7-30-2015

State of Washington's Answer to Amicus Brief of the Superintendent of Public Instruction

NO. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et al.,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

STATE OF WASHINGTON'S ANSWER TO AMICUS BRIEF OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION

ROBERT W. FERGUSON
Attorney General

ALAN D. COPSEY, WSBA 23305
Deputy Solicitor General

DAVID A. STOLIER, WSBA 24071
Senior Assistant Attorney General

WILLIAM G. CLARK, WSBA 9234
Senior Counsel

Office ID 91087
PO Box 40100-0100
Olympia, WA 98504-0100
360-753-6200

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I. INTRODUCTION

Making ample provision for education is the State's "paramount duty." Const. art. IX, § 1. But the State has many other important duties as well, from providing mental health treatment to feeding hungry children. Indeed, many of these duties are important in part because of their impact on education: children who are hungry, homeless, or being abused are extremely unlikely to succeed in school. *See* Amicus Br. of Columbia Legal Services et al. at 1 (Aug. 4, 2014) ("Nonacademic support for low-income students is as essential to educational opportunity as academic support."). The State has a responsibility to fund and oversee all of these obligations. The Superintendent of Public Instruction does not. His role, and his amicus brief, properly focus solely on K-12 education. But that narrow focus leads the Superintendent astray here. The Court should decline to adopt his counterproductive proposed remedy, recognizing that his allegation that the State's progress is inadequate is by comparison to his own view of what the Legislature should do, not by comparison to any objective constitutional standard.

This Court in *McCleary* endorsed several priorities adopted by the Legislature and, as the Superintendent acknowledges (Amicus Br. at 4, n.1), the Legislature has made significant progress on those priorities, fully funding all-day kindergarten, MSOC, and transportation, and funding

reduced K-3 class sizes. Since 2012 the State has increased biennial appropriations for K-12 education by $5.1 billion dollars. *2015 Report to the Washington Supreme Court by the Joint Select Committee on Article IX Litigation* (*2015 Report*) at 38 (Chart A). That is $5.1 billion of progress, and $5.1 billion of education funding that no longer must be paid through local levies.

The State recognizes that its task is not complete, because it has not finished addressing the related issues of compensation and local levies, which require a coordinated response. *See* State's Memorandum Transmitting the Legislature's 2015 Post-Budget Report (State's Mem.) at 22-28. But the Court gave the State until 2018 to complete its efforts, and the State is well on its way to meeting that deadline.

The State's progress, and the working relationship between this Court and the other branches of state government, would be gravely threatened by imposing the sanction the Superintendent proposes. He asks the Court to force the Legislature back into session and to shut down most of state government unless the Legislature during that session "makes substantial progress in adopting the reforms in ESHB 2261." Amicus Br. at 19. But the Legislature already has made substantial progress, and the

harm to the public—particularly to children in need[1]—of shutting down large swaths of state government vastly outweighs any purported benefit that extreme remedy would generate.

II. ARGUMENT

A. The Superintendent Agrees That the State Has Made Progress in Implementing ESHB 2261 But Faults the State for Not Having Completed the Entire Task

The Superintendent, unlike the Plaintiffs/Respondents, acknowledges that the State has made progress in implementing ESHB 2261 (Laws of 2009, ch. 548). He agrees that the first step is full implementation of SHB 2776 (Laws of 2010, ch. 236) and that SHB 2776 will be fully implemented and funded consistent with the timelines it contains. Amicus Br. at 4. But he asserts that the State has not made satisfactory progress in funding compensation, levy reform, funding from dependable and regular sources, and the Superintendent's own "plan" for the State.[2] *Id.* at 4-15. The State does not contend that it has completed its work to provide full state funding of basic education salaries or enact local levy reform, but the Legislature has taken important steps to grapple with

[1] Students who are homeless, in foster care, disabled, or in poverty depend on a variety of noneducational services from the State, which could be threatened under the remedy the Superintendent proposes.

[2] The Superintendent is certainly entitled to advocate for his plan before the Legislature and highlight it for this Court, just as the State's *2015 Report* highlighted plans and bills that were proposed during the 2015 session. Some elements in the Superintendent's plan have been enacted (completion of SHB 2776), and others may yet be enacted. But that will be the Legislature's choice.

the complicated and contentious issues that must be resolved to complete the transition from levies to state funding of basic education salaries. *See 2015 Report* at 13-34; State's Mem. at 22-29.

The Superintendent treats the salary recommendations in the Compensation Technical Working Group Final Report as the standard that must be met to comply with ESHB 2261. Amicus Br. at 8-10. But he cites no legal basis for that claim; there is no legal or constitutional requirement that the Legislature and Governor adopt every recommendation of every education advisory group. It is the Legislature that has the constitutional duty to provide the specific details of the constitutionally required education. *McCleary*, 173 Wn.2d at 517. It is the Legislature that determines whether and to what degree the reports it commissions will be implemented in legislation. A report is not law, and the recommendations of a report are not constitutional mandates.[3]

The Superintendent is correct that the state salary grid is well below the actual salaries paid in most school districts. But the State is not ignoring the problem. Rather, as explained in the State's prior brief, the

[3] Even so, the Superintendent's suggestion that the Legislature has disregarded reports and studies is inaccurate. Amicus Br. at 17. For example, the Picus and Odden Study was commissioned by Washington Learns. *McCleary*, 173 Wn.2d at 502. The Basic Education Task Force recommended a revised prototypical school funding model based in large part on the Picus and Odden Study. *Id.* at 504. The Legislature adopted that funding model, along with other recommendation from the Task Force, in ESHB 2261. *Id.* at 506. ESHB 2261, in turn, created the Quality Education Commission, which issued its initial report in 2010. Thereafter, the Legislature enacted SHB 2776, which enacted many of the Commission's recommendations into law. *Id.* at 509.

salary and levy issues are so intertwined that they must be solved as an integrated whole, and there is no easy solution. For example, the Superintendent advocates reductions in local levies as the State assumes the costs currently funded by the levies, while the Plaintiffs/Respondents vigorously oppose any such proposal.[4] The *2015 Report* at pages 17-26 and 31-34 summarizes some of the serious proposals the Legislature has been discussing.

The Superintendent treats levy reform and the need for regular and dependable state funding as if they were issues separate from staff compensation. Amicus Br. at 11-15. But they are simply different faces of the same problem. Consequently, how to pay for staff compensation from regular and dependable state funds rather than local levies is *the* central issue left before the Legislature. As noted above, serious and detailed proposals for resolving this issue were introduced and considered in the 2015 Legislature and almost certainly will form a foundation for further consideration and ultimate resolution.[5]

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[4] *Compare* Office of Superintendent of Public Instruction, *Structural changes included in Superintendent Dorn's plan*, http://www.k12.wa.us/Communications/FullyFundPlan/StructuralChanges.pdf ("Initiate levy reduction, as the state proceeds to fund basic education costs currently covered by local levies, and eliminate supplemental time, resources and incentives"), with Plaintiffs/Repondents' 2015 Post-Budget Filing at page 31-32 (reference to "levy-swipe").

[5] *See* pages 12-13 of the Amicus Brief of Former Governors, filed in this case on August 8, 2014, explaining that unsuccessful bills introduced in one legislative session may lay the groundwork for successful bills—and a better result—in a subsequent session.

B. The Staffing Policy Advocated by the Superintendent Is Not Constitutionally Mandated

The Superintendent argues that the State has failed to address staffing needs. He suggests that one of this Court's holdings in *McCleary* was that staffing levels were inadequate to provide basic education. Amicus Br. at 5 (citing *McCleary*, 173 Wn.2d at 532). That is not what the Court held. The Court mentioned staffing levels as part of its assessment of whether the State was funding the actual costs of the basic education program.

Significantly, the Court did not declare any constitutional infirmity with the staffing levels set forth in SHB 2776. Instead, the Court turned to the evidence in the trial, stating that it "highlighted three major areas of underfunding: basic operational costs [now called MSOC]; student to/from transportation; and staff salaries or benefits." *Id.* at 533. The State now has fully funded MSOC and student transportation and is working to address staff salaries and benefits. *2015 Report* at 8, 10-11, 13-34; State's Mem. at 14-15, 22-28.

The State is not arguing that the staffing ratios established in ESHB 2261 should remain fixed. The State *is* arguing (1) that the Legislature *is* funding reduced K-3 class sizes consistent with ESHB 2261 (*2015 Report* at 9-10; State's Mem. at 17-18); (2) that the Legislature has

stated its intent to address staffing ratios once it has completed its obligations under *McCleary* (HB 2266, § 1 (Laws of 2015, 3d Sp. Sess., ch. 38, § 1)); (3) that objective evidence as to proper staffing ratios at the higher grades has not yet been established; and (4) that the Court has not identified any specific staffing ratio as constitutionally mandated. The State may not have implemented the staff increases the Superintendent believes are necessary, but that does not place the State in noncompliance either with ESHB 2261 or with *McCleary*.[6]

C. The Sanction Proposed by the Superintendent Is Overbroad and Would Be Counterproductive

The Superintendent asks the Court to issue an order enjoining spending from the general fund at some date prior to the next regular legislative session unless the Legislature returns in special session and makes "substantial progress" in adopting the reforms in ESHB 2261. Amicus Br. at 18-19. Such an order is not warranted for several reasons.

First, the State already *has* made substantial progress in implementing the reforms in ESHB 2261. *2015 Report* at 6-13; State's

[6] As factual evidence for his staffing argument, the Superintendent cites staffing levels from one school district showing that the district hires more staff than is allocated under the prototypical funding model. Amicus Br. at 6-7. That evidence does not objectively demonstrate inadequate staffing levels; it demonstrates one school district's determination without setting out the factual basis for that determination. The state apportionment formula is for allocation purposes, and school districts can and do make local choices about staffing that depart from the formula's assumptions. Any proposed enhancement to staffing levels must be judged by reference to educational rationales.

Mem. at 13-20. It is simply not accurate to assert a lack of progress in implementing ESHB 2261. And given the progress that has been made, it is not clear what would be the measure of "substantial progress" necessary to avoid triggering a government shut-down.

Second, the order of contempt was premised on the State's failure to submit a plan. The Superintendent's proposed remedy erroneously treats that failure as an absence of substantial progress toward compliance with the *McCleary* decision. Any contempt remedy should target the subject of contempt—in this case, the failure to submit a plan. But as the State explained in its most recent brief, no such contempt remedy is necessary or appropriate here. State's Mem. at 29-31.

Third, the Legislature already is working on resolving the interrelated issues of compensation and levy reform. *2015 Report* at 13-34; State's Mem. at 22-28. It is far from clear that forcing a special session would be more productive than allowing the normal interim and preparatory activities to occur.

Finally, the coercive tactic urged by the Superintendent—effectively shutting down all of state government paid out of the general fund—would cause great harm. And it would do so without any assurance of success. It is like using a sledgehammer to dislodge a window that

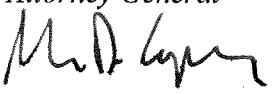
won't open—it may work, but the consequence (the broken window) is both counterproductive and disproportionate to the desired result.

III. CONCLUSION

The State has made and is making real and measurable progress toward full compliance with the *McCleary* decision. The Superintendent's proposed remedy would disrupt that progress and cause substantial collateral harm. It should be rejected.

RESPECTFULLY SUBMITTED this 30th day of July 2015.

ROBERT W. FERGUSON
Attorney General



ALAN D. COPSEY, WSBA 23305
Deputy Solicitor General

DAVID A. STOLIER, WSBA 24071
Senior Assistant Attorney General

WILLIAM G. CLARK, WSBA 9234
Senior Counsel

Office ID 91087
PO Box 40100-0100
Olympia, WA 98504-0100
360-753-6200

CERTIFICATE OF SERVICE

I certify that I served a copy of the State of Washington's Answer to Amicus Brief of the Superintendent of Public Instruction, via electronic mail and U.S. Mail, postage paid, upon the following:

Thomas Fitzgerald Ahearne Christopher Glenn Emch Adrian Urquhart Winder Kelly Ann Lennox Foster Pepper PLLC 1111 3rd Ave., Ste. 3400 Seattle, WA 98101	ahearne@foster.com emchc@foster.com winda@foster.com lennk@foster.com
William B. Collins 3905 Lakehills Dr. SE Olympia, WA 98501	wbcollins@comcast.net

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

DATED this 30th day of July 2015, at Olympia, Washington.

KRISTIN D. JENSEN
Confidential Secretary