

No. 36294-5-II

COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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DIVISION II  
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STATE OF WASHINGTON  
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SCHOOL DISTRICTS' ALLIANCE FOR ADEQUATE FUNDING OF SPECIAL EDUCATION; BELLINGHAM SCHOOL DISTRICT NO. 501; BETHEL SCHOOL DISTRICT NO. 403; BURLINGTON-EDISON SCHOOL DISTRICT NO. 100; EVERETT SCHOOL DISTRICT NO. 2; FEDERAL WAY SCHOOL DISTRICT NO. 210; ISSAQUAH SCHOOL DISTRICT NO. 411; LAKE WASHINGTON SCHOOL DISTRICT NO. 414; MERCER ISLAND SCHOOL DISTRICT NO. 400; NORTSHORE SCHOOL DISTRICT NO. 417; PUYALLUP SCHOOL DISTRICT NO. 3; RIVERSIDE SCHOOL DISTRICT NO. 416; and SPOKANE SCHOOL DISTRICT NO. 81,

Appellants,

v.

THE STATE OF WASHINGTON; CHRISTINE GREGOIRE, in her capacity as Governor of the State of Washington; TERRY BERGESON, in her capacity as Superintendent of Public Instruction; BRAD OWEN, in his capacity as President of the Senate; and FRANK CHOPP, in his capacity as Speaker of the House of Representatives,

Respondents.

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REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

The trial court found that all students who receive special education services, or specially designed instruction (“SDI”), are basic education students first, and basic education students all day long. FF 12(d). The trial court also found that the basic education allocation (BEA) is the average cost to provide a basic education to these students (FF 4), and that the Legislature separately funds the excess cost of their special education. FF 5; RCW 28A.150.390. In its opening brief, the Alliance showed that these Findings cannot be reconciled with the trial court’s Conclusion that there is left-over BEA available to school districts to pay for special education. Appellants’ Brief (“App. Brief”), pp. 31-32. Under the law, the average cost BEA pays for basic education. RCW 28A.150.220 and .250. The State does not provide extra BEA for districts to use to pay for the excess cost of students’ special education.

In its brief (“Resp. Brief”), the State does not address the conclusive impact of these Findings on the trial court’s decision. Instead, the State simply calculates the amount of BEA it provides for students receiving SDI. Resp. Brief, pp. 17-18; Appendix B. These calculations do not change FF 4. Because the BEA is not greater than the average cost of basic education, there is nothing left over to pay for the excess cost of special education. The excess cost allocation in RCW 28A.150.390 is

supposed to pay for the cost of special education over and above the cost of each student's basic education. It does not.

The State funds the average per student cost of special education with the "0.9309 x BEA" formula. FF 5. The Alliance proved the total amount of annual underfunding for special education resulting from this formula. App. Brief, pp. 25-29. The Alliance also proved the reason the "0.9309 x BEA" formula leaves so much of special education unfunded. *Id.* The trial court's FF 10 and FF 11, as illuminated by the 2002 President's Commission Report (Ex. 706, p. 0035) and the K-12 finance report for the recent 2006 Washington Learns study (Ex. 68, p. 50), show that the cost of special education today is 90 percent of basic education expenditures, or the annual average per-pupil expenditures (APPE). The State admits the BEA is much less than annual average expenditures. Ex. 61. Nevertheless, since 1995, the State has funded special education by multiplying 0.9309 by the BEA rather than APPE. The difference has an enormous impact on special education funding. App. Brief, pp. 37-39, fn 12. The trial court, however, erroneously concluded that the BEA is the same as basic education expenditures. CL 19. There are no Findings and no evidence to support this.

The State has admitted that it is aware of no facts, research, data, or other evidence to support using its "0.9309 x BEA" funding formula

today. CP 1433-35; 1306 (p. 18, ll. 1-9). The State cannot continue to reenact the same “0.9309 x BEA” formula, relying upon an out-of-date 1995 study (Ex. 92), when the current research shows that the formula produces insufficient funds. The biennial funding formula, e.g., Laws of 2005, Chapter 518, § 507 (“Section 507”), does not meet the State’s “paramount duty” under Article IX § 1 “to make ample provision for the education of all children.” The trial court’s Findings do not support its Conclusions of Law. Under *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999), this Court should reverse.

## II. ARGUMENT

### A. Neither the Law Nor the Trial Court’s Findings Support its Decision.

The Legislature defines the goals of basic education in RCW 28A.150.210. It deems these goals met when a district implements the basic education program set out at RCW 28A.150.220. The Legislature appropriates the BEA “to fund those program requirements identified in RCW 28A.150.220.” RCW 28A.150.250. It does not fund the Chapter 28A.155 RCW special education program with the BEA. RCW 28A.150.250 and .260. Instead, as the trial court found, the Legislature

separately funds the excess cost<sup>1</sup> of students' special education with the RCW 28A.150.390 special education allocation. FF 5; Section 507(1).

Consistent with its appropriation of the BEA to pay for basic education, the Legislature bases the BEA on the average cost to provide a basic education to the average student. FF 4. Every student who receives SDI is a basic education student first, and for the entire day. FF 12(d); Section 507(2)(a)(i) and (iii). The BEA is not the above-average cost of basic education; the State does not provide extra BEA for districts to use to pay for the excess cost of students' special education.

Rather than address the conclusive import of the trial court's findings, the State appears to argue that districts must first spend their BEA on special education. Resp. Brief, p. 37. In support of this erroneous legal proposition, the State cites Section 507(1):

Funding for special education programs is provided on an excess cost basis, pursuant to RCW 28A.150.390. School districts shall ensure that special education students as a class receive their full share of the general apportionment<sup>2</sup> allocation accruing through sections 502 and 504 of this act. To the extent a school district cannot provide an appropriate education for special education students under chapter 28A.155 RCW through the general apportionment allocation, it shall provide services through the special

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<sup>1</sup> ““Excess costs’ are those expenditures for special education and related services for special education students that exceed the amount needed to provide a basic education to those students.” Ex 4, p. 825; Ex. 3, p. 219.

<sup>2</sup> The Legislature uses “general apportionment” and BEA interchangeably. *E.g.*, Section 504(1)(a).

education excess cost allocation funded in this section.

(emphasis added). The State misreads the law. The phrase, “under Chapter 28A.155 RCW” modifies “special education students,” its last antecedent, and not “appropriate education.” *In re Smith*, 139 Wn.2d 199, 204, 986 P.2d 131 (1999) (“unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent”) (emphasis omitted). “Appropriate education” means the education the Constitution requires; it does not mean only special education under Chapter 28A.155 RCW, or special education paid for with a student’s BEA. Section 507(1) implements excess cost funding. This law declares what the excess cost allocation is in excess of: To the extent districts cannot provide a constitutionally appropriate education for disabled students with the BEA alone, districts must use the supplemental allocation, in excess of the BEA dedicated to the students’ basic education, that the Legislature provides for special education services.<sup>3</sup> The State’s construction of Section 507(1) would require the Court to ignore RCW 28A.150.250 and its appropriation of the BEA for the basic education program set out in RCW 28A.150.220.

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<sup>3</sup> RCW 28A.150.390 similarly explains what revenues the excess cost allocation is in excess of, rather than compels districts to spend their BEA and other federal, state, and local funds on special education first.

The Legislature created a Safety Net, a second tier of funding, for those districts that the “0.9309 x BEA” formula underfunds. FF 15. The Safety Net system further confirms the error in the State’s analysis. If the State’s argument were correct, then districts could use their BEA to fund not only the special education shortfall, but also all of their extraordinarily high-cost students. The State does not need annually to award \$20-30 million in Safety Net funds (Ex. 588) if districts should first be using \$200-300 million in BEA to pay for their extraordinarily high-cost students. Resp. Brief, pp. 17-18 and Appendix B. This Court should avoid interpretations of law and fact that render the Legislature’s acts unnecessary. *Aviation West Corp. v. Washington State Department of Labor and Industries*, 138 Wn.2d 413, 421, 980 P.2d 701 (1999). The State’s BEA calculations, if they truly present the amount of additional money available to districts to pay for special education, would render the Legislature’s biennial enactment of the Section 507(8) Safety Net superfluous. The trial court’s FF 15, that the Safety Net is for districts that the “0.9309 x BEA” formula underfunds, cannot support a decision that leaves Safety Net with no purpose.

The trial court did not find that districts fail to provide a basic education to students who also receive SDI; that districts misuse those students’ BEA for some purpose other than their basic education; or that

districts fail to use all of their students' BEA to provide them a basic education. Findings of Fact 29-33 reflect the proper accounting for the BEA under the 1077 method: students receiving SDI receive their "appropriate share" of basic education support when in the basic education classroom, and the balance of their BEA follows them to pay for services in the special education classroom. Because special education teachers do two things – deliver SDI while teaching the basic education curriculum – the 1077 method charges them to special education and basic education (that is, their salaries are paid for with both BEA and the Section 507(5) excess cost allocation<sup>4</sup>). The Alliance proved this with testimony (*e.g.* RP 411; 427-28; 661-62; 694-95; 2868) and other evidence. *E.g.*, Ex. 4, p. 825, Ex. 32, p. 28; Ex. 31, p. 178. The trial court's FF 29-33 directly support the Alliance's claim that districts have accounted for their students' BEA precisely as the State directs. App. Brief, pp. 32-35.

The trial court erred when it concluded that "[p]laintiffs have not accounted for all the revenue available to pay the cost of educating special education students. ... [P]laintiffs did not include the BEA..." CP 322,

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<sup>4</sup> The trial court's Finding that the 1077 method allocates costs, not revenues (FF 31; CP 323), is facially true but unimportant. The F-196 operates on double-entry bookkeeping where expenditures and revenues must balance. Ex 3, p. 121. Charging some of the cost of students' special education teachers to basic education through the 1077 method has the same net effect as the corresponding allocation of their BEA to pay for the same expenditures.

lines 10-13. The average-cost BEA pays for students' basic education. FF 4; RCW 28A.150.220 and .250. All students receiving SDI receive a basic education first, and receive that basic education all day long. FF 12(d); Section 507(1). The Legislature separately provides for the excess cost of their special education services over and above the cost of their basic education. FF 5; RCW 28A.150.390; Section 507(1). The Legislature does not provide extra BEA to pay for students' special education.

The trial court's FF 4, FF5, FF 12(d), FF 15, and FF 29-33 do not support its conclusion that the Alliance failed to account for basic education revenue available to students receiving SDI. Where the court's findings do not support its conclusions, the reviewing court must reverse. *Landmark Development*, 138 Wn.2d at 573.

**B. The 2005-06 Demonstration of Need Reflects Formula Underfunding that the Safety Net Cannot Remedy.**

The State all but concedes the Alliance's first issue on appeal, that any special education funding formula that provides an average cost per student must have a second tier of funding available and that the trial court's CL 15-16 were, therefore, error. Resp. Brief, p. 36 and fn 19. The trial court was obliged to review whether Safety Net meets the State's Article IX obligation. Instead, the trial court relied upon the same flawed

reasoning addressed above: Districts can use their BEA to make up the shortfall. CP 333, lines 2-5, citing CP 322-25. This decision was error.

To prove eligibility for Safety Net funding, districts must prove total “demonstration of need” on Worksheet A. But districts may only secure funding for their extraordinarily high-cost students whose cost of service exceeds \$14,902 as shown on Worksheet C. App. Brief, pp. 14-18. The State offers no cogent response to the fact that, in 2005-06, Safety Net applicant districts proved \$147 million in collective demonstration of need, only a small portion of which was due to extraordinarily high-cost students (App. Brief, pp. 25-28). The State first asserts that districts have not studied whether the problem arises from “medium cost” students. Resp. Brief, p. 38. Regardless of the shorthand phrase used, the evidence showed the State’s average excess cost allocation is well below the actual average excess cost. That is why there was a \$112 million gap in 2005-06 between the demonstration of need shown on the State’s own Worksheet A form, and the excess cost of districts’ extraordinarily high-cost students. App. Brief, 17-18, 25-28.

The State contends that Worksheet A is only half of the Safety Net process. Resp. Brief, pp. 18-20, 39. But the other half, Worksheet C’s extraordinarily high-cost student application, by definition cannot remedy the fact that the formula underfunds the students below the \$14,902

threshold of extraordinary high cost. Exhibits 111 and 111a and the testimony from four district representatives (App. Brief, pp. 26-27) showed this.

The State claims that the Alliance “mischaracterizes” Worksheet A as proof of “demonstration of need.” Resp. Brief, p. 19. This is precisely what the regulations call it. *E.g.*, WAC 392-140-626(7). Regardless, there is no difference between “maximum funding eligibility” and “demonstration of need”; both are the amount that the “0.9309 x BEA” formula underfunds districts. Further, the State’s assertion that demonstration of need does not create an entitlement to funding begs the question. If the system denies districts the opportunity even to apply for their maximum funding eligibility, it is unconstitutional.

The State’s argument that Worksheet C’s \$14,902 threshold includes the BEA (Resp. Brief, pp. 18-20) is neither accurate nor meaningful. The State calculates the threshold as 2.1 x APPE, not by some accounting for the BEA. WAC 392-140-616(2)(b)(ii) and -60105; Ex. 60, p. 1769. The State does not ask districts to demonstrate they spent BEA on special education services when completing the Worksheet C extraordinarily high-cost student application. Ex. 60, pp. 1785-90. In any event, undisputed evidence showed that typical extraordinarily high-cost students spend their entire day in a special education pullout room where

they receive, in addition to their SDI, all of their basic education. RP 1462-63. Thus, all of their BEA follows them to pay for services there.

The State had no response at trial and has none on appeal to this crucial fact: in 2005-06, the State Safety Net Oversight Committee reviewed, adjusted, and then approved the districts' calculation of demonstration of need. Allen Jones, a former Committee member, described the process and how the Committee reviewed and adjusted the demonstration of need for his district. RP 953-54; 993-94. Alliance witnesses confirmed that the Committee reviewed and adjusted the 2005-06 demonstration of need for their districts. RP 381-82; 674-76. By law, the Committee may approve only legitimate special education expenditures; it must deduct from the allowed total all available revenues from state funding formulas:

The committee shall consider unmet needs for districts that can convincingly demonstrate that all legitimate expenditures for special education exceed all available revenues from state funding formulas. ... Differences in program costs attributable to district philosophy, service delivery choice, or accounting practices are not a legitimate basis for safety net awards.

Section 507(8). Districts certify their Safety Net applications, including that they are providing services efficiently. WAC 392-140-605(1). The Committee may demand supplemental information from districts “designed to assist the state oversight committee in analyzing the

application.” WAC 392-140-605(2). If it still has concerns, the Committee may order an audit. WAC 392-140-630. These audits include a review of whether IEPs are properly formulated. Ex. 60, p. 1771. Witnesses testified about these audits from 2006. RP 1279-81.

The State’s other disputed evidence (*see* section 4 below) does not address school year 2005-06. Dr. Gill’s analysis ended with the 2004-05 school year. Ex. 722. Dr. Reschley (Ex. 529) only reviewed student files from 2001-02 to 2004-05. RP 1857. The reports at Exhibits 530 and 531 covered school years only through 2004-05. RP 2485. Exhibit 511a, an even earlier study, reviewed student files for the years 2000-01 to 2002-03. Ex. 511a, at p. 1. Exhibit 520 likewise relied on data from 2004 and before. Ex. 520, pp. 3652-54. There was no evidence that the \$147 million in demonstrated need for school year 2005-06 is anything other than what it is: the total of Committee-reviewed and Committee-approved formula underfunding.

The Alliance agrees that Article IX does not compel the State to fund whatever districts spend. The purpose of the review that the State Safety Net Oversight Committee performs is to ensure that the Legislature’s concerns about efficient service delivery and program accountability are met. As the evidence showed, districts convincingly demonstrated to the State Safety Net Oversight Committee \$147 million in

formula underfunding (“legitimate expenditures ... exceed all available revenues”). The Safety Net’s extraordinarily high-cost student limitation denies districts the opportunity even to apply for \$112 million of that underfunding.

The State does not give districts extra BEA to make up for the shortfall in special education funding that the 2005-06 demonstration of need proved. The trial court’s decision (CP 322-25) was error. The Alliance presented an overwhelming case of both total formula underfunding and a Safety Net that is structurally incapable of fully remedying the problem. Districts are spending their local excess levy money to pay for the State’s constitutional obligation contrary to *Seattle School District No. 1 v. State of Washington*, 90 Wn.2d 476, 585 P.2d 71 (1978).

**C. No Evidence Supports the State’s Use of the “0.9309 x BEA” Formula Today.**

The trial court found that the excess cost of special education today is 90 percent of basic education expenditures. FF 10 and FF 11.<sup>5</sup> The evidence supports these Findings and the State has not challenged them. The President’s 2002 Commission on Special Education confirmed that

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<sup>5</sup> FF 10 (total cost of basic and special education) and FF 11 (excess cost of special education) refer to the same facts. CP 320-21. They can be harmonized only if their use of the words “cost” and “expenditures” mean the same thing.

the best estimate of the excess cost of special education is 90 percent of annual average per-pupil expenditures (APPE) for basic education. Ex. 706, p. -0035. The results of the K-12 finance study for Washington Learns, the State's 2006 study of education funding, are identical: according to the recent research, the excess cost of special education is 90 percent of what is spent on basic education. Ex. 68, p. 50.

By contrast, no substantial evidence supports the trial court's decision to equate the BEA with basic education expenditures. CL 19. The State admitted that districts' basic education expenditures are far greater than what the State provides in the BEA. Ex. 61 (*see* App. Brief, pp. 37-39, and fn 12). Exhibit 61 was the only evidence presented on this point. This Court reviews *de novo* findings and conclusions based on documents and undisputed facts. *Jenkins v. Snohomish County PUD*, 105 Wn.2d 99, 102, 713 P.2d 79 (1986) (where "the trial court makes its determination on documentary evidence ... this court may review *de novo* the trial court's findings") (citations omitted.); *Seattle v. Sheppard*, 93 Wn.2d 861, 867, 613 P.2d 1158 (1980).

The Alliance agrees that the calculations in Exhibit 61 include local funding and non-instructional costs (Resp. Brief, pp. 20-21); that is the point. APPE is calculated using aggregate current expenditures by a local education agency "without regard to the source of funds" (Federal,

State, or local). 34 C.F.R. §300.717(d). Dr. Gill confirmed that the studies defining the cost of special education as a multiple of expenditures (APPE) include both local expenditures and such non-instructional costs as transportation. CP 2270-71; 2350-52. The trial court's FF 10 and FF 11, the President's 2002 Commission on Special Education (Ex. 706, p. - 0035), and the K-12 finance study for Washington Learns (Ex. 68, p. 50) all agree that the excess cost of special education is ninety percent of all basic education expenditures (APPE), not merely the State component of basic education funding (BEA).

The Alliance did not set out to prove that the State underfunds basic education in violation of Article IX. The Alliance did, however, prove by a preponderance of the evidence that APPE is vastly greater than the BEA. That is all it needed to prove, because all of the current research on the excess cost of special education uses a multiple of basic education expenditures (APPE). The trial court erred when it concluded that the BEA was not an issue in the case and that it was the same as basic education expenditures. CL 7 and CL 19.

The trial court relied exclusively upon the 1995 study (Ex. 92) in upholding the current "0.9309 x BEA" formula. FF 9; CP 321. That study and the formula are obsolete. Speaking as the CR 30(b)(6) witness for all defendants, Dr. Gill confirmed that the State is unaware of any

evidence, facts, data, or any research reports that support the current use of the “0.9309 x BEA” funding formula:

Q: So as we sit here today is there any evidence or facts or data, are there any research reports which support the current funding model, the 1.9309 times the assumed cost of basic education as delivering an end product that equals the actual cost of educating a special education student?

A: There may be but I am not the person who could answer that question. I don't know the studies, et cetera, that equated to the basic education number.

CP 1433-35; 1306 (p. 18, ll. 1-9).<sup>6</sup>

The Legislature's recent changes to the funding system also demonstrate why the State's continued use of the old “0.9309 x BEA” formula violates Article IX, § 1. In 2005-06, when the Legislature eliminated Line 25 on Worksheet A and opened Safety Net to actual total formula underfunding (App. Brief, pp. 16-17), it simultaneously doubled the Safety Net extraordinarily high-cost student threshold from \$7,797 to \$14,902. *Compare* Ex. 59, p. 1732 *with* Ex. 60, p. 1769. If, in 2004-05, the “0.9309 x BEA” formula was funding the average cost of special education for all of the students under the \$7,797 threshold, the next year the identical formula could not also fund all of the students with costs

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<sup>6</sup> The testimony of CR 30(b)(6) witnesses, and certainly ones that are unprepared, should bind the parties on whose behalf they speak. *See Casper v. Esteb Enterprises Inc.*, 119 Wn. App. 759, 766-68, 82 P.3d 1223 (2004).

between \$7,797 and \$14,902, too. The State cannot double the cost of students that the formula presumptively funds without changing the formula and proving that the new average cost is, in fact, the new average cost. The State has never tried to explain this. The 1995 study certainly cannot justify it. The truth is that the “0.9309 x BEA” formula is merely an historic budget construct that does not reflect the actual cost of special education.

The issue in this case is whether the State can continue to reenact the same “0.9309 x BEA” formula today, not whether there was a report that justified the formula in 1995. There is no substantial evidence to support the formula today, particularly given evidence that conclusively showed the BEA to be well below APPE. Ex. 61. The trial court’s CL 7, CL 8, CL 9, and CL 19 lack supporting Findings; indeed, the trial court’s FF 10 and FF 11 disprove them. This Court must reverse.

**D. This Court Should Not Affirm Based upon Other Grounds If to do so Requires it to Decide Disputed Evidence.**

The State quotes expert witnesses and cites to other evidence on which the trial court entered no Findings and argues this Court should affirm based on this evidence (Resp. Brief, pp. 23-26, 44-45). Although an appellate court may affirm based upon any ground set out in the pleadings and the record, this does not mean that an appellate court will

weigh disputed evidence or assess the credibility of challenged witnesses where the trial court did not. *Boeing Co. v. Heidi*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002) (“It is the sole province of the trier of fact to pass on the weight and credibility of evidence”). Appellate courts affirm on different legal grounds when the facts are not in dispute. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003) (affirmed on new ground that plaintiff executed note as an accommodation party where “the record discloses that there is no material issue of fact” as to his status); *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984) (though the trial court dismissed insurer’s contribution action based on parental immunity and release, “[o]ur review of the uncontroverted evidence in the record persuades us that the doctrine of equitable estoppel provides the most appropriate ground for affirming the dismissal of this contribution action”); *Gross v. City of Lynnwood*, 90 Wn.2d 395, 396, 583 P.2d 1197 (1978) (court affirmed on different legal theory where “the essential facts [the plaintiff’s age in a discrimination case] are not in dispute”); *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 348, 552 P.2d 184 (1976) (affirmed dismissal of nuisance claim on different theory where supported by “the court’s own findings of fact”). This Court should reject the State’s invitation to weigh disputed testimony and exhibits.

**E. Article IX Demands a Higher Standard of Review Than the Rational Basis Scrutiny The State Proposed and the Trial Court Applied.**

The State asked the trial court to apply rational-basis scrutiny, CP 600-01; the Alliance opposed that request. CP 166-67. The State cannot seriously contend that the trial court rejected its proposal. Resp. Brief, p. 45. Eight times in its opinion and three times in its Findings and Conclusions the trial court found some facet of the system “rational.” CP 305, 306, 321, 325, 329, 330, and 331. No other court has ever applied rational basis scrutiny to Article IX, and it was error for the trial court to do so here.

The Supreme Court’s prior Article IX decisions do not delineate every circumstance in which a heightened burden of proof (beyond a reasonable doubt, presumption of constitutionality, etc.) applies. In *Brown v. State of Washington*, 155 Wn.2d 254, 119 P.2d 341 (2005), the Court concluded that learning improvement days were not part of the State’s Article IX education obligation; therefore, plaintiffs did not prove a violation beyond a reasonable doubt. *Id* at 266. Similarly, in *Tunstall v. State of Washington*, 141 Wn.2d 201, 5 P.3d 691 (2000), the Court held that Article IX “children” do not include 18-21 year olds; therefore, the plaintiffs did not meet the beyond a reasonable doubt standard. *Id.* at 222-23.

These cases hold at most that the threshold determination of what is within the ambit of the Article IX duty must be proved beyond a reasonable doubt. Here, the Alliance met that burden when it proved the foundational issue that special education is part of the State's Article IX, § 1 obligation. App. Brief, § (V)(E), pp. 45-47. The State did not respond to or contest this conclusion.

The cases leave open the question of how courts will review an as-applied challenge when the facts make out a *prima facie* case that districts are compelled to use levy funds to meet a proven Article IX obligation. *Tunstall* rejected the as-applied challenge, because plaintiffs presented no facts at all. 141 Wn.2d at 223-24. *Brown and McGowan v. State of Washington*, 148 Wn.2d 278, 60 P.3d 67 (2002) are fairly read as facial challenges: They were based entirely upon the interpretation of the language of an initiative and appropriation bills and not upon the facts applicable to any particular school district.

The trial court held that proof of facts is subject to the typical civil burden of proof of a preponderance of the evidence (CL 3), and neither party challenges this. *Seattle School District* clearly supports at least this much, but does not so clearly define where this lower burden of proof ends. 90 Wn.2d at 527.

The Alliance asks this Court to decide what happens after a *prima facie* case is made. At that point, all presumptions should end, and the State should have the burden to come forward with evidence that it is meeting its Article IX paramount duty to make ample provision for the education of all children. Mere evidence that the State's actions are rational is insufficient, given the unique nature of the State's paramount duty. In reviewing the State's proof, the courts must be satisfied that the State has met its paramount duty, that the State has shown a close fit between its actions and its duty – that is, shown with compelling evidence that districts are not being forced to fund the State's education obligation with local excess levy funding.

### **III. CONCLUSION**

The State has no higher duty than to educate our children. Funding for education must be ample, and it cannot derive from local excess levies. This Court should reverse the trial court, as its Findings of Fact do not support its Conclusions of Law. Districts are not obligated first to spend their BEA on special education. Nor does the State provide extra BEA for districts to use to fill the gap in special education funding.

Section 507 violates Article IX, § 1; in 2005-06 the State underfunded by \$147 million special education in the Safety Net applicant districts; and the Section 507(8) Safety Net cannot fully remedy the

underfunding. This Court should, therefore, vacate the trial court's decision and remand with instructions to enter new findings and conclusions in the Alliance's favor. In the alternative, the Court should vacate the trial court's decision and remand for entry of new findings and conclusions consistent with the record and the appropriate evidentiary and constitutional standard.

DATED this 21 day of December, 2007.

Respectfully submitted,

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OF THE STATE OF WASHINGTON BY \_\_\_\_\_

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SCHOOL DISTRICTS' ALLIANCE FOR ADEQUATE FUNDING OF SPECIAL EDUCATION; BELLINGHAM SCHOOL DISTRICT NO. 501; BETHEL SCHOOL DISTRICT NO. 403; BURLINGTON-EDISON SCHOOL DISTRICT NO. 100; EVERETT SCHOOL DISTRICT NO. 2; FEDERAL WAY SCHOOL DISTRICT NO. 210; ISSAQUAH SCHOOL DISTRICT NO. 411; LAKE WASHINGTON SCHOOL DISTRICT NO. 414; MERCER ISLAND SCHOOL DISTRICT NO. 400; NORTHSHORE SCHOOL DISTRICT NO. 417; PUYALLUP SCHOOL DISTRICT NO. 3; RIVERSIDE SCHOOL DISTRICT NO. 416; and SPOKANE SCHOOL DISTRICT NO. 81,

Appellants,

v.

THE STATE OF WASHINGTON; CHRISTINE GREGOIRE, in her capacity as Governor of the State of Washington; TERRY BERGESON, in her capacity as Superintendent of Public Instruction; BRAD OWEN, in his capacity as President of the Senate; and FRANK CHOPP, in his capacity as Speaker of the House of Representatives,

Respondents.

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CERTIFICATE OF SERVICE

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KIRKPATRICK & LOCKHART  
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Kathy Jacobson states as follows: I am an employee of Kirkpatrick & Lockhart Preston Gates Ellis LLP, a citizen of the United States and a resident of the County of Snohomish, State of Washington and am over 18 years of age and not a party to this action.

On December 21, 2007, I caused true and correct copies of *Reply Brief of Appellant* to be hand delivered to:

William G. Clark and Newell Smith  
Assistant Attorneys General  
Washington State Office of the Attorney General  
800 5th Ave, Suite 2000  
Seattle, WA 98104

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED December 21st, 2007 at Seattle, Washington.

  
Kathy Jacobson