

9-2-2016

## **Plaintiff/Respondents' Consolidated Answer to the Three August 29, 2016 Amicus Briefs**

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No. 84362-7

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Defendant/Appellant,

v.

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,

Plaintiffs/Respondents.

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**PLAINTIFF/RESPONDENTS'  
CONSOLIDATED ANSWER TO THE THREE  
AUGUST 29, 2016 AMICUS BRIEFS**

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## I. INTRODUCTION

The following amici filed briefs on August 29, 2016:

- ◆ the Arc of Washington State, et al. (who identify themselves as the “special needs amici”);<sup>1</sup>
- ◆ Washington’s Paramount Duty, a Washington nonprofit corporation and 501(c)(4) organization (“WPD”);<sup>2</sup> and
- ◆ the Superintendent of Public Instruction (“SPI”).<sup>3</sup>

Since their briefs address overlapping aspects of the four general questions presented in this Court’s July 14, 2016 Order,<sup>4</sup> plaintiffs file this consolidated Answer to reduce redundancy and repetition.

## II. ANSWER TO AMICI’S POINTS ABOUT THE COST OF CONSTITUTIONAL COMPLIANCE

### A. Cost Of All Components Other Than Compensation.

With respect to all components of the State’s basic education program other than compensation, the State maintains that the cost of full

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<sup>1</sup> *Amicus Curiae Memorandum Of The Arc Of Washington State, The Arc Of King County, TeamChild, Washington Autism Alliance & Advocacy, Open Doors For Multicultural Families, Seattle Special Education PTSA, Bellevue Special Needs PTA, Highline Special Needs PTA, Gary Stobbe, M.D., James Mancini And Conan Thornhill In Response To State Of Washington’s Brief Responding To Order Dated July 14, 2016 at p.3 & n.3.*

<sup>2</sup> *Brief Of Amicus Curiae Washington’s Paramount Duty, A Washington Nonprofit Corporation And 501(c)(4) Organization.*

<sup>3</sup> *Superintendent Of Public Instruction’s Amicus Curiae Brief In Response To The Court’s Order Dated July 14, 2016.*

<sup>4</sup> *July 2016 Order at p.2 (“(1) what remains to be done to timely achieve constitutional compliance, (2) how much it is expected to cost, (3) how the State intends to fund it, and (4) what significance, if any, the court should attach to E2SSB 6195 in determining compliance with the court’s order to provide a complete plan. A decision on whether to dismiss the contempt order or to continue sanctions will be determined by order following the hearing.”).*

constitutional compliance for each component is the same as the cost of the State's funding formula for that component.<sup>5</sup>

The amicus briefs show, however, that State funding formulas do not fully fund the actual cost of implementing the formulas' corresponding components of the State's basic education program.<sup>6</sup>

That's fatal to the State's full funding claims – for as amici point out, this Court affirmed over four years ago that the State's funding formula amount is **not** the cost of constitutional compliance if the formula leaves part of the school district's actual cost unfunded.<sup>7</sup> As this Court stated in easy to read and comprehend language:

If the State's funding formulas provide only a portion of what it actually costs a school to pay its teachers, get kids to school, and keep the lights on, then the legislature cannot maintain that it is fully funding basic education through its funding formulas.

*McCleary v. State*, 173 Wn.2d 477, 532, 269 P.3d 227 (2012).

Funding the amount that a funding formula funds satisfies the definition of a tautology. But that amount is not the cost of achieving constitutional compliance unless the formula amply funds the actual cost of implementing the corresponding component of the State's basic education program. Since the amicus briefs confirm the State's funding

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<sup>5</sup> This point is outlined in *Plaintiff/Respondents' Answer To The State's August 22, 2016 Filing* ("Plaintiffs' August 29 brief") at pp.18-29.

<sup>6</sup> *SPI amicus brief* at pp.5-14 and appendices; *Special Needs amicus brief* at p.1 & pp.6-8; *WPD amicus brief* at p.7.

<sup>7</sup> *WPD amicus brief* at pp.11-13; *Special Needs amicus brief* at p.5 & nn.10-11.

formulas do **not** fund the corresponding component's actual cost, they confirm that the funding formula amounts upon which the State bases its "full funding" claims are **not** the full cost of constitutional compliance.

This Court's July 2016 Order emphasized that "The 2017 legislative session presents the last opportunity for complying with the State's paramount duty under article IX, section 1 by 2018."<sup>8</sup> Since full compliance requires the State to amply fund the actual cost of implementing the components of its basic education program, the State's funding formulas must be updated to fund that actual cost by the adjournment of the 2017 session.

**B. Cost Of The Compensation Component.**

The State does not dispute that its compensation funding formulas do not fund the actual cost of attracting and retaining competent teachers, staff, and administrators to implement the State's basic education program. Instead, the State maintains its prior legislatures couldn't act because the State didn't have information to determine that actual cost.<sup>9</sup>

The amicus briefs show, however, that the State has already done multiple studies to determine that information, and even knows to the dollar how much the State is underfunding its school districts' actual

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<sup>8</sup> *July 2016 Order at pp.1-2 (underline added).*

<sup>9</sup> *This point is summarized in Plaintiffs' August 29 brief at p.28 & n.44.*

compensation costs.<sup>10</sup> For example, the State knows its compensation funding formulas underfund school districts' actual compensation costs by an average of \$13,654 for a teacher, \$12,089 for a staff member, and \$54,615 for an administrator.<sup>11</sup> (The State likewise knows its compensation underfunding has gotten worse since this Court's January 2012 decision – for as amici point out, this Court's original decision expressly called out the State's underfunding of school districts' actual compensation costs by approximately \$8,000 for teachers and approximately \$40,000 for administrators.<sup>12</sup>)

In short, amici are correct. The State's "still don't know" excuse for its ongoing failure to amply fund school districts' actual compensation costs is exactly that. An excuse. And given this Court's clear ruling four years ago that this component must be fully funded to comply with the ample funding mandate of Section 1, it's not a good faith excuse.

As noted earlier, the July 2016 Order emphasized that the 2017 legislative session is the State's last chance to comply with Section 1's ample funding mandate. Since full compliance requires the State to amply fund the actual cost of attracting and retaining the teachers, staff, and administrators to implement the State's basic education

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<sup>10</sup> See *SPI amicus brief at pp.5-14 & appendices; WPD amicus brief at pp.5-6.*

<sup>11</sup> *SPI amicus brief at p.6 and Appx.B.*

<sup>12</sup> *WPD amicus brief at p.15; see also Trial Exhibit 67 at slide 11.*



program, the State's compensation funding formulas must be updated to fund that actual cost by the adjournment of the 2017 session.

**III. ANSWER TO AMICI'S POINTS ABOUT THE STATE'S FUNDING OF CONSTITUTIONAL COMPLIANCE**

As amici point out, the State has unequivocally known since this Court's January 2012 decision that compliance with Section 1's ample funding mandate requires the State to amply fund the actual cost of implementing the State's basic education program components with dependable and regular State tax sources.<sup>13</sup> Amici accurately note that after this Court's January 2012 decision, the State's 2012, 2013, 2014, 2015, and 2016 legislatures did not enact further revenue or other funding measures to do that.<sup>14</sup> As noted below, plaintiffs agree that the State's ongoing inaction on this revenue piece of compliance does not comply with the court rulings in this case.

**A. Revenue To Fund The Actual Cost Of Components Other Than Compensation.**

The State's August 22 filing did not provide any answer with respect to the dependable and regular State tax sources it plans to rely upon to fund full constitutional compliance for components other than compensation. Since the 2017 legislative session is the State's last chance

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<sup>13</sup> *Special Needs amicus brief at p.5 & n.7.*

<sup>14</sup> *See ongoing underfunding of actual costs at SPI amicus brief, pp.5-14 & appendices; Special Needs amicus brief at p.1 & pp.6-8; WPD amicus brief at p.7.*

to comply with Section 1's ample funding mandate, full compliance requires the State to secure dependable and regular State tax sources to amply fund (not partially fund) the actual cost of implementing those components by the adjournment of the 2017 session.

**B. Revenue To Fund The Actual Cost Of Compensation To Attract & Retain Competent Personnel.**

The State's August 22 filing likewise did not identify the dependable and regular State tax sources the State will rely upon to amply fund the cost of compensation to attract and retain competent personnel. Amici point out that the State instead says its 2016 legislature created another task force to come up with possible ideas for next year's 2017 legislature to consider – the same type of task force or study the State's repeatedly been doing (and then ignoring) over the past decades.<sup>15</sup> Plaintiffs agree with amici that there is no credible reason to believe that *this* time the State's legislature will receive and adopt recommended revenue measures to increase school districts' level of current funding.

One idea floated by the State's August 22 filing was for the State to take local levy dollars away from school districts and then hand those dollars back calling them "State" dollars (a/k/a the "levy swipe"/"levy swap" school funding approach). Amici point out, however, that local,

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<sup>15</sup> See, e.g., *WPD amicus brief* at pp.5-6.

State, and federal dollars combined currently leave districts without ample funding to fully implement the State’s basic education program – leaving school districts throughout the State with a serious teacher shortage.<sup>16</sup> Changing the label on school district dollars instead of the amount of school district dollars therefore does not address districts’ current lack of ample funding to fully implement the State’s basic education program.

Levy reform in the form of a levy swipe does allow State officials to pat themselves on the back and say they increased the State’s portion of our public schools’ unconstitutionally low level of funding. But it does not change that unconstitutionally low level of funding. When the total pie is too small, “reforming” the size of two slices to make one slice smaller and the other slice bigger doesn’t change the fact that the total pie is too small.

Since the 2017 legislative session is the State’s last chance to comply with Section 1’s ample funding mandate, full compliance requires the 2017 session to secure (and report to this Court) the dependable and regular State tax sources the State will be using to amply fund the actual cost of compensation to attract and retain competent personnel to fully implement the State’s basic education program. And for the reasons noted

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<sup>16</sup> *WPD amicus brief at pp.14-18; accord Plaintiffs’ August 29 brief at p.36, n.62.*

above, plaintiffs agree that a levy swipe that changes the label on school district dollars but not the net amount of those dollars does not provide the State's school districts the ample funding they currently lack.

**IV. ANSWER TO AMICI'S ARGUMENTS ABOUT WHETHER E2SSB 6195 IS THE "PLAN" THIS COURT ORDERED**

To ensure the State did not make full constitutional compliance impractical by putting too much off until right before the deadline, this Court has for the past four years been repeatedly ordering the State to produce the State's complete year-by-year plan for phasing in the State's ample funding of each component of its basic education program.<sup>17</sup>

Amici note that the State's waiting until the last minute to try to come up with something is not the complete year-by-year phase in plan long ordered by this Court.<sup>18</sup>

Plaintiffs agree. As this Court will recall from prior filings in this case, the State had previously assured this Court that the State's 2015-2017 biennium budget would provide the State's *de facto* plan to satisfy those court orders because everything the 2015 legislature did not accomplish in that budget for the 2015-2016 school year (FY 2016) and 2016-2017 school year (FY 2017) would have to be accomplished by the

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<sup>17</sup> See *Plaintiffs' August 29 brief* at pp.37-38.

<sup>18</sup> *Special Needs amicus brief* at pp.1, 2 & 4; *WPD amicus brief* at pp.5-6 & 10.

2017 legislature to meet the ensuing 2018 deadline in this case.<sup>19</sup> After the 2015 legislature made little progress towards achieving full constitutional compliance, this *de facto* plan espoused by the State translated into a plan to wait for the 2017 legislature to figure something out. See the *De Facto* Plan charts in the Appendix to Plaintiffs' **2015** Post-Budget Filing.

This Court did not agree that waiting for the 2017 legislature to figure out a way to amply fund the various components of the State's basic education program was the type of year-by-year phase in plan long ordered by this Court. Rejecting the State's claim that such a *de facto* plan purged the State's 2014 contempt of court, this Court's August 2015 Sanctions Order issued a monetary contempt sanction of \$100,000.00 per day payable daily, starting August 13, 2015. As briefly noted below, amici are correct that the State's *actual* plan in E2SSB 6195 is no more compliant than the State's prior *de facto* plan was in 2015.

**A. E2SSB 6195's "Plan" To Amply Fund The Actual Cost Of Components Other Than Compensation.**

E2SSB 6195 does not address updating the State's funding formulas to fully fund (instead of partially fund) the actual cost of implementing components other than compensation. Amici are

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<sup>19</sup> See Plaintiffs' **2015** Post-Budget Filing at p.24 & n.65.

accordingly correct that E2SSB 6195 is not the complete plan this Court ordered to achieve full constitutional compliance for those components by the firm 2018 deadline in this case.

**B. E2SSB 6195’s “Plan” To Amply Fund The Actual Cost Of Compensation To Attract & Retain Competent Personnel.**

Amici note that E2SSB 6195 establishes another task force to once again look at compensation and once again give a future legislature recommendations which the prior legislature says the future legislature should consider, and that this is not the type of complete plan this Court ordered to achieve full constitutional compliance by the firm 2018 deadline in this case.<sup>20</sup>

Amici are correct. By the time the 2016 legislature met, there were only two years left to phase in the State’s full funding by the 2017-2018 school year deadline specified in this Court’s September 2014 Contempt Order.<sup>21</sup> Waiting until the last year to do everything is not a phase in plan. It’s instead waiting until the last minute to do everything.

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<sup>20</sup> *WPD amicus brief at pp.5-6 & 10.*

<sup>21</sup> *September 2014 Contempt Order at p.4 (“The State failed to submit by April 30, 2014 a complete plan for fully implementing its program of basic education for each school year between now and the 2017-2018 school year”).*

V. **ANSWER TO AMICI'S POINTS ABOUT WHAT REMAINS TO BE DONE TO ACHIEVE FULL CONSTITUTIONAL COMPLIANCE**

A. **What Remains For The Defendant State To Do.**

As outlined above, plaintiffs agree with amici that State funding formulas do not amply fund the actual cost of implementing the various components of the State's basic education program. To achieve full constitutional compliance by the firm deadline in the case, the 2017 legislature must accordingly update the State's funding formulas to fully fund (rather than partially fund) what it actually costs the State's school districts to implement the State's basic education program.

B. **What Remains For This Court To Do.**

Plaintiffs agree with amici that we've been here many times before, dating all the way back to this Court's 1978 *Seattle School District* decision and the defendant State's multiple task forces and studies ever since.<sup>22</sup> Plaintiffs also agree with amici that this Court's 2014 Contempt Order and 2015 Sanctions Order were ineffective in compelling the State's decision-makers to comply with the law or purge the State's contempt of court.<sup>23</sup>

Plaintiffs accordingly agree with amici that what now remains for this Court to do is to stand up and start effectively enforcing the Orders

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<sup>22</sup> *WPD amicus brief at pp.5-6.*

<sup>23</sup> *SPI amicus brief at p.2; Special Needs amicus brief at p.2; WPD amicus brief at p.4.*

this Court has been issuing these past four years to vindicate the paramount and positive constitutional right of every child in our State to an amply funded K-12 education by the 2018 deadline in this case. As every elected official taking the oath of office in our State has known since this Court’s 2012 rulings, “Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education”, and this suit’s 2018 deadline is a “firm deadline for full constitutional compliance.”<sup>24</sup>

Although plaintiffs do not agree with some of the contempt sanctions alluded to in the SPI amicus brief,<sup>25</sup> plaintiffs do agree that the tax exemption sanction proposed by the WPD amicus brief would effectively exert the compelling pressure now required to coerce defendant’s compliance with the lawful court orders in this case.<sup>26</sup>

More fully, plaintiffs believe that the reasons amici assert for this Court’s imposing a firm and unequivocal contempt sanction support both of the two proposals in plaintiffs’ most recent briefing – i.e.:

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<sup>24</sup> *McCleary v. State*, 173 Wn.2d 477, 483, 269 P.3d 227 (2012); December 2012 Order at p.2 (underline added).

<sup>25</sup> The SPI amicus brief alluded to sanctions proposals in a prior SPI brief. See SPI amicus brief at pp.14-15. Rather than repeat their opposition to some of those proposals here, plaintiffs respectfully refer this Court to Plaintiff/Respondents’ Consolidated Answer To The Four June 7, 2016 Amicus Briefs at pp.16-18 (regarding SPI’s levy sanction proposal) and pp.7-18 (regarding all proposals generally).

<sup>26</sup> WPD amicus brief at pp.7-8.



**One:** Issue a contempt sanctions order that gives the State's

2017 regular session two options:

- (a) choose to fully comply with the court orders and declaratory judgments issued in this case (*update the State's funding formulas to amply fund the actual cost of school districts' implementing the State's basic education program*), or
- (b) choose to have the State's unconstitutionally funded school statutes suspended or struck down as unconstitutional, effective the first day of the 2017-2018 school year.

Either way, it's the 2017 session's choice. See Plaintiffs' August 29 brief at pp.44-45.

**Two:** Issue a contempt sanctions order that gives the State's

2017 regular session two options:

- (a) choose to fully comply with the court orders and declaratory judgments issued in this case (*update the State's funding formulas to amply fund the actual cost of school districts' implementing the State's basic education program*), or
- (b) choose to have all tax exemption statutes enacted by the legislature (instead of amply funding K-12 schools) suspended or struck down as unconstitutional, effective the first day of the 2017-2018 school year.<sup>27</sup>

Either way, it's the 2017 session's choice. See Plaintiffs' August 29 brief at pp.44-45.

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<sup>27</sup> *Since the sales tax exemption on food (Initiative 345) was enacted by the voters rather than by the legislature, this sanction would not affect that exemption if the State chose to continue its non-compliance.*

## VI. CONCLUSION

This Court has been exceedingly patient with the defendant's procrastination and contempt of court in this case.

It's been over four years since this Court affirmed that "Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education." *McCleary*, 173 Wn.2d at 483.

It's been over four years since this Court reiterated its *Seattle School District* holding that Article IX, section 1 "imposes a judicially enforceable affirmative duty on the State". *McCleary*, 173 Wn.2d at 485 & again at 514; accord January 2014 Order at p.8 ("Our decision in this case remains fully subject to judicial enforcement.").

And now, after the State's several years of unexcused delay, its upcoming "2017 legislative session presents the last opportunity for complying with the State's paramount duty under article IX, section 1 by 2018." July 2016 Order at pp.1-2 (underline added).

The State's 2012, 2013, 2014, 2015, and 2016 legislatures were running out the clock these past several years by kicking the can down the road as they approached the 2018 deadline for full constitutional compliance. If the rule of law means anything in our State, the 2017 legislature must now comply with the law as it reaches the end of that road. The State's 2017 session must update the State's funding

formulas to amply fund the actual cost of implementing all the components of the State's basic education program. Continued partial funding is not full (or ample) funding.

Plaintiffs accordingly agree with the amici who maintain that this Court should firmly stand up for Washington's over 1 million public school children and their positive constitutional right to an amply funded education by the 2018 deadline in this case. And as noted above, plaintiffs believe that either of the two contempt sanctions they propose would do that.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of September, 2016.

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**DECLARATION OF SERVICE**

Adrian Urquhart Winder declares:

I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of twenty-one years. I am not a party to this action, and I am competent to be a witness herein. On Friday, September 2, 2016, I caused PLAINTIFF/RESPONDENTS' CONSOLIDATED ANSWER TO THE THREE AUGUST 29, 2016 AMICUS BRIEFS to be served as follows:

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*Amicus Curiae Washington's Paramount Duty*

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

EXECUTED in Seattle, Washington, this 2<sup>nd</sup> day of September, 2016.

s/ Adrian Urquhart Winder  
Adrian Urquhart Winder