8-25-2014

Plaintiffs' Answer to the Amicus Brief of Superintendent Dorn

No. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW & STEPHANIE McCLEARY, on their own behalf and on behalf of Kelsey & Carter McCleary, their two children in Washington's public schools;

ROBERT & PATTY VENEMA, on their own behalf and on behalf of Halie & Robbie Venema, their two children in Washington's public schools; and

NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS ("NEWS"), a state-wide coalition of community groups, public school districts, and education organizations,

Plaintiffs/Respondents,

v.

STATE OF WASHINGTON,

Defendant/Appellant.

PLAINTIFFS' ANSWER TO THE AMICUS BRIEF OF SUPERINTENDENT DORN

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I. INTRODUCTION

This Court has summoned the State to address three topics:

- "why the State should not be held in contempt for violation of this Court's order dated January 9, 2014";
- "why, if it is found in contempt, any of the following forms of relief [list of 7 remedial sanctions] ... should not be granted"; and
- "the appropriate timing of any sanctions."

June 12, 2014 Order To Show Cause at pp.3-4.

The amicus brief of Superintendent of Public Instruction Randy Dorn addresses the second and third topics. Although he admits the 63rd legislature did not comply with this Court's Order, he says this Court should not sanction that violation.[1] And as for timing, he suggests waiting until the 64th legislature's sessions conclude next year, and then let plaintiffs seek an injunction "with regard to reductions in the general fund".[2]

For the reasons outlined in Part II below, plaintiffs do not believe that doing nothing (no sanctions) and kicking the can down the road (delay until after next year's sessions) is the appropriate way to address the State's perennial lack of progress, plan, or compliance in this case.

[1] *E.g., Amicus Dorn's Brief at pp.12-13.*
[2] *E.g., Amicus Dorn's Brief at pp.12-13.*

II. DISCUSSION

A. Amicus Dorn's "No Sanctions" Argument

Superintendent Dorn states that he is the chief school officer elected to the State's executive branch, charged with supervision, oversight, and implementation of public education.[3] He candidly admits the 63rd legislature "did not comply with the Court's order."[4] He acknowledges that the 63rd legislature did not submit the plan mandated by this Court.[5] And he does not dispute plaintiffs' showing that the 63rd legislature failed to make the steady, real, and measurable progress mandated by this Court.[6]

But he nonetheless concludes that this Court should not sanction that violation.[7] The following paragraphs outline plaintiffs' answer to his reasons for that do-nothing request.

The Order was irrelevant: Amicus Dorn notes that as a "general rule", the legislature can repeal or modify its prior acts – and suggests this

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[3] *Amicus Dorn's Brief at p.1. His Amicus Brief also notes that his responsibilities include "ensuring that local school officials comply with the law." Id. (underline added). The crux of this Show Cause proceeding, however, is ensuring that State elected officials comply with the law – specifically, with Court Orders and the paramount duty mandated by the State Constitution which lawmakers take an oath to uphold.*

[4] *Amicus Dorn's Brief at p.3.*

[5] *Amicus Dorn's Brief at p.3.*

[6] *See Plaintiffs' 2014 Post-Budget Filing at pp.10-29.*

[7] *E.g., Amicus Dorn's Brief at pp.12-13.*

Court's January 2014 Order was therefore irrelevant because the 2015 legislature can just change whatever the 2014 legislature says.[8]

But that overlooks the purpose of this Court's Orders. To secure a reversal of the trial court's affirmative injunction requiring the State to determine the actual dollar cost of complying with Article IX, §1 and how the State would fund that cost, the State had assured this Court that it recently enacted needed financing reforms with ESHB 2261 and SHB 2776, and was committed to reaching full funding of those reforms by the school year ending in 2018.[9] The purpose of this Court's ensuing Orders was to ensure that the State kept its promise: ensure that the State actually had a ***plan*** to reach full funding by the promised deadline, and ensure that the State was making steady, real, and measurable ***progress*** each year in providing that increased funding. Not just continue kicking the can down the road until it's too late to timely comply with the constitutional rulings in this case.

This Court's January 2014 Order was not a surprise. This Court unequivocally declared in one of its 2012 Orders that "Year 2018 remains a firm deadline for full constitutional compliance", and that "Given the scale of the task at hand, 2018 is only a moment away .... We cannot wait

[8] *Amicus Dorn's Brief at pp.3-4.*
[9] *See Plaintiffs' 2014 Post-Budget Filing at p.8 & nn.23-25.*

until 'graduation' in 2018 to determine if the State has met minimum constitutional standards."[10]

This Court's January 2014 Order accordingly ordered the **63rd** legislature to do two things in its 2014 "short session": (1) take immediate, concrete action to make significant ***progress*** reaching the previously promised full funding by 2018, and (2) show it actually had a year-by-year ***plan*** for reaching the previously promised full funding by that deadline. As this Court had unequivocally warned in one of its prior 2012 Orders: "there must in fact be a plan."[11]

Amicus Dorn's argument that the **64th** legislature could change that plan or pace of progress next year does not mean this Court's Order was meaningless or irrelevant. To ensure the State was on track to do what the State had previously promised when securing a reversal of the trial court's affirmative injunction, this Court ordered the **63rd** legislature to submit its plan and make significant progress this year. And the 63rd legislature knowingly violated that Court Order. Plaintiffs respectfully submit that this Court does not issue meaningless or irrelevant Orders, and that the knowing violation of court orders is not acceptable.

[10] *December 20, 2012 Order at pp.2-3 (underline added).*
[11] *December 20, 2012 Order at p.2.*

No pigheaded Wallace here: Amicus Dorn posits that since this "is not the case of one man or one branch of government being pigheaded", there is no analogy here to when George Wallace declined to obey a court order which ordered State government to do something that elected officials did not want to do (immediately admit two African Americans into the University of Alabama that year).[12]

But the analogy has nothing to do with pigheadedness, racism, or whatever other unsavory description one could ascribe to Governor Wallace. Instead, the point is that in this *McCleary* case, elected officials (legislators) are declining to obey a court order which orders them to do something they would rather not do (make immediate concrete progress this year and submit an actual plan this year). In both the Wallace and *McCleary* cases, elected officials who disagree with the court order decline to comply, insisting that courts have no business telling elected officials what the Constitution requires them to do with the State's public schools.

Governor Wallace's failure to comply with the court order was not acceptable. Similarly here, the 63rd legislature's failure to comply with this Court's Order is not acceptable either.[13]

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[12] *Amicus Dorn's Brief at p.4.*

[13] *Amicus Dorn suggests that responsibility lies with not just the legislature, but also "the Governor, the Superintendent, and local school directors." Amicus Dorn's Brief at*

Courts shouldn't harm schools: Amicus Dorn does not dispute that the judicial branch has the power and authority (and duty) to strike down unconstitutional statutes. And he acknowledges that the legislature has known since at least this suit's January 2012 decision that Washington's school financing statutes are unconstitutional.[14] But he says this Court should not give the legislature advance warning that the Court will strike down those unconstitutional statutes if the legislature does not promptly comply with the Court Orders in this case – arguing that "The Court should not be in the business of harming schools."[15]

But the harm he refers to would not be precipitated by this Court. Instead, it would be precipitated by lawmakers' continuing failure to obey the Court Orders and constitutional rulings in this case.

Moreover, this Court should be in the business of upholding and enforcing the Constitution and constitutional rights. That includes the ***paramount*** duty mandated by Article IX, §1 and the corresponding positive constitutional right of every Washington child to an amply funded K-12 education. This Court's January 2012 decision and ensuing Court

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*pp.4-5. But this Court ordered the legislature to make the **progress** and **plan** at issue – not other State officials, and not non-State officials like local school district directors.*

[14] *Amicus Dorn's Brief at p.10 ("We know from McCleary that the current system of funding basic education violates the constitution. For '30 years [the State's] education system [has fallen] short of the promise of article IX, section 1[.]' McCleary, 173 Wn.2d at 541.") (brackets in amicus brief).*

[15] *Amicus Dorn's Brief at p.4, n.1.*

Orders have clearly declared what Washington law requires Washington lawmakers to do. But lawmakers have not felt sufficient need or urgency to comply with those Court Orders. Giving legislators advance warning that this Court will strike down unconstitutional statutes if the legislature does not promptly comply with the Court Orders in this case would create that need and urgency – and thus do precisely what a remedial sanction is supposed to do: coerce compliance with court orders.

Let politics resolve policy differences: Amicus Dorn suggests this Court should ignore the 63rd legislature's violation of the Court Orders in this case because "[t]here are legitimate policy differences ... that must be worked out in the political process".[16]

But lawmakers have had many, many, many years to let "the political process" work. That political process has been dragging on since this Court's 1978 *Seattle School District* decision when Stephanie McCleary was 13 years old. Her daughter (Kelsey) was 13 when the McCleary family filed this suit. And of the two Venema children and two McCleary children, only one (Carter) is still young enough to be in our State's K-12 public schools. Plaintiffs fully appreciate that more delay doesn't harm adults in State government – but to Washington

[16] *Amicus Dorn's Brief at p.5.*

schoolchildren, each year of amply funded education delayed is a year forever lost.[17] "Justice delayed is justice denied" isn't just a phrase. It's true.

B. Amicus Dorn's "Allow Injunction Later" Suggestion

This Court's July 2012, December 2012, and January 2014 Orders repeatedly told the defendant State and its legislature what they had to do to be bringing a timely halt to the State's ongoing violation of Washington children's constitutional right to an amply funded K-12 education. But the State and its legislature have repeatedly violated this Court's Orders.

Instead of issuing any remedial sanction to compel defendant's compliance with those violated Court Orders, amicus Dorn proposes that this Court issue an order that effectively compels plaintiffs to pursue injunction litigation next year if they want the defendant State and its

[17] *As the one State court whose judgment was affirmed in the consolidated Brown v. Board of Education case aptly held: delay is like telling the plaintiffs, "Yes, your Constitutional rights are being invaded, but be patient, we will see whether in time they are still being violated", and that to postpone relief "is to deny relief, in whole or in part, and to say that the protective provisions of the Constitution offer no immediate protection". Belton v. Gebhart, 87 A.2d 862, 870 (Del. Ch.),* aff'd*, 91 A.2d 137 (Del. 1952),* aff'd sub nom. *Brown v. Board of Education, 349 U.S. 294 (1955); accord Montoy v. Kansas, 112 P.3d 923, 940 (Kan. 2005) ("we cannot continue to ask current Kansas students to 'be patient.' The time for their education is now"); see Abbott ex rel. Abbott v. Burke, 20 A.3d 1018, 1038 (N.J. 2011) ("To state the question is to present its answer: how is it that children of the plaintiff class of Abbott schoolchildren, who have been designated victims of constitutional deprivation and who have secured judicial orders granting them specific, definite, and certain relief, must now come begging to the Governor and Legislature for the full measure of their education funding? And, how can it be acceptable that we come to that state of affairs because the State abandoned its promise? The State's position is simply untenable.").*

legislature to comply with the rulings in this case. He suggests that this Court "Issue an Order establishing a process to enable [plaintiffs] to move to enjoin the operation of laws, enacted by the 2015 legislature, that reduce general fund dollars available for basic education."[18]

He gives several reasons for his wait-until-next-year timing:

Legislators might voluntarily comply next year anyway: Amicus Dorn suggests that waiting until next year might moot the prior violations of this Court's Orders because State officials "seem to agree" that the 2015 Session is critical, and anything left undone could be followed up on "in the 2016 Legislative Sessions".[19]

But State officials have for decades been professing their commitment to comply with Article IX, §1, and have for over three years been professing their commitment to comply with the rulings in this case. Amicus Dorn provides no credible reason to conclude 2015 will be different than 2014. Or 2013. Or 2012.

Let voters weigh in: Next, amicus Dorn asserts this Court should wait until after the 2015 Sessions are over because "[p]resumably, adequate funding of basic education will be an issue in the election and the

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[18] *Amicus Dorn's Brief at p.5, section heading "B"; accord, conclusion at pp.12-13.*

[19] *Amicus Dorn's Brief at p.6 & p.7. Plaintiffs note that Amicus Dorn does not explain why this Court should assume the 2016 "short session" year is long enough for a legislature to accomplish significant business, when apologists for the legislature say the 2014 "short session" year is not.*

voters will have had the opportunity to weigh in on the issue."[20] But "adequate" funding isn't the constitutional mandate. "Ample" funding is. And elected officials are required to comply with constitutional mandates – regardless of how voters "weigh in" on whether or not to comply.[21]

For example, voters in the South "weighed in" on the issue of desegregation by electing representatives who campaigned against court-ordered desegregation.[22] Plaintiffs doubt that any Washington State official would assert that those voters' "weighing in" justified Southern officials' declining to obey court rulings that the Constitution requires the the State to desegregate its public schools. Similarly here, regardless of how voters may or may not "weigh in" on school funding, Washington lawmakers must comply with this Court's ruling that the Constitution requires the State to amply fund its public schools. Put bluntly: the upcoming November 2014 election is legally irrelevant to whether and when Court Orders must be obeyed and constitutional rights must be upheld.

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[20] *Amicus Dorn's Brief at pp.6-7.*

[21] *See also Plaintiffs' Answer To State's Response To The Court's Show Cause Order at pp.34-36 (electoral majority cannot override constitutional rights of electoral minority).*

[22] *See, e.g., the discussion of George Wallace's unsuccessful first run for Governor, and then his successful second run for Governor, in Plaintiffs' Answer To The Amicus Brief of Mr. Eugster at pp.3-5 & nn.9-13.*

Let the legislature pass unconstitutional laws: Amicus Dorn next argues this Court should wait until the 2015 Session(s) are over because, "absent extraordinary circumstances", courts will not enjoin the passage of legislation.[23]

But his brief also acknowledges that "courts can restrain the legislative branch of government from acting in an unconstitutional manner", and that "by refusing to give effect to such act [the court] may restrain them."[24] Thus, for example, to restrain the legislature from making the State's unconstitutional underfunding of its K-12 schools worse, this Court could declare that acts enacted by the 2015 legislature which impose unfunded or underfunded mandates on the State's K-12 schools have no legal effect.

More fundamentally, however, amicus Dorn's focus on what the **2015** legislature may or may not do ignores the timing issue presented by this Court's Show Cause Order. The timing issue is not when this Court should do something about what the **2015** legislature does or does not do. The timing issue is when this Court should do something about what the

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[23] *Amicus Dorn's Brief at pp.7-8. Plaintiffs note that such extraordinary circumstances exist here since the State's violation of children's* ***paramount*** *right under our State Constitution has been ongoing for over a generation, and the State has been continually failing to comply with the Court Orders in this case.*

[24] *Amicus Dorn's Brief at p.8 (quoting Murphy v. Collins, 20 Ill.App.3d 181, 194, 312 N.E.2d 772 (Ill.App. 1974)).*

2014 legislature failed do. This Court Ordered the legislature to make the required ***progress*** and submit the required ***plan*** in 2014. The legislature did not comply with that Court Order. The timing issue is therefore what remedial sanctions will coerce compliance with that January 2014 Order. And amicus Dorn's proposal does not address that timing issue.

The general fund shouldn't shrink: The last reason amicus Dorn gives for his injunction idea is his desire that the 2015 legislature not be allowed to "reduce the general fund dollars available for education."[25]

But the State has never claimed in this case that the State's general fund revenue is insufficient to fully comply with the State's ***paramount*** duty to amply fund its K-12 schools.[26] The problem is that the State's current general fund revenue is insufficient to do that and fund all the non-paramount programs and services legislators want to fund. Amicus Dorn's last reason turns the constitutionally established priority of ample K-12 funding upside down. The holdup here is the amount of general fund dollars available for those constitutionally non-paramount matters if the State amply funds its K-12 public schools.

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[25] *Amicus Dorn's Brief at, e.g., p.8.*

[26] *Amicus Dorn's Brief at p.10 (quoting this Court's affirming the meaning of " '**paramount**' in article IX, section 1 as 'having the highest rank that is superior to all others, having the rank that is preeminent, supreme, and more...important to all others. [T]he State must amply provide for the education of all Washington children as the State's first and highest priority before any other State programs or operations.' McCleary, 173 Wn.2d at 520.") (bold added, brackets in amicus brief).*

III. CONCLUSION

Plaintiffs respectfully submit that court orders and constitutional rights matter – and thus this Court should issue the 3-part enforcement order plaintiffs had proposed to address the 63rd legislature's knowing failure to comply with this Court's January 2014 Order.[27] And for the reasons outlined above, plaintiffs do not agree with amicus Dorn's proposal that this Court overlook the 63rd legislature's knowing violation of the Court Orders in this case, and instead issue an Order that effectively compels plaintiffs to secure injunctions with respect to revenue bills the 64th legislature passes next year.

RESPECTFULLY SUBMITTED this 25th day of August, 2014.

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[27] *See Plaintiffs' Answer To Defendant's Response To The Court's Show Cause Order at pp.6-7 & pp.24-28.*

DECLARATION OF SERVICE

Adrian Urquhart Winder declares:

I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of twenty-one years. I am not a party to this action, and I am competent to be a witness herein. On Monday, August 25, 2014, I caused PLAINTIFFS' ANSWER TO THE AMICUS BRIEF OF SUPERINTENDENT DORN to be served as follows:

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Amici Curiae The Honorable Daniel J. Evans, The Honorable John Spellman, The Honorable Mike Lowry, The Honorable Gary Locke, and The Honorable Christine Gregoire

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

EXECUTED in Seattle, Washington, this 25th day of August, 2014.

s/ Adrian Urquhart Winder
Adrian Urquhart Winder