5-29-2007

Reply in Support of Motion for Summary Judgment Concerning Legal Interpretation 07-2-02323-2-24

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MATHEW & STEPHANIE MCCLEARY, on their own behalf and on behalf of KELSEY & CARTER MCCLEARY; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("**NEWS**"),

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

Honorable Paris K. Kallas

Hearing Date:
9:00 a.m., June 1, 2007

No. 07-2-02323-2 SEA

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT CONCERNING LEGAL INTERPRETATION

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The purpose of summary judgment is to avoid unnecessary trials.[1] The State does not show that a trial is necessary to resolve the four specific issues raised in Petitioners' Motion.

1. State does not refute that the words "paramount", "ample", and "all" in Article IX, §1 should be interpreted to have their common English meaning *[Proposed Order ¶2].*

The State's brief does not dispute the following (Petitioners' Motion at 10:2-11:23):

- The parties disagree on the interpretation of the words "paramount", "ample", and "all" as used in Article IX, §1.
- The interpretation of those words presents a pure question of law.
- It is this Court's "duty to interpret, construe and give meaning to words, sections and articles of the constitution" (*Seattle School District*).

Nor does the State provide legal argument or authority refuting Petitioners' interpretation. Instead, it urges this Court to deny Petitioners' request for a declaratory judgment on the grounds that the parties should resolve their interpretation disagreement themselves by reading case law.

In short, the State asks this Court to punt. But punter is not the position a judge plays in a declaratory judgment suit. Since the State's brief does not refute the validity of the interpretation set forth in Proposed Order ¶2, this first part of Petitioners' Motion should be granted.

2. State does not refute that RCW 29A.150.210 should be interpreted to define the substantive content of basic education *[Proposed Order ¶3].*

The State's brief does not refute the following (Petitioners' Motion at 3:9-6:2, 12:1-14:12):

- Tab 2 sets forth "the minimum of the education that is constitutionally required" (*Seattle School District* quote).
- The Supreme Court instructed the legislature to provide additional "substantive content" to further define that basic education.
- The State's Chief Education Officer under our State Constitution testified under oath that the four numbered paragraphs in §.210 of the Basic Education Act (RCW 29A.150.210) "are the substantive content of what drives education in our State".[2]

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[1] *E.g.,* Nielson v. Spanaway General Medical Clinic, *135 Wn.2d 255, 262 (1998) ("The purpose of a summary judgment is to avoid a useless trial when no genuine issue of material fact remains to be decided"). Summary judgment is therefore "an integral part" of the Civil Rules as a whole, "which are designed to secure the just, speedy and inexpensive determination of every action."* Celotex Corp. v. Catrett, *477 U.S. 317, 327 (1986).*

[2] *Consistent with Petitioners' Motion at 5:18-6:2, the State also admits that it adopted the Essential Academic Learning Requirements (EALRs) to establish the basic reading, writing, math, science, etc. skills set forth in §.210. State's brief at 7:25-26; 8:5-6.*

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- The parties disagree on whether those four paragraphs in §.210 should be construed to be the additional "substantive content" that further defines the basic education set forth in Tab 2.
- This question of statutory construction presents a question of law.

The State's response focuses on statutory provisions that operationally define the State's program of basic education (i.e., the Basic Education Act provisions that operationally define the State's program of instructional hours/days/staffing ratios, and additional statutes that define bilingual, special education, learning assistance, and transportation programs). The State then urges this Court to interpret the State's operationally defined program of basic education (*X* hours/*X* days/etc.) to also be its substantive definition of basic education.

That confuses the two tasks that *Seattle School District* directed the State to do – namely, (1) define "basic education" with additional substantive content beyond the minimum in Tab 2, and (2) define a "program of basic education" to deliver that basic education. Motion at 4:9-12.

The program provisions discussed by the State are exactly that: Program provisions that operationally define the program of basic education established by the legislature. The existence of that program of basic education does not refute Petitioners' showing that the four numbered paragraphs in RCW 29A.150.210 – "the substantive content of what drives education in our State" – should be interpreted to be the additional substantive content that adds to Tab 2 to establish the current definition of "basic education" in our State. The State accordingly does not refute the statutory interpretation of §.210 set forth in ¶3 of this Motion's proposed Order.

3. State does not raise any fact *material* to the yes-or-no question of whether it is currently complying with the above interpretation of Article IX, §1 *[Proposed Order ¶4].*

The State's own evidence establishes the following facts (Motion at 14:13-20:11):

- Less than half of our State's 10th graders have the math, reading, & science skills needed to satisfy the education standards the State has established under §.210.
- 25% - 40% of our State's 9th graders fail to graduate high school with their peers, and thousands of those who do graduate each year receive a diploma that is not backed by skills they need to succeed.
- Our State's Chief Education Officer under our Constitution admits under oath that the State is not providing the basic education that our Supreme Court held is the minimum education that is constitutionally required [Tab 2].

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- The State excludes school construction from its provision of basic education.[3]
- The State's most recent study concluded that the State is failing to provide students the education they need in today's society.

Most of the State's response focuses on whether "inadequate funding" is the cause of the above facts. But that does not create a genuine dispute as to the existence of those facts.[4]

The State suggests there are fact disputes as to whether school districts or their teachers are to blame for the above facts. But that does not create a genuine dispute as to the existence of those facts. Nor does such blame shifting have any legal basis – for school districts are treated as the State's agents with respect to the State's constitutional education duty, and Washington law holds that the State cannot avoid liability for a constitutional violation by blaming its agents.[5]

The State suggests fact issues exist because providing all children an "opportunity" might suffice. But unless the State is seriously taking the position that minority kids are just less capable than their white counterparts, the substantial achievement gap confirmed by the State's own testing and high school graduation testimony refutes any suggestion that the State is in fact providing ample "opportunity" to all.[6]

The State notes that Washington ranks above other States using some measures. But those other measures are not relevant because they do not use Washington standards.[7] The only assessment of whether students are learning the substantive content established by Washington

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[3] *The State's opposition papers do not refute this fact – instead, they note that a district can defray a minor portion of certain construction costs by seeking a limited non-basic education matching grant or diverting money away from the basic education program the State funds. 5/29 Robb Reply Dec., Exhibit P at ¶¶ 6-7.*

[4] *The State's declarations on funding (input) are not only immaterial to whether the education (output) provided by the State satisfies this Court's interpretation of Article IX, §1 – they must also be stricken and disregarded to the extent they assert legal conclusions and conclusory statements of fact. E.g., Hash v. Children's Hosp., 49 Wn.App. 130, 133, aff'd 110 Wn.2d 912 (1988); Grimwood v. UPS, 110 Wn.2d 355, 359-60 (1988).*

[5] *Bellevue School District v. Brazier, 103 Wn.2d 111, 116 (1984) ("The state has ... made the local school district its corporate agency for the administration of a constitutionally required system of free public education"); Tunstall v. Bergeson, 141 Wn.2d 201, 232 (2000) ("school districts have no duty under Washington's constitution. Article IX makes no reference whatsoever to school districts."); Orion Corp. v. State, 109 Wn.2d 621, 643-44 (1987) (State liable for unconstitutional taking from County's enactment of regulations as agent of the State because "As the principal of an agent acting within its authority, the State must take full responsibility if a taking occurred").*

[6] *Motion at 15:18-21, 16:7-10 & n.33; accord, 5/29 Ostdiek Reply Dec. at ¶2 & Exhibit FF (achievement gap).*

[7] *Accord, 5/29 Ostdiek Reply Dec. at ¶2 & Exhibits U – EE; see also 5/29 Complete Bergeson Tpt. Dec., Bergeson Tpt. at 83:7-84:8 & Ex. 10 (confirming the "$1.8 billion" new funding number noted in the State's papers is really, in truth, a $285 million ($143 million/year) State funding increase).*

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law (§.210 and its corresponding EALRs) is the Respondent State's WASL assessment – and that assessment establishes (rather than disputes) the existence of the above facts.

The State asserts things are getting better and it's now spending more money on education. But speculation that maybe the above facts might possibly change some time in the future does not create a genuine dispute as to the existence of those facts today.

The State objects that certain evidence not material to the above facts should be stricken or disregarded. But even if the State's objections had merit (which they do not[8]), ignoring evidence that is not material to the above facts does not create a dispute about those facts.

The State also makes the typical demand for a CR 56(f) delay. But its brief does not establish how the discovery it seeks is material to the truth of the above facts, or why it was impossible for the State to get any affidavits to dispute the above facts without such discovery.[9]

In short, the State's opposition does not create any genuine dispute as to the above-noted facts. This Court therefore faces a straightforward yes-or-no question: Do those facts comply with this Court's interpretation of the State's paramount duty under Article IX, §1? Unless this Court concludes that those facts describe the education required by Article IX, §1, this Court must enter the declaratory judgment ruling set forth in ¶4 of this Motion's proposed Order.

4. State does not refute that this Court can (and should) grant relief *[Proposed Order ¶5].*

The State's brief does not refute the following points of law (Motion at 20:15-23:19):

- It "is the proper function of the judiciary to interpret, construe and enforce the constitution of the State of Washington"; Article IX, §1 "is mandatory and imposes a judicially enforceable affirmative duty". (*Seattle School District*).
- "All children residing within the borders of the State possess a 'right', arising from the constitutionally imposed 'duty' of the State, to have the State make ample provision for their education. Further, since the 'duty' is characterized as paramount the correlative 'right' has equal stature." (*Seattle School District*).
- "It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded" (*Marbury v.*

[8] *5/29 Robb Reply Dec., ¶¶ 2-5 & Exhibits P – S.*

[9] *CR 56(f) (nonmoving party must prove it cannot get any affidavits essential to justify its opposition); Ernst v. UFCW, 77 Wn.App. 33, 49 (1995) (outstanding discovery does not justify Rule 56(f) delay when nonmoving party did not show it prevented him from securing any affidavits to raise a genuine issue of material fact).*

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Madison); "The judicial obligation to protect constitutionally declared fundamental rights of individuals is as old as the United States" (*Seattle School District*).

Instead, the State cites 3 cases from other States that declined to grant the type of relief sought in those cases. But those 3 cases did not address the type of relief Petitioners seek here. And even if they did, they could not overrule the Washington Supreme Court rulings noted above or revise the Washington Constitution's "paramount duty" language to say "unenforceable suggestion".

The State also implies that separation of powers prevents this Court from granting relief for a constitutional violation if the legislature takes the position that no violation exists. But that turns the fundamental checks-and-balances purpose of the separation of powers on its head. Powers are separated so the judicial branch can require other branches to obey our Constitution -- not so other branches can self-declare themselves immune from our Constitution.[10] As the court noted in the *Montoy* education system litigation referenced in Petitioners' Motion:

> This case involves the fundamental law of our land and this Court has no discretion whatsoever in whether it will be enforced and preserved. There is no higher duty of any judicial officer than to see to the adherence of government to our Constitutions. There is no such thing as "a little bit pregnant" and there is no such thing as "slightly unconstitutional."[11]

Similarly here, there is no such thing as our State's current education system being "slightly unconstitutional" under Article IX, §1. It's either constitutional or it's not.

The facts noted on pages 2-3 above confirm it's not. It is the judicial branch's duty to uphold the paramount Constitutional right that Article IX, §1 grants to every child in our State. This Court should enter the relief set forth in ¶5 of the proposed Order to assure that the State's 29 years of foot dragging and excuses for not yet fully complying with the Supreme Court's ruling in *Seattle School District v. State* (1978) finally begins to draw to an end.

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[10] *See, e.g., Tacoma v. O'Brien, 85 Wn.2d 266, 270 (1975) (legislative declaration that contract performance is "economically impossible" is void because that is a legal conclusion for the courts: "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts") (quoting Justice Holmes); cf. Cooper v. Aaron, 358 U.S. 1, 17-18, (1958) (State's compliance with State statute is no defense to Constitutional violation). The State's mandamus and injunction objections similarly fail because Petitioners do not seek a mandamus compelling an official to perform a ministerial duty (e.g., Walker v. Munro, 124 Wn.2d 402 (1994)) and their motion shows the right, invasion, and injury prongs for injunctive relief (e.g., Kucera v. DOT, 140 Wn.2d 200, 209 (2000)).*

[11] *5/29 Robb Reply Dec., Ex. T at second-to-last page.*

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RESPECTFULLY SUBMITTED this 29th day of May, 2007.

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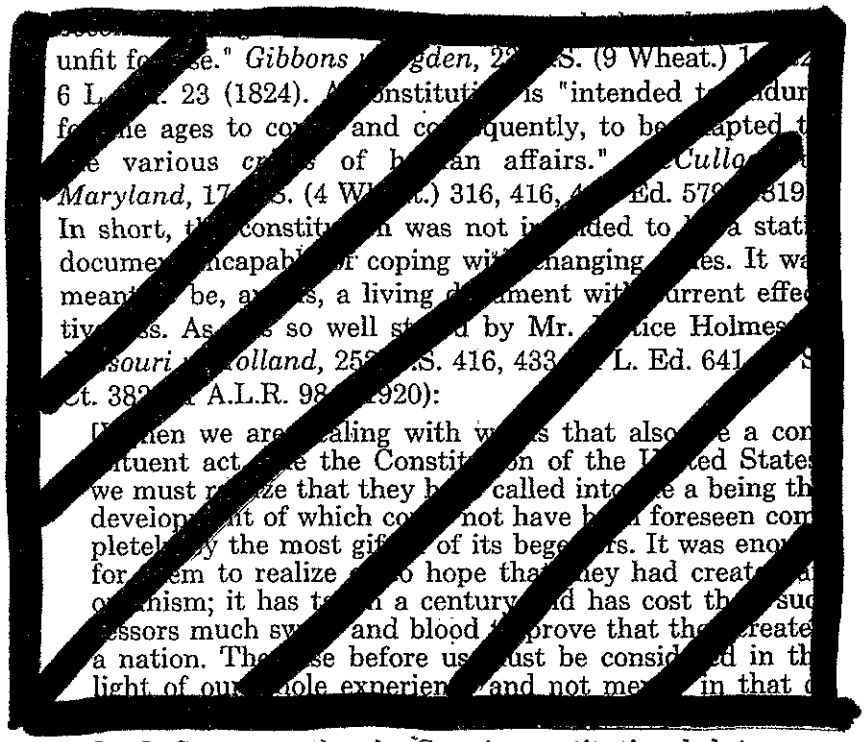
Article IX, section 1

It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

T*B 7



unfit for use." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824). A constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416, 4 L. Ed. 579, 619. In short, the constitution was not intended to freeze a state document incapable of coping with changing times. It was meant to be, as it is, a living document with current effective force. As was so well stated by Mr. Justice Holmes in *Missouri v. Holland*, 252 U.S. 416, 433, 64 L. Ed. 641, 40 S. Ct. 382, 11 A.L.R. 984 (1920):

"When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of

[13] Consequently, the State's constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas. *Robinson v. Cahill*, 62 N.J. 473, 515, 303 A.2d 273 (1973); *see also Keyishian v. Board of Regents*, 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967). Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to ensure that system's survival. *See Wisconsin v. Yoder*, 406 U.S. 205, 221, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972). It must prepare them to exercise their First Amendment freedoms both as sources and receivers of information; and, it must prepare them to be able to inquire, to study, to evaluate and to gain

TAB 2

maturity and understanding. The constitutional right to have the State "make ample provision for the education of all [resident] children" would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the marketplace of ideas.

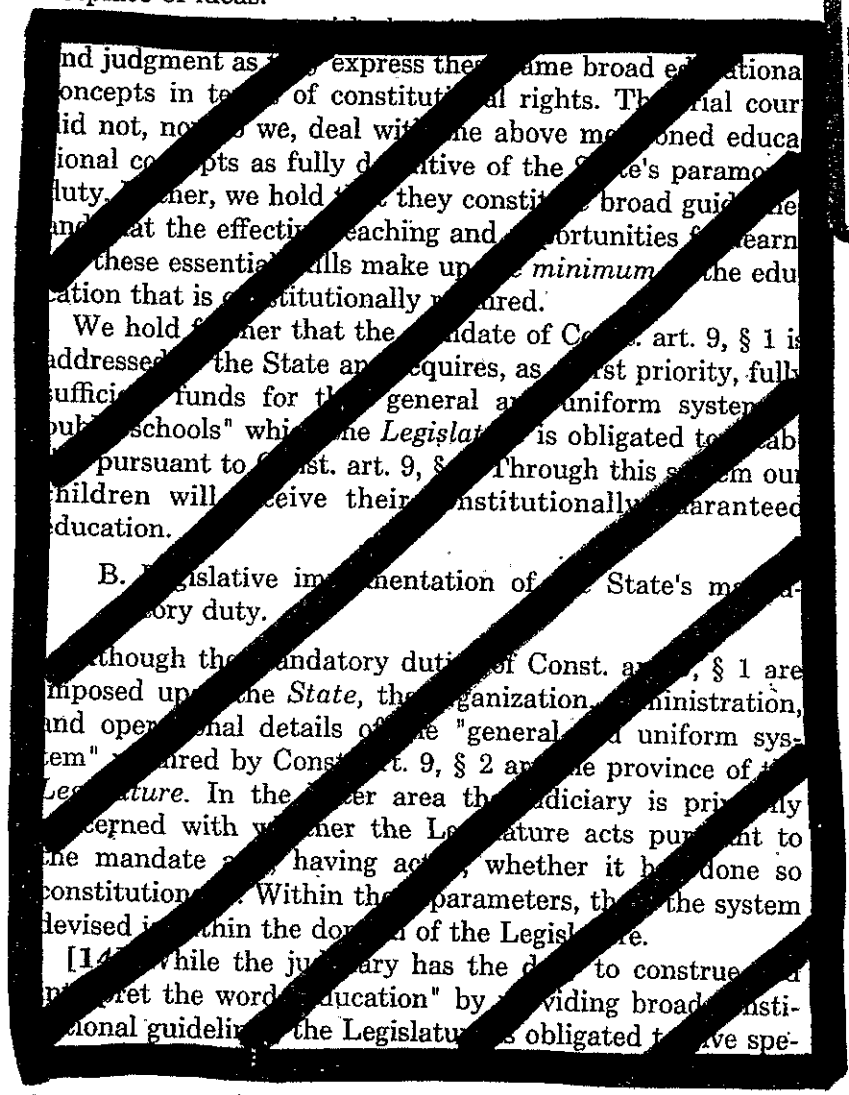


EXHIBIT 2 Burgess 07-2-

nd judgment as to express these same broad educational oncepts in terms of constitutional rights. The trial court id not, nor do we, deal with the above mentioned educational concepts as fully definitive of the State's paramount duty. Rather, we hold that they constitute broad guidelines and that the effective teaching and opportunities to learn these essential skills make up the *minimum* of the education that is constitutionally required.

We hold further that the mandate of Const. art. 9, § 1 is addressed to the State and requires, as a first priority, full sufficient funds for the general and uniform system of public schools" which the *Legislature* is obligated to provide pursuant to Const. art. 9, § 2. Through this system our children will receive their constitutionally guaranteed education.

B. Legislative implementation of the State's mandatory duty.

Although the mandatory duties of Const. art. 9, § 1 are imposed upon the *State*, the organization, administration, and operational details of the "general and uniform system" required by Const. art. 9, § 2 are the province of the *Legislature*. In the latter area the judiciary is primarily concerned with whether the Legislature acts pursuant to the mandate and having acted, whether it has done so constitutionally. Within the parameters, the system devised is within the domain of the Legislature.

[14] While the judiciary has the duty to construe and interpret the word "education" by providing broad constitutional guidelines, the Legislature is obligated to give spe-

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MATHEW & STEPHANIE MCCLEARY, on their own behalf and on behalf of KELSEY & CARTER MCCLEARY, their two children in Washington's public schools; ROBERT & PATTY VENEMA, on their own behalf and on behalf of HALIE & ROBBIE VENEMA, their two children in Washington's public schools; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("**NEWS**"), a state-wide coalition of community groups, public school districts, and education organizations,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

Honorable Paris K. Kallas

Hearing Date:
9:00 a.m., June 1, 2007

No. 07-2-02323-2 SEA

[PROPOSED]
ORDER GRANTING SUMMARY JUDGMENT CONCERNING LEGAL INTERPRETATION

Clerk's Action Required

THIS MATTER came before this Court on Petitioners' Motion For Summary Judgment Concerning Legal Interpretation, which was fully briefed by the parties and then argued on Friday, June 1, 2007. This Court has considered the pleadings and files in this case, including:

1. The Petitioners' Motion For Summary Judgment Concerning Legal Interpretation;

2. The May 4, 2007 Declaration Of Ramsey Ramerman Authenticating Documents and exhibits thereto;

3. The May 4, 2007 Declaration Of Edmund Robb Authenticating State's Cost Calculation Discovery Responses and exhibits thereto;

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Tab 11 "Proposed Order"

4. The Respondent's Opposition To Motion For Summary Judgment On Liability And Remedy (Corrected);

5. The Respondent's Opposition To Motion For Summary Judgment On Liability And Remedy -- Errata Page on Corrected Opposition Brief

6. The Declaration of William G. Clark In Opposition to Summary Judgment;

7. The Supplemental Declaration of William G. Clark In Opposition to Summary Judgment Motion On CR 56(f) Grounds;

8. The Declaration of Julie Salvi In Opposition To Motion For Summary Judgment;

9. The Declaration of Eric A Hanushek In Opposition To Motion For Summary Judgment;

10. The Short Reply In Support Of Motion For Summary Judgment Concerning Legal Interpretation;

11. The Reply Declaration Of Edmund Robb Regarding Documents To Which The State Has Objected;

12. The Declaration Submitting All Excerpts From Bergeson Deposition Relied On By Any Party; and

13. The Reply Declaration Of Alice M. Ostdiek Authenticating Documents In Reply To State's Opposition.

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Having reviewed the materials submitted by the parties; having heard from the parties, and the Court being fully informed,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Petitioners' Motion For Summary Judgment Concerning Legal Interpretation is GRANTED.

2. The words "paramount", "ample", and "all" in Article IX, §1 of the Washington State Constitution have their common English meaning.

(a) Given the plain English meaning of the word "paramount", Article IX, §1 requires the Respondent State to make ample provision for the education of all Washington children its first and highest priority above all other programs and operations.

(b) Given the plain English meaning of the word "ample", Article IX, §1 requires the amount of the Respondent State's funding to be more than merely adequate or sufficient to provide for the education of all Washington's children. Article IX, §1 requires the Respondent State's funding amount to be ample without needing supplementation or backfilling by local levies, PTA fundraisers, participation fees, private donations, or other non-State funds.

(c) Given the plain English meaning of the word "all", Article IX, §1 requires the Respondent State's above education funding to amply provide for the education of every child residing within our State's borders – not just the convenient, popular, or advantaged subsets of our State's children.

3. The basic "education" mandated by Article IX, §1 is currently defined by the substantive content specified in the four numbered provisions of §.210 of the Basic Education Act (RCW 28A.150.210) and the State's corresponding Essential Academic Learning Requirements.

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4. The Respondent State is not currently complying with its Constitutional duty under the above legal interpretation of Article IX, §1 of the Washington State Constitution.

5. To halt that lack of compliance, the Respondent State must promptly determine (1) the actual dollar cost of providing all children residing in our State with the education mandated by this Court's legal interpretation of Article IX, §1, and (2) how the State will fully fund that actual cost with stable and dependable State sources. The Respondent State must make those two determinations within one year of this Order's entry.

DONE IN OPEN COURT this _____ day of June, 2007.

_____
The Honorable Paris K. Kallas
Washington Superior Court Judge

Presented by:
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_____
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Approved as to form and for entry;
Notice of presentation waived:
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