript filed, certified.

Within twenty days of service of the notice of appeal, the school board, at its expense, or the school official, at such official's expense, shall file the complete transcript of the evidence and the papers and exhibits relating to the

decision for which a complaint has been filed. Such filings shall be certified to be correct. [Emphasis Supplied]

28A.645.030

Appeal to be heard de novo and expeditiously.

Any appeal to the superior court shall be heard de novo by the superior court. **Such appeal shall be heard expeditiously.**

[Emphasis Supplied]

*

*

*

The Legislature has imposed certain requirements the School Board

must follow prior to making a decision to close schools. These

requirements are set forth in RCW 28A.335.020, which states:

Before any school closure, a school district board of directors shall adopt a policy regarding school closures which provides for citizen involvement before the school district board of directors considers the closure of any school for instructional purposes. The policy adopted shall include provisions for the development of a written summary containing an analysis as to the effects of the proposed school closure. The policy shall also include a requirement that during the ninety days before a school district's final decision upon any school closure, the school board of directors shall conduct hearings to receive testimony from the public on any issues related to the closure of any school for instructional purposes. The policy shall require separate hearings for each school which is proposed to be closed.

The policy adopted shall provide for reasonable notice to the residents affected by the proposed school closure. At a minimum, the notice of any hearing pertaining to a proposed school closure shall contain the date, time, place, and purpose of the hearing. Notice of each hearing shall be published once each week for two consecutive weeks in a newspaper of general circulation in the area where the school, subject to closure, is located. The last notice of hearing shall be published not later than seven days immediately before the final hearing.

The School Board implemented its decisions closing schools on an emergency basis so that by the time an alleged "complete", but uncertified record was filed with the Court 262 days after the twenty day statutory deadline virtually all of the School Board decisions had been implemented.

II. ASSIGNMENT OF ERRORS

- 1.) The Superior Court erred in failing to grant a summary judgment vacating the School Board's school closure decisions because the School Board purposely failed to timely file a complete administrative record with the Superior Court as is required by RCW 28A.645.020.
- 2.) The Superior Court erred in failing to vacate the School Board's school closure decisions pursuant to Appellants' "motion to strike appeal for lack of subject matter jurisdiction [authority] to hear the merits of the appeal" which was based on the School Board refusal to *ever* certify the administrative record filed "to be correct" as is required by RCW 28A.645.020.
- 3.) The Superior Court erred in holding several Parents did not have standing to file an appeal regarding the School Board's procedures relating to the closure of schools.
- 4.) The Superior Court erred in excluding the State Auditor's Report on

grounds of hearsay where the Report was being introduced to show why Stafne believed he had a duty as an advocate for his clients and as an officer of the Court to not participate in any process before the tribunal relating to the merits of the appeal of the January 29, 2009 decisions.

III. ISSUES RELATING TO ASSIGNMENT OF ERRORS

1. Is the requirement set forth in RCW 28A.645.020 that a transcript of evidence shall be filed within 20 days of the filing of a complaint jurisdictional?

2. Is the requirement set forth in RCW 28A.645.020 that a transcript of evidence be certified "to be correct" jurisdictional?

3. Did the School Board substantially comply with the timeliness requirement of RCW 28A.645.020?

4. Did the School Board substantially comply with the requirement in RCW 28A.645.020 that the transcript of record be certified to be correct?

5. Did the Superior Court have authority under the separation of powers doctrine to relieve the School Board of its responsibility under RCW 28A.645.020 to file an administrative record within 20 days?

6. Did the Superior Court have authority under the separation of powers to relieve the School Board of its responsibility under RCW 28A.645.020 to certify the transcript of evidence "to be correct"?

7. Did the failure to timely file an administrative record that was certified to be correct within 20 days violate Appellants' access to the court pursuant to Wash. Const. art. I, § 10?

8. Did the Superior Court err in holding several Appellants did not have standing to file an appeal regarding the School Board's procedures relating to the closure of schools?

9. Did the Superior Court err as a matter of law in excluding the Auditor's Report for being hearsay where it was being offered as a basis for showing why counsel refused to participate in the merits of an appeal based on an administrative record the School Board refused to certify to be correct?

IV. STATEMENT OF THE CASE

This appeal involves review of consolidated appeals of two separate Superior Court appellate actions by the Honorable Judge Inveen upholding the Seattle School Board's January 29, 2009 decisions closing several schools.¹ Clerk's Papers (CP) 13 - 18. Both groups of Appellants

¹ The District describes these school closures as decisions "to close five buildings for instructional purposes and to approve nine programmatic changes". Parents contended below, but do not appeal here, that each of these decisions constituted school closures for purposes of RCW 28A.335.020. Parents do not reach this issue here because they claim the Superior Court should have vacated the School Board's school closure decisions because of the School Board's undisputed failure to comply with RCW 28A.645.020. Because the issues in this appeal do not involve the

(hereafter referred to as "Parents") timely filed a notice of appeal pursuant to RCW 28A.645.010 of the January 29, 2009 decisions. The District timely filed 2,218 pages of documents and six digital video disks, which it claimed constituted a Transcript of Evidence for the school closure decisions on March 23, 2009. CP 169:5; *see also* CP 228 - 232. Parents concede these particular documents and disks were timely filed pursuant to RCW 28A.645. However, Parents contend these filings did not comply with RCW 28A.645.020.

The Stafne Law Firm filed a "pro bono" limited notice of appearance on September 14, 2009. CP 13-14. The notice stated, among other things, "Respondent [School District] has opined that 'consolidation of the two cases may be in the best interests of judicial efficiency', but has made no motion to consolidate." CP 13:19-20. Thereafter, the parties stipulated to consolidate the appeals. CP 17 -18. An order consolidating the appeals in the King County Superior Court before the Honorable Judge Laura Inveen was entered on September 23, 2009. *Id.*

On October 1, 2009 Parents filed several motions for summary judgment. CP 132 - 150. The "relief requested" stated in pertinent part:

actual merits of any of the specific building closures or programmatic changes approved by the School Board the January 29, 2009 decision closing buildings and making programmatic changes shall hereinafter be referred to as the "decisions" or "school closure decisions".

"... Appellants' [Parents] motions respectfully request this Court to grant summary judgments:

* * *

4.) Finding and concluding that the District has not produced a record that complies with RCW 28A.645.020;

5.) Finding and concluding that the limited record the District has submitted to this Court frustrates Appellants' [Parents'] constitutional right of access to this court to adjudicate the complaints Appellants [Parents] have made against the District; and

6.) Finding and concluding that the limited record the District has submitted to this Court impinges on this Court's duty under the separation of powers doctrine to perform judicial review of Appellants' complaints against the District." CP 133:6 – 13.

In support of these contentions Parents produced written papers and evidence submitted by Rickie Malone (a former principle of the African American Academy) and Chris Jackins (the Coordinator of the Seattle Committee to Save Schools) to the School Board during its hearings regarding school closures that Parents claimed should have been included as a part of the administrative record kept pursuant to RCW 28A.645.020. The District did not dispute the administrative record did not contain this evidence, which was submitted to the School Board during the hearing process with regard to the challenged decisions.² Rather, the District argued:

"Appellants have belatedly attempted to challenge the Transcript

² See District's Response to Motions for Summary Judgment, App. 101:18 - 102:5.

of Evidence by way of submission of declarations. Neither declaration is from a School Board member, or by a person such as Ms. Ferguson who was in a position to know what materials were considered by the School Board." CP 169:17-22.

Further, the District contended:

"No motion to amend or supplement the Transcript of Evidence has ever been made by Appellants. Thus, there is no viable challenge to the Transcript of Evidence before the Court. Consequently, the Court is limited to reviewing the Transcript of Evidence which is cited herein as 'TE' in considering Appellants Motion for Summary Judgment". CP 170:1-4.

In their reply, Parents argued:

"... [T]he District did not dispute Parents' evidence and argument that the administrative record regarding school closures has been edited by District employees. In this regard it is compelling to note the District has only certified that the record it has submitted for judicial review relates to five *building* closures; notwithstanding the District admits this case also involves challenges to "programmatic changes" that ended such educational institutions as the African American Academy (AAA). *See* Ms. Ferguson certification of the record, which states:

'the attached documents and digital video disks constitute the "transcript of the evidence and the papers and exhibits relating to the decision" [sic] the Seattle School Board to close five school buildings for instructional purposes.'

On its face, this certification does not meet the requirements of RCW 28A.645.020 because it does not certify it is "the complete transcript of the evidence and the papers and exhibits" relating to the January 29, 2009 decision to close both buildings and programs. Of course, the District could have responded that this was an oversight and Ms. Ferguson meant to certify the Transcript also included all evidence related to programmatic changes as well. But Ms. Ferguson did **not** amend her certification.

Parents presented declarations from persons who testified they submitted documents to the School Board regarding school closure issues but their submissions were not included as part of the Transcript of Evidence. Rickie Malone, a former principal of the African American Academy (AAA) and Fulbright-Hays fellow, testified that her submissions regarding the closure of AAA were not included as part of the record. Chris Jackins, coordinator of the Seattle Committee to Save Schools, testified that his submissions (even those *relating to the closure of school buildings*) were also not included in the District's Transcript of Evidence. Significantly, the District does not dispute these omissions. More disturbingly, the District's response is that '[n]either declaration is from a school Board member, or a person such as Ms. Ferguson[] who was in a position to know what materials were considered by the School Board.' Opposition, p. 4, lines 18 – 21. To the extent the District is claiming the Board can pick and choose the evidence that is to be reviewed by the Court, Parents respectfully disagree. A complete Transcript of Evidence is necessary for interested parties, like Parents, to obtain meaningful access to the Courts to present substantive arguments regarding the evidence produced during the public hearing process. *Cf. Putman v. Wenatchee Valley Med. Ctr.*, (attached to opening motion); *Washington Trollers Association v Kreps*, 645 F2d 684 (9th Cir. 1981). It is also a necessary prerequisite to this Court's performing judicial review to determine whether the substantive decisions of an administrative agency were arbitrary and capricious or contrary to law. *Cf. Putman, supra.*" CP 192:16-194:8.

During oral argument it was the District's position that Parents could not be granted a summary judgment on the adequacy of the record because *no one knew what evidence the school board members actually considered in making their school closure decisions:*

"MS. McMINIMEE: The school board meets twice a month. And included in the transcript of evidence for Your Honor to review were school board meetings where individuals spoke about school closure or the superintendant or her staff presented issues

on school closure. None of those were required under the school closure statute or policy, we're simply providing the broadest possible recording of the events that occurred to Your Honor, given that the directive of the statute was to provide everything that was considered by the decision maker. And certainly that also allows for Your Honor to hear the public commentary that was taken before those hearings.

THE COURT: So you're saying this is more of a courtesy?

MS. McMINIMEE: Yes.

THE COURT: Why didn't the District, as a courtesy, provide all of the written comments of the litigants, as well?

MS. McMINIMEE: The District -- the transcript was done by the lead staff member and was done with her attestation that these were the papers that were considered by the school board. She certainly couldn't attest that they had read e-mails or papers sent to them.

THE COURT: So are you saying when people submit written comments, they just get thrown away and never get considered by the board?

MS. McMINIMEE: I'm saying no one can attest that every board member reviewed e-mails or materials presented to them by third parties. And we did have a telephone conversation and at that time Mr. Stafne indicated he was going to be filing a motion to augment or supplement the record. And certainly if that's something he wishes to do, he can file a motion, submit what he thinks should be part of the record, *and the District can address whether or not the materials were submitted properly or not.*³

I think that alone indicates here on a summary judgment there are a number of points of factual dispute among the parties as to what the evidence of the record is. Certainly they've not offered the testimony of any person to know what the school board considered in making its decision, nor have they offered any testimony to challenge Ms. Ferguson's testimony or

³ This comment doesn't make much sense when considered in the context of the District's record-keeping system. See *infra*.

knowledge in knowing what the school board actually considered in making their decision. " CP 503, p. 5, line 3 - 505, p. 37, line 9.

Judge Inveen was unimpressed with this argument. Judge Inveen

ruled from the Bench:

3 THE COURT: Frankly, I am flummoxed, I guess, to
4 find that there were substantial materials that were not
5 made part of the record and that the District felt that it
6 could simply take the position that if all of the school
7 board members didn't read all of the e-mails, that somehow
8 that shouldn't become part of the record.

9 In reviewing the statute on appeals of school
10 board decisions, and let me get that back in front of me,
11 as pointed out by Mr. Stafne, in 28A.645.020, "The school
12 board, at its expense, shall file the complete transcript
13 of the evidence and the papers and exhibits relating to the
14 decision for which a complaint has been filed." It doesn't
15 say the papers and exhibits which every school board member
16 has read, but it indicates relating to the decision.

17 So it does appear that the record is inadequate.
18 And I think I need to have the school board come back
19 before the Court to tell me what is in existence.

20 I didn't hear Ms. McMinimee say it had been
21 thrown away. And I would be very surprised if it has been.
22 I'm hoping that it is there, it simply has not been made
23 part of the record.

24 So I would solicit some input as to how we can
25 find out what is in existence and when we need to get

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1 before the Court for further review of this matter.

2 MS. McMINIMEE: Your Honor, I can submit all of
3 the individual comment cards for which the summaries were
4 generated. Those remain in existence. And I can also have
5 our Department of Technology Services do a search on the
6 District's e-mail server for e-mails that had key words
7 related to this. However, it's going to be a rather
8 voluminous production. So I'd ask for an appropriate time
9 period in order to do that.

10 THE COURT: When you say comment cards, what are

11 comment cards?

12 MS. McMINIMEE: Individual five by ten comment

13 cards that had comments that were provided at the public
14 workshops, and other things that were summarized in the
15 materials that are also in the transcript of evidence.

16 THE COURT: And then it sounds like there are
17 some other materials, as well, that people prepared that
18 weren't necessarily e-mails and weren't necessarily comment
19 cards.

20 MS. McMINIMEE: I have no idea what those are.
21 Certainly if Mr. Stafne wants to provide me copies of what
22 he wants included, I can review those and see if the
23 District is in agreement that they were part of the record
24 or not.

25 THE COURT: There is some reference in the reply

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1 of the referenced materials. Did you look to see what was
2 around?

3 MS. McMINIMEE: I did not go back to look at
4 those materials.

5 THE COURT: Did you ask?

6 MS. McMINIMEE: I asked the school board -- I
7 have asked the school board staff to indicate what was
8 kept. And they have not yet had the opportunity to give me
9 anything other than what has been provided to the Court.

10 As indicated by the transcript of materials, the
11 materials were quite large. I can see what the school
12 board office still maintains. I understood from our
13 telephone conference that he would actually be filing that
14 type of motion rather than this. So I'm certainly happy to
15 meet with him to reach an amicable decision.

16 THE COURT: And going back and reviewing my notes
17 of the phone conversation, I did note that there was at
18 least a suggestion, Mr. Stafne, that the record wasn't the
19 big issue. So perhaps now it's a bigger issue?

20 MR. STAFNE: Well, I did state at the time we
21 talked about filing my motion, I indicated I would make it
22 part of the motion for summary judgment. Which I did.

23 If they cannot find -- I mean, it sounds to me
24 like what they're saying is they don't know that they can

25 find what was submitted. And I don't know how --
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1 certainly, I cannot be expected to know what was submitted
2 and I don't see how any one of these people should know
3 what was submitted. I mean, they have submitted to you
4 what they submitted. So certainly, I think you can issue a
5 ruling now that will prevent this from happening during the
6 next phase of what is going on.
7 THE COURT: And, Ms. McMinimee, I wasn't sure
8 what you meant by they have not yet had an opportunity. I
9 guess I inferred that to mean that your staff hasn't used
10 staff resources to look to see what's there?
11 MS. McMINIMEE: Correct.
12 THE COURT: So I think for them to do that would
13 be appropriate. And then reporting back so we can figure
14 out what to do next in and the timing for that.
15 Mr. Stafne, I'll be happy to hear your suggested
16 verbiage for an order.
17 MR. STAFNE: All right.
18 Well, I'm just wondering if under the -- so I
19 assume you're willing to grant summary judgment but the
20 record is not adequate for purposes of review?
21 THE COURT: Or the record appears to be
22 incomplete at this time.
23 MR. STAFNE: Okay. And in terms of an order, are
24 you stating the need to provide all the evidence that would
25 have been required by RCW 28A.645.020?

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1 THE COURT: Yes." CP 522, p.54:3-526,p. 58:1

The Court Clerk's Minutes contained the following entry: "Court finds
the record presented by the Defendant is inadequate". CP 279.

The written order the Court issued stated:

"Appellants also complain that Respondent has not presented an
adequate record for purposes of judicial review. The Court finds
the Transcript of Evidence previously submitted to this Court does
not comply with RCW 28A.645.020 because it does not contain
'the complete transcript of evidence and the papers and exhibits

related to the decision for which a complaint has been filed.' The Court hereby ORDERS that the Respondent Supplement the transcript of the evidence and certify the same relating to the decision for which a complaint has been filed.

Further, it is hereby ORDERED that the Parties work together and with the Bailiff of the Court to determine a mutually agreeable date for the administrative review hearing in this matter, and to set a briefing schedule commensurate with that new hearing date. The Parties are to notify the Court of that proposed briefing schedule and hearing date by December 9, 2009." CP 391:24 - 392:2.

The plain language of RCW 28A.645.020 required a properly certified administrative record to have been filed within 20 days of Parents' complaints. Judge Inveen purported to exercise judicial power to extend the statutory deadline by 239 days. On November 17, 2009, pursuant to the Superior Court's instruction, the District filed approximately 1,000 additional documents and a digital video disk (which it claimed included at least 10,000 additional documents) as additional documents marked 2323 - 3307. CP 280. The District also filed a digital video disk which its counsel indicated contained "emails sent to the School Board mail archive which if printed out would contain over 10,000 pages". CP 280. This estimate of the number of emails the School Board received was both higher and lower than those which the District had previously provided. CP 345:4-347:16. (District claims it received hundreds of emails. District claims it received 20,000 pages of emails relating to its school closure decisions.)

The November 17, 2009 filings were accompanied by several certifications describing what had been filed. CP 280 - 284. None of these certifications stated or intimated that the addition of the supplemental filings had created a "complete" or "correct" administrative record. *Id.* Moreover, the certification of April Johnson clearly suggests that her "word" search of the District's computer server was not calculated to obtain those documents and evidence the School Board actually considered as part of its decision-making process. CP 283. Rather, her search was calculated to turn up any documents in the District's server which happened to use one of eighteen terms. CP 283.

In addition to not being certified "to be correct" and complete, the November 17, 2009 submission was also problematic because Parents and their attorney were not able to open the computer disk included with the submissions. CP 344:19 - 345:3. Only after much effort occurring over several days were Parents and their attorney able to access the materials on the disk. CP 295-296. After reviewing these materials Parents were able to prove that the transcript still was not complete. After reviewing all of the documents the district had provided, Rickie Malone submitted another declaration on November 29, 2009, which stated:

"2. I submitted a declaration to the Court on September 25, 2009, which stated on page 3, lines 16 - 19, that I had delivered to the School Board my Exhibit #2 consisting of (i) a proposal by the

African Academy Council of Elders, and (ii) recommendations by Friends of African American Academy (FOAAA). I have examined the printed transcripts of the District's original certified record and supplemented record, and to the best of my knowledge and belief, neither of the District's printed transcripts contain my submission of the seven page proposal by the African American Academy of Elders, and the District's printed transcripts contain only the first three pages of recommendations by FOAAA [TE 2880-2882] and do not contain the following six pages, beginning with '2008 African American Academy Mission Statement'".

3. The fact that I took the trouble to attend a School Board meeting and personally submit sixteen pages of input about a school which I care about and of which I have been a principal, and only three pages turns up in the District's record troubles me."

Other Parents who reviewed the documents in the District's supplemental filings with the Superior Court as of November 17, 2010 also found that the filings did not contain the exhibits and evidence and papers they had submitted to the School Board for consideration of the closure of schools. CP 297-320; 322-336.

On November 23, 2009, Parents filed two motions: Parents' "motion to reconsider and or amend summary judgment order" (CP 286-294) and Parents' "motion to take depositions of persons with knowledge relating to the preparation of the transcript pursuant to RCW 28A.645.020". CP 337-342.

On December 9, 2009, Parents' counsel filed a declaration stating that he could not agree to a briefing schedule and/or date for an appeal hearing. CP 395-402. Counsel noted that because the District did not have a

system in place to compile an administrative record he did not believe that one which complied with RCW 28A.645.020 could be created after the fact. CP 396-398:6. Further, Counsel stated that he could not provide competent representation for his clients in the absence of a record that complied with RCW 28A.645.020. CP 398:7-400:10. Counsel also defended his refusal to agree to participate in any briefing or hearing based on a record the School Board refused to certify to be correct and complete because this would require his presentation and argument of false evidence to the Court. CP 400:11 - 402:16.

On December 17, 2009, the Court ordered Petitioners' Motion for Reconsideration and/or Amend the Summary Judgment be deemed to be a motion regarding "the sufficiency of the record supplemented as a result of the November 3, 2009 oral decision (the written order of which was entered this date.)" and ordered the District to respond to the motion. CP 393-394. The evidentiary response to the Parents' "Motion to Reconsider and/or to Amend Summary Judgment" (later judicially deemed Motion to Supplement) and to take depositions were the declarations of Joy Stevens and Amy Carter on December 9, 2009. CP 422-425.

Carter's declaration stated she inadvertently did not include pages 3308-3405 as part of the record which was produced pursuant to RCW 28A.645.020. Carter's declaration substantiates that these approximately

400 additional pages of administrative record were submitted 261 days after the statutory deadline.

Joy Stevens' declaration is significant because it helps to explain these long delays in submitting the "filings" in question and why no one on the School Board is willing to certify the administrative record to be correct in spite of the District's extended search for administrative record utilized in the legislative decision making process. Stevens admits the District does not keep any administrative records for purposes of legislative rule-making. CP 422 - 433. Rather, the District only attempts to comply with RCW 42.56 (Public Records Act); WAC 44-14 (Public Records Act-Model Rules); and 20 U.S.C. § 1232 (Family Educational Rights and Privacy Act). CP 431.

Certain aspects of the District's "Disclosure of Public Records Procedure" make it inadequate for keeping track of the papers and evidence and exhibits the School Board considered with regard to school closures. None of the materials which are submitted to the School Board, school district, school superintendent, etc are indexed or organized so that they are retrievable in such a way as to assure the Court that it is reviewing the evidence the School Board actually considered in making the school closure decisions. CP 462.

In its Order entered December 17, 2009, the Superior Court, through

Judge Inveen, concluded that "[t]he supplemental record does not comply with 28A.645.020" because "lack of transcript of all meetings". CP 573:20 - 21. The Superior Court also ruled "[t]he supplemental record is not adequate to allow this Court to perform judicial review". CP 574: 1 - 2. The Superior Court ordered: "Parents shall be allowed to propound interrogatories regarding the adequacy of the record". CP 574: 21 - 23. The Superior Court again ordered counsel to agree on a hearing date for the appeal. CP 574:19 - 20.

This order declaring that the record did not comply with RCW 28A.645.020 and did not provide a basis for judicial review was written 250 days after the statutory deadline for filing a complete, properly certified record.

Parents' counsel again refused to participate in an appeal based on a record that did not comply with RCW 28A.645.020.⁴

⁴ Thereafter Parents' counsel, who by this time also represented parents in other school board appeals, sought direct discretionary review regarding, among other things, the issue of whether the Superior Court had the authority to decide the merits of an appeal which the Superior Court had determined was not adequate for judicial review. A Commissioner of the Supreme Court denied review. CP 844-853. The Commissioner framed the issue being decided in the discretionary review related to this appeal as being "whether the Superior Court properly ordered the school district to supplement the record to ensure whether the court has the complete transcript of evidence and papers and exhibits related to the Board's action". CP 852. That same issue remains to be resolved by this Court here but with the understanding that Parents' supplementation complaints

On February 26, 2010, Parents filed a motion with the Superior Court to strike any appeal hearing for lack of subject matter jurisdiction and/or judicial authority to decide an appeal based on a record that did not comply with RCW 28A.645.020. App. 377 - 385. This motion was based, in part, on the District's refusal to confirm in responses to interrogatories that the supplemented record complied with RCW 28A.645.020. App. 380:1 - 13. See "District's Responses to Interrogatories regarding the adequacy of the Transcript of Evidence", Response to Interrogatory #4: "... a.) This subpart seeks for the District to provide legal conclusions as to if the Transcript of Evidence as filed and supplemented complies with RCW 28A.645.020. No answer is required." CP 590:20-591:1. See also Response to Interrogatory 10: "... The remainder of this interrogatory seeks for the District to provide legal conclusions as to if the Transcript of Evidence as filed and supplemented complies with RCW 28A.645.020. No further answer is required." It is

are directly related to their untimeliness under RCW 28A.645.020 and to the School Board's refusal to certify the administrative record to be correct. Even the Commissioner acknowledged in the related school administrative record review actions before him that the School Board must certify the record to be correct pursuant to RCW 28A.645.020. "While the school board must also certify under the statute that the record is correct, petitioner read [sic] too much into this certification by suggesting that it somehow requires the school district to contemporaneously maintain a discreet record..." CP 973; see also 977 (same); CP 983-984 (same).

Parents' position that RCW 28A.645.020 requires the School Board, not the Court or Parents, to the administrative record "to be correct" in the first instance.

On March 23, 2010, while Parents' motion to strike any appeal hearing was pending the District moved to dismiss the appeals of all appellants except Lateefah Abdullah, Rose Sanders, and Nora Wheat for lack of standing. CP 698 - 707.

On June 2, 2010, the Superior Court denied Parents' motion to strike any appeal hearing and granted the District's motion to dismiss the following Parents for lack of standing: Briggs, Changebringer, Davis, Driver, and Grauer. CP 856-859. The Court directed that "Briefing schedule and hearing date shall be determined in conference call with the court on June 4, 2010 at 2:00 p.m." CP 859.

On July 1, 2010, Parents' counsel Stafne filed an "opening brief submitted by counsel relating to legal issues not related to the merits of the appeal". CP 862-666. That brief asserted the Superior Court had no judicial authority to hear an appeal based on an administrative record the School Board refused to certify "to be correct". *Id. See* RCW 28A.645.020.

On July 9, 2010, the Superior Court filed an "Order on case management". That Order stated in pertinent part:

"... The Order is based upon the representation by Stafne that he will represent appellants solely on the issue of the adequacy of the administrative record, and that his briefing will be limited to that issue. He indicates appellants will appear *pro se* on the merits of the underlying appeal. ...

It is further Ordered:

1. Counsel Stafne shall file an amended Notice of Appearance clarifying his role in these proceedings, limiting them to issues dealing with the adequacy of the record..." CP 888-889.

In response to the Court's order Stafne filed a Second Limited Notice of Appearance on July 12, 2010. CP 890-896. Stafne acknowledged that his refusal to participate in the preparation and presentation of the merits of the appeal prejudiced his clients with regard to litigating the merits of the appeal of the School Board's January 29, 2009 decisions. CP 891. But Stafne contended there were extreme circumstances which mandated he not simply participate in the merits of the Superior Court's appeal proceedings.

"But as an attorney and officer of the Court Stafne owes a duty to both his clients and this Court. Although Stafne's duty to represent appellants and his duty as an officer of the Court to participate in the preparation and presentation of the merits of this appeal may appear at odds in this moment, Stafne believes his refusal to participate in any appeal hearings where the school board refuses to certify "filings" to be correct will ultimately be in the best interests of his clients and this Court. This is because in the long run all citizens, litigants, and particularly these appellants and the school board will benefit from this Court applying the law the legislature has written. That law states: 'Such filings shall be certified to be correct'.

Stafne recognizes the position he is taking *i.e.* refusing to represent clients in an appeal because of Stafne's belief that the record is not adequate because of the school board's refusal to

comply with the content and certification requirements of RCW 28A.645.020, is not normally tenable because it is inimical to the routine procedures by which this Superior Court operates. Therefore, Stafne understands and accepts that he bears a heavy burden in justifying his refusal to prepare for and participate in this appeal hearing. Stafne asserts the exceptional circumstances identified below mandate he not represent appellants at all with regard to the merits of this appeal." CP 891-892.

The exceptional circumstances Stafne identified included the District's argument to the Supreme Court Commissioner that the School Board did not have to use the word "correct" in its certifications pursuant to RCW 28A.645.020. CP 892:11-893:6. Stafne noted that this argument was clearly denied by the Supreme Court Commissioner in three of his rulings regarding School Board appeals. *See, e.g.*, CP 973 ("While the school board must also certify under the statute that the record is correct, petitioners read too much into this certification by suggesting that it somehow requires the school district to contemporaneously maintain a discreet record..."); *see also* CP 977 (same); CP 983-984 (same). Further, in support of his refusal to participate in an appeal based on a record the School Board had not certified to be correct Stafne argued the State Auditor had explicitly found that "[t]he school board and District management have not implemented sufficient policies and controls to ensure District complies with state laws, its own policies, or addresses the concerns of prior audits". CP 894. *See infra* for further discussion of the Auditor's Report.

"Under these circumstances Stafne does not believe his roles as an advocate for his clients and as an officer of the court permit him to prepare for and participate in a judicial hearing to decide the merits of an appeal pursuant to Article IV, Section 6 of the Washington Constitution as implemented by RCW Chapter 28A.645 based on a transcript of evidence the school board steadfastly refuses to certify "to be correct". In the event the judges of this [King County Superior] Court continue to allow the school board to violate the letter of the law, without articulating some reasonable explanation for doing so, the judges of this Court must bear some responsibility for the culture of lawlessness that exists in the Seattle School District and which is clearly described in the Auditor's report, which is attached as Exhibit 5 to Stafne's declaration." CP 895-896.

On August 12, 2010, the Superior Court issued an Order denying appellant's motion regarding the adequacy of the record. CP 1092-1093. The Order contained no explanation or discussion as to why the School Board did not have to comply with the second sentence of RCW 28A.645.020, *i.e.* "Such filings shall be certified to be correct".

On August 18, 2010, the District moved to strike Stafne's Limited Notice of Appearance. CP 1105-1114. The District contended that that Parents could not represent themselves on the merits of the appeal while Stafne contested the legality of the appeal proceedings. CP 1105-1114. Parents and their attorney responded that RPC 3.3 contemplated a procedure where an attorney could continue representing his clients and not participate in a hearing before a tribunal where he believed he was being required to present false evidence to the tribunal. CP 1117-1122. On that same day the District also moved to strike the Auditors Report

attached to Stafne's declaration in support of not striking Stafne's second limited notice of appearance. CP 1094-1102. The District argued that the Auditor's report contained "hearsay". CP 1100:19-1102:10.

On October 18, 2010, the Superior Court denied the District's motion to strike Stafne's second notice of limited representation. CP 1144-1145. However, on that same date the Superior Court granted the District's motion to exclude the State Auditor's Report as evidence attached to Stafne's declaration in support of his Second Limited Notice of Representation. CP 1146-1147.

On November 3, 2010 the Superior Court entered an Order affirming school board decision pursuant to RCW Chapter 28A.645. CP 1150-1152

On December 1, 2010, a notice of appeal was filed. On December 23, 2010, a corrected notice of appeal was filed on behalf of Parents.

V. ARGUMENT

A. Standards of Review

The standard of review applicable to the Superior Court's ruling on Appellants' motion for summary judgment that the District had not complied with RCW 28A.645.020, *i.e.* that the School Board timely file the administrative record and that "such filings shall be certified to be correct", is *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

The standard of review for a typical motion for an extension of time is abuse of discretion. *Trummel v. Mitchell*, 156 Wn.2d 653, 670, 131 P.3d 305 (2006). However, because appellants' objection to the District's violation of the time requirements under RCW 28A.645.020 was that the Superior Court did not have the authority/jurisdiction to allow the District to exceed the time requirements under RCW 28A.645.020, the standard of review which should be applied to review of the extension of time is de novo or an "error of law" analysis. *Clingan v. Department of Labor & Indus.*, 71 Wn. App. 590, 592, 860 P.2d 417 (1993) (jurisdiction is a question of law reviewed de novo).

Ordinarily, a trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). However, when a trial court makes an evidentiary ruling in conjunction with its review of a motion for summary judgment, the applicable standard of review on appeal is de novo. *Ensley v. Mollmann*, 155 Wn. App. 744, 752, 230 P.3d 599 (Wn. App. Div. I, 2010); *Ross v. Bennett*, 148 Wn. App. 40, 45, 203 P.3d 383 (2008); *Folsom*, 135 Wn. 2d at 663. Thus, this court's review of the admissibility of the Auditor's report should be de novo.

B. The District did not substantially comply with RCW 28A.645.020.

RCW 28A.645.020 sets forth two unequivocal requirements. First, "[w]ithin twenty days of service of the notice of appeal, the School Board, ... shall file the complete transcript of the evidence and the papers and exhibits relating to the decision for which a complaint has been filed." The second requirement is: "[s]uch filings shall be certified to be correct." *Id.*

There can be no dispute that the 2,218 pages of documents Ms. Ferguson originally timely filed was not a complete or correct copy of the administrative record which was presented to the School Board for purposes of making school closure decisions on January 29, 2010. We know this because Ms. Ferguson, a District employee who participated in writing the proposed decisions, gave School Board members only those documents she wanted to make sure they considered in making their decisions. Parents' Counsel explained during oral argument relating to their summary judgment motion to conclude that the District did not comply with RCW 28.645.020 how it would be impossible to adequately present his clients' appeal based on this edited, one sided record. CP 471, p. 3, line 2 - CP 481, p. 13, line 9. We also know that the District employed no procedures to comply with RCW 28A.645.020 when it

engaged in its deliberative process regarding school closures. We know this from, among other things, the District's responses to interrogatories regarding the adequacy of the record. CP 587 - 599.

INTERROGATORY 7: Please state whether the District had a written policy or procedure in place relating to the *preservation and storage* of the evidence and the papers and the exhibits that were included as part of the Transcript of Evidence relating to decisions made by the school board in 2008 and 2009. If your answer is yes, please set forth the language of each policy or procedure verbatim or provide a copy of such policy and procedure.

ANSWER: Subject to the foregoing objections, the District directs Appellants to the previously filed declaration of Joy Stevens and Pamela Oakes, attaching the District's practice with respect to the District's School Board adopted Public Records Act and Record Management Procedures, and describing the District's practices with regard to document retention. The District does not maintain any policy or procedure specific "to decisions made by the school board in 2008 and 2009".

Because the School Board did not attempt to keep a record of public comment relating specifically to the School Board decisions in 2008 and 2009, it pretends to not have any idea as to why people were testifying about the proposed school closures. For example, *see* the District's Response to interrogatory 3 regarding the Transcript of Evidence, which states:

"The District does not maintain any policy or procedure specific to the identification of the evidence and the papers and exhibits to be included as part of evidence relating to decisions made by the School Board on January 29, 2009" CP 590:1-3.⁵

⁵ *See also*, CP 595: 2-3 ("The District cannot answer as to what 'purpose'

Parents are appalled by the fact that the School Board does not have a clue about what information citizens provided the School Board about school closures and has no way of figuring this out.

The District also made clear in its responses to interrogatories that it takes the position that it does not have to certify those filings it submits as being a complete record to the Superior Court "to be correct".

INTERROGATORY NO. 9: Please state whether the District had a written policy or procedure in place relating to *certifying* pursuant to RCW 28A.645.020 that the evidence and the papers and exhibits in the Transcript of Evidence relating to decisions made by the school board in 2008 and 2009 were correct and complete. If your answer is yes, please set forth the language of each policy and procedure verbatim or provide a copy of each policy or procedure.

ANSWER: Subject to the forgoing general objections, the District responds that it does not maintain a policy or procedure place 'relating to *certifying* pursuant to RCW 28A.645.020,' nor is it aware of any regulation of statute requiring it to do so." CP 593:17-594:3.

It also appears likely the School Board cannot and did not certify the administrative record regarding the school closures to be correct because such a statement would constitute a fraud upon the Court. The Transcript

members of the public submitted such documents..."); CP 598:11-13 ("[T]he District responds it cannot answer as to what 'purpose' members of the public submitted documents to the school board."); CP 599: 2-6 ("[T]he District responds that it cannot answer as to what 'purpose' Ms. Malone had in providing papers to the school board, nor can it speak to what she provided.").

of Evidence is indisputably incomplete because in 2008 and 2009 the School Board failed to keep minutes of special meetings where school closure issues were discussed. CP 908. The School Board admits this fact. *Id.* Because the minutes of these meeting were not included in the administrative record relating to the school closure decisions, the administrative record is not complete. Joy Stevens also provides evidence in her declaration that the administrative record is not complete. In this regard Ms. Stevens states: "District only began archiving all emails sent to and from seattleschool.org email addresses in February, 2009." CP 423:19-20. As the decision being challenged occurred on January 29, 2009 many emails, like those demonstrated by Laura Grauer, could not be made a part of the documents filed with the Court on March 23, 2009, November 17, 2009, and December 9, 2009. CP 297-320.

C. The School Board has not substantially complied with the timeliness requirements imposed by RCW 28A.645.020.

Our Supreme Court recently indicated that, as a general matter, substantial compliance requires meeting statutory deadlines. *Humphrey Industries, Ltd. v. Clay Street Associates, LLC*, 242 P.3d 846, 851 - 853 (2010).

[S]ubstantial compliance with a statutory deadline, including a specified time such as that contained in RCW 25.15.460, is impossible-one either complies with it or not. *See* Pet. for

Review at 9 (citing *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 928-29, 809 P.2d 1377 (1991); *Westcott Homes, LLC v. Chamness*, 146 Wn. App., 735, 192 P.3d 394 (2008); *Petta v. Dep't of Labor & Indus.*, 68 Wn. App. 406, 409-10, 842 P.2d 1006 (1992)).

Id. at 851.

The legislature chose the 20 day deadline to facilitate the expedited appeal process envisioned for School Board decisions. See RCW 28A.645.030 ("... Such appeal shall be heard expeditiously."). While the legislature did not impose a specific deadline within which courts had to hear and decide an appeal, the legislature did specifically and authoritatively determine the School Board has to file a record in twenty days so that the court could decide an appeal expeditiously.

In this appeal, the first record the District filed was not intended by Ms. Ferguson (the person who certified the documents) to include that evidence, papers, and exhibits that were submitted to the School Board by the public during its deliberative process. What Ms. Ferguson filed with the Court was in all practical respects an edited, one-sided group of approximately 2,000 documents which she had compiled to reflect her own interests in the decision-making outcome. ***This more than 2,000 page record did not contain a single document submitted by the public or any public criticism of the School Board's proposed decision-making.***

Parents contend this original record was put together so as to require the Superior Court to "rubber stamp" the School Board's decisions based on the one sided evidence before it. Two hundred thirty-nine days later, pursuant to a decision of the Superior Court, the District supplemented the record with over 10,000 more documents. Then, on December 10, 2009, the District, without the approval of the Superior Court filed approximately 400 more documents with the Court. ***RCW 28A.645.020 mandated a complete and certified record be filed on March 23, 2009.***

The Superior Court had no discretion to allow the School Board to simply violate the 20 day deadline set forth in this appeal statute. Wash. Const. art IV, § 6. *See also Humphrey Industries, Ltd.*, 242 P.3d at 851 - 853; *Conom v. Snohomish County*, 144 Wn.2d 154, 157, 118 P.3d 344 (2005); *Crosby v. County of Spokane*, 137 Wn.2d 296, 301, 976 P.2d 32 (1999). The evidence before this Court demonstrates the School Board did not attempt to substantially comply with RCW 28A.645.020 because it had no system in place for keeping an administrative record and originally submitted a "one-sided" edited group of documents that it knew was not a complete administrative record. *City of Seattle v. Pub. Employment Relations Comm'n (PERC)*, 116 Wn.2d 923, 928, 809 P.2d 1371 (1991) (Substantial compliance requires "actual compliance in respect to the

substance essential to every reasonable objective of [a] statute."). RCW 28A.645.020 required a complete and properly certified record to be filed within 20 days of the filing of Parents' complaint. Parents were prejudiced in their preparation and litigation of an expeditious appeal by the District's twenty fold delay in providing thousands of documents that were never certified to be a correct transcript of evidence. CP 345:14-349:3. *Cf. Magana v Hyundai Motor Company*, 167 Wn.2d 570, 590, 220 P.3d 191 (2009) (failure to provide access to facts necessary to prepare for trial constitutes prejudice sufficient to sustain default judgment).

D. The School Board has not substantially complied with the second sentence of RCW 28A.645.020 which states "[s]uch filing shall be certified to be correct".

The District also refused to comply with the second requirement of RCW 28A.645.020 that "[s]uch filings shall be certified to be correct". CP 635, 641. The Supreme Court Commissioner found that the second sentence of RCW 28A.645.020 is a certification requirement that the legislature wrote into the statute. *See, e.g.*, CP 973 ("While the school board must also certify under the statute that the record is correct, petitioners read too much into this certification by suggesting that it somehow requires the school district to contemporaneously maintain a discreet record..."); *see also* CP 977 (same); CP 983-984 (same).

Many statutes contain a similar requirement. Examples include: RCW 42.44.100 (5) Short forms of [notary] certificate; RCW 30.22.245 (Records — Admission as evidence — Certificate); RCW 70.58.107 (Fees charged by department and local registrars.); RCW 29A.72.110 (Petitions to legislature — Form.); RCW 60.42.010 (g) (Commercial real estate broker lien act); RCW 11.92.096 (1) (a) (Guardian access to certain held assets.); RCW 11.42.030 (Notice to creditors — Form.); RCW 58.17.165 (Certificate giving description and statement of owners must accompany final plat — Dedication, certificate requirements if plat contains — Waiver); RCW 9A.72.085: (Unsworn statements, certification).

Just as “substantial compliance with a statutory deadline, ... is impossible-one either complies with it or not” the same is also true with regard to the mandate “[s]uch filings shall be certified to be correct”. The School Board either complies with RCW 28A.645.020 by certifying its filings “to be correct” or it does not certify them “to be correct”. There is no middle ground. *Humphrey Industries, Ltd.*, 242 P.3d at 851 - 853.

If all the documents the District compiled almost a year after the January 29, 2009 school closure decisions constitute a “correct” administrative record, the School Board must certify this fact. Because the School Board has refused on several occasions to certify its filings to

be correct, it has not substantially complied with RCW 28A.645.020. *Davis v. Gibbs*, 39 Wn.2d 481, 485, 236 P.2d 545 (1951) (“[B]efore there can be substantial compliance, there must be some attempt to comply with the statute.”) “[N]oncompliance with a statutory mandate is not substantial compliance.” *Crosby*, 137 Wn.2d at 392.

E. The Separation of Powers Doctrine prevented the Superior Court from using judicial power to sanction the School Board's failure to substantially comply with RCW 28A.645.020.

It is axiomatic that if the School Board did not substantially comply with RCW 28A.645.020 there was not an adequate record before the Superior Court upon which to decide an appeal. Wash. Const. art. IV, § 6.⁶ *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990) (When hearing appeals all statutory procedural requirements must be met before the Superior Court's appellate jurisdiction is properly invoked.).

⁶ Article IV, § 6 of the Washington Constitution grants the superior court original jurisdiction and appellate jurisdiction. With regard to appellate jurisdiction the Constitution provides:

“They [superior courts] shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law.”

Jurisdictional requirements of appeal statutes must be strictly complied with. *Haynes v. Seattle School District*, 111 Wn.2d 250, 254, 758 P. 2d 7 (1988). Procedural requirements necessary to fulfill the purposes of appeal statutes must be substantially complied with. *Conom*, 155 Wn.2d at 157; *Keep Watson Cutoff Rural v. Kittitas County*, 184 P.3d 1278, 145 Wn. App. 31 (2008).⁷

It is Parents' position that the administrative record requirements set forth in RCW 28A.645.020 were intended to be jurisdictional given that all judicial power is delegated to the judiciary, Wash. Const. art IV, § 1, and our judicial system requires a record upon which an appeal must be decided. *Neah Bay Chamber of Commerce v. Department of Fisheries*, 119 Wn.2d 464, 474, 832 P.2d 1310 (1992); *Loveless v Yantis*, 82 Wn.2d 754, 762 - 763 (1973). *See also Board of Regents of University of Washington v. City of Seattle*, 108 Wn.2d 545, 556, 741 P.2d 11 (1987) (Whether [the] ordinance ... is quasi-judicial or legislative in nature, we are unable to review it absent a record of the City's proceedings.). *See also*, Commissioner's rulings, CP 973, 977 and CP 983-984.

⁷ In *Conom* the Supreme Court reasoned that LUPA's 7-day preliminary filing requirement did not require substantial compliance because it was not essential to the fulfillment of the statute's objectives. That rationale does not apply to the administrative record requirements imposed by .020 as the record is an essential aspect of any appeal brought pursuant to RCW Chapter 28A.645.

The Superior Court violated the separation of powers doctrine by hearing an appeal based on an administrative record that did not comply with RCW 28A.645.020.

The Separation of Powers doctrine is incorporated into the Washington Constitution. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). "[T]he drafting of a statute is a legislative, not a judicial, function." *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999)). The fundamental function of the judicial branch is to interpret the law and perform judicial review pursuant to Article IV of the Washington Constitution. *Hale*, 165 Wn.2d at 505.⁸

The legislature enacted RCW Chapter 28A.645 setting forth the procedure for appealing a School Board decision. RCW 28A.645.010 requires appellants to file a notice of appeal within 30 days after the decision being appealed is made. RCW 28A.645.020 requires (1.) that the

⁸ School districts are not a branch of government. Rather they are municipal or quasi-municipal corporations. *Noe v. Edmonds Sch. Dist. No. 15*, 83 Wn.2d 97, 103, 515 P.2d 977 (1973). A School Board can exercise only such powers as the Legislature has granted in express words, or those "necessarily or fairly implied in or incident to the powers expressly granted, and also those essential to the declared objects and purposes of the corporation." *Municipality of Metro. Seattle v. Division 587, Amalgamated Transit Union*, 118 Wn.2d 639, 643, 826 P.2d 167 (1992).

District file a complete administrative record within 20 days after a complaint is filed; and (2.) that such filing be certified to be correct. The Superior Court did not have the authority to re-write RCW 28A.645.020 simply because the School Board asked it to. Under the separation of powers doctrine courts do not have and cannot be given legislative or administrative power. *Household Finance Corp. v. Washington*, 40 Wn.2d 451, 455 – 8, 244 P.2d 260 (1952); *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wn. 1, 5 – 7, 267 P. 770 (1928).

The Superior Court had a duty to follow the plain language of RCW 28A.645.020 and require the School Board to file a properly certified administrative record within twenty days. *See State Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9 - 10, 43 P.3d 4 (2002) ("If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."). The Superior Court did not have authority to contravene a constitutional statute setting forth the limits of its appellate jurisdiction. Wash. Const., Art. IV, § 6. Especially is this so with regard to statutes which are enacted pursuant to the legislature's duty under Art. IX, § 2 of the Washington Constitution to enact statutes providing for a "general and uniform system of public schools". *See, e.g., Brown v. State*, 155 Wn.2d 254, 261 - 262, 119 P.3d 341 (2005), where a unanimous Court stated:

This court will not micromanage education and will give great deference to the acts of the legislature. *See Seattle Sch. Dist.*, 90 Wn.2d at 518-19, 585 P.2d 71. However, it is uniquely within the province of this court to interpret this state's constitution and laws. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

Certainly, one can understand why Superior Court judges might not want to overrule local School Board decisions. *Andersen v. King County*, 138 P.3d 963, 992 (2006) (Johnson concurring). But the judiciary's duty is to abide by the will of the legislature as expressed by statute unless the statute is unconstitutional. *Id.* at 968. The cost of King County Superior Court judges routinely not applying laws to the Seattle School Board is that the School Board will ignore or refuse to comply with statutes. *See Auditor Report, CP 171:19 - 22; 184* ("The School Board and District management have not implemented sufficient policies and controls to ensure the District complies with state laws, its own policies, or addresses concerns of prior audits.").

F. Wash. Const. Art. I, § 10 affords Parents the right to litigate an appeal based on a record that complies with RCW 28A.645.020.

Parents contend Wash. Const. Art. I, § 10 affords them the right to litigate an appeal based on a record that complies with RCW 28A.645.020. In this regard, this appeal involves many of the same issues as were involved in *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782, 819 P.2d

370(1991). In *Doe* the Supreme Court observed that the right to access to the courts is created by statutes like RCW 28A.645.020, which establish that evidence which a court must judicially review. In this regard, the Supreme Court stated:

The right of access is necessarily accompanied by those rights accorded litigants by statute, court rule or the inherent powers of the court, for example, service of process, RCW 4.28, or statutes of limitation. RCW 4.16 may be in aid of or limitation of a particular cause of action. The merits of a particular action may depend upon statute. e.g., RCW 4.24. The recognition of a particular cause of action may depend upon judicial decisions. *E.g.*, *Merrick v. Sutterlin*, 93 Wn.2d 411, 610 P.2d 891 (1980) (no parental immunity when child injured as result of negligent driving by parent); *Jenkins v. Snohomish Cy. PUD 1*, 105 Wn.2d 99, 713 P.2d 79 (1986) (parental immunity applies where injury results from negligent parental supervision of child).

These statutes and cases are cited to illustrate that access does not carry with it any guaranty of success, but also to demonstrate that access must be exercised within the broader framework of the law as expressed in statutes, cases, and court rules.

Under the reasoning set forth in *Doe* regarding the right of access to evidence under the discovery rules, RCW 28A.645.020 provided Parents with the right to litigate an expeditious appeal based on a timely filed record that the District certifies to be “correct” and which therefore presumably is “correct”. Access to a “correct” transcript of evidence in an appeal is the equivalent of access to that evidence which can be garnered through the rules of discovery. *Doe* stands for the proposition that access

to those facts necessary to prosecute a judicial action is a right guaranteed to litigants pursuant to Wash. Const. art. I, § 10.

The Superior Court's error was prejudicial because Appellants were unconstitutionally required to prepare for an appeal based on an untimely record the District refused to certify as "correct" and because their attorney refused to participate in such illegal appeal proceedings. *See Magana*, 167 Wn.2d at 590 (failure to provide access to facts necessary to prepare for trial constitutes prejudice sufficient to sustain default judgment.). *See also* CP 343-349.

G. The School Board's refusal to comply with RCW 28A.645.020 requires the Board's school closure decisions to be vacated.

In this appeal before the Superior Court the School Board refused to submit a timely record which was certified "to be correct" and Scott Stafne, the attorney for the Parents, refused to participate in briefing the merits of the appeal because the administrative record did not comply with RCW 28A.645.020.

What should be done?

We know if appellants had missed the filing deadline set forth in RCW 28A.645.010, their appeal would have been dismissed because the legislature has made the timely filing of an appeal a predicate to the Court's authority to decide an appeal. *Haynes*, 111 Wn.2d at 254. But

what happens if a court loses the ability and authority to decide an expeditious appeal because a School Board intentionally refuses to comply with the administrative record requirements established by the legislature? The cases cited by the Commissioner at the bottom of CP 972 provide the answer.

In *Neah Bay Chamber of Commerce v. Dept. of Fisheries*, supra, the Supreme Court refused to decide whether an administrative agency acted arbitrarily and capriciously in the absence of an adequate administrative record supporting an agency's decision-making. In that case, which involved much less egregious facts than those involved here, the Supreme Court invalidated the agency's legislative decision and remanded the issue back to the decision-maker to create an adequate record. In doing so, the Supreme Court stated:

“Although it is impossible to tell without the administrative record whether or not the procedures of the APA were followed in this case, neither party suggests that they were not, and the trial court did not consider the issue. We note, however, that lack of a rulemaking file may itself constitute a sufficient reason to invalidate a regulation. RCW 34.05.375.

In accordance with the foregoing, we reverse the trial court and remand for reconsideration. " *Neah Bay*, 119 Wn.2d at 476 - 477.

The issue of an inadequate record also arose in *Loveless v. Yantis*, 82 Wn.2d 754. The Supreme Court held that, where the failure to provide an

adequate record prevented meaningful judicial review, municipal decision-making must be vacated. *Id.* at 762 - 763. In *Loveless* the Supreme Court stated:

"The essence of the trial court's ruling was that the commissioners' decision was arbitrary and capricious. We find it impossible to intelligently review the commissioners' decision because of an incomplete and inadequate record.

Courts reviewing the proceedings of planning commissions and county commissioners in zoning cases are normally restricted to a consideration of the record made before those groups. *Bishop v. Houghton*, 69 Wn.2d 786, 520 P.2d 368 (1966); RCW 58.17.100. Incomplete records make appellate review impossible and where a 'full and complete transcript of the records and proceedings had in said cause' is ordered by the superior court and cannot be furnished, *the actions of those boards have been vacated*. *Beach v. Board of Adjustment*, 73 Wn.2d 343, 438 P.2d 617 (1968). Such is the case here." [Emphasis Supplied].

Under the above authority the Superior Court erred when it did not vacate the District's rule making decisions pursuant to Parents original motion for summary judgment which found the record was inadequate for judicial review on November 3, 2009. CP 279; 389-382. The Superior Court also erred when it failed to vacate the School Board's decisions because no one with the School Board or District ever certified the administrative record to be correct"

H. All Parents had standing to challenge the District's failure to comply with RCW 28A.335.020 and 28A.645.020.

In response to Parents' original motions for summary judgment, the District argued Parents had no "standing" to challenge the District's procedures pursuant to RCW 28A.335.020 and 28A.645.020. Parents disagreed and the Superior Court did not find Parents were without standing to raise the issue as to whether the School Board had violated in an arbitrary or capricious manner or was in violation of the law by not properly following the statutory requirements.

Washington courts have established a two-part test for determining whether a party has standing to bring a particular action. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004); *1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 576 n.3, 29 P.3d 1249 (2001). First, it must be determined whether the interest asserted is arguably within the zone of interests to be protected by a statute. *Grant County*, 150 Wn.2d at 802. Second, the courts look to determine whether the party seeking standing has suffered injury in fact. The District's original objections to standing did not address either test with regard to Parents' complaints about the District's school closure process not complying with RCW 28A.645.020 and 28A.335.020.

The injury-in-fact requirement is satisfied where an agency refuses to provide a procedure required by a statute despite the fact that "any injury to substantive rights attributable to failure to provide a procedure is both indirect and speculative". *Seattle Bldg. & Const. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 794 - 795, 920 P.2d 581 (1996), *cert. denied*,

520 U.S. 1210 (1997). “The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” *Id.*

The “zone of interest” test focuses on whether the Legislature intended the agency to protect the party's interests when taking the action regulated by the statute. *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 739 – 740, 887 P.2d 891 (1995). Here, there can be no doubt that Parents of children attending Seattle public schools are clearly within the zone of interest the legislature sought to protect by requiring the District to “receive testimony from the public on *any issues related to the closure of any school* for instructional purposes” and hold a separate hearing for each school that may be closed, RCW 28A.335.020, and to create a "correct" and "complete" record for purposes of judicial review.

If, as Parents contend, the School Board has not complied with RCW 28A.645.020 the School Board has acted illegally and in an arbitrary and capricious manner. This required vacation of the school closure decisions and remand back to the board. Following remand the Superior Court had no authority to enter a judgment dismissing any of Parents' appeals for lack of standing.

I. The Superior Court erred in failing to admit the Auditor's Report during the summary judgment proceedings.

RCW 43.09.180 provides:

The state auditor shall keep a seal of office for the identification of all papers, writings, and documents required by law to be certified by him or her, and copies authenticated and certified of all papers and documents lawfully deposited in his or her office shall be received in evidence with the same effect as the originals.

The District objected to Stafne's inclusion of the Auditor's Report as a basis for his refusal to participate in the merits proceedings relating to the appeal. CP 1100:19-1102:10. The District argued that public documents containing "conclusions involving the exercise of judgment or discretion of the expression of opinion" constitute hearsay and are not admissible. CP 1101.

But Stafne's reliance of the Auditor's Report was based, among other things, on the admissions of the School Board and District against their own interests. For example, the Auditor Report states as fact:

"The Seattle School District did not comply with state law on recording meeting minutes and making them available to the public.

Description of Condition

* * *

We determined the Board did not record minutes at retreats and workshops in the 2008 - 2009 school year. These retreats and workshops were held to discuss ... school closures...." CP 908

Cause of Condition

District personnel stated they were not aware that retreats and workshops constituted a regular or special meeting and did not keep minutes.

Effect of Condition

When minutes of special meetings are not promptly recorded, information on Board discussions is not made available to the public.

Recommendation

We recommend the District establish procedures to ensure that meeting minutes are promptly recorded and made available to the public.

District's Response

The District concurs with the finding and the requirement under the OPMA that any meeting of a quorum of the board members to discuss district business is to be treated as a special or regular meeting for the purposes of the OPMA."

The District's Response was not that such meetings regarding school closures did not occur. The District's response was an admission against interest:

"The District concurs with the finding and the requirement under the OPMA that any meeting of a quorum of the board members to discuss district business is to be treated as a special or regular meeting for the purposes of the OPMA." CP 908

This admission against interest by the School District and School Board was not hearsay⁹ and provided evidence for Stafne's refusal to

⁹ **(b) Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that

participate in an appeal based on a record the District refused to certify to be correct and which could not be certified to be correct because the School Board held several meetings secretly and illegally where it discussed school closures.

As the Auditor's Report tended to prove Parents' complaints regarding the filings compliance with RCW 28A.645.020 and the merits of Stafne's contention that any appeal proceedings based on a record that did not comply with RCW 28A.645.020 would be illegal, the Auditor's Report should not have been excluded as evidence.

VI. CONCLUSION

This Court should issue an order which concludes the District did not comply with RCW 28A.645.020; did not file an administrative record that could serve as a basis for judicial review under the separation of powers; did not provide an administrative record sufficient to allow Parents access to the Courts as guaranteed by Const. Art. 1, § 10; and which as a result constituted arbitrary and/or capricious decision-making

a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

which requires vacation of the January 29, 2009 School Board's school closure decisions.

Dated this 18th day of February, 2011.

Respectfully Submitted,

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No. 66312-7-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

GLORIA BRIGGS, et. al.,
Appellants

vs.

SEATTLE SCHOOL DISTRICT NO. 1

Respondent/Appellee

APPEAL FROM SUPERIOR COURT
FOR KING COUNTY

DECLARATION OF SERVICE

I, Jennifer Robinson, declare under the penalty of perjury that I served a copy of Appellant's Opening Brief on appellee's attorney by depositing a copy of these document with the U.S. Postal Service addressed to Shannon M. McMinimee and Mark F. O'Donnell, Preg O'Donnell & Gillett PLLC, 1800 Ninth Avenue, Suite 1500, Seattle, Washington 98101-1340.

Dated: February 18, 2011, at Arlington, Washington.


Jennifer Robinson

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