8-10-2007

Petitioner's Closing Brief 07-2-02323-2-42

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

Honorable Paris K. Kallas

Hearing Date:
9:00 a.m., August 24 2007

No. 07-2-02323-2 SEA

PETITIONERS' CLOSING BRIEF

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I. INTRODUCTION

The Petitioners' May 4 Motion presented four specific legal issues for this Court to resolve as a matter of Washington law. At the State's request, this Court granted the parties leave to file "supplemental" closing briefs on August 3 (State) and August 10 (Petitioners).

The supplemental brief and over 200 pages of supplemental papers filed by the State make several arguments. But as the following 12 pages explain, the State's supplemental filings still do not refute the central point that a trial is not necessary to resolve the four legal issues presented by the Petitioners' May 4 Motion, and that Petitioners are entitled to judgment on each of those four issues as a matter of Washington law.

II. THE FOUR ISSUES PRESENTED BY PETITIONERS' MAY 4 MOTION

1. The State still has not refuted that the words "paramount", "ample", and "all" in Article IX, §1 should be interpreted to have the common English meaning set forth in the Petitioners' May 4 Motion *[Proposed Order ¶2].*

The first issue presented by Petitioners' May 4 Motion is whether the words "paramount", "ample", and "all" in Article IX, §1 should be interpreted to have the common English meaning set forth in that Motion. Petitioners' May 4 Motion at 8, issue #1.

The State does not dispute that this issue of interpretation is a pure question of law.[1] Nor does the State offer any alternative to the common English interpretation explained at pages 10:11-11:23 of Petitioners' Motion.

Instead, the State's supplemental brief suggests that this Court should reject Petitioners' interpretation because it rests on a current edition of *Webster's Third New Int'l Dictionary* instead of an 1863 dictionary. But using the current edition of *Webster's Third New Int'l Dictionary* (instead of an 1863 dictionary) is precisely what our State Supreme Court does when interpreting the words used in Article IX. E.g., *Seattle School District v. State*, 90 Wn.2d at 511 (1978 decision quoting the 1971 edition of *Webster's Third New Int'l Dictionary* for the meaning

[1] *Petitioners' May 4 Motion at 9:15-10:11 & nn. 23-24.*

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of words used in Article IX).[2] The State 's supplemental brief simply does not refute the validity of the May 4 Motion's interpretation of "paramount", "ample", and "all" in Article IX, §1.

2. The State still has not refuted the May 4 Motion's showing that RCW 29A.150.210 should be interpreted to define the substantive content of basic education in our State *[Proposed Order ¶3].*

The second issue presented by Petitioners' May 4 Motion is whether RCW 29A.150.210 should be interpreted to define the substantive content of basic education in our State. Petitioners' May 4 Motion at 8, issue #2.

The State does not dispute that this question of statutory construction is a question of law.[3] Nor does the State dispute that the *Seattle School District* quote at Tab 2 sets forth "the minimum of the education that is constitutionally required", that our Supreme Court instructed the legislature to provide additional "substantive content" to further define that basic education, and that the Respondent State's Chief Education Officer testified under oath that the four numbered paragraphs in RCW 29A.150.210 "are the substantive content of what drives education in our State". May 4 Motion at 3:9-6:2, 12:1-14:12.

Instead, the State's supplemental filings make two basic arguments.

First, the State argues that the *Seattle School District* decision allowed the legislature to ignore the Court's direction to provide additional "substantive content" to define the basic education described in Tab 2 if the legislature instead enacted a basic program of education. In other words, the State posits that the *Seattle School District* Court instructed the legislature to define basic education with additional "substantive content" beyond that specified in Tab 2 ***or*** enact a basic program of education – and it then argues that since the legislature enacted

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[2] *Indeed, the State's invocation of an 1863 dictionary to "freeze" the meaning of our living Constitution's education mandate is similar to the State's claim in the Seattle School District case that the State could fulfill its ample provision duty under Article IX, §1 by "providing more acceptable educational facilities than those of 1889" – a claim that our Supreme Court rejected as being "utter nonsense". 90 Wn.2d at 514-17. Compare also L.K. Beale, Note,* Charter Schools, Common Schools, and the Washington State Constitution, *72 Wash.L.Rev. 535, 542 & 556 (1997) (explaining that before and during early statehood "the Legislature intended to provide only a rudimentary education: an 1881 law forbade teaching of any language other than English and any mathematics higher than arithmetic" and "common schools initially intended only to offer primary instruction").*

[3] *Petitioners' May 4 Motion at 14:8-9 & n.27.*

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statutory provisions to operationally establish a basic program of education (instructional hours/days/staffing ratios/etc.), the legislature was not required to also enact the substantive content in RCW 29A.150.210 to further define basic education.

But that is not what *Seattle School District* said. The Supreme Court directed the legislature to do ***both***. It instructed the legislature to define "basic education" with additional substantive content beyond that in Tab 2 ***and*** define a basic program of education to provide that basic education. Petitioners' May 4 Motion at 4:10-6:12 (citing, e.g., 90 Wn.2d at 482 ("The Legislature must act to carry out its constitutional duty by defining and giving substantive content to 'basic education' and a basic program of education"), at 519 (noting legislature had not yet passed legislation "defining or giving substantive content to 'basic education' or a basic program of education. Thus, the Legislature must hereafter act to comply with its constitutional duty by defining and giving substantive meaning to them."), at 537 ("We have great faith in the Legislature and its ability to define 'basic education' and a basic program of education"), and at 484 ("The Legislature has the duty to define 'basic education' ") (emphasis added)).

Second, the State submits supplemental declarations from two of its employees stating legal conclusions about whether they think the substantive content enacted in the four numbered provisions of RCW 29A.150.210 (House Bill 1209) should be interpreted to be the additional substantive content that further defines the "basic education" set forth in Tab 2.

But as noted before, interpreting RCW 29A.150.210 presents a question of law for this Court to decide. Washington law accordingly requires the legal conclusions submitted by the State's employees to be disregarded.[4] Washington law requires this Court to instead base its legal interpretation of this legislation on the language of this legislation. And as detailed at 4:9-

[4] *E.g., Terrell v. DSHS, 120 Wn.App. 20, 30 (2004) (disregarding declaration as presenting inadmissible legal conclusions because, even though the witness did not explicitly state that he was testifying to the "legal" duty at issue, "that is what he was attempting to establish"); Ball v. Smith, 87 Wn.2d 717, 722-23 (1977) (refusing to allow a chief electrical inspector to testify concerning his opinion of applicable law because "a witness is not permitted to give his opinion on a question of domestic law or upon matters which involve questions of law"); see also cases cited in May 29 Reply at 3:21.*

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6:2 & 12:3-14:12 of Petitioners' May 4 Motion, the language of this legislation (House Bill 1209) confirms that the four numbered paragraphs enacted into RCW 29A.150.210 should be interpreted to define the substantive content of "basic education" in our State pursuant to the *Seattle School District* ruling.

In short, the State's supplemental papers do not refute the Petitioners' May 4 showing that those substantive content established under RCW 29A.150.210 is our State's current legal definition of the "basic education" required by Article IX, §1.

3. <u>The State still has not raised any fact *material* to the yes-or-no question of whether it is currently complying with this Court's legal interpretation of Article IX, §1</u> *[Proposed Order ¶4].*

The third issue presented by Petitioners' May 4 Motion is the yes-or-no question of whether the State is currently complying with this Court's legal interpretation of Article IX, §1. Petitioners' May 4 Motion at 9, issue #3. As the case law quoted in Petitioners' prior briefing noted, "There is no such thing as 'a little bit pregnant' and there is no such thing as 'slightly unconstitutional'." The State is either complying with its Constitutional duty or it is not. The State's supplemental papers fail to refute Petitioners' showing that the State is not.

And while the State's supplemental briefing now argues that our Constitution does not guarantee 100% success in the education the State provides to our State's children, the State provides no legal authority for its suggestion that the State's paramount duty under our State Constitution has a "good enough for government work" exception that somehow excuses the significant education failures established by the State's own evidence.

(a) State's own WASL testimony.

The State does not dispute the May 4 Motion's showing that:

(1) The State established the Essential Academic Learning Requirements (EALRs) to specify the basic math/science/etc. skills established by RCW 29A.150.210, and that

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those EALRs "specify the skills and knowledge in core subjects that all students are expected to master as they move through Washington's public schools".[5]

(2) The State established the Washington Assessment of Student Learning ("WASL") to measure whether students possess those basic math/science/etc. skills established by RCW 29A.150.210, and that the State's measurement "is one of the most rigorous and reliable assessments of student achievement in the country."[6]

Nor does the State dispute the current failure rates identified at 15:13-21 of that May 4 Motion (e.g., only about ⅓ of our State's 10th graders have the science knowledge and skills that the State has determined they need in today's society, only about ½ of 10th graders have the math knowledge and skills that the State has determined they need, only about 16% of our State's African-American male students have the math knowledge and skills that the State has determined are needed in today's society, and only about 37% of them have the reading knowledge and skills that the State has determined are needed).

Instead, the State's supplemental briefing makes four types of arguments to try to change the subject.

First, the State's supplemental briefing cites "cumulative" pass rates – e.g., asserting the "cumulative" rate for 10th grade math is 74%. (The State's WASL Report shows the "cumulative" pass rate for all students is actually less than 62%; the "74%" figure comes from a subset of students.[7])

But even using the misleading 74% figure, the State's failing to provide a 10th grade math education to the remaining 26% of our high school students (instead of 50%) goes to the ***extent*** of the State's failure – it does not dispute the ***existence*** of that failure. Nor does that "cumulative" rate dispute the May 4 Motion's demonstration of the gross disparity in our State between the education provided to minority students and that provided to others. Nor does that "cumulative" pass rate for 10th grade math even relate to 10th graders – for the "cumulative" rates

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[5] *May 4 Motion at 5:6-6:2 & n.13; accord State's first opposition brief at 7:25-26 & 8:5-6 (admitting the Respondent State adopted the Essential Academic Learning Requirements (EALRs) to establish the basic reading, writing, math, science, etc. skills set forth in §.210).*

[6] *May 4 Motion at 15:2-12.*

[7] *8/10 Robb Multi-Year Data Dec. at ¶2 & Exhibit II.*

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cited by the State are for a subset of **11th** graders in the Class of 2008.[8] The 74% "cumulative" math pass rate cited by the State therefore proves nothing more than the State is currently failing to provide at least 26% of our State's 11th graders with the basic math education that the State has determined all **10th** graders need. That confirms – rather than disputes – the State's education failure.

Second, the State's supplemental papers suggest that the State's current failure should be ignored because its even more dismal failure in prior years suggests things might now finally be getting better. But like the State's talk of possible benefits from future legislation, this "trending better" argument goes to guessing ***how long*** the State's current failure will continue into the future – it does not disprove the current ***existence*** of that failure. Looking at prior years, moreover, confirms that things are not necessarily even "trending up" or "getting better".[9]

Third, the State's supplemental briefing argues that the education provided by Washington State compares favorably that provided by other States. But Petitioners' May 4 Motion does not ask for a ruling on whether the State of Washington is failing to provide the education required by the Constitutions of other States. That is important because the Respondent State does not dispute that no other State's Constitution has a stronger education mandate than ours.[10]

The third issue presented by Petitioners' May 4 Motion is whether the State of Washington is failing to provide the education mandated by this Court's legal interpretation of the Washington Constitution – i.e., the "basic education" defined by Tab 2, §.210, and the corresponding EALRs. The only assessment of whether students are learning the substantive content established by Washington law's definition of basic education is the Respondent State's WASL assessment – and that assessment establishes (rather than disputes) that the State is currently failing to provide that basic education to our State's public school students.

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[8] *8/10 Robb Multi-Year Data Dec. at ¶2 & Exhibit II.*
[9] *8/10 Robb Multi-Year Data Dec. at ¶4 & Exhibit KK; accord ¶¶6-8 & Exhibits MM-OO.*
[10] *Petitioners' May 4 Motion at 3:11-12 & n.7, 23:2-7.*

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Fourth, the State's supplemental brief makes an "output doesn't matter" argument that insists the fact that the State is failing to provide our public school students the basic education established by Tab 2, §.210, and the corresponding EALRs is not relevant to whether or not the State is failing to comply with its Constitutional duty to provide our public school students that basic education.

But that argument makes no logical sense. It is akin to a property owner arguing that the fact that he is failing to provide invitees a safe premises is not relevant to whether or not he is failing to comply with his legal duty to provide invitees a safe premises.

Nor does that argument have a legitimate legal basis. Article IX, §1 imposes a paramount Constitutional duty upon the State to make ample provision for the education of all children in our State – with that Constitutionally mandated education being the basic education established by Tab 2, §.210, and the corresponding EALRs. Neither the unpublished *Camer* case improperly cited by the State nor the solo concurring opinion by a former Justice in *Tunstall* operate to overrule the Washington Supreme Court's holding in *Seattle School District* that Article IX, §1 requires the State to provide our public school students that basic education.[11]

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[11] *The State's invocation of the unpublished Camer case is completely improper. Johnson v. Allstate, 126 Wn.App. 510, 519-20 (2005) ("We agree that Allstate improperly relied on our unpublished opinion and that the trial court also erred in relying on it"; unpublished opinions are not part of the state common law and "should not be considered by the trial court"); accord RAP 10.4(h). Moreover, the aspect of this unpublished opinion that the State invokes is not even relevant here because it addressed an Article IX claim against a school district (not the State), and the dismissal of that claim of course made sense because, as our Supreme Court confirmed in Tunstall, school districts have no Article IX duties. Tunstall, 141 Wn.2d at 232 & n.24. The Article IX ruling in the published Camer decision similarly does not provide legal authority for the State's argument because it concerned the res judicata doctrine – not private rights of action. See Camer v. Seattle School Dist., 52 Wn.App. 531, 535-36 (1988).*

The State's invocation of the solo concurring opinion of a former Justice in Tunstall similarly does not provide legal authority for the State's argument. Indeed, the part of that solo concurrence that the State invokes is the part that none of the other eight Justices in Tunstall joined – namely, that solitary (former) Justice's indication that he would overrule the holding in Seattle School District that Article IX grants every child in our State a fundamental, judicially enforceable Constitutional right to a basic education. Tunstall, 141 Wn.2d at 233 & 236 (Talmadge, J., concurring) (disparaging this aspect of Seattle School District as "loose language", and arguing instead that the Court should grant complete deference to the legislature). [This extreme (and lone) position is not surprising considering that Justice Talmadge was a former State legislator, and that during his subsequent service on the Court he frequently disagreed with the Court's holdings by arguing the Court should grant the legislature more deference. See, e.g., PACCAR v. State, 135 Wn.2d 301, 332 (1998) (Talmadge, J., dissenting); State v. Jackson, 137 Wn.2d 712, 732 (1999) (Talmadge, J., dissenting); National Elec. Contractors v. Riveland, 138 Wn.2d 9, 33 (1999)

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(b) State's own high school graduation testimony.

The State does not dispute the May 4 Motion's showing that the State's own testimony establishes that about ¼ of all ninth graders in our State fail to graduate from high school with their peers, that the corresponding failure rate for minority students is even worse (about 40% for our black and Hispanic students), that "too many students in our State never obtain a high school diploma", that "thousands" of those who do receive a diploma each year are "not earning a diploma backed by skills they need to succeed", and that the State does not "amply provide for the education of our State's public high school students today". May 4 Motion at 16:7-19 &n.33.

Instead, the State's supplemental briefing makes two types of arguments to try to change the subject.

First, the State suggests that its current high school graduation failure should be ignored because its even more dismal failure in prior years indicates things might now finally be getting better. But such "trending better" arguments do disprove current failure. Moreover, looking at prior years shows things are not necessarily "trending up" or "getting better".[12]

Second, the State's supplemental papers emphasize that graduation rates are higher than they otherwise could be because the State does not refuse to graduate students who fail the WASL. But that only confirms – rather than disputes – the State's failure to comply with its paramount education duty under Article IX, §1. According to the State's own sworn testimony, the State's WASL assessment measures whether students possess the skills and knowledge in core subjects that all students are expected to master as they move through Washington's public schools. The State's argument that it awards high school diplomas to students even if they do not have those basic skills and knowledge confirms the State's failure to comply with its paramount duty under Article IX, §1 – not its compliance. And that failure is even more

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(Talmadge, J., dissenting); State v. Cruz, 139 Wn.2d 186, 194 (1999) (Talmadge, J., dissenting); Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 182 (2000) (Talmadge, J., dissenting); Association of Rural Residents v. Kitsap County, 141 Wn.2d 185, 197 (2000) (Talmadge, J., dissenting); Sebastian v. State, 142 Wn.2d 280, 286 (2000) (Talmadge, J., dissenting).]

[12] *8/10 Robb Multi-Year Data Dec. at ¶5 & Exhibit LL.*

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dramatic when one also remembers that these students receiving high school diplomas still cannot pass the **10th** grade WASL, and that to pass a student only has to score a 60 or 65.[13]

(c) State's own sworn testimony that our children do not receive the basic education set forth in the 1978 Seattle School District v. State decision.

The State's supplemental papers do not dispute the sworn deposition testimony of the Respondent State's Superintendent of Public Instruction, who candidly admitted that the State is not currently providing all children in our State the basic education specified by our State Supreme Court's *Seattle School District* decision (Tab 2). May 4 Motion at 17:2-19.

(d) State's own admission that its basic education funding does not include basic education prerequisites such as new school or classroom construction.

The State's supplemental papers do not refute that the State's sworn discovery responses show that the State's current provision of basic education under Article IX, §1 categorically excludes at least one significant component necessary to any public school system – namely, new school or classroom construction. May 4 Motion at 17:22-18:7; May 29 Reply at 3:1 & n.3.

Instead, the State's supplemental papers invoke a 1995 report noting that in the mid-1990's the State was "involved" in construction funding and calling the State's overall financing system "optimal" because it did not rely entirely on local funding.[14] But that 1995 report did not address or even consider our State's Constitutional duty under Article IX, §1. The State's supplemental argument that a 1995 report noted that Washington was at that time "involved" in some school construction does not refute the current fact that the Respondent State's provision of basic education under Article IX, §1 categorically excludes at least one significant component necessary to any public school system – namely, new school or classroom construction.

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[13] *8/10 Robb Multi-Year Data Dec. at ¶3 & Exhibit JJ.*

[14] *1995 Report at 43 (explaining that an "optimal" finance system shouldn't "leave capital costs, transportation costs, or another type of spending as a totally local responsibility") and at 44 (concluding that Washington at that time met that test because there was State "involvement" in major areas of school spending).*

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(e) State's most recent education study (the Washington Learns report).

The State's supplemental papers do not refute that the State's November 2006 Washington Learns report confirmed that "Washington has a constitutional duty to provide a basic education for all children from kindergarten through twelfth grade", or that the negative findings of that State study further demonstrate the State's current failure to fully comply with that duty. May 4 Motion at 18:20-19:19.

(f) The "yes" or "no" answer to the May 4 Motion's third question.

The May 4 Motion's third issue presents a binary yes-or-no question: As we stand here today, is the State fully complying with its legal duty under Article IX, §1? While the State's supplemental papers assert arguments disputing the extent to which the State is failing to comply, those arguments do not refute the fact that the State's own testimony and documents establish that the current answer to the yes-or-no question at issue is "no".

4. The State still has not refuted that this Court should grant the limited relief requested in Petitioners' May 4 Motion *[Proposed Order ¶5].*

The fourth issue presented by Petitioners' May 4 Motion concerns the relief this Court should grant to enforce its legal interpretation of Article IX, §1 and the State's current lack of compliance with that interpretation. Petitioners' Motion at 9, issue #4. As this Court knows, the specifically tailored relief Petitioners request is simply an enforcement Order requiring the Respondent State to take two initial steps towards curing its current lack of full compliance with its paramount duty under Article IX, §1 – i.e., (1) determine the actual dollar cost of complying with this Court's legal interpretation of Article IX, §1, and (2) determine how the State will fully fund that actual cost with stable and dependable sources as required by the *Seattle School District* decision.

The State's supplemental brief makes three basic arguments against the propriety of issuing such an enforcement Order.

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First, the State's supplemental brief asserts that this Court cannot grant any relief because Washington law reserves responsibility for compliance with Article IX, §1 solely to the legislature.

But the State provides no legal authority for that assertion. That is because the our State Supreme Court has already ruled to the contrary, holding that Article IX, §1 "imposes a judicially enforceable affirmative duty" on the Respondent State. Petitioners' May 4 Motion at 20:15-23:19. Article IX, §1 establishes a "paramount duty" – not an "unenforceable suggestion".

Second, the State's supplemental brief argues that the first step requested by Petitioners' proposed enforcement remedy – requiring the State to start its compliance with this Court's legal interpretation of Article IX, §1 by determining the actual dollar cost of that compliance – is "bad science" because the "undisputed"[15] testimony in Mr. Hanushek's declaration is that spending more money doesn't matter. What Mr. Hanushek's testimony really goes to is the idea that simply throwing money at a problem is not a cure, and that money foolishly spent does not matter.[16] That notion does not negate the reasonableness of the first step of this Court's enforcement Order being to require the State to determine the actual cost (presumably with dollars wisely spent) of providing all children in our State the basic education established by this Court's legal interpretation of Article IX, §1.

Third, the State's supplemental brief suggests that requiring the State to determine the actual dollar cost of complying with this Court's legal interpretation of Article IX, §1 is

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[15] *Although irrelevant to the pending May 4 Motion, Petitioners note that the State's implication that compliance with Article IX, §1 will not cost any more money is disputed by the in-depth cost analysis conducted by the State as part of its 18-month Washington Learns study, which determined that compliance with Article IX, §1 will require "significantly more state funding." May 4 Motion at 7:3-10 & n.18.*

[16] *As noted in the Montoy decision previously submitted by Petitioners in this case, Mr. Hanushek's fuller opinion under oath is that "Only a fool would say money doesn't matter", and his real conclusion is that "money, foolishly spent" won't help. Montoy v. State of Kansas, Findings And Conclusions Of Fact & Law ¶80 (Kansas State Dist. Court, Div. 6, Dec. 2, 2003), submitted as Exhibit T to the 5/29 Robb Reply Dec*

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inappropriate because Petitioners "concede" that funding is irrelevant. But that misstates Petitioners' position.

Plaintiffs in other States have employed the following "inadequate funding" approach to prove the defendant State's violation its State Constitution: (1) it would cost *x* dollars to adequately fund the education required by the defendant State's Constitution, and (2) the fact that the defendant State funds less than *x* dollars proves the State is not providing students the education required by that State's Constitution.

Petitioners' May 4 Motion employs a different approach to establish the Respondent State's violation: (1) the *Seattle School District* ruling at Tab 2, §.210, and the corresponding EALRs define the basic education that Article IX, §1 requires the State to provide all children in our State, and (2) the Respondent State's own testing and testimony prove that the State is not currently providing that basic education to all children in our State.

The fact that the Petitioners' May 4 Motion did not employ the "inadequate funding" approach to show the State's violation of Article IX, §1 does not mean Petitioners "concede" that the State can proceed to effectively cure that violation without first determining the actual dollar cost of complying with this Court's legal interpretation of the State's education duty under Article IX, §1. Indeed, this first step of the relief requested by Petitioners' May 4 Motion is the same first step ordered in the New York case that the State's prior opposition brief cited to this Court.[17] And Petitioners' request that the State be ordered to determine the actual dollar cost of compliance and how that cost will be funded is a much more limited enforcement approach than that taken in other States where the court has determined that cost of compliance and ordered the legislature to fund that amount. See Petitioners' May 4 Motion at 21:9-14 & nn.41-42.

[17] *Campaign for Fiscal Equity v. New York, 8 N.Y.3d 14, 21 (N.Y. 2006) ("we instructed the State to ascertain the actual cost of providing a sound basic education").*

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III. CONCLUSION

It is this Court's duty to protect the paramount Constitutional right granted to the children of our State by Article IX, §1. The State's supplemental brief and over 200 pages of supplemental papers do not refute the Petitioners' entitlement to judgment on the four issues presented in the pending May 4 Motion. This Court should issue the rulings requested in that May 4 Motion to make the State's paramount legal obligation under Article IX, §1 perfectly clear, and issue the narrowly tailored enforcement Order requested in that Motion to require the State to take the first (and long overdue) steps towards bringing its 29 years of foot dragging and excuses to an end.

RESPECTFULLY SUBMITTED this 10th day of August, 2007.

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Article IX, section 1

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

Tab 7

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

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

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

TAB 2

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

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

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

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

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

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

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