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NO. 65036-0

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

DA-ZANNE PORTER, MARTHA MCLAREN, AND CLIFFORD
MASS,

Plaintiffs/Respondents,

v.

SEATTLE SCHOOL DISTRICT NO. 1, in King County, State of
Washington, BOARD OF DIRECTORS OF SEATTLE SCHOOL
DISTRICT NO. 1, and MARIE GOODLOE-JOHNSON, Superintendent
and Secretary of the Board,

Defendants/Appellants.

BRIEF OF APPELLANTS

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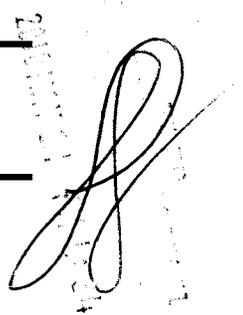


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I. INTRODUCTION

This should not be a case where a court is asked to decide whether one set of mathematics textbooks provides a better way to teach high school math than another set, but that is what happened below. The trial court accepted three community members invitation to substitute its judgment for that of an elected school board, and decided no reasonable school board member would select math books that used what the court found to be an “inquiry-based” teaching method over math books that used “direct instruction.”

This case should be about whether a school board acted arbitrarily and capriciously when it voted after months of consideration to adopt the recommendations of mathematics teachers, high school principals, community members, and other experts to adopt *Discovering Algebra*, *Discovering Geometry*, *Discovering Advanced Algebra*, *Pre-Calculus with Trigonometry*, and *Calculus* published by Key Curriculum Press, and *Statistics: Modeling the World* published by Pearson/Addison-Wesley as the Seattle School District’s textbooks for high school mathematics courses. Where there is room for two opinions, an administrative agency’s action is not arbitrary and capricious if done honestly with due consideration of competing viewpoints, even if a reviewing court believes an erroneous conclusion was reached.

After significant study over ten months, receiving input from dozens of citizens who offered criticisms and comments about various options, and consideration of hundreds of pages of conflicting studies and other material, the Seattle School Board voted 4 to 3 to select the recommended instructional materials. As the School Board was made aware, there is a dearth of unbiased, evidence-based research on the effectiveness of high school mathematics textbooks in improving outcomes, none is ideal for all students, and there is an unresolved dispute among experts and others about the best way to improve student performance in mathematics. The School Board's divided vote mirrored this controversy about the best available tools for teaching high school math to the District's diverse student body.

Although the plaintiffs below disagreed with the Board's decision regarding the selection of the algebra, geometry and algebra 2 materials (but not the pre-calculus, calculus and statistics materials), the majority's decision was not the result of willful and unreasoning disregard of facts or circumstances. The trial court erred by concluding otherwise.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering the February 4, 2010 Findings of Fact, Conclusions of Law, and Order by finding "the Discovering Series is an inquiry-based program" and "there is insufficient

evidence for any reasonable Board member to approve the selection of the “Discovering Series” as the Seattle School District’s high school mathematics textbooks [Findings of Fact Nos. 3 and 4].

B. The trial court in entering the February 4, 2010 Findings of Fact, Conclusions of Law, and Order by concluding the “Board’s selection of the Discovering Series was arbitrary” [Conclusion of Law No. 2].

C. The trial court erred in entering the February 4, 2010 Findings of Fact, Conclusions of Law, and Order by concluding the “Board’s selection of the Discovering Series was capricious” [Conclusion of Law No. 3].

D. The trial court erred in entering the February 4, 2010 Findings of Fact, Conclusions of Law, and Order by remanding the Seattle School Board’s decision selecting the “Discovering Series” instructional material for “further review” or “further proceedings” by the Board [Conclusion of Law No. 4 and Order].

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

A. Did the trial court improperly substitute its judgment for that of the Seattle School Board by finding that the *Discovering* series uses an “inquiry-based” teaching method and no reasonable School Board member would select math textbooks using that method when the

evidence before the School Board was that many experts, school administrators, teachers, students, and parents believe the *Discovering* series offers a balance between “inquiry-based” and “direct instruction” and, although imperfect, is the best choice for the District’s students? (Assignments of Error A and D.)

B. Did the trial court erroneously conclude that a majority of a divided School Board acted in willful disregard of facts or circumstances where there is no dispute the School Board was fully advised of conflicting evidence about the strengths and weaknesses of selecting the *Discovering* series of math textbooks? (Assignments of Error B-D.)

IV. STATEMENT OF THE CASE

A. Material Facts

1. Overview of process for selecting new instructional material

By statute, every local school district in Washington is required to have a written policy establishing the process for selecting the instructional materials used in that district’s classrooms. RCW 28A.320.230. Each school district must have an Instructional Materials Committee comprised of “representative members of the district’s professional staff.” *Id.*

When a school district decides it needs new instructional materials, the Instructional Materials Committee is charged with

recommending a set of materials in accordance with the district's written policy. *Id.* The elected school board's role is limited to deciding whether to adopt or reject the Instructional Materials Committee's recommendation; the school board can not reject a recommendation and adopt a different set of materials than has been recommended. *Id.*

The Seattle School District's policy for selecting instructional materials provides that its Instructional Materials Committee ("IMC") shall consist of administrators, teachers, and parents appointed to two year terms. Transcript of Evidence ("TE"), page 9.¹ The IMC's role is to develop a timetable for evaluating instructional material, appoint an Adoption Committee to conduct the evaluation of material, and approve or reject the final recommendation of the Adoption Committee. *Id.*

The Adoption Committee must be composed of interested educators in the curriculum area for which new textbooks are sought and, if deemed appropriate, parents or community members. TE 10. The composition of the Committee is to reflect the diversity of the district. *Id.*

¹ Pursuant to RCW 28A.645.010, appeals from school board decisions are to the superior court. The administrative record of the challenged school board decision is referred to in RCW 28A.645.020 as the "transcript of the evidence."

The Index to Clerk's Papers filed in this matter states that the 1,080 page Transcript of Evidence ("TE") and accompanying six DVDs of six School Board meetings (TE 1081-86) were sent to the Court of Appeals as originals, rather than numbered as Clerk's Papers ("CP"). The TE is numbered by page or DVD and is cited accordingly in this brief as "TE ____." The approximately 300 page supplemental Transcript of Evidence in this case was made part of the CP, at CP 15-315, so the CP cite for this material will be used in this brief, rather than a TE cite.

While the Adoption Committee is being formed notice is sent to members of the Washington/Alaska Textbook Representative Association and other publishers of textbooks in the subject area inviting them to send textbooks to the IMC for evaluation. TE 10.

After the IMC appoints an Adoption Committee, but before any instructional materials are reviewed, the Adoption Committee develops written selection criteria, which the IMC must approve. TE 10-11. The selection criteria must ensure the reviewed materials meet the State's learning standards for the subject and grade ranges, as well as criteria for evaluating the material for cultural relevance and anti-bias. *Id.* The material submitted by publishers is then evaluated by the Adoption Committee using the selection criteria, and considering comments solicited from interested parties, including educators, parents, and community members. TE 11. Ultimately, the Adoption Committee is to recommend one set of instructional material for district-wide use in the subject area. *Id.*

The IMC approves or rejects the Adoption Committee's final recommendation. TE 11. If approved, the IMC forwards the recommendation to the district Superintendent, who then decides whether to recommend adoption by the School Board. *Id.* The locally elected School Board members then vote yes or no whether to accept the

Adoption Committee's, the IMC's and the Superintendent's recommendation. *Id.* Upon School Board approval and funding, the IMC orders the selected textbooks from the publisher and an implementation plan is developed. *Id.*

2. Reasons for updating mathematics instructional material

The last time the Seattle School District ("District") adopted a district-wide high school mathematics textbook series was in 1992. TE 963. By 2008, at least five different series of mathematics textbooks were being used in District high schools; with some high schools using two or more different series at the same school. *Id.* Outdated books in poor condition were prevalent. *Id.*

New materials were deemed necessary to meet the District's goal of having district-wide alignment of instructional materials and curriculum for high school mathematics so that students at each high school (including intra-district transfers) would be taught the same content and the course content would uniformly build from one grade level to another. TE 963. Additionally, in July 2008, the state Office of Superintendent of Public Instruction ("OSPI") had adopted new high school mathematics learning standards in each course. TE 48-58, 102-224, 226-38, 350-472. The District thus sought to purchase updated mathematics material that aligned with OSPI's new standards for student

performance because state testing would be based on the new standards. TE 963.

At the Seattle School Board's legislative session on October 1, 2008, the District publicly announced its intention to adopt new instructional materials for high school mathematics courses and provided an overview of the issues and an outline of the process. TE 25-31.² A web site was developed to keep the public informed of the process as it went along. *See, e.g.*, TE 1-8.

3. Selection of the Adoption Committee

On October 4, 2008, the District announced it was seeking applications from mathematics instructors and community members to join the Adoption Committee to evaluate new mathematics textbooks. TE 1, 3, 487-90, 558. The applications were blind-screened (with the applicants' identifying information redacted) and scored based on experience in mathematics, diversity and geographic representation. TE 3. The scores were then ranked and the applicants were selected based on scores and diversity. TE 4.

The Adoption Committee was subdivided into two groups: a

² The DVD of the School Board's October 1, 2008 meeting includes discussions among School Board members, District staff and others regarding the significance of curriculum adoption, the need for a balanced, unbiased Adoption Committee, a previous unsuccessful effort to adopt new high school math textbooks, the controversy surrounding math textbooks, an overview of the process and timeline, and other matters. *See* TE 1081 (DVD entitled "School Board Meeting 10/1/08").

“Core” committee to evaluate materials for algebra, geometry and advanced algebra; and a smaller “Advanced Mathematics” committee to evaluate materials for pre-calculus, calculus and statistics. TE 488. Ultimately, eighteen people were selected for the Core committee and ten people were selected for the Advanced committee. TE 5-6, 542. The Core committee included several high school mathematics instructors, representatives from the District’s Special Education, English Language Learners (“ELL”), and Advanced Learning departments, and two community members with mathematics backgrounds.³ *Id.* The IMC approved the membership of the Adoption Committee, both Core and Advanced, on November 25, 2008. TE 1, 558.

4. Development of selection criteria for textbooks

The first task of the Adoption Committee was to develop selection criteria for the textbooks. Over the course of four long meetings in December 2008 and January 2009, the Adoption Committee created (1) initial screening criteria to winnow the selection down to the top three textbook series, (2) comprehensive screening criteria to make the final selection among the top three, and (3) cultural relevance criteria to ensure

³ The plaintiffs below focused their challenge on the algebra 1, geometry, and algebra 2 material and did not challenge the advanced mathematics material that was selected. *See, e.g.*, CP 382; RP 3-4. Thus, even though the trial court’s order remanded the entire decision of the School Board approving all of the recommended mathematics textbooks, more attention is paid in this brief to the decisions involving the algebra 1, geometry, and algebra 2 materials.

the selected material are usable by ethnically diverse groups and free of bias. TE 4, 558, 572-75; *see also* TE 477-78 (initial screening criteria), 479-84 (comprehensive screening criteria), and 485-86 (culturally relevant screening criteria). Development of the criteria included review of criteria used by other school districts and OSPI's new learning standards. TE 7. The IMC approved the Adoption Committee's screening criteria on January 6, 2009. TE 558.

5. The Adoption Committee's initial evaluation

A total of fifteen different mathematics textbook series in algebra, geometry and algebra 2 from twelve publishers were submitted for the Adoption Committee's review. TE 491. For advanced mathematics (*i.e.*, pre-calculus, calculus and statistics), a total of forty-seven textbooks from fourteen publishers were submitted for review. TE 492-93.

After developing the screening criteria, the Adoption Committee met on January 8, 2009 to practice using the criteria and to test its reliability among committee members. TE 558. The Adoption Committee members then took a month to individually apply the initial screening criteria to the textbooks submitted by the publishers. *Id.* In the course of this individual application of the initial screening criteria, the Committee members reviewed the OSPI's new learning standards for mathematics, the College Board advanced placement standards for

mathematics, and the Transition Math Project College Readiness Standards. TE 964. They also received the OSPI's January 15, 2009 initial recommendations on high school mathematics textbooks. *Id.*; see also TE 652-820 (copy of OSPI's entire report).

OSPI's January 2009 initial recommendations on high school mathematics textbooks was the product of a legislative directive to recommend the top three high school mathematics instructional material that align with OSPI's new mathematics learning standards for algebra 1, geometry, and algebra 2. TE 659. On behalf of OSPI, thirty-seven mathematicians, mathematics educators, parents, and others performed reviews of textbooks provided by publishers (TE 659-60, 819-20), assisted by mathematics professors Dr. George Bright and Dr. Jim King who analyzed the material for mathematical soundness (TE 818, 900-16). Ultimately, OSPI recommended two "traditional" and one "integrated" high school mathematics series: "traditional" series *Holt Algebra 1*, *Holt Geometry*, and *Holt Algebra 2* published by Holt McDougal (receiving a composite score of 0.838); "traditional" series *Discovering Algebra*, *Discovering Geometry*, and *Discovering Advanced Algebra* published by Key Curriculum Press (receiving a composite score of 0.835); and "integrated" series *Core Plus Mathematics I, II and III* published by

Glencoe McGraw-Hill (receiving a composite score of 0.780).⁴ TE 674; *see also* 784-85 (identifying textbooks and publishers reviewed by OSPI).

Following review of this material and application of the initial screening criteria, the Adoption Committee met on February 5, 2009 to discuss their respective scores and select the top three choices. TE 558. The Core committee's top three selections were: *Discovering Algebra*, *Discovering Geometry*, and *Discovering Advanced Algebra* by Key Curriculum Press; *Algebra Connections*, *Geometry Connections*, and *Algebra 2 Connections* by College Preparatory Mathematics; and *Algebra 1*, *Geometry*, and *Algebra 2* by Prentice Hall. TE 965.

Neither the *Holt Algebra 1*, *Holt Geometry*, and *Holt Algebra 2* series, nor the "integrated" *Core Plus Mathematics I, II and III* series were selected among the top three by the Adoption Committee, although both were recommended by the OSPI. *Compare* TE 674 with TE 965. Yet, both OSPI's review committee and the Seattle School District's Adoption Committee placed the *Discovering* series in their respective top three lists. TE 674, 965.

⁴ According to OSPI, OSPI's recommendations are not binding on any school district and districts are free to choose any instructional material they wish. TE 673, 1064. Most states have a textbook evaluation process that sets a minimum quality threshold and any textbooks meeting that minimum are approved. TE 674. According to OSPI, Washington is unique in only recommending the top three, but if a minimum quality threshold were used as in most states, almost all of the textbooks OSPI reviewed would likely have been approved. *Id.*

The reasons why the Adoption Committee decided other submitted textbooks did not make the top three included: the materials did not rank high enough in relation to the new OSPI standards for learning; there was a lack of balance between conceptual understanding, procedural proficiency, problem solving and process; they were less accessible, difficult to read, or lacking clarity; they did not align well with the District's cultural relevance criteria; they lacked useful teacher resources; they were too dense, while other, lighter-weight texts provided the same cognitive demand; and there was not enough symbolic notation. TE 964.

The Advanced Mathematics committee independently narrowed their selection of the top three textbooks in pre-calculus, calculus and statistics to *Pre-calculus with Trigonometry*, *Calculus*, and *Statistics in Action* by Key Curriculum Press (publisher of the *Discovering* series approved by the Core committee), as well as other textbooks from other publishers. TE 965; *see also* TE 492-93 (identifying textbooks and publishers reviewed by the Advanced Mathematics Committee).

6. The Adoption Committee's comprehensive evaluation

On February 11, 2009, after the Adoption Committee narrowed their selection to the top three, the Seattle School Board was given an update on the initial selections and process, and asked several questions

about the teaching methodology used in the selected textbooks and other concerns. TE 1083 (DVD of 2/11/09 School Board meeting). The Adoption Committee's top three choices also were made available for public review and comments in February 2009 (TE 558) and underwent review by over 600 students at five Seattle high schools (TE 523, 965). A summary of the public and student comments, identifying the perceived strengths and weaknesses of each of the top three materials, was created to facilitate decision-making. TE 582-83.

This summary of comments was provided to Adoption Committee members for their review at a meeting on March 5, 2009. TE 558. The Adoption Committee members were also provided with a report from two experts hired by the State Board of Education that was critical of the *Discovering* series' mathematical soundness, but not its alignment with OSPI's learning standards. CP 56-57. During the meeting, the Adoption Committee developed a list of questions to ask a panel of teachers currently using the top three materials. TE 558, 984-85.

Beginning on February 9, 2009, the Adoption Committee members spent over four weeks individually applying the comprehensive criteria to the top three selections. TE 558. On March 12, 2009, the Adoption Committee met to discuss their final recommendation for the algebra 1, geometry and algebra 2 series. TE 558. The consensus was

that, of the top three choices, the *Discovering* series by Key Curriculum Press best met the needs of the Seattle School District. TE 965.

The Committee explained its final recommendation by listing the strengths and weaknesses the Committee found with the *Discovering* series. TE 543-45, 966-67. The strengths of the *Discovering* series found by the Adoption Committee are:

- This series is best for the district as a whole. It presents a balanced approach (conceptual understanding, procedural proficiency, problem solving and processes). Best materials for the students and teachers of our district based on criteria.
- The program ranked 2nd overall on the initial state standards review. The difference between 1st and 2nd was 0.3%.
- The lessons serve diverse learners: visual, kinesthetic, etc.
- Advanced learners will not encounter barriers, and struggling learners will benefit from the concrete situations.
- The materials can meet the diverse pedagogical styles of teachers in the district. Less teacher dependent.
- The series meets the needs of a diverse district. Students commented on the relevance of the problems and the accompanying pictures.
- The materials align well with CMP2 (middle school materials), but also presents new challenges and opportunities for students who have already delved into Algebra in middle school.
- New concepts are introduced with concrete situations; the lessons move student thinking toward abstract representation.
- For those who want to use more direct instruction, there are condensed lessons provided for each

lesson, using direct instruction. Teachers, tutors, or students could make use of these as needed. The guide for parents and tutors provides very clear step by step processes like Prentice Hall does in text.

- Lessons are also available in Spanish.
- The materials balance creativity exploration, justification, generalization and proof.
- Materials include practical, real-life applications that don't seem made for school, but actual problems students could envision themselves encountering.
- Reviews are embedded in lessons. For example, there is a review of square roots before the section on solving quadratic equations.
- Materials provide models for use of data in mathematics.
- Rigorous, not only in mathematics, but in developing communication about mathematics, which is part of the standards.
- Discovering is far away from IMP and discovery and exploration do not preclude algebraic proficiency.
- Answers are provided for the reviews, but hints are provided for the new work, which is a strength because it helps students reconnect to what they learned.
- More accessible for ELL students [English Language Learners]. Pictures and diagrams match with problems.

The weaknesses one or members of the Adoption Committee found for the

Discovering series are:

- Concern about sequencing in moves from conceptual understanding to derivation.
- Desire for theorems and laws to be clearly stated up front.
- Concern about procedural proficiency, or better evidence of procedural proficiency in Prentice Hall.

- Concern about use of calculators.
- Concern about use of vocabulary and terminology.
- College Prep Math has a better balance of conceptual understanding, procedural proficiency, problem solving and processes.
- Concern about mathematical rigor.
- Key series somewhat prescriptive in the investigations - - less open-ended.

TE 543-45, 966-67.

Similar lists of the strengths and weaknesses of the chosen pre-calculus, calculus and statistics materials were developed by the Advanced Mathematics arm of the Adoption Committee. TE 546-48.

7. The Instructional Materials Committee's approval of the Adoption Committee's recommendation

On March 24, 2009, the IMC approved the final recommendations of the Core and Advanced arms of the Adoption Committee to adopt: (1) the *Discovering* series for algebra 1, geometry and algebra 2 by Key Curriculum Press; (2) *Pre-calculus and Trigonometry* by Key Curriculum Press; (3) *Calculus* by Key Curriculum Press; and (4) *Statistics: Modeling the World* by Pearson/Addison-Wesley. TE 558, 586.

The following day, the Seattle School Board was given an update on the status of the high school mathematics materials adoption process at a work session. TE 499-510, 558. The School Board was notified of the process to date, the finalists selected by the Adoption Committee, the criteria and rationales for making the selections, the components of

OSPI's new state standards for mathematics, OSPI's initial rankings of mathematics materials, a March 11, 2009 *High School Mathematics Curriculum Study* prepared for the State Board of Education by two members of "Strategic Teaching" criticizing the mathematical soundness of the textbooks recommended by OSPI, and several responses to the Strategic Teaching study. TE 501-03. The Strategic Teaching study had previously been provided to the Adoption Committee before it made its final selection. CP 56-57. Members of the public had also emailed copies of this study to School Board members before the March 25th work session. *See, e.g.*, CP 58-61.

The Strategic Teaching study was conducted by two mathematicians, Drs. Guershon Harel and W. Stephen Wilson. TE 609, 823. They studied the mathematical soundness of portions of four textbook series recommended by OSPI as matching OSPI's new learning standards for algebra 1, geometry, and algebra 2, which previously had been determined to be mathematically sound by Drs. Bright and King. *Id.*; *see also* TE 900-916 (Drs. Bright's and King's analysis). In contrast to Drs. Bright and King, and without addressing the textbooks' alignment with OSPI's new learning standards, Drs. Harel and Wilson concluded that none of the textbook series recommended by OSPI were mathematically sound in three subject areas they evaluated. TE 610, 824.

However, they concluded that the *Holt* series was the least unsound. *Id.* The *Discovering* series was determined by Drs. Harel and Wilson to be mathematically unsound in the three subject areas they reviewed. *Id.*

Responses critical of the Strategic Teaching study were also provided to the School Board at the March 25th work session. TE 502. These responses by other mathematicians and by the publisher of the *Discovering* series outlined several perceived flaws and biases in Drs. Harel's and Wilson's analyses of the *Discovering* series. TE 625-36.

The March 25th work session concluded with the School Board being advised of the next steps in the adoption process. TE 510. They were notified the Adoption Committee's recommendations would be formally introduced to the Board on April 8, 2009 if approved by the Superintendent, and the Board would vote on the recommendation at its April 22nd meeting. *Id.*

In conjunction with updating the School Board on the status of the adoption process, the District also presented status updates to the public at three meetings in late March, 2009. TE 511-16. These meetings included announcements of the Adoption Committee's and IMC's final selections for the District's mathematics material and the next steps in the process. *Id.*

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8. The Superintendent's recommendation to the School Board

At the Seattle School Board's regular legislative session on April 8, 2009, Seattle School District Superintendent Dr. Maria Goodloe-Johnson presented the IMC's recommendations for high school mathematics textbooks. TE 521-48, 551, 1084 (DVD entitled "School Board Meeting 4/8/09"). Board members were each given a notebook of materials with links to web sites and key documents related to the Adoption Committee's and IMC's recommendations, including summaries of public and student comments, summaries of the strengths and weaknesses of the recommended materials, statements dissenting from the Adoption Committee's recommendations, the OSPI report ranking mathematics textbooks, the Strategic Teaching report criticizing the mathematical soundness of OSPI's recommendations, responses to the Strategic Teaching criticisms from competing experts, a summary of OSPI's mathematics learning standards, charts showing the *Discovering* series alignment with OSPI's learning standards, and studies showing positive outcomes in classrooms using the *Discovering* series. TE 553-942 (including the materials referenced by web links in the table of contents at TE 553). These notebooks contained conflicting information from mathematicians and others that both supported and opposed the

Adoption Committee's and IMC's recommendations. *Id.*

During the April 8th public meeting, the District's Mathematics Program Manager AnnaMaria de le Fuentes, presented data showing the failure rates of District students on the Washington Assessment of Student Learning ("WASL") mathematics testing, with higher failure rates among students from some ethnic or racial subgroups, special education students, and ELL students. TE 522-23, 1084. She warned that new textbooks alone would not lead to improvements in WASL scores, particularly among ELL and minority student groups with lower passage rates; other planned interventions involving students, teachers and parents are necessary. TE 1084. She presented data from a Wisconsin study showing improvements in mathematics performance following use of the *Discovering* series of textbooks, including among ethnic and racial subgroups, special education students, and (to a lesser extent) ELL students, but cautioned the data was the result of "heightened supports." TE 539-41, 1084. There also was discussion about the San Diego school district's experience with the *Discovering* series, and reports that school district had switched to different textbooks after concerns about ELL students' performance. TE 1084.

The Board members publicly discussed the uncertainty created by: "dueling experts" on the mathematical soundness of various books;

the lack of unbiased, outcome-based studies on math books; the “politicized” debate in the so-called “math wars” that has led to polarized extreme viewpoints with little middle ground; and the lack of an identified “magic textbook” or teaching method that works well for all students. TE 1084. Board members stressed the importance of finding a balance that allowed for use of various teaching methodologies and discussed the Adoption Committee’s view that the *Discovering* series offered flexibility by allowing both “direct instruction” and “inquiry-based” instruction. *Id.* A few Board members mentioned they reviewed the recommended material themselves and compared it to other textbooks. *Id.*

Fifteen members of the public spoke to the School Board at the April 8th public meeting, some for (including District teachers) and some against the Adoption Committee’s recommendations, expressing competing viewpoints about “direct instruction” versus “inquiry-based” instruction. TE 517, 1084; CP 348-49. Among other testimony, the principal of Chief Sealth High School, John Boyd, testified that all nineteen of the District’s high school principals and program managers were unanimously in favor of the Adoption Committee’s and IMC’s recommendations. TE 517, 1084; *see also* CP 224.

Following the meeting, two of the speakers (Ted Nutting and Dan

Dempsey)⁵ sent several emails to School Board members criticizing the Adoption Committee's, the IMC's and the Superintendent's recommendation to adopt the *Discovering* series and attached various studies and links to web sites they believed supported their criticisms. *E.g.*, CP 95-105, 134-93, 194-213. Among the studies sent by Mr. Dempsey was a November 2008 OSPI report to the Legislature showing: (1) nineteen different algebra textbooks were being used by the 125 school districts in the state; (2) the algebra and geometry material published by Glencoe McGraw-Hill⁶ was the most commonly used material among the 125 school districts, although only twenty districts had adopted that series; (3) the *Discovering* series for algebra 1 had been adopted by eight school districts; (4) the *Holt* series had been adopted by seven districts; (5) the *Discovering* series for geometry had been adopted by thirteen school districts; and (6) the *Holt* series for geometry had been adopted by nine districts. CP 101-02.

9. The School Board's evaluation and decision

The School Board was scheduled to vote on whether to accept the Adoption Committee's, IMC's and Superintendent's recommendations

⁵ Mr. Nutting was a member of the Adoption Committee for the Advanced Mathematics group. TE 542. Mr. Dempsey unsuccessfully ran for election to the Seattle School Board and is an author of the "The Math Underground Blog." CP 98-99, 232.

⁶ Drs. Harel and Wilson opined in their Strategic Teaching report that the Glencoe McGraw-Hill material is mathematically unsound. TE 610, 824.

during its public meeting on April 22, 2009. TE 558. In anticipation, the Superintendent provided the School Board with an “Action Report” dated April 15, 2009 summarizing the adoption process and recommendations, with nine attached appendices of information supporting and opposing the recommendations (including the conflicting reports of Drs. King and Bright, and Drs. Harel and Wilson). TE 961-1048.

A presentation of this conflicting material was provided to the Board at the April 22nd meeting. TE 943, 1085 (DVD entitled “School Board meeting 4/22/09”). Eight members of the public spoke to the School Board at the April 8th public meeting, some for and some against the Adoption Committee’s recommendations. TE 1049, 1085; CP 349.

The Board members again publicly discussed: the “politicized” “math wars” that had polarized into proponents of “inquiry-based” versus “direct instruction” teaching methodologies; the balance the *Discovering* series offers between the two extremes; the greater importance of teacher competency and family engagement as compared to textbooks in relation to student outcomes; the existence of “dueling experts” and the lack of unbiased, outcome-based research identifying the best available textbooks; and Board members’ opinions on the role textbooks play in improving student achievement scores. TE 1085.

Six of seven Board members then publicly stated their preliminary

viewpoints on how they would vote and why. TE 1085. The School Board ultimately voted, however, to postpone their decision on whether to adopt the recommendations until their next regularly scheduled public meeting on May 6, 2009. TE 1052, 1085.

In the interim, community member Dan Dempsey continued having conversations with and sending emails to Board members criticizing the recommendation of the *Discovering* series. E.g., CP 217-33. These criticisms included references to text books entitled *Interactive Math Project* that had been used at Garfield and Cleveland High Schools (which Mr. Dempsey alleged were similar to the *Discovering* series because they used an “inquiry-based” model). CP 219. Mr. Dempsey alleged that WASL scores in mathematics had significantly dropped for 10th graders at Garfield and Cleveland in the two years since the *Interactive Math Project* books began to be used, particularly for ELL students and ethnic or racial subgroups of students. CP 219-33, 275-80.

During this same period between the April 22nd and May 6th meetings, School Board member Sherry Carr responded to a constituent’s email (CP 215) urging rejection of the *Discovering* series and adoption of the Prentice Hall curriculum. CP 216. Ms. Carr explained that she had “invested significant time” in deciding whether to approve the *Discovering* series. She determined the *Discovering* series is a “balanced

curriculum offering both inquiry based and direct instruction.” She also noted that she completed an “advanced algebra” lesson with her high school daughter and used the *Discovering* series “parent materials to help with homework.” Ms. Carr concluded “the lesson was not much different than the traditional math lesson when I took advanced algebra, and the parent help with homework was quite usable. This hands-on experience addressed the remaining concerns I had.” CP 216. *See also* TE 1085 (Ms. Carr’s public comments about why she voted as she did).⁷

On May 6, 2009, the School Board again heard public testimony regarding the proposed adoption of the mathematics instructional material. TE 1078, 1086 (DVD entitled “School Board meeting 5/6/09”); CP 349-50. The Board received a May 6, 2009 OSPI report recommending only the *Holt* series for adoption, but expressly stating this recommendation was not binding on any school district in the state and that “successful mathematics programs may exist with virtually any of the reviewed curricula,” including the *Discovering* series. TE 1057-65, 1086. Board members again publicly discussed the controversy surrounding their decision, the lack of reliable research on student

⁷ Plaintiffs argued Ms. Carr’s email response was evidence of arbitrary and capricious decision-making. *E.g.*, CP 41; RP 17-18. The trial court apparently found this email significant as well, and specifically referenced it in the court’s findings of fact. RP 22-23; CP 396. Notably, two Board members who voted against adoption of the recommendations stated they too had personally examined the various textbooks, which influenced their judgment on why they voted as they did. *See* TE 1084-85.

outcomes, concerns that no available textbook will fully meet all students' needs, and the fact that no high school math book has been undisputedly recognized as mathematically sound. TE 1086.

The Board members then explained the reasons for their respective votes. TE 1086. Ultimately, a divided School Board voted 4-3 to approve the Adoption Committee's, the IMC's and the Superintendent's recommendations to adopt (1) the *Discovering* series for algebra 1, geometry and algebra 2 by Key Curriculum Press, (2) *Pre-calculus and Trigonometry* by Key Curriculum Press, (3) *Calculus* by Key Curriculum Press, and (4) *Statistics: Modeling the World* by Pearson/Addison-Wesley. TE 1079, 1086.

10. Implementation of the School Board's decision

Shortly after the School Board's May 6th decision, the District ordered the approved materials. TE 1067. During the spring and summer of 2009, all District high school staff involved in teaching mathematics were trained on the use of the new materials. *Id.* Students in the District's high schools have been using the new mathematics books since September 2009. *Id.* The purchase of these materials and training cost the District about \$1.2 million. TE 1077. Due to budget shortfalls, the District likely will not be in a position to fund adoption of another set of high school mathematics instructional material for years.

B. Procedural History

1. Appeal by plaintiffs below

Pursuant to RCW 28A.645.010, the plaintiffs below timely appealed the School Board's May 6th decision. CP 1-11. At no point did the plaintiffs seek a motion for stay or injunction precluding the District from implementing the decision adopting the new high school mathematics textbooks. Implementation was complete before the trial court issued its February 4, 2010 Order remanding the School Board's decision for "further proceedings." TE 1067; CP 395-97.

2. Material reviewed by the trial court

Pursuant to RCW 28A.645.020, the District produced a transcript of evidence relating to the challenged decision. *See* TE 1-1086. On October 30, 2009, the parties stipulated to entry of an agreed order (CP 12-14) on plaintiffs' motion to supplement the transcript of evidence with the material now found at CP 15-315.

Among the supplemental material was a 2008 U.S. Department of Education "Final Report of the National Mathematics Advisory Panel." CP 23, 29. This federal report concluded that "high quality research does not support the contention that [mathematics] instruction should be either entirely 'student centered' or 'teacher directed.'" *Id.*

The order supplementing the record also required the District to

submit for the trial court's review a set of the math textbooks adopted by the School Board. CP 13; RP 8. The trial court asked plaintiffs to submit a copy of the *Holt* series of math textbooks for comparison, all of which the trial court considered in reaching its decision. RP 8, 37-40.

The primary thrust of the plaintiffs' arguments before the trial court was alleged "inquiry-based" mathematics textbooks like the *Discovering* series are inferior to "directed instruction" textbooks like the *Holt* series and, therefore, the School Board's decision to adopt the *Discovering* series was arbitrary and capricious. *E.g.*, RP 7-12, 33-35; CP 316-19, 323-26, 342-43, 386-88. To support this argument, the plaintiffs invited the trial court to compare the textbooks, which the trial court did. CP 13; RP 8, 37-40.

3. Trial court's ruling

On February 4, 2010, the trial court issued its Findings of Fact, Conclusions of Law, and Order. CP 395-97. The court found the *Discovering* series "is an inquiry-based math program" and "there is insufficient evidence for any reasonable Board member to approve the selection of the *Discovering* series." CP 397. The court concluded the School Board's selection of the *Discovering* series was arbitrary and capricious, and remanded the School Board's May 6, 2009 decision for "further review" or "further proceedings consistent with this opinion." *Id.*

The District timely appealed the trial court's order. CP 401-06.

V. ARGUMENT

A. Standard of Review

This case arises under RCW 28A.645.010, which grants superior courts with appellate jurisdiction over local school board decisions. Plaintiffs timely sought review of the Seattle School Board's May 6, 2009 quasi-legislative decision adopting (1) the *Discovering* series for algebra 1, geometry and algebra 2 by Key Curriculum Press, (2) *Pre-calculus and Trigonometry* by Key Curriculum Press, (3) *Calculus* by Key Curriculum Press, and (4) *Statistics: Modeling the World* by Pearson/Addison-Wesley.

Judicial review under RCW 28A.645.010 of quasi-legislative decisions by local school boards is limited to determining whether the board acted arbitrarily, capriciously, or contrary to law. *Haynes v. Seattle School Dist.*, 111 Wn.2d 250, 253-55, 758 P.2d 7 (1988), *cert. denied*, 489 U.S. 1015 (1989) (ruling the predecessor statute to RCW 28A.645.030, which referenced *de novo* review like the present statute, only pertains to quasi-judicial decisions, not quasi-legislative or administrative decisions). This limited review comports with the general rule that "the arbitrary and capricious standard governs judicial review of discretionary administrative decisions of local government." *Washington Waste Systems, Inc., v. Clark County*, 115 Wn.2d 74, 80, 794 P.2d 508 (1990).

The scope of review under the arbitrary and capricious standard “is very narrow,” “highly deferential” to the agency, and the party challenging an agency decision under this standard carries “a heavy burden.” *Alpha Kappa Lambda Fraternity v. Washington St. Univ.*, 152 Wn. App. 401, 418, 422, 216 P.3d 451 (2009) (citing cases). This burden is particularly heavy when agency action is based on factual matters within the agency’s expertise: “substantial judicial deference to agency views would be appropriate when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency’s expertise.” *Hillis v. Department of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997).

This narrow standard of review is as follows: “agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Washington Independent Telephone Ass’n v. Washington Utilities and Transportation Comm’n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003) (rejecting a prior review standard that included a “product of a rational decision-maker” test). “Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Id.*

Several principles have been distilled from this oft-used standard

of review:

First, an error in judgment is not arbitrary and capricious. A judicial conclusion that the administrative decision was erroneous is not sufficient. Second, the action essentially must be in disregard of the facts and circumstances involved. Third, the court necessarily looks to the facts before the administrative agency.

State v. Ford, 110 Wn.2d 827, 830-31, 755 P.2d 806 (1988).

A reviewing court is prohibited from substituting its judgment for that of the agency. *Id.* at 832. For example, where experts differ on a complex issue, it is not a reviewing court's role to substitute its judgment for that of the agency by deciding what weight to place on conflicting experts' views. *Hillis*, 131 Wn.2d at 396; *US West Communications, Inc. v. Utilities and Transportation Comm'n*, 134 Wn.2d 48, 62, 949 P.2d 1321 (1997).

B. The Superior Court Improperly Substituted Its Judgment for that of the Elected School Board

The superior court compared the *Discovering* series of math textbooks with the *Holt* textbooks in reaching its decision remanding the School Board's decision. CP 13; RP 8, 37-40. Based in part on this comparative analysis, the court found the *Discovering* series used an "inquiry-based" teaching method that no reasonable school board member would approve for use by high school mathematics teachers and students.

CP 397 (Findings of Fact Nos. 3 and 4). In so finding, apparently using a defunct “rational decision-maker” test (*see Washington Independent Telephone Ass’n*, 148 Wn.2d at 903-05), the superior court erroneously substituted its judgment for that of the elected Seattle School Board.

The undisputed evidence is that several other school districts in Washington have adopted the *Discovering* series, as have school districts in other states. CP 101-02, TE 539-41, 1084. After extensive study by OSPI’s experts and evaluators, the OSPI recommended the *Discovering* series as mathematically sound, and aligned with OSPI’s new state learning standards for high school mathematics. TE 652-800, 900-16. The Seattle School District’s Adoption Committee, comprised of educators and others with mathematics expertise, found the *Discovering* series best met the diverse needs of the District’s students among the available textbooks, while recognizing this series, like all math textbooks, has flaws. TE 543-45, 966-67. The nineteen high school principals and program managers in the Seattle School District unanimously supported adoption of the *Discovering* series. TE 517, 1084. Several District teachers, members of the public and high school students supported adoption. TE 582-83, 1084-85. Several experts in mathematics also supported adoption, while others opposed it. *E.g.*, TE 625-36.

There is no dispute the Seattle School Board was aware of data

showing many students in the District were having problems meeting the WASL standards in mathematics, particularly some ethnic or racial subgroups, special education students, and ELL students. TE 522-23, 1084. The Board also had data from a Wisconsin study showing improvements in mathematics performance following adoption of the *Discovering* series of textbooks, including among ethnic and racial subgroups, special education students, and (to a lesser extent) ELL students, but was cautioned the data may have been the result of “heightened supports.” TE 539-41, 1084. The Board was aware the San Diego school district reportedly had adopted the *Discovering* series, but later switched to different textbooks after concerns about ELL students’ drop in performance. TE 1084. Board members received information that WASL scores in mathematics had dropped for 10th graders at Garfield and Cleveland High Schools in two years’ time, particularly among ELL students and ethnic or racial subgroups, which at least one community member attributed to use of allegedly “inquiry-based” *Interactive Math Project* books. CP 219-33, 275-80. The Board was advised that changing textbooks alone would not lead to improvements in WASL scores, particularly among ELL and minority student groups with lower passage rates; improvements in teacher competency and family engagement were necessary to improve student scores. TE 1084. Overarching these

concerns, the Board was aware that no unbiased, evidence-based study existed demonstrating that any series of high school mathematics textbooks actually led to improvements in outcomes and scores, whether among students as a whole, ELL students, minority populations, or any other subgroup. TE 1084-86.

Board members publicly discussed “dueling experts” views on the mathematical soundness of various books and the lack of unbiased, outcome-based studies to help guide their decision-making. TE 1084-86. The Board expressed concern the “politicized” debate in the so-called “math wars” had led to polarized viewpoints with little middle ground. *Id.* They recognized there is no “magic textbook” or teaching method that has been shown to work well for all students. *Id.* They stated their desire to find a balance between the extremes and to find the least flawed of the available textbooks that would best serve the diverse needs of the District’s students. *Id.* They explored the Adoption Committee’s analysis that the *Discovering* series offered flexibility for teachers by allowing both “direct instruction” that seems to work better for some students and “inquiry-based” instruction that seems to work better for other students. *Id.* To determine whether a flexible balance could be found some Board members reviewed the recommended material themselves or compared it to other recommended textbooks. *Id.*

Confronted with this large collection of conflicting information and lacking any objective scientific studies to clearly guide their decision-making, a divided School Board voted 4-3 to endorse the expertise and consensus of the Adoption Committee, the IMC, the District's high school principals, and the District Superintendent that the recommended textbooks would best serve, albeit imperfectly, the District's students. TE 1079, 1085-86.

Despite this undisputed evidence, the superior court erroneously found that no reasonable school board member would approve the selection of the *Discovering* series. CP 397. This decision gave no deference to the many supportive mathematics experts, teachers, and community members, nor any deference to the District's high school principals, the Adoption Committee members, the IMC, the Superintendent, other school boards that had adopted the *Discovering* series, and the majority of the Seattle School Board who favored the *Discovering* series as the best available, most balanced choice.

Instead, the court substituted its judgment for that of all of these individuals and entities and found the *Discovering* series did not offer a balance between "inquiry-based" and "direct instruction," but instead was, in the court's judgment, a pure "inquiry-based" textbook that was not the best available choice. CP397. The court remanded the School Board's

decision for further review “consistent with this opinion” that the *Discovering* series was a pure “inquiry-based” math program and was not an acceptable choice. *Id.*

The superior court’s decision overstepped the narrow scope of review appropriate to administrative agency decisions. In effect, the superior court took a side in the so-called “math wars” by holding the School Board majority committed a judgment error by adopting what the court found to be a pure “inquiry-based” textbook. Experts clearly differed on this complex subject, as well as identification of the best available math textbooks. It was not the court’s role to substitute its judgment for that of the agency by deciding what weight to place on conflicting experts’ views, and what textbooks best met the needs of the District’s students. *See Hillis*, 131 Wn.2d at 396; *US West*, 134 Wn.2d at 62. This substitution of judgment was reversible error.

C. The School Board’s May 6, 2009 Decision Was Not Made in Willful and Unreasoning Disregard of the Facts and Circumstances

The Seattle School Board has authority under RCW 28A.320.230 to adopt or reject instructional materials recommended by the District’s appointed Instructional Materials Committee. After exercising this power, the courts’ review of the Board’s decision under RCW 28A.645.010 is limited to determining whether the decision to adopt or

reject a recommended set of instructional materials was arbitrary and capricious. *Haynes*, 111 Wn.2d at 253-55. This limited review does not include an inquiry as to whether the Board's decision was erroneous. "An unwise or even erroneous decision arrived at pursuant to the legislative duty delegated, upon facts which motivated a rational decision, is not arbitrary and capricious." *State v. Ford*, 110 Wn.2d at 832.

The School Board did not engage in willful and unreasoning action by adopting the IMC's recommendations, but rather took a reasoned action following careful consideration of the facts, circumstances and conflicting information. Plaintiffs take no issue with the School Board's due consideration of the facts and circumstances surrounding adoption of the IMC's recommendations for the pre-calculus, calculus and statistics textbooks, but claim the Board did not give due consideration to adoption of the textbook series for algebra, geometry and algebra 2. The truth is the School Board gave far more consideration to the decision about whether to adopt the algebra and geometry textbooks than was given to the pre-calculus, calculus and statistics textbooks. *See, e.g.*, TE 1083-86.

As the *State v. Ford* court recognized, review under the arbitrary and capricious standard demands "close attention to the nature of the particular problem faced by the agency . . . ; the needs, expertise and

impartiality of the agency as regards the issue presented; and the ability of the court effectively to evaluate the questions posed.” *Id.* The nature of the particular problem faced by the Seattle School District involved having to choose among high school mathematics books that were all flawed to varying degrees. OSPI had issued new mathematics learning standards that District students were expected to meet through state testing. TE 48-58, 102-224, 226-38, 350-472, 963. OSPI determined the *Discovering* series aligned well with those learning standards, although experts were in disagreement about the mathematical soundness of portions of the *Discovering* series and other textbook series. *See, e.g., id.*; and TE 609-10, 625-36, 652-820, 900-16, 1083-86.

The Board desired to improve student math scores in the WASL and other tests, particularly minority and ELL students’ scores, but knew there are no reliable outcome-based studies demonstrating that any particular textbook series or teaching methodology would accomplish that result. *See, e.g.,* TE 522-23, 539-41, 1084. The best they had available in this regard was OSPI’s determination that the *Holt* and *Discovering* series both aligned well with OSPI’s new learning standards, which would be the focus of state testing. TE 652-820. No experts or others disputed this alignment with OSPI’s learning standards.

In a publicly transparent and impartial fashion, the District

selected a committee of specialists in the field of high school mathematics instruction to develop and apply criteria for selecting a textbook series that best matched the needs of the District's large, diverse student body. The District solicited and considered input from students, teachers, parents, school administrators, the community, other school districts, textbook publishers, and mathematics experts. *E.g.*, TE 582-83, 1083-86. The District provided the School Board with its assessment of the strengths and weaknesses of its recommendations, as well as conflicting studies and expert opinions about several high school mathematics textbooks. *E.g.*, TE 553-942, 1083-85.

Rather than willfully disregarding these facts and circumstances, the School Board publicly discussed the conflicting opinions and evidence before taking a closely divided vote on a controversial recommendation. *E.g.*, TE 1083-86. Board members publicly expressed their frustrations with the "dueling experts" and lack of objective, empirical studies of student outcomes based on use of particular textbooks or teaching methods. *Id.* There was room for multiple opinions about which textbook series best met the diverse needs of the District's high school students, and the School Board considered the facts and circumstances underlying those multiple opinions. *Id.*

Fully aware of the *Discovering* series' flaws and criticisms, a slim

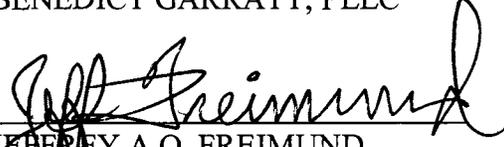
majority of the Seattle School Board chose to approve its adoption anyway, along with the other recommended textbooks. Although plaintiffs and the superior court believed a portion of the majority's decision was unwise and showed poor judgment, the decision was made after due consideration, not willful disregard, of conflicting information. Therefore, the superior court erred by concluding the Board's May 9, 2009 decision to adopt the IMC's recommendations was arbitrary and capricious.

VI. CONCLUSION

Based on the foregoing reasons, the trial court's order should be reversed and the Seattle School Board's decision should be affirmed. The School Board's decision to adopt the textbooks recommended by the IMC pursuant to RCW 28A.320.230 was not made in willful disregard of the facts or circumstances. Even if the Court believes an erroneous conclusion was reached, the School Board's decision should be affirmed because there is room for multiple opinions concerning the best available material to use for teaching high school mathematics, and the Seattle School Board exercised its discretion honestly and upon due consideration of the conflicting evidence. The trial court erred by improperly substituting its judgment for the Seattle School Board's and concluding otherwise.

RESPECTFULLY SUBMITTED this 21st day of May, 2010.

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CERTIFICATE OF SERVICE

I certify that on the 21st day of May, 2010, I caused a true and correct copy of this Brief of Appellants to be served on the following in the manner indicated below:

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