

6-25-2007

Motion for Protective Order 07-2-02323-2-29

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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"), <p style="text-align: right;">Petitioners,</p> <p style="text-align: center;">v.</p> STATE OF WASHINGTON, <p style="text-align: right;">Respondent.</p>
--

Honorable Paris K. Kallas

*Hearing Date (without oral
argument): July 3, 2007*

No. 07-2-02323-2 SEA

MOTION FOR PROTECTIVE
ORDER

ORIGINAL

MOTION FOR A PROTECTIVE ORDER

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I.	SUMMARY OF THIS MOTION	1
II.	RELIEF REQUESTED	2
III.	FACTS	3
	A. Background: The Pending Summary Judgment Motion.....	3
	B. The State’s Document Requests & The Parties’ Resulting Discovery Conferences.....	4
IV.	ISSUES PRESENTED	4
V.	EVIDENCE RELIED UPON.....	5
VI.	LEGAL DISCUSSION	5
	A. Rule 26 In General.	5
	B. The Three Categories Of Documents At Issue.	6
	1. Documents Re Funding (Inputs).	6
	2. Documents That Petitioners’ Counsel Select & Compile As Part Of Their Litigation Preparation.	8
	3. Documents Possessed By Petitioners’ Counsel Because Of Their Area Of Practice.....	10
VII.	CONCLUSION & PROPOSED ORDER.....	11

1 I. SUMMARY OF THIS MOTION

2 The parties have narrowed the scope of their disagreement about the State's document
3 requests at two discovery conferences this month. But they continue to disagree about
4 Petitioners' objection to three categories of documents sought by those requests. Petitioners file
5 this motion for a protective order to resolve that disagreement.

6 **1. Documents Re Funding.** This suit does not ask the Court to determine the funding
7 necessary to comply with the education mandate in Article IX, §1. Instead, it requests a legal
8 ruling that interprets the scope of the education that Article IX, §1 requires the State to provide to
9 all Washington children, and an enforcement order that requires the State to determine the
10 funding necessary to comply with that legal ruling. Although discovery relating to the funding
11 necessary to comply with this Court's interpretation of Article IX, §1 might become relevant in a
12 subsequent proceeding, it is neither relevant nor material to the rulings sought in this proceeding.

13 The State nonetheless demands that Petitioners search for and then produce documents
14 relating to such funding in this proceeding. Those demands are improper because they serve no
15 purpose other than to impose needless costs and burdens on the Petitioners. At the very least,
16 this Court should issue a protective order staying such "funding" discovery until after it issues its
17 legal ruling establishing the scope of the State's duty under Article IX, §1 and the State
18 determines the funding that it believes will comply with that duty.

19 **2. Documents Selected By Counsel In Litigation Preparation.** Petitioners' counsel
20 have collected over ½ million pages of the State's public documents by submitting Public
21 Records Act requests and making a full copy of the State's two websites relating to K-12
22 education. The full set of those documents is organized the same way as they were made
23 available by the State.

24 Petitioners' counsel have also selected specific documents from their full set of these
25 State records and compiled subsets of documents as part of their litigation preparation in this
26 case. Revealing which of the State's documents are (and are not) selected and compiled by

1 Petitioners' counsel as the ones helpful, harmful, or otherwise relevant to counsel's legal claims,
2 theories, and strategies would effectively reveal counsel's mental impressions and theories about
3 the litigation of this case.

4 The State nonetheless demands that Petitioners' counsel effectively do that. Those
5 demands are not proper because they require the disclosure of attorney work product. Nor are
6 those demands necessary to secure access to any of the requested documents themselves, because
7 the State already has those State documents. At the very least, this Court should issue a
8 protective order confirming that, as allowed by Rule 34(b), Petitioners can simply provide a copy
9 of the full set of the State's documents as they were made available by the State.

10 **3. Documents Possessed By Counsel Given Their Area Of Legal Practice.** The
11 practice areas of Petitioners' counsel include education, municipal, bond, and constitutional law.
12 Thus, as part of their general legal practice they for many years have routinely received
13 periodicals, internet webpages & emails, articles, and other materials relating to education,
14 municipal, bond, and constitution law issues.

15 The State demands that Petitioners' counsel search through those materials to find which
16 materials may relate to the topics the State is interested in for this case. Those demands are not
17 proper because the Civil Rules do not allow a party to demand that opposing counsel search
18 through his or her general practice materials to find periodicals, internet webpages & emails,
19 articles, and other materials which relate to topics or issues that the requesting party is interested
20 in researching.

21 **II. RELIEF REQUESTED**

22 This motion seeks a Rule 26 protective order against the State's requests that:

- 23 1. Would impose upon Petitioners the burden of searching for, reviewing, and
24 producing documents concerning an issue not material to the pending summary
25 judgment motion that will (if granted) put an end to this trial court proceeding –
26 i.e., documents concerning the funding that the State should appropriate to
comply with this Court's yet-to-be-issued interpretation of the scope of the
education that Article IX, §1 requires the State to provide to all Washington
children.

2. Would reveal which of the State's documents were selected by Petitioners' attorneys as being helpful to, harmful to, or otherwise relevant to their litigation of this case.
3. Would force Petitioners' attorneys to search through the periodicals, internet webpages & emails, articles, and other materials they routinely receive as part of their general legal practice to find materials that relate to the topics the State is interested in researching for this case.

III. FACTS

A. Background: The Pending Summary Judgment Motion.

The Petitioners filed their Motion For Summary Judgment Concerning Legal Interpretation on May 4. If granted, that motion will end these trial court proceedings.

That motion is based on our Supreme Court's recognition that it "is the proper function of the judiciary to interpret, construe and enforce the constitution of the State of Washington."¹ That motion accordingly seeks four legal rulings to construe and enforce the Constitutional mandate in Article IX, §1 that "It is the paramount duty of the State to make ample provision for the education of all children residing within its borders":

1. The words "paramount", "ample", and "all" in Article IX, §1 have their common English meaning.

This Constitutional interpretation issue is a pure question of law.

2. The basic "education" mandated by Article IX, §1 is currently defined by the substantive content specified in RCW 28A.150.210 and its corresponding Essential Academic Learning Requirements (EALRs).

This statutory interpretation issue is a pure question of law.

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

This compliance issue is a binary yes-or-no question about educational output (i.e., is the State currently equipping all Washington children with the basic education required under this Court's interpretation of Article IX, §1?) It is not a matter-of-degree question or one about funding input (e.g., what is the appropriate size and type of education funding that should be appropriated?).

¹ Motion For Summary Judgment Concerning Legal Interpretation at 9:14-25 (quoting Seattle School District v. State, 90 Wn.2d 476, 482 (1978)).

- 1 4. Court enforcement of Article IX, §1 should begin by ordering the State to take
2 two steps in the 12 months: (1) determine the actual dollar cost of providing
3 all children in our State with the education mandated by this Court's legal
4 interpretation of Article IX, §1, and (2) determine how the State will fully
5 fund that actual cost with stable and dependable State sources.

6 *This enforcement issue does not ask the Court to determine the funding amount
7 needed to comply with the Court's legal interpretation of Article IX, §1 or to
8 determine which State funding sources should be used. Instead, the pending
9 summary judgment motion seeks only to require the State to take those first two
10 steps. If this relief is granted, this trial court proceeding ends.*

11 This Court has rescheduled the above motion's original June 1 hearing date to August 24 to
12 allow the Court more time to fully study the parties' submissions.

13 **B. The State's Document Requests & The Parties' Resulting Discovery Conferences.**

14 As noted in the Certificate Of Compliance Concerning Discovery Conferences, counsel
15 for the parties have held a face-to-face discovery conference, and then a follow-up telephone
16 conference, to try to narrow their disagreements over the set of 30 document requests that the
17 State had served on the Petitioners in this suit – i.e., the McCleary family, the Venema family,
18 and the non-profit corporation Network for Excellence in Washington Schools (“NEWS”). The
19 State's counsel focused on the following 12 document requests:

- 20 • Six requests for documents about funding and education system inputs
21 (Document Request Nos. 20, 21, 26, 27, 29, & 30).
- 22 • Six requests for documents that “support, negate, refer, or relate to”
23 certain paragraphs of the Petition (Document Request Nos. 14-19).

24 Although the parties narrowed the scope of their disagreement at those two discovery
25 conferences, they continue to disagree about Petitioners' objection to three categories of
26 documents sought by the State's requests. The parties accordingly decided that Petitioners
should file a CR 26 motion for a protective order to resolve this disagreement.

27 **IV. ISSUES PRESENTED**

28 This protective order motion presents three issues:

- 29 1. Is the State entitled to impose upon Petitioners the burden and expense of searching
30 for, reviewing, and producing documents on an issue not material to the pending
31 summary judgment motion that will (if granted) put an end to this trial court
32 proceeding – i.e., documents concerning the funding that the State should appropriate

1 to comply with this Court's yet-to-be issued interpretation of the scope of the
2 education that Article IX, §1 requires the State to provide to all Washington children?

- 3 2. Is the State entitled to discovery that reveals which of the State's documents were
4 selected by Petitioners' attorneys as being helpful to, harmful to, or otherwise
5 relevant to their litigation of this case?
6 3. Is the State entitled to force Petitioners' attorneys to search through the periodicals,
internet webpages & emails, articles, and other materials they routinely receive as
part of their general legal practice to find materials that relate to the topics the State is
interested in researching for this case?

7 As summarized on pages 1-2 above and outlined below, the answer to each question is "no".

8 **V. EVIDENCE RELIED UPON**

9 This motion is based on this suit's records and files, including the contemporaneously
10 filed Certificate Of Compliance Concerning Discovery Conferences.

11 **VI. LEGAL DISCUSSION**

12 **A. Rule 26 In General.**

13 The relevant portions of Rule 26 read as follows:

14 **RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY**

- 15 (a) Discovery Methods. Parties may obtain discovery by ... production of
documents....
16 (b) Discovery Scope and Limits. Unless otherwise limited by order of the court
in accordance with these rules, the scope of discovery is as follows:
17 (1) In General. Parties may obtain discovery regarding any matter, not
18 privileged, which is relevant to the subject matter involved in the pending
action, whether it relates to the claim or defense of the party seeking
19 discovery or to the claim or defense of any other party....

20 The frequency or extent of use of the discovery methods set forth in
section (a) *shall* be limited by the court if it determines that: (A) the
21 discovery sought is unreasonably cumulative or duplicative, or is
obtainable from some other source that is more convenient, less
22 burdensome, or less expensive; (B) the party seeking discovery has had
ample opportunity by discovery in the action to obtain the information
23 sought; or (C) the discovery is unduly burdensome or expensive, taking
into account the needs of the case, the amount in controversy, limitations
24 on the parties' resources, and the importance of the issues at stake in the
litigation. The court may act upon its own initiative after reasonable
25 notice or pursuant to a motion under section (c).

26 * * * *

1 (4) Trial Preparation: Materials. Subject to the provisions of subsection (b)(5)
2 [testifying experts], a party may obtain discovery of documents ...
3 discoverable under subsection (b)(1) of this rule and prepared in
4 anticipation of litigation or for trial by or for another party or by or for that
5 other party's representative (including his attorney...) *only* upon a showing
6 that the party seeking discovery has substantial need of the materials in the
7 preparation of his case and that he is unable without undue hardship to
8 obtain the substantial equivalent of the materials by other means. In
9 ordering discovery of such materials when the required showing has been
10 made, the court *shall* protect against disclosure of the mental impressions,
11 conclusions, opinions, or legal theories of an attorney or other
12 representative of a party concerning the litigation.

13 * * * *

14 (c) Protective Orders. Upon motion ..., and for good cause shown, the court ...
15 may make any order which justice requires to protect a party or person from
16 annoyance, embarrassment, oppression, or undue burden or expense,
17 including one or more of the following: (1) that the discovery not be had; (2)
18 that the discovery may be had only on specified terms and conditions,
19 including a designation of the time or place; (3) that the discovery may be had
20 only by a method of discovery other than that selected by the party seeking
21 discovery; (4) that certain matters not be inquired into, or that the scope of the
22 discovery be limited to certain matters;

23 CR 26 (emphasis added).

24 This Rule grants broad discretion to “make any order which justice requires to protect a
25 party or person from annoyance ... oppression or undue burden or expense,” including an order
26 “that the discovery not be had”.² This Court also “has the inherent power to stay its proceedings
where the interest of justice so requires”,³ and has the express power to control the timing and
scope of discovery.⁴

27 B. The Three Categories Of Documents At Issue.

28 1. Documents Re Funding (Inputs).

29 The education-related suits filed by plaintiffs in other States have asked the Court to
30 conduct a trial to determine the funding that the State must appropriate to comply with the State

31 ² CR 26(c); accord, *Kramer v. J.I. Case Manufacturing Co.*, 62 Wn.App. 544, 556 (1991) (trial
32 court has broad discretion and wide latitude to issue protective orders because “Under CR 26(b)
33 and (c), a trial court has authority to limit discovery to protect a party or person from annoyance
34 ... oppression or undue burden or expense”, and noting that the trial court properly based its
35 discovery ruling on its analysis of the issues in the case at the time the motion was made).

36 ³ E.g., *King v. Olympic Pipeline Co.*, 104 Wn.App. 338, 350 (2000).

⁴ E.g., *Gillett v. Conner*, 132 Wn.App. 818, 823 (2006)

1 Constitution's education clause.⁵ Such lawsuits open up an incredibly expensive and time
2 consuming can of litigation worms that entail numerous dueling funding-experts and intensive
3 studies of funding-related evidence, which often results in years and years of time (and millions
4 and millions of dollars) being spent in courtrooms before the State's children receive the
5 Constitutionally mandated education in their classrooms.⁶

6 The Petitioners here have not filed such a suit. They are *not* asking the Court to make
7 such a funding determination. Instead, their suit requests an interpretation ruling that establishes
8 the scope of the education that Article IX, §1 requires the State to provide to all Washington
9 children, and an enforcement order that requires the State to determine the funding necessary to
10 comply with legal ruling. Discovery about the funding the State should appropriate to comply
11 with this Court's interpretation of Article IX, §1 might become relevant in a subsequent
12 proceeding – but it is neither relevant nor material to the rulings sought in this proceeding.

13 The State's demand that Petitioners search for and then produce documents relating to
14 such funding at this time accordingly serve no purpose other than to impose needless costs and
15 burdens on the Petitioners.

16 That is not a legally legitimate purpose. At the very least, this Court should issue a
17 protective order staying such "funding" discovery until after this Court issues its legal ruling
18
19

20 ⁵ *Three examples of this litigation approach employed in other States (New York, New Jersey,*
21 *and Kansas) were noted in the pending Motion For Summary Judgment Concerning Legal*
Interpretation at 21:9-11 & n.41.

22 ⁶ *This negative result from the litigation approach employed in other States was also noted in the*
23 *pending Motion For Summary Judgment Concerning Legal Interpretation at 21:11-14 & n.42.*
24 *See also the recent examples in Nebraska and Missouri noted in the Certificate Of Compliance*
25 *Concerning Discovery Conferences at ¶4 and Ex. 1 (re the Nebraska litigation, excerpts from*
26 *the plaintiff Omaha Public Schools' Answers to Defendants' First Set of Interrogatories stating*
that, even though discovery in that funding suit is "in its infancy," the plaintiffs have already
identified eleven expert witnesses and more than 130 fact witnesses) and Ex. 2 (re the Missouri
litigation, a February 25, 2007 St. Louis Dispatch article reporting that that funding suit trial
lasted almost 2 months, required a "host of education finance experts," and cost more than
\$2.9 million in legal fees).

1 interpreting the State's duty under Article IX, §1, and after the State then determines the funding
2 that the State believes will comply with that duty.⁷

3 **2. Documents That Petitioners' Counsel Select & Compile As Part Of Their Litigation**
4 **Preparation.**

5 Petitioners' counsel have received over 42,000 public documents from the State under the
6 Washington Public Records Act.⁸ Petitioners' counsel have also made a full copy of the State's
7 two websites relating to K-12 education (OSPI's "http://www.k12.wa.us/" and the K-12 sections
8 of Washington Learns' "http://www.washingtonlearns.wa.gov/") – 9.6 gigabytes which would
9 roughly translate into over ½ million paper pages.⁹

10 The full set of these State documents are copied and organized in the same way as they
11 were made available by the State. The State does not need document requests to secure access to
12 these public documents because it was the State that provided them.

13 Petitioners' counsel have also selected specific documents from their full set of these
14 State documents and compiled subsets of documents as part of their litigation preparation in this
15 case. Revealing which of the State's documents Petitioners' counsel does (and does not) select
16 as being helpful to, harmful to, or otherwise relevant to counsel's legal claims, theories, and
17 strategies would reveal counsel's mental impressions and theories about this case.

18 ⁷ E.g., *Brazos Valley Coalition For Life v. City of Bryan*, 421 F.3d 314, 327 (5th Cir. 2005)
19 (order staying discovery pending the resolution of a dispositive motion is proper where
20 additional discovery is not required to determine that motion); *Scroggins v. Air Cargo*, 534 F.2d
21 1124, 1133 (5th Cir. 1976) (protective order "staying general discovery until the court could
22 determine whether the case would be resolved at the summary judgment stage" is proper; stay
23 serves as a valuable tool to prevent "putting the parties to the expense of conducting broad
24 discovery on all issues raised in the complaint"); *Landry v. Airline Pilots Assoc. Int'l*, 901 F.2d
25 404, 435-36 (5th Cir. 1990) (protective order staying discovery proper where "many of the
26 issues raised by the summary judgment motions were purely legal and that discovery would
therefore not aid their resolution"); *Maune v. Int'l Brotherhood of Electrical Workers*, 83 F.3d
959, 963 (8th Cir. 1996) (stay pending resolution of summary judgment motion proper); see also,
e.g., *Ernst v. UFCW*, 77 Wn.App. 33, 49 (1995) (fact that discovery has not been produced does
not justify Rule 56(f) denial of summary judgment if party opposing summary judgment fails to
show it prevented him from securing affidavits to raise a genuine issue of material fact).

⁸ Certificate Of Compliance Concerning Discovery Conferences at ¶3.

⁹ Certificate Of Compliance Concerning Discovery Conferences at ¶3.

1 The State nonetheless demands that Petitioners' counsel produce (or at least identify) the
2 documents Petitioners' counsel select from the State's document production. Such demands are
3 not proper because they require the disclosure of attorney work product.

4 Washington law recognizes that the work product doctrine is intended "to preserve a zone
5 of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye
6 toward litigation,' free from unnecessary intrusion by his adversaries."¹⁰ As the case law cited in
7 the *Washington Practice* section on CR 26 accordingly holds, the work produce doctrine bars
8 discovery that would reveal counsel's thought about strong and weak points in a party's case.¹¹

9 For example, "Materials compiled for purposes of litigation by a nontestifying consultant
10 constitute the classic example of work product and are clearly protected against discovery."
11 *Washington Practice* Volume 3A (2006) at 585. Consistent with this protection of the materials
12 compiled by nontestifying experts, work product case law holds that the attorney's selection and
13 compilation of documents also constitutes protected work product.¹²

14
15 ¹⁰ *Soter v. Cowles Pub. Co.*, 131 Wn.App. 882, 893 (2006), review granted 158 Wn.2d 1029
16 (2007) (citations omitted).

17 ¹¹ *Washington Practice* Volume 3A (2006) at 590 ("One often-cited case is *Ceco Steel Products*
18 *Corp. v. H.K. Porter Co.*, 31 F.R.D. 142 (D.C.Ill. 1962) (party cannot be forced to respond to
19 questions if response would reveal attorney's thoughts about strong and weak points in party's
20 case). Another is *Ford v. Philips Electronics Instruments Co.*, 82 F.R.D. 359 (E.D.Pa. 1979)
21 (similar, in context of deposition).").

22 ¹² E.g., *In re Allen*, 106 F.3d 582, 608 (4th Cir. 1997) (arrangement of employment records in
23 anticipation of litigation "constitutes opinion work product because [the attorney's] selection
24 and compilation of these particular documents reveals her thought processes and theories
25 regarding th[e] litigation"); *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1328-29 (8th
26 Cir. 1987) (work product because, in cases which "involve reams of documents and extensive
discovery, the selection and compilation of documents is often more crucial than legal
research"); *Spork v. Peil*, 759 F.2d 312, 315-16 (3d Cir. 1985) (party not required to produce
groupings of the selected documents compiled by counsel "[b]ecause the identification of the
documents as a group will reveal defense counsel's selection process, and thus his mental
impressions"; "the selection and compilation of documents by counsel in this case in
preparation for pretrial discovery falls within the highly protected category of opinion work
product"); see also, e.g., *Limstrom v. Ladenburg*, 136 Wn.2d 595, 614 (1998) ("factual
documents gathered by the prosecutor and which [the requester] had already received from
other sources prior to the trial court's ruling, ... are part of the prosecutor's fact-gathering
process and are work product").

1 At the very least, this Court should issue a protective order confirming that, as allowed by
2 Rule 34(b), Petitioners can simply provide a copy of the full set of the State's documents as they
3 were made available by the State, rather than subsets of the documents produced by the State
4 which are selected or compiled by Petitioners' counsel.

5 **3. Documents Possessed By Petitioners' Counsel Because Of Their Area Of Practice.**

6 The discussion of CR 26 in *Washington Practice* notes that one of the principles
7 underlying the work product doctrine is that the law should not reward an attorney "who seeks
8 access to opposing counsel's file instead of doing his or her own research", and that "The basic
9 rationale of the work product doctrine is that it is unfair to permit the adverse party to feed on the
10 industriousness or the wits of the party from whom discovery is sought." *Washington Practice*
11 Volume 3A (2006) at 584-85.¹³

12 The practice areas of Petitioners' counsel include education, municipal, bond, and
13 constitutional law. As part of their general legal practice they for many years have routinely
14 received periodicals, internet webpages & emails, articles, and other materials relating to
15 education, municipal, bond, and constitution law issues.

16 The State demands that Petitioners' counsel search through those materials to find which
17 materials may relate to the topics the State is interested in for this case. Those demands are not
18 proper because the Civil Rules do not allow a party to demand that opposing counsel search
19 through his or her general practice materials to find periodicals, internet webpages & emails,
20 articles, and other materials which relate to topics or issues that the requesting party is interested
21 in researching. This Court should accordingly confirm that Petitioners' attorneys do not have to

22 ¹³ *In full, that discussion explains that the work product doctrine "grew out of a number of*
23 *loosely related notions – that while an attorneys' work product may be interesting reading to*
24 *opposing counsel, it is not relevant as evidence; that the adversary system operates best when*
25 *each side develops its own case independently; even that the law should not reward a cheap or*
26 *lazy attorney who seeks access to opposing counsel's file instead of doing his or her own*
research. Wright & Graham, 8 Federal Practice & Procedure §2021. 'The basic rationale of
the work product doctrine is that it is unfair to permit the adverse party to feed on the
industriousness or the wits of the party from whom discovery is sought.' In re Williams, 106
Wn.App. 85, 22 P.2d 283 (2001)." *Washington Practice Volume 3A (2006) at 584-85.*

1 search through the periodicals, internet webpages & emails, articles, and other materials they
2 routinely receive as part of their general legal practice.

3 **VII. CONCLUSION & PROPOSED ORDER**

4 Petitioners respectfully request that this Court resolve the parties' disagreement over the
5 three categories of documents at issue in this Rule 26 motion as follows:

6 1. The Civil Rules do not entitle the State to impose upon Petitioners the burden and
7 expense of searching for, reviewing, and producing documents on an issue not material to the
8 pending summary judgment motion that will (if granted) put an end to this trial court proceeding
9 – i.e., documents concerning the funding that the State should appropriate to comply with this
10 Court's yet-to-be-issued interpretation of the scope of the education that Article IX, §1 requires
11 the State to provide to all Washington children. [At the very least, this Court should issue a
12 protective order staying such "funding" discovery until after it issues its legal ruling establishing
13 the scope of the State's duty under Article IX, §1 and the State determines the funding that the
14 State believes will comply with that duty.]

15 2. The Civil Rules do not entitle the State to discovery that reveals opposing counsel's
16 work product, mental impressions, and theories about this case – e.g., discovery that reveals
17 which of the State's documents Petitioners' counsel does (and does not) select or compile into
18 subsets as helpful to, harmful to, or otherwise relevant to this suit. [At the very least, this Court
19 should issue a protective order confirming that, as allowed by Rule 34(b), Petitioners can (at the
20 State's expense) provide a copy of the full set of the State's documents as they were made
21 available to the Petitioners by the State.]

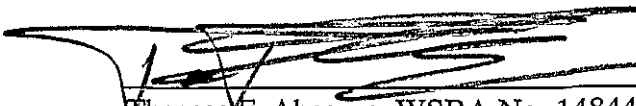
22 3. The Civil Rules do not entitle the State to force Petitioners' attorneys to search through
23 the periodicals, internet webpages & emails, articles, and other materials they routinely receive
24 as part of their general legal practice to find materials that relate to the topics the State is
25 interested in researching for this case. This Court should accordingly confirm that Petitioners'
26

1 attorneys do not have to search through those materials to find materials that relate to the topics
2 the State is interested in researching for this case.

3 A proposed Order granting the above protective order is accordingly attached.

4 RESPECTFULLY SUBMITTED this 25th day of June, 2007.

5 FOSTER PEPPER PLLC

6 
7 Thomas F. Ahearn, WSBA No. 14844
8 Edmund W. Robb, WSBA No 35948
9 Attorneys for Petitioners

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7 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

Honorable Paris K. Kallas

*Hearing Date (without oral
argument): July 3, 2007*

No. 07-2-02323-2 SEA

[Proposed]
PROTECTIVE ORDER

13 THIS MATTER came before this Court on Petitioners' Motion For A Protective Order.
14 This Court has considered the pleadings and files in this case, including that Motion, the
15 Certificate Of Compliance Concerning Discovery Conferences, the Respondent State's
16 opposition papers, and the Petitioners' reply papers.

17 Having reviewed the above, this Court hereby ORDERS, ADJUDGES, and DECREES
18 that Petitioners' Motion For A Protective Order is GRANTED as follows:

- 19 1. The Civil Rules do not entitle the State to impose upon Petitioners the burden
20 and expense of searching for, reviewing, and producing documents on an issue
21 not material to the pending summary judgment motion that will (if granted) put
22 an end to this trial court proceeding – in this instance, documents concerning the
23 funding that the State should appropriate to comply with this Court's
24 yet-to-be-issued interpretation of the scope of the education that Article IX, §1
25 requires the State to provide to all Washington children. *[Alternative language:*
26

[PROPOSED] PROTECTIVE ORDER - 1

FOSTER PEPPER PLLC
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1 *Discovery concerning the funding that the State should appropriate to comply*
2 *with this Court's interpretation of the scope of the education that Article IX, §1*
3 *requires the State to provide to all Washington children is stayed until after this*
4 *Court issues its legal ruling establishing the scope of the State's duty under*
5 *Article IX, §1 and the State determines the funding that the State believes will*
6 *comply with that duty.]*

7 2. The Civil Rules do not entitle the State to discovery that reveals opposing
8 counsel's work product, mental impressions, and theories about this case – e.g.,
9 discovery that reveals which of the State's documents Petitioners' counsel does
10 (and does not) select or compile into subsets as helpful to, harmful to, or
11 otherwise relevant to counsel's litigation of this suit. As allowed by Rule 34(b),
12 Petitioners can (at the State's expense) provide a copy of the full set of the
13 State's documents as they were made available to the Petitioners by the State in
14 lieu of isolating specifically selected documents or subsets of those State
15 documents.]

16 3. The Civil Rules do not entitle the State to force Petitioners' attorneys to search
17 through the periodicals, internet webpages & emails, articles, and other materials
18 they routinely receive as part of their general legal practice to find materials that
19 relate to the topics the State is interested in researching for this case. The
20 Petitioners' attorneys accordingly do not have to search through those materials
21 to find materials that relate to the topics about which the State has requested.

22 DONE IN OPEN COURT this _____ day of July, 2007.

23
24
25 _____
26 The Honorable Paris K. Kallas
 Washington Superior Court Judge

[PROPOSED] PROTECTIVE ORDER - 2

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1 Presented by:
2 FOSTER PEPPER PLLC

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_____~~
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5 Edmund W. Robb, WSBA No 35948
6 Attorneys for the Petitioners

7 Approved as to form and for entry;
8 Notice of presentation waived:
9 OFFICE OF THE WASHINGTON ATTORNEY GENERAL
10 ROBERT M. MCKENNA

11 _____
12 William G. Clark, WSBA No. 9234
13 David S. Stolier, WSBA No. 24071
14 Jon P. Ferguson, WSBA No. 5619
15 Dierk Meierbachtol, WSBA No. 31010
16 Attorneys for the Respondent State

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18 2.
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[PROPOSED] PROTECTIVE ORDER - 3

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