NO. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

STATE OF WASHINGTON'S REPLY BRIEF AND ANSWER TO AMICUS BRIEFS FILED BY ARC OF WASHINGTON et al., COLUMBIA LEGAL SERVICES et al., WASHINGTON'S PARAMOUNT DUTY, AND THE SUPERINTENDENT OF PUBLIC INSTRUCTION

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I. INTRODUCTION

Plaintiffs present the Court with a false choice: either impose a drastic contempt sanction (such as shutting down all public schools) or admit that the Court does not really care about constitutional rights. In their telling, failure to impose a drastic sanction would be akin to the Court approving of racial segregation, Japanese internment, or Nazi propaganda. The Court should reject their bullying tactics and instead give effect to the whole Washington Constitution, allow the Legislature room to complete its task, and remain vigilant to ensure ultimate compliance with the State's constitutional obligations. The issues in this case are too important to give in to Plaintiffs' hyperbole.

Plaintiffs' first mistake (repeated by some Amici) is focusing on the wrong issue as the basis for a contempt sanction. This Court held the State in contempt for failure *to enact a plan* to meet the Court's 2018 deadline for constitutional compliance. The State has now enacted a plan for meeting the deadline. Yet Plaintiffs and Amici argue for a new sanction based on the State's alleged failure now to meet the 2018 deadline for constitutional compliance. That misdirection ignores that the Court did not hold the State in contempt for failure to meet the ultimate obligation. Basing a contempt sanction on failure to achieve ultimate compliance would thus be premature and inappropriate.

Plaintiffs and Amici also err in dismissing the State's enacted plan. They argue that the plan is "meaningless" because it leaves important decisions to the 2017 Legislature. But this is ultimately an attack on the Court's original 2012 decision, which declined to order a specific, immediate remedy and instead appropriately allowed the State time to develop ways to meet the extraordinary new financial obligations the ruling imposed. Plaintiffs and Amici also object to the plan's requirement to study the actual costs of teacher compensation. But they simultaneously criticize the State for allegedly not calculating the actual costs of other subjects covered by this Court's 2012 ruling. They can't have it both ways.

Ultimately, Plaintiffs offer soundbites rather than solutions. Comparing the State to George Wallace may garner media attention, but it does little to advance the issues in this case. This is not a situation where the State denies its constitutional obligations; rather, members of the Legislature (and public) disagree about how to meet those obligations. This Court appropriately left it to the Legislature to try to reach agreement on the appropriate combination of revenue enhancements, cuts to other programs, and other changes necessary to comply with the State's constitutional obligations. There is no basis for the Court to end that democratic process before the deadline the Court itself imposed. And there

is certainly no basis to order the closure of public schools, harming the very schoolchildren our constitution protects. Instead, the Court should recognize that the State has enacted a plan, should purge the contempt sanction, and should evaluate the Legislature's compliance with its ultimate constitutional obligations on the timeline the Court imposed.

II. ARGUMENT

The issue before the Court is whether the State has complied with the orders requiring it to submit a plan. The State has complied. The order of contempt should be dissolved and the sanction terminated.

A. There Is No Legal or Factual Basis for Imposing Additional Sanctions

1. The State has submitted a plan and therefore has purged contempt

Plaintiffs and some Amici mischaracterize the Court's orders finding the State in contempt and imposing sanctions by focusing on the 2018 deadline for compliance rather than the language of the orders.[1] The Superintendent of Public Instruction directs almost all his attention to new sanctions that he believes should be imposed.

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[1] *See* Plaintiff/Respondents' 2016 Post-Budget Filing (Pls.' Br.) at 43-49; SPI Amicus at 2-3; Paramount Duty Amicus at 4. Amicus Arc of Washington focuses on special education funding, essentially attempting to relitigate issues decided in *School Districts' Alliance for Adequate Funding of Special Education v. State*, 170 Wn.2d 599, 601, 244 P.3d 1 (2010). Their arguments are more properly raised in a new complaint.

The Court found the State in contempt for *not submitting a plan*—not for failing to meet the 2018 deadline three years early. Order, *McCleary v. State*, No. 84362-7 (Wash. Sept. 11, 2014), at 4. The Court imposed a sanction to coerce *the submission of a plan*—not to compel full constitutional compliance before the 2018 deadline. Order, *McCleary v. State*, No. 84362-7 (Wash. Aug. 13, 2015), at 1.

The State has *submitted a plan*, enacted as E2SSB 6195 (Laws of 2016, ch. 3), that identifies the final steps to be taken on the road to achieving compliance by 2018. And in that plan the Legislature categorically stated its intent to reform state funding of compensation to provide "competitive salaries and benefits that are sufficient to hire and retain competent certificated instructional staff, administrators, and classified staff," "eliminat[e] school district dependency on local levies for implementation of the state's program of basic education," and complete its implementation of ESHB 2261 (Laws of 2009, ch. 548) and SHB 2776 (Laws of 2010, ch. 236). E2SSB 6195, § 1. If it succeeds in doing so, the State will be in compliance with the decision in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012).

Alternatively, Plaintiffs would have the Court punish the State now for not having produced a plan before 2016. Pls.' Br. at 32-33. But the

Court already imposed a sanction of $100,000 a day to continue until a plan was enacted. A plan now has been submitted and the question before the Court is whether it should dissolve its order of contempt and stop further accumulation of the sanction now that a plan has been enacted.

In short, there is no basis on which to find the State in continued contempt or for continuing the sanction. Before there can be any new sanction, there must be a finding of new contempt. And before there can be any of the draconian sanctions proposed by the Superintendent, there must be a finding that the new or continuing contempt is so egregious as to require such severe sanctions. The Court should reject the ongoing attempts of Plaintiffs and some Amici to use the contempt order as a vehicle for imposing a prospective sanction simply because they assume a future failure to meet a deadline that is still two years away. *See State ex rel. O'Connell v. Kramer*, 73 Wn.2d 85, 87, 436 P.2d 786 (1968) ("[W]e cannot pass on the constitutionality of proposed legislation . . . until the legislative process is complete and the bill or measure has been enacted into law.").

2. The attacks on the plan by Plaintiffs and Amici are unfounded and legally in error

Lacking compelling legal critiques of the State's plan, Plaintiffs instead try to bully the Court, arguing that acceptance of the plan would be

equivalent to approving of George Wallace's opposition to desegregation (Pls.' Br. at 44[2]), the World War II internment of Japanese Americans (Pls.' Br. at 43 n.87, 49), or the Nazi propaganda machine (Pls.' Br. at 30 n.63). While such inflammatory rhetoric may be increasingly and troublingly common in our nation's political discourse, it is unhelpful and inappropriate here. The Court should reject Plaintiffs' inflammatory rhetoric and focus instead on assessing the substance of the enacted plan.

At the end of the day, the issues in this case can be resolved only by a Legislature whose members can come together to solve a particularly difficult and complex problem with guidance from this Court. Plaintiffs' inflammatory rhetoric does not move the ball forward. It is unnecessary, counterproductive, and distracting.

a. Plaintiffs and Amici fail to establish that additional data and analysis are unnecessary

In criticizing the State's plan, Plaintiffs and some Amici argue that no further information is needed. While they cite a variety of previous studies going back to 1982 as important, they contend that the current work of the Education Funding Task Force initiated by E2SSB 6195 cannot possibly be important or necessary. *See* Pls.' Br. at 33-34; SPI Amicus at 3; Paramount Duty Amicus at 7.

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[2] *See also* Pls.' 2015 Br. at 10 (July 27, 2015); Pls.' 2014 Br. at 38 (May 21, 2014); Pls.' 2013 Br. at 39 (Sept. 30, 2013).

But neither Plaintiffs nor Amici have been able to unearth and refer the Court (or the Legislature) to any current analysis that (a) delineates district-by-district compensation paid beyond the state salary allocations generated through the prototypical school model; (b) identifies the funding sources of the additional paid compensation; and (c) reveals the precise mix of basic education and local enhancement duties supported by the additional pay.[3] If those data are present in one of the studies Plaintiffs and Amici reference, it should have been a simple matter to identify it for the Legislature and the Court.

Presumably, Plaintiffs are well positioned and motivated to identify such information, since they have argued repeatedly that the State does not pay the actual cost of compensation necessary to support the State's program of basic education. Instead, they provide a short list of bills and reports issued between 1982 and 2012 and essentially tell the Court to go search for the information. *See* Pls.' Br. at 5-6, 33-34.

The Superintendent suggests the information exists in the 2012 Compensation Technical Working Group Final Report, but does not provide a citation showing where such information is to be found. SPI

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[3] E2SSB 6195, § 1, p. 2; Joint Education Funding Task, Jessica Harrell & Bryon Moore, *Salary Spending by School Districts: What We Know, What We Don't Know* (May 11, 2016), https://app.leg.wa.gov/CMD/document.aspx?agency=4&year=2016&cid=17131&mid=25309&hid=193564_(web page, click on *Other*, click on *Internal – K-12 Compensation Overview Charts*).

Amicus at 3. Appendix 2 of the Final Report contains some minimal information on funding sources in the form of three pie charts showing percentages of 2010-11 average additional salary above state allocation.[4] But the Final Report does not identify where the underlying data came from, what level of detail is available by district, what services are supported by the additional salary, or the source of the funding beyond "local."

Amicus Washington's Paramount Duty claims that the State has failed to explain why this study is needed, given the history of previous studies. Paramount Duty Amicus at 7-8. Actually, the State did explain and just did so again here. *See* E2SSB 6195, § 1; *2016 Report*[5] at 8-10; State's Br. at 11-14. Paramount Duty simply does not like the explanation.

Taken together, Plaintiffs and these Amici are arguing that they, not the Legislature, know what information the Legislature needs in order to craft and enact the best remedial legislative policy. The Legislature itself, in a duly enacted statute, has made the determination that further data collection is necessary for the Legislature's "'uniquely constituted fact-finding and opinion gathering processes' [that] provide the best forum

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[4] *Compensation Technical Working Group Final Report* 81 (June 30, 2012), http://www.k12.wa.us/Compensation/CompTechWorkGroupReport/CompTechWorkGroup.pdf (last visited June 16, 2016).

[5] *2016 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* (May 18, 2016).

for addressing the difficult policy questions inherent in forming the details of an education system." *McCleary*, 173 Wn.2d at 517 (quoting *Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 476, 551, 585 P.2d 71 (1978) (Utter, J., concurring)). Plaintiffs would have the Court deny the Legislature the opportunity to gather additional data and policy recommendations.

Paramount Duty also appears to argue that the State is estopped from arguing any need for additional data because the State previously argued to the Court that all the work that went into ESHB 2261 was a better remedial solution than starting from scratch. Paramount Duty Amicus at 6-7. There is no estoppel. The arguments are not inconsistent.[6] The fact that decision-makers may need more detailed information as plans progress from general to more specific is unremarkable and unsurprising. The implication of Paramount Duty's argument is that less information somehow leads to a better solution.

Plaintiffs and Amici reference prior reports and other documents as if bare citation proves their argument. It does not. None of those prior efforts assembled the information needed to determine the state funding necessary to provide compensation adequate to attract and retain well

[6] Paramount Duty mischaracterizes the State's argument from its 2010 brief. The issue was whether, given the Legislature's recent enactment of ESHB 2261, the trial court's remedy to start over was appropriate. This Court held that it was not. *McCleary*, 173 Wn.2d at 542.

qualified teachers and staff, to ensure accountability for the spending of state dollars, and to do so over the long term. And none of those prior efforts showed how school districts expend local levy dollars on staffing and implementing the State's program of basic education. Until that information is gathered, the Legislature cannot determine the amount of the State's constitutional obligation.

b. Under the tests set forth by Plaintiffs and Amici, no plan could pass muster

A closer look at the arguments made by Plaintiffs, the Superintendent, and Paramount Duty reveals that *no plan* could be sufficient under their view and sanctions therefore should be levied for failure to achieve compliance by 2016. They argue essentially that a plan is a meaningless exercise (and always was a meaningless exercise) because no plan, study, or legislation can bind a future Legislature. *See* Pls.' Br. at 37 ("It's meaningless to say the 2016 legislature is 'requiring' the 2017 legislature to enact reforms. . . ."); Pls.' Br. at 38 ("It is similarly meaningless to say the 2016 legislature is 'committed' to having the 2017 legislature comply with the court orders in this case. . . ."). Under their arguments, no plan or promise should be believed and the only way the State could avoid sanctions is to have met the 2018 deadline in 2016.

The Superintendent argues that E2SSB 6195 is "demonstrably unreliable" because it consists of "mere words of promise." SPI Amicus at 5-6. Paramount Duty makes a similar argument. Paramount Duty Amicus at 6. That argument is untenable. Just because the Legislature has chosen not to adopt each recommendation offered by the Superintendent or by various task forces and commissions is no basis for concluding that the commitment in E2SSB 6195 is "demonstrably unreliable." The Legislature does not and cannot delegate legislative authority to such groups. Nevertheless, it is well established that education reform to date has been shaped by the results of numerous studies, as outlined by the Court in *McCleary*, 173 Wn.2d at 500-08. The fact that studies and recommendations are not adopted wholesale and verbatim does not mean that they failed to result in legislative action or did not provide an important and necessary foundation for enacted policy changes.[7] Washington Learns led to the Basic Education Finance Task Force, which resulted in ESHB 2261 and SHB 2776. *Id.* at 505-10.

Although ESHB 2261 and SHB 2776 also were "mere words," under the Superintendent's argument, and have always been subject to

[7] The Court acknowledged that the State is not bound to adopt precisely the recommendations by various workgroups, because they do not provide the only means of achieving compliance. Order, *McCleary v. State*, No. 84362-7 (Wash. Aug. 13, 2015), at 7.

amendment by subsequent Legislatures, the State has followed through with their implementation. As explained in the State's Brief at pages 16-21, the Legislature has met every deadline it established in those bills and in doing so has increased annual funding over a four-year span by billions of dollars.

c. The State has not ignored the current sanction

Plaintiffs and Amici claim that new sanctions are necessary because the State either did not take the current sanctions of $100,000 per day seriously (SPI Amicus at 4), or did not consider the sanction significant because the State "refus[ed] to fund it" (Pls.' Br. at 46). Such claims are baseless. The current remedial penalty was levied by the Court for failure to produce a plan in 2015. The Legislature enacted a plan in E2SSB 6195 in 2016, as described in the State's Brief at pages 10-14. That alone should be sufficient to rebut the bald assertion that the penalty has been ignored.

Moreover, the plan enacted in E2SSB 6195 is already being implemented. The Education Funding Task Force established in that legislation has been moving ahead to complete its assigned responsibilities. Its early focus has been on obtaining information in four areas: (1) school district reporting and accounting procedures and data received (and not received) by the Office of the Superintendent of Public

Instruction; (2) K-12 educator supply and demand issues; (3) what information is or is not reported about salary spending by school districts and the data collection tools necessary to obtain necessary but unreported information about salary spending; and (4) differences between school districts' actual staff allocations and staff allocations assumed in the prototypical funding model.[8]

As directed in E2SSB 6195, the Washington State Institute for Public Policy timely selected and contracted with a qualified consultant,[9] who began work on May 31, 2016. The consultant is tasked with (1) identifying and reporting reasons for and funding sources of differences between actual salaries and those provided under the State's prototypical school model; (2) identifying and reporting market rate salaries comparable to each staff category in the prototypical school model; and (3) developing a model tool to explore local labor market adjustments and criteria for evaluating them. Data collection has begun. Deadlines are set in E2SSB 6195, section 3: the consultant's interim report is due September 1, 2016, and the final report and analysis is due November 15, 2016.

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[8] *See* Joint Education Funding Task, http://leg.wa.gov/jointcommittees/eftf/pages/default.aspx.

[9] Third Sector Intelligence, Inc. (3Si), a Seattle consulting firm (http://team3si.com/), in partnership with Edunomics Lab at the McCourt School of Public Policy, Georgetown University, Washington, D.C. (http://edunomicslab.org/).

Neither has the executive branch ignored the sanction. On June 10, 2016, the Office of Financial Management released its Operating Budget Instructions for the 2017-19 biennium. Both the cover memo and opening instructions explain that state agencies should not expect increased funding in the next biennium because of the need to fund the "continuing costs of major K-12 funding enhancements made in the current biennium and the final phasing in of legislative commitments to decrease K-3 class sizes in the 2017-19 biennium" and the need to "further increase state funding of K-12 school employee compensation at a cost of several billion dollars next biennium (*McCleary v. State of Washington*)."[10] "Meeting the state's constitutional duty to fully fund K-12 education is an enormous challenge and the top budget priority."[11] This language, unprecedented in its clarity, is a clear and affirmative response to the Court.

3. The State remains on track to achieve constitutional compliance by 2018

Plaintiffs' arguments are fundamentally flawed because they are premised on *their* measures of ultimate constitutional compliance—not on

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[10] Office of Fin. Mngt., Budget Div., *2017-19 Biennium Operating Budget Instructions* 2 (June 2016), http://www.ofm.wa.gov/budget/instructions/operating/2017_19/2017-19instructions.pdf; Memo from David Schumacher, Director, Office of Financial Management, to Agency Directors, Presidents of Higher Education Institutions, and Boards and Commissions (June 10, 2016), at 1 (re 2017-19 Operating and Capital Budget Instructions) http://www.ofm.wa.gov/budget/instructions/operating/2017_19/covermemo.pdf.

[11] *Id.*

measures established by this Court or the Legislature. The Washington Constitution does not confer on Plaintiffs—or on the Superintendent of Public Instruction, for that matter—the authority to determine the measure of ample funding under article IX, section 1. It is for the *Legislature* to determine in the first instance what constitutes "ample provision" for the State's program of basic education. And it is for the *Court* to determine whether the Legislature's provision is constitutionally sufficient.

The Legislature is on the threshold of making that determination. That threshold marks the culmination of a process reflected in the reforms and deadlines established in ESHB 2261 and SHB 2776 and carried forward in E2SSB 6195. Once the Legislature determines the real cost and enacts implementing legislation, the Court can address whether the State has complied with article IX, section 1, as directed in the *McCleary* decision. If the Legislature fails to address the compensation challenge by the deadline set in *McCleary*, the Court then could determine whether the State failed to meet its constitutional obligation.

a. The $4.8 billion increase in state spending for K-12 education over two biennia is real

The State has made very real and concrete progress since 2012. In attempting to discredit that progress, Plaintiffs wrongly claim that the $4.8 billion increase in education funding between the 2011-13

biennium and the 2015-17 biennium is illusory and is actually less than if the State had merely maintained the "status quo" level of services. Pls.' Br. at 26. Plaintiffs' characterization of maintenance level is erroneous for several reasons.

First, Plaintiffs argue that the State's published 2015-17 maintenance level of $19.5 billion reflects the "status quo" costs of providing the same services funded in the prior biennium. They misunderstand this budgeting term of art. In its *2014 Report*,[12] the Legislature's Article IX Committee provided an explanation of the term "maintenance level" as used in the budgeting process.

> The maintenance level budget is the estimated cost of providing currently authorized services in the new budget period. It is calculated using current ongoing appropriations, application of any bow wave adjustments (costs or savings that occur in the future because a current budget item is not yet fully implemented), and adjustments for caseload or enrollment or other funding driver changes to mandatory programs.

2014 Report at 35-36. The funding driver adjustments in maintenance level can include costs driven by new laws or new budget items being phased in. It is not limited simply to the "status quo" of the cost of the previous level of services adjusted for caseload. *See also 2016 Report* at 17 (like the MSOC allocation in the 2015-17 biennial budget, the

[12] *2014 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* (Apr. 30, 2014).

final increment of K-3 class funding will be included in the maintenance level in the next biennial budget because it is statutorily mandated in SHB 2776).

Having misunderstood the meaning of "maintenance level," Plaintiffs compound their error by arguing that $19.5 billion represents the 2015-17 cost of maintaining the "status quo" of the 2013-15 biennium level of services. In fact, the voters' approval of Initiative 1351 in November 2014 resulted in a sudden increase of $2 billion to 2015-17 maintenance level costs (an increase of over 11 percent). That $2 billion increase temporarily brought K-12 maintenance level costs to $19.5 billion,[13] but it represented new funding requirements that had not previously been implemented. It was not a mere continuation of the 2013-15 level of service and it is incorrect to claim that the new $19.5 billion total reflected the cost of continuing the "status quo."

Ultimately, the Legislature delayed phase-in dates for I-1351 for four years and did not fund the initiative's class size allocations in the 2015-17 budget.[14] Contrary to Plaintiffs' claims, this policy decision neither decreased state spending nor decreased previously provided

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[13] State of Washington, *Legislative Budget Notes: 2015-17 Biennium & 2015 Supplemental* 275 (Oct, 2015), http://leap.leg.wa.gov/leap/budget/lbns/2015LBN.pdf; State's Br. at 37.

[14] *2015-17 Budget Notes* at 275 (reflecting decision to postpone I-1351 implementation as a policy-level reduction to maintenance level); State's Br. at 37.

services. The enacted public schools budget for 2015-17 was $18.2 billion.[15] That was an increase from the approximately $15.3 billion for public schools in 2013-15, which had increased from approximately $13.4 billion in the 2011-13 budget.[16]

In sum, the $4.8 billion increase includes adjustments for caseloads and the new spending for MSOC, transportation, all-day kindergarten, and K-3 class size reduction, as well as all the other education-related increases that have been reported in the *2013*, *2014*, *2015*, and *2016 Reports* and confirmed in the Budget Notes for each biennium. Plaintiffs cannot show that the increases are illusory.

b. All of the SHB 2776 reforms are fully funded consistent with the schedule established in that legislation

Plaintiffs repeat their arguments from 2015 that none of the SHB 2776 reform elements are actually implemented, even where the Court has said otherwise. For MSOC, transportation, and the highly

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[15] *2015-17 Budget Notes* at 277.

[16] *2015 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* at 38 (July 27, 2015). Plaintiffs can be forgiven for also getting the figure for the 2011-13 biennium wrong. With each supplemental budget, appropriations are updated until, after the close of the biennium, actual expenditures are available. More current fiscal data shows a figure close to $13.5 billion for the 2011-13 biennium. *See 2013-15 Omnibus Budget Overview: Operating Only* at O-23, http://leap.leg.wa.gov/leap/budget/lbns/2013operating1315.pdf. That figure does not account for a one-time shift of apportionment of $115 million between fiscal years 2011 and 2012 that shifted 2009-11 biennium costs to the 2011-13 biennium as a budget balancing effort during the fiscal crisis. State of Washington, *Legislative Budget Notes: 2011-13 Biennium & 2011 Supplemental* at 273 (Oct. 2011), http://leap.leg.wa.gov/leap/budget/lbns/2011lbn.pdf.

capable programs, their arguments are simply that formulas are not good enough, notwithstanding that (1) the Court held that the ESHB 2261 and SHB 2776 reforms, if implemented, would remedy the constitutional violation (*McCleary*, 173 Wn.2d at 540-47); and (2) the Court and the Superintendent subsequently recognized that transportation is fully funded (Order, *McCleary v. State*, No. 84362-7 (Wash. Aug. 13, 2015), at 5).

As to class size reduction and all-day kindergarten, Plaintiffs make the same arguments, as if to re-litigate the prototypical school model as a remedy, and then simply repeat language from the Court's August 2015 Order that there is "far to go" with regard to class size reduction. Pls.' Br. at 21. In fact, the State demonstrated in its *2016 Report* and Brief that there is not so far to go. *2016 Report* at 15-17, 30-34; State's Br. at 18-19. The Legislature has done everything it can do in this biennium to ensure the last increment of K-3 class size reduction is funded as scheduled in SHB 2776 for the 2017-18 school year. Plaintiffs' reference back to the Court's 2015 Order is insufficient rebuttal.

c. The Legislature is actively engaged in addressing the need for additional teachers

Plaintiffs' arguments regarding teacher shortages assumes the answer to that problem is simple. It is not. To quote H.L. Mencken, every human problem has a solution that is "neat, plausible, and wrong."

H.L. Mencken, *Prejudices: Second Series* 158 (1921). According to the Professional Educator Standards Board (PESB), the current and projected shortages have a number of root causes, some of them following national trends, and some cyclical in nature. But while there are many theories, "there are no easy answers."[17]

The PESB identifies a number of potential strategies for addressing the issue, including changes in salary, local practices, routes to certification, educator program production and eliminating other barriers in the pipeline.[18] Some of these can be pursued administratively by state agencies and some require legislative action. Some were adopted by the Legislature in 2016.[19] The *2016 Report* detailed a number of additional investments made by the State to address the need for additional teachers. *2016 Report* at 18. The Education Funding Task Force is also tasked with forwarding recommendations as to whether any additional legislation is needed to help support state-funded all-day kindergarten and class size reduction. E2SHB 6195, § 2(3).

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[17] Prof'l Educator Standards Bd., *Addressing the Recurring Problem of Teacher Shortages*, https://drive.google.com/a/pesb.wa.gov/file/d/0B-CWbSsnLOBqa0dDYmUzeVVkMnM/view?pref=2&pli=1 (last visited June 16, 2016).

[18] *Id.*; Prof'l Educator Standards Bd., *Educator Workforce Supply and Demand Issues* (presentation to Education Funding Task Force, May 11, 2016), https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=wSTKSysjAs4&att=false (last visited June 16, 2016).

[19] *See* n.17.

B. The Specific Sanctions Proposed by Plaintiffs or Amici Should Be Rejected

Plaintiffs and their supporting Amici have lost sight of the basis for the Court's order of contempt and imposition of sanctions. They would have the Court consider the State to be in contempt for having not yet met the 2018 deadline and ask the Court to impose sanctions on the assumption that deadline will not be met. They offer a menu of possible sanctions for the Court to choose from. No sanction should be imposed.

1. "Close or defund schools"

Plaintiffs and the Superintendent again propose shutting down the public schools as a sanction to compel legislative action. They again show their willingness to directly harm the very schoolchildren they claim to be advocating for as their means to an end.

Plaintiffs' approach is indirect. They ask the Court to issue an order now that invalidates all "unconstitutionally funded school statutes" on the first day of the 2017-18 school year if the Legislature does not "choose to fully comply with the court orders and declaratory judgments issued in this case." Pls.' Br. at 48. That would set a date for shutting down schools. Putting aside the ambiguity of this request, its inevitable effect would be to create immense uncertainty for schools, school

children, teachers, and parents as they anticipate and plan for the 2017-18 school year. It would be especially problematic for students going into their senior year with post-secondary plans. This is so for two reasons. First, the ultimate legislative remedy likely will not be finally achieved until late in the 2017 session as the budget is approved. Second, Plaintiffs almost certainly will challenge the sufficiency of any action the Legislature takes, and public uncertainty will continue until any such challenge is resolved.

The Superintendent suggests a direct approach: simply enjoin operation of the schools. SPI Amicus at 16-18. Just shut them down. As Plaintiffs did before, the Superintendent cites *Robinson v. Cahill* (*Robinson* VI), 70 N.J. 155, 161, 358 A.2d 457 (1976), as a "successful" model for the sanction they seek. Perhaps it is time to examine the claimed "success" of that model more closely. To assist the Court, concise summaries of the New Jersey litigation are provided in the appendix to this brief.

In *Robinson* VI, the court ordered the shutdown of public schools in New Jersey as of July 1, 1976, if the state legislature did not act to fund a new public education act. The schools were closed, the legislature enacted a new income tax, and the schools were reopened after eight days.

Plaintiffs and the Superintendent end their story of the New Jersey school funding saga at this point, arguing that closing the schools in Washington will be just as effective in compelling a solution as it was in New Jersey. Let's hope not, because the New Jersey saga did not end in 1976. More than *forty years* after the litigation began, the court was *still* mandating specific educational reforms and managing their implementation. *See Abbott v. Burke* (*Abbott* XXI), 206 N.J. 332, 20 A.3d 1018 (2011) (finding inadequate funding of education reform legislation). Derivative litigation is *still* percolating in administrative tribunals and lower courts. *See Bacon v. New Jersey State Dep't of Educ.*, 443 N.J. Super. 24, 126 A.3d 1244 (2015) (procedural dismissal of appeal). The New Jersey saga continues.

The lesson of the New Jersey litigation, applied to the arguments of Plaintiffs and the Superintendent should be unmistakable. Closing down the schools in the summer of 1976 *did* prompt the New Jersey legislature to enact a new tax. It did *not* result in full funding of the educational reforms ordered by the court or in the cessation of litigation. Instead, the court found itself locked in a decades-long conflict with the legislative and executive branches, with the ultimate resolution still in doubt.

Moreover, a court-ordered closure of schools would result in court-imposed violations of federal law or the loss of federal funding. For

example, the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482, guarantees children with disabilities access to "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs[.]" 20 U.S.C. § 1400(d)(1)(A). The Act operates by providing federal funding to state and local agencies and requiring them, as a requirement for funding, to provide certain programs and services. *See* 20 U.S.C. § 1414(d). If public schools were closed in Washington, they could not satisfy their obligations under the Act. Closing schools could jeopardize federal funding under several other programs with cost-sharing requirements, including funding for disadvantaged students (20 U.S.C. §§ 6301-6578), for students who speak languages other than English (20 U.S.C. §§ 6801-6871), and for the education of homeless children (42 U.S.C. §§ 11431-11435).

2. "Strike, suspend, or enjoin tax preferences, credits, and deductions"

The Superintendent suggests the Court could enjoin the operation of "certain state tax exemptions, credits, and preferential tax rates" enacted in the 2013, 2014, and 2015 legislative sessions. SPI Amicus at 11-12. Plaintiffs appear to propose the same sanction. Pls.' Br. at 48. This argument puts the Court on a slippery slope that slides across constitutional limitations imposed by separation of powers. Under their

approach, the Court could reach out to invalidate any statute enacted in 2013, 2014, or 2015 that has any effect on state revenue or spending. As explained in prior briefing, the Court is not constitutionally free to assume the legislative function. *See State of Washington's Opening Brief Addressing Order to Show Cause* at 17-23 (filed July 11, 2011); *State of Washington's Reply Brief Addressing Order to Show Cause* at 10-14 (filed Aug. 25, 2014).

Moreover, this proposed remedy, like others proposed by the Plaintiffs and their supporters, asks the Court to sanction third parties as a means to compel action by the Legislature, and to do so without regard to the culpability or complicity of those third parties, and without regard to the quality or magnitude of harm that might be caused.

Plaintiffs and the Superintendent apparently believe that enjoining the operation of state tax credits and exemptions would be straightforward and efficient. In fact, it likely would require substantial time and money to implement such an injunction. Although their suggestion is sufficiently abstract that an accurate assessment is not presently possible, we can identify some issues and problems that would have to be addressed for any such injunction to be workable and enforceable.

For example, the Superintendent suggests the Court could order the Department of Revenue to simply "disallow any of the enjoined tax breaks

that appear on tax returns filed with the Department." SPI Amicus at 14. The Department receives over two million tax returns annually[20] and almost certainly lacks the resources to manually identify and review each return in order to disallow deductions, exemptions, credits, and preferences subject to injunction, and then to demand additional payment from each taxpayer who claimed an "enjoined tax break." If a lack of resources leads to inconsistent application of the injunction, the inevitable result would be sharp increases in the numbers of taxpayer complaints, requests for review, and lawsuits. If the Superintendent's goal is to increase taxpayer dissatisfaction with government, he has identified an effective approach to achieve that goal.

One potential alternative to the quick-fix approach suggested by Plaintiffs and the Superintendent would be to allow the Department to implement an injunction in the same manner as it implements a change in tax law. That implementation would require time and money to train staff, educate taxpayers, revise the state combined excise tax return and instructions, reprogram software, and update taxpayer dispute and refund procedures. In the normal situation, where enacted legislation has been developed over time in consultation with the Department, that implementation may take a couple of months (or longer if the changes are

[20] http://dor.wa.gov/Docs/Pubs/Misc/RevenueAtAGlance.pdf.

substantial). Implementing an injunction that affects scores of tax provisions would have to be accomplished using existing Department resources and could take many months.

Under either approach, affected taxpayers could bring lawsuits alleging, for example, that the injunction violates their right to due process by depriving them of a duly enacted deduction, exemption, credit, or preference without notice and an opportunity to be heard. Businesses would have to update their bookkeeping and accounting systems in response to an injunction. They may need to revise contracts with suppliers or customers, reprogram point-of-sale systems and online transaction systems.

Plaintiffs and the Superintendent address none of these issues and consequences. They expect the Court to resolve them.

3. "Enjoin county treasurers from disbursing special levy revenues to school districts"

The Superintendent suggests the Court could enjoin county treasurers from disbursing revenues collected from special excess levies, on the ground that the expenditure of such moneys in support of the State's program of basic education violates article IX, section 1 and this Court's decisions in *Seattle School District* and *McCleary.* There are at least four significant problems with this proposed remedy.

First, it rests on a mischaracterization of the contempt order and sanction issued in this case. As explained above, the Superintendent is focused on ultimate constitutional compliance, while the contempt order and sanction were imposed to compel the submission of a legislative plan.

Second, it is overbroad. There is no evidence to suggest that all special levy revenues are used to pay for basic education, but the Superintendent's proposal would enjoin the payment of any school district revenues from special levies.

Third, the only justification offered for the requested injunction is as a contempt sanction. It would require a finding of contempt against all 295 school districts for a contempt sanction to be levied against them. There has been no showing of the factual predicates for such a finding or any judicial determination of unconstitutionality as to any specific school district. All we have is the Superintendent's assertion in an amicus brief that local school districts have "acted improperly" by using special levies to pay for basic education. SPI Amicus at 10. On that basis, he asks the Court to sanction all school districts without regard to their status or culpability under the *McCleary* decision and orders.

Fourth, local school districts would have no ability to purge contempt since, under the theory advanced by the Superintendent, it is only the Legislature's action that can do so. *See Int'l Union, United Mine*

Workers of America v. *Bagwell*, 512 U.S. 821, 826-27, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994) (civil contempt sanction must give contemnor opportunity to avoid the sanction); *In re Pers. Restraint of King*, 110 Wn.2d 793, 799-800, 756 P.2d 1303 (1988) (same); *State v. Boatman*, 104 Wn.2d 44, 48, 700 P.2d 1152 (1985) (same). The Superintendent would punish school districts for the State's noncompliance.

4. "Enjoin the expenditure of state funds for non-education purposes"

The Superintendent suggests the Court could enjoin state spending of non-education state moneys that are not constitutionally required or necessary to preserve public health and safety. SPI Amicus at 15. Plaintiffs make the same suggestion. Pls.' Br. at 48.

The Superintendent would identify spending to be enjoined using state contingency planning done in 2015 in anticipation of a possible government shutdown. Using that planning, the following programs and services are examples of those that would be shut down or discontinued[21]:

- Women Infants and Children (WIC) food and nutrition programs.
- State medical services for the aged, blind, or disabled.
- Need grants for students at Washington universities.

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[21] *See* https://s3.amazonaws.com/s3.documentcloud.org/documents/2090195/agency-contingency-plans-summary-2015.pdf.

- Opportunity grants for students at Washington community colleges.
- The State's health care program for undocumented children.
- The Washington Department of Agriculture's food assistance program and pesticide waste disposal program.
- The Washington Department of Commerce's housing and essential needs program and homeless services program.
- Non-emergency investigations of misconduct by health professionals.
- HIV client services.
- Health inspections of shellfish operations.
- The Washington Department of Health's kidney disease and dialysis program.
- State-only programs including funding for senior citizen services, county community mental health, and individual and family services for the developmentally disabled.
- The Washington Department of Early Learning's working connection child care program and some services providing background checks.
- Certain community outreach programs for veterans.
- Distribution of state funding to local governments, used to support local criminal justice agencies, emergency communications, juvenile detention, mental health, and public safety.
- WorkSource offices.
- Vocational rehabilitation services.
- New applications for worker compensation benefits.

- The Office of Crime Victims Advocacy.
- Transfer of new offenders from county jails to state correctional facilities.
- Most community corrections services.
- Response to requests for GPS tracking for sex offenders.
- Fish and wildlife enforcement.
- Fish hatcheries operation.
- Certain sport and commercial fisheries.
- State parks.
- All activities relating to approximately two dozen business and occupation licenses.
- Complete shutdown of at least 32 state agencies.

Plaintiffs and the Superintendent display no concern for the public value of these programs and services or for the people who rely on them. Again, they have lost sight of the fact that making ample provision for public schools is not the State's *sole* duty. The State has many other important duties, from providing mental health treatment to feeding hungry children, that have an impact on education. Children who are hungry, homeless, or being abused are extremely unlikely to succeed in school. *See* Columbia Legal Servs. Amicus. The State has a responsibility to fund and oversee all of these obligations.

5. "Hold individual legislators in contempt and impose monetary sanctions against them"

It would be an unprecedented and extraordinary intrusion on the legislative branch to hold individual legislators in contempt for failure to take action as legislators, and no case supports such a result. Though the Superintendent advocates this approach, he cites no case in which this Court (or any other State's court) issued a contempt order against any individual legislator for action taken as a legislator, and he says nothing about constitutional limits on the Court's power. This proposed remedy lies outside the Court's constitutional power.

In their 2014 brief, Plaintiffs advocated this remedy, relying on *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), in which the United States sued the city for intentionally maintaining racial segregation in residential areas and schools. The city ultimately entered into a consent judgment, but the city council refused to enact a public housing ordinance it had agreed to. The district court held the city and the four council members who voted against the ordinance in contempt and imposed financial sanctions, and the court of appeals affirmed. The United States Supreme Court reversed this decision as an abuse of judicial discretion because (1) the city council members were not named as parties, (2) the "extraordinary" imposition of sanctions against individual

council members should not have been imposed until sanctions imposed on the city alone failed to secure compli-ance, and (3) considerations supporting the legislative immunity doctrine must inform a court's discretion in imposing sanctions. *Spallone v. United States*, 493 U.S. 265, 280, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990).[22]

Consistent with *Spallone*, any sanction directed toward individual legislators here would be inappropriate because it could force legislators to vote to serve their personal interests (getting out of contempt) rather than the interests of their constituents and the public. Restrictions on legislative freedom undermine representative democracy. Moreover, individual legislators are not parties; Plaintiffs sued the State. And individual legislators do not enact laws; for the State to enact a plan, pass a budget, or fulfill its article IX duty, the Legislature must act collectively. Const. art. II, § 22.

The doctrine of legislative immunity does not, of course, prevent this Court from determining the constitutionality of the Legislature's actions and ordering compliance. That power is beyond question. But legislative immunity is an element of separation of powers. When the Washington Constitution was adopted, the federal Speech or Debate

[22] Because the order of contempt was ordered by a federal court, state constitutional separation of powers limitations were not implicated.

Clause was understood to protect legislators from *any* liability or judicial action for their legislative votes. *Kilbourn v. Thompson*, 103 U.S. 168, 204, 26 L. Ed. 377 (1880). The framers of our Washington Constitution presumably shared that understanding when adopting a state speech and debate clause in article II, section 17.[23] A contempt order here directed at individual legislators or an order threatening or imposing sanctions on individual legislators because of their legislative deliberations or votes would violate article II, section 17.

Moreover, the Superintendent is asking the Court to use the threat of sanctions to compel specific votes, which unmistakably invades the authority vested solely in the Legislature by article II of the Washington Constitution. *See State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 182, 492 P.2d 1012 (1972) (the Legislature's plenary power includes its power "to do those things necessarily incident to the enactment of laws . . . the power is procedural as well as substantive").[24]

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[23] Article II, section 17 was taken from the Wisconsin Constitution [art. IV, § 16]. Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution* 72 (2d ed. 2013). The Wisconsin provision was drafted by its framers to "ensure the independence of the legislature and the integrity of the legislative process by precluding the possibility of intimidation or harassment of members of the legislature." *State v. Beno*, 116 Wis. 2d 122, 141-42, 341 N.W.2d 668 (1984). That provision reaches legislators' actions that "are within the regular course of the legislative process." *Id.* at 143-44. Deliberating on legislation and casting votes on bills is squarely within the regular course of the legislative process.

[24] This Court has acknowledged the coequal status of the Legislature at least since *State ex rel. Reed v. Jones*, 6 Wash. 452, 462-63, 34 P. 201 (1893) (rejecting the "false theory" that only the judiciary can be "entrusted" to enforce the constitution).

In any event, there is more than just the Court's authority to consider. When contemplating sanctions, the potential effectiveness of the sanction to compel the desired outcome must be considered. Does the Superintendent seriously believe that imposing monetary sanctions on individual legislators would lead to legislative progress on school funding? A more dispassionate observer of this case might reasonably conclude that such sanctions would bring legislative progress to a standstill.

III. CONCLUSION

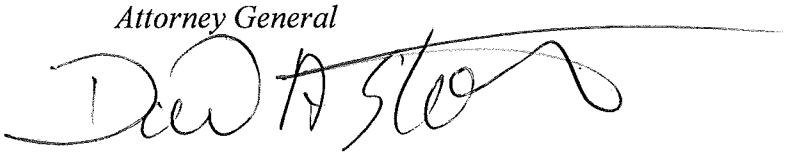
The Legislature has not sat on its hands. Although the remaining steps are big, the Legislature has been progressing along the path toward compliance that this Court and the Superintendent identified as a remedy for the constitutional deficiencies in 2012. *McCleary*, 173 Wn.2d at 484 (describing ESHB 2261 as a "promising reform package . . . which, if fully funded, will remedy deficiencies in the K-12 funding system"); *id.* at 543 (quoting testimony by the Superintendent of Public Instruction, in which he agreed that ESHB 2261 would meet the State's constitutional duty when fully implemented in 2018, if it was fully funded). It is not yet 2018 and the State has not completed its implementation of that "promising reform package," but it has met every deadline along the way and formally committed in E2SSB 6195 to meeting the final

deadline. Because there is no legitimate basis for continuing the order of contempt and the imposition of a sanction, there most certainly is no basis for imposing a heightened sanction.

This Court should dissolve its contempt order against the State and lift the sanction order imposing a daily penalty on the State.

RESPECTFULLY SUBMITTED this 17th day of June 2016.

ROBERT W. FERGUSON
Attorney General



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Appendix

Summary of Major New Jersey School Funding Litigation

Robinson v. Cahill
New Jersey Supreme Court cases, 1970-1976

- In 1970, a lawsuit challenged New Jersey's system of public school funding, claiming it did not comply with the state constitutional requirement to provide a "thorough and efficient" system of public schools (N.J. Const., art. VIII, § 4). The New Jersey Supreme Court held that the state's then-existing system of financing public elementary and secondary schools violated the "thorough and efficient" clause of the state constitution, because it produced gross disparities in per-pupil expenditures, brought about by a substantial reliance upon local taxes. *Robinson v. Cahill* (*Robinson* I), 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973). The court gave the legislature until December 1974 to adopt remedial legislation. *Robinson v. Cahill* (*Robinson* II), 63 N.J. 196, 306 A.2d 65 (1973).

- When the New Jersey legislature took no action, the court scheduled additional briefing and oral argument, *Robinson v. Cahill* (*Robinson* III), 67 N.J. 35, 335 A.2d 6 (1975), after which it imposed an interim remedy in which it ordered a redistribution of education funds to partially equalize the funding disparities for the 1976-77 school year. *Robinson v. Cahill* (*Robinson* IV), 69 N.J. 133, 351 A.2d 713 (1975). Two days before the interim remedy was to take effect, the legislature passed the Public School Education Act of 1975, which contained a new funding equalization mechanism. The *Robinson* plaintiffs immediately challenged the Act, but the court held it was facially constitutional, based on the assumption it would be funded. *Robinson v. Cahill* (*Robinson* V), 69 N.J. 449, 355 A.2d 129 (1976).

- The legislature did not fully fund the Act because of political opposition to a state income tax. In May 1976, over two extended dissents, a divided court issued an order imposing an injunction that would take effect on July 1, 1976, if the legislature did not enact legislation to fund the Act by that date. *Robinson v. Cahill* (*Robinson* VI), 70 N.J. 155, 160-61, 358 A.2d 457 (1976). The conditional

injunction enjoined all public officers in New Jersey "from expending any funds for the support of any free public school," with certain exceptions, beginning on July 1, 1976. *Id.* at 160. The legislature did not act by July 1, 1976 and the injunction took effect. Alfonso Narvaez, "Jersey Schools Closed by Court Order," *New York Times*, July 1, 1976, at A1.

- On July 7, 1976, the legislature passed a bill containing the state's first income tax, and the governor signed it the next day. Alfonso A. Narvaez, "New Jersey Votes State Income Tax; Byrne Signs Bill," *New York Times*, July 9, 1976, at A1. On July 9, at the governor's request, the New Jersey Supreme Court lifted its injunction. *Robinson v. Cahill* (*Robinson* VII), 79 N.J. 464, 360 A.2d 400 (1976).

Abbott v. Burke
New Jersey Supreme Court cases, 1981-2011(?)

- In 1981, an applied challenge to the 1975 Act was filed, again alleging a violation of the "thorough and efficient" clause of the state constitution.[1] *Abbott v. Burke* (*Abbott* I), 100 N.J. 269, 495 A.2d 376 (1985). After a remand for administrative fact finding, the court held the Act unconstitutional as applied to poorer urban school districts (which became known as "Abbott districts"). *Abbott v. Burke* (*Abbott* II), 119 N.J. 287, 575 A.2d 359 (1990).

- The legislature increased state appropriations to Abbott districts, but the court found the increase unconstitutional because it did not assure "substantial equivalence" among school districts. *Abbott v. Burke* (*Abbott* III), 136 N.J. 444, 643 A.2d 575 (1994).

- The legislature then enacted comprehensive reform legislation containing new educational standards to define and assess a thorough and efficient education, funding for regular education as defined by the new educational standards, and funding for supplemental programs determined essential in the Abbott districts. *Abbott v. Burke* (*Abbott* IV), 149 N.J. 145, 693 A.2d 417 (1997). The court declared that

[1] The New Jersey Supreme Court itself seems to have recognized the inevitability of further litigation following its final resolution of *Robinson v. Cahill*. *See Abbott v. Burke* (*Abbott* II), 119 N.J. 287, 300, 575 A.2d 359 (1990) (describing the *Abbott* litigation as "[p]redictably flowing from our decision in *Robinson v. Cahill*, 69 N.J. 449, 355 A.2d 129 (1976) (*Robinson* V)").

legislation to be unconstitutional as applied to the Abbott districts and remanded to the superior court to determine what judicial relief was necessary. *Id.*[2]

- A special master devised recommended reforms, as did state education and finance officials, which the court largely adopted in *Abbott v. Burke* (*Abbott* V), 153 N.J. 480, 710 A.2d 450 (1998). The court ordered the reforms implemented as quickly as possible.[3]

- The plaintiffs continued to press their challenge. Two years later, the court held that there were deficiencies in the implementation of preschool education, but rejected the plaintiffs' request to order even smaller class sizes. *Abbott v. Burke* (*Abbott* VI), 163 N.J. 95, 748 A.2d 82 (2000). The court also clarified the state's funding responsibilities

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[2] Apparently, in response to the decision in *Abbott* IV, a third group of plaintiffs, comprising rural property-poor school districts brought an action alleging the new standards and funding violated the "thorough and efficient" clause of the New Jersey Constitution as applied to them. *See Bacon v. New Jersey State Dep't of Educ.*, 398 N.J. Super. 600, 942 A.2d 827 (2008). That litigation has not so far made its way to the New Jersey Supreme Court, but it was still active as of late last year. *Bacon v. New Jersey State Dep't of Educ.*, 443 N.J. Super. 24, 126 A.3d 1244 (2015).

[3] The New Jersey Supreme Court took it upon itself to determine what reforms would improve educational outcomes:

> [W]e determine and direct that the [state Commissioner of Education] implement whole-school reform; implement full-day kindergarten and a half-day pre-school program for three- and four-year olds as expeditiously as possible; implement the technology, alternative school, accountability, and school-to-work and college-transition programs; prescribe procedures and standards to enable individual schools to adopt additional or extended supplemental programs and to seek and obtain the funds necessary to implement those programs for which they have demonstrated a particularized need; implement the facilities plan and timetable he proposed; secure funds to cover the complete cost of remediating identified life-cycle and infrastructure deficiencies in Abbott school buildings as well as the cost of providing the space necessary to house Abbott students adequately; and promptly initiate effective managerial responsibility over school construction, including necessary funding measures and fiscal reforms, such as may be achieved through amendment of the Educational Facilities Act.

Abbott v. Burke (*Abbott* V), 153 N.J. 480, 710 A.2d 450 (1998). The court ordered these reforms without any reference to or consideration of separation of powers or the constitutional limits on its own authority.

where school districts' circumstances changed over time. *Abbott v. Burke* (*Abbott* VII), 164 N.J. 84, 751 A.2d 1032 (2000).

- The state Department of Education developed a new preschool curriculum strategy, but plaintiffs challenged the pace of implementation and alleged other shortcomings. The court ordered the Department to meet its deadlines and make other improvements. *Abbott v. Burke* (*Abbott* VIII), 170 N.J. 537, 790 A.2d 842 (2002). But four months later, the court granted the Department's request to "relax the remedies for K-12 programs" for one year because of a state budget crisis. *Abbott v. Burke* (*Abbott* IX), 172 N.J. 294, 798 A.2d 602 (2002).

- When disputes arose regarding Department proposals to improve implementation of "whole school reform," the court ordered mediation, which led to agreement on all disputed issues except whether the "relaxation of remedies" could extend another year because of the continuing state budget crisis. The court approved the agreement in *Abbott v. Burke* (*Abbott* X), 177 N.J. 578, 832 A.2d 891 (2003), and allowed the relaxed remedies to continue for another year under a series of administrative and procedural requirements. *Abbott v. Burke* (*Abbott* XI), 177 N.J. 596, 832 A.2d 906 (2003).

- The court issued three decisions the following year addressing other disputes and issues that arose. *Abbott v. Burke* (*Abbott* XII), 180 N.J. 444, 832 A.2d 185 (2004); *Abbott v. Burke* (*Abbott* XIII), 181 N.J. 311, 857 A.2d 173 (2004); *Abbott v. Burke* (*Abbott* XIV), 182 N.J. 153, 862 A.2d 538 (2004).

- In 2005, when the Department failed to file its annual facilities report and most school districts did not meet the deadline for filing long-range facilities plans, the court set new deadlines and ordered the Department and the school districts to comply with them. *Abbott v. Burke* (*Abbott* XV), 185 N.J. 162, 889 A.2d 1063 (2005).

- In 2006, the Court issued two orders addressing school districts' responsibility to file budget requests consistent with the revenue sources set out in the state's budget and their ability to appeal inadequate funding. *Abbott v. Burke* (*Abbott* XVI), 187 N.J. 191, 901

A.2d 299 (2006); *Abbott v. Burke*, 203 N.J. 157, 1 A.3d 602 (2006).[4] The court denied two subsequent requests by the plaintiffs for remedial relief. *Abbott v. Burke* (*Abbott* XVII), 193 N.J. 34, 935 A.2d 1152 (2007); *Abbott v. Burke* (*Abbott* XVIII), 196 N.J. 451, 956 A.2d 923 (2008).

- In 2008, the New Jersey legislature enacted yet another new funding formula, which the plaintiffs challenged. The court declined to afford the new formula a presumption of validity, placed the burden on the state to demonstrate constitutionality, sent the case to a special master to develop an evidentiary record, and required the state to continue complying with the court's orders pending a decision on the constitutionality of the new legislation. *Abbott v. Burke* (*Abbott* XIX), 196 N.J. 544, 960 A.2d 360 (2008). After receiving the special master's report and the arguments of the parties, the court held that the new legislation was constitutional, contingent on adequate funding and further review after implementation. *Abbott v. Burke* (*Abbott* XX), 199 N.J. 140, 971 A.2d 989 (2009).

- Two years later, the court, in a split decision (three justices in the majority, two dissenting, and two not participating), found that the state had not fully funded the new formula and ordered the state to provide full funding to the Abbott districts in future appropriations. *Abbott v. Burke* (*Abbott* XXI), 206 N.J. 332, 20 A.3d 1018 (2011). *Abbott* XXI appears to be the most recent decision issued in that case.

[4] Because of a publisher's error, the second 2006 order was not published until 2010. Perhaps for that reason, that order is not assigned a Roman numeral in New Jersey citations to the *Abbott* decisions and orders.

CERTIFICATE OF SERVICE

I certify that I served a copy of the State Of Washington's Reply Brief And Answer To Amicus Briefs Filed By Arc Of Washington et al., Columbia Legal Services et al., Washington's Paramount Duty, And The Superintendent Of Public Instruction, via electronic mail and U.S. Mail, postage paid, upon the following:

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I certify under penalty of under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of June 2016, at Olympia, Washington.

Wendy R Scharber

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