

6-7-2016

**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 PTSA, Bellevue Special Needs PTA, Highline Special Needs PTA, Gary Stobbe, M.D., James Mancini and Conan Thornhill**

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**Recommended Citation**

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Jun 07, 2016, 12:35 pm

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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**

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## I. INTRODUCTION

More than 125,000 students in Washington have disabilities requiring special education. For a fair chance to succeed, these children must have special instruction designed to meet their individual needs. For example, a student's plan may focus on listening, speaking, interacting, reading, writing, walking without a wheelchair, or all of those and more. Students depart from the common curriculum in different ways and at widely varying costs, depending on their disabilities.

For 20 years the Legislature has paid for special education as if every student needs the same funding, instead of fully funding the actual costs of properly educating children with disabilities. The funding formula embraced in 2ESHB 2376, the 2016 supplemental budget, arbitrarily limits state money for a special education student to 1.93 times the amount allocated for a general education student. Many children need more than this rigid formula provides.

Making matters worse, the Legislature refuses to pay for *any* special education for thousands of children with disabilities, simply because they happen to live where special education enrollment exceeds a random 12.7 percent cap. According to new apportionment data posted by

the Office of the Superintendent of Public Instruction (OSPI),<sup>1</sup> 120 school districts reported K-12 special education enrollments larger than the funded 12.7 percent enrollment level in 2015-16. Most are small districts with little or no local taxes to make up for the shortfall, but the problem also affects large districts such as Spokane, where 14.4 percent of K-12 students needed special education but only 12.7 percent received state money for it this school year. Special education enrollments exceeded 15 percent in 51 districts and topped 20 percent in six districts, highlighting the unfairness of capping funded enrollments at 12.7 percent.

The so-called “safety net,” slashed in the 2016 budget from an already inadequate amount, does not close the funding gap. In Spokane, for example, the State provided only \$28.9 million of the \$33.3 million that the school district spent on K-12 special education last year, while at the same time the State underfunded the primary basic education program for all Spokane students by \$43 million.<sup>2</sup>

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<sup>1</sup> The data was posted on May 23, 2016 on the OSPI Web site at <http://www.k12.wa.us/SAFS/default.asp>. Each district’s percentage of special education students for funding purposes is available 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.

<sup>2</sup> Similar gaps are evident from financial statements submitted to OSPI in January 2016 by school districts around the state. Each district’s report on 2014-15 revenues and expenses is available at <http://www.k12.wa.us/safs/reports.asp> by choosing the district from the dropdown menu and then clicking on the link for “F-196 All Pages.”

In its 2016 Post-Budget Report, the State claims that existing statutory formulas will fully fund the “basic education” constitutionally required for all students by 2018. But even if the Legislature somehow replaces local levies with dependable state revenues next year as promised, that would not fix the current special education funding formula, which leaves out thousands of students and is disconnected from the actual costs of meeting individual needs. Moreover, although the State has made progress reducing general class sizes, the 2016 budget still grossly underfunds the para-educators who provide 60 percent of instruction to special education students in Washington. The general funding formula provides less than one classified instructional staff member for an *entire school*, although in reality para-educators are needed in each *classroom* so that students with disabilities can learn alongside non-disabled peers.

In reforming education, the State has overlooked the special needs of children with disabilities. The 2016 budget actually cuts special education. Having retained jurisdiction to ensure compliance generally, this Court should order the State to fix special education funding.

## II. INTEREST OF AMICI

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 nationally recognized, non-profit civil legal advocacy program for low-income children at risk of or involved with the juvenile justice and child welfare systems. Since 1995 TeamChild has provided direct legal representation to thousands of low-income youth across Washington. TeamChild lawyers help these youth access their basic legal rights to education, health care, safe and stable housing and other social services. Many of the children that TeamChild represents are eligible to receive special education 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 provides support to 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 bring increased 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 Assistant 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 in a high-need classroom at Kentwood High School in the Kent School District, where nine para-educators are assigned to help his students.

All of the participants in this brief share a strong interest in ensuring that the State pays the full costs of special education to meet the needs of individual students with disabilities.

### III. ARGUMENT

#### A. Special Education Funding is Subject to Constitutional Scrutiny.

Article IX, section 1 of the Washington Constitution declares, “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders.” This imposes an affirmative duty on the state to make ample provision for the basic program of education “by means of dependable and regular tax sources.” *McCleary v. State*, 173 Wn.2d 477, 517 (2012).

More specifically, 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, and the Essential Academic Learning Requirements. *McCleary* at 525-26. Thus, the state is constitutionally required to

provide opportunities for every student to develop the knowledge and skills essential to:

- (1) Read with comprehension, write effectively, and communicate successfully in a variety of ways and settings and with a variety of audiences;
- (2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history, including different cultures and participation in representative government; geography; arts; and health and fitness;
- (3) Think analytically, logically, and creatively, and to integrate technology literacy and fluency as well as different experiences and knowledge to form reasoned judgments and solve problems; and
- (4) Understand the importance of work and finance and how performance, effort, and decisions directly affect future career and educational opportunities.

*Id.*; RCW 28A.150.210. The state also must provide “broad educational opportunities...to equip our children for their role as citizens and as potential competitors in today’s market,” and must prepare children “to participate intelligently and effectively in our open political system” and “to inquire, to study, to evaluate and to gain maturity and understanding.” *McCleary* at 516, citing *Seattle School Dist.*, 90 Wn.2d at 517-18. This

mandate is consistent with the federal goal “of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities” stated in the Individuals with Disabilities in Education Act (IDEA), which governs special education. 20 U.S.C. 1400(c).

Within the substantive guidelines identified by this Court, the Legislature must define the program that it deems necessary to provide an education. *McCleary* at 526. It has done so, and special education falls within the Legislature’s definition of “basic education.” *Id.* at 496, 526; RCW 28A.150.220(3)(f) (“The instructional program of basic education provided by each school district shall include:...the opportunity for an appropriate education at public expense as defined by RCW 28A.155.020 for all eligible students with disabilities”).<sup>3</sup>

Because special education is part of basic education, it is “considered nondiscretionary and must be funded regardless of budgetary constraints.” *McCleary* at 496. Special education may not be eliminated from the basic education program for reasons unrelated to educational

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<sup>3</sup> RCW 28A.155.020 says: “In accordance with part B of the federal individuals with disabilities education improvement act and any other federal or state laws relating to the provision of special education services, the superintendent of public instruction shall require each school district in the state to insure an appropriate educational opportunity for all children with disabilities between the ages of three and twenty-one.” *See also* RCW 28A.150.203(8).

policy. *Id.* at 527. Moreover, special education funding is subject to present scrutiny in this case. This Court retained jurisdiction in order to monitor not just promised reforms but “more generally, the State’s compliance with its paramount duty.” *Id.* at 545-46. As stated in the 2012 decision, “This court intends to remain vigilant in fulfilling the State’s constitutional responsibility under article IX, section 1.” *Id.* at 547. This includes the responsibility to fully fund special education. *Id.* at 496, 526.

**B. Special Education Funding is Impermissibly Divorced From True Costs.**

**1. The state abandoned cost-based funding decades ago.**

Before 1995, state funding for special education was based on the actual number of students enrolled in special education, with varying levels of funding based on 14 categories of disability ranging from \$1,117 above general education funding for a student with a communication disorder to \$9,057 in excess funding for a student with multiple disabilities.<sup>4</sup> In 1995, taking a cost-saving cue from other states, the Legislature shifted toward the current system which adds 0.93 percent to basic education funding for children in special education regardless of the severity of disabilities being addressed. LAWS OF 1995, 2<sup>nd</sup> Sp. Session, ch. 18, § 508.

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<sup>4</sup> See p. 12, Special Education Fiscal Study, January 1995, at <http://leg.wa.gov/jlarc/AuditAndStudyReports/Documents/95-3.pdf>.

Also in 1995, the Legislature began paying for special education for no more than 12.7 percent of a district's K-12 enrollment even if actual special education enrollments are higher. *Id.* This cap remains in place today. RCW 28A.150.390; LAWS OF 2016, 1<sup>st</sup> Sp. Session, ch. 36, § 505(5) ("Each district's general fund-state funded special education enrollment shall be the lesser of the district's actual enrollment percent or 12.7 percent").

## **2. The funding level falls short of actual enrollment.**

At least 120 school districts reported having more than 12.7 percent of K-12 students enrolled in special education this year, according to data recently posted by the State.<sup>5</sup> Under the current formula, the State pays these districts to provide special education to 12.7 percent of students, and beyond that, the districts have to find their own funding. RCW 28A.150.390(3)(b) and (d). Under the IDEA, the school districts are

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<sup>5</sup> See Footnote 1 and <http://www.k12.wa.us/SAFS/default.asp>. Districts reporting special education enrollments over the cap include, for example: Blaine, 13.6%; Bremerton, 14.2%; Castle Rock, 14.9%; Central Kitsap, 14%; Centralia, 15%; Chehalis, 13.65%; Concrete, 14.1%; Cosmopolis, 17.1%; Coupeville, 15.5%; Darrington, 16.8%; Dayton, 13.4%; East Valley (Spokane), 14.6%; Enumclaw, 13.9%; Ferndale, 15%; Garfield, 17.8%; Granite Falls, 16.4%; Hood Canal, 19.9%; Hoquiam, 15.4%; Kettle Falls, 14.75%; LaConner 14.2%; Lake Stevens, 13.4%; Longview, 14.3%; Morton, 15.9%; Mossyrock, 17.2%; Nespelem, 22.8%; Oak Harbor, 13.2%; Pateros, 14.3%; Pe Ell, 16.7%; Pomeroy, 15.5%; Port Angeles, 13%; Port Townsend, 14.9%; Riverside, 16.5%; Sedro-Woolley, 14.6%; Shelton, 14.2%; South Kitsap, 13.4%; Stanwood-Camano, 14.2%; Sultan, 15.1%; and White Pass, 18.2%. See also the accompanying Motion for Leave to File Amicus Curiae Memorandum.

obligated to develop and carry out individual special education plans whether state funding is available or not. 20 U.S.C. 1414(d); RCW 28A.155.020. Thus, in at least 120 school districts, the funding formula is not making ample provision for the education of all children as required by article IX, section 1. Rather, it is shortchanging thousands of students who have no dependable funding source to meet their special needs.

In Spokane, for example, the state formula provided special education funding for only 3,742 of the 4,250 children who needed it this year, according to the OSPI data. That left more than 500 other Spokane children with only basic education funding from the state to meet exceptional needs. The Spokane School District was able to spend \$4 million of local levy money for special education in 2014-15.<sup>6</sup> Aberdeen, by contrast, had no local money for special education last year, according to its most recent F-196 report. *Id.* This year, Aberdeen has 14.7 percent of students in special education, or 65 more students than the state pays for, illustrating the disconnect between state funding and actual costs.

**3. Special education students are doubly harmed by the failure to eliminate levy reliance.**

The Legislature still has not planned how it will eliminate dependency on local levies to fund education. The 2016 Budget Report

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<sup>6</sup> See Footnote 2 and <http://www.k12.wa.us/safs/reports.asp>.

notes that E2SSB 6195 “establishes a legislative commitment to enact legislation in 2017 that will eliminate school districts’ dependency on local levies for implementation of the state’s program of basic education.” 2016 Budget Report, pp. 6. The State argues that this commitment is entitled to deference and should bring an end to sanctions. State’s Memorandum, p. 22. In determining whether to grant the State’s request, this Court should consider the particularly harsh impact of the continuing disparities caused by levy-based funding on children with disabilities.

Under the special education funding formula, “special education students are basic education students first,” LAWS OF 2016, 1<sup>st</sup> Sp. Session, ch. 36, § 505(2)(a)(i). Each funded student gets a general allocation in the same amount as a general education student, plus an extra amount equal to 0.93 of the general allocation to pay for special education. LAWS OF 2016, 1<sup>st</sup> Sp. Session, ch. 36, § 505(1)(a); RCW 28A.150.390. Thus, when the Legislature forces school districts to rely on local levies to pay for basic education, special education students are doubly affected – first by the shortage in general money, and second by the shortage in special money. The impact varies from one district to another depending on local resources, and is especially acute in school districts that cannot pass levies at all.

The shortages for the 2014-15 school year are described in F-196 reports submitted in January 2016. To give a few examples:<sup>7</sup>

- Bellingham School District spent \$70.2 million on the primary “Basic Education” program but received only \$45.7 million from the State. For K-12 special education, the district spent \$12.6 million but received only \$9.4 million in state funds.

- Evergreen School District spent \$143.9 million on the main “Basic Education” program but received only \$103.6 million from the State. For K-12 special education, the district spent \$29.2 million but received only \$23.8 million in state funds.

- The Kent School District spent \$167.6 million on the primary “Basic Education” program but received only \$132.2 million from the State. For K-12 special education, the district spent \$29.9 million but received only \$25.2 million in state funds.

- The Lake Washington School District spent \$156.8 million on “Basic Education” but received only \$108.4 million from the State. For K-12 special education, the district spent \$28.5 million but received only \$21.1 million in state funds.

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<sup>7</sup> These examples refer to the largest line item labeled “Basic Education,” not the full range of programs included within the constitutional scope of basic education, and refer to the main special education line item labeled “Special Education-Supplemental, State,” which does not include special education for infants and toddlers. See Footnote 2 and <http://www.k12.wa.us/safs/reports.asp>.

- Seattle Public Schools spent \$305.4 million on “Basic Education” but received only \$202.8 million from the State. For K-12 special education, the district spent \$85.4 million but received only \$45.9 million in state funds.

These examples illustrate the lack of dependable funding sources for special education students, and the large gap between state funding and actual costs. In school districts without levies, special education students receive only the inadequate state allocations, which are not tied to individual needs and which underfund *both* the general and special education components of their programs.

This Court’s decision in *School Districts’ Alliance for Adequate Funding of Special Education v. State*, 170 Wn.2d 599 (2010), does not establish that the current funding system is Constitutional nor does it insulate the ongoing gap in special education funding from scrutiny. In that case, an alliance of school districts challenged the constitutionality of funding for the excess costs of special education, focusing on the difference between actual spending and state appropriations within the special education program. *School Districts’ Alliance*, 170 Wn.2d at 608. The alliance took the position that basic education was “fully funded,” and challenged only the special education component of the funding allocated

for special education students. *Id.* at 610. This Court held that basic education and special education allocations are “utterly intertwined” and that, by focusing only on the latter, the alliance failed to prove underfunding beyond a reasonable doubt. *Id.* at 611.

That decision came two years before this Court ruled in *McCleary* that the overall funding of basic education is indeed deficient. Moreover, in *School Districts’ Alliance*, this Court did not reach the question of whether the 12.7 percent cap on funded special education enrollments is unconstitutional, nor did it address the adequacy of allocating to every special education student 1.93 percent of the cost of a basic education student regardless of the severity of the student’s individual needs.

It is time to examine these questions. As this Court explained, all children in Washington have a “true right” to ample provision for their education, arising from a “positive constitutional grant.” *McCleary*, 173 Wn.2d at 518. Therefore, this case is concerned with “whether the State has done enough” to achieve the “constitutionally prescribed end.” *Id.* at 519. At this juncture, despite \$28 million in accrued sanctions, the state has *not* done enough. It still forces school districts to rely on local levies for necessary spending in both the basic education and special education programs. It still has no specific plan for eliminating levy reliance. Even

if the 2017 Legislature addresses the levy problem as promised, it must also fix the funding formula in order to ensure that special education funding matches the actual costs of meeting individual needs. Neither SB 6195 nor the 2016 supplemental budget promises – nor even hints - that will happen.

**4. The staffing formula does not fully fund para-educators.**

The State emphasizes its progress in implementing ESHB 2261 and SHB 2776, noting increases in funding for school materials, supplies and operating costs, all-day kindergarten, early elementary class size reductions and transportation. 2016 Post-Budget Report, pp. 13-17. The State does not acknowledge, however, that the new funding formula for prototypical schools fails to meet the well-documented need for para-educators to assist students with disabilities. A recent state report found that 60 percent of special education instruction is delivered by para-educators rather than certificated teachers.<sup>8</sup> Yet, under RCW 28A.150.260(5), the “minimum allocation” for “instructional services provided by classified employees” is .936 of a staff person at each elementary school, 0.7 of a staff person at each middle school and 0.652 of

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<sup>8</sup> See the January 7, 2016 report to the Legislature by the State of Washington Professional Educator Standards Board – Para-educator Work Group at: <https://drive.google.com/file/d/0B4PrGgwx2LerbGhtMWQ4c2hiaGs/view?pref=2&pli=1>, page 21.

a staff person at each high school. There are more custodians than para-educators provided by this formula.

The reduction of class sizes will benefit all students. But a smaller class size does little good if the overwhelmed teacher has nobody attending to the special needs of students whose individual education plans depart from the common curriculum. The State cannot reasonably expect a teacher to effectively teach a multiplicity of common and individual curricula at the same time, without help. For this additional reason, this Court should not yet find the State in compliance with its paramount duty to fully fund basic education.

#### IV. CONCLUSION

While new formulas have enhanced funding in important ways, special education has eluded reforms. In fact, the 2016 budget bill *reduces* state funds for special education from \$864.7 million to \$853.3 million next year while slashing from \$28 million to \$24.5 million the State's safety net "for districts with demonstrated needs for special education funding beyond the amounts provided." LAWS OF 2016, 1<sup>st</sup> Sp. Session, ch. 36, § 505(7). These cuts are occurring even as the State claims to have increased education funding enough to satisfy Constitutional requirements (see 2016 Post-Budget Report, pp. 11-12). In sum, there is a

disconnection between the State's special education funding and actual needs, which warrants continuing scrutiny by this Court. For the foregoing reasons, this Court should continue to retain jurisdiction in this case and withhold a finding of compliance until the State has demonstrated a plan to fully fund basic education, including special education.

Dated this 7th day of June 2016.

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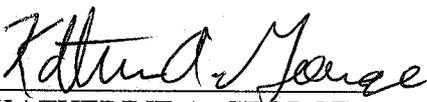
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on June 7, 2016, I served the foregoing Amicus Curiae Memorandum and related motion by email, per agreement, to:

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