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**Amicus Curiae Memorandum of the Arc of King County, the Arc of Washington State, TeamChild, Washington Autisim 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 1, 2016**

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NO. 84362-7

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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**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**

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## I. INTRODUCTION

The State of Washington does not claim, nor could it honestly contend, that it pays the actual costs of educating children with disabilities. But when ordered to identify underfunded components of education, the State failed to mention special education, presumably because the Legislature has no plan to spend what is necessary to meet the actual needs of special education students. It should be painfully clear by now that the funding formula is not sufficient just because the Legislature says so.

The special education formula assumes that each child's special needs can be met at the same cost. But under civil rights laws in place since 1975,<sup>1</sup> each child with a disability is entitled to a unique education plan at whatever cost is dictated by the nature of the disability. Knowing that public schools must spend what is necessary to meet widely varying needs of students with disabilities, the Legislature nevertheless adheres to rigid limits on per-student funding and on the percentage of students receiving state-funded special education. This forces dozens of communities around Washington to either raise local taxes or deny required services to their most vulnerable residents, violating the State's paramount duty to amply provide for the education of all children.

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<sup>1</sup> *See, e.g.*, 20 U.S.C. 1414(d)(3) (requiring school districts to develop an individualized education plan for each child with a disability based on that child's unique needs).

The State does not dispute that special education is a component of basic education subject to scrutiny under article IX, section 1. Yet despite this Court's repeated orders to submit a complete plan for fully funding *each component* of basic education, the State continues to ignore special education. The State relies on E2SSB 6195 as the "plan" for curing all constitutional deficiencies, but that 2016 bill does not purport to address the mountainous divide between special educational needs and the state resources devoted to meeting them.

The State's response to the July 14, 2016 Order is not sufficient. More than 125,000 Washington students depend on special education for a chance to acquire the same knowledge and skills as typically developing peers, and to become productive members of society. Students with disabilities need help to access the general curriculum that all children are expected to learn - part of the basic education they are entitled to. They must not be left out of reforms. As this Court recently warned, "The 2017 legislative session presents the last opportunity for complying with the State's paramount duty under article IX, section 1 by 2018."<sup>2</sup> Because the State has failed to submit a plan to fully cover the true costs of special education, this Court should require such a plan to be submitted upon the 2017 Legislature's adjournment.

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<sup>2</sup> July 14, 2016 Order, pp. 1-2.

## II. INTEREST OF AMICI

All of the participants in this brief (“special needs amici”) are advocates for children with disabilities.<sup>3</sup> The special needs amici have a

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<sup>3</sup> The Arc of Washington is a statewide non-profit organization composed of individuals with intellectual and developmental disabilities, their families, professionals and concerned members of the community. Its mission is to advocate for the rights and full participation of all people with intellectual and developmental disabilities. The Arc of King County is an affiliated chapter of the Arc of Washington. Its vision is for individuals with developmental disabilities to thrive as equal, valued and active members of the community.

TeamChild is a non-profit civil legal advocacy program for low-income children at risk of or involved with the juvenile justice and child welfare systems. TeamChild lawyers help youths access their basic rights to education, health care, safe and stable housing and other social services.

Washington Autism Alliance & Advocacy is a statewide nonprofit organization dedicated to helping children with Autism Spectrum Disorders and other disabilities to thrive and become productive members of society. It does this by helping families access health insurance benefits, effective services in schools, and community-based services.

Open Doors for Multicultural Families is a non-profit organization dedicated to ensuring that families who have members with developmental disabilities and special health care needs have equal access to culturally and linguistically appropriate information, resources and services. It supports hundreds of low-income immigrant and refugee families in school districts where more than 100 languages are spoken.

The Seattle Special Education PTSA is a nonprofit group of parents, educators, friends, and students dedicated to supporting all students with disabilities in the Seattle School District. Its mission is to assist families of students with disabilities as they navigate the education system; to partner with parents and educators in advocating for improvements in the special education system; and to build bridges between the general and special education communities in order to increase educational resources and opportunities for all students.

The Bellevue Special Needs PTA is a non-profit group of parents, educators and community members dedicated to supporting students with disabilities throughout the Bellevue School District. It is committed to helping children with special needs succeed and reach their full potential.

The Highline Special Needs PTA is a non-profit group supporting special needs students and their parents, teachers and staff throughout the Highline School District. Its mission includes promoting a truly inclusive school environment where the needs of students with disabilities are met.

Gary Stobbe, M.D., is a Clinical Associate Professor of Neurology and Psychiatry at the University of Washington and directs adult transition services at Seattle Children’s Autism Center. James Mancini is a speech and language pathologist and coordinator of parent education at Seattle Children’s Autism Center. Conan Thornhill is a special education teacher at Kentwood High School in the Kent School District.

strong interest in enforcing the full funding requirement of article IX, section 1 so that all children, including those with disabilities, will have the same opportunity to learn, graduate, get jobs and contribute to society.

### III. ARGUMENT

#### A. The State Misperceives the Mandate.

The State's response to the July 14 Order rests on the fundamentally flawed premise that the only mandate in this case is to finish implementing ESHB 2261, the 2009 bill which defined a program of basic education and adopted a prototypical school model.<sup>4</sup> This Court has never said that providing a basic education program pursuant to ESHB 2261 is all that article IX, section 1 requires. On the contrary, this court retained jurisdiction "to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its *paramount duty*."<sup>5</sup>

In defining that duty, the Court said:

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<sup>4</sup> See Resp., p. 9 (interpreting this Court's 2012 decision, *McCleary v. State*, 173 Wn.2d 477, as equating constitutional compliance with carrying out ESHB 2261); p. 14 (presuming that SHB 2776, adopted in 2010, was "viewed...as an incomplete plan" for implementing ESHB 2261 because it did not address salaries and benefits); pp. 1-2, 14-16 (asserting that E2SSB 6195 fills the gap left by SHB 2776 in implementing ESHB 2261 by addressing salaries, satisfying this Court's January 2014 Order).

<sup>5</sup> *McCleary*, 173 Wn.2d at 545-546. See also January 9, 2014 Order, p. 8 (the state must submit a complete plan addressing each area of education identified in ESHB 2261 as well as the implementation plan called for by SHB 2776, "and must include a *phase-in schedule for fully funding each of the components of basic education*").



- the “education” to be funded under article IX, section 1 consists of the opportunity to obtain the knowledge and skills described in *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476 (1978), ESHB 1209 (Laws of 1993, ch. 336), and the Essential Academic Learning Requirements<sup>6</sup>; and
- the “ample provision” required by article IX, section 1 includes funding education “by means of dependable and regular tax sources” of the *state* (not federal or local) government.<sup>7</sup>

ESHB 2661 outlined a program designed to meet the “education” prong, but did not provide a dependable or adequate means of paying for it.<sup>8</sup>

ESHB 2261 contains the Legislature’s proclamation that special education is to be considered “fully funded” by the formula in RCW 28A.150.390.<sup>9</sup> But this Court has rejected the argument that “full funding is whatever the Legislature says it is.”<sup>10</sup> The question is whether the State’s funding formulas “correlate to the *real cost*” of providing the constitutionally required education.<sup>11</sup> In sum, the State misperceives the mandate for full funding, and wrongly presumes that the special education formula is sufficient simply because the Legislature said so.

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<sup>6</sup> *McCleary* at 525-26.

<sup>7</sup> *McCleary* at 527-28.

<sup>8</sup> Laws of 2009, ch. 548.

<sup>9</sup> Laws of 2009, ch. 548, §5(2).

<sup>10</sup> *McCleary* at 531-32.

<sup>11</sup> *McCleary* at 529 (italics added).

B. The State Responded Inadequately to This Court's Questions.

The special needs amici previously explained that the special education formula is constitutionally deficient partly because it limits funds for each special education student to 1.93 times the amount allocated for a general education student – even though many students need more than that amount due to complex or severe disabilities. RCW 28A.150.390; Amicus Cur. Mem. Of The Arc of Wash. State, et al., pp. 9-16. The amicus brief explained that the state provides special education money only for up to 12.7 percent of each school district's enrollment, even though many districts have a higher percentage of students requiring special education, and it also noted that many districts use local levies to fill the gap in special education funding. *Id.*<sup>12</sup> The previous arguments are not repeated here. However, some data cited in the earlier briefing needs updating. According to apportionment reports posted on August 25, 2016, on the State's Web site, there are now 121 school districts that have more than 12.7 percent of students enrolled in special education while receiving

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<sup>12</sup> Each district's percentage of special education students for funding purposes is available on the State's Web site at <http://www.k12.wa.us/SAFS/default.asp> by clicking on the link to "2015-16 Special Ed Rate for Current Month," selecting the district from the dropdown menu, and going to the "District Specific" worksheet tab at line 35. The amount of local levy funds allocated to special education in each district in 2014-15 is available on the State's Web site at <http://www.k12.wa.us/safs/reports.asp> by choosing the district from the dropdown menu, clicking on the link for "F-196 All Pages," and going to "Resource to Program Expenditure Report."

state funding only for 12.7 percent.<sup>13</sup> This readily available data bears directly on this Court's question as to which components of basic education are underfunded, and should have been addressed in the State's response to the July 14 Order.

Notably, the State has not denied that its funding falls short of the actual costs of educating children with disabilities. Rather, the State

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<sup>13</sup> The enrollment figures have changed slightly since the May 2016 reports cited in the June 7, 2016 amicus brief. Districts presently reporting special education enrollments beyond the state-funded 12.7 percent level include: Aberdeen 14.68%; Benge, 15.75%; Bickleton, 15.5%; Blaine, 13.67%; Boistfort, 23.14%; Bremerton, 14.13%; Brinnon, 23.45%; Burlington-Edison, 13.2%; Castle Rock, 14.97%; Central Kitsap, 14%; Centralia, 15.02%; Chehalis, 13.71%; Cheney, 13.82%; Clarkston, 13.18%; Colton, 15.27%; Columbia (Stevens County), 16.35%; Columbia (Walla Walla County), 14.11%; Concrete, 14.25%; Cosmopolis, 17.14%; Coupeville, 15.48%; Creston, 17.44%; Curlew, 14.83%; Cusick, 17.65%; Darrington, 16.82%; Dayton, 13.38%; East Valley (Spokane), 14.73%; Easton, 13.29%; Edmonds, 12.86%; Elma, 15.69%; Enumclaw, 13.9%; Evaline, 18.69%; Evergreen (Clark County), 12.78%; Ferndale, 15.07%; Finley, 13.93%; Garfield, 17.77%; Granite Falls, 16.41%; Great Northern, 26.31%; Green Dot, 17%; Green Mountain, 13.02%; Harrington, 15.97%; Hood Canal, 19.6%; Hoquiam, 15.42%; Inchelium, 12.99%; Kettle Falls, 14.78%; Kiona-Benton, 13.48%; Kittitas, 14.59%; LaConner 14.13%; LaCrosse, 16.54%; Lake Stevens, 13.52%; Lamont, 17.88%; Longview, 14.31%; Lopez, 15.91%; Lummi Tribal Agency, 32.26%; Lynden, 13.32%; Mansfield, 17.25%; Manson, 12.77%; Mary Knight 16.7%; Mary Walker, 12.92%; Marysville, 13.81; McCleary, 12.57%; Morton, 15.92%; Mossyrock, 17.31%; Mount Adams, 14.3%; Mount Baker, 16.13%; Mukilteo, 13.06%; Napavine, 12.83%; Nespelem, 23.25%; Newport, 14.47%; Nine Mile, 15.16%; Nooksack Valley, 15.38%; North Beach, 17.74%; North Franklin, 13.05%; North River, 17.12%; Oak Harbor, 13.21%; Oakville, 19.15%; Ocosta, 16.24%; Omak, 13.08%; Onion Creek, 17.38%; Orchard Prairie, 14%; Palisades, 16.2%; Palouse, 12.86%; Pateros, 14.44%; Pe Ell, 16.7%; Pioneer, 13.99%; Pomeroy, 15.57%; Port Angeles, 13.06%; Port Townsend, 14.94%; Queets-Clearwater, 30.36%; Quillayute, 14.44%; Rainier, 12.92%; Riverside, 16.55%; Rochester, 13.95%; Sedro-Woolley, 14.69%; Selah, 13.04%; Selkirk, 15.56%; Shelton, 14.18%; Skykomish, 26.38%; Snohomish, 12.98%; South Kitsap, 13.48%; South Whidbey, 13%; Spokane, 14.48; Sprague, 13.08%; Stanwood-Camano, 14.2%; Star, 45.2%; Sultan, 15.23%; Sunnyside, 12.83%; Suquamish Tribal, 30.29%; Taholah, 16.41%; Tekoa, 19.46%; Thorp, 13.34%; Toledo, 14.97%; Waitsburg, 16.37%; Washtucna, 17.69%, Wellpinit, 13.66%; West Valley (Spokane County), 13.44%; White Pass, 18.48%; White River, 12.91%; Wilbur, 14.89%; Willapa Valley, 12.72%; and Winlock, 18.4%. See <http://www.k12.wa.us/SAFS/default.asp> ("2015-16 Special Ed Rate for Current Month" – "District Specific" tabs, at line 35).

simply ignored the subject in responding to the July 14 Order. The State's appendix showed what it would cost to continue the current formula, not what it would actually cost to provide the necessary special education to all children who need it. This was unresponsive to the Court's order and an affront to the 125,000 Washington students whose right to an amply funded education was invisible in the State's brief.

Because the State failed to even acknowledge underfunding of special education, much less to provide a detailed plan for fixing it, this Court should accept the State's offer to "enact further detail" in the 2017 legislative session. Resp., p. 17. More specifically, this Court should order the State to demonstrate precisely how it will eliminate the need for local levies to pay for special education, including determining the true cost of providing necessary services to children with disabilities and identifying dependable state revenues to cover that cost.

#### IV. CONCLUSION

For the foregoing reasons, this Court should retain jurisdiction in this case and require the State to submit a plan to fully fund special education as a component of basic education.

Dated this 29th day of August 2016.

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The undersigned declares under penalty of perjury under the laws of the State of Washington that on August 29, 2016, I served the foregoing Amicus Curiae Memorandum by email, per agreement, to:

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