5-29-2014

State of Washington's Reply

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 REPLY

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I. INTRODUCTION

This reply is filed by the State of Washington as a legal response to Plaintiff/Respondents' 2014 Post-Budget Filing (Plfs' 2014 Resp.), as permitted by the Court in a letter dated May 1, 2014. It is not a supplement to the Legislature's Report filed on April 30.

The State has not achieved full implementation of the reforms scheduled for phase-in by 2018. However, it has demonstrated that, with guidance from the Court, there is momentum toward finding the political consensus needed to complete the task. Plaintiffs have made creative arguments claiming the State has failed to implement reforms that it actually has implemented, and they have woven an illusion of precedent for an array of sanctions that actually are without precedent. This State's judicial, legislative, and executive branches all share the goal of achieving full article IX compliance through implementation of the reforms embodied in Engrossed Substitute House Bill 2261 (ESHB 2261) and subsequent education reform legislation. The imposition of sanctions would not advance this shared goal.

II. FACTUAL AND PROCEDURAL HISTORY

On January 5, 2012, this Court issued a decision holding that the State was not meeting its obligation to amply provide for the education of all children within its borders as required in article IX, section 1 of the

state constitution. *McCleary v. State*, 173 Wn.2d. 477, 545-46, 269 P.3d 227 (2012). The Court rejected both the trial court's remedy ordering another study and Plaintiffs' proposed remedy requiring full compliance at the end of the next school year (2011-12). *Id.* at 541-46. Instead, the Court endorsed the Legislature's enacted reforms embodied in ESHB 2261 (Laws of 2009, ch. 548) and subsequent legislation, which contemplated implementation by 2018. The Court retained jurisdiction to "monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty," with the express goal of "fostering dialogue and cooperation between coordinate branches of state government in facilitating the constitutionally required reforms." *McCleary*, 173 Wn.2d. at 543-46. The Court did not specify which actions must be taken by the 2012 Legislature; neither did it attempt to set specific priorities.

In July 2012, after the legislative session had concluded, the Court issued a procedural order for its retained jurisdiction, which provided for annual legislative reports to the Court, followed by comments filed by Plaintiffs. *McCleary v. State*, No. 84362-7, Order at 2 (July 18, 2012). The Court declined to "measure the steps taken in each legislative session between 2012 and 2018 against full constitutional compliance," but

indicated that the State must "show real and measurable progress" toward achieving full compliance. *Id.* at 3.

The 2013 Legislature appropriated new funding for basic education during the 2013-15 biennium, as summarized in its 2013 report to the Court.[1] The Court responded by acknowledging the "meaningful steps" the 2013 Legislature had taken to address funding for education, but criticized the amount and extent of progress, suggesting possible harsh enforcement actions in the near term. *McCleary v. State*, No. 84362-7, Order (Jan. 9, 2014). The Court ordered the State to submit its next report by April 30, 2014, containing "a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year" that addresses "each of the areas of K-12 education identified in ESBH 2261, as well as the implementation plan called for by SHB 2776 [Laws of 2010, ch. 236]" that includes "a phase-in schedule for fully funding each of the components of basic education." *Id.* at 8.

The Legislature, through the Article IX Committee, submitted its report on April 30, 2014.[2]

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[1] Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation (Aug. 29, 2013) (Leg. 2013 Report).

[2] Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation (Apr. 30, 2014) (Leg. 2014 Report).

III. ARGUMENT

A. Plaintiffs Misrepresent the Status of Implementation and Seek to Relitigate Funding Formulas This Court Already Approved

In their haste to assign "three strikes" in support of a punitive order against the Legislature, Plaintiffs mischaracterize the implementation the State has accomplished to date. Their continued assertion that the State has been stalling for 36 years is an example of false hyperbole that serves no useful purpose. "Reform has been continual since [the Seattle School District case] and neither the Legislature's commitment nor its sincerity in addressing this perennial problem should be in doubt." CP 2932 (Trial Court, FF 239). Plaintiffs' efforts reflect a desire to relitigate portions of the case and, rather than accept the timeline the Court established, to continue their quest for immediate implementation. The Court retained jurisdiction to monitor the State's implementation of the financial reforms adopted in ESHB 2261, not to relitigate the funding formulas adopted in that bill.

In its *McCleary* decision, the Court endorsed reform legislation initiated by ESHB 2261 and its foundational work as an appropriate remedy, provided it is implemented. *McCleary*, at 542. According to an unchallenged finding of fact from the trial court, ESHB 2261 was endorsed by "educators, school districts and by state and local officials,"

including persons and entities who are Plaintiffs in this case. CP 2935 (Trial Court, FF 249); *see also McCleary*, at 544 (quoting Superintendent of Public Instruction). Under ESHB 2261, actual costs are provided for through a prospective allocation model rather than through reimbursement of expenditures. *McCleary*, at 541-42; Leg. 2014 Report at 40.

Moreover, the Legislature has not overstated in any of its reports to the Court the extent or degree to which it has implemented the reforms initiated in ESHB 2261. Thus far, it has not let pass any specific deadline enacted in SHB 2776. Because implementation is an ongoing process, and because the filings by the parties each year build upon previous filings, it is necessary to correct some misperceptions perpetuated in Plaintiffs' filings.

1. The Highly Capable Program is Fully Funded

Plaintiffs argue, for example, that the State did not demonstrate any progress in 2014 toward fully funding the Highly Capable program. Plfs' 2014 Resp. at 23. The reason is simple: the Highly Capable program is fully funded. Under the formula specified in RCW 28A.150.260(10)(c), the Legislature appropriates funding to support programs for highly capable students. It appropriated $19,232,000 for the 2013-15 biennium to fully fund the amount required by the formula. Laws of 2013, 2d Spec. Sess., ch. 4, § 511. Plaintiffs do not explain why the

appropriation is insufficient. They supply nothing in the way of evidence or credible argument that the program is anything less than fully funded. Instead, they reference regulations adopted by OSPI to implement the program that is now part of basic education. Plfs' 2014 Resp. at 23. These regulations require school districts to provide services for the most highly capable students. RCW 28A.150.260(10)(c); WAC 392-170. Districts continue to receive additional funding for providing these services.

2. Reforming Basic Education to Implement 24 Credits for Graduation Did Not Violate Any Court Order

In 2014, the Legislature responded to school district and educator requests to convert increased hours to increased credits. Leg. 2014 Report at 18-24. Plaintiffs treat the Legislature's responsiveness as a failure to comply with a Court Order. Plfs' 2014 Resp. at 24-26. It is not. As explained in the Legislature's 2014 Report, and as Plaintiffs concede,[3] the Legislature made an educational policy decision that had consensus in the educational community. It enhanced the prototypical school funding model by, for example, reducing laboratory class sizes and increasing the high school allocation for materials, supplies, and operating costs (MSOC) to further support Career and College Ready Graduation Requirements.

[3] Plfs' 2014 Resp. at 25.

Leg. 2014 Report at 22-23. It also provided flexibility to school districts on minimum hour requirements. That reallocation of dollars violates no order of the Court. Rather it effectuates the shared expectation that the Legislature will continue to review and revise the basic education program as needed. *McCleary*, at 526-27; RCW 28A.150.1981.

3. The Pupil Transportation Formula is Fully Implemented for the 2014-15 School Year

ESHB 2261 included a new "expected cost model" formula for Pupil Transportation, predicting costs using a regression analysis based on the number of students transported and a set of statistically significant characteristics for each district. RCW 28A.160.180. "The Office of Financial Management (OFM), with the help of consultants, developed a new pupil transportation funding model which was then adopted in ESHB 2261." Quality Education Council Initial Report to the Governor, January 13, 2010 (2010 QEC Report) at p. 4.[4] Under SHB 2776, the plan was for the new formula to be phased in until fully implemented during the 2013-15 biennium. RCW 28A.160.192. It will be fully implemented for the first time for the 2014-15 school year. The Legislature appropriated funding in the 2013-15 biennial budget sufficient to cover 40 percent of the gap between the 2011-12 baseline and full funding in the

[4] Plfs' 2014 Resp. at 22, n. 68; http://www.k12.wa.us/QEC/pubdocs/QEC2010 report.pdf.

2013-14 school year, ramping up to full implementation for the 2014-15 school year. Laws of 2013, 2d Spec. Sess., ch. 4, § 505(2); Leg. 2013 Report at 12-13. In the 2014 supplemental budget, the Legislature increased the initial FY 2015 appropriation from $427,408,000 to $429,312,000, including a set-aside of $558,000 for anomalies not addressed by the formula, such as a district's unusual geographical configuration. Districts that meet a minimum efficiency rating and can demonstrate their actual prior year costs exceed the expected cost allocations due to exceptional circumstances are eligible for additional money from this set-aside. Laws of 2014, ch. 221, § 503(3).

The plaintiffs are incorrect in their 2014 Response (which by and large cites as authority their incorrect 2013 Response) in suggesting that the new funding formula is legally flawed or that full implementation will not be achieved for the 2014-15 school year. First, this Court accepted ESHB 2261 as a valid attempt to account for actual costs of the state program. Plaintiffs should not be allowed to relitigate that issue here, where the Court is monitoring implementation, not reassessing the statute. Second, Plaintiffs have provided the Court with no credible evidence from which it can possibly conclude that the $429,312,000 appropriated for FY 2015, plus any 2015 supplemental amount, will fail to fully implement pupil transportation.

Citing their own 2013 Response, Plaintiffs claim the State must be failing to take into account assumed rising fuel costs. But, neither their 2013 Response nor their 2014 Response contains any evidence related to fuel costs or evidence that the expected cost formula fails to adequately account for fuel costs within its statistical analysis.

Plaintiffs also claim various state documents show underfunding. They do nothing of the sort. None of the documents cherry-picked by Plaintiffs "show" underfunding of transportation for the 2014-15 school year—not the March 2013 OSPI "Implementation of the New Student Transportation Funding System" status update,[5] not the 2010 QEC Report, and not the documents cited in footnote 56 of their 2014 Response.[6] None of those documents rely on updated data inputs. Anticipated cost estimates can swing wildly when attempting to project the enrollments of

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[5] Plfs' 2014 Resp. at 17, n.54 (citing Plfs' 2013 Resp. at 24-25, n. 75).

[6] Plfs' 2014 Resp. at 8, n.56. In their footnote, Plaintiffs cite a report of expenditures by school districts for 2012-13 as being greater than an estimated total for 2014-15 found in a preliminary transportation allocation spreadsheet compiled by OSPI. Regarding the expenditures document, there is no foundation for determining whether expenditures coincide with eligible services. Regarding the transportation allocation spreadsheet, there is no foundation for the context of the estimates. The Court is provided no information on how the estimates may change with actual, audited data that may provide a basis for supplemental budget requests. Indeed, the face of the document explicitly cautions that "[t]he adjustment to actual will be made in the February 2015 apportionment. Adjustments will be made based on reported student counts and route data. The formula coefficients will be adjusted based on statewide reported data from the 2013-14 school year." http://www.k12.wa.us/safs/Misc/BudPrep14/Estimated%2014-15%20Transportation%20Allocations.xlsx. In sum, there is no evidence to suggest any underfunding of whatever OSPI ultimately supplies as the proper cost amount based on the formula.

roughly one million students, inflation rates, and other factors into the future. The Legislature's 2014 Report explains the difference between formula changes and updated data or variables that are inputs to the formula. Leg. 2014 Report at 13, 49-50. The outputs of the state funding process are necessarily fluid as the State steadily updates the model with actual audited data from school districts and adjusts apportionment accordingly. Plaintiffs do not dispute this. *Id.*[7]

Plaintiffs point to the projection in the March 2013 OSPI Transportation Status Update that, if the transportation formula were to be fully funded at $375.1 million, funding would be something less than 100 percent of all districts' 2012-13 school year expenditures. Once again, this document tells the Court nothing about the relationship of those school districts' expenditures to appropriate services, costs, or efficiencies. It provides no information on student enrollment counts and thus no information on the costs for the 2014-15 school year. It provides no basis to conclude that the $429.3 million appropriated for student transportation for FY 2015 will fail to accomplish full implementation of the

[7] Plaintiffs in *Montoy v. Kansas*, 282 Kan. 9, 138 P.3d 755 (2006) (*Montoy* IV), similarly argued that the court should rely on findings and conclusions contained in a cost study prepared for the legislature as it responded to judicial orders regarding public school funding. The court instead deferred to the legislature's treatment of the study, concluding that it should not consider the report to be "substantial competent evidence of the actual and necessary costs of providing a suitable education" because the cost study had not been subjected to the fact-finding processes of litigation. *Id.* at 21.

transportation funding model, particularly in light of the extra set-aside for formula anomalies.

The components of basic education that must be fully implemented are identified in the Court's January 8, 2012, decision. The Legislature's Reports to the Court have accurately reported its implementation progress. Plaintiffs' attempts to discredit the Reports are veiled attempts to relitigate portions of this case. Plaintiffs are arguing as if the Court ordered the State to implement a reimbursement model rather than the reformed allocation formulas embodied in ESHB 2261.

B. Any Order Imposed by the Court Should Further the Goal of Achieving Ample Funding for Education

No sanction is necessary to compel constitutional compliance. There is agreement between the Legislature and the Court that basic education must be amply funded. While there is not current political consensus on how best to achieve that end, there is progress toward resolution and preparation for significant work in the 2015 legislative session. Leg. 2014 Report at 25-33.

Nevertheless, throughout this litigation, Plaintiffs have sought an order forcing immediate action by the Legislature. This Court properly rejected that request, recognizing its decision imposed on the Legislature a complex and challenging set of tasks that would require more than a single

legislative session to resolve. *McCleary*, 173 Wn.2d at 545-47. The Court adopted the 2018 deadline the Legislature had set for itself to accomplish the tasks set before it and declined to establish intermediate benchmarks for assessing compliance. *Id.* at 549 (Madsen, C.J., concurring/ dissenting). *See also McCleary v. State*, No. 84362-7, Order at 3 (July 18, 2012) (order regarding retained jurisdiction; "it is not realistic to measure the steps taken in each legislative session between 2012 and 2018 against full constitutional compliance").

Accomplishing reform of this magnitude takes time to build political consensus; to evaluate existing education programs and modify them as necessary to incorporate updated information; to identify or develop appropriate reliable revenue sources; and to draft, consider, and enact implementing legislation. But the Plaintiffs' repeated call for immediate compliance has proved a clever litigation strategy, because anything other than immediate compliance can be characterized as intentional delay.

The Legislature's decision not to adopt the reimbursement model Plaintiffs have advocated does not demonstrate resistance to the Court or to the constitutional duty to amply fund education. Under Plaintiffs' model, the state is virtually obligated to pay whatever amount of money each of the 295 independent school districts believes is necessary. That is

not a model for effectiveness, efficiency, or accountability, and it has not been mandated by the Court.

Nevertheless, as is their pattern, Plaintiffs respond by again advocating sanctions. Plfs' 2014 Resp. at 46-49. *Compare* Plfs' 2013 Resp. at 45-48; Plfs' 2012 Resp. at 42-43. Their request for sanctions reflects their refusal to accept this Court's denial of their request to require "full funding" immediately. It also reflects their tiresome contention that the Legislature—like former Governor George Wallace—is obstinately refusing to meet its constitutional duty. This is not Alabama in 1963 and Plaintiffs' continuing and repeated comparisons to segregationists is offensive and unproductive.

The Legislature has made it clear through its reports to the Court that it is working to comply with article IX, section 1. As explained above, it has made measurable progress toward ultimate compliance. Its 2014 Report acknowledges that the Legislature did not formally adopt a plan in response to the Order of January 9, 2014. But Plaintiffs' attempt to wrap that failure in a cloak of constitutional noncompliance, institutional recalcitrance, and offensive historical comparisons should be flatly and unequivocally rejected.

No sanction should be issued. The Legislature is well aware of its constitutional duty and is moving toward completion of the task by the

2018 deadline this Court established. Imposing the type of onerous sanction Plaintiffs advocate would create distraction and slow progress.

Nonetheless, were the Court inclined to consider a sanction, any sanction must lie within the Court's constitutional authority and should advance the goal of achieving compliance with article IX, section 1 by 2018. The sanctions proposed or contemplated by Plaintiffs do not meet those two criteria.

1. Contempt Order Against Legislature or Legislators

Plaintiffs suggest the Court should hold "the governmental body or elected officials" in contempt of court. Plfs' 2014 Resp at 47, 49. We have found no case in which this Court has issued a contempt order against the Legislature or against any legislator. This Court has decided contempt proceedings as original actions for violations of its own orders,[8] but the Court has never held the Legislature or a legislator in contempt for any such violation. The Court has considered contempt orders against executive branch officers and agencies[9] and against a city,[10] but not against the Legislature or a legislator.

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[8] *See, e.g., In re Koome*, 82 Wn.2d 816, 514 P.2d 520 (1973) (respondent violated stay); *State v. Thompson*, 99 Wash. 478, 169 P. 980 (1918) (respondents failed to comply with order to surrender possession of property).

[9] *See, e.g., State v. Breazeale*, 144 Wn.2d 829, 841-43, 31 P.3d 1155 (2001) (reversing court of appeals order to impose remedial contempt on state patrol because superior court had reversed order at issue); *Bresolin v. Morris*, 86 Wn.2d 241, 251, 543 P.2d 325 (1975) (delaying consideration of request to hold agency head in contempt, as

None of the cases Plaintiffs cite provide precedent for this Court to hold the Legislature in contempt, and we have found no case where any state's highest court issued or affirmed contempt sanctions against that state's own legislature. All of the cases Plaintiffs cite are federal cases and none involves a state legislature or implicates separation of powers among co-equal branches of state government.[11]

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alternative to mandamus) (no finding of contempt or order of mandamus was issued, *see Bresolin v. Morris*, 88 Wn.2d 167, 558 P.2d 1350 (1977)).

[10] *See R/L Associates, Inc. v. City of Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989) (affirming judgment of contempt against city for deliberately violating a permanent injunction).

[11] In *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 678 F.2d 470 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982), the court held that neither the Eleventh Amendment, nor "concerns for our federal system," nor the language of the Clean Air Act barred a civil contempt sanction against the state to enforce a consent judgment in an action brought by the United States against the state. *Id.* at 475-77. At issue was an automobile emissions control program the state legislature refused to fund; the remedy imposed for contempt was the withholding of federal highway funds. *Id.* at 478-79.

In *Vecchione v. Wohlgemuth*, 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977), the court declined to vacate a contempt order against state executive branch officials who defied a district court order enjoining them from summarily seizing mental patients' property, and then failed to make payments agreed to in a subsequent consent judgment. The court of appeals rejected the state officials' procedural and institutional arguments and held that Eleventh Amendment immunity had been waived. *Id.* at 155-59.

In *U.S. v. City of Yonkers*, 856 F.2d 444, 460 (2d Cir. 1988), the United States sued the city for intentionally maintaining racial segregation in residential areas and schools. The city ultimately entered into a consent judgment, but the city council refused to enact a public housing ordinance it had agreed to. The district court held the city and the four council members who voted against the ordinance in contempt and imposed financial sanctions. The court of appeals affirmed, primarily because the city—through the city council—had agreed to the terms of the consent judgment. *Id.* at 454. However, the Supreme Court reversed because (1) the city councilmembers were not named as parties, (2) imposition of sanctions against individual councilmembers was "extraordinary" and should not have been imposed until sanctions imposed on the city alone failed to secure compliance, and (3) considerations supporting the legislative immunity doctrine must inform the court's discretion in imposing sanctions. *Spallone v. United States*, 493 U.S. 265, 280, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990).

As explained in footnote 11, one of the federal cases Plaintiffs cited was reversed by the United States Supreme Court citing, *inter alia*, considerations underlying the legislative immunity doctrine. The doctrine of legislative immunity does not, of course, prevent this Court from determining the constitutionality of the Legislature's actions and ordering compliance. That power is beyond question. But not all remedies ordinarily available to a court in civil litigation are consistent with the separation of powers and the independence afforded the Legislature and its members under our constitutional scheme. When the Washington Constitution was adopted, for example, the federal Speech or Debate Clause was understood to protect legislators from any liability or judicial action for their legislative votes. *Kilbourn v. Thompson*, 103 U.S. 168, 204, 26 L. Ed. 377 (1880). The framers of our Constitution presumably shared that understanding when adopting a state speech and debate clause in article II, section 17, such that a contempt order directed at legislative actions of individual legislators would contravene article II, section 17.

Plaintiffs also cite *Hutto v. Finney*, 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978), but that case did not involve a contempt proceeding. At issue was whether, under the Eleventh Amendment, a federal court could order that attorney fees under 42 U.S.C. § 1988 be paid from public funds. *Id.* at 690-91. The Court discussed contempt only for comparison, concluding that the award of attorney fees for bad faith served the same purpose as a remedial fine imposed for civil contempt. *Id.* at 691.

2. Order Prohibiting State Expenditures

Plaintiffs suggest the Court could prohibit the Legislature from making expenditures for non-educational programs until the court's constitutional ruling is complied with. Plfs' 2014 Resp. at 47. They offer no suggestion as to what expenditures should or could be prohibited or on what basis, and they display no concern for the public value of other programs and services or for the citizens who rely on them. Again, they cite only federal cases, none of which prohibited spending on unrelated programs, and none of which involved a state legislature or implicated separation of powers.[12]

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[12] In two of the cited cases, black residents prevailed in actions alleging their cities had discriminated against black neighborhoods in providing certain city services. *Dowdell v. City of Apopka, Fla.*, 511 F. Supp. 1375 (M.D. Fla. 1981), *aff'd in part and reversed and remanded in part*, 698 F.2d 1181 (11th Cir. 1983); *Baker v. City of Kissimmee, Fla.*, 645 F. Supp. 571, 589 (M.D. Fla. 1986). In both cases, the district court declined to order the city to institute specific programs or construction projects in black neighborhoods, but enjoined the city from spending any funds on the construction or improvement of municipal services in white neighborhoods until the services in black neighborhoods were on par with those in white neighborhoods. *Dowdell*, 511 F. Supp. at 1384; *Baker*, 645 F. Supp. at 588-89. The relief in *Baker* was patterned after that in *Dowdell*. *Baker*, 645 F. Supp. at 589.

The other case cited by Plaintiffs is a discrimination case challenging racial segregation in Virginia public schools. *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964). In response to earlier court decisions, the state had tried various means to preserve segregated schools, ultimately settling on a program that repealed compulsory public education, made school attendance a matter of local option, and provided tuition grants for private schools. *Id.* at 222. After a court ordered the public schools in Prince Edward County to admit students without regard to race, the county supervisors refused to levy school taxes, closed the schools, and passed ordinances to provide financial support for segregated private schools. *Griffin*, at 222. The Supreme Court held the county's action violated equal protection and affirmed the district court's injunction barring financial support for private schools while public schools remain closed. *Id.* at 233.

3. Order Requiring State Expenditures

Plaintiffs suggest the Court could order the Legislature to pass legislation to provide specific funding. Plfs' 2014 Resp. at 47. Three of the cases they cite are federal school desegregation cases that invoke federal rights and the Supremacy Clause, but not separation of powers.[13]

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[13] One of the cases, *Griffin*, is discussed above in footnote 12. Faced with an unrepentant and recalcitrant school system in that case, the Supreme Court stated in dictum that the district court may, if necessary to prevent further racial discrimination, require county legislators to "*exercise the power that is theirs* to levy taxes to raise funds" adequate to reopen, operate, and maintain a nondiscriminatory public school system. *Griffin*, 377 U.S. at 233 (emphasis added). The Court did not authorize the district court to assume the legislative function.

In *Missouri v. Jenkins*, 495 U.S. 33, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990), the Court again was faced with a segregated school system. After several attempts to devise a remedy that would ensure funding for the desegregation plan, the district court ordered a property tax increase and the issuance of capital improvement bonds. *Id.* at 41-42. The Supreme Court held that the district court abused its discretion. *Id.* at 52. "In assuming for itself the fundamental and delicate power of taxation the District Court not only intruded on local authority but circumvented it altogether." *Id.* at 51. The Court made a broader observation:

> "The very complexity of the problems of financing and managing a . . . public school system suggests that there will be more than one constitutionally permissible method of solving them, and that . . . the legislature's efforts to tackle the problems should be entitled to respect."

Id. at 52 (quoting *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (internal quotes omitted)).

In *Arthur v. Nyquist*, 547 F. Supp. 468 (W.D.N.Y. 1982), *aff'd*, 712 F.2d 809 (2d Cir. 1983), *cert. denied sub nom Griffin v. Bd. of Educ. of City of Buffalo, N.Y.*, 466 U.S. 936 (1984), city officials declined to fund the cost of implementing certain desegregation efforts ordered by the district court. The district court found that the board of education had demonstrated the need for additional money to carry out the desegregation orders and that city officials had made no effort to ascertain what funds were needed, and it ordered the city to provide the funds. *Id.* at 478-79, 484.

Interestingly, counsel for the plaintiff parents declined to defend the district court's order on appeal, because he believed school boards operating under desegregation orders were using the orders to pursue "their private agendas of unmet educational needs," and then blaming advocates of school desegregation for the added financial burdens courts were imposing. *Arthur*, 712 F.2d at 813.

The single state case they cite provides only a cursory analysis of separation of powers in determining a remedy. They cite no case supporting judicial control over the enactment of legislation.

Plaintiffs cite one decision in a long-running dispute over education funding in Kansas, but do not provide context. The Kansas Supreme Court affirmed a trial court ruling that the legislature had not made "suitable provision" for financing public schools, as required in the state constitution, but it then stopped: "We do not dictate the precise way in which the legislature must fulfill its constitutional duty. That is for the legislators to decide, consistent with the Kansas Constitution." *Montoy v. Kansas*, 278 Kan. 769, 775, 120 P.3d 306 (2005) (*Montoy* II).

The Kansas Legislature responded by adopting legislation, which the court found inadequate in *Montoy v. Kansas*, 279 Kan. 817, 112 P.3d 923 (2005) (*Montoy* III). The court dismissed separation of powers concerns in reliance on a student note in a law review arguing that equitable power is appropriate if exercised after legislative noncompliance. *Id.* at 828-29. Finding a need for immediate relief, the court ordered the legislature to increase funding for the upcoming school year by at least $285 million. *Montoy* III, at 845.[14] A month later, the

[14] It is this part of this single decision that Plaintiffs cite. Plfs' 2014 Resp. at 47 (citing Plfs' 2013 Resp. at 46 n.137).

court approved a legislative increase of half that amount. *Montoy v. Kansas*, 282 Kan. 9, 15, 138 P.3d 755 (2006) (*Montoy* IV) (citing unpublished order).

During its next session the legislature revised its school finance formula, adding additional funding. The court held the legislature had complied with the court's previous orders, and remanded with directions to dismiss the action. *Id.* at 24-25, 26-27.[15]

Read together, the *Montoy* decisions show a pattern of deference to the legislative's constitutional role.

4. Order Requiring Sale of State Property

Plaintiffs suggest the Court could order the sale of state property to fund constitutional compliance. Plfs' 2014 Resp. at 47.[16] They offer no examples, of course, of property that might be sold. Neither do they offer

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[15] The court declined to consider the constitutionality of the new legislation, holding that it must be challenged in a new action in the trial court:

> We have already made the determination that the school finance formula which was before this court in *Montoy II* was unconstitutional. The school finance system we review today is not the system we reviewed in *Montoy II* or *Montoy III*. The sole issue now before this court is whether the [legislative acts] comply with the previous orders of this court. If they do then our inquiry ends and this case must be dismissed.

Montoy IV, 282 Kan. at 18-19.

[16] Plaintiffs cite a single case in support of this remedy, but they mischaracterize it. In *Reed v. Rhodes*, 472 F. Supp. 623 (N.D. Ohio 1979), the court did not order the sale of any state property; rather, it ordered that the proceeds of excess property that the state already had advertised for sale must be used to help pay for a school transportation system to comply with desegregation orders.

any explanation as to how the one-time sale of state property would provide a "dependable and regular" revenue source for funding basic education. *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 522, 585 P.2d 71 (1978).

5. Order Invalidating Education Funding Cuts

Plaintiffs suggest the Court could invalidate legislation that makes cuts to education funding. Plfs' 2014 Resp. at 47. While the Court unquestionably has authority to invalidate unconstitutional statutes, Plaintiffs did not challenge the constitutionality of *any* statute in their complaint, CP 3-26. In the context of this litigation, therefore, it is far from clear what legislation Plaintiffs suggest should be invalidated.

Perhaps relatedly, Plaintiffs ask the Court for an order enjoining the Legislature from imposing "any more unfunded or underfunded mandates" on schools. Plfs' 2014 Resp. at 49. Putting aside the question of how to define an "unfunded or underfunded mandate," this suggestion lacks the precision required for a prospective injunction.[17]

[17] A court must precisely tailor a permanent injunction to prevent a specific harm. *Kitsap Cnty. v. Kev, Inc.*, 106 Wn.2d 135, 143, 720 P.2d 818 (1986). *See also* CR 65(d) (order imposing injunction must describe in reasonable detail the acts enjoined as well as the reasons supporting issuance of the injunction, above and beyond the complaint or other documents).

6. Order Shutting Down the Public School System

Finally, Plaintiffs step into the deepest water by suggesting the Court might shut down all public schools in Washington until such time as they are amply funded. Plfs' 2014 Resp. at 47. This suggestion assumes no education is preferable to the education students in Washington currently are receiving. In fact, it would most directly harm the very persons—school children—Plaintiffs claim to be advocating for.

Plaintiffs have cited cases in which state courts have issued orders temporarily enjoining their state from disbursing money to schools, but none of those cases provide a persuasive rationale for applying that remedy here.[18] Only one decision, *Robinson v. Cahill*, 70 N.J. 155, 161,

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[18] They cite *Montoy v. State*, No. 99-C-1738, 2004 WL 1094555 (Kan. Dist. Ct., Shawnee County, May 11, 2004) (unpublished *Decision and Order Remedy*), in which "legislative leaders openly declared their defiance of the Court," ignored the court's factual findings, and refused to take action in response to the court's order. 2004 WL 1094555 at *5. After surveying actions taken in other states (none of which had ordered the shutdown of public schools), the trial court declared the funding statutes, which it already had found unconstitutional, to be void as applied to the funding of public schools and enjoined their use for distributing funds for public education. *Id.* at *11. Significantly, the injunction was to take effect on June 30, while the schools were closed for summer. *Id.* at *15. The Kansas Supreme Court stayed the injunction before it took effect. *Montoy v. State*, No. 92,032 (May 19, 2004) (unpublished order) *available at* http://www.kscourts.org/Court-Administration/News-Releases/schoolfinanceorder 20040519.pdf.

The decision in *Hull v. Albrecht*, 192 Ariz. 34, 960 P.2d 634 (1998), marked the fourth time in four years that the Arizona Supreme Court addressed the constitutionality of school funding legislation. In its third attempt at compliance, the legislature adopted an act establishing a new funding mechanism. The court found an "opt-out" provision in the act would continue unconstitutional disparities in funding, held the act unconstitutional, and invalidated it. *Id.* at 639. Invalidating the act left no mechanism for distributing state funds to public schools; but rather than immediately enjoining the distribution of funds, the court extended the time during which the state could distribute

358 A.2d 457 (1976), actually closed the schools, and it did so for a few days in the summer of 1976. That decision is one of dozens in four decades of litigation over school funding and control in New Jersey.[19] In response to earlier decisions, the legislature enacted a statute in 1975 which the New Jersey Supreme Court found to be constitutional if fully funded. When the 1976 legislature did not fully fund it, a divided court enjoined all public officers in New Jersey "from expending any funds for the support of any free public school," with certain exceptions. *Robinson*, 70 N.J. at 160. The court lifted the injunction after the legislature adopted an income tax to fund the statute.[20]

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funds to give the legislature additional time to respond. *Id.* at 640. The legislature responded quickly by deleting the "opt-out" provision, and no bar on distributing funds was ever imposed. *Hull v. Albrecht*, No. CV-98-0238-SA (July 20, 1998) (unpublished *Order*), *available at* http://www.supreme.state.az.us/orders/scorder/1999_2002Orders/schorder.pdf.

Plaintiffs also cite a case involving unconstitutional conditions of confinement that is not directly on point, and they erroneously characterize it. The court of appeals affirmed a district court order closing a Boston jail if conditions were not remedied, but stayed the effective date of the order for six months. *Inmates of Suffolk County Jail v. Kearney*, 573 F.2d 98, 101 (1st Cir. 1978). The order did not take effect because of a consent judgment, which governed until the jail was completed. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 372-77, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992).

[19] The most recent decision appears to be *Abbott v. Burke*, 206 N.J. 332, 20 A.3d 1018 (2011) (*Abbott* XXI).

[20] The order dissolving the injunction is not found in Westlaw, but is referenced in subsequent decisions of New Jersey courts. *See, e.g., New Jersey Hosp. Ass'n v. New Jersey State Dep't of Health*, 249 N.J. Super. 194, 204, 592 A.2d 265 (App. Div. 1991) (listing the cite as 70 N.J. 464, 360 A.2d 400 (1976); *D.S. v. Bd. of Educ. of E. Brunswick Twp.*, 188 N.J. Super. 592, 605, 458 A.2d 129 (App. Div. 1983) (listing the cite as 70 N.J. 465, 360 A.2d 400 (1976)).

The *Robinson* court imposed the injunction over two extended dissents, one of which laid out several reasons for exercising restraint in fashioning a judicial remedy. Four of the reasons given proved prescient for New Jersey and are relevant to all the sanctions Plaintiffs have proposed here: (1) potential violation of separation of powers by intruding into areas constitutionally delegated to the legislature; (2) placing in jeopardy the court's "power of legitimacy"—"the power to command acceptance and support from the community so as to render force unnecessary, or necessary only upon a small scale against a few recalcitrants"; (3) assuming a task of enforcement that may be beyond the competence of the court for lack of supportive resources; (4) an institutional inability to view the governmental problem in its entirety and as a whole (i.e., without adequate information as to other public needs the legislature balances). *Robinson*, 70 N.J. at 162-64 (Mountain, J., dissenting) (quoting Archibald Cox, *The Role of the Supreme Court in American Government* 103-05 (1976)).

Plaintiffs here have not articulated how their goal of fully funding education is advanced by an order enjoining any disbursement of state funds to public schools in Washington. Presumably, they believe the pressure will be so great that the Legislature will have no choice but to act and to do so quickly. But that is a dangerous strategy. If the remedy fails

and schools are closed, it is schoolchildren who are harmed most directly. Moreover, those put at greatest risk of harm are those who have the fewest educational alternatives—wealthy parents can arrange for educational alternatives during a period of school closure, but such options are seldom available to families of modest means. Plaintiffs' suggested remedy contravenes the constitutional ideal they purport to uphold.

IV. CONCLUSION

The State shares the Court's goal of achieving full compliance with article IX, and the Legislature continues to make progress toward meeting the 2018 deadline this Court established. Plaintiffs' arguments to the contrary are unfounded and unproductive. No sanction is necessary to compel continued progress.

RESPECTFULLY SUBMITTED this 29 day of May, 2014.

ROBERT W. FERGUSON
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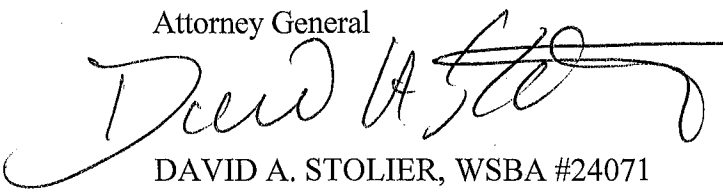

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SUPREME COURT OF THE STATE OF WASHINGTON

MATHEW and STEPHANIE McCLEARY, et al., Respondents, v. STATE OF WASHINGTON, Appellant.	CERTIFICATE OF SERVICE

I certify that I served a copy of the State of Washington's Reply, via electronic mail and U.S. Mail, postage paid, upon the following:

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

SIGNED this 29th day of May 2014 at Olympia, Washington

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