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**SUPREME COURT OF THE STATE OF WASHINGTON**

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SCHOOL DISTRICTS' ALLIANCE FOR ADEQUATE FUNDING OF  
SPECIAL EDUCATION, ET AL.,

Petitioners,

v.

THE STATE OF WASHINGTON, ET AL.,

Respondents.

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**STATE'S CORRECTED SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

The appellants School Districts' Alliance for Adequate Funding of Special Education and individual school districts (collectively referred to as Alliance) assert that Laws of 2005, ch. 518, § 507 (the biennial appropriations act) violates Washington Constitution, article IX, section 1 because it appropriates insufficient funds to school districts for the provision of special education services. As a law duly enacted by the Legislature, Laws of 2005, chapter 518 is entitled to a presumption of constitutionality. At trial, the Alliance was unable to rebut that presumption and indeed failed to make a prima facie case that the State underfunds special education under article IX, section 1. The court of appeals affirmed. *Alliance v. State*, 149 Wn.2d 241, 202 P.3d 990 (2009).

The Alliance's Petition for Review of the court of appeals decision presents six questions for the Court's consideration. However, collectively they implicate only two basic issues. First, the determinative

issue with respect to three of the Alliance's questions (A, D, and E)<sup>1</sup> is whether the basic education allocation (BEA) is a funding source available for special education. As the trial court and the court of appeals both properly concluded, and as is discussed more fully below, the basic education allocation is an integral part of special education funding. This also disposes of the Alliance's erroneous assumption in questions A and B<sup>2</sup> that it made a *prima facie* showing of inadequate special education funding.

The second basic issue presented by the Alliance's questions is whether this Court should jettison 100 years of precedent holding that statutes, including statutes concerning basic education, are presumed

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<sup>1</sup> A. Whether the State meets its Constitutional and "paramount duty to make ample provision for the education of all children," when school districts must use local levy funding to provide legally required special education services to students with disabilities?

D. Whether it is proper for a reviewing court, when determining if the State makes ample funds available to school districts to provide legally required special education services, to consider the basic education appropriation the State provides, in addition to the separate special education appropriation, given that all appropriations must distinctly specify both the amount and the object to which they are to be applied under Article VIII, § 4?

E. Whether it is proper for a reviewing court, when determining if the State makes ample funds available to school districts to provide legally required special education services, to consider the basic education appropriation the State provides, given that the Legislature declares and the trial court found that the basic education appropriation covers only the cost of basic education, not special education as well?

<sup>2</sup> B. Whether a challenge to the constitutionality of a law based on violation of Article IX, § 1, which mandates that the State's "paramount duty [is] to make ample provision for the education of all children," should be reviewed with more than the lowest level of judicial scrutiny, where the plaintiffs present a *prima facie* case that the State is requiring school districts to spend their local levy money to provide required services?

constitutional and that a party challenging a statute must demonstrate by law and argument that the statute is unconstitutional beyond a reasonable doubt. This is the determinative issue with respect to Questions B and C<sup>3</sup> in the Petition for Review. As explained more fully below, there is no basis in law or policy for the Alliance’s requested dramatic departure from these long-standing legal principles.<sup>4</sup>

Special education is specially designed instruction for eligible students with disabilities. It is designed to address the student’s unique needs and to ensure the student has access to the general curriculum so that he or she has an opportunity to meet the educational standards that apply to all students. WAC 392-172A-01175. Thus, it is an overlay on the basic education services available to all students and conceptually, is not properly divorced from the basic education curriculum. Such is the context for the legislative command cited by both parties that “[s]pecial education students are basic education students first... [and] are entitled to

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<sup>3</sup> C. Whether it is consistent with this Court’s decision in *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), to require plaintiffs who challenge the constitutionality of a law based on violation of Article IX, § 1, which mandates that the State’s “paramount duty [is] to make ample provision for the education of all children,” to carry their burden of proof beyond a reasonable doubt?

<sup>4</sup> In question F, the Alliance asks whether an appellate court may weigh disputed evidence where the trial court made no finding of fact on an issue. However, the Alliance does not further explain in its Petition for Review or identify portions of the court of appeals opinion inappropriately weighing disputed evidence. A review of the opinion by the court of appeals shows that it determined that substantial evidence in the record supports the trial court’s findings and the findings support its conclusions. *Alliance v. State*, 149 Wn.2d 241.

the full basic education allocation.” Laws of 2005, ch. 518, § 507 (2)(a)(i) and (ii) (Appendix A to Appellant’s Brief).

The Alliance’s arguments on appeal gloss over the relationship of special education services to basic education services and artificially separate the two for purposes of funding. This is directly contrary to the experience of the State and the research of experts that confirms the appropriate funding for special education is 193 percent of the costs to educate a basic education student.<sup>5</sup> As Judge McPhee put it, the arguments put forth by the Alliance sought to “decouple” special education funding from basic education funding. Trial Court’s Opinion, CP 423 (Appendix A). However, the coupling of the special education excess cost allocation to basic education allocation “is a basic feature of the legislature’s funding approach.” Trial Court’s Opinion, CP 423 (Appendix A).

## II. ARGUMENT

### A. **The Funding Approach Chosen By The Legislature Unambiguously Requires School Districts To Apply The Basic Education Allocation To The Education Of Special Education Students**

The question of whether districts should count the basic education allocation per student when determining how much revenue they receive

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<sup>5</sup> See Br. of Resp’t at 8-11, 33-34.

to educate a special education student is the dispositive issue in this appeal. As both previous courts concluded, and as the statutory language makes clear, the answer is unequivocally “yes.” Districts must use and count the BEA for each special education student. That principle underlies unchallenged Conclusion of Law 10.<sup>6</sup> Unchallenged conclusions of law become the law of the case. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993); *State v. Slanaker*, 58 Wn. App. 161, 165, 791 P.2d 575, *review denied*, 115 Wn.2d 1031 (1990)).

The terms of special education funding relevant to this case are plain and straightforward.

To the extent a school district cannot provide an appropriate education<sup>7</sup> 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 under this section.

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<sup>6</sup> Unchallenged trial court Conclusion of Law 10 provides “A special education student is first and foremost a basic education student all during the school day. Thus, a district must expend all of the BEA received for its special education students before the district can contend that the legislature has underfunded its special education program.” CP 306.

<sup>7</sup> “Appropriate education” is a term of art used in the special education statute. “It is the purpose of RCW 28A.155.010 through 28A.155.160, 28A.160.030, and 28A.150.360 to ensure that all children with disabilities as defined in RCW 28A.155.020 shall have the opportunity for an *appropriate education* at public expense as guaranteed to them by the Constitution of this state and applicable federal laws.” RCW 28A.155.010 (emphasis added).

Laws of 2005, ch. 518, § 507(1). The plain meaning is that districts are expected to provide special education services using the basic education allocation first, and then turn to the excess cost allocation as needed. In other words, the whole value of 1.9309 multiplied by the basic education allocation is available. RP 2338.

The Alliance argues that this sentence does not in fact require districts to apply the BEA to special education services because the BEA is for the program set forth in RCW 28A.150.220. Reply Br. at 5. The referenced statute sets forth the program requirements for basic education instruction. The principle requirements are 180 days and 1,000 hours of instruction in the State's essential academic learning requirements.

However, it does not follow that the BEA cannot support the specially designed instruction that delivers the program requirements to special education students. The Legislature has taken pains to drive this message home repeatedly in the Basic Education Act, in the budget, and in the Special Education Act. Funding for special education programs "shall be on an excess cost basis" and "shall take account of state funds" accruing through the basic education allocation (BEA). RCW 28A.150.390. Special education students are basic education students first, are entitled to their full basic education allocation as a class,

and are basic education students for the entire school day. Laws of 2005, ch. 518, § 507 (2).

According to the Special Education Act,

[A]ny school district required to provide such [special education] services shall thereupon be granted regular apportionment of state and county school funds and, *in addition*, allocations from state excess funds made available for such special education services . . . .

RCW 28A.155.050 (emphasis added). Further, if a special education student transfers to a program operated by another school district, the receiving district is granted the regular apportionment generated by the student plus the “entire approved excess cost *not reimbursed from such regular apportionment.*” RCW 28A.155.050 (emphasis added).<sup>8</sup> This latter provision illustrates what is meant by “excess cost.” It is those costs not covered by the basic education allocation.

To summarize, each student found eligible for special education generates a basic education allocation and a special education excess cost allocation. Both are available to provide the student with the services he or she needs and to follow the student from district to district. Both the trial court and the court of appeals recognized that state law requires the

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<sup>8</sup> The total BEA is apportioned by OSPI to the school districts. Thus, the BEA is also referred to as “general apportionment” in the state appropriations act (*see*, Laws of 2005, ch. 518, section 502, Appendix D to Petition for Review). It is also referred to as “state apportionment.” RCW 28A.150.290.

BEA to be counted. Moreover, the trial court's unchallenged Conclusion of Law 10 so holds. Both the trial court and the court of appeals correctly concluded that the evidence of underfunding presented by the Alliance improperly left out the basic education allocation and therefore was insufficient to make a prima facie case of underfunding.

**B. Article VIII, Section 4 Does Not Preclude Applying the BEA to Special Education<sup>9</sup>**

Article VIII, section 4 provides:

No money shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payments be made within one calendar month after the end of the next ensuing fiscal biennium, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

The purpose of article VIII, section 4 is to secure to the legislative branch “the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government.”

*Washington Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 365;

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<sup>9</sup> This Court should not even entertain this argument for it was not plead in the Complaint or Amended Complaint; it was not raised at trial; it is contrary to unchallenged Conclusion of Law 10; and was not briefed before the court of appeals. The Alliance raised this issue for the first time just prior to oral argument on April 23, 2008. Theories not presented to the trial court generally will not be considered on appeal. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992). Simply framing the issue as a constitutional violation by the court of appeals (Petition for Review at 10) is insufficient to raise the claim so late in the day.

70 P.3d 920 (2003). “The object behind this provision is to prevent the spending of public funds without authorization by the legislature.” *Neighborhood Stores* (citing *King Cy. v. Taxpayers of King Cy.*, 133 Wn.2d 584, 604, 949 P.2d 1260 (1997)). A statutory provision which instructs the legislature to spend money or make an appropriation serves this purpose. *Id.*

The Alliance focuses on the provision of article VIII, section 4, that requires every law making a new appropriation to specify the sum it appropriates for expenditure and the object to which the appropriation is to be applied. Presumably, the claim is that school districts lack authority to use one dime of BEA appropriation in support of any special education services because section 502 of the budget containing the BEA appropriation, standing alone, does not prescribe that it is for special education in addition to basic education.

This is a baseless argument that elevates form over substance.<sup>10</sup> The plain language of article VIII, section 4 on its face does not require the Legislature to include all conditions in a single appropriation.<sup>11</sup>

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<sup>10</sup> Attorneys for the State have been unable to find any case supporting such an application of article VIII, section 4.

<sup>11</sup> Moreover, the BEA plus the special excess cost allocation (the 1.9309) arguably constitutes a single appropriation for basic education.

Moreover, the argument exemplifies the Alliance's artificial decoupling of basic education from special education.

The Legislature appropriates funds for the basic education allocation in Laws of 2005, ch. 518, § 502 (Appendix D to Pet. for Review). It does not state that the funds are provided solely for basic education. Section 503 then qualifies the use of the basic education funds for employee salaries and benefits through specified instructions and methodologies to be applied to the BEA appropriation. Section 504 specifies cost of living adjustments to be applied to the BEA. Section 507 incorporates section 502 to specify that special education excess cost allocations are available to the extent a district cannot provide special education services through the general apportionment allocation (BEA). "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." Laws of 2005, ch. 518, § 507(1).

Thus, sections 502, 503, 504, and 507 must be read together. Altogether, the appropriation language specifies the sums available and the objects to which they are to be applied sufficiently to authorize the Office of Superintendent of Public Instruction (OSPI) to draw funds from the treasury and to apportion to school districts. Under the Alliance's

overly restrictive reading, not only could districts not apply the BEA to special education, but they also could not apply the BEA to employee salaries and benefits consistent with the instructions and limitations contained in section 503. On a larger scale, the Legislature would be unduly hampered in efforts to condition and link complex appropriations to multiple program applications. There is no support for such a construction in case law or in logic.

**C. The Burden of Proof in Constitutional Challenges To A Statute Has Been Well-Established in Washington Jurisprudence For Over 100 Years**

Whether codified or in an appropriations act, statutes are presumed constitutional. *See, Retired Public Employees Council of Washington v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003). The burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. *Tunstall v. Bergeson*, 141 Wn.2d 201, 220, 5 P.3d 691 (2000). The principle is well-established. It is based on the recognition of the separation of powers principle inherent in the structure of our government. *Island Cy. v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). The reasonable doubt standard means that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. *Island Cy. v. State*, 135 Wn.2d 141 at 147. “These rules are more than mere rules of judicial

convenience. They mark the line of demarcation between legislative and judicial functions.” *Lenci v. City of Seattle*, 63 Wn.2d 664, 668, 388 P.2d 926 (1964).

In 1916, this Court rejected a constitutional challenge to a statute under article IX, sections 1 and 2. Even at that point in time, the principle was well-established that

the courts will presume that an act regularly passed by the legislative body of the government is a valid law, and will entertain no presumptions against its validity, and when the constitutionality of an act of the Legislature is drawn in question, the courts will not declare it void unless its invalidity is so apparent as to leave no reasonable doubt upon the subject . . . .

*Litchman v. Shannon*, 90 Wash. 186, 155 P. 783 (1916) (citing *State v. Ide*, 35 Wash. 576, 77 P. 961 (1904) (overruled on other grounds)). Thus the “beyond a reasonable doubt” level of deference has been applied for over 100 years in a variety of constitutional cases, including more recent challenges under article IX, sections 1 and 2 in *Tunstall*, and in *Brown v. State*, 155 Wn.2d 254, 266, 119 P.3d 341 (2005).

This expression of judicial deference is particularly appropriate in challenges to what the Court has time and again recognized as a fundamental legislative prerogative—to define basic education and to choose the means of implementing article IX consistent with the broad constitutional guidelines set down by the Court. “This court will not

micromanage education and will give great deference to the acts of the legislature.” *Brown v. State*, 155 Wn.2d at 345 (citing *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 518-19, 585 P.2d 71 (1978)).

The language the Alliance points to in *Seattle School District* does not suggest a different burden of proof to invalidate a statute.<sup>12</sup> Nor, does it at all suggest a departure from deference to legislative enactments. Rather, as the trial court correctly noted, the language upon which the Alliance relies addresses the standard of proof with respect to factual matters. Trial Court’s Opinion, CP 316-17. This is evident from (1) the relevant language of *Seattle School District* itself; (2) the *Juvenile Director* case *infra* to which the court refers; and (3) the argument by the State in *Seattle School District* to which the Court’s language responds.

First, the very passage itself explains that it concerns a challenge by the State to the “sufficiency of the evidence” “pertaining to the District’s salary scale, staffing ratios, [and] associated nonsalaried costs,” not to the validity of a statute.<sup>13</sup> *Seattle Sch. Dist.* at 527. Second, the

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<sup>12</sup> The Alliance relies on the following language: “Thus, contrary to appellants’ contention, the normal civil burden of proof, i.e., ‘preponderance of the evidence’, applies.” *Seattle Sch. Dist.*, 90 Wn.2d at 528.

<sup>13</sup> The *Seattle School District* case did not involve the judicial invalidation of a statute. The Court considered the Legislature’s *inaction* in defining a basic education or in determining a sufficient level of funding. *Seattle Sch. Dist.* at 519, 537. Thus, the Court called upon the Legislature to act “to alleviate the constitutional void.” *Seattle Sch. Dist.* at 519, fn 14.

case that the State relied on, *In re Salary of the Juvenile Dir.*, concerned not the validity of any law, but whether the evidence demonstrated that there existed a reasonable need to increase the salary of the Juvenile Director. *In Re Salary of Juvenile Dir.*, 87 Wn.2d 232, 251, 552 P.2d 163, 175 (1976). As *Juvenile Director* explains,

[i]n the present controversy, there is a fundamental failure of proof by respondent Superior Court. No evidence in the record supports by a preponderance of the evidence-let alone by a clear, cogent and convincing showing-respondent's determination that the salary paid to the Director of Juvenile Services was so inadequate that the court not fulfill its duties. Neither does the record show that an increase in salary was reasonably necessary for the efficient administration of justice.

*Id.* at 252.

Third, the State argued in *Seattle School District* that the factual evidence was insufficient to establish a need by the school district for additional funding. On page 139 of State's Brief in *Seattle School District*, the State argued, "the court must apply, on any relevant *factual questions* 'the highest burden of proof in a civil case'", quoting *Juvenile Director*. See Brief of Appellants at 139 in *Seattle School District v. State*, 90 Wn.2d 476 (1978), Appendix B (emphasis added).<sup>14</sup> At the same page, the State explains that "[t]he critical *factual* question in *Juvenile Director*

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<sup>14</sup> Volume 8, 476-573 of the bound appellate Briefs, 90 (2<sup>nd</sup>) at the State Law Library.

was the “reasonableness” of the juvenile officer’s salary.” *Id.* (emphasis added).

In short, where the Court in *Seattle School District* states, “Thus, contrary to appellants’ [the State’s] contention, the normal civil burden of proof, i.e., ‘preponderance of the evidence’ applies,” the Court is referring to proof on factual questions, not to the burden to demonstrate by law and argument that a statute is unconstitutional beyond a reasonable doubt. In this respect, *Seattle School District* simply confirms the standard of proof on questions of fact that was applied by the trial court and the court of appeals in this case.

Contrary to the argument made by the Alliance, *Seattle School District* expressly recognizes the deference due enactments of the Legislature. “While the Legislature must act pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* to discharge that duty should be left to the Legislature.” *Seattle Sch. Dist.* at 520 (emphasis in original). Indeed, the Court in *Seattle School District* reversed the trial court’s retention of jurisdiction because it was “inconsistent with the assumption that the Legislature will comply with . . . its constitutional duties.” *Seattle Sch. Dist.* at 538.

The Alliance argues that the deference due a legislative enactment should be different depending upon whether the challenger is alleging that

the statute is unconstitutional in all of its applications (facial) or in a particular application (as applied). The argument is unfounded. There is no reason why the Legislature should be entitled to a different level of deference if a statute is challenged as facially invalid than if it is claimed to be invalid as applied. The Alliance offers no reason and cites no authority. Indeed, there is no authority for the proposition.

The Alliance also argues that where a challenger has made a prima facie case of inadequate funding the presumption of constitutionality should disappear and the burden should shift to the Legislature to prove adequate funding. The issue is not even presented by this case because the Alliance did not make a prima facie case of underfunding.<sup>15</sup> Therefore, the Court should not reach it.

Further, the Alliance offers no authority or reason why the Legislature should be required to bear such a burden. Burden shifting has been employed by courts in a variety of discrimination contexts where a defendant takes adverse action against a plaintiff and the motivation for the action is not readily discernable. In such “mixed motive” cases, the defendant may have both legal and illegal motives. “This Court has found it necessary to formulate a test of causation which distinguishes

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<sup>15</sup> See Trial Court’s Opinion, CP 324, fn 13 (not necessary to address the State’s affirmative defense in detail).

between a result caused by a constitutional violation and one not so caused.” *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286, 97 S. Ct. 568 (1977).<sup>16</sup>

This burden shifting principle is not new or novel. There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, ‘is merely a question of policy and fairness based on experience in the different situations. 9 J. Wigmore, *Evidence* s 2486, at 275 (3d ed. 1940). In the context of racial segregation, in public education, the courts, including this Court, have recognized a variety of situations in which ‘fairness’ and ‘policy’ require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated.

*Keyes v. Sch. Dist. No. 1, Denver, Colorado*, 413 U.S. 189, 209, 93 S. Ct. 2686 (1973). This motivational element is not present in a case where a school district seeks to prove that the State is failing to provide ample funding under article IX, section 1. Therefore, even if the question were properly presented before this Court, and it is not, the Alliance’s proposed burden-shifting lacks merit, as do its other arguments to abandon the well-established doctrine according statutes a presumption of constitutionality.

Finally, although not presented as one of the issues for review, the Alliance claims that the trial court somehow erred in determining whether the challenged legislative enactment was a reasonable approach to

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<sup>16</sup> See also *Preserving Procedure: Requiring the Government to Disprove Causation in Procedural Due Process Claims*, 76 U. Chi. L. Rev. 441 (2009).

providing ample funding for special education. Pet. for Review at 9. In fact, based solely on the use of the term “rational,”<sup>17</sup> the Alliance erroneously contends that the trial court somehow engaged an equal protection analysis. This is patently incorrect.

Moreover, the court of appeals did not even use this term. Rather, it properly concluded that substantial evidence supported the findings and that the chosen formula components provided an adequate calculation for a funding allocation. Whether expressed as rational or adequate, it reflects nothing more than properly affording to the Legislature the deference this Court repeatedly has held it is due in selecting policy choices to define and fund basic education. “[T]he general authority to select the *means* to discharge that duty should be left to the Legislature.” *Seattle Sch. Dist.* at 520.

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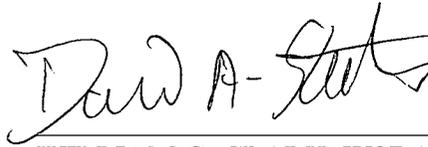
<sup>17</sup>“There is persuasive evidence that the legislature acted rationally in establishing this [.9309] multiplier.” Trial Court’s Opinion, CP 321.

### III. CONCLUSION

For the foregoing reasons, Respondent, State of Washington, respectfully requests the Court to affirm the court of appeals.

RESPECTFULLY SUBMITTED this 10 day of November, 2009.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "David A. Stulier". The signature is written in a cursive, flowing style with a horizontal line underneath it.

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## APPENDIX A

Trial court's Findings of Fact, Conclusions of Law and  
Court's Opinion, CP 297-336

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EXPEDITE  
 No Hearing is Set  
 Hearing is Set:  
Date: April 10, 2007  
Time: 1:30 p.m.  
Judge Wm. Thomas McPhee

STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT

SCHOOL DISTRICTS' ALLIANCE  
FOR ADEQUATE FUNDING OF  
SPECIAL EDUCATION, et al.,

Plaintiffs,

v.

THE STATE OF WASHINGTON, et al.,

Defendants.

NO. 04-2-02000-7

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW (CR 52)  
[PROPOSED]

This matter came on for trial before the Honorable William Thomas McPhee, Judge of the Superior Court of Washington in Thurston County. Trial commenced on October 30, 2006 and fact-finding concluded on November 20, 2006. The parties presented their closing arguments on December 1, 2006. The Court issued a written Court's Opinion on March 1, 2007. The Opinion is attached hereto and incorporated by reference herein.

Kirkpatrick & Lockhart Preston Gates Ellis L.L.P. and attorneys John Bjorkman and Cabrelle Abel represented plaintiffs in this case. The Washington Attorney General's Office, through Assistant Attorneys General William Clark, Newell Smith and Drew Zavatsky, represented defendants.

ORIGINAL

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW (CR 52)  
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1 The Court, having heard the testimony presented by the parties, having reviewed all  
2 exhibits and deposition excerpts admitted into evidence, having considered the legal  
3 memoranda and closing argument by the parties, and having issued its written Opinion in this  
4 case on March 1, 2007, enters the following:

5 **I. FINDINGS OF FACT**

6 **A. Parties**

7 1. The plaintiffs are an Alliance of public school districts of the State of  
8 Washington, and Bellingham School District No. 501, Bethel School District No. 403,  
9 Burlington-Edison School District No. 100, Everett School District No. 2, Federal Way School  
10 District No. 210, Issaquah School District No. 411, Lake Washington School District No. 414,  
11 Mercer Island School District No. 400, Northshore School District No. 417, Puyallup School  
12 District No. 3, Riverside School District No. 416, Spokane School District No. 81 ("Plaintiffs"  
13 or the "Alliance").

14 2. Defendants are the State of Washington, representatives of the two political  
15 branches of government, and the agency bearing overall responsibility for education in  
16 Washington State: for the Executive, Governor Christine Gregoire; for the legislature, Brad  
17 Owen, President of the Senate, and Frank Chopp, Speaker of the House; and Terry Bergeson,  
18 the Superintendent of Public Instruction. The Office of the Superintendent of Public  
19 Instruction (OSPI) is responsible for, among other things, allocating special education funding  
20 to the school districts, receiving financial reports and enrollment data for special education  
21 from the districts, interfacing with the federal government regarding special education funding  
22 and reporting requirements and monitoring special education compliance with the requirements  
23 of federal and state special education laws and regulations.

24 **B. Basic Framework: Special Education Law**

25 3. In 1971, the Washington legislature recognized the rights of disabled students  
26 when it passed the "Education for All Act," chapter 28A.13 RCW (subsequently recodified as

1 chapter 28A.155 RCW). Each biennium, the legislature sets the funding formula for special  
2 education through its Appropriations Act, Chapter 518, Laws of Washington 2005, § 507  
3 (hereinafter, "Section 507).

4 4. In 1977, the legislature adopted the Basic Education Act, RCW 28A.150.200, *et*  
5 *seq.* RCW 28A.150.250 and 28A.150.260 provide for an annual basic education allocation  
6 ("the BEA") of state funds based upon the average full-time equivalent (FTE) student  
7 enrollment in each school district. The BEA is the same for all FTE students in a district. It is  
8 based on the average cost of a basic education for an average student.

9 5. Funding is expanded for special education students. As with the BEA, a district  
10 receives revenue calculated as a per capita allocation for each special education student in the  
11 district. The population of students receiving special education services, however, is counted  
12 differently; it is a headcount of all students in the district receiving special education services,  
13 without conversion to full-time equivalency. Like the BEA, this excess cost allocation is based  
14 on an average cost—it is the additional cost of educating an average special education student,  
15 with average disabilities, in excess of the BEA for that student. Since 1995, the legislature has  
16 allocated this excess cost on a formula of 0.9309 times the BEA. Thus, the total allocation for  
17 each FTE special education student is 1.9309 X BEA.

18 6. Under state and Federal law, school districts must create an Individualized  
19 Education Program ("IEP") for each disabled child.

20 7. A properly formulated IEP determines every handicapped student's appropriate  
21 special education program.

22 8. The choices and responsibility for educating children are left to the local  
23 districts through the students' IEPs subject to statewide minimum standards.

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1 **C. Washington State Special Education Financing System and Funding Formula**

2 9. The legislature selected the 0.9309 times BEA funding formula as part of a new  
3 financing system in 1995, and has re-enacted it in every subsequent budget. Washington's  
4 experience as of 1995 had demonstrated that the total average cost of educating a special  
5 education student was 1.87 times the cost of a basic education student.

6 10 Current national data fixes the total average cost of educating a student  
7 receiving special education services (basic education plus special education) at approximately  
8 190 percent of the total average cost of the basic education of a student.

9 11. Plaintiffs' expert, Dr. Parrish, found in his 2002 study that nationwide the  
10 average total excess expenditures for special education services were about 90% of average  
11 total basic education expenditures.

12 12. Pursuant to the funding system initiated in 1995, the legislature provides funds  
13 for special education through its budget appropriations acts. Currently, Section 507 provides  
14 in relevant part:

- 15 a. Pursuant to RCW 28A.150.390, funding for special education is provided on an  
16 excess cost basis. ¶ 1.
- 17 b. School districts shall ensure that special education students as a class receive  
18 their full share of the basic education apportionment. ¶ 1.
- 19 c. To the extent school districts can not provide an appropriate education for  
20 special education students through the basic education apportionment, services  
21 shall be provided using the special education excess cost allocation. ¶ 1.
- 22 d. OSPI shall use the excess cost methodology using the S-275 personnel  
23 reporting and other accounting systems to ensure that (a) special education  
24 students are basic education students first, (b) as a class, special education  
25 students are entitled to the full basic education allocation and (c) special  
26 education students are basic education students for the entire school day.  
¶ 2(a).
- e. Federal and state funds are distributed based on a headcount of special  
education students receiving specially designed instruction in accordance with  
a properly formulated IEP. ¶¶ 4 and 5.
- f. The special education allocation for school districts for disabled children birth  
through two is the average headcount of those children multiplied by the



1 17. In 2002, the State eliminated state-funded Safety Net categories. The Safety  
2 Net for High Cost Individual Students remained in place.

3 18. The 2002 Safety Net changes eliminated the districts' ability to apply for Safety  
4 Net or other additional funding for their special education population above 12.7%.

5 19. By statute, districts applying for Safety Net may not include supplemental  
6 contracts in their calculation of demonstration of need. In addition, Section 507 limits the  
7 calculation of indirect costs in Safety Net to 4 percent of direct expenditures.

8 20. Prior to the 2004-05 school year, the total amount of Safety Net relief provided  
9 by the legislature was never exhausted.

10 21. There was no evidence presented that the cost of educating a special education  
11 student above the 12.7% cap is averaged into the allocation paid for students below the cap.

12 22. A cap without a Safety Net assures that districts whose special education  
13 populations exceed 12.7 percent will not receive any excess cost allocation for those students  
14 above the cap.

15 23. The former Safety Net "Demographics" category was designed to relieve school  
16 districts that attract special education students because of the high quality of medical and social  
17 services available to the disabled in the area encompassed by the district. Spokane is an  
18 example of such a district.

19 **E. Findings Regarding Alleged Underfunding**  
20 **F196 Analysis**

21 24. Districts provide annual financial reports (F196 reports) to the Office of the  
22 Superintendent of Public Instruction (OSPI) that contain the districts' revenues and  
23 expenditures pursuant to OSPI accounting rules.

24 25. The F196 reports do not separate the amounts of basic education revenues that  
25 arise due to the special education students residing in each school district.

26

1 26. Special education revenues on the F196 Report do not contain the BEA to  
2 which each special education student is entitled.

3 27. The F196 reports do not demonstrate that districts, in fact, are applying the BEA  
4 as directed.

5 28. Plaintiffs' expert, Dr. Tom Parrish, also confirmed that the F196-based  
6 comparison of excess costs over 4121 revenues cannot establish underfunding of special  
7 education.

8 **F. 1077 Cost Accounting Methodology**

9 29. The purpose of the 1077 methodology is to provide a uniform statewide  
10 allocation of basic education support for special education services.

11 30. The 1077 methodology includes two key assumptions relevant to this case:

- 12 • Special education students receive their appropriate share of basic education  
13 support from basic education staff when served in the regular classroom.  
14 • When special education students are served outside the regular classroom, basic  
15 education dollars follow them to partially support special education services  
16 they receive

17 31. The 1077 methodology is solely for allocation of costs; it does not allocate  
18 revenue or identify sources of revenue.

19 32. The 1077 worksheet is a series of reasonably complex calculations that allocates  
20 to special education and basic education the cost of each special education teacher.

21 33. Examples offered at trial demonstrated that the average (rounded off) allocation  
22 of such teacher costs was 38 percent to basic education and 62 percent to special education.

23 **G. Indirect Costs**

24 34. The school districts report all of the district-wide indirect costs (overhead) in  
25 Program 97 expenditures on their annual F196 reports.

26 35. The State pays most of these costs.

1 36. No attempt is made on the F-196 to allocate the payments for indirect costs  
2 among basic education, special education, or other programs.

3 37. For example, the Lake Washington School District F196 report for sy2004-05  
4 shows Program 97 expenditures of \$20,084,105.

5 38. In Lake Washington's accounting of Program 97 revenue for these costs, state  
6 revenue paid \$15,106,206, federal revenue paid \$152,860, and the balance of \$4,824,968 was  
7 paid by other resources.

8 39. It is impossible to determine what proportion of this money was used to pay  
9 special education related indirect expenditures, if any.

10 **H. Supplemental Contracts**

11 40. Most special education programs offer supplemental contracts and time,  
12 responsibility, and incentive (TRI) pay in order to attract and retain special education teachers  
13 and administrators.

14 41. There was no evidence why such contracts and extra pay are a component of  
15 basic education.

16 **I. Federal IDEA Funds**

17 42. The only evidence of this issue at trial was that Spokane's excess cost allocation  
18 for sy2004-05, for example, was reduced by \$127.35 per student because federal IDEA funds  
19 were used to offset teacher salary and benefit increases, thereby reducing the BEA and  
20 consequently the excess cost allocation. No evidence of why this occurred was offered.

21 **J. Plaintiffs' Expert Testimony**

22 45. Dr. Parrish's conclusions concerning the need to change staffing ratios for  
23 special education were not persuasive

24 **CONCLUSIONS OF LAW**

25 1. This Court has jurisdiction over the parties and the subject matter of this  
26 dispute. Venue in this county is appropriate.

1           2.     The acts of the State, acting through the legislature and the Office of  
2 Superintendent of Public Instruction, that are subject to scrutiny are those acts that reflect the  
3 State's current funding approach. What occurred beforehand may have historical relevance,  
4 but is not what is judged here.

5           3.     With respect to a challenge under Wash. Const. Art. IX, §§ 1 and 2, a court  
6 should presume that an act of the legislature is constitutional; a party challenging a legislative  
7 act or statute must prove it unconstitutional beyond a reasonable doubt; the preponderance of  
8 evidence standard is applicable to questions of fact and the beyond a reasonable doubt standard  
9 is applicable to review of constitutional issues of law; and, the judiciary should defer to the  
10 legislature, and restrain its role to providing only broad constitutional guidelines within which  
11 the legislature may work.

12           4.     The legislature has the authority to select the means to discharge its duty under  
13 Wash. Const. Art. IX, § 1 and 2.

14           5.     The task of the Court when deciding a facial challenge to legislation is to  
15 determine whether the statute or act is unconstitutional on its face without regard to the manner  
16 in which it is enforced. A facial challenge must be rejected unless there is no set of  
17 circumstances in which the law can constitutionally be applied.

18           6.     Section 507 of the appropriations act is not unconstitutional beyond a  
19 reasonable doubt on its face or as applied. The amount appropriated in Section 507 is not on  
20 its face or as applied so deficient that the appropriation is unconstitutional.

21           7.     Plaintiffs also have failed to carry their burden of proving that the special  
22 education multiplier of .9309 violates Article IX of the Washington Constitution. The  
23 legislature's approach of using a multiplier to couple special education funding to BEA  
24 funding is rational and constitutional. The adequacy of the BEA is not an issue before this  
25 Court.

26



1 that the district is accessing all available revenue, and that it is operating a reasonably efficient  
2 special education program.

3 15. A safety net is not the only approach to addressing the constitutional imperative  
4 to fund special education. The legislature can, but is not obliged to, use a Safety Net. The  
5 means of satisfying the constitutional duty to fund education remains the legislature's  
6 exclusive prerogative.

7 16. A safety net is not part of the State's constitutional duty to make ample  
8 provision for special education.

9 17. Dependable and regular funding has never been a constitutional requirement.  
10 Rather, revenue for schools must come from a dependable and regular tax source.

11 18. The conditions and limitations in Section 507 do not, on their face or as applied,  
12 limit districts' access to Safety Net funds beyond a reasonable doubt.

13 19. There is no persuasive evidence of a difference between the BEA and basic  
14 education expenditures; the BEA is required by law to be the cost of basic education ("fully  
15 funded", RCW 28A.150.250).

16 20. Districts applying for Safety Net funding may not include indirect costs of 16.7  
17 percent (the average state recovery rate) in computing eligibility for Safety Net funds. The State  
18 currently allows indirect costs of approximately 4 percent for such applications. This is  
19 reasonable. The fact that a higher rate could be used or that additional indirect costs could be  
20 included in Safety Net applications does not prove that the failure to use another rate is  
21 constitutionally inadequate.

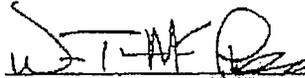
22 21. Supplemental contracts and TRI pay are not part of an article IX, section 1,  
23 constitutional analysis. There is no basis here for declaring RCW 28A.400.200(4)  
24 unconstitutional.

25 22. Plaintiffs' evidence regarding the alleged diversion of Federal IDEA funds is  
26 wholly inadequate to prove a constitutional violation.

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23. Finally, there is no basis to retain jurisdiction in this case.

DATED this 12 day of April, 2007.

  
WM. THOMAS MCPHEE, JUDGE

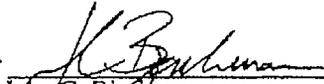
Presented by:

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Attorney General

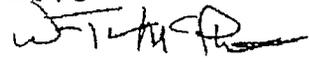
  
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By   
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Attorneys for Plaintiffs.

The above findings and conclusions are prepared by defendant (and approved for entry by plaintiff) from the court's 27 page written opinion on file herein. I intend that the written opinion be incorporated into my findings and conclusions.



3



1 Plaintiffs have summarized their claims in seven parts,<sup>1</sup> the first, overarching claim contends  
2 that the legislature has underfunded support for special education to such a degree that it has failed  
3 its paramount duty under article IX, section 1, to make ample provision for education. Hereafter I  
4 refer to this overarching claim as the funding formula claim. Plaintiffs contend that the funding  
5 formula deficit is so large that proof of the existence of the deficit, without more, is proof that the  
6 funding formula is unconstitutional. Following the funding formula claim are five subclaims and a  
7 request for retained jurisdiction. I designate the five as subclaims because each challenges the  
8 constitutionality of a discrete part of the State's approach for special education funding.

9 The litigants and counsel are very familiar with the background discussed here, but since this  
10 case has engendered public interest, a very basic explanation of the process for school funding may  
11 be helpful.

12 The legislature's approach to school funding is fairly described as a formula that calculates  
13 the cost of educating a student through the application of uniform statewide ratios of students to  
14 staff and the state average costs of staff. The product is a basic education allocation (BEA) for each  
15 student that, after adjustments unique to each district, is paid to a district for each FTE student<sup>2</sup>

16  
17 <sup>1</sup> Synopsis of plaintiffs' claims

18 1. The State has been underfunding special education programs over the last four years in at least the following  
19 amounts:

20 2002-03 \$101,977,191  
21 2003-04 \$108,908,593  
22 2004-05 \$134,133,659

23 2005-06 At least \$117,000,000 for those school districts applying for Safety Net funding

24 2. Safety Net is unconstitutional in that it does not provide a sufficient means of access for all school districts' full  
25 demonstration of need.

26 3. The 12.7% cap on excess cost funding is unconstitutional without a Safety Net that allows school districts to  
27 recover their legitimate demonstration of need.

28 4. The State cannot categorically refuse to fund the indirect costs of special education programs. The State cannot  
artificially limit Safety Net demonstration of need based on a lower indirect rate.

5. The State cannot categorically refuse to fund necessary special education supplemental contracts.

6. The State cannot divert federal funds to pay for state obligations for salary increases, as federal funds are no  
more dependable and reliable than local levy funding.

7. This Court should retain jurisdiction to satisfy itself that the Legislature takes reasonably prompt action to  
correct features of the funding system that the Court has found to be unconstitutional.

<sup>2</sup> An average full-time equivalent student. RCW 28A.150.260.

1 enrolled in the district. The choices and responsibility for educating are left to the local districts  
2 through Individualized Education Programs (IEPs), subject to statewide minimum standards  
3 imposed by the legislature pursuant to its constitutional duty in article IX, section 2, to provide a  
4 "general and uniform" educational system in Washington.<sup>3</sup> The BEA is the same for all students in  
5 a district, regardless of grade, gender, or skill at learning. It is based on the average cost of  
6 educating an average student. RCW 28A.150.260.

7 The funding formula is expanded for special education students. As with the BEA, a district  
8 receives revenue calculated as a per capita allocation for each special education student in the  
9 district.<sup>4</sup> This special education allocation is the amount required in excess of the BEA to provide a  
10 basic education to a student with a disability. Like the BEA, this excess cost allocation is based on  
11 an average cost – it is the additional cost of educating an average special education student, with  
12 average disabilities, in excess of the BEA for that student. Since 1995, the legislature has allocated  
13 this excess cost on a formula of 0.9309 times the BEA.

14 This formulaic approach has never been approved by our Supreme Court. Cf. *Brown v.*  
15 *State*, 155 Wn.2d 254, 261, 119 P.3d 341(2005) ("But this court has never held, nor do we now  
16 hold, that the Basic Education Act defines the scope of the State's paramount constitutional duty to  
17 provide education.") A formulaic approach for special education was approved generally in *School*  
18 *Funding III*<sup>5</sup> by Judge Doran.

19  
20 <sup>3</sup> And also subject to an extensive set of federal regulations imposed on the states as a condition of federal funding for  
21 education. Federal funding for Washington is annually around \$200 million. OSPI has promulgated rules that mostly  
22 mirror federal regulations.

23 <sup>4</sup> Special education population is counted differently; it is a headcount of all students receiving special education services  
24 in the district, without conversion to full-time equivalency. A special education student is, "Any student, enrolled in  
25 school or not, (i) who has been identified as having a disability, (ii) whose disability adversely affects the student's  
26 educational performance, and (iii) whose unique needs cannot be addressed exclusively through the education in general  
27 education classes with or without individual accommodations and is determined to be eligible for special education  
28 services; ..." WAC 392-172-035(2).

<sup>5</sup> Three school funding cases were decided in this Superior Court by Judge Robert Doran between 1977 and 1988. Only  
the first case was appealed to an appellate court; it is reported as *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 458  
P.2d 71 (1978). The second and third cases are *Seattle School Dist. v. State*, Thurston County Cause No. 81-2-01713-1  
(1983), and *Washington State Special Education Coalition*, Thurston County Cause No. 85-2-00543-8 (1988).

1 A special education student is first and foremost a basic education student all during the  
2 school day. Thus, a district must expend all of the BEA and all of the excess cost allocation  
3 received for its special education students before the district can contend that the legislature has  
4 underfunded its special education program. Because both the BEA and the excess cost formulas are  
5 based on average costs and average students (and for the excess cost formula, average disabilities), a  
6 district with a large special education population will be able to educate a significant number of its  
7 special education students for less than the combined BEA and excess cost allocations, and of  
8 course the opposite is true for students who need more than average services; state funding is based  
9 on averages.

### 10 The standards for Judicial Review

11 The process for judicial review in a constitutional challenge to a legislative act begins with  
12 an understanding of the power and duty of the court as provided in the Washington Constitution and  
13 the separation of powers doctrine.

14 The ultimate power to interpret, construe and enforce the constitution of this State  
15 belongs to the judiciary.

16 *Seattle School Dist. No. I v. State*, 90 Wn.2d 476, 496, 458 P.2d 71 (1978).

17 Nevertheless, we are sensitive to the fact that our state government is divided into  
18 legislative, executive and judicial branches with the sovereign powers allocated  
19 among the co-equal branches. We are equally aware that those charged with the  
20 exercise of power in one branch must not encroach upon power exercisable by  
21 another. But, the compartments of government are not rigid. In fact, the  
22 practicalities of government require that each branch take into account the power of  
23 the others. None was intended to operate with absolute independence.

24 *Id.* at 505-506

25 Even within the separation of powers doctrine, a court cannot abdicate its duty to interpret,  
26 construe, and enforce the constitution, and where the constitution has been violated a court must act

27 Throughout this trial the parties have referred to these three cases as *Doran I*, *Doran II*, and *Doran III*. However, the  
28 Supreme Court and Judge Doran himself referred to the cases as *School Funding I*, *School Funding II*, and *School Funding III*. The latter references are used in this opinion.

1 to enforce the constitution regardless of the views of a co-equal branch of government. *Id.* at 508.  
2 Nevertheless, the hallmark of judicial review of legislative acts is caution. A court must not  
3 encroach upon the legislature's exclusive power to legislate and thereby violate separation of  
4 powers in the guise of constitutional review. This hallmark of caution finds expression in several  
5 doctrines well engrained in our law:

6 • A court should conduct constitutional review of legislative acts with deference to the role of the  
7 legislature in the separation of powers doctrine, and in the unique role of the legislature in  
8 crafting law, a role totally foreign to the traditional role of courts.

9 In specific area of article IX legislation, the Supreme Court has declared:

10 This court will not micromanage education and will give great deference to the acts  
11 of the legislature.

12 *Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341(2005). Great deference means great caution, but  
13 it does not mean that constitutional review of article IX is less precise or less important.

14 • A court should "presume" that an act of the legislature is constitutional.

15 Presumptions in the law normally apply to facts, not the law; and constitutional review is a matter of  
16 law. Here the presumption is that the legislature is well aware of its responsibility to craft  
17 legislation that is constitutional, has intended to do so, and believes that it has.

18 • A court should overturn a legislative act only if the court concludes beyond a reasonable doubt  
19 that the act is unconstitutional.

20 A conclusion beyond a reasonable doubt may be reached after consideration of the deference and  
21 presumption discussed above; but if that quantum of assurance is reached, a court may not fail to  
22 declare the act unconstitutional.

23 I have been guided by these principles in deciding this case.

24 Throughout this trial, the litigants disagreed on the standard of review that this court must  
25 apply. Plaintiffs contend that the preponderance standard should apply to my decision making,  
26 relying on a passage from *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 528,  
27 458 P.2d 71 (1978). Defendant counters that the standard is proof beyond a reasonable doubt and  
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1 that this standard applies to findings of fact that support a court's analysis of constitutional issues.  
2 Neither is entirely correct.

3 The standard of review in a case where the constitutionality of a statute is challenged is that  
4 the burden is on the party challenging the statute to prove its unconstitutionality beyond a  
5 reasonable doubt. A recent statement of these well established principles is found in *Island County*  
6 *v. State*, 135 Wn.2d 141, 146-147, 955 P.2d 377 (1998), where the standard of review for  
7 constitutional challenges is discussed at length and distinguished from the standard of evidence that  
8 requires proof beyond a reasonable doubt in a criminal case.

9 The reasonable doubt standard, when used in the context of a criminal proceeding as  
10 the standard necessary to convict an accused of a crime, is an evidentiary standard  
11 and refers to 'the necessity of reaching a subjective state of certitude of the facts in  
12 issue.' *State v. Smith*, 111 Wn.2d 1, 17, 759 P.2d 372 (1988) (Utter, J., dissenting)  
(quoting *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368  
(1970)).

13 In contrast, the beyond a reasonable doubt standard used when a statute is  
14 challenged as unconstitutional refers to the fact that one challenging a statute must,  
15 by argument and research, convince the court that there is no reasonable doubt that  
16 the statute violates the constitution.

17 *Id.* at 147

18 Constitutional challenges are questions of law. Perusal of a representative sample of  
19 appellate decisions addressing constitutional challenges to statutes shows that they seldom involve  
20 disputed issues of fact. This is axiomatic for "facial" challenges to the constitutionality of statutes,  
21 and it is usually the case for "as applied" challenges.<sup>6</sup> Occasionally an as applied challenge involves  
22 findings about disputed facts that must be resolved before the constitutional challenge is addressed.  
23 When that is the case, it does not follow that the evidentiary standard for disputed facts changes to  
24 conform to the standard of review for the constitutional challenge. The two are apples and oranges;  
25 the first involves findings of fact, the latter conclusions of law.

26 In civil actions there are several recognized burdens of proof, but the paramount evidentiary  
27 standard is proof by a preponderance of evidence. For example, in a civil enforcement action

28 <sup>6</sup> These challenges are often decided on agreed facts or on summary judgment.

1 brought by a government agency against an individual for violation of a statute, the evidentiary  
2 standard for proving the violation may be proof by a preponderance. If so, a defense asserting that  
3 the statute is unconstitutional as applied against the individual does not change the evidentiary  
4 burden of proof required for proving violation of the statute. If the government may prove violation  
5 of the statute by a preponderance, that burden does not change to proof beyond a reasonable doubt  
6 merely because the constitutionality of the statute is challenged. And in a declaratory judgment  
7 action brought under RCW 7.24.020 by an individual challenging the validity of a statute on as  
8 applied constitutional grounds, issues of fact are tried and determined in the same manner as issues  
9 of fact are tried and determined in other civil actions. RCW 7.24.100. The evidentiary standard for  
10 contested issues of fact does not change because the declaratory judgment is sought on  
11 constitutional grounds rather than some other asserted ground. For contested issues of fact, the  
12 evidentiary burden remains proof by a preponderance even though the standard for reviewing the  
13 constitutionality of the statute is that the statute is presumed constitutional unless the court is  
14 convinced beyond a reasonable doubt that the statute is unconstitutional.

15 In this case plaintiffs have sought a declaratory judgment that the appropriations of the  
16 legislature to fund payment of the special education costs of the districts are unconstitutional on  
17 both "facial" and "as applied" grounds. In the as applied challenges there are many disputed factual  
18 issues that are material to the questions of law – for example, what number of special education  
19 students in the school districts' accounting actually have current, properly formulated IEPs? Proof  
20 of this issue must be determined on a preponderance standard; it does not shift to the evidentiary  
21 standard of proof beyond a reasonable doubt.

22 *Seattle School Dist. No. 1 of King County v. State*, supra, is in accord. The Supreme Court  
23 addressed the issue of whether a higher evidentiary standard applied and rejected such a contention.

24 Thus, contrary to appellants' contention, the normal civil burden of proof, i.e.,  
25 preponderance of the evidence, applies.  
26  
27  
28

1 *Id.* at 528. The Supreme Court did not specifically address the standard of review because that issue  
2 was not raised. However, at the trial court level, and in all the *School Funding* cases, Judge Doran  
3 applied the beyond a reasonable doubt standard for constitutional review.

4 In this case I have applied the preponderance standard for questions of fact and the beyond a  
5 reasonable doubt standard for review of constitutional issues of law.

### 6 The "Facial" Constitutional Challenge

7 The task of a court when deciding a facial challenge – *i.e.*, deciding whether a statute or act  
8 of the legislature is unconstitutional on its face, without regard to the manner in which enforcement  
9 of the statute or act is attempted – is whether the language of the statute or act violates the  
10 constitution. In this exercise, a court interprets and construes ("gives legal meaning to") the  
11 language of the constitution, but views the language of the statute or act using the meaning directed  
12 by the legislature,<sup>7</sup> or where the legislature is silent, the plain meaning of the language.

13 In *Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000), the Supreme Court opined:

14 [A] facial challenge must be rejected unless there exists *no set of circumstances* in  
15 which the statute can constitutionally be applied.

16 Facial challenges are decided by a two step process, as declared in *Tunstall*, at page 221: First,  
17 determine what article IX, section 1 ("the paramount duty to make ample provision [for special  
18 education students]") requires; and second, determine whether there is no set of circumstances in  
19 which the acts of the legislature could satisfy article IX, section 1.

20 It is settled law that in fulfilling this broad constitutional duty, the legislature must define  
21 basic education and create a basic program of education. *Seattle School Dist. No. 1 v. State*, 90  
22 Wn.2d 476, 482, 458 P.2d 71 (1978). Further, the legislature has the authority to select the means  
23 to discharge this duty and the judiciary should restrain its role to providing only broad constitutional  
24 guidelines within which the legislature may work. *Seattle School Dist. No. 1*, 90 Wn.2d at 518;

25  
26 <sup>7</sup> "[I]n interpreting a statute it is the duty of the court to ascertain and give effect to the intent and purpose of the  
27 Legislature, as expressed in the act. The act must be construed as a whole, and effect should be given to all the language  
28 used." *Tommy P. v. Board of Commissioners*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

1 *Tunstall*, 141 Wn.2d at 223. The legislature has addressed its constitutional duty to make ample  
2 provision for special education by enacting chapter 28A.150 RCW, the Basic Education Act, and  
3 specifically including chapter 28A.155 RCW and RCW 28A.150.370 and .390, and by making  
4 annual appropriations for special education that appear in section 507 of the current General  
5 Government Appropriation Act.<sup>8</sup> The plaintiffs do not assert that the codified laws, chapter  
6 28A.155 RCW and RCW 28A.150.370 and .390 are facially unconstitutional; rather they contend  
7 that section 507 is facially unconstitutional in both the amount appropriated and the funding formula  
8 contained in the conditions and limitations of section 507.<sup>9</sup> In support of these contentions, the  
9 plaintiffs assert:

10       Accordingly, if there is no set of circumstances where the disputed [sic] statutory  
11       provision amply provides for *all* students in special education programs, the Court  
12       must find that the funding formula is facially unconstitutional. Since the State's  
13       funding formula does not, and cannot, adequately fund all students in all school  
14       districts all of the time, Plaintiffs' facial challenges are valid.

15 *Plaintiffs' Supplemental Trial Brief*, p. 7. Plaintiffs' argument on the facial unconstitutionality of  
16 section 507 seems encapsulated in the following exchange at oral argument:

17       The Court: [You seem to contend that] The [12.7 percent] cap is only constitutional  
18       if you have a mechanism that eliminates the cap.

19       Ms Abel: Right. To be able to apply, to show that they have a need. . . . And that  
20       was the original intention when they created the Safety Net system, as you heard  
21       evidence. There was a mechanism to apply for students that were over the cap.

22 <sup>8</sup> At trial, Laws of 2005, chapter 518, section 507, was used (Ex. 550, pdf 15); currently it is Laws of 2006, chapter 372,  
23 section 507. The sections are the same except that the amount appropriated for FY2007 was increased by about \$7 million  
24 in the 2006 appropriation act. Over the past 10 years, the appropriation for special education appears in much the same  
25 form in each appropriation act. The language of the special education section contains the amount of the appropriation  
26 followed by conditions and limitations that have been mainly consistent from one year to the next. This declaratory  
27 judgment action pertains only to the law as it currently exists. In discussion of the issues, I have used the 2005  
28 appropriation amount in order to be consistent with the evidence. The conditions and limitations are exactly the same in  
both appropriation acts. At trial and in this opinion, the special education appropriation and the conditions and limitations  
are referred to as section 507.

<sup>9</sup> In my research I did not discover any appellate decision that declared an appropriation act (or bill) of the legislature  
unconstitutional on its face, as distinguished from a codified statute enacted by the legislature. Defendants did not raise  
this issue, so I have proceeded as if this claim is available to plaintiffs. I have not resolved that question.

1 I am not persuaded. Section 507 is not unconstitutional on its face. The test in a facial  
2 challenge is whether there is any set of circumstances that permits a conclusion that school districts  
3 receive sufficient money from the State to pay the districts' costs of providing a basic education to  
4 the districts' special education students. The language of section 507 permits that conclusion. In  
5 the language of section 507, there is a limitation (the 12.7 percent cap) and a safety net (with an  
6 appropriation for safety net that has not been exhausted). The conditions and limitations in section  
7 507 that address the 12.7 percent cap and the safety net do not create the impediment to access of  
8 safety net awards that are the core of plaintiffs' argument on this facial challenge. Subsection (8) of  
9 section 507 appropriates approximately \$47.5 million for safety net awards and directs the  
10 superintendent of public instruction to an additional source if necessary. Subparts (a) and (b) of  
11 subsection (8) direct, first, "The committee shall consider unmet needs for districts that can  
12 convincingly demonstrate that all legitimate expenditures for special education exceed all available  
13 revenues from state funding formulas" and, second, "The committee shall then consider the  
14 extraordinary high cost needs of one or more special education students." These provisions do not,  
15 on their face, limit districts' access to safety net funds in the manner plaintiffs contended at trial.  
16 Those limitations arise from application of the safety net process to the districts' alleged excess  
17 need, and should be analyzed under the "as applied" challenge. Subparts (c), (d), and (e) of  
18 subsection (8), do potentially restrict safety net awards, but the language of these subparts is not  
19 nearly sufficient to convince me beyond a reasonable doubt that they unconstitutionally restrict  
20 "ample provision".

21 Subsection (9) of the conditions and limitations in section 507 delegates to the  
22 superintendent of public instruction the power to adopt rules and procedures to administer the safety  
23 net process – and the effect of some rules are clearly part of this case. However, delegation of this  
24 authority and rules promulgated by the superintendent cannot make the challenged act of the  
25 legislature facially unconstitutional.

26 Finally, the amount appropriated in section 507 is not on its face so deficient that the  
27 appropriation is facially unconstitutional. The evidence in this case is that the fund for safety net  
28

1 awards was not exhausted. The reason for that occurrence is properly addressed in the as applied  
2 challenge, but not in this facial challenge.

3 **The "As Applied" Constitutional Challenges**

4 **The Funding Formula Claim**

5 This claim contends that the State has been underfunding special education programs over  
6 the last four years in at least the following amounts:

7 2002-03 \$101,977,191  
8 2003-04 \$108,908,593  
9 2004-05 \$134,133,659  
10 2005-06 At least \$117,000,000 for those school districts applying for safety net  
funding.

11 Consistent with the evidence offered at trial, I have focused on the last school year with complete  
12 records, sy2005-06, where the deficit is alleged to be \$134 million. Included in that figure is \$21.6  
13 million attributed to the 12.7 percent cap on excess cost allocation. This claim is addressed in a  
14 following section and so the \$21.6 million can be deducted from the \$134 million to give a more  
15 accurate picture of the magnitude of deficit claimed here. This remaining portion, \$112.4 million in  
16 sy2005-06, is directly attributable to plaintiffs' claim that the excess cost allocation is so inadequate  
17 that it is a violation of the State's paramount duty to make ample provision for special education.

18 I conclude that the claimed amount of excess cost funding deficit does not prove that the  
19 legislature's allocation for special education is unconstitutional. For each special education student  
20 under the 12.7 percent cap, the State pays a district an excess cost allocation equal to 0.9309 of the  
21 BEA. This is in addition to the full BEA for that student. Except for the cap, plaintiffs  
22 acknowledge that this excess cost formula is consistent with national data that fixes the cost of  
23 educating a special education student at approximately 190 percent of the cost of educating a basic  
24 education student. It is also consistent with the opinion of plaintiffs' expert, Dr. Parrish, whose  
25 study, according to plaintiffs, "found that nationwide the total excess expenditures for special  
26 education in addition to basic education expenditures were about 90% of total basic education  
27 expenditures." *Plaintiffs' Proposed Findings of Fact*, No. 207. Nevertheless, plaintiffs argue that  
28

1 special education is grossly under funded and rely upon the opinion of Dr. Parrish and statewide  
2 accountings of special education expenditures for proof of that contention. Plaintiffs explain that  
3 the State's formula is constitutionally deficient because the 0.9309 multiplier is applied against the  
4 BEA, not the expenditures for basic education. Plaintiffs also argue that the required cost  
5 accounting methodology proves their claim by showing such a large deficit of the excess cost  
6 allocation compared to special education costs that the deficit itself is sufficient to prove that the  
7 appropriation is constitutionally deficient. I am not persuaded.

8 The 0.9309 multiplier is not an unconstitutional application of the ample provision  
9 requirement of article IX, section 1. There is persuasive evidence that the legislature acted  
10 rationally in establishing this multiplier. The legislature had before it the 1995 *Special Education*  
11 *Fiscal Study*, Exhibit 92, pdf 21, that reported a 0.87 multiplier for Washington education. Further,  
12 as noted above, the multiplier is consistent with national standards, and evidence has shown that it  
13 has remained relatively constant over time.<sup>10</sup> At the end of the trial, it seems evident that the  
14 alleged shortfall in the special education appropriation, if it is found to exist at all, is the product of  
15 an inadequate BEA, not an inadequate excess cost multiplier. The adequacy of the BEA is not an  
16 issue before this court. I have read reports that other cases in other courts are addressing the  
17 constitutionality of basic education funding, but that issue is not here.<sup>11</sup>

18 Plaintiffs argue that Dr. Parrish's study, and others, applied a multiplier to the actual costs of  
19 basic education, while the 0.9309 multiplier in this state has been applied to the BEA, a revenue  
20 rather than a cost allocation. I am not persuaded that there is a difference; the BEA is required by  
21 law to be the cost of basic education ("fully funded", RCW 28A.150.250), and that issue is not  
22 before this court.

23  
24  
25 <sup>10</sup> Plaintiffs argue that the 0.9309 multiplier not a rational legislative choice, but rather is a "construct" selected by the  
26 legislature to comply with the federal requirement of "maintenance of effort". Carried to the last 9/10,000 of the formula,  
that may be so. Still, that does not detract from the rationality of the number for all the reasons identified here.

27 <sup>11</sup> Plaintiffs' proposed findings of fact numbered 226 and 227 address this matter indirectly, but the evidence referred to is  
28 peripheral to the issues here and falls well short of that required for constitutional review of basic education funding.

1           Plaintiffs have not shown the funding deficit for special education that they claim. They rely  
2 upon the F196 reports of all districts statewide submitted annually to OSPI. These voluminous  
3 reports, provided here in Exhibit 501, include an accounting of special education expenditures from  
4 Program 21 (Special Ed – Supplemental, State) and Program 24 (Special Ed – Supplemental,  
5 Federal). The reports also include an accounting of revenue received by the district, including the  
6 BEA, the excess cost allocation, federal IDEA revenue, federal Medicaid reimbursement revenue,  
7 and often a small amount received from other districts for transfer students. Plaintiffs compiled  
8 these statewide reports of special education expenditures and revenue in Exhibit 131a, totaled  
9 expenditures and revenues, and concluded that the deficits reported above are the result.

10           This evidence does not prove the contention that special education is underfunded at a level  
11 anywhere near the magnitude claimed. Plaintiffs have not accounted for all the revenue available to  
12 pay the cost of educating special education students. While F196 reports include all of the revenue  
13 sources identified above, including the BEA, plaintiffs did not include the BEA in Exhibit 131a.  
14 For example, the \$134 million deficit shown by the totals for sy2005-06 in Exhibit 131a includes a  
15 \$1,305,776 deficit for Bellingham School District. In the accounting for that district, \$8,339,487 is  
16 stated as the cost of special education, and is the sum of Program 21 and 24 costs shown in  
17 Bellingham's F196. \$7,033,711 is stated as the revenue to pay those costs, and is the sum of four of  
18 the five revenue sources listed above, but not including BEA. In Exhibit 131a, plaintiffs have not  
19 accounted for any part of the \$5.4 million BEA received that year by Bellingham School District for  
20 its 1,279 special education students,<sup>12</sup> or for any other school district.

21           Plaintiffs do contend that the BEA for special education students is used to pay the costs of  
22 basic education in the district, including some of the costs for special education students. They  
23 offer the State's 1077 methodology as proof of their contention. Plaintiffs misconstrue the law and  
24 fail to prove the factual underpinnings of their contention that the 1077 methodology accounts for  
25 all special education students' BEA in basic education services.

26  
27 <sup>12</sup> The example of Bellingham School District was explored in the cross examination of Dr. Dale Kinsley, superintendent  
28 of that district.

1           The 1077 report is an annual report required by the federal government to show the  
2 allocation between basic and special education services by school districts receiving IDEA special  
3 education supplemental funds (State Program 24). The State has used the report to develop its 1077  
4 methodology for the purpose of providing uniform statewide allocation of basic education support  
5 for special education services. The methodology includes two key assumptions relevant to this  
6 issue:

- 7           • Special education students receive their appropriate share of basic education support
- 8           • When special education students are served outside the regular classroom, basic
- 9           education dollars follow them to partially support special education services they
- 10           receive.

11 Exhibit 4, pdf 167. These assumptions are consistent with the law, as provided in Section  
12 507(2)(a):

13           The superintendent of public instruction shall use the excess cost methodology developed  
14 and implemented for the 2001-02 school year using the S-275 personnel reporting system  
15 and all related accounting requirements to ensure that:

- 16           (i) Special education students are basic education students first;
- 17           (ii) As a class, special education students are entitled to the full basic education
- 18           allocation; and
- 19           (iii) Special education students are basic education students for the entire school day.

20 Exhibit 86.

21           The 1077 methodology is solely for allocation of costs; it does not allocate revenue or  
22 identify sources of revenue. Its primary purpose is to uniformly identify special education costs in  
23 the districts' F196 reports. (It is also for use in preparing safety net applications, but in recent past  
24 that has been limited to high cost individual students.) The 1077 worksheet is a series of reasonably  
25 complex calculations that allocates the cost of a special education teacher whose duties are part  
26 basic education and part special education. In the examples offered at trial, the average (rounded  
27 off) allocation of cost was 38 percent to basic education and 62 percent to special education. The  
28 38 percent allocated to basic education costs is significantly less than the percentage of state support  
for a special education student that is BEA. And when a special education student moves out of the  
basic education classroom, by law the BEA follows that student and is applied to special education

1 costs. The 1077 methodology does not prove that school districts expend all BEA for special  
2 education students in the basic education classrooms. The 1077 methodology does not prove that  
3 BEA can be omitted from the calculation of alleged funding formula deficit.

4 Plaintiffs also attempted to show even larger funding formula deficits using first, the opinion  
5 of Dr. Thomas Parrish and second, a formula that applies the 0.9309 multiplier to the average per  
6 pupil expenditures (APPE) calculated by OSPI.<sup>13</sup> Dr. Parrish's conclusions concerning the need to  
7 change staffing ratios for special education were not persuasive. The APPE is a federally directed  
8 calculation of expenditures that includes more than basic education. It includes costs for  
9 supplemental contracts, class size reductions, local choice programs, and undefined extracurricular  
10 activities. The APPE calculation brings me full circle to the point first made in this section: that it  
11 seems evident that the alleged deficit in the special education appropriation, if it exists, is the  
12 product of an inadequate BEA, not an inadequate excess cost multiplier. As before, adequacy of the  
13 BEA is not an issue before this court.

14 Plaintiffs' contention addressed in this section of the court's opinion, that the funding  
15 formula deficit is so large that the deficit itself is evidence of constitutionally inadequate funding,  
16 seeks in essence to decouple special education funding from BEA funding. This coupling<sup>14</sup> of the  
17 excess cost allocation to the BEA allocation is a basic feature of the legislature's funding approach;  
18 and the coupler, the 0.9039 multiplier, is acknowledged as a reasonable approach supported by  
19

20 <sup>13</sup> Just as plaintiffs assert more than one basis for their claim, the State's challenge to plaintiffs' accounting of revenue is  
21 not the only defense asserted against the funding formula claim. A substantial defense was offered by Dr. Douglas Gill,  
22 State Director of the Special Education Section of OSPI, in his testimony and Exhibit 722. In testimony and the exhibit,  
23 Dr. Gill identified 7 broad categories where he contends plaintiffs improperly account for expenditures or fail to account  
24 for revenue; and he assigns a dollar amount to each. In each of the three school years addressed by plaintiffs where  
25 records are complete, Dr Gill's dollar totals exceed the amount of deficit claimed by plaintiffs. For example, in sy2005-  
26 06, where plaintiffs claim a deficit of \$134 million (or \$112.5 million excluding the cap impact), Dr Gill identifies \$310.6  
27 million to offset that claim. Four of the largest categories identified by Dr. Gill, "2(c) Undeclared Revenue Acct 7121," "5  
28 State Levy Equalization Funding," "6 Inconsistent Indirect Cost Calculation," and "7 Over ID of Sp. Ed. Students by  
15%," comprise \$217 million of his total. I was not persuaded by the evidence on these categories; nevertheless, the  
remaining amounts for the other categories raise significant issues about plaintiffs' claim. I have not addressed this  
defense in detail because it was not necessary to my decision.

<sup>14</sup> In his testimony, Dr. Gill of OSPI spoke of the legislature's changes to funding in 1995 as "decoupling". Dr. Gill's  
decoupling was of a different relationship than is discussed here.

1 national experience and expert opinion. However, because the BEA is so inadequate in plaintiffs'  
2 view, they ask this court to decouple the multiplier from the BEA allocation and instead couple it to  
3 a school district's expenditures for its special education students. This would create a funding  
4 approach to special education independent of the funding approach to basic education and would  
5 permit me to consider the legislature's funding of special education separate and apart from basic  
6 education funding.

7 Such a course is permitted only if I conclude beyond a reasonable doubt that the coupled  
8 funding approach is unconstitutional. I cannot reach that conclusion. As developed above, the  
9 legislature's approach of using the multiplier to couple special education funding to BEA funding is  
10 rational.<sup>15</sup> Of the two principal variables in this approach, the BEA allocation and the multiplier,  
11 only the adequacy of the multiplier is part of this case – and plaintiffs have not proved it inadequate.  
12 There is no basis here for me to declare the legislature's approach unconstitutional. To do so would  
13 be an unwarranted usurpation of the legislature's prerogatives in the field of education. *Brown v.*  
14 *State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005) (“This court will not micromanage education and  
15 will give great deference to the acts of the legislature.”)

#### 16 Application and History of Safety Net

17 Parts two and three of plaintiff's claims address the safety net in special education funding.  
18 Before deciding those issues, I here address the safety net generally, as it currently exists and as it  
19 has existed in the past.  
20  
21  
22

23 <sup>15</sup> Indeed, the finance subcommittee report of the K-12 Advisory Committee of Washington Learns recommended,  
24 “Students eligible for special education services should be allocated additional funding; the formula should continue to be  
25 a derivative of Basic Education Funding.” Exhibit 69, pdf 20. Mike Merlino, a member of the finance subcommittee,  
26 testified to various tweaks recommended in the report that would increase the amount of the BEA allocation to which the  
27 0.9309 multiplier would be applied. The tweaks were mainly recognized enhancements to the BEA allocation. While the  
28 inclusion of these enhancements would be significant (about \$40 million) and may be wise, they do not rise to the level of  
constitutional significance. To declare that the legislature's present approach is unconstitutional because of failure to  
include the enhancements in its current funding formula is precisely the type of micromanagement cautioned against in  
*Brown v. State*, *Id.* at 261.

1 Counsel often referred to Judge Doran's decision in *School Funding III* on the issue of safety  
2 net. As noted earlier, *School Funding III* does not have preclusive effect. Nevertheless, in his  
3 closing, Mr. Bjorkman urged the court to:

4 Remember in *Doran III*, the judge said, if you are going to fund based on averages, you  
5 have to have a system in place where a district can go get more money. The state set up  
6 a system to allow districts to do that.

6 I conclude that *School Funding III* does not support such a broad characterization of the State's  
7 obligation to provide a safety net. *School Funding III* addressed the use of averaged populations of  
8 special education students to determine the levels of special education support from the State.  
9 Judge Doran concluded that a safety net was necessary for that plan. The current excess cost  
10 methodology depends on average costs, not average population. Further, I find that the State has  
11 never had a safety net program of broad application; rather it has had an inconsistent history of  
12 narrowly focused safety nets.

13 In *School Funding III*, the court considered a special education funding plan that awarded  
14 excess cost allocations to districts based on a presumed average population of special education  
15 students in four specific learning disability (SLD) categories, A-B-C-D. Excess cost allocation for a  
16 fifth SLD, category E (the least disabled students), was paid on a per capita basis up to four percent  
17 of the district's total population of students. Above this four percent cap, the State provided  
18 reduced allocations for "E" students on a diminishing scale.

19 Judge Doran decided the SLD-E category case apart from the other categories, and declared  
20 that its four percent cap and sliding scale of allocation violated ("is inconsistent with") the State  
21 Education for All Act, chapter 28A.13 RCW. He also declared, somewhat enigmatically, that it  
22 "Fails to satisfy to some extent the full funding mandate of Article IX, Sections 1 and 2, . . ."  
23 *Conclusion of Law 1.20*. In regard to safety net for SLD-E, he said nothing at all.

24 The complaint of *School Funding III* plaintiffs about the other four categories of SLD was  
25 that allocation was based on average populations of special education students. If a district had  
26 more students in a category than the average permitted, the district got no excess cost allocation for  
27 those students. In *School Funding III*, this was called the A-B-C-D formula. Judge Doran did not  
28

1 declare that formula unconstitutional. Instead he opined that the legislature could use the formula if  
2 it had a safety net. His conclusions, including his view of deference to the legislature, are provided  
3 here:

4 1.14. There is no perfect formula and the formula must necessarily evolve and  
5 undergo change in order to reflect changing public policy and factual patterns. No  
6 formula or element of the formula should be set in constitutional concrete as long as the  
7 formula selected and the public policy determined provides fully sufficient funds to  
8 districts which permit districts then to offer handicapped students, who are eligible for  
9 the program, the education that is constitutionally required.

10 1.15. Whether the State devises another formula or restructures the A-B-C-D  
11 formula is for the Legislature to decide.

12 1.16. However, if the present formula is to continue as the basis for the  
13 allocation of funds for the handicapped programs, provision would have to be made for  
14 the districts that can establish their programs of special education are underfunded to  
15 obtain the additional or supplemental funds necessary to provide the constitutionally-  
16 mandated program of education for their handicapped students.

17 ...  
18 1.18. There is no constitutional requirement that all costs be recognized in a  
19 single formula for funding the handicapped program, and School Funding II Conclusion  
20 of Law 6 does not so hold. The Legislature may, but is not Constitutionally required to,  
21 fund the handicapped program by means of a single formula. . . .

22 The limitation of the A-B-C-D formula in *School Funding III* is similar to the 12.7 percent cap in  
23 this case because both categorically exclude some special education students from excess cost  
24 allocation if a population ceiling is exceeded; but it has no direct relationship to plaintiffs' claim  
25 that there must be safety net access to protect from a funding formula deficit. *School Funding III* is  
26 not binding precedent, but even if it was, it would not compel a safety net on what plaintiffs  
27 characterize as "their demonstrated unmet need"<sup>16</sup> - i.e., the funding formula issue.

28 After *School Funding III* was decided in 1988, the legislature did not create a safety net until  
1995. At some point not made clear by this record, the legislature scrapped the A-B-C-D formula  
and instituted an approach that provided special education funding for all special education students.  
In 1995, the legislature overhauled the system and instituted the methodology that is before the

<sup>16</sup> *Plaintiffs' Supp'l Trial Brief*, p 10.

1 court today. Since 1995, safety net has had a limited but still discernable role in excess cost  
2 funding.

3 The overhaul of the special education funding plan reflected, in significant part, the  
4 legislature's intention to connect the growth in cost of special education more closely to the growth  
5 in cost of basic education. A key to accomplishing that goal was to control growth in special  
6 education by capping excess cost allocations at 12.7 percent of the basic education population. The  
7 cap was phased in gradually, in part because of the federal restriction against using federal funds to  
8 supplant state funds. A safety net category, called MOESR (maintenance of effort – state revenue)  
9 was created for sy1995-96, and as shown below in Exhibit 710, paid out safety net awards in  
10 decreasing amounts over the seven year phase-in of the 12.7 percent cap. In 1995 there was an  
11 additional category, Special Characteristics, that morphed into the Percentage and Demographics  
12 categories for sy1997-98. Demographics was a category to relieve school districts that attract  
13 special education students because of the high quality of medical and social services available to the  
14 disabled in the area encompassed by the district. Spokane is an example of such a district.  
15 Beginning in sy2000-01, the legislature eliminated the funding for the Demographics category.

16 High Cost Individual Students (HCI) has been a safety net category from the beginning. It is  
17 available only after costs exceed a minimum established by the State. Until sy2005-06, the State  
18 minimum has been the same as (or exceeded) the federal minimum for a concurrent federal safety  
19 net program. Accordingly, federal funds have been used exclusively to pay those needs until last  
20 year when the federal minimum was raised to about \$21,000, while the state minimum remained at  
21 about \$15,000.

22 Although MOESR was designed to soften the blow of the 12.7 percent cap, the Percentage  
23 category was intended to directly address the impact of the cap on school districts whose special  
24 education population exceeded the cap. Within a few years of applying the Demographics category,  
25 it became evident that this category was serving the same need as Percentage. Demographics was  
26 eliminated, and by sy2001-02, Percentage safety net awards totaled approximately \$5.4 million. For  
27 sy2002-03, Percentage was essentially eliminated by the legislature's decision to withhold funding  
28

1 for that category. Since sy2001-02, the State has not awarded any money for safety net, except the  
 2 past year for HCI. Although Exhibit 710 shows appropriations of \$8.5 million for safety net after  
 3 sy2001-02, that appropriation was for HCI only.

4 Exhibit 710 shows the history of safety net categories and awards.

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SY	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Substitutions of Costs	\$4,812,202	\$7,774,000	\$1,218,834	\$4,113,400	\$2,711,712	\$1,568,438	\$1,428,674									
Priority of Appropriations	\$24,000	\$20,371	\$0	\$0	\$0	\$0	\$0									
Excess Costs	\$0	\$0	\$1,831,071	\$2,381,177	\$4,113,400	\$1,568,438	\$1,428,674									
Excess Costs - HCI	\$0	\$0	\$1,831,071	\$2,381,177	\$4,113,400	\$1,568,438	\$1,428,674									
Excess Costs - Other	\$0	\$0	\$0	\$0	\$0	\$0	\$0									
Total Excess Costs	\$0	\$0	\$1,831,071	\$2,381,177	\$4,113,400	\$1,568,438	\$1,428,674									
Substitutions of Costs - HCI	\$0	\$0	\$0	\$0	\$0	\$0	\$0									
Substitutions of Costs - Other	\$4,812,202	\$7,774,000	\$1,218,834	\$4,113,400	\$2,711,712	\$1,568,438	\$1,428,674									
Total Excess Costs - HCI	\$0	\$0	\$1,831,071	\$2,381,177	\$4,113,400	\$1,568,438	\$1,428,674									
Total Excess Costs - Other	\$4,812,202	\$7,774,000	\$1,218,834	\$4,113,400	\$2,711,712	\$1,568,438	\$1,428,674									
Total Excess Costs	\$4,812,202	\$7,774,000	\$3,037,905	\$8,504,800	\$7,433,542	\$3,136,876	\$2,857,348									
Substitutions of Costs - HCI	\$0	\$0	\$0	\$0	\$0	\$0	\$0									
Substitutions of Costs - Other	\$4,812,202	\$7,774,000	\$3,037,905	\$8,504,800	\$7,433,542	\$3,136,876	\$2,857,348									
Total Excess Costs - HCI	\$0	\$0	\$0	\$0	\$0	\$0	\$0									
Total Excess Costs - Other	\$4,812,202	\$7,774,000	\$3,037,905	\$8,504,800	\$7,433,542	\$3,136,876	\$2,857,348									
Total Excess Costs	\$4,812,202	\$7,774,000	\$3,037,905	\$8,504,800	\$7,433,542	\$3,136,876	\$2,857,348									

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16 **The 12.7 Percent Cap**

17 I conclude that the cap in Section 507 that denies payment of excess cost allocation for that  
 18 portion of a school district's special education population over 12.7 percent of the district's FTE  
 19 student population is unconstitutional as applied because there is no safety net or other alternative  
 20 that permits affected school districts to seek redress from the limitations of the cap. In the manner  
 21 in which the cap is currently applied, it violates the State's duty to make ample provision for the  
 22 education of all special education students, as required by article IX, section 1 of the constitution.  
 23 As a result of application of the cap in sy2005-06, excess cost allocation was denied to school  
 24 districts for 5,464 special education students, and the districts affected experienced a loss of \$21.6  
 25 million of excess cost allocation.

26 Conversely, I conclude that a cap on the population eligible for excess cost allocation is  
 27 constitutional if (1) the cap is imposed for a rational legislative purpose, (2) the level of the cap has  
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1 been established rationally, and (3) there is a safety net process that permits a school district the  
2 opportunity to show that without additional allocation its special education program cannot be fully  
3 funded. The 12.7 percent cap in Section 507 passes the first two tests, but as presently applied, fails  
4 the third.

5 The 12.7 percent cap was created as a way to control the growth of special education  
6 population as a percentage of total student population by compelling school districts to confront  
7 over-identification of special education students. The cap was a rational choice by the legislature to  
8 meet a significant problem. When the cap was created in 1995, special education population was  
9 growing at a rate of 10 percent per year, or about twice as fast as the basic education population. It  
10 was growing about twice as fast as the revenue limitations of I-601 would permit. The legislature  
11 had before it three studies, Exhibits 92, 93, and 94, that each concluded the then current approach  
12 encouraged over-identification of special education students. Setting 12.7 percent as the level for  
13 imposition of the cap was also a rational choice. It was, and is today, supported by similar  
14 percentages nation wide, and at the time of enactment the 12.7 percent level was higher than the  
15 percentage of special education population in Washington.

16 The State's funding formula approach to special education funding (the excess cost  
17 methodology) is rational (and constitutional) because while it is based on average services and  
18 costs, those averages are computed on a whole spectrum of disabilities and needs. For each eligible  
19 special education student, a school district receives an average basic education allocation and an  
20 average excess cost allocation based upon the 0.9309 multiplier. Some students will be educated  
21 for less, some will cost more, but the theory of the funding formula approach is that the cost of each  
22 student will be funded. This applies whether the special education population of the district is 10  
23 percent or 15 percent; the funding for the district is based on a per capita amount for each eligible  
24 student. A cap without a safety net changes that. It assures that districts whose special education  
25 population exceed 12.7 percent will not receive any excess cost allocation for those students above  
26 the cap. As noted above, the funding formula approach is based on averages that provide the same  
27 excess cost allocation whether the cost of educating the student is above or below average.

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1 However, no evidence in this case suggests that the cost of educating a special education student  
2 above the cap is averaged into the allocation paid for students below the cap – and neither party  
3 contended that it was. Accordingly, it is clear that while the State's funding formula approach can  
4 amply provide for a special education student even if the costs of educating that student exceed  
5 1.9309 times BEA, the same formula does not amply provide for a student above the cap who is  
6 simply excluded from the funding formula.

7 A safety net is not the only approach to addressing the constitutional imperative to provide  
8 for students above the cap. It is addressed here because it was the solution originally implemented  
9 by the legislature when the cap was created, before it was eliminated by lack of funding in sy2002-  
10 03.

11 A cap with a safety net permits a school district to seek the excess cost allocation for its  
12 students over the cap, but gives the State the opportunity to analyze the district's entire special  
13 education program, to assure before payment of safety net funds that the district's special education  
14 students are eligible and have current, properly formulated IEPs, that the district is accessing all  
15 available revenue, and that it is operating a reasonably efficient special education program. Such  
16 close scrutiny for every district every year would not be practical, so a cap with a safety net is a very  
17 rational alternative; it addresses the State's interest in preventing over-identification of special  
18 education students by permitting close scrutiny of districts that exceed the cap, while at the same  
19 time providing ample funding for all eligible special education students.

#### 20 Application of the Safety Net to the Funding Formula Deficit

21 In part two of their Summary of Claims,<sup>17</sup> plaintiffs contend:

22 Safety Net is unconstitutional in that it does not provide a sufficient means of access for  
23 all school districts' full demonstration of need.

24 As explained in their *Supplemental Trial Brief*, p 9-10, plaintiffs' argument has two parts:  
25 first, the safety net is inadequate because it does not address the gap "between overall demonstrated  
26 need" and State funding; and second, safety net funding of any kind is unconstitutional because it is

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28 <sup>17</sup> Plaintiffs' Closing Argument Rebuttal, p 5.

1 not sufficiently dependable and regular to serve as an adequate funding source, citing *Seattle School*  
2 *Dist. No. 1 v. State*, 90 Wn.2d 476, 524-27, 458 P.2d 71 (1978). The apparent inconsistency in  
3 these two parts is difficult to address, so I will not try. I reject the second part and will address the  
4 first.

5 I reject the second part because the case cited by plaintiffs does not make dependable and  
6 regular funding a constitutional requirement. Rather, *Seattle School Dist.* required that revenue for  
7 schools come from a dependable and regular tax source. The court rejected special levies as a  
8 taxing source. *Seattle School Dist.*, 90 Wn.2d at 526. Dependable and regular funding by the  
9 legislature has never been a constitutional test.

10 As regards the first part, I am not persuaded that safety net must be part of the State's  
11 constitutional duty of ample provision for special education, and therefore am not persuaded that  
12 inadequate access to safety net revenue violates the constitution. This claim is denied. Safety net is  
13 not any part of a constitutionally mandated duty of the legislature, it is a tool available to the  
14 legislature to use as it chooses. It is a tool that may in some instances be used by the legislature to  
15 save a feature of its education funding program that might otherwise violate the constitution – for  
16 example, a feature that caps the number students for whom excess cost allocation will be paid and  
17 categorically excludes those over the cap, as in this case with the 12.7 percent cap, or in *School*  
18 *Funding III*, with the A-B-C-D formula. In constitutional review of an education funding approach,  
19 a court may consider the legislature's choice to include a safety net when determining whether the  
20 funding approach satisfies the constitution; but a court cannot declare that the legislature's decision  
21 to forgo safety net unconstitutional. Courts must defer decisions about the details of a funding  
22 approach to the legislature; courts must avoid micromanaging policies that are clearly the province  
23 of the legislature. In addressing the constitutionality of the 12.7 percent cap, I declared that feature  
24 of the legislature's approach unconstitutional. I further opined that the safety net for that feature,  
25 authorized in section 507 but unfunded, could save the cap. I did not declare that the legislature  
26 must have a safety net for the cap. Such a declaration is beyond my power, it is a decision for the  
27 legislature. Here, in the second part of the safety net claim, plaintiffs contend that safety net is  
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1 underfunded and too restrictive to meet the districts' demonstrated unmet need. That is an issue to  
2 defer to the legislature. My judicial responsibility is to consider the funding approach as  
3 implemented by the legislature and to consider whether the approach is so inadequate that it violates  
4 article IX, section 1. I have done that in the Funding Formula section of this opinion and declared  
5 against the plaintiffs.

#### 6 Indirect Costs

7 This claim fails for lack of proof. All school district indirect expenditures are accounted for  
8 in Program 97 of the State's program of accounting for expenditures and revenue. Program 97  
9 includes all indirect costs. It does not matter which program generates the cost, it can be basic  
10 education, special education, or any other program operated by a school district. The school  
11 districts report Program 97 expenditures on their annual F196 reports, but do not allocate these  
12 indirect expenditures to the programs that generate them. The State pays most of these costs, and no  
13 attempt is made to break out the payments into allocation among basic education, special education  
14 or other programs. For example, the Lake Washington School District F196 report for sy2004-05  
15 shows Program 97 expenditures of \$20,084,105. In the accounting of Program 97 revenue for these  
16 costs, state revenue paid \$15,106,206, federal revenue paid \$152,860, and the balance of \$4,824,968  
17 was paid by other resources, which witnesses identified as local levy money. Plaintiffs contend they  
18 should receive additional excess cost allocation to pay for special education related indirect  
19 expenditures, but at trial no attempt was made to show how reported Program 97 expenditures  
20 should be broken out. In the Lake Washington School District example, about 24% of indirect  
21 expenditures were paid for by local levy money, but it is impossible to determine what proportion of  
22 this money was used to pay special education related indirect expenditures, if any. Exhibit 50, pdf  
23 49.

24 In the safety net applications for districts with high cost individual students (HCI safety net  
25 category), the demonstration of need application permits a school district to show indirect costs of  
26 approximately 4% in making application for additional safety net excess cost allocation. This is  
27 reasonable because Program 97 expenditures and payments are not otherwise reflected in the  
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1 application. The fact that additional indirect costs can be included in a safety net application does  
2 not prove that State payment of Program 97 indirect expenditures is constitutionally inadequate.

3 Plaintiffs also contend that the 4% indirect cost rate permitted by the State for safety net  
4 applications should be higher. They point to the 16.7% rate for indirect expenditures that school  
5 districts are permitted to deduct from the reimbursement they must make to the State for unspent  
6 federal IDEA funds. The basis for this difference is not explained in the evidence; but in any event,  
7 judicially compelled higher rates would be a micromanaging education. *Brown v. State*, 155 Wn.2d  
8 254, 261, 119 P.3d 341 (2005) ("This court will not micromanage education and will give great  
9 deference to the acts of the legislature.")

### 10 Supplemental Contracts

11 Plaintiffs contend that it is unconstitutional to exclude supplemental contracts from the  
12 State's obligation to fund basic education for special education students. The prohibition against  
13 State payment of supplemental contracts is not limited to special education, it encompasses all basic  
14 education. RCW 28A.400.200(4) provides, in relevant part:

15 Salaries and benefits for certificated instructional staff may exceed the limitations in  
16 subsection (3) of this section only by separate contract for additional time, additional  
17 responsibilities, or incentives. Supplemental contracts shall not cause the state to incur  
any present or future funding obligation.

18 This statute directs that supplemental contracts cannot be part of the State's funding obligation, and  
19 so by implication they are not part of basic education. Although the proposition is not stated  
20 directly, plaintiffs contend that the statute is unconstitutional, at least for special education. At trial  
21 they demonstrated that most special education programs offer supplemental contracts and TRI pay  
22 in order to attract and retain special education teachers and administrators, but plaintiffs did not  
23 show why such contracts and extra pay are a component of basic education.

24 Basic education is not specifically defined in the Basic Education Act, instead the legislature  
25 has enacted a set of goals and declared that the purpose of the Act, "shall be to provide  
26 opportunities for all students to develop the knowledge and skills essential to" accomplish those  
27 goals. RCW 28A.150.210. The Act is a plan to provide administration and revenue to accomplish  
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1 the goals, with the actual delivery of services left to local school boards. The focus of the Act is  
2 clearly on students and the services necessary to educate them.

3 In addition to the Basic Education Act, the legislature has enacted a myriad of other  
4 education related laws. The authority to enact these additional education laws falls within the  
5 general power and constraints granted the legislature in the constitution, but they are not governed  
6 by article IX, section 1. The provision for supplemental contracts, including TRI pay, is such a law.  
7 It is included in chapter 28A.400 RCW, which addresses education employees. Given the  
8 invaluable service they provide, the level of pay for teachers and staff and the manner in which they  
9 are paid are matters of great concern for citizens and the legislature. Nevertheless, those issues are  
10 not part of an article IX, section 1, analysis. There is no basis here for declaring RCW  
11 28A.400.200(4) unconstitutional.

#### 12 Federal IDEA Funds Diversion

13 In this part, plaintiffs contend:

14 The State cannot divert federal funds to pay for state obligations for salary increases, as  
15 federal funds are no more dependable and reliable than local levy funding.

16 *Plaintiffs' Closing Argument Rebuttal*, p 5. The only evidence of this issue offered at trial was the  
17 cryptic testimony of Dr. Brian Benzel, superintendent of the Spokane School District, who testified  
18 that the district's excess cost allocation for sy2004-05 was reduced by \$127.35 per student because  
19 federal IDEA funds were used to offset teacher salary and benefit increases, thereby reducing the  
20 BEA and consequently the excess cost allocation. No explanation of why this occurred was offered,  
21 except a single short paragraph in the State's *Administrative Budgeting and Reporting Handbook* . .  
22 ., Exhibit 4, pdf 79, where it is noted, "The Legislature assumes that the districts will obtain funding  
23 for these increases from the district's increase in IDEA funding for 2004-05. This integration will  
24 not impact the amount of IDEA funding received by a district." This evidence is wholly inadequate  
25 to prove violation of the constitution beyond a reasonable doubt.

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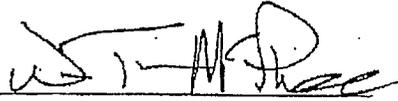
**Retained Jurisdiction**

I decline to retain jurisdiction in this case.

[A] trial court's decision to retain jurisdiction is inconsistent with the assumption that the Legislature will comply with the [court's] judgment and its constitutional duties.

*Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 538, 458 P.2d 71 (1978)

Dated March 1, 2007



Thomas McPhee, Judge

## APPENDIX B

Excerpt from Brief of Appellants in *Seattle School District v. State*, 90 Wn.2d 476 (1978)

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**In The SUPREME COURT  
Of The STATE OF WASHINGTON**

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SEATTLE SCHOOL DISTRICT NO. 1, ET AL.,

Respondents,

vs.

STATE OF WASHINGTON, ET AL.,

Appellants.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY

---

THE HONORABLE ROBERT J. DORAN

---

**BRIEF OF APPELLANTS**

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Juvenile Director clearly established the proposition that, under certain circumstances, an inherent power resides in the courts to compel the funding level for the judicial branch. However, before that power is to be exercised, the case for judicial intervention must be absolutely compelling, and accordingly, the court must apply, on any relevant factual questions, ". . . the highest burden of proof in civil cases. . . ." 87 Wn.2d at 251.

We suggest that the considerations which prompted the majority in Juvenile Director to adopt "the highest burden of proof" are also applicable here. As in Juvenile Director, the basic claim in the case at bar is that the legislative branch has violated the constitution by not providing a sufficient funding level for a governmental function. Here the constitutional claim is based upon Article IX, § 1, whereas in Juvenile Director it was based upon the constitutional imperative of an independent judiciary. Note again, as in Gottstein, that the nature of the constitutional claim is to determine the degree of the burden of proof.

The critical factual question was the "reasonableness" of the juvenile officer's salary. This becomes clear from the following excerpt from the record in Juvenile Director, found at pages 12 and 13 of the Statement of Facts in