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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 BRIEF
RESPONDING TO ORDER DATED JULY 14, 2016

ROBERT W. FERGUSON
Attorney General

DAVID A. STOLIER, WSBA 24071
Senior Assistant Attorney General

ALAN D. COPSEY, WSBA 23305
Deputy Solicitor General

Office ID 91087
PO Box 40100-0100
Olympia, WA 98504-0100
360-753-6200

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I. INTRODUCTION

In 2014, the Court held the State in contempt for failing *to submit a complete plan* for meeting the Court's 2018 deadline for constitutional compliance, not for failing to meet the 2018 deadline that had not yet arrived. Order, *McCleary v. State*, No. 84362-7 (Wash. Jan. 9, 2014). As explained in the State's prior briefs,¹ the State now has submitted a complete plan that satisfies the requirements set out in that Order.

In ESHB 2261 (Laws of 2009, ch. 548), the State established a framework for comprehensive reform of basic education and its funding methodology. SHB 2776 (Laws of 2010, ch. 236) quantified the policy aspects of those reforms by establishing specific formula enhancements and specific deadlines for implementing them, but SHB 2776 did not address compensation. The plan enacted in E2SSB 6195 (Laws of 2016, ch. 3) fills that gap by establishing specific steps and timelines for determining the compensation allocation levels necessary to implement the State's program of basic education and for taking legislative action to end reliance on local tax levies to fund that program. Read together,

¹ See State of Washington's Memorandum Transmitting the Legislature's 2016 Post-Budget Report and Requesting the Lifting of Contempt and End of Sanctions (filed May 18, 2016); 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 (filed June 17, 2016).

E2SSB 6195 and SHB 2776 constitute a complete plan for implementing the education reforms the State enacted in ESHB 2261.

Because the State has satisfied the requirements in the Court's January 2014 Order, there is no basis for continuing to hold the State in contempt and levying a daily sanction. The Court should dissolve the contempt order and terminate the daily sanction.

On July 14, 2016, the Court issued an Order directing the parties to appear for oral argument on September 7, 2016, prepared to respond to a series of questions posed by the Court. Order, *McCleary v. State*, No. 84362-7 (Wash. July 14, 2016). That Order also gave the parties an opportunity to brief those questions in advance of oral argument. In this brief, the State responds first to the general questions posed at page 2 of the Order, then in detail to the more specific questions posed at pages 3-4 of the Order.

II. STATE'S RESPONSE TO GENERAL QUESTIONS

(1) What remains to be done to timely achieve constitutional compliance?

The State must complete three tasks to achieve compliance with article IX, section 1 and the Court's 2012 decision.

First, the State must complete implementation of the 2017-18 K-3 class size reductions identified by ESHB 2261 and SHB 2776. This is the

final step to be taken under SHB 2776. Appropriations for those reductions are included in the projected maintenance level funding for the 2017-19 biennium.

Second, the State must continue to adjust state expenditures for basic education under the prototypical school funding model to account for inflation, student enrollment, and other variables. Appropriations for those adjustments are included in the projected maintenance level funding for the 2017-19 biennium.

Third, the State must determine its cost to fully fund salaries needed for school districts to recruit and retain staff to implement the State's statutory program of basic education, and provide that funding. Part IV of ESHB 2261 identified the need for an enhanced salary allocation model that provides the necessary state funding for compensation. The process for adopting a revised salary allocation model was established in E2SSB 6195, with timelines and benchmarks to ensure full consideration in the 2017 legislative session.

(2) How much is it expected to cost?

The current estimated cost to the state to fully fund the program of basic education identified by ESHB 2261 and the implementation program established by SHB 2776 is approximately \$19.7 billion for the 2017-19 biennium. *See* response to question (c)(1) *infra* pp. 17-19.

The estimated cost to the State to fully fund salaries needed for school districts to recruit and retain staff to implement the State's statutory program of basic education is not yet known. As explained in response to question (d), at pages 26-33 below, various working groups have provided a range of estimates, but none of those estimates included all the information necessary to determine the State's cost for compensation. The information necessary to determine that cost is being gathered through the processes established in E2SSB 6195.

(3) How does the State intend to fund it?

This is a decision for the 2017 Legislature and cannot be answered at this time. The Legislature committed in E2SSB 6195, § 4 to take legislative action by the end of the 2017 session to fully fund the State's statutory program of basic education and end school district dependence on local levies to implement that program.

(4) What significance, if any, should the Court attach to E2SSB 6195 in determining compliance with the Court's Order to provide a complete plan?

In E2SSB 6195, the Legislature enacted a plan that (1) established specific steps and timelines for developing evidence-based recommendations as to compensation levels the State should fund to hire and retain staff who implement the State's program of basic education, and (2) committed to legislative action by the end of the 2017 session to

fully fund the State's program of basic education and eliminate school district dependence on local levies to implement that program. By establishing a plan to provide for compensation by the 2018 deadline, E2SSB 6195 thus fills the gap left in SHB 2776. Read together with ESHB 2261 and SHB 2776, E2SSB 6195 satisfies this Court's January 9, 2014, Order for a plan.

Because the State has complied with the Court's January 9, 2014, Order for a plan, the State has purged contempt and the Court should dissolve the contempt order and terminate sanctions.

III. STATE'S RESPONSE TO SPECIFIC QUESTIONS

- (a) **Does the State view the 2018 deadline as referring to the beginning of the 2017-18 school year, to the end of the 2017-18 fiscal year, to the end of 2018, or to some other date?**

Based on the Court's prior holdings in this case, the State understands "the 2018 deadline" to refer to September 1, 2018.

This Court first endorsed a 2018 deadline in its 2012 decision, and it did so by adopting the 2018 deadline established by the Legislature in ESHB 2261:

A better way forward is for the judiciary to retain jurisdiction over this case to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty. . . . We defer to the legislature's chosen means of discharging its article IX, section 1 duty, but the judiciary will retain jurisdiction over

the case to help ensure progress in the State's plan to fully implement education reforms by 2018.

McCleary v. State, 173 Wn.2d 477, 545-47, 269 P.3d 227 (2012). Since the 2012 opinion, the Court often has reiterated that its goal in retaining jurisdiction is “to monitor the State’s progress in implementing the reforms that the legislature had recently adopted by the 2018 deadline *that the legislature itself had established*.”² Thus, the crucial question in determining the relevant 2018 deadline is what deadline ESHB 2261 set.

ESHB 2261 established September 1, 2018, as the deadline for fully implementing the enacted reforms. Section 1 of ESHB 2261 stated the Legislature’s intent to fully implement its redefined statutory program of basic education and funding “by 2018.” Section 114 provided the specific date, instructing the Quality Education Council to devise a schedule for full implementation “by September 1, 2018,” the beginning of the 2018-19 school year. ESHB 2261, § 114(5)(b)(iii). SHB 2776 enacted the implementation schedule devised by the Quality Education Council and set deadlines for phasing in the new program by 2018. SHB 2776 did not change the 2018 deadline for full implementation—rather, it set a schedule for meeting that deadline. The September 1, 2018, deadline

² Order, *McCleary v. State*, No. 84362-7, at 2 (Wash. Aug. 13, 2015) (emphasis added); see Order, *McCleary v. State*, No. 84362-7, at 1 (Wash. Sept. 11, 2014) (same); see also Order, *McCleary v. State*, No. 84362-7, at 3 (Wash. July 18, 2012) (Court’s goal in retaining jurisdiction is to ensure “full compliance with article IX, section 1 by 2018”); Order, *McCleary v. State*, No. 84362-7, at 1 (Wash. Dec. 20, 2012) (same).

enacted in ESHB 2261 was unchanged.³ It is the deadline “the legislature itself had established”⁴ and that the Court retained jurisdiction to enforce.

The other possible deadlines suggested by the Court’s question are contrary to this Court’s prior statements and to the legislative deadline in ESHB 2261 that the Court endorsed.

The first alternative deadline suggested by the Court is “the beginning of the 2017-2018 school year[.]” Order at 3 (July 14, 2016). But that deadline would require the State to achieve compliance by September 2017, a year earlier than specified in ESHB 2261 and in conflict with the Court’s repeated description of the deadline as falling in 2018.⁵ It also would ignore this Court’s commitment that it would not “require[] that full funding be achieved in advance of the 2018 deadline,”⁶ but was instead requiring the State to “present its *plan* for achieving compliance by

³ SHB 2776 set “the 2017-18 school year” as the deadline for specified reductions in K-3 class size and for full implementation of all-day kindergarten. SHB 2776, §§ 2(4)(b), 4(1). That was one of several intermediate implementation deadlines adopted in SHB 2776, not a change to the deadline enacted in ESHB 2261.

⁴ Order at 2 (Aug. 13, 2015); Order at 1 (Sept. 11, 2014).

⁵ See, e.g., Order at 2 (Aug. 13, 2015) (describing purpose of retaining jurisdiction as being “to monitor the State’s progress in implementing the reforms that the legislature had recently adopted by the 2018 deadline that the legislature itself had established”); Order at 1 (Sept. 11, 2014) (same); Order at 3 (July 18, 2012) (Court’s goal in retaining jurisdiction is to ensure “full compliance with article IX, section 1 by 2018”); Order at 1 (Dec. 20, 2012) (same); *id.* at 2 (describing “2018” as a “firm deadline for full constitutional compliance”); Order at 1-2 (Jan. 9, 2014) (same); *McCleary*, 173 Wn.2d at 547 (Court will retain jurisdiction “to help ensure progress in the State’s plan to fully implement education reforms by 2018”).

⁶ Order at 7 (Aug. 13, 2015).

its own deadline of 2018.”⁷ Moreover, in measuring progress, the Court required the State to submit reports “at the conclusion of each legislative session from 2013 through 2018 inclusive.”⁸ That timeframe would make no sense if the true deadline were before the 2018 legislative session even began. In short, there is no support for adopting September 2017 as the “2018 deadline.”

The other possible deadlines mentioned in the Court’s question—“the end of the 2017-2018 fiscal year” and “the end of 2018,” Order at 3 (July 14, 2016)—likewise find no support in this Court’s prior holdings or in legislative enactments. The Court should instead confirm the deadline it originally endorsed and repeatedly confirmed: “the 2018 deadline *that the legislature itself had established*”⁹—September 1, 2018. ESHB 2261, § 114(5)(b)(iii).

- (b) Does E2SSB 6195, when read together with ESHB 2261 and SHB 2776, satisfy this Court’s January 9, 2014, Order for a plan and, if not, what opportunities, if any, remain for the Legislature to provide the plan required by that January 9, 2014, Order?**

We respond to the subparts of this question separately.

⁷ Order at 8 (Aug. 13, 2015) (second emphasis added).

⁸ Order at 2 (July 18, 2012).

⁹ Order at 2 (Aug. 13, 2015) (emphasis added); *see* Order at 1 (Sept. 11, 2014) (same).

- (1) ***Does E2SSB 6195, when read together with ESHB 2261 and SHB 2776, satisfy this Court’s January 9, 2014, Order for a plan?***

The answer is yes, as explained at pages 6 and 8-11 of the *2016 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* (May 18, 2016) (*2016 Report*) and at length in the State’s briefs filed on May 18, 2016, and June 17, 2016.

The Court described ESHB 2261 and SHB 2776, read together, as the “State’s plan to fully implement education reforms by 2018.” *McCleary*, 173 Wn.2d at 547. As explained in the State’s prior reports and briefs, that plan established a schedule—with specific benchmarks—to complete implementation by the 2018 deadline enacted in ESHB 2261:

- Full phase-in of the new distribution formula for pupil transportation was to begin by the 2011-13 biennium and be fully implemented by the 2013-15 biennium. SHB 2776, § 8(1). *The State met this deadline*: the 2013-15 biennial budget provided full funding for the actual expected costs of transportation under the new formula.¹⁰ The 2015-17 biennial

¹⁰ See *Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* at 12-13 (Aug. 29, 2013) (*2013 Report*); Laws of 2013, 2d Sp. Sess., ch. 4, § 505 (3ESSB 5034); see also *2014 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* at 11-14 (as corrected May 1, 2014) (*2014 Report*) (explaining application of the pupil transportation funding formula); *id.* at 46-50 (explaining relationship between fiscal years and school years when funding the pupil transportation expected cost model).

budget carried forward that full funding.¹¹ The Legislature has continued to increase funding in response to changing variables,¹² and further increases are included in the projected maintenance level funding for the 2017-19 biennium.¹³

- The minimum per-student allocation for maintenance, supplies, and operating costs (MSOC) was to be fully funded by the 2015-16 school year, and adjusted annually for inflation thereafter. SHB 2776, § 2(8)(b). *The State met this deadline:* per pupil MSOC allocation more than doubled by 2015-16, increasing from \$546.37 per student in the 2011-12 school year to \$1,210.05 per student in the 2015-16 school year.¹⁴ The allocation was increased for inflation in the 2016-17 school year,¹⁵ and further increases for inflation and enrollment

¹¹ 2016 Report at 17; 2015 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation at 8 (July 27, 2015) (2015 Report); Laws of 2015, 3d Sp. Sess., ch. 4, § 502(8) (ESSB 6052).

¹² 2016 Report at 17.

¹³ See *Current Near General Fund-State(NGF-S) Allocations for K-12 Public Schools and Estimated Cost to Continue Current Law Basic Education Policies*, prepared by staff for the Joint Select Committee on Article IX Litigation, attached as Appendix A to this brief. See also State's Reply Brief at 16-17 (filed June 17, 2016) (explaining "maintenance level" as that term is used in the state budgeting process).

¹⁴ 2015 Report at 8.

¹⁵ 2016 Report at 14.

growth are included in the projected maintenance level funding for the 2017-19 biennium.¹⁶

- Full statewide implementation of voluntary all-day kindergarten was to be completed by the 2017-18 school year. SHB 2776, § 4(1). *The State met this deadline.* In fact, the State met this deadline a year early, fully funding all-day kindergarten for the 2016-17 school year.¹⁷ Continued full funding and adjustments for increased enrollment are both included in the projected maintenance level funding for the 2017-19 biennium.¹⁸
- Funding allocations sufficient to support average K-3 class sizes of 17 full-time equivalent students per teacher were to be phased in, beginning in the 2011-13 biennium with schools with the highest percentage of students eligible for free and reduced-price meals, and including all schools by the 2017-18 school year. SHB 2776, § 2(4)(b). *The State is meeting this deadline.* By focusing first on high-poverty schools and grades K-1, the Legislature allocated funds for the 17-student average

¹⁶ App. A.

¹⁷ *2016 Report* at 15; *2015 Report* at 8-9; Laws of 2015, 3d Sp. Sess., ch. 4, § 502(12) (ESSB 6052).

¹⁸ App. A.

a year early in these schools, and it remains on schedule to meet the 2017-18 deadline for all schools. *See 2016 Report* at 15-16, 30-33. The allocations necessary to meet that deadline are included in both the projected maintenance level funding for the 2017-19 biennium¹⁹ and in the four-year balanced budget projection.²⁰

Since 2012, when the *McCleary* decision was issued, the Legislature has substantially increased the real dollars in per-pupil spending under the prototypical school funding model for these four components of basic education. Had the Legislature not enacted ESHB 2261 and SHB 2776, there would have been an increase in state spending for basic education anyway because of inflation and student enrollment. But the actual increase in spending is substantially greater because of implemented changes to the prototypical school funding model in ESHB 2261 and SHB 2776—\$1,336,536,000 more in the 2016-17 fiscal year,²¹ and \$1,639,356,000 more in the 2017-18 fiscal year as the State meets its

¹⁹ App. A.

²⁰ *2016 Report* at 16-17, 28.

²¹ App. A. This number is the sum of the allocations in FY 2017 for the first four policy enhancements listed, as follows:

K-3 class size reductions	\$330,974,000
All day kindergarten	\$167,094,000
MSOCs	\$695,957,000
Transportation	\$142,511,000
Sum	\$1,336,536,000

target for K-12 class size reductions.²² Other enhancements to the State’s program of basic education increase these totals by more than \$340 million annually.²³ These are actual increases in state funding of basic education—nearly *\$1.7 billion per year* more in 2016-17, rising to nearly *\$2.0 billion per year* more in 2017-18 than it otherwise would have.²⁴ This is real, measurable progress in response to this Court’s 2012 decision. In other words, the State kept faith with the plan it enacted in ESHB 2261 and SHB 2776.

In January 2014, however, concerned in part that the State was not yet addressing the underfunding of educator and staff salaries, the Court ordered the State to submit a “complete plan” for phasing in funding and fully implementing each component of its program of basic education

²² App. A. This number is the sum of the allocations in FY 2018 for the first four policy enhancements listed, as follows:

K-3 class size reductions	\$592,549,000
All day kindergarten	\$188,942,000
MSOCs	\$713,940,000
Transportation	\$143,925,000
Sum	\$1,639,356,000

²³ *Id.* This number is the sum of the allocations FY 2017 and FY 2018 that are not listed above, as follows:

	FY 2017	FY 2018
24 credits/increased hours	\$227,185,000	\$228,637,000
Parent engagement coordinator	\$7,343,000	\$7,739,000
Middle school guidance counselor	\$3,358,000	\$3,385,000
Learning Assistance Program	87,649,000	\$89,119,000
Bilingual Instruction	\$16,624,000	\$17,589,000
Sum	\$342,250,000	\$346,307,000

²⁴ *Id.* These numbers are in the bottom row (Grand Total) for FY 2017 (\$1,678,785,000) and for FY 2018 (\$1,985,663,000).

through the 2017-18 school year. Order at 8 (Jan. 9, 2014). Presumably, the Court viewed SHB 2776 as an incomplete plan because it did not address state funding for competitive salaries and benefits for certificated instructional staff, administrators, and classified staff implementing the state program of basic education. That omission was corrected by the plan enacted as E2SSB 6195.

The plan in E2SSB 6195 fills the gap left in SHB 2776 by establishing specific steps and timelines for determining the compensation levels necessary to implement the State's statutory program of basic education and for taking legislative action to eliminate the reliance on local tax levies to fund that program. The State's response to question (d), at pages 26-33 below, explains why those steps are necessary and details the major elements of the plan enacted in E2SSB 6195:

- Create the Education Funding Task Force, E2SSB 6195, § 2(1), (6)-(10);
- Select and fund professional consultants, *id.*, §§ 3(1), 5;
- Gather the necessary compensation data, *id.*, § 3(1), (2);
- Provide timely analysis to the Task Force and the Governor, *id.*, § 3(1), (3) (interim report due September 1, 2016), (4) (final data and analysis due November 15, 2016);

- Produce recommendations for compensation sufficient to hire and retain staff that implement the State's program of basic education, E2SSB 6195, § 2(2);
- Produce recommendations for providing and funding health benefits for those staff, *id.*, § 2(5)(e);
- Produce recommendations to address the problem of teacher shortages, *id.*, § 2(4);
- Produce recommendations as to whether and how to account for salary differences in local labor markets, *id.*, § 2(2);
- Produce recommendations as to how to improve school districts' accountability, *id.*, § 2(5)(d);
- Produce recommendations as to sources of State revenue to fund the State's program of basic education, *id.*, § 2(5)(f);
- Require all recommendations to be made to the Legislature by the first day of the 2017 legislative session, *id.*, § 2(11); and
- Commit to legislative action by the end of the 2017 session to fully fund the State's program of basic education and eliminate school district dependence on local levies to implement that program, *id.*, §§ 1, 4.

E2SSB 6195 thus establishes explicit benchmarks the Court may use to assess the Legislature's progress under this plan.

Some amici dismissed E2SSB 6195 as a promise to act, not action. But that's exactly what a plan is—a statement of an intended course of action. E2SSB 6195 commits to a course of action in the only constitutionally permissible way available to the Legislature—by enacting legislation, voted on and approved by majorities in both houses.

Moreover, as explained in the State's Reply Brief at 12-13 (filed June 17, 2016), the plan enacted in E2SSB 6195 is already being implemented.²⁵ The promise is already being kept.

The plan enacted in E2SSB 6195 completes the plan enacted in ESHB 2261 and SHB 2776. Read together with those earlier statutes, E2SSB 6195 satisfies this Court's January 9, 2014, Order for a plan.

(2) If not, what opportunities, if any, remain for the Legislature to provide the plan required by that January 9, 2014, Order?

Because E2SSB 6195 satisfies this Court's January 9, 2014, Order for a plan, when read together with ESHB 2261 and SHB 2776, this question need not be addressed.

²⁵ The most recent meeting of the Joint Education Funding Task Force was on July 13, 2016, at which it received information about regional differences in staff salaries, school district spending on basic and non-basic education and salaries, collective bargaining by school districts, and health benefits. Joint Education Funding Task Force, Agenda for July 13, 2016, <https://app.leg.wa.gov/CMD/agenda.aspx?agency=4&year=2016&cid=17131&mid=25344#> (last visited Aug. 18, 2016). Its next meetings are set for September 6 and 21, 2016.

However, if the Court were to conclude that this combination of legislation is not a complete plan, the Legislature, during the 2017 legislative session, could enact further detail (responding to the Court's direction) to meet the September 1, 2018, deadline.

- (c) **What is the estimated current cost of full state funding of the program of basic education identified by ESHB 2261 (RCW 28A.150.220) and the implementation program established by SHB 2776, including, but not limited to, the costs of materials, supplies, and operating costs; transportation; and reduced class sizes for kindergarten through third grade and all-day kindergarten, with the costs of reduced class sizes and all-day kindergarten to include the estimated capital costs necessary to fully implement those components and the necessary level of staffing?**

We respond to the subparts of this question separately.

- (1) *What is the estimated current cost of full state funding of the program of basic education identified by ESHB 2261 (RCW 28A.150.220) and the implementation program established by SHB 2776, including, but not limited to, the costs of materials, supplies, and operating costs; transportation; and reduced class sizes for kindergarten through third grade and all-day kindergarten?*

The estimated cost of full state funding of the program of basic education identified by ESHB 2261 and the implementation program established by SHB 2776 is approximately \$19,655,157,000 for the next biennium. That number represents the estimated total cost of carrying forward the basic education policies implemented in the 2015-17 biennium plus the cost of implementing the remaining K-3 class size

reduction policy and adjusting for projected student enrollment and inflation for the 2017-19 biennium.²⁶ Appendix A shows the total costs for basic education based on the 2015-17 enacted budget and the projected total costs in the forthcoming 2017-19 biennium. It also breaks down costs associated with the four policy enhancements identified in SHB 2776, as well as the other policy enhancements enacted by the Legislature in Laws of 2014, ch. 217 (E2SSB 6552).²⁷ Therefore, the estimated cost includes, but is not limited to “the costs of materials, supplies, and operating costs^[28]; transportation; and reduced class sizes for kindergarten through third grade and all-day kindergarten.” Of the \$1.47 billion difference between the projected 2017-19 biennial costs and the 2015-17 biennial numbers, nearly \$800 million is attributable to the completion of K-3 class size reduction. In FY 2018, it is estimated that it will require a total of \$592,549,000 to fund the fully implemented K-3 class size

²⁶ App. A.

²⁷ E2SSB 6552 enacted some additional enhancements initiated by E2SHB 2261 as described in the *2014 Report* at pages 17-24.

²⁸ In question (d), the Court asked about costs related to professional development. Professional development is a component of the materials, supplies, and operating costs and is built into the MSOC enhancement numbers. RCW 28A.150.260(8).

reductions. Those costs will increase to \$658,329,000 in FY 2019, resulting in a biennial expenditure of \$1,250,878,000.²⁹

(2) *What are the estimated capital costs necessary to fully implement reduced class sizes for kindergarten through third grade and all-day kindergarten under ESHB 2261 (RCW 28A.150.220) and SHB 2776?*

The Washington Constitution treats capital construction differently from operating costs of education and contemplates a shared responsibility between school districts and the State. The Legislature has not defined capital construction as part of the program of basic education and the contours of the shared responsibility and decision-making concerning school facilities have not been part of this case. Capital construction was not addressed in this Court's 2012 decision nor has the constitutional relationship between state and local decision-making on school facilities been adjudicated in any other case.

Since statehood, the Constitution has assumed that school district voters will incur debt to construct school facilities. Article VIII, section 6 imposes limitations on municipal indebtedness, but it contains an exception that authorizes school districts, with voter assent, to incur a

²⁹ Reading across the rows in Appendix A, the table shows costs to "Reduce Early Elementary Class Size in Grades K-3" of \$330,974,000 in FY 2017. That amount increases by an estimated \$261,575,000 to an estimated \$592,549,000 to fund the fully implemented K-3 class size reductions in FY 2018. Those costs will increase to \$658,329,000 for FY 2019 to maintain full implementation. Each of these numbers thus shows the estimated annual cost of this educational reform.

greater amount of debt specifically for capital outlays. Debt incurred by school districts is not state debt. Const. art. VIII, § 1(e).

Article VII, section 2 establishes a property tax limit and conditions under which the Legislature may authorize local governments to collect voter-approved property taxes above that limit. With voter approval, school districts may levy additional tax to support the construction, modernization, or remodeling of school facilities for a period not to exceed six years. Const. art. VII, § 2(a). School districts also may exceed the limitation on tax levies “for the sole purpose of making the required payments of principal and interest on general obligation bonds issued solely for capital purposes” Const. art. VII, § 2(b).

Article IX, section 3 establishes the Common School Construction Fund to provide a dedicated source of state funding for school construction. Revenues to that fund consist of timber revenue, rental and other revenue, and interest earnings on the Permanent School Construction Fund. Const. art. IX, § 3.

Taken together, these sections plainly contemplate that both the State and school districts will contribute to the capital costs of K-12 schools. The obligation to construct new classrooms is not assigned solely to the State. Moreover, because school facilities are owned by the districts themselves, decisions concerning those assets have long been understood

to be primarily matters of local control. *Edmonds Sch. Dist. 15 v. City of Mountlake Terrace*, 77 Wn.2d 609, 465 P.2d 177 (1970); RCW 28A.335.090.³⁰ It is precisely for these reasons that reports about the total need for new classrooms statewide (such as the system capacity reports produced by OSPI, referenced below) are not measures of the State’s funding responsibility. That responsibility is shared with school districts.

Capital construction costs are not a purely State obligation, and neither this case nor any other has addressed whether or to what extent the Washington Constitution determines how the State and school districts are to share responsibility and decision-making concerning school facilities. Nevertheless, the Legislature has taken many steps to assess districts’ space needs and ensure that they have adequate space.

ESHB 2261 contained provisions addressing the “educational system’s capacity to accommodate increased resources in relation to the elements in the prototypical funding allocation model.” RCW 28A.300.172(1) (ESHB 2261, § 113). It required the Legislature to review recommendations of the Superintendent of Public Instruction concerning capacity issues and to make use of the information as it

³⁰ Antecedents of this statute provided local school boards with control of school district facilities as far back as 1890.

“continues to review, evaluate, and revise the definition and funding of basic education”; “continues to fulfill the state’s obligation under Article IX”; and “ensures that no enhancements are imposed on the educational system that cannot be accommodated by the existing system capacity.” RCW 28A.300.172(2).

OSPI issued system capacity reports to the Legislature in 2011, 2013, and most recently in February 2015.³¹ The reports show that capital facilities and costs for construction vary widely from district to district.³² Construction costs can change very quickly and depend on whether adding a classroom is a standalone project or part of a larger construction project.³³ The reports provide less clarity as to how much additional space districts currently need, in part because the data are self-reported and have not been independently verified.³⁴

Because of the uncertainty in data quality, and because of the substantial flexibility afforded school districts under the prototypical

³¹ System capacity reports are available at <http://www.k12.wa.us/LegisGov/Reports.aspx>.

³² Office of Superintendent of Public Instruction, *Educational System Capacity to Accommodate Increased Resources*, at 10 (Feb. 2015), www.k12.wa.us/LegisGov/2015documents/2014CapacityReport.pdf.

³³ *Id.* at 6-7, 12.

³⁴ For example, in Appendix A of the 2015 System Capacity Report (*supra* note 30), more than 20 schools reported needing 1 or more additional classrooms (with some reporting a need as high as 40 classrooms) while also reporting that they currently have 0 classrooms. The difference between the stated need and 0 was then reported as a classroom shortage. The accuracy of these data is suspect.

school funding model, the State does not have accurate data necessary to provide the Court a good estimate of whether and to what extent full implementation of ESHB 2261 and SHB 2776 will result in additional classroom needs. Consistent with ESHB 2261, therefore, the Legislature responded to the system capacity survey information by taking important steps, described below, to gather accurate data for purposes of improving school construction programs going forward. It did so in the context of establishing a pilot K-3 classroom construction grant program³⁵ and supplementing the existing school construction assistance program with an appropriation of \$5.5 million for modular classrooms to support reduced class sizes in K-3.³⁶

The Legislature established a multistep process for school districts to receive K-3 class size reduction grants. The process includes verifying the need for adding classrooms, verifying school district readiness to proceed with construction, and implementing certain assumptions related to whether additional classrooms or whole new schools are implicated. RCW 28A.525.058. Along with the class size reduction grant program, the Legislature initiated procedures to ensure the State gathers accurate data concerning school facilities inventory.

³⁵ RCW 28A.525.058; Laws of 2016, 1st Spec. Sess., ch. 35, § 5006; Laws of 2015, 3d Sp. Sess., ch. 3, § 5028.

³⁶ Laws of 2016, 1st Sp. Sess., ch. 35, § 1022.

First, the Legislature appropriated \$2.3 million to Washington State University to collect, input, and verify public school facilities data to provide a more comprehensive understanding of school district needs.³⁷ WSU is conducting on-site school visits to assess inventory and condition of facilities. It will verify school district facility data and the accuracy of the OSPI surveys. WSU is collecting data related to schools and space allocations for various classroom and administrative spaces, entering those data into the State's inventory system, and verifying the number of classrooms available for use. WSU's initial report was submitted in December 2015.³⁸ The final report is due December 2016. WSU verification is a prerequisite for schools seeking class size reduction grants. Laws of 2015, 3d Sp. Sess., ch. 41.

Second, the Legislature directed OSPI to contract with Educational Service District 112 (ESD 112) to perform an analysis of school construction costs, to try to reconcile variations in construction costs among different projects, districts, and regions. OSPI is to submit a report

³⁷ Laws of 2016, 1st Spec. Sess., ch. 35, § 5008; Laws of 2015, 3d Sp. Sess., ch. 3, § 5054.

³⁸ Wash. State Univ., *Inventory and Assess the Condition of Washington Schools: Initial Report to the Washington State Legislature* (Dec. 1, 2015), http://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=WSU%20Energy%20Program%20Legislative%20Report%20December%202015_96e69ad0-520c-4b62-b13d-aaa3d9b9558a.pdf.

on the ESD 112 findings to the Legislature and the Office of Financial Management (OFM) on September 1, 2016.³⁹

Third, the Legislature created a school construction technical work group, consisting of legislative and OFM staff, to monitor the K-3 class size reduction grant pilot program and a new STEM capital grant program, along with the work done by WSU and by ESD 112. The work group is to identify issues for the Legislature to consider to improve how state assistance is provided to school districts to design, build, and maintain public schools. Laws of 2016, 1st Sp. Sess., ch. 35, § 6018. A final report is due to the Legislature by January 15, 2017. *Id.*

The State's review of system capacity is ongoing and includes efforts to refine enrollment projections and facilities inventory, to improve various capital programs, and to gather accurate data to inform legislative decision-making in this area. The State can and will fully implement the prototypical school model's allocation to school districts based on a teacher for every 17 students in grades K-3 by the 2017-18 school year and will fully fund the staffing for schools that provide all day kindergarten programs.

³⁹ Laws of 2016, 1st Sp. Sess., ch. 35, § 5003; Laws of 2015, 3d Sp. Sess., ch. 3, § 5012.

(d) What is the estimated cost of full state funding of competitive market-rate basic education staff salaries, including the costs of recruiting and retaining competent staff and professional development of instructional staff?

The estimated cost is not yet known for reasons explained below.

Prior reports have provided a range of cost estimates, but these estimates generally included new policy proposals that would expand the State's statutory program of basic education. For example, in 2012, the Compensation Technical Working Group estimated a total additional annual cost of approximately \$2 billion to fully implement its recommendations, which included not just salary increases, but additional professional development days, allocations for mentors and instruction coaches, allocations for substitute teachers, and additional allocations for special education.⁴⁰ That same year, making different assumptions, the Joint Task Force on Education Funding estimated the dramatically lower annual cost of \$681.5 million to provide "a labor-market-based salary for each classified and administrative full-time-equivalent staff unit generated by the prototypical model."⁴¹ At the other end of the range, the Office of Superintendent of Public Instruction recommended in 2014 that the State

⁴⁰ *Compensation Technical Working Group Final Report 20* (June 30, 2012), <http://www.k12.wa.us/Compensation/CompTechWorkGroupReport/CompTechWorkGroup.pdf>.

⁴¹ *Joint Task Force on Education Funding Final Report 3, 5* (Dec. 2012), <http://leg.wa.gov/JointCommittees/Archive/EFTF2012/Documents/JTFEF%20Final%20Report%20-%20combined%20%282%29.pdf>.

pay more than \$3.3 billion of additional money for compensation in the 2017-18 school year, along with another \$490 million for additional professional development.⁴²

In addition, there are reports that identify actual salaries paid by local school districts to administrators and staff. For example, the total amount of district-by-district compensation paid to education staff is reported yearly by OSPI.⁴³ OSPI reports the average base salary per FTE for certificated instructional staff for the 2015-16 school year as \$54,135.⁴⁴ That amount represents the portion currently paid by the State.⁴⁵ OSPI reports the average actual salary per FTE for certificated instructional staff for the 2015-16 school year as \$65,541.⁴⁶ That difference, approximately \$11,400 per FTE, is paid through annual supplemental contracts negotiated at the local level. State law allows such supplemental contracts

⁴² Office of Superintendent of Public Instruction, *2015 Biennial Budget Request: Funding McCleary* 6 (Oct. 1, 2014), <http://www.k12.wa.us/LegisGov/2015documents/N0FundingMcCLEary.pdf>.

⁴³ The most recent such report is from the Office of Superintendent of Public Instruction titled *Preliminary School District Personnel Summary Reports, 2015-16 School Year* (Feb. 2016), located at <http://www.k12.wa.us/safs/PUB/PER/1516/All.pdf> (2015-16 Salary Report).

⁴⁴ *2015-16 Salary Report* at 186.

⁴⁵ The base amount is calculated for each individual by multiplying the derived base salary allocation for certificated instructional staff for a school district (see LEAP Document 2 at <http://leap.leg.wa.gov/leap/budget/leapdocs/2015L2.pdf>) times the staff mix factor for the individual, which is tied to the individual's experience and education (see LEAP Document 1 at <http://leap.leg.wa.gov/leap/budget/leapdocs/2015L1.pdf>).

⁴⁶ *2015-16 Salary Report* at 186. OSPI cautions that this average is overstated because of the calculation per 1.0 FTE. *Id.* at 11.

to compensate certificated instructional staff for additional time, additional responsibilities, incentives, or educational enhancements, but it prohibits the use of supplemental contracts to provide services that are part of the State's program of basic education. RCW 28A.400.200(4). If school districts are in compliance with RCW 28A.400.200(4), then the additional salary paid through supplemental contracts is not the State's responsibility, because it is not compensation for implementing the State's program of basic education.⁴⁷

As this Court recognized in 2012, however, some school districts may be using supplemental contracts to pay for basic education responsibilities while claiming to compensate activities and enhancements for which such contracts are authorized. *McCleary*, 173 Wn.2d at 536-37. The extent to which school districts do so is unknown, because the reporting system established by OSPI does not track the purposes for which supplemental contracts are negotiated or how districts use state funds or local levy funds. *See id.* at 538 (neither F-196 form nor accounting records revealed whether schools actually used local funds for basic education program expenditures). Until this information is obtained,

⁴⁷ Article IX, section 1 of the Washington Constitution requires the State to amply fund the cost of basic education, not enhancements to basic education or enrichment programs. *McCleary*, 173 Wn.2d at 536; *Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 476, 526, 585 P.2d 71 (1978). The State has chosen to give school districts the authority to choose and fund enhancements. RCW 28A.400.200.

it is not possible to accurately determine what portion of the supplemental salaries are actually in support of basic education, and therefore it is not possible to accurately determine the cost of the State's additional compensation responsibility.⁴⁸

Consequently, there is no available report or combination of reports that provides the crucial information necessary to determine the State's cost to fully fund salaries needed for school districts to recruit and retain staff to implement the State's statutory program of basic education:

- (1) The district-by-district compensation paid beyond the State salary allocations generated through the prototypical school model that is attributable to the State's program of basic education;
- (2) The funding sources of the additional paid compensation; and
- (3) The precise mix of basic education and local enhancement duties supported by the additional pay.⁴⁹

⁴⁸ As one example, the prototypical model drives state funding to school districts based on specified staffing assumptions, but state law does not control local staffing decisions. School districts can and do depart from the staffing assumptions of the prototypical model to meet local needs and preferences. *See* Kate Davis & Jessica Harrell, *Overview of K-12 Public School Staffing*, slide 14 (June 8, 2016), <https://app.leg.wa.gov/CMD/Handler.aspx?MethodName=getdocumentcontent&documentId=E3VPvtYtjFo&att=false>.

⁴⁹ E2SSB 6195, § 1.

An explicit purpose and key objective of the Education Funding

Task Force established in E2SSB 6195 is to obtain this information:

In consultation with the education funding task force established in section 2 of this act, the Washington state institute for public policy shall contract for independent professional consulting services to:

(a) Collect K-12 public school staff total compensation data, and within that data, provide an analysis of compensation paid in addition to basic education salary allocations under the statutory prototypical school model, source of funding, and the duties, uses, or categories for which that compensation is paid;

(b) Identify market rate salaries that are comparable to each of the staff types in the prototypical school funding model[.]”

E2SSB 6195, § 3(1). “This foundational data is necessary to inform the legislature’s decisions.” *Id.*, § 1.

E2SSB 6195 also provides a protocol for gathering and assessing information about regional differences, including current differences in salaries across the State. The professional consultant is directed to

[p]rovide analysis regarding whether a local labor market adjustment formula should be implemented and if so which market adjustment factors and methods should be used.

Id., § 3(1)(c). Adjustments might be appropriate to reflect different costs of living, challenges in recruiting and retaining staff, or special circumstances in a district or school.

Data collection by the consultant began in June 2016.⁵⁰ OSPI and school districts are directed to cooperate fully with the consultant. E2SSB 6195, § 3(2).

The consultant must provide an interim report to the Education Funding Task Force and the Governor by September 1, 2016. *Id.*, § 3(3). The final data and analysis must be provided to the Education Funding Task Force and the Governor by November 15, 2016. *Id.*, § 3(4).

The Education Funding Task Force must use the data and analysis provided by the consultant, along with previous information and analysis provided to the Legislature, to make recommendations for compensation sufficient to hire and retain the staff funded under the statutory prototypical school funding model and an associated salary allocation model. *See* E2SSB 6195, § 2(2) (directing the Education Funding Task Force to recommend levels of compensation sufficient to hire and retain the educational staff funded under the prototypical school funding model); *id.*, § 2(2)(b) (directing the Education Funding Task Force to recommend whether and how to adjust salaries among school districts to account for differences in local labor markets); *id.*, § 2(5)(c) (directing the Education

⁵⁰ Annie Pennucci, Wash. State Inst. for Pub. Policy, *K-12 Public School Staff Compensation: Update of Consultant Selection and Data Collection*, slide 13 (June 8, 2016), <https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=u8uTAn7Ba70&att=false>.

Funding Task Force to make recommendations to clarify the distinction between services provided as part of the State's statutory program of basic education and services—which must be paid by the State—and those that may be provided as local enrichment through supplemental contracts); E2SSB 6195, § 2(5)(d) (directing the Education Funding Task Force to make recommendations to improve the reporting, accounting, and transparency of school district data and expenditures going forward).

E2SSB 6195 goes further than just requiring recommendations in advance of the 2017 legislative session. The bill explicitly states the Legislature's commitment to enact legislation by the end of the 2017 legislative session fulfilling the State's obligation to compensate education staff for their basic education responsibilities. *See* E2SSB 6195, § 1 (committing to full funding of the State's program of basic education and eliminating school district dependence of local levies to implement that program); *id.*, § 4 (committing to legislative action by the end of the 2017 session to eliminate any need for school districts to use local levies to implement the State's program of basic education).

In sum, the information necessary to answer the Court's question is not yet available, but the plan enacted in E2SSB 6195 established a process for obtaining that information, analyzing it, and forwarding recommendations to the Legislature prior to the 2017 legislative

session. And E2SSB 6195 commits the Legislature to act on those recommendations in the 2017 legislative session.

(e) What components of basic education, if any, has the State fully funded in light of the costs specified above?

In light of the cost discussions above, the State has implemented and fully funded all components of basic education other than the elements in the prototypical school model identified in subsection (f), below.

(f) What components of basic education, including basic education staff salaries, has the State not yet fully funded in light of the costs specified above; what is the cost of achieving full state funding of the components that have not been fully funded by the deadline; and how does the State intend to meet its constitutional obligation to implement its plan of basic education through dependable and regular revenue sources by that deadline?

(1) *Components of basic education not yet fully funded and their associated costs.*

The State has not yet fully funded the costs of staffing at a class size ratio of 17 full-time equivalent students per teacher as set forth in RCW 28A.150.260(4)(b) for the 2017-18 school year. As set out in the response to question (c)(1), at pages 17-19 above, the State will need to increase expenditures by an estimated \$261,575,000 in FY 2018 (in the 2017-19 biennial budget) to achieve the estimated \$592,549,000 necessary to fund the class size reduction ratio. Those costs are estimated to increase

to \$658,329,000 for FY 2019, for a total estimated biennial expenditure of \$1,250,878,000.⁵¹ This amount is the estimated annual and biennial costs of completing the K-3 class size reduction; these are true increases in allocations for basic education, above and beyond the costs of inflation, increased enrollment, and changes in staff educational attainment and experience.

The State also has not yet fully funded basic education staff salaries, and does not yet have a full measure of the cost of doing so, as described in response to question (d), at pages 26-33 above.

(2) *How does the State intend to meet its constitutional obligation to implement its plan of basic education through dependable and regular revenue sources by that deadline?*

(1) The 2017 Legislature will enact a biennial budget that includes sufficient funds to allocate class size ratios to school districts specified in ESHB 2261 and SHB 2776, and to carry forward the education reforms implemented under those statutes.

(2) The 2017 Legislature will follow through on the plan enacted in E2SSB 6195 to determine the cost of fully funding competitive salaries for staff implementing the State's program of basic education, and provide that funding.

⁵¹ App. A.

(3) The 2017 Legislature will determine the sources of State revenue (new, existing, or a combination) to be used in implementing its plan of basic education. Previous reports and bills have identified a variety of options for the Legislature to consider. The following nonexclusive list, for example, was provided without recommendation by the Joint Task Force on Education Funding⁵²:

- Draw from the Budget Stabilization Account;
- Retain existing taxes set to expire;
- Additional budget efficiencies and savings;
- Eliminate tax exemptions;
- Fund all or part of K-12 transportation using transportation revenue sources;
- Enact an excise tax on capital gains;
- Lift or amend the current one-percent limit on the growth of state property taxes;
- Increase the state school levy rate;
- Use the state school levy to replace all or some local school levies.

⁵² *Joint Task Force on Education Funding Final Report 6-7* (Dec. 2012), <http://leg.wa.gov/JointCommittees/Archive/EFTF2012/Documents/JTTFEF%20Final%20Report%20-%20combined%20%282%29.pdf>.

SB 6109 (introduced in 2015, but not passed)⁵³ and other proposed legislation would have reduced school districts' maintenance and operation levy authority, restricted their use to non-basic education enhancements, and increased the state property tax to replace them. SB 6104 (introduced in 2015, but not passed)⁵⁴ similarly would have reduced local levy authority and replaced it with a state capital gains tax. Three bills would have imposed a capital gains tax with revenue dedicated solely for education.⁵⁵

The purpose of referencing these examples is not to suggest that the Legislature has settled on a funding strategy, but to show that the Legislature has been considering a variety of options. Raising revenue and appropriating tax dollars are legislative functions. Settling on one or a combination of approaches is a task facing the 2017 Legislature, to which it has committed under E2SSB 6195, § 4.

⁵³ SB 6109, §§ 201-301, 64th Leg., Reg. Sess., (Wash. 2015), <http://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Bills/6109.pdf>.

⁵⁴ SB 6104, §§ 201-315, 64th Leg., Reg. Sess., (Wash. 2015), <http://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Bills/6104.pdf>.

⁵⁵ HB 2224, 64th Leg., Reg. Sess., (Wash. 2015), <http://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bills/House%20Bills/2224.pdf>; SB 5699, 64th Leg., Reg. Sess., (Wash. 2015), <http://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Bills/5699.pdf>; SB 6102, 64th Leg., Reg. Sess., (Wash. 2015), <http://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bills/Senate%20Bills/6102.pdf>.

(g) Should this Court dismiss the contempt order or continue sanctions?

The Court did not find the State in contempt for failure to meet the 2018 deadline—that deadline has not yet arrived. The Court did not find the State in contempt for not progressing rapidly enough toward full constitutional compliance—even though the Court expressed concern about the pace of progress. Rather, the Court found the State in contempt and imposed sanctions *because the State failed to submit a complete plan*:

[I]t is hereby ORDERED: That the State is in contempt of court for violating the court's order dated January 9, 2014. The State failed to submit by April 30, 2014 a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year.

Order at 4 (Sept. 11, 2014). The Court imposed a sanction *to coerce the submission of a complete plan*—not to compel full constitutional compliance in advance of the 2018 deadline:

[I]t is hereby ORDERED: Effective immediately, the State of Washington is assessed a remedial penalty of one-hundred thousand dollars (\$100,000) per day until it adopts a complete plan for complying with article IX, section 1 by the 2018 school year.

Order at 9 (Aug. 13, 2015).

The Legislature now has enacted a plan for meeting the 2018 deadline. As explained above, E2SSB 6195, read together with ESHB 2261 and SHB 2776, provides a complete plan that complies with

the Court's January 2014 Order. It establishes a series of steps with benchmarks, sets deadlines in advance of the 2017 legislative session, and commits to take legislative action "by the end of the 2017 session to eliminate school district dependency on local levies for implementation of the state's program of basic education." E2SSB 6195, § 4.

The State has submitted a plan. It has purged contempt. There is no further plan to compel, and thus no justification for the sanction to continue. The Court should dissolve the contempt order and terminate the imposition of sanctions.

(h) Any additional information that will demonstrate to the Court how the State will fully comply with article IX, section 1 by 2018.

In its July 2016 Order, the Court included a footnote stating that the Legislature is not constitutionally prohibited from requiring itself to make future appropriations to implement legislation, and rejecting any suggestion that the biennial budget system hinders the State from complying with the Court's Order to submit a plan. The State agrees that the biennial budget system does not prevent the State from adopting a plan that complies with the Court's Order (like E2SSB 6195), but the State respectfully maintains that this Court's decisions limit the State's ability to adopt a plan committing to specific appropriations for a future biennium.

This Court has held repeatedly that our Constitution prohibits the Legislature from appropriating funds beyond the current biennium. *See* State’s Brief at 19 (filed May 18, 2016).⁵⁶ The footnote in the Court’s July Order cites *Washington Association of Neighborhood Stores v. State*, 149 Wn.2d 359, 365-68, 70 P.3d 920 (2003), for the proposition that “the legislature is not constitutionally prohibited from requiring itself to make future appropriations to implement legislation.” Order at 2 n.1 (July 14, 2016). But that decision itself made clear that a statute adopted in one biennium cannot actually “require” the Legislature to make expenditures in a future biennium.

In that case, the people had adopted an initiative that imposed a tobacco tax and directed “that the legislature shall appropriate certain funds” from the tax revenue for particular programs. *Wash. Ass’n of Neigh. Stores*, 149 Wn.2d at 366. Plaintiffs sued, arguing that this

⁵⁶ Citing *Wash. Ass’n of Neigh. Stores v. State*, 149 Wn.2d 359, 364, 70 P.3d 920 (2003) (“Article VIII, section 4 [of the Washington Constitution] imposes a bar on appropriations continuing beyond the next ensuing biennium.”); *Wash. State Legislature v. State*, 139 Wn.2d 129, 145, 985 P.2d 353 (1999) (“Appropriation bills are made temporary in nature by the provisions of Art. VIII, §4 (amendment 11), which require that all expenditures of moneys appropriated be made within one calendar month after the end of the fiscal biennium.” (quoting *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 54 Wn.2d 545, 551, 342 P.2d 588 (1959))); *League of Women Voters of Wash. v. State*, 184 Wn.2d 393, 424, 355 P.3d 1131 (2015), *as amended on denial of recons.* (Nov. 19, 2015) (“the nature of an appropriation is that it is finite and renewed every two years”); *State v. Clausen*, 160 Wash. 618, 627, 295 P. 751 (1931) (Article VIII, section 4 did not permit continuing appropriation to State College of Washington (now Washington State University); under article VIII, section 4, state funds held by state treasurer “cannot be paid out by him save pursuant to biennial appropriations made by the Legislature in due form of law.”); *id.* at 627-31.

directive was “unconstitutional because it mandates appropriation beyond a single biennium.” *Wash. Ass’n of Neigh. Stores*, 149 Wn.2d at 366. The Court disagreed, holding that the statutory directive “that the legislature shall appropriate certain funds” did not actually make “an appropriation at all” and did not bind future legislatures:

A direction to the legislature (even the use of the word “shall”) to make an appropriation is not itself an appropriation. Critically, the direction is not self-executing and it is up to the legislature to make an appropriation every biennium. The legislature retains the power to appropriate or not.

Id. at 368. In other words, even if a statute says “that the legislature shall appropriate certain funds” going forward, it is up to the Legislature each biennium to decide whether to actually do so. Thus, even if the Legislature had adopted a “plan” stating “that the legislature shall appropriate certain” amounts in future years, that plan could not have bound a future Legislature to actually appropriate that amount. The Court should not require such a provision in a “plan,” since it can have no binding effect.

The Legislature enacted the plan in E2SSB 6195 in good faith, fully intending that it will be implemented in subsequent legislative sessions—just as it did when enacting ESHB 2261 and SHB 2776. But no “plan” it enacts can commandeer the appropriating power of a future

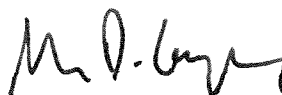
Legislature. The future Legislature “retains the power to appropriate or not.” *Id.* at 368.

IV. CONCLUSION

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 22nd day of August 2016.

ROBERT W. FERGUSON
Attorney General



DAVID A. STOLIER, WSBA 24071
Senior Assistant Attorney General

ALAN D. COPSEY, WSBA 23305
Deputy Solicitor General

Office ID 91087
PO Box 40100-0100
Olympia, WA 98504-0100
360-753-6200

APPENDIX A

Current Near General Fund-State(NGF-S) Allocations for K-12 Public Schools and Estimated Cost to Continue Current Law Basic Education Policies (dollars in thousands)						
	2016 Supplemental Enacted Biennial Budget			Estimated Cost to Maintain 2016 Supplemental Policies and Implementing Remaining K-3 Class Size Policy		
	FY 2016	FY 2017	Sum of 2015-17 Biennium	Estimated FY 2018	Estimated FY 2019	Sum of Estimated 2017- 19 Biennium
NGF-S (General Fund + Education Legacy Trust Acct)	8,804,303	9,381,637	18,185,940	9,712,333	9,942,824	19,655,157
Estimated Amount of Totals Above Attributable to Enhancements to the State's Program of Basic Education, as Compared to the State's Prototypical Formula Values in the 2011-12 School Year						
Policy Enhancements	FY 2016	FY 2017	Sum of 2015-17 Biennium	Estimated FY 2018	Estimated FY 2019	Sum of Estimated 2017- 19 Biennium
Reduce Early Elementary Class Size in Grades K-3	130,160	330,974	461,134	592,549	658,329	1,250,878
State Funded All-Day Kindergarten	93,070	167,094	260,164	188,942	193,930	382,873
Maintenance, Supplies & Operating Costs	547,602	695,957	1,243,559	713,940	730,650	1,444,590
Increase Pupil Transportation	112,909	142,511	255,420	143,925	145,534	289,459
Opportunity for 24 Credits and Increased Instructional Hours Increase Elementary School Parent Engagement Coordinator Allocation	180,183	227,185	407,368	228,637	231,915	460,552
	5,762	7,434	13,196	7,577	7,739	15,316
Increase Middle School Guidance Counselor Allocation	2,631	3,358	5,989	3,385	3,465	6,850
Increase Learning Assistance Program Instructional Hours	68,221	87,649	155,870	89,119	91,172	180,291
Increase Bilingual Instruction Instructional Hours	12,690	16,624	29,314	17,589	18,673	36,262
Grand Total Attributable to Basic Education Enhancements	1,153,228	1,678,785	2,832,013	1,985,663	2,081,408	4,067,070

Note 1: Estimated FY 2018 and FY 2019 values include the cost of continuing prior year policies, completing implementation of K-3 Class Size reductions, and the impact of increased enrollment and inflation on those specific policy areas.

Note 2: Above amounts are in addition to the Cost of Living Adjustments that were included in the 2015-17 biennial budget.

CERTIFICATE OF SERVICE

I certify that I served a copy of the State Of Washington's Brief Responding To Order Dated July 14, 2016, via electronic mail, upon the following:

Thomas Fitzgerald Ahearne : Christopher	tom.ahearne@foster.com
Glenn Emch : Adrian Urquhart Winder : Kelly	chris.emch@foster.com
Ann Lennox : Lee R. Marchisio	adrian.winder@foster.com
Foster Pepper PLLC	kelly.lennox@foster.com
1111 3rd Avenue Suite 3400	lee.marchisio@foster.com
Seattle, WA 98101	

AMICUS:

Arc of Washington

Katherine A. George
Harrison-Benis LLP
2101 4th Avenue Suite 1900
Seattle, WA 98121

kgeorge@harrison-benis.com

Washington's Paramount Duty

Summer Stinson
311 NW 74th Street
Seattle, WA 98117

summerstinson@gmail.com

Kathryn Russell Selk
Russell Selk Law Office
1037 NE 65th Street Suite 176
Seattle, WA 98115

karsdroit@aol.com

Superintendent of Public Instruction

William B. Collins
Special Assistant Attorney General
3905 Lakehills Drive SE
Olympia, WA 98501

wbcollins@comcast.net

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

DATED this 22nd day of August 2016, at Olympia, Washington.


WENDY R. SCHARBER
Legal Assistant