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NO. 36294-5-II

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**COURT OF APPEALS, DIVISION II  
OF THE 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; PUYALLUP SCHOOL DISTRICT NO. 3;  
NORTHSHORE SCHOOL DISTRICT NO. 417; 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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**RESPONDENTS' OPPOSITION TO BRIEF OF AMICI CURIAE**

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## I. INTRODUCTION

The amici school districts support Appellants' request that this Court reverse the trial court judgment that Appellants failed to prove the State inadequately funds special education. They contend: (1) that the basic education allocation ("BEA") the State provides for every special education student cannot be used to defray special education costs; (2) that school district F-196 reports prove that the amici districts receive insufficient funding to pay special education costs; and (3) that Washington students' excellent performance on national tests proves that the State provides constitutionally inadequate funding because Washington provides less funding than other states. The amici are wrong on all three counts.

## II. ARGUMENT

### A. **State Law and the State's Special Education Funding Formula Require School Districts to Use the BEA to Pay for Special Education.**

The amici's first error is the contention that "the State provides the basic education allocation to pay for basic education, not special education." (Amici Br. at 6). They compound this error by double-counting the costs of the education that students with special needs receive: "Every student who also receives a special education first

receives a basic education.” *Id.* These positions are contrary to law and fact.

The Basic Education Act, RCW 28A.150.390, mandates that funding to defray special education costs shall include the BEA:

**Appropriations for special education programs.**

...Funding for programs operated by local school districts shall be on an excess cost basis from appropriations provided by the legislature for special education programs for students with disabilities and shall take account of state funds accruing through RCW 28A.150.250, 28A.150.260, federal medical assistance and private funds accruing under RCW 74.09.5249 through 74.09.5253 and 74.09.5254 through 74.09.5256, and other state and local funds, excluding special excess levies.

(Emphasis supplied). State funds accruing through RCW 28A.150.250 and .260 are the BEA.

Similarly, the Annual Appropriations Acts for special education mandates:

New Section.      **Sec. 507.      FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION—FOR SPECIAL EDUCATION PROGRAMS**

.....  
(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 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 education excess cost allocation funded in this section.

Laws of 2005, Ch. 518, § 507 (Ex. 550 at 000027-28). The “general apportionment allocation” is the BEA and Section 507 requires that the BEA be exhausted first on educating special education students, with special education funding used only after the BEA is exhausted.<sup>1</sup>

Finally, unchallenged Conclusion of Law 10 provides that “a district must expend all of the BEA and all of the excess cost allocation received for its special education students before the district can contend that the legislature has underfunded its special education program.” The unchallenged conclusion is the law of this case. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716, 846 P.2d 550 (1993); *State v. Slaneker*, 58 Wn. App. 161, 165, 791 P2d 575 (1990).

The amici’s argument that BEA cannot defray special education costs is also contrary to the history underlying the special education funding formula. When that formula was adopted in 1995, it was based, in part, upon Washington’s historical experience: that average special education costs were 1.87 x BEA. Ex. 92. The funding formula adopted by Washington in fact was a more generous provision of 1.9309 x BEA for every special education child. The “1” in both the historical

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<sup>1</sup> The BEA clearly is intended to defray special education costs. The statute directs the BEA be used to provide an “appropriate education for special education students.” That term is defined in RCW 28A.155.020 as “education directed to the unique needs, abilities and limitations of the children with disability.”

experience recounted in Exhibit 92 and in the formula itself is the BEA. The formula requires that special education costs will be paid for with a full BEA plus .9309 x BEA.

The amici and Appellants refuse to recognize that all students in Washington receive an education. Those without disabilities receive a “basic education.” Those with disabilities receive a “basic” and “special education” at the same time, within the same school day as basic education students, and with 1.9309 times the revenues provided for the basic education student. Positing that every special education student is both a full-time basic education student and a full-time special education student is contrary to the undisputed evidence at trial. Treating special education students as full-time, all day students in basic education and special education is neither appropriate nor the state of practice in Washington’s schools. RP 1758-59.

**B. F-196 Financial Statements Cannot Prove That School Districts Are Underfunded.**

The amici school districts next contend that the F-196 financial statements introduced at trial (Exs. 501 and 502) prove they have received insufficient funding for special education. (Amici Br., Ex. A). However, these exhibits contain no F-196 reports or financial statements for districts other than the 12 Appellants. Exhibits 501 and 502 have nothing to do

with the amici districts. There is no evidence in the record to support the underfunding claims of the amici school districts.<sup>2</sup> The appellate courts must disregard claims that are not supported by the record. *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 513, 857 P.2d 283 (1993); *Lewis v. Mercer Island*, 63 Wn. App. 29, 32, 817 P.2d 408 (1991); *State v. Stevenson*, 16 Wn. App. 341, 555 P.2d 1004 (1976). Therefore, this Court must strike the portions of the amicus brief, including Exhibit A, that include the unproven allegation that the amici received insufficient funding for special education.

Even if Exhibits 501 and 502 did support allegations of underfunding, the amici cannot overcome the preclusive effect of the evidence admitted at trial about the F-196s and the unchallenged Findings of Fact 24 through 28. Appellants' own expert admitted that the F-196 documents cannot prove underfunding. RP 771. Unchallenged FF 28 confirms the F-196s "cannot establish underfunding of special education."

Finally, as the chart submitted with this brief establishes, all but one of the amici districts have substantial surpluses in funding for special

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<sup>2</sup> The deficit figures in Exhibit A to the Amicus Brief appear to come from the amicus trial brief these same districts submitted to the trial court. There was no sworn testimony or documents, in Affidavits or at trial, about alleged underfunding in these districts. Matters argued in briefs, but not established by evidence in the record, cannot be considered on appeal. *Southcenter View Condo Owners Assn. v. Condo Builders, Inc.*, 47 Wn. App. 767, 770, 736 P.2d 1075 (1986); *Stevenson, supra*. In addition, the trial court in this case ruled that the "facts or allegations" in the amicus trial brief were excluded from the case. RP 761, 1.9 to 762, 1.4.

education, as do the Appellants, when only a portion of the BEA they have received for special education students is included. (*See* Exhibit 1 hereto and Respondents' Brief at 17-18). The deficit claimed by the amici districts, in fact, is eliminated by applying only 36% of the BEA they receive for these students.<sup>3</sup> Thus, the amici underfunding claims, like those of Appellants, are a fiction.

**C. The Extraordinary Success Washington Students Have Achieved on National Tests Does Not Provide Evidence of Underfunding.**

The amici's final argument is that the success of Washington students in national testing, coupled with evidence that Washington provides less funding than other states, proves that special education is underfunded. (Amici Br. at 7). The amici claim that this attenuated logic is supported by the State's expert. They are incorrect.

First, Respondents expert, Dr. Hanushek, disagreed with the proposition that Washington's funding of special education should be determined or measured by what other states spend. RP 2131. Moreover, contrary to the amici position, Dr. Hanushek concluded that Washington provides adequate funding for special education:

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<sup>3</sup> The Taholah amicus district has a deficit of \$1,811.00 after application of BEA and funding for students over the 12.7% cap. Ex. 1. The latter funding is the result of the trial court's ruling that application of the cap was unconstitutional without a Safety Net. CP 329. That ruling is not part of this appeal. Moreover, the remaining deficit could have been covered by Safety Net funding, but Taholah failed to apply for it. Ex. 588.

There is no constitutional requirement that the State of Washington spend what other states spend, particularly since spending bears no obvious relationship to outcomes. The State of Washington has demonstrated that it operates schools more efficiently than other states. This accomplishment should be rewarded, not penalized.

But, even ignoring problems of what is adequate by the [Appellants' expert's] calculations, the State of Washington currently provides sufficient funding for special education students.

Ex. 523 at 9. Washington's successful student outcomes and cost-efficient operations do not constitute proof of underfunding.

**D. The Amici Districts and Appellants Both Misperceive the Role of the Appellate Courts in Deciding Constitutional Challenges.**

Inherent throughout the amicus brief is the mistaken belief, shared by the Appellants, that this Court should re-weigh the evidence as a trial court of last resort. The issue before an appellate court is not whether it could reach a different result than the trial court's Judgment. *Sunnyside Valley Irrigation Dist. v. Dicke*, 149 Wn.2d 873, 73 P.3d 369 (2003). Rather, the issue is whether any evidence supports the three challenged Findings of Fact and whether those and the other Findings support the Conclusions of Law and the Judgment. *SAC-Downtown Ltd. Partnership v. Kahn*, 123 Wn.2d 197, 867 P.2d 605 (1994). Simply put, an appeal from a bench trial is not an opportunity to "second guess" the trial court, is not a chance to reargue the evidence and not a reason to substitute the

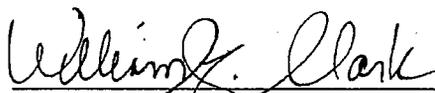
judgment of the appellate court for the trial court. *Ferree v. The Doric Co.*, 62 Wn.2d 561, 383 P.2d 900 (1963).

### III. CONCLUSION

This Court's task is to apply well-established Supreme Court principles that govern judicial review of challenges to the constitutionality of state legislation: whether the trial court correctly ruled that Appellants failed to overcome the special education Appropriations Acts' presumed constitutionality by proof beyond a reasonable doubt. In so doing, this Court follows equally well-established precedent requiring analysis of whether there is evidence to support the trial court's Findings, and whether those Findings, in turn, support the Conclusions of Law and Judgment. The amici districts have provided neither arguments nor evidence nor case law to justify a reversal of the trial court's Judgment dismissing Appellants' claims.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of April, 2008.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding **Respondents' Opposition to Brief of Amici Curiae** was filed by legal messenger in Division II of the Court of Appeals at the following address:

Court of Appeals of Washington, Division II  
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And that a copy of the preceding **Respondents' Opposition to Brief of Amici Curiae** was served on appellants' counsel and counsel for Amicus Districts by legal messenger at the addresses below:

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\_\_\_\_\_  
AGNES ROCHE

**EXHIBIT 1**

**Surplus of Special Education Funding for Amicus Districts**

School District	Student FTE in 2004-05	Students in Special Education Programs in 2004-2005	Claimed Underfunding in 2004-05 (Amicus Brief) <sup>i</sup>	Actual Surplus After BEA Applied <sup>ii</sup>
Aberdeen	3,727	558	\$515,228	\$1,493,239
Anacortes	2,980	360	\$564,451	\$788,389
Arlington	5,240	700	\$600,171	\$1,945,104
Asotin-Anatone	568	109	\$190,145	\$217,514
Bainbridge Island	4,044	551	\$1,295,716	\$755,871
Battle Ground	12,146	1,420	\$85,621	\$5,069,454
Blaine	2,143	254	\$165,177	\$751,840
Central Kitsap	12,354	1,811	\$1,760,414	\$4,940,451
Central Valley	11,531	1,472	\$1,341,073	\$4,041,657
Centralia	3,219	449	\$242,687	\$1,410,982
Cheney	3,270	509	\$442,239	\$1,464,678
Chimacum	1,249	156	\$317,741	\$263,746
Clarkston	2,656	450	\$136,789	\$1,560,404
Concrete	758	126	\$83,138	\$386,470
Deer Park	2,135	283	\$15,454	\$1,031,543
Dieringer	1,135	81	\$273,592	\$30,598
Evergreen (Clark)	23,509	3,039	\$3,284,187	\$7,744,756
Ferndale	5,094	677	\$700,107	\$1,741,440
Fife	3,127	304	\$280,595	\$823,310
Granite Falls	2,311	379	\$78,857	\$1,255,107
Highline	16,623	2,148	\$3,465,617	\$4,229,298
Kent	26,040	3,044	\$2,126,024	\$8,710,361
Lake Stevens	7,171	928	\$921,114	\$2,377,862
Lakewood	2,423	330	\$214,629	\$955,751
Liberty	504	71	\$64,583	\$194,314
Lynden	2,632	242	\$238,617	\$644,501
Mary M. Knight	200	20	\$1,087	\$76,712
Marvsville	10,914	1,629	\$1,050,969	\$5,028,907
Mead	8,595	954	\$1,008,428	\$2,536,119
Meridian	1,479	222	\$337,938	\$476,788
Monroe	6,234	733	\$628,833	\$2,044,090

School District	Student FTE in 2004-05	Students in Special Education Programs in 2004-2005	Claimed Underfunding in 2004-05 (Amicus Brief) <sup>i</sup>	Actual Surplus After BEA Applied <sup>ii</sup>
Montesano	1,223	150	\$6,407	\$552,670
Moses Lake	6,480	884	\$1,895,940	\$1,325,729
Mount Baker	2,294	345	\$267,842	\$975,144
Mount Vernon	5,488	847	\$1,435,501	\$1,672,224
Nine Mile Falls	1,592	215	\$61,547	\$735,624
Nooksack Valley	1,684	271	\$270,305	\$712,914
North Thurston	12,460	1699	\$3,822,743	\$2,505,802
Oak Harbor	5,661	687	\$243,562	\$2,273,105
Orcas Island	486	64	\$159,653	\$75,424
Orting	1,924	296	\$327,562	\$741,250
Port Angeles	4,485	764	\$879,420	\$1,964,291
Prescott	242	38	\$28,723	\$116,369
Raymond	533	94	\$72,002	\$275,289
Renton	12,594	1,658	\$4,344,300	\$1,608,583
Republic	487	37	-\$191	\$131,437
Ridgefield	1,848	203	\$0	\$751,918
Riverview	2,836	349	\$316,176	\$949,671
Rosalia	236	19	\$62,025	\$7,361
San Juan Island	947	106	\$23,300	\$364,987
Seattle	44,234	5,936	\$20,232,015	\$1,883,457
Sedro Woolley	4,242	674	\$870,264	\$1,580,859
Shelton	3,962	597	\$366,817	\$1,812,210
Shoreline	9,502	1,309	\$2,294,722	\$2,493,341
South Kitsap	10,521	1,517	\$268,675	\$5,282,981
South Whidbey	2,065	238	\$174,726	\$730,064
Steilacoom Historical	2,101	311	\$116,208	\$1,022,323
Sultan	2,121	324	\$753,266	\$398,129
Tacoma	29,541	4,377	\$5,594,113	\$10,446,056
Taholah <sup>iii</sup>	223	34	\$142,429	-\$1,811
Tahoma	6,345	821	\$1,373,295	\$1,590,978
Toledo	963	146	\$19,082	\$517,001
Tukwila	2,473	290	\$272,861	\$746,420
Union Gap	552	92	\$45,423	\$281,639

School District	Student FTE in 2004-05	Students in Special Education Programs in 2004-2005	Claimed Underfunding in 2004-05 (Amicus Brief) <sup>i</sup>	Actual Surplus After BEA Applied <sup>ii</sup>
University Place	5,126	626	\$353,651	\$1,926,110
Vancouver	21,174	2,756	\$123,172	\$9,933,090
Waitsburg	351	52	\$37,186	\$158,527
Washougal	2,730	296	\$328,820	\$729,734
White River	4028	584	\$214,996	\$1,917,852
Winlock	766	82	\$42,950	\$264,813
Yakima	13,331	1,810	\$1,754,568	\$4,901,337
Yelm	4,680	570	\$762,266	\$1,323,518
Total Surplus for All Amicus Districts				\$132,669,679

<sup>i</sup> The totals in this column are taken from Exhibit A to the Brief of Amici Curiae. The Amicus Districts claim that the totals on that exhibit can be found in the record in Exhibits 501 and 502. Amicus Brief at 5. Exhibits 501 and 502 contain F-196 and 1220 reports for the Appellant school districts only. Exhibits 501 and 502 do not contain any data for the Amicus Districts and therefore do not support the deficits alleged by the Amicus Districts. Respondents' analysis includes the totals in this column in order to demonstrate the actual surplus in special education funding that would exist were the amounts in this column to be accepted as accurate.

<sup>ii</sup> Source: Exhibit 41. Statewide December 1 Child Count was used as the basis to determine the relative percentage of 3-5 year-old special education students as compared to the total 3-21 year-old special education student population. This percentage was applied to the total 3-21 BEA FTE Enrollments from the 1220 Reports (Exhibit 45) to arrive at an estimate of the age 6-21 population for each Amicus District. The total for the estimated age 6-21 student population for each district was then multiplied by the relevant BEA Rate from the 1220 Reports (Exhibit 45). The resulting amounts were next reduced by the claimed underfunding amounts in Exhibit A to the Amicus brief to arrive at the amounts shown in the "Actual Surplus After BEA Applied" column. For simplicity of presentation, the unenhanced BEA was used for this chart. Most students generate an additional amount reflected in an enhanced general apportionment called the enhanced BEA. RP 157. Were the enhanced BEA to be used in this calculation, the surplus of revenues over expenditures shown in this chart would have been even greater. The BEA for each student is distributed to school districts based on Full Time Equivalencies (FTE) rather than headcount. RP 157. A small number of students in the 6-21 age group attend school less than full time and do not generate a full 1.0 FTE BEA. In order to compensate for this, five-year old students, who are typically in kindergarten and receive a 0.5 FTE BEA, have not been included in this analysis RP 160. If they had been, the surplus of revenues over expenditures shown in this chart would have been even greater.

<sup>iii</sup> Taholah School District is a small, unique district with a total resident BEA eligible FTE enrollment of only 222.8 students. In 2004-2005, it had a special education enrollment that was 2.51% greater than the

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12.7% index for excess cost funding. *See* Ex. 45: 2004-05 1220 All Districts.pdf, p. 252. The trial court addressed the issue of access to additional funds for districts like Taholah in its opinion. CL 13. In an attachment to the declaration of Stephen J. Nielsen in support of a similar Amicus brief submitted to the trial court, Taholah School District asserted that \$19,877 of its claimed 2004-2005 funding deficit was attributable to a lack of excess cost funding for students over the 12.7% index. CP 133. In light of the trial court's decision, \$19,877 was backed out of the deficit shown for Taholah in the "Actual Surplus After BEA Applied" column. The remaining -\$1,811 amount might have been addressed through Safety Net funding, however, Taholah School District chose not to apply for Safety Net funding in 2004-2005. *See* Ex. 588.