

No. 84362-7

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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MATTHEW and STEPHANIE McCLEARY, *et al.*,

Respondents/ Cross-Appellants,

v.

STATE OF WASHINGTON,

Appellant/ Cross-Respondent.

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AMICUS CURIAE BRIEF OF

**National Association For The Advancement Of Colored People  
Chinese Information Service Center  
Multicultural Education Rights Alliance  
Rainier Beach Action Coalition  
Southeast Seattle Education Coalition  
United Indians Of All Tribes Foundation**

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## **I. INTRODUCTION**

The funds allocated by the 2017 Legislature are absolutely insufficient to support a finding that the State has met its paramount constitutional duty to amply fund the actual costs of implementing the components of its basic education program critical to closing the opportunity gap and to providing all children with the opportunity to obtain the knowledge and skills necessary to compete in today's economy and meaningfully participate in this state's democracy. See *McCleary v. State of Washington*, 173 Wn.2d 477, 483-4, 269 P.3d 227 (2012).

## **II. STATEMENT OF THE CASE**

As this Court decides whether the State has met its constitutional obligation, it is instructive to review some of the history in this case behind three critical rulings:

- (1) The "ample" mandate in our Constitution's paramount duty provision requires State funding to be "considerably more than just adequate or merely sufficient." 173 Wn.2d at 484 and 528.
- (2) The "all children" mandate in our Constitution's paramount duty provision covers "each and every child ... No child is excluded." 173 Wn.2d at 520.

- (3) The State must update its funding formulas to fully fund the actual cost of implementing the State’s basic education program. Partial funding does not suffice. 173 Wn.2d at 532; *See also* January 2014 *McCleary* Washington Supreme Court Order, at 4; State Legislature’s 2014 Report to the Supreme Court, at 52.

The Final Judgment at the trial court, affirmed by this Court, made it clear that education is a civil right given special status by the Washington state constitution. As the Final Judgment declared:

- “Education ... is the number one civil right of the 21st century. There is no excuse for accepting failure.” *McCleary v. State, Final Judgment* at ¶¶ 134.
- “Education ... plays a critical civil rights role in promoting equality in our democracy.” *Id.* at ¶¶ 132.
- “Amplly provided, free public education operates as the great equalizer in our democracy, equipping citizens born into underprivileged segments of our society with the tools they need to compete on a level playing field with citizens born into wealth or privilege.” *Id.*

Civil rights leaders testifying at trial in the *McCleary* case confirmed that lack of ample funding prevents our schools from serving this vital civil rights role of public education. Specifically, lack of ample funding prevents our public schools from providing programs needed to remove existing opportunity gaps and give all students a realistic educational opportunity. Roberto Maestas, civil rights leader in the Latino community, testified that lack of funding is “the biggest problem,” and without ample funding “everything falls by the wayside.” (RP 2622-2623). James Kelly, civil rights leader for the African American community, stated that our public schools’ lack of sufficient funding produces a deceptively “false promise” for students of color and underprivileged kids who need help. (RP 2510-2511). Erin Jones, researcher for the State’s Final Report on Closing The Achievement Gap, testified that the “insufficient funding” of our public schools obstructs minority and disadvantaged students from getting through school. (RP 1401-1412).

Without ample funding, our public schools perpetuate existing inequality instead of leveling the playing field for all kids regardless of race or wealth. As civil rights leader James Kelly testified: “for me, education is a great equalizer.... I view it as a civil rights issue, more importantly, kind of the 14th Amendment, which is equality for all.” (RP 2498). Civil rights leader Roberto Maestas further explained that:

“Education is the great equalizer. It levels the playing field that is very uneven.” (RP 2594, 2643).

In *McCleary*, this Court affirmed the trial court’s findings in full and stated emphatically that Article IX, section 1 confers on all children in Washington a positive constitutional right to an amply funded education. 173 Wn.2d at 483. This Court retained jurisdiction over the case to ensure that by September 1, 2018, the State meets its constitutional obligation to fully fund the actual costs of fully implementing the State’s basic education program. *Id.*, at 484, 545-546.

The Legislature in ESHB 2261 established the Quality Education Council (QEC) and directed it to determine the phase-in for the program of basic education that “shall have full implementation completed by September 1, 2018.” LAWS of 2009, ch. 548, §114(5)(b)(iii). The QEC submitted its findings, including its phase-in schedule to implement these findings by September 1, 2018. See *McCleary*, 173 Wn.2d at 508.<sup>1</sup> This Court reaffirmed its holding that any program for full state funding of basic

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<sup>1</sup> The Legislature repealed the statute that created the Quality Education Council. See LAWS of 2016, ch. 162 (E2SSB 6195) § 5(1). But that legislation eliminated the council only going forward. “The fact that the legislature has since disbanded the council does not alter the phase-in schedule that the council recommended at the legislature’s direction.” October 2016 *McCleary* Washington Supreme Court Order, at 12-13 (hereinafter referred to as “October 2016 Order”).

education must therefore be fully implemented not later than September 1, 2018. October 2016 Order, at 12.

The State submitted two documents to this Court on July 31, 2017 asking this Court to find that the State complied with its Article IX duty as follows: (1) State of Washington’s Memorandum Transmitting the Legislature’s 2017 Post Budget Report<sup>2</sup> and (2) 2017 Report to the Washington Supreme Court by the Joint Select Committee on Article IX Litigation.<sup>3</sup>

### **III. IDENTITY AND INTEREST OF AMICUS CURIAE**

Amici are several civil rights organizations that each recognize that a fully funded and ample education is key to leveling the playing field in society for the constituents that each represents. The civil rights organizations signing on as Amicus Curiae are the National Association for the Advancement of Colored People, Chinese Information Service Center, Multicultural Education Rights Alliance, Rainier Beach Action Coalition, Southeast Seattle Education Coalition, and the United Indians of All Tribes Foundation. Additional information regarding each organization is contained in Civil Rights Organizations’ Motion to File Amicus Curiae Brief.

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<sup>2</sup> hereinafter referred to as “State’s Memorandum”

<sup>3</sup> hereinafter referred to as “2017 Report”



#### **IV. ARGUMENT**

##### **A. The Legislature's 2017 Budget Enactment Does Not Comply With The Civil Rights Mandate That The Paramount Constitutional Right Of Every Child Is An Amply Funded Education.**

At no time in the State's Memorandum or in its 2017 Report does the State claim that it has fully funded the actual costs of fully implementing the components of the state's basic education plan for all students by September 1, 2018. Rather, the State argues that the Legislature provides the State full funding by the 2019-20 school year and relies on the 2017 Legislature's commitment to add \$8.3 billion in state funding over the next two biennia. State's Memorandum, at 8-9. But this Court has required full funding by September 1, 2018:

We conclude, based on the relevant legislation, that the State has until September 1, 2018, to fully implement its program of basic education, and that the remaining details of that program, including funding sources and the necessary appropriations for the 2017-19 biennium, are to be in place by final adjournment of the 2017 legislative session.

October 2016 *McCleary* Washington Supreme Court Order, at 13.

Additionally, the State, in its 2017 Report, admits that the 2017-19 budget does not fully fund the actual costs of constitutional compliance by 2018, the date that this Court set for full compliance, stating:

At full implementation in the 2019-21 fiscal biennium, EHB 2242 requires expenditures totaling \$26.6 billion...[T]hese planned future expenditures are incorporated into the

balanced projected expenditures for the 2019-21 fiscal biennium.

2017 Report, at 7-8.

The 2017 Legislature created a new compensation model. Even if that model was sufficient to meet this Court's requirements, which it is not, the Legislature has not fully funded this model at this time and states that it will not do so until until the 2019 Legislature passes a 2019-21 budget. State's Memorandum, at 14, 16, 19.

Thus, the State is clearly telling the Court that it does not even plan to achieve full implementation until the 2019-2021 biennium. And, the State has no control over the actions of the 2019-21 Legislature. It is a fundamental principle that one Legislature cannot bind a future Legislature absent the creation of contract rights. *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 319, 174 P.3d 114 (2007); *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 759, 131 P.3d 892 (2006).

It is not enough to partially fund the actual costs of providing every child in Washington state with an education:

If the State's funding formulas provide only a portion of what it actually costs a school to pay its teachers, get kids to school, and keep the lights on, then the legislature cannot maintain that it is fully funding basic education through its funding formulas. Even assuming the funding formulas represented the actual costs of the basic education program

when the legislature adopted them in the 1970s, the same is simply not true today.

*McCleary*, 173 Wn.2d at 532.

Consequently, the State, at best, has only partially funded the actual costs of basic education components and is in violation of the Orders of this Court.

B. The Legislature Did Not Fully Fund The Actual Cost Of Categorical Programs That Are Part Of The Basic Education Program

EHB 2442,<sup>4</sup> adopted by the 2017 Legislature, preserved the Legislature's definition of the categorical programs included in basic education program that existed at the time of trial. 173 Wn.2d at 526. These historically recognized categorical programs target students who need additional assistance to obtain a basic education. While the 2017 Legislature increased funding for these programs, these increases do not fund the actual costs of providing every child in need of these services with an amply funded education.

1. The Remediation Assistance Act also known as Learning Assistance Program (a/k/a "LAP" or "Remediation")

The LAP program provides enhanced resources to students from disadvantaged backgrounds who are falling behind academically. 173

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<sup>4</sup> LAWS of 2017, 3d Sp. Sess., ch. 13, hereinafter referred to as EHB 2242.

Wn.2d at 489, 496, 505-06, 526. These resources are critical to closing the opportunity gap and to leveling the playing field for higher poverty students and students that are struggling in school. Such resources are quantified in the legislative appropriations as funding for increased instructional time with smaller class sizes.

Multiple reports to the Legislature have emphasized the importance of small class sizes for remediation programs particularly for younger students.<sup>5</sup> Specifically, research has shown a positive relationship between reducing class size in the lower grades at the elementary level and improving student achievement. There is also evidence that there is a benefit to lowering class sizes further for low-achieving and high poverty students. Lowering class size for students in need of remediation allows schools to have the resources required to provide these students with more individual attention which will ultimately close the opportunity gap and increase student achievement.

The Legislature failed to even get close to amply funding class size reductions that the QEC determined should be in place for the Learning Assistance Program for K-6 students by September 1, 2018. Prior to EHB 2442, the minimum allocation for LAP instruction was provided for a class

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<sup>5</sup><http://www.k12.wa.us/QEC/Meetings2012/Sept/2018ValuesBackgroundInformation.pdf>, at 25-26.

size of 15.<sup>6</sup> EHB 2442 did not lower the average class size either for LAP instruction statewide for any students. Under EHB 2442, the average class size for all LAP instruction including for K-6 students as well as for students high-poverty schools remains at 15.

The failure to lower class size for LAP instruction for grades K-6 is in direct conflict with the substantial need articulated by the State in many of its own documents including OSPI's determinations for what is needed to fully fund basic education so that all children can succeed. Specifically, OSPI, in its budget submission to the 2017 Legislature,<sup>7</sup> requested the phase-in of funding lower class size for students in need of remediation in grades K-6 students as follows:

- (1) in 2017-18 to 13.5 students
- (2) in 2018-19 to 11.3 students
- (3) in 2019-20 to 9.4 students, and
- (4) in 2020-21 to 7.8 students.

In addition, the LAP Technical Working Group, dedicated to working on this issue on behalf of OSPI, determined a class size of six students for

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<sup>6</sup> 2017 Report, at 31.

<sup>7</sup> [http://www.k12.wa.us/LegisGov/2017documents/AA\\_2017-19\\_FullyFundingBasicEducation.pdf](http://www.k12.wa.us/LegisGov/2017documents/AA_2017-19_FullyFundingBasicEducation.pdf), at 5.

grades K-6 in order to support a limited pullout model.<sup>8</sup> EHB 2442 does not begin to make a dent in this area.

The 2017 Legislature's funding for instructional time for the LAP Program is also absolutely insufficient to fully fund the actual cost of providing these services to these students. EHB 2442 sets a minimum allocation of 2.3975 hours per week of extra instructional time for LAP students. An increase of 2.3975 hours per LAP student is far less than the amount OSPI articulated in its budget submission to the 2017 Legislature for the amount necessary to fully fund the LAP educational needs of all students. The State's Superintendent of Public Instruction specified:<sup>9</sup>

- (1) an additional 2.8483 hours of instructional time for students in Grades K-6 for the 2018-19 school year followed by an additional 3.265 hours per week of instructional time for students in Grades K-6 for the 2020-21 school year.
- (2) an additional 3.265 hours of instructional time for students in Grades 7-12 for the 2018-19 school year followed by

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<sup>8</sup><http://www.k12.wa.us/QEC/Meetings2012/Sept/2018ValuesBackgroundInformation.pdf>, at 26.

<sup>9</sup>[http://www.k12.wa.us/LegisGov/2017documents/AA\\_2017-19\\_FullyFundingBasicEducation.pdf](http://www.k12.wa.us/LegisGov/2017documents/AA_2017-19_FullyFundingBasicEducation.pdf), at 5.

additional 4.1325 hours per week of instructional time for students in Grades 7-12 for the 2020-21 school year.

The LAP Technical Working Group, dedicated to working on this issue on behalf of the State's Superintendent of Public Instruction, specified increasing the instructional hours for struggling students to 3.75 hours for K-6 students and to 5 hours for students in Grades 7-12.<sup>10</sup>

The 2017 Legislature allocated additional funds for LAP instruction only for students who attend high poverty schools, defining high poverty schools as schools that have at least 50 percent of the students who are eligible for free or reduced priced meals.<sup>11</sup> For students attending these schools, the new additional minimum allocation is based on an additional 1.1 hours per week. For students eligible for LAP services in high poverty schools in grades 7-12, the amount allocated is still below what the State articulated as necessary to fully fund the actual costs of educating these students.

Significantly, the State does not claim, nor can it claim, that all students in need of LAP services are in high poverty schools. The State does not even claim that most of the students eligible for remediation are in high poverty schools. There are definitely many students eligible for

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<sup>10</sup><http://www.k12.wa.us/QEC/Meetings2012/Sept/2018ValuesBackgroundInformation.pdf>, at 26.

<sup>11</sup> EHB 2242, §§ 403-05 (amending sections in ch. 28A.165 RCW).

these services that do not attend high poverty schools. No additional instructional time has been provided for any of the LAP eligible students who do not attend high poverty schools even though the actual cost of educating these students is well-documented and recognized. Consequently, the Legislature is violating the constitutional rights of those students.

Lowering class size and providing additional instructional time to struggling students is critical to closing the opportunity gap for all students. While the State added funding for this program, the amount added does not fund the actual cost of educating these students. Nor does the State claim that it has funded the actual cost of educating these students. Consequently, the 2017 Legislative appropriation for additional instruction and lower class size for LAP is vastly insufficient to address the State's constitutional obligation to these students, regardless of whether or not these students are in high-poverty schools.

## 2. Transitional Bilingual Instruction For Students In Grades K-6

Transitional bilingual instruction (a/k/a "TBIP" or "Transitional Bilingual Education" a/k/a "English Language Learners" or "ELL") is a categorical program that is critical to closing the opportunity gap for Washington state students. See, e.g., 173 Wn.2d at 489, 496, 505-06, 526.



The 2017 Legislature preserved and increased funding for the Transitional Bilingual Instructional Program for students in grades 7-12.<sup>12</sup> Significantly, however, the Legislature failed to add any additional instructional time for students in grades K-6 despite the fact that the greatest proportion of students eligible for these services are, by far, students in grades K-6. In OSPI's most recent annual report to the Legislature regarding Transitional Bilingual education, it is documented that over 77% of the students in need of transitional bilingual education are students in Grades K-6.<sup>13</sup> Thus, despite the fact that the greatest number of students eligible for TBIP are in the primary grades, the Legislature provided no additional instructional time for these students.

The Transitional Bilingual Program Technical Working Group specified increasing instructional hours for all ELL students from 4.778 to 8.0 hours with a class size of 15 for all students in all grades.<sup>14</sup> The State Superintendent of Public Instruction's 2017 legislative submission reported that to fully fund the transitional bilingual program, currently set at a minimum allocation per student of 4.778 hours per week for students in grades 7-12, it would be necessary to increase that time to 6.926 hours

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<sup>12</sup> 2017 Report, p.34.

<sup>13</sup><http://www.k12.wa.us/MigrantBilingual/BilingualProgram/AnnualReports.aspx>. See 2015-16 Appendices, Figure 5 (Total TBIP Enrollment by grade).

<sup>14</sup>[http://www.k12.wa.us/LegisGov/2010documents/TBIP\\_Dec10.pdf](http://www.k12.wa.us/LegisGov/2010documents/TBIP_Dec10.pdf), Executive Summary recommendation (3) at 3.

per week.<sup>15</sup> As stated above, the Legislature increased the formula's instructional time for students in grades 7-12 but not for younger students.<sup>16</sup>

Consequently, while the Legislature made some progress in TBIP instructional time for grades 7-12, the Legislature did not provide sufficient funding to amply fund the actual cost of transitional bilingual instruction to level the playing field for all students.

3. The Class Size For K-3 Students in EHB 2442 Continues To Be Insufficient To Amply Fund The Constitutional Obligation

EHB 2242 sets the formula allocation for the general education average class size for Grades K-3 at 17 students.<sup>17</sup> This allocation is insufficient to meet the need to fully fund the actual cost of educating these students as defined by the State in its own documents.

The 2010 QEC schedule for fully funding the actual cost of educating all students, recognized by this Court as the Legislature's own plan for fully implementing ESHB 2261 by 2018,<sup>18</sup> found that the Legislature must immediately implement class size reductions to 15 for all K-3 students.<sup>19</sup> The QEC, confirming the positive achievement gains

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<sup>15</sup> [http://www.k12.wa.us/LegisGov/2017documents/AA\\_2017-19\\_FullyFundingBasicEducation.pdf](http://www.k12.wa.us/LegisGov/2017documents/AA_2017-19_FullyFundingBasicEducation.pdf), at 5.

<sup>16</sup> 2017 Report, at 34.

<sup>17</sup> EHB 2442, § 402(4).

<sup>18</sup> *McCleary*, 173 Wn.2d at 508.

<sup>19</sup> <http://www.k12.wa.us/QEC/pubdocs/QEC2010report.pdf>, at 8-9.

associated with reducing class size at the primary level,<sup>20</sup> also found that these gains persist over time.

Even greater gains to be made in terms of closing the achievement gap and increasing graduation rates for low-income students occur by investing in K-3 class size reductions. Washington's low-income students consistently score lower on state assessments and drop out of high school at higher rates than their more affluent peers. Amply funding smaller classes at the maximum of 15 for these students is necessary to ensure that they receive the one-on-one attention they need to excel.<sup>21</sup> In addressing the opportunity gap that exists, in 2012, the QEC again determined that class sizes for Grades K-3 should be 15 students, confirming two independent studies supporting this finding.<sup>22</sup>

Smaller class sizes of 15 in grades K-3 are a critical element to level the playing field. In 2010, when the QEC phase-in schedule was presented, the State provided Basic Education funding based on a class size in grades K-3 of 25. While basing formula funding on a class size of 17 for K-3 is a step in the correct direction, it does not meet the constitutional obligation to fully or amply fund the actual costs of educating these students.

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup><http://www.k12.wa.us/QEC/Meetings2012/Sept/2018ValuesBackgroundInformation.pdf>, at 4.

C. Constitutional Compliance Requires That All Elements of Basic Education Are Fully Funded

Clearly, closing the opportunity gap and leveling the playing field requires more than funding LAP, Transitional Bilingual instructional education and smaller K-3 class sizes, the categorical programs discussed above. Full and ample funding requires that each and every child in the State of Washington be provided with the opportunity to obtain the knowledge and skills necessary to compete in today's economy and meaningfully participate in this state's democracy. For this Court to find that the State has achieved full constitutional compliance, the State must amply fund all elements of the actual costs of a basic education for all children. The funding formulas on which the 2017-2019 Biennium Budget are based do not do that.

**V. CONCLUSION**

This Court, in enforcing its orders requiring the State to fulfill its constitutional duty to comply with Article IX, section 1 of the Washington state constitution, should rule that the State has not met its obligation to fully and amply fund the actual costs of providing the basic education to which the public school students in Amici's communities are constitutionally entitled as a State constitutional right under Article IX,

section 1, and issue such further orders as it deems appropriate to firmly uphold and enforce that civil right.

DATED this 30<sup>th</sup> day of August, 2017.

Respectfully submitted,

/s/ Harriet Strasberg

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**CERTIFICATE OF SERVICE**

HARRIET STRASBERG declares:

I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of twenty-one years. On August 30, 2017, I caused the foregoing document to be served as follows:

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that the foregoing is true and correct.

EXECUTED on this 30<sup>th</sup> day of August, 2017.

/s/ Harriet Strasberg

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## Transmittal Information

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