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## State of Washington's Memorandum Transmitting the Legislature's 2017 Post-Budget Report

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SUPREME COURT OF THE STATE OF WASHINGTON

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MATHEW and STEPHANIE McCLEARY, et al.,

*Respondents,*

v.

STATE OF WASHINGTON,

*Appellant.*

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STATE OF WASHINGTON'S MEMORANDUM TRANSMITTING  
THE LEGISLATURE'S 2017 POST-BUDGET REPORT

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## I. INTRODUCTION

The State has achieved compliance with article IX, section 1 of the Washington Constitution, as this Court directed in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012). Through continuous effort over the course of years, culminating in legislation enacted this year, the Legislature has *doubled* state K-12 education funding since this Court’s 2012 decision. *See 2017 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* at 8 (July 31, 2017) (*2017 Report*).<sup>1</sup>

This massive increase in funding supports numerous policy improvements and fully implements the educational reforms this Court endorsed in 2012—including full state funding for staff compensation by the 2019-20 school year. The Court consistently has treated the implementation of these reforms, enacted in ESHB 2261 (Laws of 2009, ch. 548) and SHB 2776 (Laws of 2010, ch. 236), as a measure for finding full compliance with the ample provision duty in article IX, section 1. *See McCleary*, 173 Wn.2d at 484. Because the Legislature has enacted legislation that fully implements those reforms, the Court should dissolve its order of contempt against the State, relinquish jurisdiction, and terminate this appeal.

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<sup>1</sup> As directed by the Court, the *2017 Report* is filed as an attachment to this pleading. Order at 13, *McCleary v. State*, No. 84362-7 (Wash. Oct. 6, 2016).



## **II. STATEMENT OF THE ISSUES**

1. Beginning in the 2013 legislative session and culminating with the enactment of EHB 2242 (Laws of 2017, 3d Sp. Sess., ch. 13) and SSB 5883 (Laws of 2017, 3d Sp. Sess., ch. 1) in the 2017 legislative session just concluded, the State has ensured that all educational reforms in ESHB 2261 and SHB 2776 will be fully implemented and funded by the 2019-20 school year. Has the State complied with its duty under article IX, section 1 of the Washington Constitution to make ample provision for the education of all children residing within the State, as set out in this Court's decision in *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012)?

2. The Court retained jurisdiction in this appeal “to monitor implementation of the reforms under ESHB 2261, and more generally, the State’s compliance with [article IX, section 1].” *McCleary*, 173 Wn.2d at 545-46. Should the Court relinquish jurisdiction and terminate the appeal?

3. Should the Court dissolve its order of contempt against the State?

## **III. STATEMENT OF THE CASE**

The *McCleary* plaintiffs filed suit in 2007, challenging the adequacy of the State’s K-12 funding system that was in place *prior to* the Legislature’s enactment of ESHB 2261 and SHB 2776 in 2009 and 2010. In the 2012 *McCleary* decision, the Court held the State’s 30-year-old

system for funding basic education did not comply with its duty under article IX, section 1 of the Washington Constitution to make ample provision for K-12 education. *McCleary*, 173 Wn.2d at 539. However, as the Court recognized in its 2012 decision, the Legislature already had begun implementing the funding reforms enacted in ESHB 2261 and SHB 2776.

The Court described the new program of basic education adopted in ESHB 2261 as a “promising reform package . . . which, if fully funded, will remedy deficiencies in the K-12 funding system.” *McCleary*, 173 Wn.2d at 484; *see also id.* at 543 (describing ESHB 2261 as a “promising reform program” and citing trial testimony that “full implementation and funding for ESHB 2261 will remedy the deficiencies in the prior funding system”).

In ESHB 2261, the Legislature substantially revised and updated the Basic Education Act, which had been enacted in 1977.<sup>2</sup> ESHB 2261 redefined “basic education” to include (1) the instructional program of basic education, (2) the institutional program for juveniles in detention, and (3) student transportation. Laws of 2009, ch. 548, § 101(2). It added specific instructional requirements and a program for highly capable students, and increased yearly instructional hours for

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<sup>2</sup> The Basic Education Act defined the minimum education program to be made available to all students in public school and shifted the funding responsibility for that program from local excess levies to the State. Laws of 1977, 1st Ex. Sess., ch. 359.

grades 7-12. Laws of 2009, ch. 548, § 104(2), (3). It added voluntary all-day kindergarten to the definition of “basic education.” *Id.* §§ 104(2), 107. It retained the learning assistance program (providing remediation services to certain students), transitional bilingual education, and special education as part of “basic education.” *Id.* § 104(3). It also adopted a new transportation funding formula, to be phased in by 2013. *Id.* §§ 304-311.

ESHB 2261 also adopted new requirements for teacher certification and development targeted toward improving student learning. *Id.* § 601. In the bill, the Legislature specifically recognized the need for additional state investment to attract and retain high quality educators, and it established a compensation work group to recommend a new salary allocation model. *Id.* § 601.

Finally, ESHB 2261 instituted what this Court described as “bold reforms” to the K-12 funding system. *McCleary*, 173 Wn.2d at 506. The bill adopted a prototypical school model, which allocates state funds to local school districts to meet their staffing and resource needs for the State’s program of basic education using evidence-based formulas that respond to the number of students in each district. Laws of 2009, ch. 548, § 106. The Legislature established a technical working group to develop the details of the funding formulas. *Id.* § 112(2)(a). Funding was to be phased in over time, with full implementation by September 1, 2018. *Id.* § 114(5)(b)(iii).

Details of the funding system were developed over the following year and enacted in 2010 in SHB 2776, which set class sizes, staffing ratios, and a specific allocation for MSOCs (materials, supplies, and operating costs) on a per-student basis. Laws of 2010, ch. 236, § 2. SHB 2776 also established deadlines for phasing in implementation of the education funding reforms enacted in ESHB 2261. It directed the phase-in of a new formula for pupil transportation between 2011 and 2015. It required the Legislature to phase in increased funding for MSOCs beginning in the 2011-13 biennium with full funding by the 2015-16 school year. *Id.* § 2(8)(b). It mandated funding for smaller K-3 class sizes beginning in the 2011-13 biennium, with funding for 17 students per classroom by the 2017-18 school year. *Id.* § 2(4)(b). It required the Legislature to continue phasing in all-day kindergarten to reach statewide implementation by the 2017-18 school year.

Although the Court endorsed the reforms enacted in ESHB 2261 and the implementation schedule in SHB 2776, it retained jurisdiction to “monitor implementation of the reforms under ESHB 2261,” to “foster[] dialogue and cooperation between coordinate branches of state government,” and to “help ensure progress in the State’s plan to fully implement education reforms by 2018.” *McCleary*, 173 Wn.2d at 545-47.

#### IV. STANDARD OF REVIEW

The ultimate issue now before the Court is whether the State has complied with its obligation under article IX, section 1 of the Washington Constitution, as that obligation was set out by the Court in its 2012 decision in this case. That decision established three principles as the framework for the Court's constitutional analysis.

First, it is the Court's duty to construe and interpret the language of article IX, section 1, but it is the Legislature's obligation to address "the difficult policy questions inherent in forming the details of an education system," to develop the State's program of basic education, and to select the means for implementing that program. *McCleary*, 173 Wn.2d at 517. To meet that obligation, the Legislature developed a new basic education program, enacted in ESHB 2261 and SHB 2776. As explained above, the Court acknowledged that program as an education reform package that would, if fully funded, remedy deficiencies in the K-12 funding system. *Id.* at 484. It is the State's implementation and funding of that "promising reform package" that is before the Court.

Second, this case was brought as a challenge to "the adequacy of state funding for K-12 education under article IX, section 1." *Id.* at 482. The Court identified two components for determining funding adequacy: (1) funding must be "fully sufficient" to support the State's basic education

program; and (2) the State must fund its basic education program using “dependable and regular tax sources,” which requires “state-provided funding” and does not permit reliance on “special excess levies” to support the basic education program. *McCleary*, 173 Wn.2d at 527-28.

Third, the Court described the right to an amply funded education under article IX, section 1 as a “positive constitutional right” which must be analyzed through the proper lens. “In the typical constitutional analysis, we ask whether the legislature or the executive has overstepped its authority under the constitution. . . . [I]n a positive rights context we must ask whether the state action achieves or is reasonably likely to achieve the constitutionally prescribed end.” *Id.* at 518-19 (internal quotation marks omitted). This analysis necessarily is imprecise for at least two reasons. First, the analysis is prospective—it inevitably involves some prediction of the state action’s operation and consequences into the future. Second, there is no single “right” answer when addressing a complex problem such as the implementation of a state program of basic education—there can be multiple paths to constitutional compliance. Perhaps those considerations led the Court, when explaining its decision to retain jurisdiction, to again emphasize the need to avoid “cross[ing] the line from ensuring compliance with article IX, section 1 into dictating the precise means by which the State must discharge its duty.” *Id.* at 541.

Finally, separate from the constitutional analysis, the Court retained jurisdiction “to monitor implementation of the reforms under ESHB 2261, and more generally, the State’s compliance with its paramount duty.” *McCleary*, 173 Wn.2d at 545-46. In that context, the Court again recognized the constitutional discretion conferred on the Legislature: “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.” *Id.* at 547.

This Memorandum and the accompanying *2017 Report* explain how the legislation enacted in 2017, together with other policy improvements and increases in funding since 2012, now fully implement and fund the State’s program of basic education established in ESHB 2261 and SHB 2776. To the extent Plaintiffs disagree, they bear the burden of showing that the new legislation, *on its face*, is not reasonably likely to provide fully sufficient state funding for basic education. *League of Women Voters of Washington v. State*, 184 Wn.2d 393, 423, 355 P.3d 1131 (2015) (“It is well settled that, in a facial challenge, the burden rests on the plaintiff[.]”).

## V. ARGUMENT

The legislation enacted in 2017 implements a new system of compensation that allocates state funding to support the full cost of salaries for staff providing the State’s program of basic education. The legislation

identifies and provides the state revenue necessary to fully fund basic education for all students in Washington by the 2019-20 school year. The new legislation commits the State to adding another \$8.3 billion in state funding over the next two biennia, bringing state funding for K-12 education from \$13.4 billion in 2011-13 to \$26.6 billion by 2019-20. *2017 Report* at 8, 12-13.

Because the State has enacted legislation that fully implements all parts of the educational reform package this Court endorsed in 2012, the Court should find the State has fulfilled its duty under article IX, section 1, release the State from its contempt orders, and terminate this appeal.

**A. In the Two Budget Cycles Following the 2012 *McCleary* Decision, the State Took Substantial Steps Toward Implementing the Educational Reforms Enacted in ESHB 2261 and SHB 2776**

In the two biennia following the 2012 *McCleary* decision, the Legislature substantially increased state funding for K-12 education as it implemented the educational reforms enacted in ESHB 2261 and SHB 2776. *2017 Report* at 8. In every instance, the reforms were implemented and funded by the deadline established in SHB 2776: the new student transportation formula was fully implemented and funded for the 2014-15 school year; the statutory formula for MSOCs was fully implemented and funded for the 2015-16 school year; increased



instructional hours also were implemented and funded for the 2015-16 school year; and all-day kindergarten was fully phased in and funded by the 2016-17 school year. *2017 Report* at 4-5. Allocation funding for K-3 class size reductions was increased every year beginning with the 2011-13 school year to reach the target allocation class size of 17 students by the 2017-18 school year—the deadline set in SHB 2776. *2017 Report* at 4-5. As explained below at A.3.b on page 23, full funding for staffing of these class sizes beginning in the 2017-18 school year is provided in the 2017-19 operating budget.

Consequently, by the end of the 2015-17 biennium, the Legislature had fully implemented and funded all of the ESHB 2261 and SHB 2776 reforms except the final increment for K-3 class size reduction allocations and staff compensation. The final increment for class size reduction allocations had been included in the 4-Year Balanced Budget Outlook in 2015 and thus was part of the maintenance funding level in the 2017-19 operating budget. *2015 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* (July 27, 2015) (*2015 Report*), at 4-5; *2016 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation* (May 18, 2016) (*2016 Report*), at 16-17. Only compensation was still unresolved.

In the 2015 and 2016 legislative sessions, legislators engaged in extensive policy review and development to identify options for full state funding of basic education staffing levels, but no legislative solutions were reached. The Legislature lacked fundamental information about the relative contributions of state and local funding to overall salaries.<sup>3</sup> The 2015-17 operating budget nevertheless appropriated more than \$600 million for compensation-related increases for K-12 staff, and the 2016 Legislature established a task force to obtain the needed information.

The work accomplished in the 2015 legislative session led directly to the enactment of E2SSB 6195 early in the 2016 legislative session. E2SSB 6195 called for specific additional and updated compensation information and established the Education Funding Task Force to review the information and make compensation recommendations. The bill also committed the Legislature to taking action in the 2017 legislative session to eliminate school district dependency on local levies. Laws of 2016, ch. 3, § 1; *see 2016 Report* at 6; State Of Washington's Memorandum Transmitting The Legislature's 2016 Post-Budget Report And Requesting The Lifting Of Contempt And End Of Sanctions (May 18, 2016), at 11-14.

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<sup>3</sup> In its 2012 decision, the Court recognized that some portion of the difference between actual salaries paid by school districts and the state allocations was permissible incentive pay for non-basic education tasks, and thus not the State's responsibility to fund. *McCleary*, 173 Wn.2d at 536.

The activities of 2015 and 2016 thus set the stage for the legislative action taken in the 2017 session. The Court acknowledged that the Legislature could not “realistically determine the appropriations necessary for full funding of basic education, including salaries” until it obtained the updated data the Task Force would gather. Order at 11, *McCleary v. State*, No. 84362-7 (Wash. Oct. 6, 2016). And it acknowledged the Legislature’s commitment to achieve compliance in the 2017 legislative session. *Id.*

**B. Legislation Enacted in 2017 Completes the Educational Reforms Initiated in ESHB 2261, Which This Court Identified as a Means to Fulfill the State’s Constitutional Duty**

In its 2016 briefing, the State suggested that “the issues in this case can be resolved only by a Legislature whose members can come together to solve a particularly difficult and complex problem with guidance from this Court.” State’s Reply Br. at 6 (June 17, 2016). The task of resolving interrelated issues concerning widely varying district compensation levels and the transition to new state allocations, funding, taxation, and sustainability proved to be exceedingly complex, with implications and consequences that extend well beyond education policy. Resolution was reached with thorough data review, policy tradeoffs, careful balancing, and coordination of implementation.

The 2017 legislation will not end debate over educational policy. Nor does it “complete” ongoing adjustments to improve the system—

indeed it specifically contemplates and provides for ongoing review to allow policy adjustments and ensure continuing funding adequacy. But the 2017 Legislature has done what the Court required in its 2012 decision: it has acted to complete the implementation of full state funding for the state program of basic education, eliminating unconstitutional reliance on local levies to fund basic education. The 2017 Legislature has brought the State into compliance with article IX, section 1.

A detailed summary of EHB 2242 is provided in the *2017 Report*, with highlights discussed below.

**1. The 2017 Legislature established a compensation system for its program of basic education that will complete the final task set out in ESHB 2261**

In enacting EHB 2242, the 2017 Legislature established a compensation system for its program of basic education that funds market-rate salaries paid from state revenue sources (not local levies), that eliminates grandfathered base salary disparities among school districts, and that provides for regular review and adjustments to ensure market-rate compensation levels into the future. Implementing these provisions will complete the final task set out in ESHB 2261.

EHB 2242 reforms the staff salary allocation methodology in a manner that aligns state allocations with evidence-based, market rate levels designed to attract and retain competent staff. The new methodology has

multiple steps, beginning with a base salary allocation for each of the three classes of employees and then applying upward adjustments to the base.

**a. New base salary allocation**

The State begins phasing in new state salary allocations in the 2018-19 school year, shortly after the new state tax revenue collections begin in calendar year 2018. The phase-in is completed the following school year (2019-20). For school year 2019-20, the State will allocate money to school districts based on an average salary of \$64,000 per FTE for certificated instructional staff (CIS) before inflation adjustments and the regionalization adjustments described below. The State will allocate an average salary of \$95,000 per FTE for certificated administrative staff (CAS) and \$45,912 for classified staff (CLS) before inflationary and regionalization adjustments. Laws of 2017, 3d Sp. Sess., ch. 13, § 101; *2017 Report* at 21.

**b. Fifty percent phase-in for 2018-19**

For school year 2018-19, school districts will receive allocations based on the following average base salaries:

- \$59,333.55 for certificated instructional staff.
- \$79,127.50 for certificated administrative staff.
- \$39,975.50 for classified staff.

Laws of 2017, 3d Sp. Sess., ch. 1, § 503(1)(c) (SSB 5883, the 2017-19 Operating Budget)).<sup>4</sup> Individual school districts are held harmless during the transition to the new formula, receiving the greater of the product of the 2018-19 formula or the district's 2017-18 allocation increased by 2.3 percent. *Id.* § 503(8).

**c. Salary allocation adjustments**

The second step of new salary allocation methodology applies factors to adjust for regional differences in the cost of hiring staff. Regionalization factors become operative in the 2018-2019 school year. As described in the *2017 Report*, salary allocations are adjusted upward for those districts with higher costs of living. Laws of 2017, 3d Sp. Sess., ch. 13, § 104; Laws of 2017, 3d Sp. Sess., ch. 1, § 503(c); LEAP Document 3<sup>5</sup>; *2017 Report* at 23-24.<sup>6</sup> The projected salary allocations for school year 2019-20, after regionalization and inflation adjustments, *as statewide averages*, are as follows:

- \$72,694 for certificated instructional staff.

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<sup>4</sup> The allocations are 50 percent of the difference between fully funded allocations in the 2019-20 school year and allocations in the 2016-17 school year.

<sup>5</sup> See <http://fiscal.wa.gov/BudgetOLEAPDocs.aspx> (*2017 Report*, App. C).

<sup>6</sup> During the period between 2018 and 2023, additional upward adjustments will be made to certain school districts to ensure new allocations will not be less than their estimated total salary. Those adjustments are temporary and will expire over time as inflationary adjustments bring the other districts up. *2017 Report* at 25.

- \$107,354 for certificated administrative staff.
- \$51,935 for classified staff.

*2017 Report* at 22.<sup>7</sup>

**d. Other elements of compensation**

The 2017 legislation increases allocations for health benefits and staff pensions. *2017 Report* at 27. For the 2017-19 biennium, fringe benefit factors are applied to the salary allocations, including regional adjustments and inflationary adjustments, at a rate of 23.49 percent for certificated (instructional and administrative) staff and 24.60 percent for classified staff. Laws of 2017, 3d Sp. Sess., ch. 1, § 502(6).<sup>8</sup> In addition, insurance benefit allocations increase in 2019-20 from \$780 per employee per month to \$957 per employee per month to bring contributions for school employees in parity with contributions for state employees. *Id.* § 504(4); *2017 Report* at 27 n.57.

Increases for all compensation combined in the 2017-19 biennium total \$1.7 billion over the 2015-17 biennium. *2017 Report* at 27. Increases for all compensation in the 2019-21 biennium are projected to rise to \$4.78 billion over the 2015-17 biennium. *2017 Report* at 27.

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<sup>7</sup> The table on page 22 of the *2017 Report* illustrates the impact of inflation and regionalization factors in producing state-funded salary allocation ranges.

<sup>8</sup> Fringe benefits include pension contributions, Social Security and Medicare taxes, and other benefits. *2017 Report* at 12 n.19.

**e. New employee salary and compensation levels are consistent with evidence of market rates for attracting and retaining competent staff**

The new salary allocations are consistent with evidence-based research on market rates and comparable non-education employment positions. E2SSB 6195 required the Education Funding Task Force to work with an independent professional consultant to, among other things, identify market rate salaries that are comparable to each of the staff types in the prototypical school funding model. Laws of 2016, ch. 3, § 3. The consultant performed a number of analyses on state base pay allocations, types of supplemental pay, and market context for attracting and retaining K-12 staff.<sup>9</sup> From its comparable positions analysis, the consultant concluded:

- State base salary allocations for K-12 positions were lower than salaries for comparable positions.
- On a statewide average, salaries were parallel to comparable non-education positions when additional locally-funded supplemental pay was added.

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<sup>9</sup> The consultant reviewed data from the 2014-15 school year and built on some of the work done by the 2012 Compensation Technical Work Group Report as part of its analysis. *Final Report to the Education Funding Task Force K-12 Public School Staff Compensation Analysis* at 7, 50 (Nov. 15, 2016), <https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=izzhDGqdgfw&att=false>.



- Current total salaries (i.e., base salary allocation plus local supplemental pay) reflected market factors.
- Teachers earn 102-104 percent of the national average (when supplemental pay is included).
- Average salary (including supplemental pay) across all staff types was \$60,915.

*Final Report to the Education Funding Task Force K-12 Public School Staff Compensation Analysis* (Nov. 15, 2016).<sup>10</sup>

The comparative market analysis conducted by Dr. Lori Taylor in 2012 as part of the 2012 Compensation Technical Work Group made conclusions similar to the Education Funding Task Force consultant.<sup>11</sup> Dr. Taylor concluded that State-funded base salaries for teaching and non-teaching staff generally were not competitive with base salaries in other states or with comparable positions outside the education sector. But total salaries for teachers<sup>12</sup> met or exceeded those of comparable non-education counterparts. Non-teaching staff were competitive with or well above the

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<sup>10</sup> See note 9 for internet link to the report.

<sup>11</sup> See Lori Taylor, *But Are They Competitive in Seattle? An Analysis of Educator and Comparable Non-educator Salaries in the State of Washington* (Apr. 2012), <http://www.k12.wa.us/Compensation/pubdocs/CompetitiveSeattle.pdf>.

<sup>12</sup> “Total salaries” included amounts paid from all sources (including local levies) without regard to whether they were compensation for activities within the State’s program of basic education. *Id.* at 11.

salaries received by their counterparts outside of the education sector. Fringe benefits were deemed “unusually generous.”<sup>13</sup> Thus, total compensation packages were deemed sufficient to attract and retain a high quality workforce.<sup>14</sup>

The State projects that it will allocate funds sufficient to pay an average salary for all staff types of approximately \$69,721 by the 2019-20 school year as compared to \$52,171 under the previous allocation method. *2017 Report* at 22 n.40. Including increases to already generous fringe benefits and health benefits, the State achieves a competitive level of compensation. Evidence shows that the projected salary level to be allocated is consistent with market rates and should be sufficient to attract and retain competent staff.

**f. Measures to ensure compensation remains sufficient to attract and retain competent staff**

EHB 2242 provides school districts with an annual adjustment allocation each year beginning in the 2020-21 school year to keep up with inflation. Laws of 2017, 3d Sp. Sess., ch. 13, § 102; *2017 Report* at 25-26. In addition, beginning with the 2023-24 school year, the state basic education compensation allocations are to be rebased every six years to

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<sup>13</sup> *Id.* at 51.

<sup>14</sup> *Id.* at 50-51.

ensure that they continue to provide market-rate salaries and that regionalization adjustments continue to reflect actual economic differences between school districts. Laws of 2017, 3d Sp. Sess., ch. 13, § 104; *2017 Report* at 25.

**2. The increased state salary allocations also result in increased funding for all the programs that require instructional staff to deliver services**

The new salary allocations are embedded in the prototypical school model. The prototypical school model provides the formula for calculating funding allocations for the additional staff hours required to provide the supplemental instruction associated with the categorical educational programs. Therefore, programs such as the highly capable program, the learning assistance program, and the transitional bilingual program will see a higher funding level due to the higher state salary allocations for the staff providing the increased instructional hours. The salary allocation-related increase to these programs is in addition to the separate program-specific enhancements described at B.3.a. on pages 21-22 below. *2017 Report* at 28-29. For special education, districts receive an excess cost allocation per eligible student of an additional 93.09 percent of the basic education allocation. RCW 28A.150.390(2)(b). For each student, therefore, the increased staff compensation allocation results in a school district receiving both a higher basic education allocation and a higher excess cost

allocation. *2017 Report* at 28-29. The pupil transportation allocation formula also contains a component incorporating compensation increases. RCW 28A.160.192(2)(b).

**3. The 2017 legislation enhances funding for categorical education programs, completes the phase-in of operating funds for K-3 class size reduction, and enacts other important educational policy improvements**

Providing state funding for compensation is the most expensive and extensive component of the 2017 legislation. But the 2017 legislation also enhances funding for categorical basic education programs, completes the implementation of K-3 class size reduction allocations, and adopts important education policy improvements.

**a. Enhanced funding for categorical programs**

The 2017 legislation makes targeted investments in the following basic education student support programs:

*The Learning Assistance Program.* The State creates a new program within LAP that establishes a high poverty allocation for an additional 1.1 hours of instruction per week for schools with at least 50 percent of students eligible for free or reduced meals at a ratio of 15 students per teacher. Laws of 2017, 3d Sp. Sess., ch. 13, §§ 403-405; *2017 Report* at 31-33. The high poverty-based eligibility is generated at the school building level. The allocation must be expended for students in those buildings. *Id.* § 405;

2017 Report at 31-33. In addition, EHB 2242 codifies into basic education the increases previously provided in the operating budget from an average 1.5156 hours per week to 2.3975 hours per week supplemental instruction for low income students not meeting academic standards. Laws of 2017, 3d Sp. Sess., ch. 13, § 402(10)(a).

*Transitional Bilingual Instruction Program.* The State boosts the funding to support an increase from 4.7780 hours per week in extra instruction to 6.7780 hours per week in grades 7-12 at a ratio of 15 students per teacher. *Id.* § 402(10)(b)(i). The prototypical school model is amended to codify an additional 3 hours per week of instruction to students exiting the bilingual program. *Id.* § 402(10)(b)(ii).

*Highly Capable Program.* The State boosts the minimum allocation for the highly capable student program from 2.314 percent of each school district's full time equivalent (FTE) student enrollment to 5 percent of each district's FTE. *Id.* § 402(10)(c). School districts must also prioritize equitable identification of low-income students for their highly capable programs.

*Special Education.* The State increases the percentage of enrolled students for whom districts may receive a 93.09 percent special education excess cost allocation. The percentage increases from 12.7 percent to 13.5 percent of enrolled students. *Id.* § 406.

**b. K-3 class size allocations**

SHB 2776 required the Legislature to allocate funding sufficient to staff an average class size of 17.00 students in K-3 classes by 2018, focusing first on high poverty schools. The 2017 legislation provides full funding for K-3 class size reduction for the 2017-18 school year. Laws of 2017, 3d Sp. Sess., ch. 1, § 502(2)(c); Laws of 2017, 3d Sp. Sess., ch. 13, § 402(4)(a); *2017 Report* at 4, 10, 13, 44.

**c. Continuous improvement**

The 2017 legislation also puts mechanisms in motion to maintain momentum and keep the system moving forward and fully funded. As mentioned above, EHB 2242 establishes cost of living increases and periodic rebasing of salary allocations. Laws of 2017, 3d Sp. Sess., ch. 13, § 101(10). It establishes a process for reviewing and refining enrichment activities. *Id.* § 502. It establishes a process to review and updated the special education safety-net process and resources. *Id.* §§ 407(3), 408. It establishes a process to review and prioritize potential staffing enhancements in the future. *Id.* §§ 904, 905. The 2017-19 operating budget provides for a study by the Superintendent of Public Instruction of the new pupil transportation formula and authorizes the Superintendent to establish an alternate transportation grant program for districts that have unique characteristics. Laws of 2017, 3d Sp. Sess., ch. 1, § 501(45); *2017 Report*

at 40-41. EHB 2242 codifies previously funded enhanced values for guidance counselors and parent involvement coordinators into positive law in the prototypical school model. Laws of 2017, 3d Sp. Sess., ch. 13, § 402(5); *2017 Report* at 41.

**d. Levy reform/enrichment activities**

In order to sharpen the distinction between basic education activities that the state has an obligation to fund and those activities that may be supported by local revenues, EHB 2242 defines a scope of permitted “enrichment” activities and establishes a process for continued review and refinement of the definition. Laws of 2017, 3d Sp. Sess., ch. 13, §§ 201, 501, 502; *2017 Report* at 52-58. EHB 2242 establishes a new formula for calculating school district levy authority and puts into place certain controls, described fully in the report, to ensure districts use levies for authorized enrichment rather than basic education activities. *2017 Report* at 56-58.

**e. Other significant policy changes**

*SEBB.* The Legislature established a new School Employees Benefits Board to design, approve, and administer health care benefits for all public school and educational service district employees. Laws of 2017, 3d Sp. Sess., ch. 13, §§ 801(1), 806(4)(d); *2017 Report* at 65-70.

*Professional Learning Days.* The State will provide allocations to school districts for professional learning days to be phased in with one day

funded in school year 2018-19, two days funded in school year 2019-20, and three days funded in school year 2020-21 and thereafter. Laws of 2017, 3d Sp. Sess., ch. 13, § 105; *2017 Report* at 39.

*Career and Technical Education (CTE) and Skills Centers.* EHB 2242 allocates funding to reduce average class sizes for CTE from 26.57 to 23, and for approved skills center programs from 22.76 to 20. Laws of 2017, 3d Sp. Sess., ch. 13, § 402(4)(c)(i). The 2017-19 operating budget provides an extra increase in MSOC allocations for students in approved skill center programs to bring the level up to parity with CTE programs. Laws of 2017, 3d Sp. Sess., ch. 1, § 502(8)(b), (c); *2017 Report* at 37-38. EHB 2242 also lays a foundation for broader course equivalency crediting. Laws of 2017, 3d Sp. Sess., ch. 13, § 410; *2017 Report* at 38.

*Transparency and Accountability.* The Legislature enacted a number of new policies designed to increase transparency and accountability for the public. These are detailed in the *2017 Report* at 62-64.

#### **4. Newly enacted revenue provisions coordinate with increases in funding allocations**

In coordination with the new school funding provisions, the Legislature enacted several changes to bring in additional revenue of approximately \$5.3 billion over the next four years.<sup>15</sup> *2017 Report* at 52.

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<sup>15</sup> The balance of the \$8.3 billion increase in K-12 spending, comes from existing tax revenue sources, adjustments in other expenditures, and projected revenue growth.



The Legislature enacted an increase in the state property tax levy for the support of the common schools. Laws of 2017, 3d Sp. Sess., ch. 13, § 301; *2017 Report* at 46-49. In addition, the Legislature enacted a variety of other measures, as detailed in the *2017 Report* at 50-52, to bring additional revenue into the General Fund.

**C. The Court Should Find That the State Has Complied with Its Article IX, Section 1 Duty**

The legislation enacted in the 2017 legislative session completes the implementation of the educational reforms enacted in ESHB 2261 and SHB 2776 and provides for fully sufficient state funding for that implementation. Applying the normal presumptions and analysis employed in a facial challenge to legislation, the Court should find that EHB 2242 is “reasonably likely to achieve” fully sufficient state funding for the State’s program of basic education, *see McCleary*, 173 Wn.2d at 519, and that the State therefore has complied with its article IX, section 1 duty.

**1. The burden is on those challenging the newly enacted legislation to demonstrate its noncompliance with article IX, section 1.**

As detailed above, the Court set out the appropriate standard for assessing compliance with article IX, section 1 in its 2012 decision: “we must ask whether the state action achieves or is reasonably likely to achieve the constitutionally prescribed end.” *McCleary*, 173 Wn.2d at 519 (internal

quotation marks omitted). The “state action” at issue here is the legislation enacted in 2017 to implement and enhance ESHB 2261 and SHB 2776. The evidence from the 2009 trial in this case, and the trial court’s 2010 findings based on that evidence are of little assistance in evaluating constitutional compliance in 2017, for two overriding reasons.

First, plaintiffs’ lawsuit challenged a funding system that is no longer used, and the evidence at trial addressed that “now-abandoned” funding system. Simply put, a new system of education funding has been implemented, and its compliance with article IX, section 1 cannot be assessed by relying on outdated evidence and findings, as the Court recognized even in 2012. *See McCleary*, 173 Wn.2d at 543 (“[W]e have the benefit of seeing the wheels turn under ESHB 2261. It would be a mistake to disregard that progress now . . .”).

Second, if plaintiffs believe the newly enacted legislation is not compliant with article IX, section 1, their challenge to that legislation must be analyzed as a facial challenge. Theirs would be a challenge to *legislation as enacted*, not to a particular application of law to them. New legislation, new funding formulas, and new funding sources are now before the Court, and plaintiffs can do no more than argue that those legislative enactments cannot and will not amply fund education. *See Tunstall v. Bergeson*, 141 Wn.2d 201, 223, 5 P.3d 691 (2000) (deciding plaintiffs’ facial challenge

under article IX, section 1, but rejecting their attempted as-applied challenge because their claims and arguments “merely speculate about constitutional problems that *could result* from [the statute’s] application”); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (cautioning against speculation, especially where the State has not yet had an opportunity to implement a newly-enacted statute).

Accordingly, the inquiry is whether the enacted legislation *on its face*—without resort to outdated facts, speculation, or hypothetical future scenarios—is reasonably likely to provide fully sufficient state funding for the State’s program of basic education. As in any other facial challenge, the focus must be on the language of the legislation. *League of Women Voters of Washington v. State*, 184 Wn.2d 393, 401-02, 355 P.3d 1131 (2015); *Tunstall*, 141 Wn.2d at 220-21.

The Court should apply normal principles of statutory construction and interpretation when reading the legislative language. It should assume that the Legislature shares the Court’s commitment to act consistent with the Washington Constitution and has enacted legislation in a good faith attempt to comply with article IX, section 1. *Tunstall*, 141 Wn.2d at 220.<sup>16</sup>

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<sup>16</sup> The judicial presumption that the Legislature shares the Court’s commitment to act in compliance with the Constitution extends back to this Court’s earliest cases. *See*,

And, as in any other facial challenge, the Court should uphold the legislation unless its unconstitutionality is demonstrated “beyond a reasonable doubt.” *League of Women Voters*, 184 Wn.2d at 423; *Tunstall*, 141 Wn.2d at 221.<sup>17</sup> These principles of judicial review apply in a positive rights analysis as in any other facial challenge.<sup>18</sup>

As this Court explained in *Hoppe*, these principles—the plenary power of the Legislature except as limited by the Constitution and the presumption of validity in a facial challenge to legislation—are “not merely rules of judicial convenience. Rather, they draw and mark the line of demarcation between the function and authority of the legislative and

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*e.g.*, *State ex rel. Reed v. Jones*, 6 Wash. 452, 462-63, 34 P. 201 (1893) (rejecting the “false theory” that only the judiciary can be “entrusted” to enforce the constitution).

<sup>17</sup> This presumption of regularity and constitutionality has a long history in this Court. *See, e.g.*, *Sch. Dists.’ All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605-08, 244 P.3d 1 (2010) (statutes are presumed constitutional and a challenger must prove that the statute is unconstitutional beyond a reasonable doubt) (citing cases and tracing the standard to *Parrott & Co. v. Benson*, 114 Wash. 117, 122, 194 P. 986 (1921)); *Clark v. Dwyer*, 56 Wn.2d 425, 431, 353 P.2d 941 (1960) (same) (citing cases); *Union High Sch. Dist. 1 v. Taxpayers of Union High Sch. Dist. 1*, 26 Wn.2d 1, 5-7, 172 P.2d 591 (1946) (same) (citing cases).

<sup>18</sup> As Professor Hershkoff explained when proposing the “achieves or is reasonably likely to achieve” standard, it was not meant to suggest that there is any single “right” answer to complex social problems like the design and funding of educational systems or that courts should uphold only those laws that promote the best constitutional effects. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1185 (1999). This Court implicitly acknowledged the availability of multiple “right” answers when it acknowledged the constitutional delegation to the Legislature to address “the difficult policy questions inherent in forming the details of an education system.” *McCleary*, 173 Wn.2d at 517.

judicial branches of our government.” *Hoppe v. State*, 78 Wn.2d 164, 169, 469 P.2d 909 (1970).

**2. EHB 2242 provides or is reasonably likely to provide fully sufficient state funding for the State’s program of basic education**

As summarized above and as explained in more detail in the *2017 Report*, EHB 2242 implements and funds the final pieces of the educational reform program enacted in ESHB 2261 and SHB 2776. Through that legislation, the State has reformed the K-12 staff compensation system to ensure that *state* funding allocated to local districts is sufficient to pay market rate salaries for all staff providing the State’s program of basic education.<sup>19</sup> That system adjusts for regional differences in the cost of hiring staff, to avoid disadvantaging school districts with high costs of living and it provides additional state funding for small school districts who may otherwise receive insufficient state funds under the prototypical school model.<sup>20</sup> EHB 2242 provides for salary increases that keep up with inflation and establishes an evidence-based rebasing mechanism to ensure that market rate salaries are funded into the future.<sup>21</sup>

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<sup>19</sup> See *2017 Report* at 17-27 (explaining new compensation allocations).

<sup>20</sup> See *id.* at 20-25 (regionalization adjustments); *id.* at 15 (small school factor).

<sup>21</sup> See *id.* at 21-22, 25-26 (inflation adjustments); *id.* at 25 (rebasings).

By enacting EHB 2242, the Legislature has fully implemented the reforms enacted in ESHB 2261. It has modified the prototypical school model to determine the state salary allocations needed to support the State’s program of basic education and to accommodate new and updated educational policy choices, and it is funding each policy change. It has established mechanisms for obtaining future information to use in updating the model. In short, it has enacted comprehensive, integrated, and far-reaching legislation that *on its face* provides or is reasonably likely to provide fully sufficient state funding for the State’s program of basic education. The Court should find that the State has complied with its constitutional duty under article IX, section 1.

**D. The Court Should Relinquish Jurisdiction Over This Appeal**

The Court retained jurisdiction “to help ensure progress in the State’s plan to fully implement education reforms by 2018” and to foster “dialogue and cooperation” between the Court and the Legislature to facilitate those reforms. *McCleary*, 173 Wn.2d at 547, 549. The purposes to be served by retaining jurisdiction now have been fulfilled. The Legislature has implemented and is funding every reform required under ESHB 2261—enhancing many of them beyond what ESHB 2261 required. It revised the state property tax and identified other revenue to ensure “dependable and regular” “state-provided funding” to support the basic education

program. *McCleary*, 173 Wn.2d at 528. Adding to and completing other policy enhancements and funding increases for the prototypical school model and categorical basic education programs, it implemented a new system of market-rate compensation sufficient to attract and retain staff to provide the State's program of basic education. Funding commitments for the next biennium, to the maximum extent allowed by law, are in place. There is no further need for the Court to retain jurisdiction in this matter.

Plaintiffs may argue that the Court should continue jurisdiction to make sure all provisions of EHB 2242 are fully funded beyond the current biennium. That argument fails on three grounds.

First, it disregards the language of EHB 2242, which was enacted by the Legislature in the full and proper exercise of its statutory authority. As explained above, EHB 2242 is entitled to a presumption of constitutional validity and regularity, and to a presumption that the Legislature will heed the mandates of that statute. The mere *possibility* that a future Legislature will not adhere to the requirements of EHB 2242 is not a cognizable basis for continuing to retain jurisdiction.

Second, the 2017 Legislature has done all that it can do to ensure future funding: it enacted positive law requiring that the funding be

provided. It has no other means to direct future legislative action.<sup>22</sup> Having enacted positive law (and having funded it for the 2017-19 biennium), the 2017 Legislature is at the end of its constitutional power, and no exercise of retained jurisdiction can expand the Legislature’s constitutional power.

Third, should the State fail to implement and fund EHB 2242 at some point in the future, the courthouse door will be open to plaintiffs. But it is time for *this* case to end. The State has taken all actions reasonably necessary to implement and fund all the educational and funding reforms enacted in and contemplated by ESHB 2261. Those actions in sum are “reasonably likely to achieve the constitutionally prescribed end” identified in the 2012 *McCleary* decision: state funding that is “fully sufficient” to support the State’s basic education program. *McCleary*, 173 Wn.2d at 527-28.

The Court should relinquish its retained appellate jurisdiction.

**E. The Court Should Dissolve Its Order of Contempt Against the State**

In 2014, the Court found the State in contempt for failing to submit a “complete plan” for achieving compliance with article IX, section 1. Order, *McCleary v. State*, No. 84326-7 (Wash. Sep. 11, 2014). The

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<sup>22</sup> See *Washington State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 290, 301-02, 174 P.3d 1142 (2007) (each Legislature has plenary power under the Washington Constitution that cannot be constrained by the enactment of a prior Legislature).



contempt order should be dissolved. In EHB 2242, the Legislature has enacted all legislation necessary to complete the implementation and funding of ESHB 2261. There is no principled basis for continuing to require submission of a plan for enacting implementing legislation that already has been enacted. In both its January 2012 decision and the order directing submission of a plan, the Court stated that its purpose in retaining jurisdiction was to foster a dialogue with the Legislature that would further the shared goal of providing ample funding for educational reforms by 2018. *McCleary*, 173 Wn.2d at 545-47; Order at 8, *McCleary v. State*, No. 84326-7 (Wash. Jan. 9, 2014). The dialogue occurred and the ultimate goal has been met, as this Memorandum and the accompanying *2017 Report* explain in detail.

## **VI. CONCLUSION**

Through the legislation enacted in the 2017 legislative session, the State has implemented all educational reforms adopted in ESHB 2261 and SHB 2776, including staff compensation, and the Legislature is providing for funding that is sufficient to support the State's program of basic education without resort to local levy funding. The State has remedied the constitutional deficiencies in the prior funding system.

The State therefore has complied with its duty under article IX, section 1 of the Washington Constitution to make ample provision for the

education of all children residing within the State, as set out in this Court's 2012 decision. The Court should find the State in compliance with article IX, section 1, release the State from its contempt orders, and terminate this appeal.

RESPECTFULLY SUBMITTED this 31st day of July 2017.

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**CERTIFICATE OF SERVICE**

I certify that I served a copy of the State Of Washington's Memorandum Transmitting The Legislature's 2017 Post-Budget Report, via electronic mail, upon the following:

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

DATED this 31st day of July 2017, at Olympia, Washington.

*s/ Wendy R Scharber*

WENDY R. SCHARBER  
*Legal Assistant*

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