

FILED
SUPREME COURT
STATE OF WASHINGTON
2010 AUG 26 A 10:31
BY RONALD R. CARPENTER
CLERK

NO. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

MATHEW & STEPHANIE McCLEARY, on their own and on behalf of
KELSEY & CARTER McCLEARY, their two children in Washington's
public schools; ROBERT & PATTY VENEMA, on their own behalf and
on behalf of HALIE & ROBBIE VENEMA, their two children in
Washington's public schools; and NETWORK FOR EXCELLENCE IN
WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of
community groups, public school districts, and education organizations,

Respondents.

**BRIEF OF APPELLANT
(CORRECTED)**

ROBERT M. MCKENNA
Attorney General
WILLIAM G. CLARK, WSBA #9234
DAVID A. STOLIER, WSBA #24071
Assistant Attorneys General
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 389-2794

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	6
IV.	STATEMENT OF THE CASE.....	7
	A. The State’s Constitutional Duty Under Article IX Was Established in <i>Seattle School District v. State</i>	9
	B. The Legislature Fulfilled the Holdings of <i>Seattle School District v. State</i> by Enacting the Basic Education Act of 1977.....	9
	C. During the 1990s, the State Enacted and Implemented Reforms to Basic Education.....	10
	D. From 2005 to 2009, the State Studied and Implemented Reforms to the Funding of a Performance-Based K-12 Education System.....	12
	E. In 2009, the State Enacted ESHB 2261 to Implement K- 12 Education Reforms, Including Substantially Increased State Funding.	17
	F. State Statutes Determine the Basic Education Funding Provided by the State to Local School Districts.	19
	G. School Districts Have the Authority to Raise Local Levy Funding to Pay the Costs of Local Programs and Operations.	23
	H. Procedural History: Evidence of State Funding, School District Spending, Outcomes and Cost Studies.	26
	1. Respondents’ Evidence of Inadequate Funding.	26

2.	State’s Evidence That Increased Funding Does Not Produce Improved Student Achievement.....	28
3.	The Trial Court’s Ruling.....	32
V.	STANDARDS OF REVIEW	33
VI.	LEGAL ARGUMENT	34
A.	The State’s Constitutional Duty Under Article IX Was Established in <i>Seattle School District v. State</i>	35
B.	The Trial Court Entered Judgment Based Upon an Erroneous Definition of the “Education” for Which the State Must Make Provision.....	37
1.	The Basic Education Act of 1977 Provided the Definition, Programs, Substantive Content and Funding for Basic Education Contemplated in <i>Seattle School District v. State</i>	39
2.	The Basic Education Act Was Amended to Update the 1977 Statutory Definition, Program, and Funding for Basic Education.....	42
3.	The Legislature Cannot Raise the Article IX Constitutional Floor.....	46
C.	The Trial Court Further Erred by Equating “Making Ample Provision” with the Actual Costs of Obtaining Successful Outcomes for All Students and/or the Total Costs of Operating Schools.....	48
1.	Article IX Requires Educational Inputs, Not Outcomes.....	48
2.	Article IX Does Not Require the State to Fund Whatever Districts Expend to Operate Public Schools.....	51

D. Article IX Does Not Require Stable and Dependable Funding from State-Only Sources.	54
E. The Trial Court's Enforcement Order Usurps the Legislature's Prerogative to Select and Implement the Means of Discharging Its Article IX Duty.....	55
F. A Challenge to the State's Compliance with Article IX Claims That State Law Is Unconstitutional.	59
VII. CONCLUSION	62

TABLE OF AUTHORITIES

Cases

<i>Brown v. State</i> , 155 Wn.2d 254, 261, 199 P.3d 341 (2005).....	46, 55, 62
<i>Erwin v. Cotter Health Ctrs., Inc.</i> , 161 Wn.2d 676, 687, 167 P.3d 1112 (2007).....	33
<i>Federal Way v. State</i> , 167 Wn.2d 514, 524, 291 P.3d 941 (2009).....	50, 61
<i>Gallwey v. Grimm</i> , 146 Wn.2d 445, 459-60, 48 P.3d 274 (2002)	49
<i>Grundy n. Brack</i> , 151 Wn. App. 557, 213 P.3d 619 (2009).....	33
<i>Hegwine v. Longview Fibre Co.</i> , 132 Wn. App. 546, 556, 132 P.3d 789 (2006).....	33
<i>Hilltop Terrace Homeowners' Ass'n v. Island County</i> , 126 Wn.2d 22, 34, 89 P.3d 29 (1995).....	33
<i>Island County v. State</i> , 135 Wn.2d 141, 147, 955 P.2d 377 (1998).....	60
<i>Malyon v. Pierce County</i> , 131 Wn.2d 779, 799, 935 P.2d 1272 (1997).....	49
<i>McGowan v. State</i> , 148 Wn.2d 278, 292, 60 P.3d 67 (2000).....	47, 56
<i>Nuttall v. Dowell</i> , 31 Wn. App. 98, 639 P.2d 832 (1982).....	34
<i>Parents Involved in Community Schools v. Seattle School District</i> , 149 Wn.2d 660, 673, 72 P.3d 151 (2003).....	55

<i>Retired Pub. Emp. Council of Wash. v. Charles</i> , 148 Wn.2d 602, 623, 62 P.3d 470 (2003).....	62
<i>San Antonio Sch. Dist. v. Rodriguez</i> , 411 U.S. 1, 42, 93 S. Ct: 1278, 36 L. Ed. 2d 16 (1973).....	57
<i>School Dist. Alliance v. State</i> , 149 Wn. App. 241, 266, 202 P.3d 990 (2009), review granted 166 Wn.2d 1024 (2009).....	56
<i>Seattle School District v. State</i> , 90 Wn.2d 476, 585 P.2d 71 (1978).....	passim
<i>State ex rel. Freedom Foundation v. WEA</i> , 111 Wn. App. 586, 596, 49 P.3d 894 (2002).....	33
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003)	33
<i>Tunstall v. Bergeson</i> , 141 Wn.2d 201, 236, 5 P.3d 691 (2000).....	50, 56, 61

Statutes

RCW 28A.150.100.....	44
RCW 28A.150.200-240	10, 40
RCW 28A.150.210.....	passim
RCW 28A.150.220.....	44, 52
RCW 28A.150.250.....	44
RCW 28A.150.260.....	21, 44
RCW 28A.150.410.....	44
RCW 28A.400.200.....	25, 47, 53
RCW 28A.41.....	41

RCW 28A.41.050.....	41
RCW 28A.41.110.....	42
RCW 28A.41.112.....	42
RCW 28A.41.130.....	41
RCW 28A.41.140.....	42
RCW 28A.58.750.....	47
RCW 28A.58.750-.760	10, 40
RCW 28A.58.752.....	40, 44, 51
RCW 28A.58.754.....	23, 41, 52
RCW 28A.630.885.....	43, 44

Other Authorities

ESHB 1209 (1993).....	passim
ESHB 2261 (2009).....	passim
Laws of 1977, 1st Ex. Session, ch. 359, § 1	39, 45
Laws of 1993, Reg. Sess., ch. 336	11, 43
Laws of 2004, Reg. Sess., ch. 276, § 515	12
Laws of 2005, Reg. Sess., ch. 489	12
Laws of 2005, Reg. Sess., ch. 496	12
Laws of 2005, Reg. Sess., ch. 518, § 515	12

Constitutional Provisions

Article IX, section 1	1
-----------------------------	---

I. INTRODUCTION

Thirty-two years ago this Court decided what Article IX, section 1 of the state constitution requires in making ample provision for public K-12 schools. In *Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), this Court held that the Legislature must define and fully fund a “basic education” for all resident Washington school children. This Court further held that the State was constitutionally required to fund basic education from “dependable and regular tax sources.” *Id.* at 522. Finally, this Court held that the Legislature had the constitutional authority to select the means of discharging its Article IX duty. *Id.*

Respondents filed suit, claiming that the State was currently failing its Article IX constitutional duty. Rather than applying the above principles, however, the trial court applied incorrect legal standards in entering Judgment in Respondents’ favor. First, the trial court erred by ruling that the State’s duty is to make ample provision for the “education mandated by this [trial] court’s interpretation of Article IX,” instead of the basic education mandated by the Supreme Court. Second, the trial court ordered the Legislature to determine the “actual costs” of that education and to indicate the “stable and dependable State-only funds” that the Legislature would provide. Next, the trial court improperly interfered with the Legislature’s enacted reforms. Finally, the court applied the incorrect

standard of proof to a constitutional challenge to an education funding process that is entirely contained in state law.

These errors are fundamental and pertain to both the liability and remedy issues in this case. This Court should reverse the trial court's Judgment and remand with instructions to apply the correct legal standards governing challenges to the State's statutory regime for basic education funding and to adhere to the deference accorded to the Legislature in selecting the means of discharging the State's constitutional duty.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Findings of Fact 152 and 237 and Conclusions of Law 157-169, inclusive, that redefine terms that already have been construed by this Court.

2. The trial court erred in entering Findings 171, 172, 175 and 176 and Conclusions 205, 208 and 209 regarding the "current" legal meaning of the constitutional term "education" where this Court construed that term to mean "basic education."

3. The trial court erred in entering Findings 180, 220, 227, 229 and 263 that statutes allocating and appropriating funds for basic education have no connection to, or basis in, providing K-12 students with the tools and skills needed to compete and participate in today's

democracy and that ample funding is simply “whatever the Legislature says it is.”

4. The trial court erred in entering Findings 185, 186, 187, 193, 194, 195, and 197, and Conclusions 206 through 212, inclusive, that this Court directed the Legislature to expand the constitutional definition of education in Article IX; that the Legislature expanded the definition by enacting ESHB 1209 (1993); and that ESHB 1209 and the subsequently adopted Essential Academic Learning Requirements amended or enlarged the definition of “education” in Article IX.

5. The trial court erred in entering Finding 221 that federal revenues cannot be used to pay for basic education.

6. The trial court erred in entering Findings 222 and 230 that school districts have to cobble together ample funding to keep their basic education programs operational; and Finding 223 that Finding 222 was corroborated by a January 13, 2010 report that had not been admitted in evidence.¹

7. The trial court committed error in entering Findings 224, 225, 226 and 231 that the actual costs of operating schools and of ensuring

¹ Finding 223 is based on a Report dated January 13, 2010, which was generated months after the conclusion of trial. CP 2873. Neither the Report nor the statement from it that appears in Finding 223 were offered into evidence. There is no evidentiary basis for Finding 223.

all children receive the substantive education mandated by Article IX are significantly higher than the resources provided by the State.

8. The trial court erred in entering Findings 231 and 231(a) that making ample provision for the education required by Article IX requires the State to equip all children with the "substantive education" mandated by Article IX and "includes" the provision of a realistic or effective opportunity to acquire the substantive education that it ruled is constitutionally mandated.

9. The trial court erred in entering Findings 233, 234 and 236 that the State is failing to provide students with the opportunity to achieve, based on anecdotal testimony about the effects on some students of smaller class sizes, extra-curricular activities, vocational training and individualized attention.

10. The trial court erred in entering Finding 235 that because not all students are meeting outcome goals and standards, the State is not amply funding school programs.

11. The trial court committed error in entering Finding 238 that Washington students are underperforming and failing to achieve, requiring the State to determine what resources are needed to ensure that all students acquire the education that the trial court ruled is mandated by Article IX.

12. The trial court erred in entering Finding 264 that the State is not amply funding basic education because funding per pupil has remained flat when adjusted for inflation and excluding State contributions to employee pensions in that time period.

13. The trial court erred in entering Findings 228, 262 and 266 and Conclusion 268 that the State has never complied with Article IX by (1) designing and implementing a system that determines and funds the actual cost of amply providing all Washington students with the education mandated by the trial court's interpretation of Article IX, section 1, and (2) fully funds that actual cost with stable and dependable state resources; and Conclusions 272, 273 and 275 that, absent court intervention, there will be "another 30 years of underfunding of basic education," thus justifying the remedy ordered by the trial court.

14. The trial court committed error in entering Conclusions 101 and 103 that the standard of proof in this constitutional challenge is preponderance of the evidence, and that its Findings and Conclusions satisfy that standard.

15. The trial court erred in entering Conclusion 251 that the State's constitutional duty requires the State to ensure all the students acquire the knowledge and skills required by the trial court's definition of

“education” in Article IX and that the trial court’s definition provides a solid constitutional floor below which the State cannot lawfully go.

16. The trial court committed error in entering Conclusion 253 that ESHB 2261 (2009) is irrelevant to the issue of constitutional compliance.

17. The trial court erred in entering Conclusion 255 that the State currently is not complying with Article IX because local levy money funds some operations of K-12 public schools.

18. The trial court erred in entering Conclusion 256 that Respondents proved their case beyond a reasonable doubt and that stable and dependable state funding is constitutionally required.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. This Court held in *Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), that the Legislature has a constitutional duty to define basic education. Did the superior court err by rejecting the Legislature’s definition of basic education and instead mandating a definition of basic education determined by whether all students are equipped with knowledge and skills that the superior court identified? (Assignments of Error 1, 2, 4, 15)

2. This Court held in *Seattle School District v. State* that the Legislature has a constitutional duty to amply fund basic education. Did

the superior court err by rejecting the Legislature's funding formulas and instead mandating funding based on the actual costs of equipping all children with the knowledge and skills that the superior court identified as basic education? (Assignments of Error 1, 3, 8, 10, 11, 13, 15, 16)

3. This Court held in *Seattle School District v. State* that the Legislature has a constitutional duty to amply fund basic education from regular and dependable tax sources. Did the superior court err by instead mandating that the Legislature establish how it will provide stable and dependable state funding for basic education? (Assignments of Error 1, 5, 13, 17, 18)

4. Did the evidence before the superior court establish that the Legislature has failed to comply with its obligation under Article IX, section 1, to amply fund basic education from regular and dependable tax sources? (Assignments of Error 1, 6, 7, 9, 10, 11, 12, 13, 14)

IV. STATEMENT OF THE CASE

Respondents are the McCleary and Venema families and the corporation "NEWS" (a consortium of school districts, school employee labor organizations, and advocacy groups). CP 2876-2888. After a lengthy trial, the court entered Judgment in Respondents' favor that the State was currently not making ample provision for basic education according to the trial court's interpretation of Article IX, Section 1 of the

state constitution. CP 2866-2867. The court also ordered the Legislature to establish the “actual cost” of amply providing all Washington children with “the education mandated by [the trial court’s] interpretation of Article IX, section 1.” *Id.* The Judgment further ordered that Article IX required funding to be “stable and dependable” and from only state sources. *Id.*

Appellate review of this Judgment requires an examination of Supreme Court precedent and legislative enactments regarding education funding from 1977 to 2009. Accordingly, this Statement of the Case traces: (1) this Court’s 1978 decision of *Seattle School District v. State*; (2) the Basic Education Act of 1977 and its amendment in 1993; (3) the Legislature’s reform efforts in basic education from 1993 to 2009; (4) the statutory process for basic education’s definition, programs and funding; (5) the role of local levy funding in the operation of K-12 public schools; and (6) the dilemma created by Petitioners’ evidence that funding for the current, education system is inadequate and the State’s evidence that the infusion of more funding into K-12 schools will not produce improved student achievement nor ensure successful educational outcomes for all students.

A. The State's Constitutional Duty Under Article IX Was Established in *Seattle School District v. State*.

Article IX, section 1 of the Washington constitution provides:

It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

The definitive interpretation and construction of this constitutional language was set forth in *Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978). In that landmark decision, this Court provided comprehensive guidelines for the Legislature to abide by in complying with Article IX. *Id.* at 515. The Court directed the Legislature to define and amply provide for a "basic education." *Id.* at 519-523. "While the Legislature must act pursuant to the constitutional mandate to discharge its duty, the general authority to select the means of discharging that duty should be left to the Legislature." *Id.* at 519-20. The decision is discussed in further detail in the Argument section.

B. The Legislature Fulfilled the Holdings of *Seattle School District v. State* by Enacting the Basic Education Act of 1977.

Following the trial court decision in *Seattle School District v. State* and before the appellate oral argument before the Supreme Court the Legislature enacted the Basic Education Act of 1977. FF 178, 179.² The

² The trial court issued Findings of Fact and Conclusions of Law in a 73-page document with 275 consecutively numbered paragraphs. Findings and Conclusions were

Basic Education Act contained three elements that together constituted the definition of basic education: (1) education system goals; (2) education program requirements; and (3) funding ratios and formula mechanisms for funding basic education. FF 178, 179. See RCW 28A.58.750-.760 (1977), later recodified at RCW 28A.150.200-.240. The Legislature appropriated funding for K-12 public schools in accordance with this statutory definition, statutory program, and the “guidelines” contained in *Seattle School District*. FF 179.

C. During the 1990s, the State Enacted and Implemented Reforms to Basic Education.

In 1992, Washington initiated what had become a national trend to transition K-12 public education from a “seat time” system and approach to a “performance based” one. RP 973. The former focused on students’ progression grade level by grade level, determined by locally-established standards and culminating in graduation after twelfth grade. RP 973-74. A “performance based” education system assesses how much students are learning at various stages in their twelve years of schooling, based upon statewide, uniform goals, with State assessments or tests measuring student performance based upon those state goals. *Id.*; Tr. Ex. 360,

grouped according to specific issues, rather than as all Findings, then all Conclusions. Findings are designated “FF” with the court’s paragraph number. Conclusions are designated “CL” with the court’s paragraph number. Respondents attached a copy of the entire document to their Statement of Grounds for Review of April 23, 2010, on file herein.

pp. 12-13. Graduation from high school depends, in part, on performance on these assessments. *Id.*

The transition in Washington was launched (but not completed) by ESHB 1209 (Laws of 1993, Reg. Sess., ch. 336). FF 184. The legislation set in motion a process for the State's development of its Essential Academic Learning Requirements ("EALRs"), and the development and implementation of the Washington Assessment of Student Learning ("WASL") to assess how students were progressing in mastering the EALRs. *Id.* Passage of the WASL (or completion of an alternative course of action) became a graduation requirement in 2008. RP 2005.

In 1995, an ESHB 1209-authorized fiscal study committee reported back to the Legislature, based upon an independent consultant's analysis of Washington's K-12 funding system. RP 1006-08. Tr. Ex. 1376. The consultant reported how Washington's education funding system compared to an "optimal" funding system: "When compared to the seven concepts of an optimal school finance system, the Washington school finance system does very well. In fact, it meets or exceeds the expectations set out by nearly all of the concepts." *Id.*, pp. 43-44.

The first WASL assessment results for all tested grade levels that informed the State about levels of student performance became available

in 2005. FF 191. Those results indicated that many students were struggling with the assessments and needed help. *Id.* Thus, the Legislature increased funding to, and changed the formula for, the State's Learning Assistance Program (LAP) to assist districts with programs and services for struggling students. Laws of 2005, Reg. Sess., ch. 489; Laws of 2005, Reg. Sess., ch. 518, § 515; Laws of 2004, Reg. Sess., ch. 276, § 515.

D. From 2005 to 2009, the State Studied and Implemented Reforms to the Funding of a Performance-Based K-12 Education System.

In 2005, the Governor sponsored and the Legislature passed E2SSB 5441 (Laws of 2005, Reg. Sess., ch. 496) (Tr. Ex. 19), which created "Washington Learns," a 16-month process for studying all sectors of the State's education system, from early learning to K-12 to higher education and workforce preparation. FF 190. Washington Learns had three advisory committees, one for each level of education, with each committee meeting monthly. *Id.* A steering committee, responsible for coordinating the feedback and reports from the advisory committees, was chaired by Governor Gregoire. *Id.* The K-12 Advisory Committee was chaired by then-Superintendent Terry Bergeson. *Id.*

Washington Learns also commissioned studies by out-of-state consultants, Picus & Odden. *Id.* One of their studies presented

“prototype” schools as a basis for examining the prospective staff make-up and potential costs of elementary, middle, and high schools that were intended to help students achieve at higher levels and to build a new finance structure for Washington’s schools. *Id.*; Tr. Ex. 364, 365.

Washington Learns produced a final report on November 13, 2006. Tr. Ex. 16. The report concluded, in part, that building a “world class education system” (as opposed to the current basic education system) would require significant additional funds as well as the strategic reallocation of existing resources. *Id.*, pp. 47-49. The report envisioned a number of focused initiatives to implement the transition to a “world class” system, a commitment to obtaining more resources and a ten-year plan to complete the process. *Id.*; FF 192. “Next steps” included recommendations for the design of a new funding structure and for student, teacher and district accountability measures. *Id.* In addition, several more immediate steps were recommended that were put in place during the 2007 legislative session. *Id.* Finally, Washington Learns recommended immediate increases to K-12 funding that were enacted for the 2007-09 biennium. RP 3508-09.

The 2007 Legislature also established a Basic Education Finance Task Force to carry on the work of Washington Learns³ and to develop detailed recommendations for a new funding system for K-12 public schools. FF 242; RP 3506-08. As recommended by Washington Learns, the Task Force was directed to complete its work and issue a comprehensive report and set of recommendations by December 2008, so the Legislature could act in the 2009 legislative session. *Id.*; RP 3510-11; Tr. Ex. 124, p. 2.

From fall 2007 through December 2008, the Task Force conducted numerous meetings and heard many presentations from stakeholders such as school districts, local educators and representatives of state agencies concerning the need for, and components of, a new approach to funding and to accountability. FF 243. OSPI staff provided analysis, based in part on the operating results and in part on perceived additional needs derived from workgroups assembled from school district staff. RP 4387-88. OSPI and the school districts identified many desirable programs, services and products, described by one OSPI workgroup coordinator as a “wish list” of the types of staff positions and services that school officials desired to acquire at state expense. CP 1628. That process formed the basis for a

³ Washington Learns’ statutory authority expired in July 1, 2007. Tr. Ex. 19, p. 5.

funding proposal that OSPI submitted to the Task Force in the summer of 2008. RP 4387-88; Tr. Ex. 67 (slides 18-20; 22-25; 40-41); Tr. Ex. 616.

The Task Force members also explored two other issues critical to deriving new formulae for funding K-12 schools. First, they asked OSPI staff to determine if local levy funds were being used to pay for basic education. RP 4249-50. Next, they debated whether the sufficiency of state funding depended upon successful achievement and graduation by all Washington students. RP 1654-56. The Task Force determined that district financial documents could not establish that local funds “backfilled” basic education funding. RP 4249-50, 4255-58, 4268; Tr. Ex. 1470, pp. 2-3, 11. As to outcomes and funding, the Task Force rejected the argument that current or future education funding had to be based on the “cost” of ensuring successful outcomes for all students. RP 1654-56.

The Task Force received a number of proposals, including the one substantially adopted by the Task Force in the fall of 2008. FF 243. That proposal was developed and sponsored by the six state legislators on the Task Force. *Id.*; RP 1669. The other proposals, including the OSPI proposal, were rejected. RP 1639, 1642.⁴

⁴ The Task Force did not consider retaining the current statutory funding system for basic education. However, the Chairperson testified that current funding levels make ample provision for the education of all Washington students and that no student is

The final Task Force Report and Recommendation was unanimously adopted by its members and issued on January 14, 2009. FF 244; Tr. Ex. 124. The Report contained detailed staffing models for each school level: elementary, middle and high school. *Id.*, pp. 7-13. It proposed reduced class sizes, early learning programs for three and four year olds from families with low incomes, increased funding for students struggling with academic performance, students with disabilities and students whose primary language was not English. *Id.*, pp. 8, 12, 14. The Report called for significant changes in the qualifications and promotion of teachers as well as factoring into total teacher compensation regional cost of living adjustments and pay levels commensurate with other professions. *Id.* The Report contained estimates for substantial increases in funding, as much as \$6 billion per biennium to offset the expected costs of fully implementing the new education programs. Tr. Ex. 124.

The Report had three significant observations about total estimated costs, about the ten-year period of time for complete implementation of recommended changes, and about the expected benefits of making the additional, substantial investment. FF 245. The Report contained a forecast that the State's high school graduation rate would only improve nine percent *14 years* after full implementation of the Task Force's

denied access to instructional programs that produce achievement at fairly high levels. RP 1644-45; 1725.

recommendations. *Id.*; RP 1663-64. To get graduation rates higher than forecasted (72.4 percent to 81 percent) would require an unlimited, steep increase in the billions already contemplated by the Task Force Report. RP 1663-64, 2341. The Washington State Institute for Public Policy (WSIPP), which produced this projection explained that the projection reflected what national research had revealed: “the underlying uncertainty in the expected effect of educational resources on student outcomes.” Tr. Ex. 124 at 25; FF 245, 246. This conclusion supported the Task Force Chair’s belief that simply infusing substantially more funding into basic education would not result in all students meeting performance standards. RP 1647-48.

E. In 2009, the State Enacted ESHB 2261 to Implement K-12 Education Reforms, Including Substantially Increased State Funding.

In 2009, the Legislature enacted ESHB 2261⁵ based, in substantial part, on recommendations of the Task Force. FF 198; Tr. Ex. 239. The law made fundamental changes and reforms to the programs, services and, eventually, to the state funding of K-12 education. RP 4099-4101. The new funding mechanism replaces the three broad categories of state-funded school staff positions with more discreet categories based upon prototypical schools at elementary, middle, and high school levels. RP 4101-03.

⁵ The official designation for ESHB 2261 is Laws of 2009, Reg., Sess., ch. 548.

ESHB 2261 created a Quality Education Council to recommend funding formulae for the new staffing and substantially increased non-staff costs for technology, instructional materials, and utilities. RP 4106-07. A new funding mechanism to cover 95 percent of all currently reported district pupil transportation costs is to be implemented by 2012. RP 4119-20; Tr. Exs. 52, 239, pp. 46-47.

ESHB 2261 will accomplish much needed reforms to teacher certification standards, to the raising and uses of local funding to supplement K-12 education programs, and to the development and implementation of a comprehensive data system to track and coordinate teacher and student performance. FF 247. A reformed accounting system will allow, for the first time, the ability to tie specific revenue sources to specific school district expenditures for both staff and non-staff expenditures. RP 4116-17. For the first time, school district accounting documents will demonstrate where federal, state, and local revenues are spent. *Id.* For the first time, the accounting documents will demonstrate whether, and to what extent, local levies are paying for basic education programs and services. *Id.*

ESHB 2261 specified the structure, mechanisms and timeframes for K-12 reform. FF 248. However, the increased funding levels, the restructuring of the current uses of existing dollars, and identification of specific tax sources were not spelled out. FF 248. Instead, the Legislature

determined those issues would be better addressed by obtaining findings and recommendations from the statutorily created Quality Education Council. *Id.* The deadline for full implementation is 2018. *Id.*

Passage of ESHB 2261 was greeted enthusiastically by educators, local school districts, and state and local officials. FF 249; Tr. Ex. 1183; RP 353-360. It was endorsed and supported by many organizations that belong to Respondent NEWS. *Id.* At trial, both sides' witnesses testified that full implementation and funding of the reforms in ESHB 2261 will cure any inadequacies perceived in the current system. RP 2859-60; Dorn Dep., p. 59; Jarrett Dep., pp. 132-33.⁶

F. State Statutes Determine the Basic Education Funding Provided by the State to Local School Districts.

The policies pertaining to, and the funding for, basic education are contained in and governed by Washington statutes and regulations. FF 215; RP 3524. Annual state funding for basic education is specifically provided in enacted Appropriation Acts. *Id.* Improvements and proposed reforms to basic education policy, its definition, programs, and funding similarly are contained in state law. *Id.*

⁶ This deposition testimony was excerpted and admitted into evidence at trial. Such testimony is part of the "Clerk's Papers"; however, neither side has yet designated the Dorn and Jarrett testimony. Appellant will do so by supplemental designation. Copies of the pages cited above are attached as Attachment C.

The process by which the State funds basic education involves both executive and legislative branches and requires several steps. FF 217. In anticipation of each biennial funding legislative session, the Governor, through the Office of Financial Management (OFM), develops a proposed budget for all state programs, including K-12 education. FF 217. The Office of the Superintendent of Public Instruction (OSPI) contributes to that process by suggesting enhancements above the base funding needed for basic education costs. FF 218. OSPI has no legal authority or responsibility for establishing the required funding levels for basic education. *Id.*; RP 4152. The Legislature and the Governor jointly have that authority. *Id.*

Because biennial funding covers the ensuing two years, the K-12 education budget forecasts what will be needed based upon historical experience. FF 219. State statutes then provide pupil to staff ratios and other funding requirements that are entered into a formula that ensures the State is appropriately costing out basic education. RP 3514. The annual cost of basic education is updated using staffing ratios and non-employee related cost factors that are contained in the Basic Education Act, as well as enrollment figures reported and projected by school districts. *Id.* Basic education program costs then are funded by the Legislature through annual

appropriations contained in the State's biennial appropriations act. *Id.*; RCW 28A.150.380.

Basic education funding consists of a general allocation for every student and categorical funding for student transportation, special education, funding for students for whom English is not the primary language (ELL program) and for students struggling with academic achievement (LAP program). RP 4057, 4069-74. The basic education general allocation appropriated by the Legislature has four components: student enrollment, staff to student ratios, salary and benefit calculations, and non-employee related costs. *Id.*; Tr. Ex. 43, pp. 4-6. Changes to student enrollment drive the numbers of staff funded by the State, while non-employee related costs are determined using a formula known as the implicit price deflator. *Id.* The specific staff ratios are provided in RCW 28A.150.260, while salary and benefit calculations and non-employee related costs are specified in the Appropriations Acts. RP 4093. Student transportation funding is generated by the number of student miles traveled, while categorical funding is provided as a specific additional amount provided per student (e.g., ELL and LAP). RP 4069-74.

The State's general fund provides funding that is regular and dependable for basic education. RP 3527-28. Basic education funding is non-discretionary and funded without regard to the State's economy or

financial condition. RP 3556. Funding for basic education occupies a paramount position in every enacted state budget. RP 3551-52, 3559.

State funding for K-12 education in the 2009-11 biennium exceeded \$12 billion. RP 3527-28; Tr. Ex. 617. For school year 2007-08, state revenues for K-12 education were approximation \$5.5 billion. RP 5120; Tr. Ex. 660. Since 1981, student population has increased by 37.7 percent, while the number of staff employed by schools has grown by 67.8 percent. Tr. Ex. 66, pp. 15, 17. The total amount **appropriated** for basic education has grown proportionally and K-12 state funding remains larger than funding for other state programs or functions. RP 3535-36, 5178.

Following appropriation, OSPI allocates funding to school districts. RP 4147-48. Amounts provided are driven by the statutory formulae based on student enrollment, staffing ratios, salary and benefit calculations, and non-employee related costs. *Id.* The allocation process is designed to conform the forecast of costs to actual school district experience and, if more funding is needed to satisfy the formulae, supplemental appropriations are made by the Legislature to cover those costs. Tr. Ex. 43, p. 3.

G. School Districts Have the Authority to Raise Local Levy Funding to Pay the Costs of Local Programs and Operations.

In *Seattle School District v. State*, 90 Wn.2d at 526, the Court authorized the use of local special excess levy funding to pay for costs associated with locally determined programs and services that were not part of basic education. The Basic Education Act of 1977 also envisioned locally authorized programs and operations (RCW 28A.58.754); state funding was never intended to cover whatever school districts elect to expend in operating their K-12 schools. RP 3541-42.

Washington has 295 school districts that staff and operate the State's 2,200 public schools. Each district is managed and operated by local officials and employees. Tr. Ex. 192, p. 2. Each district operates under authority of a locally elected School Board. *Id.* The CEO is the District Superintendent who has authority over all K-12 public schools, programs, employees and operations. *Id.* Washington's districts enjoy a substantial measure of local control. *Id.* For example, there is no state requirement that the general allocation for all K-12 students (the largest state allocation for basic education) must be used for any specific program or service; local school officials determine how state and local funds are actually spent. RP 3911; Tr. Ex. 1406, p. 14. Just as importantly, "local control" determines the courses offered to students and the length of the

school day and year, subject only to the 180-day, 1,000-hour minimum school year mandated in the Basic Education Act. Tr. Ex. 1406, pp. 9, 14. Washington's K-12 public schools are thus substantially funded by the State, but local control vests the districts with discretion as to where and when funds are spent, how much is spent, and which sources of revenues to apply to its operational expenditures. RP 4210-12.

The school districts have authority to hire more staff (teachers, aides, building and grounds, administrative) than are funded by the State, and they have authority to pay higher compensation than state or federal funding provides, using local funds. RP 334-36, 3907-09. Staffing numbers, hours, and compensation typically are the subjects of locally-negotiated collective bargaining agreements. RP 3905-3908. The State is not a party to these agreements or their negotiation. RP 863. School district expenditures overall tend to be 90 percent devoted to staff and 10 percent devoted to non-employee related costs. Tr. Ex. 43, p. 2, ¶ 5.

As noted above, this Court held that local special excess levy funding is not part of a dependable and regular tax source for basic education. *Seattle Sch. Dist.*, 90 Wn.2d at 526. However, local levy funding was not forbidden as a revenue source for non-basic education programs and services or for course offerings and other activities offered as local choice. *Id.*; FF 177. Moreover, local levy funding is not confined

to special excess levies, but includes capital funding, maintenance and operations funding, local debt financing, and technology funding. RP 4148-49.

Though state statutes authorize local levy funding for local programs and services, state law prohibits local school districts from using local funds to pay a teacher for performing basic education services. RCW 28A.400.200. Currently, the State cannot determine from school district accounting practices and documents whether staff compensation paid with local funds are provided for basic education or for federal or locally required programs and services. RP 4210-12.

Local school district accounting practices are consistent with a system funded primarily with state revenues, but controlled and operated locally. OSPI provides forms and instructional manuals, developed with the active participation of local school district representatives, that describe how to develop annual budgets and year-end financial statements. Exs. 26, 30. The school districts are responsible for the integrity of the information provided in the accounting documents and are solely responsible for the categorization of revenues and expenditures and for the accuracy of underlying data. RP 4178. The documents do not identify which school programs and services are paid for with state, federal or local funds; nor do they separate expenditures for "basic education" from

the expenditures for other purposes or provide any basis for determining the adequacy or inadequacy of state funding of basic education. RP 4255-37.

H. Procedural History: Evidence of State Funding, School District Spending, Outcomes and Cost Studies.

The bench trial of this case took place between August 31 and October 21, 2009. CP 2865. Twenty-eight fact and expert witnesses testified live; an additional 27 testified by deposition. CP 2946-47. Over 500 exhibits were admitted into evidence. CP 2948-71. On February 4, 2010, the Court announced the decision and filed Findings and Conclusions. Judgment and amended Findings and Conclusions were filed on February 24. CP 2866. The State appealed on March 25 and Respondents cross-appealed on April 8. CP 2973-74; CP 3086-87.

1. Respondents' Evidence of Inadequate Funding.

To support their claim that state funding of K-12 schools is unconstitutional, Respondents presented evidence that school districts spend more to operate K-12 schools than the State provides in funding; that school districts raise and spend local tax monies and funds from non-state sources to operate schools; that not all students pass WASL tests and/or graduate from high school; and that former and current state officials opined that the State did not amply fund K-12 education.

Respondents used school district annual financial statements to show that yearly operating costs exceeded state revenues provided for basic education. RP RP 266-267, 765, 1840-47, 3328-29; Tr. Exs. 375, 380, 422, 520, 649, 651, 652, 659, 660. From this comparison, the district superintendents derived the conclusion that total expenditures for K-12 schools were not amply funded by the State, and the trial court agreed.

They used district and statewide "Report Card" documents to demonstrate that all students, but particularly those in ethnic minorities or from poor families, were not passing all WASL exams and/or graduating from high school. RP 223, 348, 748-49, 1842, 3316; Tr. Ex. 689. Based on this data, witnesses opined that state funds were inadequate to ensure that all students succeed, and the trial court so ruled.

The district superintendents testified that they must raise and expend local levy and other non-state revenues to operate their K-12 schools. RP 252, 773, 1847, 3258-59. They testified that total education funding (state, federal and local) was insufficient to procure successful outcomes for all students. *Id.* When asked how much more funding was needed, they could not answer, admitting they had never considered or analyzed the level of funding they needed. RP 279-81, 813-14.

Respondents provided testimony and documents produced by former and present state officials. RP 1078-79, 1169-70, 4531-32. This

evidence was derived from a number of efforts to reform the programs and funding of basic education, including Washington Learns and the Basic Education Task Force. RP 1148, 1168-69, 1429-30, 1581-82. This evidence was also invoked as a basis to conclude that the current state funding was unconstitutional.

2. State's Evidence That Increased Funding Does Not Produce Improved Student Achievement.

The State presented evidence that the State amply provides for basic education, as defined, programmed, and funded in state law, and that recently enacted substantive and financial reforms of basic education will cure any deficiencies in the current system. The State also presented substantial fact and undisputed expert testimony that infusing more funding into education did not increase student achievement. Just as importantly, the State demonstrated that efforts to study and establish the "actual cost" of providing a successful education to all students—or to targeted student populations—failed to raise achievement levels, even when a court ordered the study and substantially increased funding.

The State called a number of prominent, nationally recognized experts in public school programs and financing. Drs. Eric Hanushek and David Armor analyzed Washington's system and compared its successes and shortcomings to the national experience, with particular emphasis on

spending levels and student achievement. RP 2993, 3056, 3063, 3353-55, 3359-60, 3378-80; Tr. Exs. 1536, 1530, 1531. Dr. Robert Costrell testified about “costing out” analyses as a putative basis for establishing the costs of educational programs and services that will produce student achievement. RP 4563-66. A cost study or “costing out” analysis is a process whereby consultants try to determine funding levels for a variety of interventions assumed to produce student achievement. RP 4564-65.

Analysis nationally and locally, however, proved no connection between reducing class sizes and improved performance, no link between teachers with masters’ degrees and student performance and no improvement in the achievement of struggling students from resources targeted at such populations. RP 3009-16, 3029, 3035, 3041-43, 3063, 3072, 3075-78; Tr. Ex. 1536, pp. 11, 14-23, 25-44. Dr. Armor’s analysis confirmed that these findings also were evident in the experience of Washington’s school districts. RP 3358-60, 3378-81; Tr. Exs. 1530, 1531.

Drs. Hanushek and Costrell also examined the nature and effectiveness of “cost studies,” including their use in other states involved in education funding litigation—some spanning decades. RP 3043-45, 3095-3104, 3112-14, 4564-65, 4569-72, 4607-08. The experiences of New Jersey, Massachusetts, Wyoming and Kentucky demonstrated that court-ordered funding increases based on such studies revealed little or no

improvements in achievement levels. *Id.* They concluded that efforts to cost out funding levels needed to obtain student achievement were based on flawed premises and methodologies. *Id.* They contrasted such exercises with the Legislature's approach to financial reform in ESHB 2261. RP 3112-14, 4565-66, 4609-11. In their opinion, ESHB 2261 provides the better program for reforms and targeted investments over a reasonable implementation period and constitutes a rational means of bringing about education program and financial reforms. *Id.*

Dr. Armor specifically analyzed the impacts that a student's socio-economic circumstances have on the ability of impoverished students to succeed in school. His analysis of Washington students' performance levels found that the children of lower income families do not achieve at higher levels based on increased resources, even when resources are targeted to districts with significant populations of low-income families. RP 3378-79, 3381, 3457-58. He concluded that Washington should continue to target increased resources after identifying programs and services that actually work, rather than infusing substantial additional resources to education generally. RP 3457-58. Simply increasing education funding to implement popular interventions like reduced class

sizes will not raise student achievement levels. *Id.*; Tr. Ex. 1531, pp. 4-7; RP 3417.

The evidence at trial demonstrated that student performance on WASL has improved steadily since the examinations were introduced. Tr. Ex. 281 (slide 5). The high school reading and writing WASL first counted toward graduation in 2008. RP 4449. Over 90% passed. *Id.* Washington's standards as measured by the WASL are high compared to other states. RP 5009. The States' four year high school graduation rate has remained at 70-75%, reflecting the national trend. Tr. Ex. 207, p. 1. The States' graduation rate, including students whose high school experience exceeds four years, is 77.4%. Tr. Ex. 491, p. 1.

Student performance on national assessments confirms that Washington's level of achievement ranks high. RP 5009; Tr. Ex. 1536, pp. 3-6. Indeed, an annual report by the American Legislative Exchange Council, which combines reading and math scores on national assessments with ACT and SAT college entrance exams, indicates that Washington's overall educational system ranks twelfth in the nation in student performance, in line with the performance of states with much less diverse populations. RP 5011-5012.

Washington has an "achievement gap" in performance levels of minority, low-income populations. RP 2211-2212; Tr. Ex. 231, p. 6.

However, Washington's experience is reflective of national results. RP 3072. While the gap in Washington has narrowed dramatically over the years in reading and writing, and student math achievement for both majority and minority students has improved, the achievement gap in math has persisted. Tr. Ex. 293, pp. 79-80. In 2008, the State conducted independent studies of the five largest ethnic and income level minority populations. Laws of 2008, Reg. Sess., ch. 298; Laws of 2008, Reg. Sess., ch. 329, §§ 118, 119, 131. The results of these studies were taken into account in ESHB 2261. Tr. Ex. 189, p. 2.

3. The Trial Court's Ruling.

The trial court reconciled the conflicting testimony by crediting the State's evidence and acknowledging the district superintendents' anecdotal accounts of successes involving diversion of resources into teacher training, remedial classes for students struggling with the WASL, or the monitoring of students who had left school or were in danger of dropping out.⁷ FF 232-233. Finding that the State had never determined the "actual costs" of basic education, the Court directed the State to study and determine the cost of providing all students with the education the court ruled is mandated by Article IX, and it ordered the State to identify

⁷ Each of the superintendents testifying at trial had an anecdotal example of their diversion of resources to a practice like monitoring "at risk" children (RP 1837, 1894), a special class for those having difficulty with the WASL (RP 3851-52) and extra-curricular activities (RP 892).

the “state-only” sources of funding that will be “stable and dependable” from year to year. CP 3091.

V. STANDARDS OF REVIEW

Appellate courts review issues of law and the trial court’s Conclusions of Law *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003); *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 132 P.3d 789 (2006). The Findings of Fact are reviewed to ascertain whether they are supported by substantial evidence to persuade a rational person of the truth of the proposition. *Hilltop Terrace Homeowners’ Ass’n v. Island County*, 126 Wn.2d 22, 34, 89 P.3d 29 (1995).

Findings of fact are also reviewable *de novo* whenever the trial court has mislabeled a conclusion of law as a finding. *Grundy n. Brack*, 151 Wn. App. 557, 213 P.3d 619 (2009). Where, as in this case, a number of factual findings present mixed questions of law and fact, such findings are reviewed under an error of law standard. See *Erwin v. Cotter Health Ctrs., Inc.*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007); *State ex rel. Freedom Foundation v. WEA*, 111 Wn. App. 586, 596, 49 P.3d 894 (2002). The process of determining the applicable law and applying it to the facts is a question of law that this Court reviews *de novo*. *Id.* *De novo* review is particularly apt when the trial court analyzes the application of

facts and statutes. *Nuttall v. Dowell*, 31 Wn. App. 98, 639 P.2d 832 (1982).

Most of the challenged trial court findings are either mislabeled legal conclusions or mixed statements of fact and law reviewable under a *de novo* standard. Findings 180, 185-87, 193-95, 197, 220, 233 and 236 also lacked substantial evidentiary support.

VI. LEGAL ARGUMENT

Seattle School District v. State, 90 Wn.2d 476, 585 P.2d 71 (1978), provided the trial court with the interpretation and construction of Article IX that should have disposed of the liability and remedy issues in this case. Instead, the trial court departed from that decision and expanded the State's constitutional duty by: (1) applying the wrong constitutional standard in defining the "education" for which the State must make ample provision; (2) incorrectly ruling that the State must fund "the actual costs" of successfully educating all Washington's children; and (3) incorrectly ruling that state funding must be "stable and dependable" and must come exclusively from state revenue sources.

The trial court further erred by entering an enforcement order that directs the Legislature as to the means it must employ to comply with the Legislature's Article IX duty. Finally, the trial court applied the incorrect

burden of proof to Respondents' constitutional challenge to the State's statutory regime for defining and funding basic education.

A. The State's Constitutional Duty Under Article IX Was Established in *Seattle School District v. State*.

Article IX, section 1 of the Washington constitution provides:

It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

The definitive interpretation and construction of this constitutional language was set forth in *Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978). In that landmark decision, this Court provided comprehensive guidelines for the Legislature to abide by in complying with Article IX. The Court defined the terms *paramount*, *ample*, *make provision*, and *education*. 90 Wn.2d at 516. The Court described the State's obligation as providing more than reading, writing and arithmetic; embracing "broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas." *Id.* at 517.

The Court cautioned that Article IX's terms were "broad guidelines," not "educational concepts [that are] fully definitive of the constitutional duty, and that "effective teaching and opportunities for

learning” are “the minimum of the education that is constitutionally required.” *Id.* at 518.

The guidelines were intended to give the Legislature the “greatest possible latitude to participate in the full implementation of the constitutional mandate.” *Id.* at 515. Therefore, the guidelines contemplate that the State must furnish a “basic education” as distinguished from “total education or all other educational programs, subjects or services which might be offered.” *Id.* at 519. Regarding the sources of funding, the Court held that the Legislature must fund basic education through “dependable and regular tax sources,” excluding only local special excess levies (which remain appropriate for local programs not part of the State’s basic education program). *Id.* at 520, 525-26.

The Court directed the Legislature to provide substantive content to basic education and determine the amounts of resources needed; although the Basic Education Act of 1977 was not part of the record before the Court, the Court described the Legislature’s enactment of that Act as a “commendable effort to alleviate the constitutional void.” *Id.* at 519 n.14.

The Court declined to provide the Legislature with more direction on specific elements of basic education such as staffing ratios and salaries, individualization of instruction for academically challenged students and

local control over educational policy and other matters. *Id.* at 519-20. To justify court intervention directing the means of satisfying the Article IX obligation, there must be proof of a “constitutional imperative requiring immediate judicial intervention.” *Id.* at 519-20. The Court was explicit: “While the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature.” *Id.* at 520 (emphasis by the Court).

B. The Trial Court Entered Judgment Based Upon an Erroneous Definition of the “Education” for Which the State Must Make Provision.

As explained above, it is “basic education” to which the State must give substantive content and for which the State must make ample provision to satisfy Article IX. *Id.* at 518-20.

Instead of determining whether the State made ample provision for basic education, the trial court ruled that the Legislature had raised the constitutional bar by enacting amendments in 1993 to the Basic Education Act. FF 170-0202; CL 203-13, 251. This ruling was premised upon two erroneous predicates: (1) that *Seattle School District v. State* mandated that the Legislature provide further substantive content to the constitutional term “education” and that it did so for the first time in ESHB 1209; and (2) that the Legislature expanded the constitutional

meaning of that term by enacting ESHB 1209 (1993) and providing for the subsequent development of "Essential Academic Learning Requirements." *Id.* From these erroneous predicates, the trial court concluded that the "current definition" of basic education went beyond that provided by this Court, and that the Legislature was now charged with satisfying an elevated constitutional minimum: providing an education to all students that caused them to attain the goals listed in RCW 28A.150.210 and master the skills specified by the Essential Academic Learning Requirements, erroneously converting educational goals and opportunities into constitutionally mandated guaranteed outcomes. CL 251. The trial court's conclusion that there was an elevated constitutional duty formed the basis for its liability ruling that the State was not currently making ample provision for the education of all Washington's students. *Id.*

While the Court in *Seattle School District* did direct the Legislature to define basic education, enact a program to provide basic education and to give it "substantive content," the Legislature had already done so by enacting the Basic Education Act of 1977, as Justice Utter noted in his concurring opinion:

[W]here the old legislative scheme provided no detailed definition of the educational program to be offered students, the current legislation provides such a definition. The Basic Education Act defines the program evolving from the act to include a complex series of goals

enumerated therein, and the program requirements deemed necessary to accomplish these goals as well as the legislative determination of state resources to implement the program. Laws of 1977, 1st Ex. Session, ch. 359, § 1.

Seattle Sch. Dist., 90 Wn.2d at 548. While the majority's direction to the Legislature was phrased prospectively, the Court noted explicitly that it was not examining the Basic Education Act because it had not been adopted in time for the trial court to have considered it. *Id.* at 519 n.14, 526 n.16. The Court simply declined to examine whether that legislation satisfied the Article IX duty to define and fully fund "basic education." In the context of *Seattle School District*, the Basic Education Act was prospectively enacted legislation not yet properly before the Court. It is in this context that the majority observed that no "current law"⁸ contained the definition, substantive content or full funding of basic education that the Legislature was constitutionally charged to enact. *Id.* at 519 n.14, 537.

1. The Basic Education Act of 1977 Provided the Definition, Programs, Substantive Content and Funding for Basic Education Contemplated in *Seattle School District v. State*.

To understand where the trial court's analysis began to go astray, it is important to recognize the Legislature's response to the *Seattle School District* litigation. The Basic Education Act of 1977 contained three elements that together constituted the definition of basic education:

⁸ Though enacted in 1977, by its terms, the Basic Education Act was not to be completely implemented until 1981. As of 1978, it had yet to become "current law."

(1) education system goals; (2) education program requirements; and (3) funding ratios and formula mechanisms for funding basic education. FF 178, 179. See RCW 28A.58.750-.760, later recodified at RCW 28A.150.200-.240. The Legislature appropriated funding for K-12 public schools in accordance with these provisions and the "guidelines" contained in *Seattle School District*.⁹ FF 179.

Educational system goals were set out in RCW 28A.58.752 (1977):

RCW 28A.58.752 Basic Education Act of 1977-Goal. The goal of the Basic Education Act for the schools of the state of Washington set forth in this 1977 amendatory act shall be to provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning. Those skills shall include the ability:

(1) To distinguish, interpret and make use of words, numbers and other symbols, including sound, colors, shapes and textures;

(2) To organize words and other symbols into acceptable verbal and nonverbal forms of expression, and numbers into their appropriate functions;

(3) To perform intellectual functions such as problem solving, decision making, goal setting, selecting, planning, predicting, experimenting, ordering and evaluating; and

(4) To use various muscles necessary for coordinating physical and mental functions.

⁹ The "guidelines" adopted by the Supreme Court were taken from the 1977 trial court Memorandum Opinion. *Seattle Sch. Dist.*, 90 Wn.2d at 515.

The statutory program requirements for basic education were set out in RCW 28A.58.754 (1977), which specified a "total program hour offering" for kindergarten through grade 12. Programs for all grades first assigned percentages for instruction in "the basic skills areas" of reading/language arts, mathematics, social studies, science, music, art, health and physical education and then assigned percentages for instruction in "such subjects and activities as the school district shall determine to be appropriate ... in such grades." Thus, the Act contemplated that each day in the school year would include basic education instruction as well as instruction based upon locally funded, local district choices or courses in addition to basic education.

Funding for basic education was provided in RCW 28A.41. Statutory appropriations were authorized in RCW 28A.41.050 (1977). Funded ratios of staff to students for the costs of basic education were specified in RCW 28A.41.130 and -.140 (1977).¹⁰ RCW 28A.41.130 (1977) addressed the level of funding:

Basic education shall be considered to be fully funded by those amounts of dollars appropriated by the legislature pursuant to RCW 28A.41.130 and 28A.41.140 to fund those program requirements identified in RCW 28A.58.754

¹⁰ The staffing ratios that drove state funding for staff and non-staff costs alike were determined after lengthy study, including consideration of the numbers and types of staff employed at the time by the local school districts. RP 1607-09. They were not insubstantial "arithmetic equations," without correlation to district needs, as erroneously determined by the trial court. FF 220, 224, 227.

in accordance with the formula and ratios provided in RCW 28A.41.140 and those amounts of dollars appropriated by the legislature to fund the salary requirements of RCW 28A.41.110 and 28A.41.112.

Since the passage of the Basic Education Act of 1977, all aspects of basic education, including its definition, programmatic requirements and funding, have been contained in state statutes. FF 215; RP 3524.

2. The Basic Education Act Was Amended to Update the 1977 Statutory Definition, Program, and Funding for Basic Education.

As previously explained, during the 1990s, the State of Washington initiated a process of transitioning basic education from a "seat time" K-12 education system to a "performance based" system. RP 973.

This transition in Washington was launched, but not completed, by ESHB 1209, codified as RCW 28A.150.210. FF 184. Through ESHB 1209, the Legislature intended to improve opportunities for student achievement. Tr. Ex. 133, p. 2. ESHB 1209 focused on factors such as the establishment of standards set at internationally competitive levels, primary parental responsibility in the education of children, students taking responsibility for their education, and the provision of resources for educators to develop and implement strategies for improved student learning:

It is the intent of the legislature to provide students the opportunity to achieve at significantly higher levels, and to provide alternative or additional instructional opportunities to help students who are having difficulty meeting the essential academic learning requirements in RCW 28A.630.885.

ESHB 1209, § 1 (Laws of 1993, ch. 336, § 1). ESHB 1209 enacted new student learning goals, replacing those enacted in the Basic Education Act of 1977. RCW 28A.150.210 (1977) was amended to read as follows:

The goal of the Basic Education Act for the schools of the state of Washington set forth in this chapter shall be to provide students with the opportunity to become responsible citizens, to contribute to their own economic well-being and to that of their families and communities, and to enjoy productive and satisfying lives. To these ends, the goals of each school district, with the involvement of parents and community members, shall be to provide opportunities for all students to develop the knowledge and skills essential to:

(1) Read with comprehension, write with skill, and communicate effectively and responsibly in a variety of ways and settings;

(2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history; geography; arts; and health and fitness;

(3) Think analytically, logically, and creatively, and to integrate experience and knowledge to form reasoned judgments and solve problems; and

(4) Understand the importance of work and how performance, effort, and decisions directly affect future career and educational opportunities.

ESHB 1209, § 101.

The Legislature also revised the statutory program for basic education, replacing the specific division of the school day into basic skills instruction and locally-driven instruction with a more general statutory directive that each school districts' program "shall include instruction in the Essential Academic Learning Requirements under RCW 28A.630.885 and such other subjects and such activities as the school district shall determine to be appropriate." RCW 28A.150.220. Teacher-to-pupil funding ratios to determine the funding of staff and non-staff costs now were provided in RCW 28A.150.250 and -.260. As with the Basic Education Act of 1977, RCW 28A.150.250 provided that basic education was "fully funded" by the amounts appropriated by the Legislature to fund the program and salary requirements of RCW 28A.150.100 and 28A.150.410.

Nothing in ESHB 1209 indicated that its enactment was intended to comply with a directive or holding in *Seattle School District v. State*.

A simple, side-by-side comparison of the provisions of the 1977 Act and its amendment by ESHB 1209 in 1993 confirms neither act purported to amend Article IX or the constitutional term "education." Both RCW 28A.58.752 (1977) and 28A.150.210 (1993) provide that the Act's "goal" is for public schools to provide "the opportunity" to acquire

skills, either as requisites to learning or to become responsible citizens and to lead productive and satisfying lives. Both statutes then list four skills centered around reading, language (written and oral), mathematics, critical thinking and problem solving. (For ease of reference, a chart comparing the 1977 and 1993 statutes is attached as Appendix A.)

Similarly, comparison of the 1977 Act and its 1992 amendment regarding the basic education "program" to carry out the "goal" and "opportunities" portion of the Basic Education Act reflect a similar provision for instruction in "basic skills" (RCW 28A.58.754) or the EALRs (RCW 28A.150.220) and in "subjects and activities" as the school districts choose to provide. (A chart comparing these provisions is attached as Appendix B.)

Neither the 1977 statutes nor their amendments express an intent to change, modify or enlarge the Article IX duty to make provision for basic education. Neither provides that the Legislature intends to raise the constitutional minimum set forth in *Seattle School District v. State*. Neither has the factual or constitutional significance determined by the trial court in this case.

By recasting the 1993 amendments to the learning goals in RCW 28A.150.210 as "additional substantive content" to the definition basic education, the trial court combined the goals with the EALRs to erect a

new “current” constitutional definition of education. CL 212. The court then erroneously re-defined the constitutional floor as “equipping all children with the basic knowledge and skills established by the current definition of education” and found that the State’s funding allocation formulas do not ensure that all children achieve the level defined by the court. FF 220, CL 251.

This approach makes for an untenable standard the State is not required to meet under the constitution—ensuring that all students actually achieve each of the goals of RCW 28A.150.210 and master each of the EALRs. The State was bound to fail an ample funding test predicated on such a standard. For the reasons stated above, use of this approach was reversible error.

3. The Legislature Cannot Raise the Article IX Constitutional Floor.

In concluding that ESHB 1209 and the Essential Academic Learning Requirements created an entirely new constitutional definition of “education” and an enhanced “solid constitutional floor below which the Respondent State cannot lawfully go” (FF 170-02 and CL 203-12, 251), the trial court essentially ruled that the Legislature can amend the state constitution, contrary to *Brown v. State*, 155 Wn.2d 254, 261, 199 P.3d 341 (2005) (scope of State’s paramount duty to provide for education

cannot be defined by legislation). *See also McGowan v. State*, 148 Wn.2d 278, 292, 60 P.3d 67 (2000) (Article IX constitutional duty could not be expanded through voter initiative.).

In *Seattle School District v. State*, 90 Wn.2d at 518, this Court established the “minimum of the education”—the “constitutional floor”—below which the State’s ample provision for basic education cannot lawfully go. The Legislature’s definition, program and funding of basic education must enable districts to offer “the effective teaching” and “opportunities for learning essential skills” necessary to become good citizens and competitors in the labor market and marketplace of ideas. *Id.* While it is the task of the Legislature to design a system of basic education that provides those educational opportunities, this Court has definitively construed and interpreted the constitutional term “education.” *Id.* at 518-19.

To rule that the Legislature may create a new constitutional floor, as the trial court has done, is to constitutionalize every statutory or regulatory change to basic education that the Legislature makes. Such a ruling effectively confers on the Legislature the power to amend the constitution by statute.¹¹ Whether all students attain statutory goals or

¹¹ The Legislature knew it was not amending the constitution. Its stated legislative purpose in enacting these laws was “compliance” with the constitutional mandate of Article IX. *Compare* RCW 28A.58.750 *with* RCW 28A.150.200.

master specific EALRs cannot determine the Legislature's compliance with Article IX. The trial court's Judgment was predicated upon this error and should be reversed.

C. The Trial Court Further Erred by Equating "Making Ample Provision" with the Actual Costs of Obtaining Successful Outcomes for All Students and/or the Total Costs of Operating Schools.

The trial court entered Judgment that was also predicated upon Findings and Conclusions that State funding was insufficient to produce successful academic outcomes or to pay the total costs of operating K-12 public schools. FF 235, 263 and CL 273, 275. The former was error because Article IX does not mandate that all students achieve. The latter was error because Article IX does not require the State to fund "total" education.

1. Article IX Requires Educational Inputs, Not Outcomes.

Article IX, section 1 commands the State to "make ample provision" for the basic education of Washington's K-12 students. It does not obligate the State to do the impossible; provide successful educational outcomes for all students. Equating "ample provision" with the actual costs of obtaining successful outcomes for all students is contrary to Article IX's terms and the decisions of this Court.

Appropriate constitutional analysis begins with the text, which necessarily includes the words used, their grammatical relationship to each other and their context. *Gallwey v. Grimm*, 146 Wn.2d 445, 459-60, 48 P.3d 274 (2002). Constitutional terms are defined according to the original understanding of the ratifying public. *Id.* See also *Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997) (“[D]ictionary definition[s] published over one hundred years after the constitution’s ratification provide little guidance in ascertaining the original understanding of the ratifying public.”).

The trial court’s ruling that the State has a constitutional duty to provide successful educational outcomes conflicts with the meaning of the phrase “make provision” in Article IX. The meaning of these words, both in historical context and as the *Seattle School District* court construed them, refers to a process, not an outcome:

As used in art. 9, sec. 1, “education” in its total or ultimate sense comprehends *that series of instruction and discipline which is intended to enlighten the understanding, correct the temper, and form the manners and habits of youth, and fit them for usefulness in the future*

90 Wn.2d at 516 (emphasis supplied).

Similarly, this Court held that “provision” in Article IX “means preparation, measures taken beforehand; for the supply of wants;

measures taken for a future exigency.” 90 Wn.2d at 516. “To make provision” refers to inputs and resources, not outcomes.

No Washington cases have construed Article IX to require the State to ensure successful outcomes, much less for “all” students. Rather, the State provides “opportunities” for education and does not create a cause of action for students’ failure to achieve:

The Washington Constitution effectively offers children in this state a constitutional right to *educational opportunity*. The state has the paramount duty to make ample provision for this opportunity in the education of its children. The Legislature’s paramount duty is to define this educational opportunity in the establishment of an educational system and to fund it. Individual children, their parents, and local school districts each have standing to compel the Legislature to implement this constitutional mandate. But the courts cannot prescribe an individual right to a specific form of education.

Tunstall v. Bergeson, 141 Wn.2d 201, 236, 5 P.3d 691 (2000) (J. Talmadge, concurring). *See also Federal Way v. State*, 167 Wn.2d 514, 524, 291 P.3d 941 (2009) (general and uniform system is one in which every child has free access to reasonably standardized educational and instructional opportunities); *Seattle Sch. Dist.*, 90 Wn.2d at 518 (opportunities to learn essential skills are part of the constitutional minimum under Article IX.).

As neither the text of Article IX nor the courts (until the trial court in this case) require successful educational outcomes for all Washington

students, every statutory definition of basic education has been phrased in terms of “opportunities” and not guarantees. *See, e.g.*, RCW 28A.58.752; ESHB 1209 (Tr. Ex. 14, p. 3); RCW 28A.150.210. The trial court judgment is reversible error because it has misconstrued Article IX to require outcomes, rather than inputs, for all Washington students.¹²

2. Article IX Does Not Require the State to Fund Whatever Districts Expend to Operate Public Schools.

The trial court’s Judgment also was predicated upon testimony from witnesses that the “actual cost” of operating public schools exceeds state revenues. FF 220, 223; CL 275. The witnesses equated “costs” with what districts spent on all programs and services to operate their schools. RP 250, 719, 1822, 1866, 3303-04. They tallied all expenditures for federal, state, and local programs, including total staff compensation, without regard to whether the expenses were for basic education or some other purpose. *Id.* Article IX, however, requires that the State fund *basic education* programs and services with regular and dependable tax sources. The constitution does not require the State to pay for federal or local programs or services.

¹² Similarly, the trial court erred in concluding that the word “ample” means “considerably more than just adequate or merely sufficient.” CL 165. *Seattle School District v. State* held that that, “[a]s used in Const. Art. 9, sec. 1 the word ‘ample’ (amply) means liberal, unrestrained, without parsimony, fully, sufficient.” The State’s duty under Article IX is to fully and sufficiently fund basic education for Washington’s children, not “considerably more.”

Witnesses for both sides confirmed that public schools offer, in addition to programs and services for basic education, programs and services that are locally chosen and funded or authorized by federal law. RP 298, 5002, 4275-76. For example, the Superintendent for Chimacum's schools (who also is President of the Respondent NEWS) admitted that his district's operational costs included the costs of running an alternative high school for "at risk" students. RP 297-98. He conceded that this facility, its staff and other operational costs, were local choices because the district only needed the mainstream high school. *Id.* He further conceded that it was entirely appropriate to use local funding to pay for the alternative school and its operations. *Id.* Despite this concession, he and all the other school district superintendents included the total expenditures for schools—basic education, federal and local—in their calculations of "underfunding" in their districts. RP 250, 719, 1822, 1866, 3303-04.

Washington's statutory program envisions that non-state programs will be a part of the school day and, therefore, an integral part of school operations and expenses. RCW 28A.58.754 (1977) and RCW 28A.150.220 (1982). The Basic Education Act has always provided for basic skills classes (later instruction in the EALRs) and those the individual districts choose to offer. *Id.* School districts have the

autonomy to hire more staff, and to pay all staff more, than state law provides for basic education. Tr. Ex. 192, pp. 17-19. State law specifically authorizes districts to pay teachers more than the State funds and prohibits the use of the additional compensation for “basic education” services. RCW 28A.400.200. Because the trial court considered “total” education costs, without recognizing that the State is constitutionally responsible only for basic education costs, the Judgment that “actual costs” exceed state funding is in error.

Moreover, only “special excess levies” are forbidden as basic education revenues.¹³ The rationale behind excluding the special excess levies was not due to their “local” or “non-state” status. Their exclusion was due to the “irregular” manner in which they were raised: voters could turn them down. *Seattle Sch. Dist.*, 90 Wn.2d at 526-27. That is why this Court proscribed irregular, undependable “tax sources.” *Id.* at 524-26. As explained below, this Court has not imposed blanket prohibitions on federal or local funds as revenues for basic education.

By using total operational expenditures as the measure of the State’s funding duty, the trial court distorted and substantially escalated the State’s constitutional duty by inflating the Article IX duty into whatever the districts spend, effectively making state compliance

¹³ Other local revenue sources for K-12 schools are provided for capital projects, for maintenance and operations, local debt service and for technology. RP 4148-49.

impossible. The trial court should have separated state, local and federal responsibilities to determine whether the State was amply providing for basic education. It was error not to do so. The Judgment should be reversed and remanded with instructions that Respondents be required to account for local and federal "costs" that are not the State's responsibility in order to determine whether funding for basic education violates Article IX.

D. Article IX Does Not Require Stable and Dependable Funding from State-Only Sources.

The trial court's Judgment mandates that funding for basic education be "stable and dependable" from year to year and include only funds from "State sources." FF 255; CL 273; CP 2867. To the extent that this means that the State must fund education in the same or greater amounts each year to make funding "stable," and exclusively from funds derived from *state* resources, the trial court's holding was in error. Article IX, section 1 contains no such requirements.

Compliance with Article IX, sections 1 and 2 can be achieved if sufficient funds are derived, through "dependable and regular tax sources." *Seattle School Dist.*, 90 Wn.2d at 522. Every decision about public school finances since 1978 has expressed this requirement as "regular and dependable tax sources," not as "stable and State-only"

funding. See *Brown v. State*, 155 Wn.2d 254, 258 (2005); *McGowan v. State*, 148 Wn.2d 278, 284 (2002); *Parents Involved in Community Schools v. Seattle School District*, 149 Wn.2d 660, 673, 72 P.3d 151 (2003). Indeed, in the *Parents Involved* case, this Court stated that basic education funding was required to come from “state appropriations” or from dependable and regular tax sources.” *Id.*

Nothing in the constitution or the opinions of this Court suggests that basic education funding must be “State-only.” This Court has never dictated the governmental sources of the revenues that satisfy Article IX. As discussed above, special excess levies were deemed unconstitutional because they were not regular and dependable tax sources, not because the funds came from local sources. Similarly, no decision has prohibited the use of federal funding to help defray the expenses of basic education. Excluding revenues because they ultimately come from a “non-state source” is neither constitutionally necessary nor fiscally sound. Article IX does not require the exclusion of federal or local revenues as a funding source for basic education.

E. The Trial Court’s Enforcement Order Usurps the Legislature’s Prerogative to Select and Implement the Means of Discharging Its Article IX Duty.

The Judgment in this case is also an “enforcement order” that directs the Legislature to determine the “actual cost” of amply providing

the education it has deemed Article IX requires for all Washington children, and to comply with the “constitutional mandate” to provide “stable and dependable” funding from “State sources.” CP 2867. The enforcement order is tantamount to the entry of mandatory injunctive relief or a writ of mandamus. By directing the Legislature how to implement the means of satisfying its Article IX obligation, the trial court also has interfered with the implementation of ESHB 2261,¹⁴ the Legislature’s selected and enacted means of complying with Article IX.

Washington courts have consistently held that the Legislature has the right to devise and to enact the methods and the means of amply providing for basic education; the courts will not micromanage education. *See McGowan*, 148 Wn.2d at 293; *Tunstall*, 141 Wn.2d at 223; *Seattle Sch. Dist.*, 90 Wn.2d at 519-20; *School Dist. Alliance v. State*, 149 Wn. App. 241, 266, 202 P.3d 990 (2009), *review granted* 166 Wn.2d 1024 (2009). Indeed, the enforcement order in this case is contrary to this Court’s reasoning in reversing the trial court’s enforcement order in *Seattle School District v. State*:

Legislators, as well as judges, are sworn to support the constitution of the State of Washington and we see no reason to assume legislators will fail to act in good faith to comply with their oath.

¹⁴ ESHB 2261 is summarized in the Statement of the Case, *supra*.

The trial court's decision to retain jurisdiction is inconsistent with the assumption that the Legislature will comply with the judgment and its constitutional duties. Consequently, we modify that portion of the judgment retaining jurisdiction over the parties and action. We have every confidence the Legislature will comply fully with the duty mandated by Const. art. 9, §§ 1 and 2 within the time specified in the judgment as here modified.

90 Wn.2d at 538-39.¹⁵

The trial court's enforcement order compels the Legislature to spend time and money on a cost study or costing out exercise that is not constitutionally required—and that is futile. Renowned national experts gave undisputed testimony and analysis establishing that attempts to determine the actual costs of providing successful academic outcomes for all students—or even substantial segments of the student population—are doomed to failure. RP 4564-66, 4607-08. The one constant in studies of education systems, nationally and locally, over the last 40 years, is that there is no demonstrated scientific link between increasing funding for public schools and increased student achievement. *Id.* Both locally in Washington and nationwide, governments face the frustrating reality that

¹⁵ Judicial deference to legislative prerogative in the area of K-12 funding was counseled by the United States Supreme Court.

The very complexity of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that, within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect.

San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 42, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (internal quotation marks omitted).

districts with the most resources frequently get poor student achievement results, while “underfunded” districts often get better results for students. RP 3378-89, 3400-01, 3417; Tr. Ex. 1530. Even court-ordered studies of the “actual costs” of getting students to meet state or federal standards have universally failed. RP 3093-3102.

The State’s experts also opined and were uncontradicted in their testimony that the comprehensive legislation enacted as ESHB 2261 was a vastly preferable alternative to costing out exercises or studies, particularly in its deliberate approach for implementing prototypical schools and proven methods with targeted funding increases over a reasonable time for full implementation by 2018. RP 4565-67, 4609-11, 4614.

This Court also should balance the scant prospect for benefits from the enforcement order against the real prospect that performing another study will delay full implementation of ESHB 2261. As described in the Statement of the Case, *supra*, ESHB 2261 itself was enacted after significant studies of existing and prospective education programs, practices and funding mechanisms, including Washington Learns, the proceedings of the Task Force as assisted by studies by the Washington Institute for Public Policy and the Task Force Report itself. Indeed, ESHB 2261’s implementation is designed to incorporate feedback and

analysis from a Quality Education Council. No additional court-ordered studies are necessary for the formation of a reasoned legislative decision.

The trial court's enforcement order is reversible error because it is contrary to Washington law, is contrary to the undisputed expert testimony about "costing out" exercises, and because such court orders have failed to work wherever tried. Reversal is also warranted because the enforcement order likely will interfere with and delay implementation of the Legislature's enacted reforms to K-12 education policy, practices and financing.

F. A Challenge to the State's Compliance with Article IX Claims That State Law Is Unconstitutional.

Finally, the Judgment in this case was in error because the trial court applied the incorrect burden of proof for constitutional challenges to substantive and appropriations statutes. The trial court accurately determined that every aspect of the State's policies, programs and funding of basic education are in statutes and regulations. FF 215. Respondents conceded that the Legislature has enacted appropriate constitutional definitions and a statutory program for basic education, and they conceded that all the statutes at issue are constitutional. RP 283, 285; Tr. Ex. 1025, p 5; Tr. Ex. 1026, p. 7. Nevertheless, they claim their particular challenge exists because the State "has not complied with Article IX." CL 102. The

trial court agreed and applied a preponderance standard instead of requiring Respondents to demonstrate the unconstitutionality of a statute beyond a reasonable doubt. *Id.*

The trial court relied on a passage in *Seattle School District*, 90 Wn.2d at 528, applying “the normal civil burden of proof, i.e., ‘preponderance of the evidence.’” However, there is a critical difference between the “civil” burden of proof and a constitutional challenge to the State’s statutory programs and/or funding of basic education. The former sets the amount of evidence needed to establish a fact, while the constitutional burden applies to the legal issue of constitutionality. Unlike the civil burden of proof:

[T]he beyond a reasonable doubt standard used when a statute is challenged as unconstitutional refers to the fact 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 County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

The passage from *Seattle School District* is inapposite because there the Legislature had failed to enact statutes defining “basic education” and establishing a program of and funding for “basic education.” Such statutes now have been in existence since 1977 and have been revised and updated multiple times. Unlike this case, where the court acknowledged that every aspect of the basic education system is based upon a statute, no

statute was before the trial court in *Seattle School District*, and neither that court nor this Court had to consider the constitutionality of the State's statutory compliance with Article IX.

In the *Seattle School District* passage relied upon by the trial court here, this Court was addressing a challenge by the State to "the sufficiency of the evidence" about the reasonableness of the District's salary scale, staffing ratios, and associated nonsalaried costs. *Seattle Sch. Dist.*, 90 Wn.2d at 527. The State argued in *Seattle School District* that, on factual issues, the court must apply the highest burden of proof in a civil case. *Id.* This passage had no relation to the burden to demonstrate that a system so thoroughly dependent upon, and intertwined with, state statutes is unconstitutional beyond a reasonable doubt.

In this case, the trial court correctly applied the civil burden of proof to factual issues but did not apply the correct burden of proof for cases that challenge the constitutional adequacy of education funding that can be provided only pursuant to state statutes.¹⁶ The correct burden is beyond reasonable doubt. *Federal Way v. State*, 167 Wn.2d at 523-24; *Tunstall v. Bergeson*, 141 Wn.2d at 220. It has been applied to statutes enacting basic education policies. *Id.* It has been applied to

¹⁶ In CL 256, the trial court did state that it believed Respondents had satisfied proof "beyond a reasonable doubt." However, the statement pertains to the evidentiary standard, not the constitutional one. CL 256 is inapposite to whether Respondents have proven the unconstitutionality of Washington's statutes funding basic education.

appropriations acts for funding K-12 education, *Brown v. State*, 155 Wn.2d 254, 266, 119 P.3d 341 (2005), and to appropriations acts for other state programs, see *Retired Pub. Emp. Council of Wash. v. Charles*, 148 Wn.2d 602, 623, 62 P.3d 470 (2003).

Proof of the facts supporting their constitutional challenge is only part of Respondents' burden. Before concluding that the State's statutes funding basic education do not comply with Article IX, a trial court must impose the constitutional burden of proof as well. The failure to do so is reversible error.

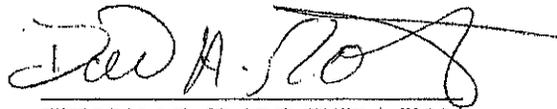
VII. CONCLUSION

The State respectfully requests that this Court reverse the trial court's judgment and enforcement order, and remand to the trial court with instructions as to the correct construction and application of Article IX of the Washington Constitution. Reversal and remand is also necessary because of the extraordinary enforcement order entered by the trial court and because it applied the wrong constitutional burden of proof. This Court's reversal and remand will reaffirm the holdings in *Seattle School District v. State*, and restore to the Legislature "the greatest possible

latitude to participate in the full implementation of the constitutional
mandate." 90 Wn.2d at 515.

RESPECTFULLY SUBMITTED this 20th day of August, 2010.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "David A. Stoler", with a long horizontal stroke extending to the right.

WILLIAM G. CLARK, WSBA #9234
DAVID A. STOLIER, WSBA #24071
Assistant Attorneys General
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
Telephone: (206) 464-7352
Fax: (206) 587-4229
Attorneys for Respondent

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

10 AUG 26 PM 4:57

BY RONALD R. CARPENTER

CLERK

CERTIFICATE OF SERVICE

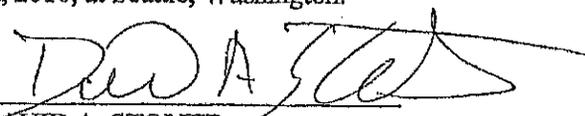
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the preceding *Brief of Appellant* was hand-delivered for filing by David A. Stolier in the Washington State Supreme Court at the following address:

Washington State Supreme Court
Temple of Justice
415 12th Avenue SW
Olympia, WA 98504-0001

And that a copy of the preceding *Brief of Appellant* was served on Respondents' counsel by legal messenger at the address below:

Thomas F. Ahearne
Christopher G. Emch
Edmund W. Robb
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

DATED this 20th day of August, 2010, at Seattle, Washington.


DAVID A. STOLIER

Appendix A

1993 MODIFICATIONS TO BASIC EDUCATION ACT GOALS	
Basic Education Act 1977 (RCW 28A.58.752)	Act as amended by HB 1209 1993 (RCW 28A.150.210)
<p>The goal of the Basic Education Act for the schools of the state of Washington set forth in this 1977 amendatory act shall be to provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning. Those skills shall include the ability:</p> <p>(1) To distinguish, interpret and make use of words, numbers and other symbols, including sound, colors, shapes and textures;</p> <p>(2) To organize words and other symbols into acceptable verbal and nonverbal forms of expression, and numbers into their appropriate functions;</p> <p>(3) To perform intellectual functions such as problem solving, decision making, goal setting, selecting, planning, predicting, experimenting, ordering and evaluating; and</p> <p>(4) To use various muscles necessary for coordinating physical and mental functions</p>	<p>The goal of the Basic Education Act for the schools of the state of Washington set forth in this chapter shall be to provide students with the opportunity to become responsible citizens, to contribute to their own economic well-being and to that of their families and communities, and to enjoy productive and satisfying lives. To these ends, the goals of each school district, with the involvement of parents and community members, shall be to provide opportunities for all students to develop the knowledge and skills essential to:</p> <p>(1) Read with comprehension, write with skill, and communicate effectively and responsibly in a variety of ways and settings;</p> <p>(2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history; geography; arts; and health and fitness;</p> <p>(3) Think analytically, logically, and creatively, and to integrate experience and knowledge to form reasoned judgments and solve problems; and</p> <p>(4) Understand the importance of work and how performance, effort, and decisions directly affect future career and educational opportunities.</p>

Appendix B

1992 MODIFICATIONS TO BASIC EDUCATION ACT PROGRAM	
Basic Education Act 1977 (RCW 28A.58.754)	Act as amended by SSB 5953 1992 (RCW 28A.150.220)
<p>...(2) Satisfaction of the basic education goal identified in RCW 28A.58.752 shall be considered to be implemented by the following program requirements:</p> <p>(a) Each school district shall make available to students in kindergarten at least a total program offering of four hundred fifty hours. The program shall include reading, arithmetic, language skills and such other subjects and such activities as the school district shall determine to be appropriate...;</p> <p>(b) Each school district shall make available to students in grades one through three...two thousand seven hundred hours. A minimum of ninety-five percent...shall be in the basic skills areas of reading/language arts... mathematics, social studies, science, music, art, health and physical education. The remaining five percent...may include such subjects and activities as the school district shall determine to be appropriate...;</p> <p>(c) Each school district shall make available to students in grades four through six...two thousand nine hundred seventy hours. A minimum of ninety percent...shall be in the basic skills areas...;</p> <p>(d) Each school district shall make available to students in grades seven through eight...one thousand nine hundred eighty hours. A minimum of eighty-five percent... shall be in the basic skills areas...;</p> <p>(e) Each school district shall make available to students in grades nine through twelve...four thousand three hundred twenty hours. A minimum of sixty percent...shall be in the basic skills areas....</p>	<p>(1) Satisfaction of the basic education program requirements identified in RCW 28A.150.210 shall be considered to be implemented by the following program:</p> <p>(a) Each school district shall make available to students enrolled in kindergarten at least...four hundred fifty hours. The program shall include instruction in the essential academic learning requirements...and such other subjects...the school district shall determine to be appropriate...;</p> <p>(b) Each school district shall make available to students enrolled in grades one through twelve, at least a district-wide annual average total instructional hour offering of one thousand hours.... The program shall include the essential academic learning requirements under RCW 28A.630.885 and such other subjects and such activities as the school district shall determine to be appropriate....</p>

Appendix C

28A.58.740

Provisions Applicable to all School Districts

total investments or payments, and the employee's non-deferred income for any year exceed the total annual salary, or compensation under the existing salary schedule or classification plan applicable to such employee in such year. Any income deferred under such a plan shall continue to be included as regular compensation, for the purpose of computing the retirement and pension benefits earned by any employee, but any sum so deducted shall not be included in the computation of any taxes withheld on behalf of any such employee. [1975 1st ex.s. c 205 § 1; 1974 ex.s. c 11 § 1.]

RCW 28A.58.750 Basic Education Act of 1977—
Program contents—As meeting constitutional requirements. *This 1977 amendatory act shall be known and may be cited as "The Washington Basic Education Act of 1977". The program evolving from the Basic Education Act shall include (1) the goal of the school system as defined in RCW 28A.58.752, (2) those program requirements enumerated in RCW 28A.58.754, and (3) the determination and distribution of state resources as defined in RCW 28A.41.130 and 28A.41.140.

The requirements of the Basic Education Act are deemed by the legislature to comply with the requirements of Article IX, section 1 of the state Constitution, which states that "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex", and are adopted pursuant to Article IX, section 2 of the state Constitution, which states that "The legislature shall provide for a general and uniform system of public schools". [1977 ex.s. c 359 § 1.]

*Reviser's note: For codification of "this 1977 amendatory act" [1977 ex.s. c 359], see Codification Tables, Volume 0.

Effective date—1977 ex.s. c 359: "This 1977 amendatory act shall take effect September 1, 1978." [1977 ex.s. c 359 § 22.]

Severability—1977 ex.s. c 359: "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1977 ex.s. c 359 § 21.]

The above two annotations apply to 1977 ex.s. c 359. For codification of that act, see Codification Tables, Volume 0.

RCW 28A.58.752 Basic Education Act of 1977—
Goal. The goal of the Basic Education Act for the schools of the state of Washington set forth in *this 1977 amendatory act shall be to provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning. Those skills shall include the ability:

(1) To distinguish, interpret and make use of words, numbers and other symbols, including sound, colors, shapes and textures;

(2) To organize words and other symbols into acceptable verbal and nonverbal forms of expression, and numbers into their appropriate functions;

(3) To perform intellectual functions such as problem solving, decision making, goal setting, selecting, planning, predicting, experimenting, ordering and evaluating; and

(4) To use various muscles necessary for coordinating physical and mental functions. [1977 ex.s. c 359 § 2.]

*Reviser's note: For codification of "this 1977 amendatory act" [1977 ex.s. c 359], see Codification Tables, Volume 0.

Effective date—Severability—1977 ex.s. c. 359: See notes following RCW 28A.58.750.

RCW 28A.58.754 Basic Education Act of 1977—
Definitions—Program requirements—Program accessibility—Rules and regulations. (1) For the purposes of this section and RCW 28A.41.130 and 28A.41.140, each as now or hereafter amended:

(a) The term "total program hour offering" shall mean those hours when students are provided the opportunity to engage in educational activity planned by and under the direction of school district staff, as directed by the administration and board of directors of the district, inclusive of intermissions for class changes, recess and teacher/parent-guardian conferences which are planned and scheduled by the district for the purpose of discussing students' educational needs or progress, and exclusive of time actually spent for meals.

(b) "Instruction in work skills" shall include instruction in one or more of the following areas: Industrial arts, home and family life education, business and office education, distributive education, agricultural education, health occupations education, vocational education, trade and industrial education, technical education and career education.

(2) Satisfaction of the basic education goal identified in RCW 28A.58.752 shall be considered to be implemented by the following program requirements:

(a) Each school district shall make available to students in kindergarten at least a total program offering of four hundred fifty hours. The program shall include reading, arithmetic, language skills and such other subjects and such activities as the school district shall determine to be appropriate for the education of the school district's students enrolled in such program;

(b) Each school district shall make available to students in grades one through three, at least a total program hour offering of two thousand seven hundred hours. A minimum of ninety-five percent of the total program hour offerings shall be in the basic skills areas of reading/language arts (which may include foreign languages), mathematics, social studies, science, music, art, health and physical education. The remaining five percent of the total program hour offerings may include such subjects and activities as the school district shall determine to be appropriate for the education of the school district's students in such grades;

(c) Each school district shall make available to students in grades four through six at least a total program hour offering of two thousand nine hundred seventy hours. A minimum of ninety percent of the total program hour offerings shall be in the basic skills areas of reading/language arts (which may include foreign languages), mathematics, social studies, science, music, art, health and physical education. The remaining ten percent of the total program hour offerings may include such subjects and activities as the school district shall

determine to be appropriate for the education of the school district's students in such grades;

(d) Each school district shall make available to students in grades seven through eight, at least a total program hour offering of one thousand nine hundred eighty hours. A minimum of eighty-five percent of the total program hour offerings shall be in the basic skills areas of reading/language arts (which may include foreign languages), mathematics, social studies, science, music, art, health and physical education. A minimum of ten percent of the total program hour offerings shall be in the area of work skills. The remaining five percent of the total program hour offerings may include such subjects and activities as the school district shall determine to be appropriate for the education of the school district's students in such grades;

(e) Each school district shall make available to students in grades nine through twelve at least a total program hour offering of four thousand three hundred twenty hours. A minimum of sixty percent of the total program hour offerings shall be in the basic skills areas of language arts, foreign language, mathematics, social studies, science, music, art, health and physical education. A minimum of twenty percent of the total program hour offerings shall be in the area of work skills. The remaining twenty percent of the total program hour offerings may include traffic safety or such subjects and activities as the school district shall determine to be appropriate for the education of the school district's students in such grades, with not less than one-half thereof in basic skills and/or work skills. *Provided*, That each school district shall have the option of including grade nine within the program hour offering requirements for grades seven and eight so long as such requirements for grades seven through nine are increased to two thousand nine hundred seventy hours and such requirements for grades ten through twelve are decreased to three thousand two hundred forty hours.

(3) In order to provide flexibility to the local school districts in the setting of their curricula, and in order to maintain the intent of this legislation, which is to stress the instruction of basic skills and work skills, any local school district may establish minimum course mix percentages that deviate by up to five percentage points above or below those minimums required by subsection (2) of this section, so long as the total program hour requirement is still met.

(4) Nothing contained in subsection (2) of this section shall be construed to require individual students to attend school for any particular number of hours per day or to take any particular courses.

(5) Each school district's kindergarten through twelfth grade basic educational program shall be accessible to all students who are five years of age, as provided by RCW 28A.58.190, and less than twenty-one years of age and shall consist of a minimum of one hundred eighty school days per school year in such grades as are conducted by a school district, and one hundred eighty half-days of instruction, or equivalent, in kindergarten. *Provided*, That effective May 1, 1979, a school district may schedule the last five school days of the one

hundred and eighty day school year for noninstructional purposes in the case of students who are graduating from high school, including, but not limited to, the observance of graduation and early release from school upon the request of a student, and all such students may be claimed as a full time equivalent student to the extent they could otherwise have been so claimed for the purposes of RCW 28A.41.130 and 28A.41.140, each as now or hereafter amended.

(6) The state board of education shall adopt rules to implement and ensure compliance with the program requirements imposed by this section, RCW 28A.41.130 and 28A.41.140, each as now or hereafter amended, and such related supplemental program approval requirements as the state board may establish. *Provided*, That each school district board of directors shall establish the basis and means for determining and monitoring the district's compliance with the basic skills and work skills percentage and course requirements of this section. The certification of the board of directors and the superintendent of a school district that the district is in compliance with such basic skills and work skills requirements may be accepted by the superintendent of public instruction and the state board of education.

(7) Handicapped education programs, vocational-technical institute programs, state institution and state residential school programs, all of which programs are conducted for the common school age, kindergarten through secondary school program students encompassed by this section, shall be exempt from the basic skills and work skills percentage and course requirements of this section in order that the unique needs, abilities or limitations of such students may be met.

(8) Any school district may petition the state board of education for a reduction in the total program hour offering requirements for one or more of the grade level groupings specified in this section. The state board of education shall grant all such petitions that are accompanied by an assurance that the minimum total program hour offering requirements in one or more other grade level groupings will be exceeded concurrently by no less than the number of hours of the reduction. [1982 c 158 § 1; 1979 ex.s. c 250 § 1; 1977 ex.s. c 359 § 3.]

Severability—1982 c 158: "If any provision of this amendatory act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1982 c 158 § 8.] For codification of 1982 c 158, see Codification Tables, Volume 0.

Effective date—1979 ex.s. c 250: "This amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and except as otherwise provided in subsection (5) of section 1, and section 2 of this amendatory act, shall take effect August 15, 1979." [1979 ex.s. c 250 § 10.] Section 1 and section 2 of this amendatory act [1979 ex.s. c 250], are codified as RCW 28A.58.754 and 28A.41.130, respectively.

Severability—1979 ex.s. c 250: "If any provision of this amendatory act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1979 ex.s. c 250 § 11.]

The above two annotations apply to 1979 ex.s. c 250. For codification of that act, see Codification Tables, Volume 0.

Effective date—**Severability**—1977 ex.s. c 359: See notes following RCW 28A.58.750.

Appendix D

Randolph I. Dorn

July 27, 2009

Page 59

1 MR. CLARK: Are what?

2 Q. Today do you believe the state is amply
3 providing for the education of all Washington students?

4 MR. CLARK: Object to the complete
5 question.

6 A. I don't believe we are.

7 Q. Under 2261, do you believe that by 2018
8 the state will be amply providing for the education of
9 all students?

10 MR. CLARK: Same objection.

11 A. If the legislature fulfills its obligation
12 in that law and also finds the funding source. Okay, I
13 think that's key. I don't think you can do it out of
14 existing systems. So they would have to find a funding
15 source. Then I believe you could get to adequate or
16 ample funding of education, but they also have to find
17 a funding source for revenue to go to education.

18 Q. Okay, and with respect to 2261, that was
19 enacted by the 2009 legislature, correct?

20 A. Correct.

21 Q. And can the 2010 legislature change 2261?

22 A. Correct, yes, it can.

23 Q. So the '09 legislature cannot bind future
24 legislatures, can it?

25 A. That's a good question. Initiatives can

SEATTLE DEPOSITION REPORTERS, LLC

www.seadep.com

(206) 622-6661 * (800) 657-1110 FAX: (206) 622-6236

Appendix E

Fred L. Jarrett

May 22, 2009

Page 132

1 had a deposition this afternoon and whining about it?
2 I'm sure appropriately so.

3 Q. Do you have an understanding about what
4 the lawsuit that this deposition is in, what that
5 lawsuit is about?

6 A. Yes.

7 Q. What is that understanding?

8 MR. CLARK: I will caution you that to the
9 extent your understanding comes from your conversations
10 with counsel, whether me, Mr. Lovinger or other legal
11 counsel, you shouldn't be revealing that, but if your
12 understanding comes from other sources, that's
13 discoverable.

14 A. What I know about it comes from what I
15 learned, essentially briefings that we've had over the
16 last I guess year or so and discussions that I've had
17 with superintendents who are your clients about what
18 the goal is. What I understand it to be is essentially
19 to demonstrate that the current funding didn't meet the
20 constitutional test of ample funding.

21 Q. Do you believe that the current state
22 funding system amply provides for education under the
23 constitution?

24 MR. CLARK: Object to the form of the
25 question. Clearly calls for a legal conclusion.

SEATTLE DEPOSITION REPORTERS, LLC

www.seadep.com

(206) 622-6661 * (800) 657-1110 FAX: (206) 622-6236

1 A. I can't -- you know, that's what you guys
2 are trying to figure out. From my standpoint as a
3 candidate who has run for office, someone who has
4 served in the legislature, I think my record and what I
5 have on paper tells you that I don't think so. But
6 that's not a constitutional opinion. That's a parent's
7 opinion and a politician's opinion.

8 Q. Is that a legislator who has served on
9 Education Committees for six, seven --

10 A. Nine.

11 Q. Nine years and the Basic Ed Task Force?

12 A. Yeah.

13 Q. I don't have anything else.

14 A. I think that's why we passed this bill.

15 Q. "This bill" being 2261?

16 A. 2261. It's because we believed that, we
17 believed that we need to have a better education system
18 and that's why we're -- I mean, that's why I've put the
19 time into it that I've put into it. That's why I've
20 said earlier, of my nine years in the legislative, that
21 bill is the thing I'll be proudest of when I leave.
22 It's not my bill. It took a lot of people to do it and
23 just to be able to be one of the people who was engaged
24 in doing that, I will be very proud of.

25 MR. AHEARNE: Thank you very much.