5-10-2018

State of Washington's Reply to Plaintiffs/Respondents and Answer to Amicus Curiae

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 TO PLAINTIFFS/RESPONDENTS AND ANSWER TO AMICUS CURIAE

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I. INTRODUCTION

In its 2018 opening brief and the Legislature's 2018 Report, the State explained the actions it took to complete the implementation of the McCleary remedy, consistent with the Court's November 17, 2018, Order, the Court's previous orders, and the benchmarks set forth therein. In response, the Plaintiffs agree that the State has fully complied with the Court's remedial orders and that further review from the Court is not warranted. Nevertheless, Plaintiffs claim that compliance with the Court's remedial orders does not remediate the constitutional violation and that the Court should now assess "prejudgment interest" on the remedial contempt sanction, when the Court imposed no interest with the sanction order.

The Court should hold that compliance with the long history of remedial orders in this case brings the State into compliance with article IX, section 1. Further, the Court should decline the invitation to expand the sanction now that the State has purged contempt and paid the sanction into a dedicated account for basic education. Finally, the plea by Amicus Curiae that the Court retain jurisdiction should be rejected as being without merit in law or fact.

II. ARGUMENT

A. The State Has Completed the Remedial Measures Ordered by the Court and Thus Has Achieved Full Compliance with Article IX, Section 1 of the Washington Constitution

The *McCleary* Plaintiffs concede that no further review is needed because the State has addressed the Court's remedial orders. Plaintiff/Respondents' 2018 Post-Budget Filing (Pls.' Br.) at 8-9, 25. With no dispute that the State has fully complied with the Court's remedial orders, the Court should conclude that the State has achieved compliance with article IX, section 1 of the Washington Constitution.

Yet the Plaintiffs protest that, even though the State has achieved full compliance with the remedial orders, it has not achieved constitutional compliance. Though styled as a new factual dispute between the Plaintiffs and the State,[1] the Plaintiffs' argument seeks belated reconsideration of this Court's legal conclusions and remedial orders in its 2012 Decision. The Court should reject this line of argument because it ignores and undermines that portion of the 2012 Decision that gave rise to six years of continuing jurisdiction, seven annual reports, roughly a dozen court orders, and over one hundred post-decision pleadings. It ignores the fact that the Legislature has taken historic action in reliance on the 2012 Decision and subsequent orders. It minimizes the most recent Order issued

[1] Pls.' Br. at 21.

by this Court in November 2017 applying the law to the actions taken by the State toward implementing the remedy. And it minimizes the constitutional test articulated by the Court. As of the actions taken in the 2018 session, the State has created a system that meets that constitutional test—a system that achieves or is reasonably likely to achieve the constitutional end of amply funding K-12 basic education.

In its 2012 Decision, this Court held that the State had failed to comply with its article IX, section 1 duty to make ample provision for the education of all children in Washington. *McCleary v. State*, 173 Wn.2d 477, 539, 269 P.3d 227 (2012). Turning to the appropriate remedy, the Court overturned the trial court's order to have the State conduct another cost study. Instead, the Court endorsed the remedial plan already initiated by the State in recently enacted legislation and retained jurisdiction to monitor the progress of fulfilling that plan. *Id.* at 543-47. The Court consistently has treated the State's fulfillment of the remedial plan initiated by ESHB 2261 and SHB 2776 as a remedy for constitutional noncompliance ever since. [2]

[2] "In deference to ESHB 2261 and its implementation schedule, the court's review will focus on whether the actions taken by the legislature show real and measureable progress toward achieving full compliance with article IX, section 1 by 2018." Order, *McCleary v. State*, No. 84362-7 (Wash. July 18, 2012), at 3.

"The question before us is whether, in remedying the constitutional violation of the State's paramount duty under article IX, section 1, current actions 'demonstrate steady progress according to the schedule anticipated by the enactment of the program of

The Plaintiffs apparently hope to forestall a legal conclusion that the State has achieved constitutional compliance, even as they concede that it is time for the Court's review to end. But it is unclear what kind of quasi-constitutional purgatory the Plaintiffs are proposing for this case. They filed the case to prove the State was out of constitutional compliance and sought a judicial remedy. The Court identified a remedy and the State implemented it. There is no daylight between achieving the remedy and achieving constitutional compliance. The State and all of its citizens deserve finality.

There may indeed be another case in the future contesting whether the State has remained in constitutional compliance. But the status of this case is simple and straightforward. The Court prescribed a remedy for constitutional non-compliance. The State fully implemented the remedy,

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reforms in ESHB 2261.' " Order, *McCleary v. State*, No. 84362-7 (Wash. Dec. 20, 2012), at 1.

"The Court therefore deferred to the legislature's chosen means of discharging its constitutional duty, but retained jurisdiction over the case to help ensure the State's progress in its plan to fully implement reforms by 2018." Order, *McCleary v. State*, No. 84362-7 (Wash. June 12, 2014), at 1.

"The court's opinion and orders measure constitutional compliance according to the areas of basic education identified in Engrossed Substitute House Bill (ESHB) 2261 (Laws of 2009, ch. 548) and the implementation benchmarks established by Senate [*sic*] House Bill (SHB) 2776 (Laws of 2010, ch. 236)." Order, *McCleary v. State*, No. 84362-7 (Wash. Nov. 15, 2017), at 3-4.

The new salary model "provides for full state funding of basic education salaries sufficient to recruit and retain competent teachers, administrators, and staff. This is consistent with the standards established for constitutional compliance." Order, *McCleary v. State*, No. 84362-7 (Wash. Nov. 15, 2017), at 40.

as conceded by the Plaintiffs. The State is in constitutional compliance and is therefore entitled to an order recognizing that the State has achieved full compliance with article IX, section 1 of the Washington Constitution and with the Court's 2012 *McCleary* decision.

B. The Court Should Reject Plaintiffs' Request to Impose Prejudgment Interest on the Contempt Sanction

The Court should deny Plaintiffs' request to assess prejudgment interest on the remedial contempt sanction imposed in the Court's August 13, 2015, Order. That Order did not impose interest on the State. Order, *McCleary v. State*, No. 84362-7 (Wash. Aug. 13, 2015), at 9-10. Even though Plaintiffs subsequently have tried to make it seem as if prejudgment interest was assumed,[3] at no time has the Court suggested that interest would be assessed on the sanction. The Court's tacit refusal to assess prejudgment interest is consistent with precedent.

Prejudgment interest can be appropriate when a plaintiff is awarded *damages*, as this Court explained in *Hansen v. Rothaus*, 107 Wn.2d 468, 730 P.2d 662 (1986). "Prejudgment interest awards are based on the principle that a defendant 'who retains money which he ought to pay to another should be charged interest upon it.'" *Id.* at 473 (quoting *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 34, 442 P.2d 621 (1968)).

[3] *See* Plaintiff/Respondents' 2016 Post-Budget Filing at 29 (June 7, 2016); Plaintiff/Respondents' 2017 Post-Budget Filing at 4 n.14 (Aug. 30, 2017).

"Prejudgment interest is not a penalty imposed on a defendant for wrongdoing nor is its purpose to deter wrongdoing." *Id.* at 475. Its purpose is to compensate a plaintiff for the "'use value' of the money representing his damages for the period of time from his loss to the date of judgment." *Id.* at 473.[4]

Assessing prejudgment interest on a remedial contempt sanction does not serve that compensation purpose. A contempt sanction is not imposed to compensate a plaintiff. The sanction is not paid to a plaintiff and has nothing to do with any damages the plaintiff may have suffered. The sole purpose of a remedial contempt sanction is to compel compliance with a court order. *King v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988); *Arnold v. Nat'l Union of Marine Cooks & Stewards Ass'n*, 41 Wn.2d 22, 27, 246 P.2d 1107 (1952).

The three cases Plaintiffs cite are readily distinguishable from this case.

In *Rekhter v. State*, 180 Wn.2d 102, 323 P.3d 1036 (2014), the trial court awarded damages to the plaintiffs, finding a state agency had

[4] The United States Supreme Court is in accord. *See City of Milwaukee v. Cement Div., Nat'l Gypsum, Co.*, 515 U.S. 189, 197, 115 S. Ct. 2091, 132 L. Ed. 2d 148 (1995) ("[P]rejudgment interest is not awarded as a penalty; it is merely an element of just compensation."); *W. Virginia v. United States*, 479 U.S. 305, 310 n.2, 107 S. Ct. 702, 93 L. Ed. 2d 639 (1987) ("Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress").

breached an implied duty of good faith and fair dealing in the performance of specific contract terms, and it specifically ordered the payment of prejudgment interest on the damage award (which this Court reversed). That case involved a breach of contract, an award of damages to be paid by the defendant to the plaintiff, and a specific order to pay prejudgment interest on the damage award. None of those elements are present here. It was not a contempt case.

Likewise, in *Pierce County v. State*, 144 Wn. App. 783, 185 P.3d 594 (2008), the Court of Appeals held that prejudgment interest was available for that portion of the damages flowing from a state agency's breach of contract. That case involved a breach of contract and an award of damages to be paid by the defendant to the plaintiff. It was not a contempt case.

Plaintiffs' third case, *State v. Sims*, 1 Wn. App. 2d 472, 406 P.3d 649 (2017), is a contempt case, but it also is distinguishable. In that case, the trial judge entered an order that specifically assessed postjudgment interest (not prejudgment interest) on an award of statutory sanctions. No order assessing interest has ever been entered in the *McCleary* case.[5]

[5] In *Sims*, the Court of Appeals affirmed the assessment of postjudgment interest on the ground that the State had impliedly waived its sovereign immunity in enacting RCW 7.24.030 to provide "full compensatory relief to parties injured by contemptuous acts." *Sims*, 1 Wn. App. 2d at 484. Judge Korsmo filed a vigorous dissent, arguing that there could be no implied waiver under the statute where there was no compensatory

There is no legal, procedural, factual, or policy basis for now assessing prejudgment interest on the sanction the State has fully paid.

C. Amicus Curiae Disregard the Court's 2017 Order and Rely on Outdated News Reports and Press Releases to Support Their Plea for the Court to Continue Retaining Jurisdiction

Amicus curiae Washington Paramount Duty (WPD) disregards this Court's November 2017 Order that, subject to addressing the timeliness of full funding of staff salaries, the State has satisfied the Court's mandate to fully fund the program of basic education established by ESHB 2261 "in accordance with the formulas and benchmarks set forth in SHB 2776 and this court's orders." Order, *McCleary v. State*, No. 84362-7 (Wash. Nov. 15, 2017), at 37.

Nonetheless, WPD insists it has uncovered evidence of underfunding based on an alleged fact that Washington spent $9,980 per student, compared to the national average of $10,615 in 2007-08. WPD Br. at 2. Even if accurate, the relevancy of such "evidence" would have been marginal when this case went to trial in 2010. It is completely irrelevant to assessing ample funding in 2018, and its accuracy is questionable since WPD erroneously attributes it to a 1978 decision of this Court.

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relief to a party, and that there is no precedent in Washington law for assessing interest on a contempt sanction. *Id.* at 485-92. This Court granted review on May 1, 2018 (Case No. 95479-8).

WPD next identifies an April 2018 press release by the Superintendent of Public Instruction intended to solicit public input in establishing his 2019-21 education budget request priorities. WPD Br. at 3. The press release includes a qualitative remark about prioritizing *future* investments ("future investments need to increase student achievement"), not the quantitative statement about *current* funding that WPD's selective quotation implies. WPD also highlights a statement from the same press release that says Washington invests less in schools than the national average. Neither the press release nor WPD identify the source or date of this questionable comparison. WPD merely passes the hearsay on to the Court, without investigation, and without establishing any nexus between national average investments and proof of constitutionally ample funding in Washington. It is not competent evidence.[6]

WPD also insists that special education funding is lacking, based on a newspaper article from September 3, 2017. The article reports on differences in opinion between the Superintendent and a state legislator, each opining on the future effects of the 2017 funding increases on special education. WPD Br. at 5. The article was written before the Court's

[6] In the same press release, the Superintendent also said that the Legislature worked hard on "solving the *McCleary* math problem." But the point is that none of these statements supplies evidence one way or the other as to constitutionally ample funding.

November 2017 Order and before the passage of the 2018 legislation (E2SSB 6362; ESSB 6032). WPD ignores the effect of the 2018 legislation, including the effect of accelerated salary increases on the special education formula in 2018, the effect of the newly increased excess cost multiplier, and the addition of professional learning days to the special education base allocation. State's Br. at 12-13.[7] WPD simply reasons that because the Superintendent made certain statements about special education in September 2017, the State cannot claim to have achieved constitutional compliance as of March 2018. WPD Br. at 6. The argument makes no sense and the newspaper article is not competent evidence.

Finally, WPD argues that the Court should retain jurisdiction because the Superintendent of Public Instruction will not have completed a review and revision of special education safety-net rules by September 1, 2018. This argument is at odds with the holding in this case that the Legislature has a continuing duty to review the basic education program as the needs of students and the demands of society evolve and that it must

[7] Last year we explained the three tiers of special education funding the State provides. We explained the increases in special education funding produced by increases in staff compensation, special education excess cost allocation, and funded enrollment percentage. And we explained how amici could not successfully bring either a facial or applied challenge to special education funding. State of Washington's Reply and Answer to Amici Briefs (filed Sept. 8, 2017), at 25-33. The Court agreed. Order, *McCleary v. State*, No. 84362-7 (Nov. 15, 2017), at 35-37. As noted above, state funding for special education will increase again in the 2018-19 school year as a product of the 2018 legislation.

evaluate whether new offerings must be included in the program. *McCleary*, 173 Wn.2d at 526.

The review and revision requirement WPD objects to was added in 2017, with an original deadline of September 1, 2019. Laws of 2017, 3d Spec. Sess., ch. 13, § 407 (EHB 2242). This provision was one of a number of policy initiatives in EHB 2242 not directly tied to remedial provisions identified in ESHB 2261 or SHB 2776. See State's 2017 Br. at 23; 2017 Report at 30.

In 2018, the Legislature amended the statute again, adding another new element to the safety-net process that requires the safety-net committee to consider the extraordinary high cost needs of individual special education students served in residential schools. This added another element for the Superintendent to take into account in his rules review. The Legislature also advanced the timeline for the Superintendent to conclude the review and revisions to December 2018. E2SSB 6362 (Laws of 2018, ch. 266), § 106.

Rather than acknowledge the legislative prerogative to continue to improve the State's program of basic education beyond that required in this Court's 2012 decision, WPD sees a constitutional violation because this improvement is not completed by September 2018. The Court did not

require that all future improvements in basic education be conceived of, developed, and implemented by the *McCleary* deadline.[8]

Instead, this Court held that the State must complete the remedial measures identified in ESHB 2261 and SHB 2776 by the deadline identified in that remedial legislation. As argued above and in the State's 2018 opening brief, the State has done so. Concurrently, the State has continued to evaluate and make additional policy adjustments when identifying additional needs, including the adjustments to the safety-net process.[9] Education policy is an evolving picture and always will be. If WPD is arguing that the Court should retain jurisdiction until the State is "finished" enacting education policy enhancements, jurisdiction would never end. That argument should be rejected.

III. CONCLUSION

The Court should find that the legislation enacted in the 2018 legislative session corrects the final item of constitutional noncompliance identified in the Court's November 15, 2017, Order. The Court should hold that the State has achieved full compliance with article IX, section 1

[8] It is not clear whether WPD believes that the safety-net process is suspended until OSPI's review is completed. It is not and therefore OSPI's review need not be completed before the statutory deadline.

[9] Each of the State's annual Reports during the period of retained jurisdiction detailed additional enhancements designed to advance educational policy beyond the remedial elements identified in ESHB 2261 and SHB 2776. See 2012 Report at 20; 2013 report at 17-18; 2014 Report at 17-23; 2015 Report at 12-13; 2016 Report at 22-26; 2017 Report at 28-35; and 2018 Report at 18-22.

of the Washington Constitution and with the Court's 2012 *McCleary* decision, and has done so by September 1, 2018.

The Court should find that the State purged contempt as of March 27, 2018, and lift its contempt order. The Court should stop the accrual of the daily sanction as of March 27, 2018.

The Court should find that the State has fully paid the accumulated contempt sanction into a separate account dedicated to basic education, as the Court directed in its November 15, 2017, Order; deny Plaintiffs' request to assess prejudgment interest; and allow the funds paid into the segregated account to be expended to support basic education in Washington.

Finally, the Court should relinquish its retained jurisdiction and terminate review.

RESPECTFULLY SUBMITTED this 10th day of May 2018.

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DATED this 10th day of May 2018, at Olympia, Washington.

s/ Kristin D. Jensen

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