10-17-2012

Plaintiff/Respondents' 2012 Post-Budget Filing

No. 84362-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Defendant/Appellant,

v.

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.

PLAINTIFF/RESPONDENTS' 2012 POST-BUDGET FILING

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Note: Since the "Petitioner" below is the "Respondent" in this Court (and vice versa), this filing refers to the McCleary family, Venema family, and Network for Excellence in Washington Schools (NEWS)[1] *as "plaintiffs", and to the State as "defendant". Cf. RAP 10.4(e).*

I. SUMMARY OF PLAINTIFFS' COURT FILING

This Court affirmed the February 2010 declaratory judgment that the State's failure to amply fund its K-12 public schools is unconstitutional.[2] To ensure the defendant State stops that unconstitutional underfunding, this Court Ordered the State to submit a court filing after each State budget is finalized. This Court Ordered that each post-budget filing must:

(1) "demonstrate steady progress" implementing the reforms promised under ESHB 2261, and

(2) "show real and measurable progress towards achieving full compliance with article IX, section 1 by 2018."[3]

[See Part II below of this filing.]

The State's September 2012 post-budget filing does neither. To the contrary, it acknowledges that the 2012 legislature chose to make virtually no progress implementing funding increases under ESHB 2261. *[Part III below.]* It similarly acknowledges that the 2012 legislature chose to make virtually no progress funding the significant shortfalls the

[1] *The 399 community groups, school districts, and education organizations in NEWS are listed at "http://www.waschoolexcellence.org/about_us/news_members".*

[2] *McCleary v. State, 173 Wn.2d 477, 539 269 P.3d 227 (2012) ("We affirm the trial court's declaratory ruling and hold that the State has not complied with its Article IX, section 1 duty to make ample provision for the education of all children in Washington").*

[3] *Order ¶4.*

State has already identified in its school funding studies concerning Article IX, §1. *[Part IV below.]*

Plaintiffs fully appreciate the principle theme underlying the post-budget narrative filed by the State – i.e., that providing the significant K-12 funding increases required to comply with our State Constitution isn't easy for elected officials to do. Plaintiffs do not believe, however, that State government officials are only required to obey our State Constitution when it's easy. Plaintiffs believe the 2012 legislators' decision to continue the State's violation of Constitutional rights during the 2012/2013 school year is not Constitutionally acceptable. Plaintiffs accordingly submit that the "appropriate step" for this Court to take is to firmly stand up as the one branch of State government that actually upholds (instead of just talks about) the Constitutional right of every Washington child to an amply funded K-12 education. *[Part V below.]*

II. THE ISSUE THIS COURT ORDERED THE PARTIES' POST-BUDGET FILINGS TO ADDRESS

A. What's *Not* An Issue In This Case: the nature of the State's Article IX, §1 duty.

1. The legal meaning of "paramount", "ample", "all", "education", and Article IX, §1 have been established.

The February 2010 declaratory judgment ruling in this case established the legal meaning of "paramount", "ample", "all", "education", and Article IX, §1.[4]

This Court affirmed that February 2010 declaratory judgment ruling,[5] and expressly reaffirmed that:

- ***paramount duty*** means that "the 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."[6]

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[4] *February 2010 declaratory judgment [CP 2860-2971] at ¶¶151-212 .*

[5] *McCleary, 173 Wn.2d at 539 ("We affirm the trial court's declaratory ruling and hold that the State has not complied with its Article IX, section 1 duty to make ample provision for the education of all children in Washington").*

[6] *McCleary, 173 Wn.2d at 520 (underline added). That holding rejects the notion that K-12 funding restrictions are necessary to leave money for other important State programs – for the State has never disputed that it currently has plenty of tax revenue to cover the multi-billion dollar increase necessary to amply fund the State's K-12 public schools **if** the State is required to provide that ample funding first – and that's precisely what this Court held our Constitution requires the State to do: "the 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. This Court similarly rejected the State's claim that a fiscal crisis can justify cuts to the State's Constitutionally required ample education funding, reaffirming that the State may **not** make reductions "for reasons unrelated to education policy, such as fiscal crisis or mere expediency" McCleary, 173 Wn.2d at 527.*

- ***ample provision*** means "considerably more than just adequate".[7]
- ***all children*** means "each and every child" in Washington – "No child is excluded."[8]
- ***education*** means "the basic knowledge and skills needed to compete in today's economy and meaningfully participate in this state's democracy" – which are the knowledge and skills specified in the State's Essential Academic Learning Requirements (EALRs), the four numbered provisions from ESHB 1209, and the *Seattle School District* decision.[9]
- ***Article IX, section 1*** "imposes a judicially enforceable affirmative duty" on the State.[10]
- "***Article IX, section 1*** confers on children in Washington a positive constitutional right to an amply funded education."[11]
- This right to an amply funded education is each Washington child's ***paramount Constitutional right***.[12]

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[7] *McCleary, 173 Wn.2d at 484. See also id. at 527 (reiterating the Seattle School District Court's holding that ample means "liberal, unrestrained, without parsimony, fully, sufficient"); and the Webster's Third New International Dictionary cited by that Seattle School District Court (90 Wn.2d at 476, 511, 512 n.12, 585 P.2d 71 (1978)), which provides the following definitions (at pp. 1302, 2508, & 1645): **liberal**: "marked by generosity." & "ABUNDANT, BOUNTIFUL"; **unrestrained**: "not restrained" & "UNCONTROLLED"; **parsimony**: "carefulness in the expenditure of money or resources".*

[8] *McCleary, 173 Wn.2d at 520.*

[9] *McCleary, 173 Wn.2d at 483, again at 522-524 & n.21 (holding this definition of "education" is the same as the definition of "basic education"); see also id. at 522-523n.20 (quoting the current version of the four numbered provisions from ESHB 1209, codified at RCW 28A.150.210). This Court accordingly rejected the State's claim that the "education" required by Article IX, §1 is the same as the basic education program the legislature defines and funds. McCleary, 173 Wn.2d at 531-532 ("The legislature's definition of full funding amounts to little more than a tautology") and at 526 (explaining the program to provide the above basic "education" is a separate matter).*

[10] *McCleary, 173 Wn.2d at 485, 514 (reiterating the Seattle School District Court's holding).*

[11] *McCleary, 173 Wn.2d at 483, 518 (underline added).*

[12] *McCleary, 173 Wn.2d at 485, 518 (underline added).*

In short, the legal meaning of the affirmative legal duty that Article IX, §1 requires the State's elected officials to obey is not subject to dispute in this case.[13]

2. The State's longstanding violation of Article IX, §1 has been established.

The February 2010 declaratory judgment against the State held the State's K-12 funding level was so low it violated Article IX, §1.[14]

This Court affirmed that declaratory judgment,[15] and expressly held that substantial evidence showed the State "has failed to adequately fund the 'education' required by Article IX, section 1", that "the State has consistently failed to provide adequate funding", and that this fact is so well known by the State that "[w]e do not believe this conclusion comes as a surprise."[16]

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[13] *This part of the Court's McCleary decision was unanimous. McCleary, 173 Wn.2d at 547-548 (concurring in part/dissenting in part, Madsen, C.J.) ("I agree with Justice Stephens' articulation of the State's duty to fund education under article IX, section 1 of the Washington Constitution and the conclusion that the current system is not operating at its constitutionally mandated levels. .... [W]e have defined 'education', 'paramount', 'all', and 'ample' and ordered the State to carry out its constitutional duty.")*

[14] *E.g., McCleary, 173 Wn.2d at 529, 513 (quoting trial court's conclusion that "State funding is not ample, it is not stable, and it is not dependable.").*

[15] *McCleary, 173 Wn.2d at 539 ("We affirm the trial court's declaratory ruling and hold that the State has not complied with its Article IX, section 1 duty to make ample provision for the education of all children in Washington").*

[16] *McCleary, 173 Wn.2d at 530 (underline added) & 539. This part of the Court's McCleary decision was also unanimous. McCleary, 173 Wn.2d at 547-548 (concurring in part/dissenting in part, Madsen, C.J.) ("I agree with Justice Stephens' articulation of the State's duty to fund education under article IX, section 1 of the Washington Constitution and the conclusion that the current system is not operating at its constitutionally mandated levels.").*

In short, the State's ongoing, longtime violation of its legal duty under Article IX, §1 is not subject to dispute in this case.

B. The One Remaining Issue In This Case: is the State diligently ending its violation of Article IX, §1?

The trial court's chosen remedy was to order the State to (1) establish the actual cost of amply providing all Washington children with the education mandated by this court's interpretation of Article IX §1, and (2) establish how the defendant State will fully fund that actual cost with stable and dependable State sources.[17]

On appeal, the State argued that wasn't necessary because it had already done the studies it needed,[18] and was substantially increasing its K-12 funding under ESHB 2261 by billions of dollars.[19] The State also

[17] McCleary, *173 Wn.2d at 513.*

[18] *E.g., State's 8/20/10 Corrected Brief at pgs. 58-59 (telling this Court that the State has already done "significant studies of existing and prospective education programs, practices and funding mechanisms, including Washington Learns, the proceedings of the Task Force as assisted by studies by the Washington Institute for Public Policy and the Task Force Report itself. ... No additional court-ordered studies are necessary"); State's 10/20/10 Reply Brief and Response to Cross-Appeal at p. 11 ("the State has already extensively studied education funding" – "Courts should not order a co-equal branch to do something that has already been accomplished") and at p. 20 ("ESHB 2261 has mooted [the trial court] remedy").*

[19] *E.g., State's 8/20/10 Corrected Brief, at p. 17 heading E ("In 2009, the State enacted ESHB 2261 to implement K-12 education reforms, including substantially increased state funding."); State's 4/9/10 Statement of Grounds for Direct Review at p. 8 ("HB 2261 will increase state funding of basic education by billions of dollars.").*

assured this Court that it was increasing K-12 funding on a pace that would end the State's violation of Article IX, §1 by no later than 2018.[20]

To support its assurances to this Court, the State said it was, for example,

- increasing K-12 funding to pay 95% of school districts' current pupil transportation costs "by 2012".[21]
- increasing K-12 funding for school maintenance, supplies, and operating costs (MSOCs) "in the 2011-13 biennium".[22]
- increasing K-12 funding to reduce class sizes "in the 2011-13 biennium".[23]
- increasing K-12 funding for full-day kindergarten "in the 2011-13 biennium".[24]
- increasing K-12 funding "by billions of dollars" through full implementation of ESHB 2261 no later than 2018.[25]
- increasing K-12 funding by over $9.6 billion/year under ESHB 2261 alone.[26]

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[20] *E.g., State's 4/9/10 Statement of Grounds for Direct Review at p. 8 (ESHB 2261 is "implemented over a ten-year period, beginning in 2009 and concluding in 2018. When fully implemented, HB 2261 will increase state funding of basic education by billions of dollars."); State's 10/20/10 Reply Brief and Response to Cross-Appeal at p. 10 (ESHB 2261 "was passed in 2009 and remains unchanged today, except for the further implementation of its provisions. It still calls for complete implementation by 2018").*

[21] *State's 8/20/2010 Brief to Supreme Court, p.18.*

[22] *State's 4/9/2010 Brief to Supreme Court, p. 8.*

[23] *State's 4/9/2010 Brief to Supreme Court, p. 8.*

[24] *State's 4/9/2010 Brief to Supreme Court, p. 8.*

[25] *State's 4/9/2010 Brief to Supreme Court, p. 8.*

[26] *RP 3951:14-3953:2; 3965:10-3970:17; 4018:7-4021:10 & Exhibit 1483 [State testimony and Exhibit from one of the legislature's Senior K-12 Fiscal Analysts (Ben Rarick), showing K-12 funding increase under ESHB 2261 alone totals over $9.6 billion/year (<u>not</u> including subsequent student enrollment increases or inflation), producing a State funding increase of at least $9,710 per student/year].*

This Court vacated the trial court's remedy in light of the State's assurances that it would steadily increase K-12 funding to end the State's violation of Article IX, §1 by no later than 2018 – but retained jurisdiction of this case to vigilantly ensure that the State actually did so.[27]

C. The "Dialogue" Ordered By This Court After Each State Budget.

"Trust, but verify"

Ronald Reagan

[quoting the Russian maxim "Dovorey No Provorey" while signing 1987 nuclear weapons treaty[28]]

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[27] *This Court phrased the remedy issue as being a question of "what remedy this Court should employ to ensure that the State complies with its article IX, section 1 duty." McCleary, 173 Wn.2d at 539-540. The 7-Justice majority held this Court is retaining jurisdiction to ensure the State actually does what it promised, reiterating that "What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education" (McCleary, 173 Wn.2d at 541), that in light of the legislature's failures to yet provide the increased funding it had promised for MSOCs, full-day kindergarten, K-3 class size reduction, and pupil transportation, "This court cannot idly stand by as the legislature makes unfulfilled promises" (McCleary, 173 Wn.2d at 545), that the State's request to deferentially await its promised 2018 compliance was "unacceptable" (McCleary, 173 Wn.2d at 544), that retaining jurisdiction was proper because "Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under Article IX, section 1" (McCleary, 173 Wn.2d at 546), and that since "success depends upon continued vigilance on the part of courts", this Court "intends to remain vigilant in fulfilling the State's constitutional responsibility under Article IX, section 1" (McCleary, 173 Wn.2d at 547).*

[28] *President Reagan: "But the importance of this treaty transcends numbers. We have listened to the wisdom in an old Russian maxim. And I'm sure you're familiar with it, Mr. General Secretary, though my pronunciation may give you difficulty. The maxim is: Dovorey no provorey -- trust, but verify." The General Secretary: "You repeat that at every meeting." [Laughter] President Reagan: "I like it." [Laughter] Source: Remarks on Signing the Intermediate-Range Nuclear Forces Treaty, December 8, 1987, Ronald Reagan Presidential Library, http://www.reagan.utexas.edu/archives/speeches/198July 18, 20120887c.htm.*

All lawsuits entail some type of "dialogue" between the parties and court within the framework of the litigation. This Court's January 5, 2012 decision did not specify the type or scope of dialogue this Court would establish within this litigation for its retention of jurisdiction in this case.

So its July 18, 2012 Order did. It mandated the specific type and scope of "dialogue" this Court would have with the parties in this litigation after each State budget is signed:

1. The defendant State's post-budget filing.

This Court Ordered that after the signing of each State budget, the State shall make a filing in this lawsuit informing this Court of the State's progress on two points:

First, this Court Ordered the State's post-budget filing to summarize the "actions taken towards implementing the reforms initiated by ... ESHB 2261".[29] This Court Ordered that each post-budget filing "must demonstrate steady progress according to the schedule anticipated by the enactment of the program of reforms in ESHB 2261."[30]

Second, this Court Ordered the State's post-budget filing to summarize the actions taken towards "achieving compliance with Washington Constitution article IX, section 1".[31] This Court's Order

[29] *Order ¶1 (underline added).*
[30] *Order ¶4 (underline added).*
[31] *Order ¶1 (underline added).*

expressly stated its review of each post-budget filing "will focus on whether the actions taken by the legislature show real and measurable progress towards achieving full compliance with article IX, section 1 by 2018."[32]

2. Plaintiffs' corresponding post-budget filing.

This Court Ordered that the plaintiffs could then file a response addressing the adequacy of the State's progress on those same two points:

First, this Court directed that plaintiffs' post-budget filing should present plaintiffs' comments "addressing the adequacy of the State's implementation of reforms".[33]

Second, this Court directed that plaintiffs' post-budget filing should present plaintiffs' comments "addressing the adequacy of the State's ... progress towards compliance with article IX, section 1".[34]

3. Judicial review of parties' post-budget filings.

As noted earlier, this Court Ordered that each of the State's post-budget filings "must demonstrate steady progress" under ESHB 2261, as well as "show real and measurable progress" towards full Article IX, §1 compliance by 2018.[35]

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[32] *Order ¶4 (underline added).*
[33] *Order ¶3 (underline added).*
[34] *Order ¶3 (underline added).*
[35] *Order ¶4 (underline added).*

This Court's Order accordingly concluded that "Upon reviewing the parties' submissions, the court will determine whether to request additional information, direct further fact-finding by the trial court or a special master, or take other appropriate steps."[36]

4. The above judicial process is the type of "dialogue" specified by this Court's Order.

Legislators are understandably accustomed to the legislative process and the type of legislative dialogue that occurs between co-equal bodies of the legislature when the House and Senate have a policy disagreement on proposed legislation, and leaders from one co-equal body communicate with leaders of the other co-equal body to work out a compromise acceptable to both co-equals.[37]

But as the judicial process specified in this Court's Order confirms, this is a litigation dialogue instead – i.e., one where a court reviews the legally relevant facts established by the parties' filings in light of the legal rulings in this case, and then determines the appropriate legal step the

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[36] *Order ¶5.*

[37] *This negotiate-for-compromise among co-equals approach is reflected by the way the State submitted its post-budget filing – namely, a letter **from** Senator Frockt, Representative Alexander, and the members of their committee **to** Chief Justice Madsen and the members of this Court, with 2 enclosures (their committee's 36 page report and a 1 page letter from the Attorney General's office certifying that the legislators' letter and 36 page report had been served on plaintiffs' counsel. Although footnote 2 of that 36 page report references an "Appendix A" and its footnote 31 references an "Appendix B", no Appendices were served on plaintiffs' counsel, so they were apparently omitted before filing with this Court).*

court should take to uphold and enforce the Constitutional mandate of Article IX, §1.

In other words: the dispute in this case is not a policy difference between two co-equal bodies of the legislature (House and Senate), which is subject to negotiation and compromise in legislative dialogue between those two co-equals. Rather, this case concerns an affirmative Constitutional right that the judicial branch is obligated to enforce – even when another "co-equal" branch prefers to violate that right instead.

The structured litigation "dialogue" mandated by this Court's Order in this litigation makes sense as a legal matter. Although the judicial system in some countries might allow "dialogue" between a judge and defendant outside the courtroom to negotiate how the judge will resolve plaintiff's lawsuit against that defendant, our State isn't in one of those countries.[38]

[38] *See, e.g., Washington Code of Judicial Conduct (CJC) and Washington Rules of Professional Responsibility (RPC). Judges are not permitted to engage in ex parte communications outside of the presence of the parties or their lawyers concerning a pending or impending matter, and shall consider only the evidence presented and any facts that may be judicially noticed, unless expressly authorized by law. CJC 2.9(A)&(C) (ex parte communications); see also CJC 2.4(A) ("A judge shall not be swayed by public clamor, or fear of criticism."). Similarly, the parties' attorneys in this case (Plaintiffs' counsel and the State Attorney General's Office) are not permitted to engage in ex parte communications with the Court. RPC 3.5 ("A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order").*

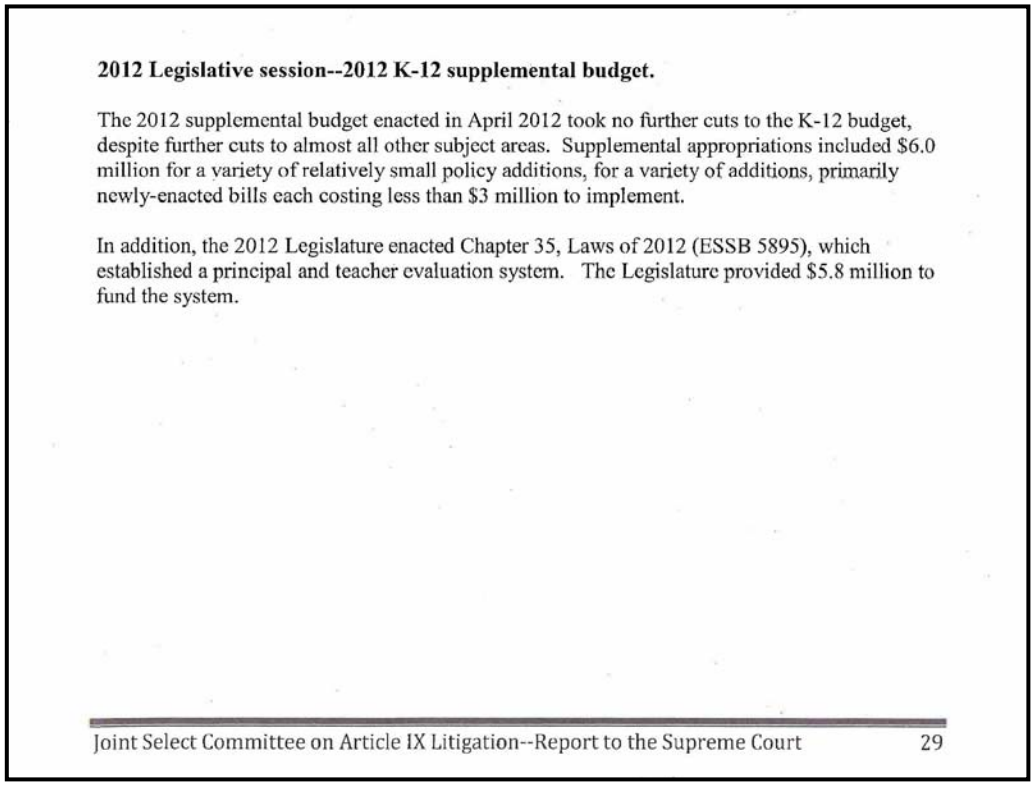
This Court's having limited the type of "dialogue" it will have with the parties also makes sense as a practical matter. By setting a clear, narrow focus for the parties' compliance filings after each State budget is finalized, this Court dictated that the parties' submissions be limited to the only issue remaining in this case – i.e., whether the State is keeping its promises to (1) steadily increase K-12 funding under ESHB 2261, and (2) be in full compliance with Article IX, §1 by 2018.

D. The Piece Of The State's Post-Budget Filing That Addressed What This Court Ordered.

Only a small portion of the State's post-budget filing addressed the two points mandated by this Court's Order – i.e., the actions in that budget that (1) demonstrate "steady progress" implementing ESHB 2261, and (2) show "real and measurable progress" towards full Article IX, §1 compliance by 2018.[39]

[39] *Order ¶¶1 & 4.*

The State's post-budget filing explained the State's education funding increases in that budget as follows:[40]



2012 Legislative session--2012 K-12 supplemental budget.

The 2012 supplemental budget enacted in April 2012 took no further cuts to the K-12 budget, despite further cuts to almost all other subject areas. Supplemental appropriations included $6.0 million for a variety of relatively small policy additions, for a variety of additions, primarily newly-enacted bills each costing less than $3 million to implement.

In addition, the 2012 Legislature enacted Chapter 35, Laws of 2012 (ESSB 5895), which established a principal and teacher evaluation system. The Legislature provided $5.8 million to fund the system.

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[40] *State's post-budget filing at p. 29.*

The State's "Executive Summary" of its funding for this 2012/2013 school year therefore explained:[41]

> [T]he Legislature did not take further steps to implement the reforms established in ESHB 2261 and SHB 2776 beyond those already enacted in 2011. The 2012 legislature rejected proposals to balance the budget by making reductions to the program of basic education, and the supplemental budget enacted in 2012 did not make reductions to funding K-12 education.

Plaintiffs now address the adequacy of the State's action with respect to the two previously noted points specified in this Court's Order.[42]

III. ADEQUACY OF THE DEFENDANT STATE'S PROGRESS UNDER ESHB 2261

A. The State's Testimony In This Case Set A Clear Benchmark To Measure "Steady Progress" Funding ESHB 2261

To dispute plaintiffs' claim that ESHB 2261 did not require specific dollar increases in K-12 funding, the State submitted sworn testimony from one of the legislature's Senior K-12 Fiscal Analysts to show that fully funding the program of reforms in ESHB 2261 would increase the State's K-12 education funding by over $9.6 billion/year.[43]

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[41] *State's post-budget filing at p. 1 (footnotes omitted).*

[42] *Plaintiffs respectfully request that their decision to follow this Court's Order (instead of correcting the State's long renditions on topics other than the two mandated by this Court for the parties' post-budget filings) not be construed as plaintiffs' agreement with the State's self-serving rhetoric on those other topics.*

[43] *RP 3951:14-3953:2; 3965:10-3970:17; 4018:7-4021:10 & Exhibit 1483 [State testimony and Exhibit from one of the legislature's Senior K-12 Fiscal Analysts (Ben Rarick), showing K-12 funding increase under ESHB 2261 alone totals over $9.6 billion/year (not including subsequent student enrollment increases or inflation), producing a State funding increase of at least $9,710 per student/year].*

The State itself has accordingly set $9.6 billion as a clear benchmark against which to measure "steady progress" funding its reforms under ESHB 2261.

B. The State's Post-Budget Filing In This Case Demonstrates The State *Failed* To Make "Steady Progress" Funding ESHB 2261.

This Court Ordered that the State's post-budget filing must demonstrate "steady progress" implementing the program of reforms in ESHB 2261.[44]

"Progress" does not mean stepping backwards or standing still. It means "to move forward : to proceed or advance", "to develop to a higher, better, or more advanced stage : make continual improvements".[45]

And "steady" does not mean moving in fits and spurts. It means "even development, movement, or action: not varying in quality, intensity, or direction", "UNIFORM", "CONTINUOUS", "consistent in performance or behavior: DEPENDABLE, RELIABLE".[46]

There are nine school years between the legislature's enactment of ESHB 2261 in the Spring of 2009 and its promised completion by 2018. Given the State's sworn testimony in this case that the program of reforms

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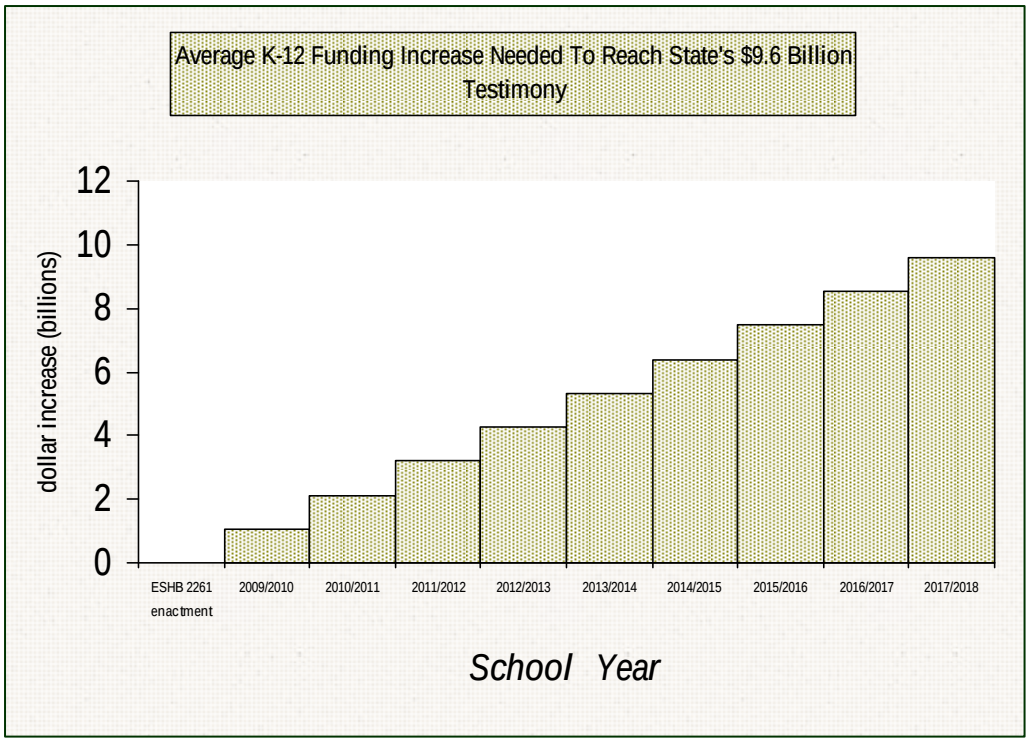
[44] *Order ¶4.*

[45] *WEBSTER'S THIRD NEW INT'L DICTIONARY* (1993) *at 1813; [Same dictionary this Court used in Seattle School District, 90 Wn.2d at 511 & 512n.12; see also February 2010 declaratory judgment [CP 2860-2971] at ¶¶156 & 157].*

[46] *WEBSTER'S THIRD NEW INT'L DICTIONARY* (1993) *at 2231. See also footnote 45.*

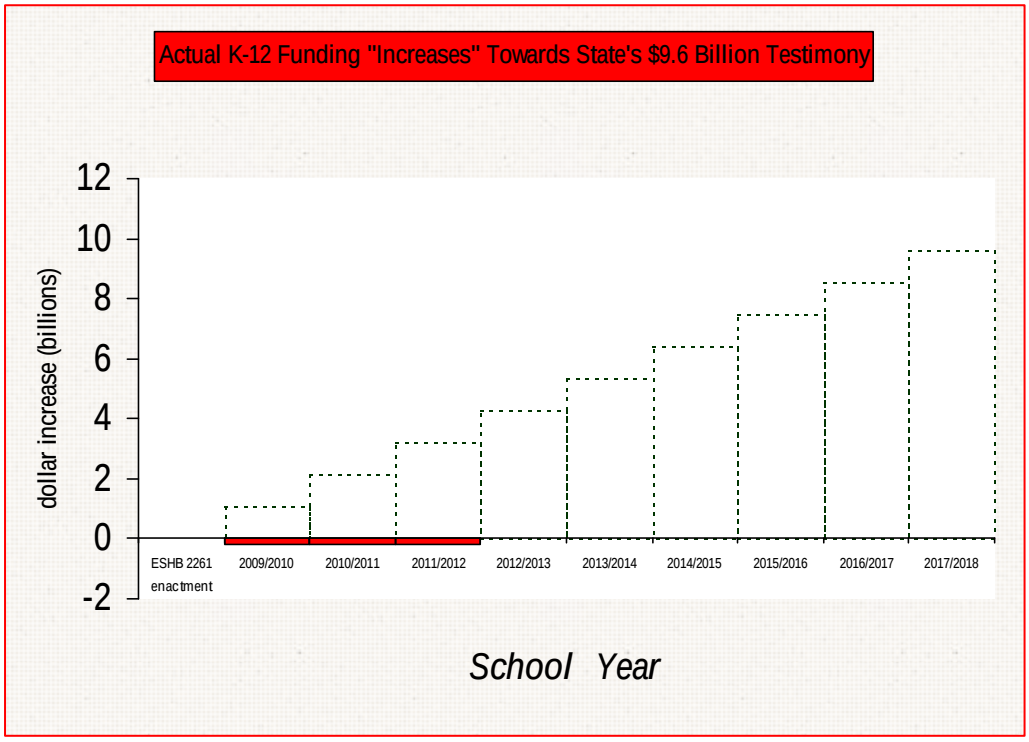
in that bill total over $9.6 billion/year, "steady progress" requires an average K-12 funding increase of over $1 billion each of those nine school years:



As this Court noted in its ruling, however, K-12 funding instead "sustained massive cuts" in the State's biennium budget for the 2011/2012 and 2012/2013 school years.[47] And the State's post-budget filing admits that even after this Court affirmed the February 2010 declaratory judgment against the State, the State still did not restore those funding cuts.[48]

[47] McCleary, *173 Wn.2d at 511.*

[48] *E.g., State's post-budget filing at p. 1 ("the Legislature did not make changes to basic education funding during the 2012 legislative session").*



This step backward is not "progress". The State's post-budget filing demonstrates that while the State has continued to talk about funding ESHB 2261 ever since that bill's enactment in the Spring of 2009, the 2012 legislature also continued the State's failure to actually provide such funding. The State's post-budget filing demonstrates the State did not make the "steady progress" required by this Court's Order.

C. The State's August 2012 QEC Report Confirms The State's Failure To Make Steady Progress Funding ESHB 2261.

ESHB 2261 created a Quality Education Council ("QEC") to oversee the phase-in of that bill's promised reforms for full implementation by 2018.[49]

The QEC reviewed the State's funding for the 2012/2013 school year before the State made its filing in this case. The QEC compared that funding to the funding levels needed to make progress under ESHB 2261. The QEC concluded the State was not making that needed progress, and even produced graphs to illustrate the State's failure.[50]

For example, the three graphs on the next page illustrate the most recently enacted budget's failure to make progress in the transportation, MSOC, and full-day Kindergarten areas of underfunding that the court rulings in this case have discussed. They show the funding level that was required for steady progress *(the steep dark red line on top)*, the funding level the State chose to provide instead *(the relatively flat left half of the light orange line on the bottom)*, and the funding increase needed to now

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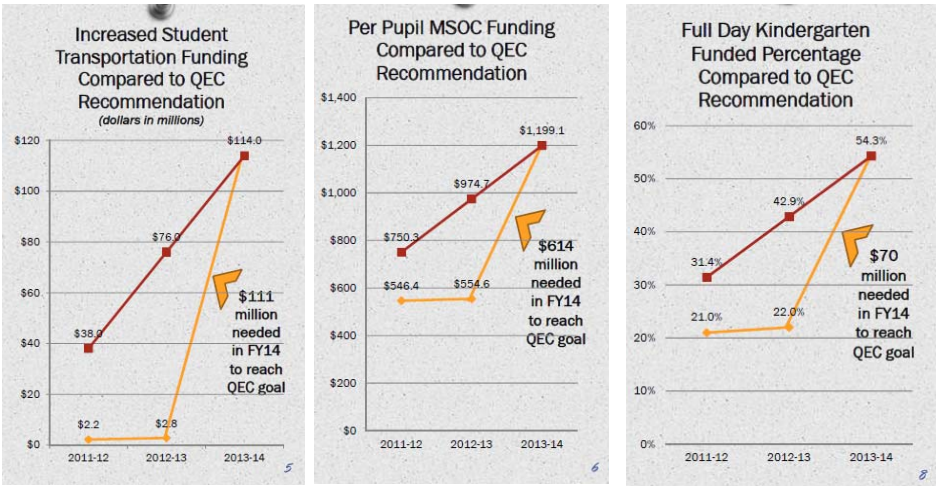
[49] McCleary, *173 Wn.2d at 507. As the Governor confirmed when signing ESHB 2261 into law, "the timeline for implementation of various programs and formulae is left to the Quality Education Council." Governor's May 19, 2009 partial veto statement at 2nd to last paragraph; cf. also Washington State Grange v. Locke, 153 Wn.2d 475, 490, 105 P.3d 9 (2005) (Washington courts look to Governor's interpretation of legislation as element of legislative history when interpreting statutes).*

[50] *See http://www.k12.wa.us/QEC/Meetings2012/August/CouncilRecommendations.pdf.*

catch up for the coming 2013/2014 school year *(the steep right half of the light orange line)*:[51]



In short: these QEC charts graphically confirm the dispositive point that the State's post-budget filing attempts to gloss over: the State budget at issue did not make "steady progress" under ESHB 2261.

IV. ADEQUACY OF THE DEFENDANT STATE'S PROGRESS TO FULLY COMPLY WITH ARTICLE IX, §1 BY 2018

A. The State Has Already Set Several Minimum Benchmarks To Measure Its Progress Eliminating The State's Unconstitutional Underfunding.

The State has already set several specific benchmarks to measure its progress towards amply funding its K-12 public schools. For example:

[51] *Supra footnote 50 at slides 5, 6, and 8.*

- **February 2010 Starting Line:** The February 2010 declaratory judgment affirmed in this case held the K-12 funding level set by the State was unconstitutionally low.[52]

  That unconstitutionally low K-12 funding level in February 2010 sets the starting line against which "progress" towards compliance with Article IX, §1 can be measured in this case.

- **Admitted NERC/MSOC Underfunding:** This Court repeatedly reiterated how the State woefully underfunds the actual cost of materials, supplies, and operating costs (formerly "NERCs", now "MSOCs"),[53] and how the State's failure to increase funding after the February 2010 court ruling perpetuated that shortfall.[54] This Court also recognized that the legislature has promised to fully fund those MSOCs by the 2015/2016 school year.[55]

  The State's testimony in this case admits that its NERC/MSOC underfunding is well over $500 million every year.[56] This admitted annual underfunding amount sets a minimum benchmark against which progress can be measured for amply funding materials, supplies, and operating costs.

- **Admitted To/From Transportation Underfunding:** This Court reiterated that the State's failure to fund the actual cost of transporting K-12 students to and from school is another one of the "major areas of underfunding" highlighted in this case,[57] and that the State's token $5 million increase after the February 2010 court ruling "will barely make a dent" in the

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[52] *The State budget's K-12 funding level at that time was $15.5 billion/biennium. ESHB 1244, §§501-518.*

[53] *E.g., McCleary, 173 Wn.2d at 494, 508, 509 nn.17 & 18, 530, 532-535.*

[54] *E.g., McCleary, 173 Wn.2d at 511, 540, 544.*

[55] *McCleary, 173 Wn.2d at 510.*

[56] *Exhibit 616 at slide 1 ($585 million in the 2007/2008 school year); Exhibit 67 at slide 20 (over $500 million in the 2006/2007 school year).*

[57] *E.g., McCleary, 173 Wn.2d at 502-503, 509, 533, 535.*

State's perennial shortfall of over $100 million/year.[58] This Court also recognized that the legislature set a "phase-in deadline of 2013" for its increased funding formula.[59]

The State's testimony in this case admits that its to/from transportation underfunding is significantly over $122 million every year.[60] That admitted underfunding amount sets a minimum benchmark against which progress can be measured for amply funding student to/from transportation.

- **Admitted Market Salary Underfunding:** This Court noted that school salaries are another one of the "major areas of underfunding" highlighted in this case,[61] and reiterated the State has "consistently underfunded" school salaries – funding "far short of the actual cost of recruiting and retaining competent teachers, administrators, and staff."[62] This Court further noted that despite the legislature's declaring its intent to increase school salary funding,[63] the State instead cut that funding after the February 2010 court ruling in this case – reducing teacher and staff salaries 1.9% and reducing principals' and other school administrators' salaries by 3.0%.[64]

  The K-12 compensation workgroup referenced in this Court's decision has determined that the State underfunds K-12 salaries

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[58] *E.g., McCleary, 173 Wn.2d at 545. As the State's post-budget filing confirms at p. 29 (1st bullet), with its $5 million transportation increase the State also made a change to its bus replacement schedule "saving" the State $49 million (budget speak for decreasing State funding to its school districts by $49 million) – thus resulting in a net decrease of $44 million in transportation related funding.*

[59] *McCleary, 173 Wn.2d at 507.*

[60] *Exhibit 356 at Appendix A (listing State's underfunding, by specific dollar amount, for each school district, with a total underfunding amount of $122,493,341 in the 2006/2007 school year).*

[61] *E.g., McCleary, 173 Wn.2d at 533.*

[62] *E.g., McCleary, 173 Wn.2d at 535-536, 532-533, 508, 498-499. This Court further noted that this is not the first time it has told the State that the State's funding does not approach the true cost of school salaries. McCleary, 173 Wn.2d at 536 n.29.*

[63] *E.g., McCleary, 173 Wn.2d at 507.*

[64] *E.g., McCleary, 173 Wn.2d at 511, 544.*

and benefits by over $2.8 billion every year.[65] This underfunding amount determined by the State sets a minimum benchmark against which progress can be measured for amply funding K-12 salaries.

B. The State's Post-Budget Filing Shows The State *Failed* To Make "Real & Measurable Progress" Eliminating The State's Unconstitutional Underfunding By 2018.

This Court Ordered that the State's post-budget filing must show "real and measurable progress towards achieving full compliance with article IX, section 1 by 2018."[66]

As noted earlier, "progress" means "to move forward : to proceed or advance", "to develop to a higher, better, or more advanced stage : make continual improvements".[67]

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[65] McCleary, *173 Wn.2d at 507 (referencing compensation workgroup and its initial December 2012 report deadline [which was later moved up to June 30, 2012 instead]); Compensation Technical Working Group Final Report, dated June 30, 2012, at pp. 45-48 [http://www.k12.wa.us/Compensation/CompTechWorkGroupReport/CompTechWorkGroup.pdf] (Final Report Ex. 21 determining total increase in State salary payment including benefits for existing staffing levels in 2012 would be $1,425,730,000, Final Report Ex. 22 determining total increase in State salary, benefits, and substitutes for 10 professional development days in 2012 would be $483,236,000, and Final Report Ex. 23 determining total increase in State salary payment including benefits for staffing increases under SHB 2776 and QEC would be $927,175,000 [$4,562,137,000 - $3,634,962,000 = $927,175,000]. The total increase from those three Final Report Exs. is therefore $2,836,141,000 [$1,425,730,000 + $483,236,000 + $927,175,000 = $2,836,141,000]); see also Compensation Technical Working Group Final Report at p. 22 ("the promising reforms [of ESHB 2261] will be just that – a promise – unless the Legislature fully funds the basic education program through the prototypical schools funding model and provides comparable wages as part of the state salary allocations.") and at p. 80 ("The proportion of local revenue relied on by school districts is the highest since the Basic Education Act of 1977.").*

[66] *Order ¶4.*

[67] *Supra footnote 45 (citing WEBSTER'S THIRD NEW INT'L DICTIONARY* (1993) *at 1813).*

"Measurable" means "capable of being measured" and "great enough to be worth consideration: SIGNIFICANT".[68]

And "real" means "AUTHENTIC", "GENUINE", "not illusory : INDUBITABLE, UNQUESTIONABLE".[69]

The State's post-budget filing does not show "real and measurable progress". For example:

February 2010 Starting Line: This case's February 2010 declaratory judgment held the State's total K-12 funding level was unconstitutionally low[70] – not an unexpected result since, as this Court repeatedly noted in its decision, the State's funding studies had determined that "significantly increased funding" is required to support the State's public schools.[71] The State responded by making "massive cuts" to K-12 funding in its biennium budget for the 2011/2012 and 2012/2013 school years.[72] The State's post-budget filing acknowledges:

- The 2012 legislature maintained those K-12 funding cuts for the 2012/2013 school year.[73]
- The 2012 legislature believes it deserves praise for not adding more cuts after this Court's January 5, 2012 ruling.[74]

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[68] *WEBSTER'S THIRD NEW INT'L DICTIONARY* (1993) *at 1399. See also footnote 45.*

[69] *WEBSTER'S THIRD NEW INT'L DICTIONARY* (1993) *at 1890. See also footnote 45.*

[70] *E.g., McCleary, 173 Wn.2d at 529, 513 (quoting trial court's conclusion that "State funding is not ample, it is not stable, and it is not dependable.").*

[71] *E.g., McCleary, 173 Wn.2d at 501, 530, 532.*

[72] *McCleary, 173 Wn.2d at 511.*

[73] *E.g., State's post-budget filing at p. 1 ("the Legislature did not make changes to basic education funding during the 2012 legislative session").*

The State's maintaining a K-12 funding level below the level declared unconstitutionally low in this case is "real". It's "measureable". But it's not "progress". The State's post-budget filing shows that the State has ***failed*** to make the "real and measurable progress towards achieving full compliance with article IX, section 1 by 2018" that this Court Ordered the State's post-budget filing to show.

Admitted NERC/MSOC Underfunding (> $500 million/year): The State's post-budget filing acknowledges this Court affirmed the February 2010 ruling that the State unconstitutionally underfunds K-12 materials, supplies, and operating costs (formerly "NERCs" / now "MSOCs").[75] Even though this Court recognized NERCs/MSOCs as being "woefully underfunded",[76] the State's post-budget filing shows the State nonetheless chose to continue its NERC/MSOC underfunding this 2012/2013 school year.[77]

The State's decision to continue its admitted underfunding again this school year is "real". It's "measurable". But it's not "progress". The

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[74] *E.g., State's post-budget filing at p. 1 ("the supplemental budget enacted in 2012 did not make reductions to funding for K-12 education"); at p. 35 ("the Legislature preserved K-12 education from further cuts as it balanced the budget").*

[75] *State's post-budget filing at p. 3 ("this Court upheld the trial court's determination that the state had underfunded Non-Employee Related Costs (NERCs), student transportation, and staff salaries and benefits").*

[76] *Supra footnotes 53 & 54.*

[77] *E.g., State's post-budget filing at p. 1 ("the Legislature did not make changes to basic education funding during the 2012 legislative session").*

State's post-budget filing shows that K-12 materials, supplies, and operating costs is a specific area where the State ***failed*** to make the "real and measurable progress" this Court Ordered the State's post-budget filing to show.

Admitted Transportation Underfunding (> $122 million/year): The State's post-budget filing acknowledges this Court affirmed the February 2010 ruling that the State unconstitutionally underfunds K-12 student transportation to and from school.[78] Even though this Court recognized to/from transportation as one of the "major areas of underfunding" highlighted in this case,[79] the State's post-budget filing shows the State nonetheless chose to continue that underfunding in the 2012/2013 school year.[80]

That's "real". The State's choosing to continue its long-known underfunding of this K-12 expense forces schools to take money out of classrooms, educational programs, and local levies to cover the State's continued funding shortfall.[81]

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[78] *State's post-budget filing at p. 3 ("this Court upheld the trial court's determination that the state had underfunded Non-Employee Related Costs (NERCs), student transportation, and staff salaries and benefits").*

[79] *Supra footnotes 57 & 58.*

[80] *E.g., State's post-budget filing at p. 1 ("the Legislature did not make changes to basic education funding during the 2012 legislative session").*

[81] *See, e.g., McCleary, 173 Wn.2d at 510 (noting legislature's recognition that the State's ending its underfunding of MSOCs and transportation will free up local levy funds for school districts) and at 539 n.30 (similar recognition).*

The State's continued underfunding of its schools' to/from transportation costs is also "measurable". Indeed, the State's testimony in this case acknowledged a specific dollar amount of underfunding for each one of the State's school districts – for example:

- $4,384,205/year for its Bethel School District (Pierce County)
- $3,260,928/year for its Evergreen School District (Clark County)
- $1,413,141/year for its Kennewick School District (Benton County)
- $1,521,660/year for its Mead School District (Spokane County)
- $3,805,418/year for its Tacoma School District (Pierce County)
- $1,106,131/year for its Yakima School District (Yakima County)
- Etc., etc., etc..[82]

The State's decision to nonetheless continue this admitted underfunding is not "progress".

The State's post-budget filing accordingly shows student to/from transportation is another specific area where the State ***failed*** to make the "real and measurable progress" this Court Ordered the State's post-budget filing to show.

Admitted Market Salary Underfunding (> $2.8 billion/year):

The State's post-budget filing acknowledges this Court affirmed the February 2010 ruling that the State unconstitutionally underfunds K-12

[82] *Exhibit 356 at Appendix A at pp. 69-74.*

school salaries.[83] Even though this Court noted State funding falls far short of the actual cost of recruiting and retaining competent teachers, administrators, and staff,[84] the State's post-budget filing shows the State nonetheless chose to continue its underfunding for this 2012/2013 school year.[85]

Indeed, the State chose to make this part of its underfunding even worse than what the trial court had found to be unconstitutional – for the State's post-budget filing acknowledges the 2012 legislature chose to continue the prior salary cuts that put the State's salary funding below the level declared unconstitutionally low in February 2010.[86]

The State's decision to fund K-12 school salaries this coming school year at a level below the level declared unconstitutional in this case is both "real" and "measurable". But a step backwards isn't "progress". The State's post-budget filing shows K-12 market salaries is another specific area where the State ***failed*** to make the "real and measurable progress" this Court Ordered the State's post-budget filing to show.

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[83] *State's post-budget filing at p. 3 ("this Court upheld the trial court's determination that the state had underfunded Non-Employee Related Costs (NERCs), student transportation, and staff salaries and benefits").*

[84] *Supra footnotes 61 & 62, see also footnote 65.*

[85] *E.g., State's post-budget filing at p. 1 ("the Legislature did not make changes to basic education funding during the 2012 legislative session").*

[86] *E.g., State's post-budget filing at p. 1 ("the Legislature did not make changes to basic education funding during the 2012 legislative session").*

In short: The State's post-budget filing shows legislators continue to ***talk*** about providing ample funding for the State's K-12 public schools. But it also shows they continued the State's perennial failure to ***provide*** that funding. The court rulings in this case do not say the State should talk about amply funding its public schools. With all due respect to Nike®, the court rulings in this case ordered the State to "just ***do*** it"™. The State's post-budget filing, however, confirms the State did not make the "real and measurable progress" required by this Court's Order.

V. ADEQUACY OF THE DEFENDANT STATE'S 2012 "PROGRESS"

A. The State's Dwelling On *Other* Topics Cannot Hide The 2012 Budget's Failure To Make Progress.

This Court affirmed the February 2010 declaratory judgment ruling that the State's failure to amply fund its K-12 public schools is unconstitutional.

To ensure the State stops that lack of ample K-12 funding by no later than 2018, this Court Ordered the State to submit a court filing after each budget is finalized that must:

> (1) demonstrate "steady progress" implementing the reforms promised under ESHB 2261, and
>
> (2) show "real and measurable progress towards achieving full compliance with article IX, section 1 by 2018."[87]

[87] *Order ¶4.*

The State's post-budget filing, however, focuses primarily on other matters such as:

(3) the State's preferred recharacterization of past events, court rulings, and legislation,

(4) other "important" (but not paramount) things legislators choose to spend State revenue on,

(5) rationalizations for legislators' longstanding violation of Washington children's paramount Constitutional right to an amply funded education, and

(6) excuses for why it's not easy for legislators to obey the Constitution they took an oath to uphold.

The State previously tried to sell its rhetoric on these matters to the trial court – but after an 8-week bench trial, 55 witnesses, and over 500 exhibits, the trial court issued detailed findings of fact and corresponding declarations of law that rejected the State's rendition. The State tried again in this Court – but this Court did not adopt the State's renditions or reverse a single one of the trial court's findings of fact or corresponding declarations of law on these matters.

An elected official's desire to repeat and publicize his or her favorable characterizations (rather than the courts' unfavorable rulings) is entirely understandable from an election and public relations standpoint. And, as with many public relations pieces, it is therefore not surprising that many of the assertions included in the State's post-budget filing have

the inadmissible weight of unverified assertions not trustworthy or legally relevant.[88]

But most importantly, this Court's Order did not ask the State to repeat the State's previously asserted (and judicially rejected)

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[88] *Some of the premises asserted in the State's post-budget filing are simply* ***inaccurate****. For example, its premise (e.g., at p. 12) that the State's "program of basic education" is the same as the "definition of basic education" – for the Court rulings in this case have held the opposite (see, e.g., supra footnotes 9 & 4). Another example is its premise (e.g., at pp. 9 & 12) that fully funding ESHB 2261 constitutes full compliance with Article IX, §1 – for this Court expressly acknowledged that the Basic Education Finance Task Force work upon which ESHB 2261 is based left the school construction part of the State's ample funding obligation to another day since that issue was being addressed by a separate task force (McCleary, 173 Wn.2d at 503n.10; see also Exhibits 261 & 262). Other parts of the State's post-budget filing are* ***legally irrelevant****. For example, its rhetoric about "local implementation of the paramount duty" (p. 7) – for this Court has held that "school districts have no duty under Washington's constitution. Article IX makes no reference whatsoever to school districts." Tunstall v. Bergeson, 141 Wn.2d 201, 232 (2000). Another example is the State's long discussion of revenues and non-education expenditures State legislators choose to make (pp. 21-26) – for the State has never disputed that it currently has plenty of tax revenue to amply fund the State's K-12 public schools if the State provides that funding first – and that's precisely what this Court held our Constitution requires the State to do: "the 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). Other parts of the State's filing are simply* ***misleading****. For example, its saying (p. 27, 2nd bullet) that the State increased funding for K-3 class size reduction by $33.6 million – when the State at the same time cut class reduction funding for K-4 by $214 million, producing a net decrease of over $180 million (McCleary, 173 Wn.2d at 545). Another example is its statement that the legislature provided $5.8 million to fund the new principal and teacher evaluation system – for the costs that system imposes upon the State's 295 school districts is far more than that $5.8 million amount. (e.g., FNS063 Individual State Agency Fiscal Note, Section II.C, pp. 2-3, 5895 ESSB Certificated Employee Evals, 02/24/2012 Revised, confirming that "Additional resources are necessary to support 80 additional districts in their implementation of the 4-tier evaluation systems" and that "2,000 additional administrators would need to be trained" that are not accounted for in the current budget at https://fortress.wa.gov/ofm/fnspublic/legsearch.asp?BillNumber=5895&SessionNumber=62) Cf. State v. Kaiser, 161 Wn.App. 705, 719, 254 P.3d 850 (2011) (State prevailing in its argument that even "accurate" information can be deceptive if it has a statement or omission that is likely to mislead); cited with approval in Bain v. Metro. Mortgage Group, --- Wn.2d ---, 285 P.3d 34, 49-50 (2012).*

characterizations of fact and law. Instead, this Court Ordered a clear and narrow two-point focus for the State's post-budget filing:

(1) demonstrate "steady progress" implementing the reforms promised under ESHB 2261, and

(2) show "real and measurable progress towards achieving full compliance with article IX, section 1 by 2018."[89]

Pursuant to that same Court Order, plaintiffs' post-budget filing is addressing the adequacy of the State's progress on those two points (rather than correcting the revisionist history and excuses repeated throughout most of the State's post-budget filing).[90]

B. The State's Continued Failure Is Not Constitutionally Acceptable.

Our State's elected officials have known for 35 years that the paramount right of every child under our State Constitution is that child's positive, Constitutional right to an amply funded K-12 education.[91]

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[89] *Order ¶4.*

[90] *Order ¶3 (providing for plaintiffs' "written comments addressing the adequacy of [1] the State's implementation of reforms and [2] its progress towards compliance with article IX, section 1"). Plaintiffs wish to be clear that their post-budget filing does not respond to the State's assertions concerning matters other than the two progress points specified by this Court because plaintiffs believe parties in a lawsuit should adhere to the court orders in that lawsuit. Plaintiffs' silence on the many other matters upon which the State's post-budget filing improperly dwelt therefore cannot legitimately be claimed by the State to be any sort of "agreement" with the inaccurate, misleading, and legally irrelevant characterizations of fact and law regarding those other matters in the State's post-budget filing.*

[91] *E.g., Seattle School District, 90 Wn.2d at 511-512; February 2010 declaratory judgment [CP 2860-2971] at ¶¶144-149 and ¶¶157-161; McCleary, 173 Wn.2d at 483, 518 (underline added).*

The State has also acknowledged the vital importance of this affirmative Constitutional right – never challenging any of the court rulings in this case that confirm the central role education plays in our democracy, our economy, and each citizen's civil rights.[92] For example, the fact that:

- "A healthy democracy depends on educated citizens".[93]
- Education "plays a critical civil rights role in promoting equality".[94]
- An "amply provided, free public education operates as the great equalizer in our democracy, equipping citizens born into underprivileged segments of our society with the tools they need to compete on a level playing field with citizens born into wealth or privilege."[95]
- Education "is the number one civil right of the 21st century."[96]

As one of the Latino-American civil rights leaders at trial testified without disagreement from the State, "the only way that you can be free is to be fully educated."[97]

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[92] *February 2010 declaratory judgment [CP 2860-2971] at ¶¶118-142. Such unchallenged findings are now verities in this case. E.g.,* Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808-809, 828 P.2d 549 (1992).*

[93] *February 2010 declaratory judgment [CP 2860-2971] at ¶119.*

[94] *February 2010 declaratory judgment [CP 2860-2971] at ¶132.*

[95] *February 2010 declaratory judgment [CP 2860-2971] at ¶132.*

[96] *February 2010 declaratory judgment [CP 2860-2971] at ¶134.*

[97] *RP 2597:16-18 (Roberto Maestas when explaining why El Centro de la Raza had named its early learning program after the revolutionary who had emphasized that point (José Martí)); accord, Epictetus, Discourses, Bk. II, ch. 1 ("Only the educated are free"). Or, as the trial court noted with respect to the cost of complying with Article IX, §1: it may sound like a lot of money, but "you know the old adage: if you think education is expensive, try ignorance." RP 5580:16-18.*

The February 2010 ruling in this case confirmed that State officials nonetheless continued for decades to knowingly violate this affirmative Constitutional right of all Washington children by knowingly underfunding the State's K-12 public schools. When this Court affirmed the declaratory judgment ruling in this case, it accordingly stated that "[w]e do not believe this conclusion comes as a surprise."[98]

State officials' longtime violation of Washington children's Constitutional right to an amply funded education is entirely understandable as a political matter because children do not vote.

But it's completely unacceptable as a Constitutional matter.

Courts enforcing the Constitutional rights of public school children have made it clear that "a citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that they be."[99] As the court in another public school case reiterated, the argument that Constitutional rights "must depend upon the majority vote has never found foothold under our form of constitutional government. Democratic

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[98] *McCleary, 173 Wn.2d at 539. As Justice James Johnson noted during oral argument, "It's not the first time in history the Legislature has approached a very difficult problem by kicking it down the road another session or another election." http://www.tvw.org/scripts/iframe_video.php?eventID=2011060043C&start=2132&stop=2141.*

[99] *U.S. v. Yonkers Board of Education, 837 F.2d 1181, 1224 (2d Cir. 1987),* cert. denied, *486 U.S. 1055 (1988) (quoting Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 736-737, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964)); Haney v. County Board of Education, 410 F.2d 920, 926 (8th Cir. 1969) (same).*

government under our Constitution respects the majority will, but our forefathers had sufficient vision to ensure that even the many must give way to certain fundamental rights of the few."[100]

The U.S. Supreme Court has accordingly long held that the government may not escape liability merely because its unconstitutional action was undertaken in response to the desires of a majority of its citizens.[101] The February 2010 ruling in this case similarly rejected the State's suggestion that political priorities have a role in this Constitutional arena:

> During the trial, the State cross-examined many of the [plaintiffs'] education witnesses as to whether they would prioritize education at the expense of other worthy causes and services, such as health care, nutrition services, and transportation needs. But this is not the prerogative of these witnesses – or even of the Legislature – that decision has been mandated by our State Constitution. The State must make basic education funding its top legislative priority.[102]

This Court could not have been clearer when it then reiterated that "Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education" – a positive

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[100] Haney v. County Board of Education, *410 F.2d 920, 925-926 (8th Cir. 1969) (citing* Federalist Papers No. 10 *(Madison) and* Federalist Papers No. 51 *(Madison)).*

[101] U.S. v. Yonkers Board of Education, *837 F.2d 1181, 1224 (2d Cir. 1987),* cert. denied, *486 U.S. 1055 (1988) (citing* Palmore v. Sidoti, *466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984)).*

[102] *February 2010 Declaratory Judgment [CP 2860-2971] at ¶160 (footnote omitted).*

Constitutional right that the State must fund "as the State's first and highest priority before any other State programs or operations."[103]

The State's supplemental budget covering the 2012/2013 school year was finalized and signed four months after this Court's ruling.[104] A budget which, as the State's post-budget filing admits, did not make any changes to the State's unconstitutionally low level of education funding.[105]

As a Constitutional matter, it is completely unacceptable for the defendant State to have chosen to not make significant progress reducing its unconstitutional (and long-known) underfunding of its K-12 public schools this 2012/2013 school year.

C. This Court Should Not Condone The State's Failure By Sitting Silently On The Sidelines.

1. This isn't about faceless statistics.

The hundreds of thousands of Washington children whose Constitutional right to an amply funded education continues to be violated every day are easy to dismiss as faceless statistics.

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[103] *McCleary, 173 Wn.2d at 483, 518, 520 (underline added); supra footnotes 11 & 6.*

[104] *2012 Supplemental Budget, Third Engrossed Substitute House Bill 2127, passed April 11, 2012, and signed (partial veto) May 2, 2012.*

[105] *E.g., State's post-budget filing at p. 1 ("the Legislature did not make changes to basic education funding during the 2012 legislative session").*

But as one of the State Legislators who served on both Washington Learns and the Basic Education Finance Task Force summed up at trial, our State government's longtime violation of children's Constitutional rights is a tragedy rather than numbers and statistics – explaining that every day, every week, every month, every year that we delay means that additional students drop out, and additional students who don't drop out are left unable to meet the requirements of today's society. It's easy to talk about numbers. It's easy to talk about statistics. But when it comes right down to it, every kid we lose is something that is very, very real. The great tragedy of the State's long debate and delay is that we're not talking about numbers. We're talking about real world kids.[106]

[106] *(Now-former) Representative Skip Priest trial testimony [RP 1168:12-1170:5], previously paraphrased in Plaintiffs' November 19, 2010 Reply Brief in this Court. In sharp contrast, compare someone else's harshly opposing view about "tragedy" vs. "statistics": 1947 January 30, Washington Post, Loose-Leaf Notebook by Leonard Lyons, at p. 9, Washington, D.C. (ProQuest Historical Newspapers); [STL2] 1947 January 30, Salt Lake Tribune, Lyons Den by Leonard Lyons, at p. 8, Column 3, Salt Lake City. (Newspaper Archive) (Joseph Stalin's dismissing other commissars' concerns about famine in the Ukraine by saying "If only one man dies of hunger, that is a tragedy.... But if millions die, that's only statistics.").*

The State's own publications in this case also confirm that the kids whose Constitutional rights the State chooses to continually violate are not faceless:[107]

What does the Washington State Constitution say about K-12 public school funding?

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

-Washington Constitution, article IX, section 1

This constitutional provision is unique to Washington. While other states have constitutional provisions related to education, no other state makes K-12 education the "paramount duty" of the state.

2. There's no "separation of powers immunity" for violating Constitutional rights.

The State's longtime practice of appointing another task force, forming another workgroup, or doing another study, makes perfect sense from the perspective of a government official wanting to reduce State expenses in the upcoming biennium – for it's much cheaper to fund

[107] *Exhibit 192, cover and p. 2.*

another study, workgroup, or taskforce than it is to fund the significant funding shortfalls identified by the last study, workgroup, or taskforce.[108]

But State officials' decision to continue violating Article IX, §1 does not make sense from the perspective of the child whose Constitutional right to an amply funded K-12 education continues to be violated every day at school.

The State's repeated practice of funding a new study instead of funding the significant shortfalls identified by its last study is politically and financially convenient. But it's also unconstitutional. And as most lawyers (but perhaps not all legislators) know, "unconstitutional" means "illegal".

This Court has long recognized that one of the judicial branch's central roles is to serve as "a check on the activities of another branch" – even when the Court's decision "is contrary to the view of the Constitution taken by another branch."[109]

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[108] *This Court noted many (but not all) of the State's prior studies at McCleary, 173 Wn.2d at 491-505, 530-540. See also, e.g., Exhibit 333, Exhibit 125, Exhibit 360, Exhibit 262 at p. 171, Exhibit 262 at p. 161, Exhibit 262 at p. 119, Exhibit 357, Exhibit 16, Exhibit 262 at p. 1, Exhibit 215, Exhibit 261, Exhibit 356, and Exhibit 124.*

[109] *McCleary, 173 Wn.2d at 515 [citing Seattle School District, 90 Wn.2d at 496; In re Juvenile Director, 87 Wn.2d 232, 241, 552 P.2d 163 (1976); U.S. v. Nixon, 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803)]; accord, McCleary, 173 Wn.2d at 544 ("As a coequal branch of state government we cannot ignore our constitutional responsibility to ensure compliance with article IX, section 1"); see also State v. Rice, 174 Wn.2d 884, 279 P.3d 849, 857 (2012) (the constitutional division of government into three branches is for the protection of individuals against centralized authority and abuses of power); accord Montoy v.*

The declaratory judgment entered in this case over 2½ years ago held the defendant State's perennial underfunding of its K-12 public schools is unconstitutional (illegal). And the State knows that a court judgment legally binds the defendant during appeal unless the defendant seeks and secures a stay of that judgment.[110]

Indeed, the State's response to the trial court's declaratory judgment ruling in the *Seattle School District* case confirms that knowledge – for the State did not seek or secure any stay of the trial court's declaratory judgment in that case, and thus promptly increased its K-12 funding even though the State had appealed.[111]

The defendant State did not seek or secure a stay of the declaratory judgment entered against it in this case either.

Kansas, 112 P.3d 923, 930 (Kan. 2005) ("state courts consistently reaffirm their authority, indeed their duty, to engage in judicial review and, when necessary, compel the legislative and executive branches to conform their actions to that which the constitution requires").

[110] *Filing an appeal on the merits does not relieve the appellant of the obligation to comply with the trial court's order. RAP 8.1(b) (trial court decision is enforceable pending appeal or review unless that decision is stayed). In civil cases that are neither money judgments or decisions affecting property, the appellant must file a motion with the appellate court seeking a stay. RAP 8.1(b)(3), RAP 8.3 (stay must be obtained by motion of the party).*

[111] *The Seattle School District trial court entered its Judgment and Findings of Fact and Conclusions of Law on March 17, 1977, and the State filed its appeal on March 31, 1977. The legislature's House and Senate passed the Basic Education Act on June 20, 1977. LAWS OF 1977, 1st Ex. Sess., ch. 359, § 22 (1977) (Washington Basic Education Act of 1977). The legislature's House and Senate then enacted a State Budget with increased K-12 funding the next day (June 21, 1977). LAWS OF 1977, 1st Ex. Sess., ch. 339, § 175 (1977). This Court did not rule on the State's appeal until September 28, 1978. Seattle School District No. 1 v. State, 90 Wn.2d 476, 585 P.2d 71 (1978).*

But this time, the State chose to simply disregard the court judgment against it – even going so far as to cut K-12 funding lower than what that court judgment had declared to be unconstitutionally low.[112]

The State's post-budget filing confirms that the State continues to think it is free to disregard the court rulings in this case – for it conspicuously failed to demonstrate "steady progress" under ESHB 2261, and also failed to show "real and measurable progress" towards full Article IX, §1 compliance by 2018.

Separation of powers does not give the legislative branch a free pass to disregard court rulings or Constitutional rights – for if it did, "the constitution itself becomes a solemn mockery".[113]

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[112] McCleary, *173 Wn.2d at 511 and 544.*

[113] Cooper v. Aaron, *358 U.S. 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958) (explaining that if a legislature could, at will, annul the judgment of a court and destroy the rights acquired under that judgment, "the constitution itself becomes a solemn mockery" (internal quotations omitted)); Montoy v. Kansas, 112 P.3d 923, 930-931 (Kan. 2005) ("courts consistently reaffirm their authority, indeed their duty, to engage in judicial review and, when necessary, compel the legislative and executive branches to conform their actions to that which the constitution requires" – and when the workings of the political process "lead to a continued constitutional violation, judicial action is entirely consistent with separation of powers principles and the judicial role. Although state constitutions may commit educational matters to the legislative and executive branches, if these branches fail to fulfill such duties in a constitutional manner, 'the Court too must accept its continuing constitutional responsibility ... for overview ... of compliance with the constitutional imperative.' Moreover, unlike federal courts, state courts need not be constrained by federalism issues of comity or state sovereignty when exercising remedial power over a state legislature, for state courts operate within the system of a single sovereign") (internal quotations omitted); Lake View School District v. Huckabee, 91 S.W.3d 472, 484 (Ark. 2002), cert. denied, 538 U.S. 1035 (2003) ("This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the*

Constitutional case law accordingly confirms that a court can force the legislative or executive branch to comply with the Constitution by issuing orders which, for example:

- impose monetary contempt sanctions against legislative branch officials;[114]
- prohibit government expenditures on certain other matters until the court's Constitutional ruling is complied with;[115]

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field of education. As Justice Hugo Black once sagely advised: '[T]he judiciary was made independent because it has ... the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches.' Hugo L. Black, The Bill of Rights, *35 N.Y.U.L.Rev. 865, 870 (1960).");* Rose v. Council for Better Education, *790 S.W.2d 186, 208-209 (Ky. 1989) ("we must address a point made by the appellants with respect to our authority to enter this fray and to 'stick our judicial noses' into what is argued to be strictly the General Assembly's business. .... To avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable. .... This [judicial branch] duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.").*

[114] *E.g.,* Spallone v. United States, *493 U.S. 265, 276, 280, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990) (approving of $1 million per day contempt sanction until city council enacted desegregation legislation, and observing that if that sanction failed, the court could then address sanctioning individual council members), compare* Id., *430 U.S. at 281-306 (Brennan, J. and three other Justices dissenting, opining that sanctions against individual council members were warranted immediately without any giving them a second chance.);* Hutto v. Finney, *437 U.S. 678, 691-692, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) (acknowledging that appropriate contempt penalties against state officials failing to cure unconstitutional prison conditions can include monetary fines and jail terms).*

[115] *E.g.,* Dowdell v. City of Apopka, *511 F. Supp. 1375, 1384-1386 (M.D. Fla. 1981), aff'd in relevant part, 698 F.2d 1181 (11th Cir. 1983) (retaining jurisdiction and enjoining defendant city from spending "any funds on the construction or improvement of municipal services in the white community until such time as the street paving, storm water drainage and water distribution systems in the black community are on par with that of the white sections" and further impounding and escrowing all federal revenue sharing funds to be used only to improve municipal services in the black community);* Griffin v. Prince Edward County School Board, *377 U.S. 218, 232-233, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) (enjoining county officials from paying grants or giving tax exemptions as long as they failed to comply with court's order regarding public schools);*

- order the legislature to pass legislation to fund specific education amounts;[116]
- prohibit the State from limiting an education program to less than all eligible students in a given grade level;[117]
- order the sale of State property to fund Constitutional compliance;[118] and
- issue a writ of mandamus to the legislature to compel performance.[119]

3. It's not "unprecedented" for a court to force the government to stop violating Constitutional rights.

Although some State officials have complained that this Court's retaining jurisdiction to ensure compliance with the court rulings in this

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Robinson v. Cahill, 358 A.2d 457 (N.J. 1976) (after legislature failed to fully fund new school funding statute that court said would be constitutional only if fully funded, court held it would enjoin the State from expending any school funds (including the payment of debts, contractual obligations, pension contributions, insurance premiums, and facilities maintenance) unless the State fully funded that statute for the upcoming school year).

[116] *E.g., Montoy v. Kansas, 112 P.3d 923, 940-941 (Kan. 2005) (ordering legislature to fund at least $285 million for upcoming school year based on state cost study), Arthur v. Nyquist, 547 F.Supp. 468, 477-482 (W.D.N.Y. 1982), aff'd 712 F.2d 809 (2d Cir. 1983),* cert. denied, *466 U.S. 936 (1984) (ordering mayor and city council to appropriate $7.4 million to comply with desegregation remedy); Missouri v. Jenkins, 495 U.S. 33, 51, 55, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990) (while federal court could not impose property tax increase directly, it could require local school district to levy taxes at a rate adequate to fund desegregation remedy); Griffin v. Prince Edward County School Board, 377 U.S. 218, 233, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) (district court could order local government to levy taxes to raise funds adequate to reopen public school system without discrimination).*

[117] *Hoke County Board of Education. v. North Carolina, 731 S.E.2d 691 (N.C. 2012) (enjoining State from denying any eligible at-risk four year old admission to pre-kindergarten program, after State placed a 20% cap on the number of at-risk students to be served by program).*

[118] *Reed v. Rhodes, 472 F. Supp. 623 (N.D. Ohio 1979) (ordering sale of surplus land and buildings to fund desegregation remedy and requiring bimonthly financial accounting to court).*

[119] *McCleary, 173 Wn.2d at 550 (concurring in part/dissenting in part, Madsen, C.J.).*

case is "unprecedented", a court's retaining jurisdiction to ensure the defendant complies with the court's ruling is not unprecedented.[120]

To the extent anything is "unprecedented" in this case, it is Washington officials consciously choosing, year after year after year, to continue violating the Constitutional rights of hundreds of thousands of Washington children.

D. The "Appropriate Step" For This Court To Take Is To Stand Up As The One Branch Of State Government That Upholds (instead of just talks about) Every Washington Child's Constitutional Right To An Amply Funded K-12 Education.

> "Americans can always be trusted to do the right thing. Once all other possibilities have been exhausted."
>
> *Winston Churchill*[121]

Washington State legislators have been studying, confirming, and reconfirming the State's ongoing failure to amply fund its K-12 public

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[120] *E.g.,* Robinson v. Cahill*, 358 A.2d 457, 459 (N.J. 1976) (retaining jurisdiction to ensure that legislature fully funded new education statutes; and, when legislature failed to provide funding, issuing injunction to shut down public schools if not so funded).* Montoy v. Kansas*, 112 P.3d 923, 929, 941 (Kan. 2005) (retaining jurisdiction to determine whether state complied with decision ordering increased education funding); see also* Montoy v. Kansas*, No. 99-C-1738, Decision and Order Remedy (May 11, 2004), 2004 WL 1094555, at *6-7 (observing that courts in Massachusetts, North Carolina, and New York likewise retained jurisdiction to ensure compliance with education funding decisions);* Freeman v. Pitts*, 503 U.S. 467, 490-491, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992) (acknowledging that courts in desegregation cases have authority to retain jurisdiction to supervise and control defendant school districts);* Green v. County School Board*, 391 U.S. 430, 439, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) ("[T]he court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed").*

[121] *Source: Langworth, Richard.* Churchill by Himself: The Definitive Collection of Quotations*. New York: Perseus Books Group, 2008. Hardcover, at p. 124.*

schools ever since the trial court's declaratory judgment ruling in the *Seattle School District* case over 35 years ago. Plaintiffs wish the legislative branch could now be trusted to obey our Constitution and amply fund our State's K-12 public schools. But history has shown – and the State's 2012 post-budget filing unfortunately confirms – that the legislative branch can be trusted to do that only after all other possibilities have been exhausted.

Plaintiffs accordingly submit that the "appropriate step" for this Court to take in response to the State's post-budget filing is to issue a strong, firm, unequivocal Order that exhausts possibilities for further stalling and delay by the defendant State. Plaintiffs respectfully request that this Court vigorously assert – rather than timidly shy away from – this Court's Constitutional duty to uphold and enforce the paramount Constitutional right of every Washington child currently sitting in our State's K-12 schools to an amply funded education. A positive Constitutional right that is equally held by all Washington children – not just those children who are more privileged, more politically popular, or more easy to teach.[122]

[122] *McCleary, 173 Wn.2d at 520 ("all children" under Article IX, §1 means "each and every child" in Washington – "No child is excluded."); February 2010 declaratory judgment [CP 2860-2971] at ¶168.*

This Court emphasized in its January 5, 2012 ruling that "positive constitutional rights do not restrain government action; they require it."[123] And that that in turn "require[s] the Court to take a more active stance in ensuring that the State complies with its affirmative Constitutional duty."[124] This Court accordingly assured every child in our State's public schools that this Court will not just "stand on the sidelines and hope the State meets its Constitutional mandate to amply fund education."[125]

The "appropriate step" for this Court to take is therefore to stand up as the one branch of State government that upholds (instead of just talks about) every Washington child's Constitutional right to an amply funded K-12 education. Plaintiffs accordingly submit that the "appropriate step" for this Court to take is to issue a firm, unequivocal Order that (hopefully) forces our State officials to put their perennial excuses and foot-dragging to an end, by making it emphatically and unmistakably clear that:

(1) The State's post-budget filing did not demonstrate "steady progress" in fully funding the reforms promised under ESHB 2261, and did not show "real and measurable progress" in achieving full Article IX, §1 compliance by 2018.

(2) The State's failure to make that required progress in its 2012 budget is Constitutionally unacceptable.

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[123] *McCleary, 173 Wn.2d at 519 (underline added).*
[124] *McCleary, 173 Wn.2d at 519.*
[125] *McCleary, 173 Wn.2d at 541.*

(3) This Court will therefore take firm action (the form or type of which elected officials might not like) if the State's 2013 budget fails to make ***significant*** progress fully funding the reforms promised under ESHB 2261 as well as achieving full Article IX, §1 compliance by 2018.

VI. CONCLUSION

Back in February 2010, the trial court ruled that the defendant State's continued failure to amply fund its public schools is unconstitutional.

The State's 2012 post-budget filing is long. But it doesn't demonstrate real, measurable, or steady progress stopping the State's longtime violation of Washington children's Constitutional right to an amply funded K-12 education.

Instead, the State's post-budget filing demonstrates another year of delay. It basically says "Legislators have been talking about school underfunding for many many years now, they didn't increase funding for this 2012/2013 school year because it's not a convenient time right now, but legislators are looking busy with a bunch of busywork, and whoever's elected in November might start to make some progress next year for kids in the 2013/2014 school year."

Many parents talk about "teachable moments" for their kids. The step this Court chooses to take in response to the parties' post-budget filings in this case presents a teachable moment not just for the McCleary and Venema children who are plaintiffs in this case, but also for every student currently in our State's public schools. That is because this Court's response will teach our upcoming generation of Washington citizens a fundamental lesson about whether our Constitution really matters. Does our Constitution grant citizens legally enforceable rights, or just make hollow suggestions that courts allow government officials to reject if politically convenient? In our State, is a Constitutional mandate an order that the government must obey, or just a suggestion that it may obey if it wants to?

As the history of enforcing *Brown v. Board of Education* illustrates, forcing recalcitrant State officials to pay the political and monetary price of complying with school children's Constitutional rights can be a hard path for the judicial branch to take. But that same experience also confirms that the hard path is the Constitutionally correct one for the judicial branch to take.

Plaintiffs respectfully request that this Court take the harder path of Constitutional enforcement, rather than the relatively easy path of political convenience.

RESPECTFULLY SUBMITTED this 17th day of October, 2012.

Foster Pepper PLLC

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DECLARATION OF SERVICE

Christopher G. Emch 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 Wednesday, October 17, 2012, I caused PLAINTIFF/RESPONDENTS' 2012 POST BUDGET FILING to be served on the following counsel as follows:

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☒ Via Electronic Mail (cc to the same email sent to the Supreme Court for the filing of this Supplemental Brief)
☒ Via U.S. First Class Mail

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☒ Via U.S. First Class Mail

Defendant State of Washington

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 17th day of October, 2012.

s/ Christopher G. Emch
Christopher G. Emch