"McCLEARY V. STATE—DECISION ON THE MERITS"

Supreme Court of Washington

McCLEARY, et al., Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON, Appellant/Cross-Respondent*

173 Wn.2d 477 (2012)
No. 84362-7
Argued June 28, 2011
Decided January 5, 2012

STEPHENS, J.

This case challenges the adequacy of state funding for K-12 education under article IX, section 1 of the Washington State Constitution. Unlike recent challenges to the State's funding of education, which have focused on discrete aspects of school finance such as staff compensation and special education, this case concerns the overall funding adequacy of K-12 education. The only other time we have reviewed this type of challenge to school funding was more than 30 years ago in *Seattle School District No. 1 v. State*, 90 Wash.2d 476 (1978).

Now, as then, the factual and legal background of the case, and the necessity of adequately addressing the number of issues involved, cause this opinion to reach great length. We therefore summarize the central portions of our decision:

- The judiciary has the primary responsibility for interpreting article IX, section 1 to give it meaning and legal effect.
- The legislature has the responsibility to augment the broad educational concepts under article IX, section 1 by providing the specific details of the constitutionally required "education."
- Article IX, section 1 confers on children in Washington a positive constitutional right to an amply funded education.
- The word "education" under article IX, section 1 means the basic knowledge and skills needed to compete in today's economy and meaningfully participate in this state's democracy.
- The current substantive content of the requisite knowledge and skills for "education" comes from three sources: the broad educational concepts outlined in *Seattle School District*, the four learning goals in Engrossed Substitute House Bill (ESHB) 1209, 53d Leg., Reg. Sess. (Wash.1993), and the State's essential academic learning requirements (EALRs).
- The "education" required under article IX, section 1 consists of the *opportunity* to obtain the knowledge and skills described in *Seattle School District*, ESHB 1209, and the EALRs. It does not reflect a right to a guaranteed educational outcome.

* This opinion has been edited substantially, including removal of all footnotes and many of the textual citations.

- The program of basic education is not etched in constitutional stone. The legislature has an obligation to review the basic education program as the needs of students and the demands of society evolve.
- The word "ample" in article IX, section 1 provides a broad constitutional guideline meaning fully, sufficient, and considerably more than just adequate.
- Ample funding for basic education must be accomplished by means of dependable and regular tax sources.
- The State has not complied with its article IX, section 1 duty to make ample provision for the education of all children in Washington.
- The legislature recently enacted a promising reform package under ESHB 2261, 61st Leg., Reg. Sess. (Wash.2009), which if fully funded, will remedy deficiencies in the K-12 funding system.
- This court defers to the legislature's chosen means of discharging its article IX, section 1 duty but retains jurisdiction over the case to help facilitate progress in the State's plan to fully implement the reforms by 2018.

[The Court's Background section has been deleted in light of the above summary.]

PROCEDURAL HISTORY

The McClearys and the Venemas are Washington State citizens, voters, and taxpayers, who brought suit individually and on behalf of their children enrolled in the State's public school system. The Network for Excellence in Washington Schools (NEWS) is a statewide coalition of community groups, school districts, and education organizations. Together, the McClearys, Venemas, and NEWS (collectively "Plaintiffs") filed a petition for declaratory judgment on January 11, 2007, alleging that the State is violating article IX, section 1 of the Washington State Constitution by failing to adequately fund the K-12 school system.

The petition raises four main questions. First, "What is the correct interpretation of the words 'paramount,' 'ample,' and 'all' in Article IX, § 1 of the Washington State Constitution?" Second, "What is the correct interpretation of the word 'education' in Article IX, § 1 of the Washington State Constitution?" Third, "Is the Respondent State currently complying with its legal duty under [the] court's interpretation of the language in Article IX, § 1?" Lastly, "If the Respondent State is not currently complying with its legal duty under [the] court's interpretation of Article IX, § 1, what (if any) Order should [the] court enter to uphold and enforce the State's legal duty?"

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On February 24, 2010, the trial court entered written findings and conclusions and final judgment in favor of Plaintiffs.

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The State filed a notice of appeal with this court seeking direct review under RAP 4.2(a)(4). . . . We agreed and accepted the case for direct review.

ANALYSIS

I. Standard of Review

We review a trial court's challenged findings of fact for substantial evidence. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879 (2003). Substantial evidence is "defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Id*. We will not

"disturb findings of fact supported by substantial evidence even if there is conflicting evidence." *Merriman v. Cokeley*, 168 Wash.2d 627, 631 (2010). Unchallenged findings of fact are verities on appeal. *In re Estate of Jones*, 152 Wash.2d 1, 8 (2004). We review de novo the trial court's conclusions of law, including its interpretation of statutes and constitutional provisions.

II. Article IX, Section 1

Article IX, section 1 of the Washington State Constitution provides, "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."

More than 30 years ago, we held that article IX, section 1 imposes a judicially enforceable affirmative duty on the State to make ample provision for the education of all children. *Seattle Sch. Dist.*, 90 Wash.2d at 520. We rejected the notion that section 1 is merely a preamble to article IX, saying instead that "[i]t is declarative of a constitutionally imposed *duty*." *Id.* at 499. This is the first time since *Seattle School District* that we have reviewed a broad challenge to the State's alleged failure to comply with article IX, section 1.

Preliminarily, two aspects of the duty under article IX, section 1 stand out. First, by imposing the duty on "the sovereign body politic or governmental entity which comprises the 'State,'" article IX, section 1 contemplates a sharing of powers and responsibilities among all three branches of government as well as state subdivisions, including school districts. *Id.* at 512. At all levels of government the citizenry share in state sovereignty and responsibility.

The judiciary has the primary responsibility for interpreting article IX, section 1 to give it meaning and legal effect. We reiterated in *Seattle School District* the long-standing principle that "'"'"it is emphatically the province and duty of the judicial department to say what the law is.'"'" *Id.* at 496. This is so, we explained, "'even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch.'" *Id.*

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This court adopted broad educational concepts under article IX, section 1 to give the legislature "the greatest possible latitude to participate in the full implementation of the constitutional mandate." *Id.* at 515. We explained that, "[w]hile the judiciary has the duty to construe and interpret the word 'education' by providing broad constitutional guidelines, the Legislature is obligated to give specific substantive content to the word and to the program it deems necessary to provide that 'education' within the broad guidelines." *Id.* at 518-19.

Thus, the legislature has the responsibility to augment the broad educational concepts under article IX, section 1 by providing the specific details of the constitutionally required "education." The legislature's "uniquely constituted fact-finding and opinion gathering processes" provide the best forum for addressing the difficult policy questions inherent in forming the details of an education system. *Id.* at 551. We therefore concluded that, "[w]hile the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature." *Id.* at 520.

The division of responsibilities between the judiciary and the legislature is evident from our refusal to establish specific guidelines for staffing ratios, salaries, and individualization of instruction. *Id.* at 519-20. These considerations, we noted, are better left to legislative discretion as informed by the broad educational concepts under article IX, section 1. *Id.*

The delicate balancing of constitutional responsibilities under article IX, section 1 also led this court to adopt broad guidelines regarding the State's duty to fund the school system. We explained that

"the State ... has an affirmative paramount duty to make ample provision for funding the 'basic education' or basic program of education defined." *Id.* at 520. And we expressed the duty in broad terms, saying that the "funding must be accomplished by means of dependable and regular tax sources." *Id.* But we did not outline the details of any particular funding structure, nor did we direct the legislature to infuse a specific level of resources into the school system.

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Given this "'delicate exercise in constitutional interpretation,'" *Seattle School District*, 90 Wash.2d at 497, cases under article IX, section 1 have always proved difficult. If nothing else, they test the limits of judicial restraint and discretion by requiring the court to take a more active stance in ensuring that the State complies with its affirmative constitutional duty. Notwithstanding these concerns, "[w]e cannot abdicate our judicial duty to interpret and construe" article IX, section 1. *Seattle Sch. Dist.*, 90 Wash.2d at 506.

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IV. The State's Compliance with Its Article IX, Section 1 Duty

The trial court concluded that the State has failed to adequately fund the "education" required by article IX, section 1. Substantial evidence supports this conclusion. The evidence at trial showed that the State's now-abandoned basic education funding formulas did not correlate to the real cost of amply providing students with the constitutionally required "education." As a result, the State has consistently failed to provide adequate funding for the program of basic education, including funding for essential operational costs such as utilities and transportation. To fill this gap in funding, local districts have been forced to turn increasingly to excess levies, placing them on the same unstable financial foundation as the schools in *Seattle School District.*

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After extensive review over many years, state task forces and committees have concluded that the K-12 funding system is broken. The legislature itself abandoned its longtime funding model effective September 1, 2011. Following an eight-week bench trial, the trial court concluded that the State has failed to meet its constitutional obligations. Substantial evidence confirms that the State's funding system neither achieved nor was reasonably likely to achieve the constitutionally prescribed ends under article IX, section 1. 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.

We do not believe this conclusion comes as a surprise. Rather, the evidence in this case confirms what many educational experts and observers have long recognized: fundamental reforms are needed for Washington to meets its constitutional obligation to its students. Pouring more money into an outmoded system will not succeed. We turn then to the more difficult issue: what remedy this court should employ to ensure that the State complies with its article IX, section 1 duty.

V. Remedy

Finding the appropriate remedy in cases involving article IX, section 1 has always proved elusive. Part of the reason is that things do not stand still while the litigation progresses. Here, for instance, Plaintiffs initially wanted the State to conduct a study to determine the actual cost of funding basic education. Shortly after the litigation began, the State through the Basic Education Finance Task Force moved forward with a comprehensive review of K-12 finance. By the time of trial, the legislature had implemented many of the task force's findings with the passage of ESHB 2261. The State took the position that the new legislation essentially mooted Plaintiffs' demands. The trial court

disagreed and ordered the legislature to determine the actual cost of basic education and to provide the requisite funding. Then, while the appeal was pending in this court, but before oral argument, the legislature passed an appropriations bill that failed to provide full funding for ESHB 2261. At this juncture, neither side is satisfied with the trial court's remedy—the State believes it goes too far, and Plaintiffs believe it does not go far enough.

The other reason that the remedy question proves elusive has to do with the delicate balancing of powers and responsibilities among coordinate branches of government. This court is appropriately sensitive to the legislature's role in reforming and funding education, and we must proceed cautiously. At the same time, the constitution requires the judiciary to determine compliance with article IX, section 1. In *Seattle School District,* we deferred to ongoing legislative reforms and simply declared the funding system inadequate. Though Judge Doran had retained jurisdiction to monitor the progress of reforms, this court rejected that part of his order. *Seattle Sch. Dist.,* 90 Wash.2d at 538-39. The immediate result was another lawsuit, ensuing litigation, and a second trial court ruling in which Judge Doran outlined a detailed enforcement plan. The long term result was 30 years of an education system that fell short of the promise of article IX, section 1 and that ultimately produced this lawsuit. 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. Article IX, section 1 is a mandate, not to a single branch of government, but to the entire state. *Id.* at 512. We will not abdicate our judicial role.

That said, we cannot endorse the trial court's remedy. It is problematic insofar as it gives too little weight to the reform efforts initiated under ESHB 2261. In the trial court's view, ESHB 2261 fell short of providing a solution to the funding system's deficiencies because it lacked specifics and it failed to bind future legislatures to provide full funding for basic education. To address these concerns, the trial court ordered the legislature "(1) to 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) to establish how the Respondent State will fully fund that actual cost with stable and dependable State sources." CP at 2837-38 (CL 275). The court further directed the legislature to proceed "with real and measurable progress" in accomplishing this task. *Id.*

Ordering the legislature to do yet another cost study crosses the line from ensuring compliance with article IX, section 1 into dictating the precise means by which the State must discharge its duty. This fails to respect the division of constitutional responsibilities outlined in *Seattle School District,* where we said that "[w]hile the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature." 90 Wash.2d at 520.

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Given the comprehensive reforms projected under ESHB 2261, the State argues that we should do no more than await the legislature's implementation schedule. While we are sensitive to the legislature's role in reforming education, such an approach would be unacceptable. As a coequal branch of state government we cannot ignore our constitutional responsibility to ensure compliance with article IX, section 1.

Recent cuts to K-12 funding confirm that too much deference may set the stage for another major lawsuit challenging the legislature's failure to adhere to its own implementation schedule. . . . .

* * * * *

This court cannot idly stand by as the legislature makes unfulfilled promises for reform. We therefore reject as a viable remedy the State's invitation for the court simply to defer to the legislature's implementation of ESHB 2261. At the same time, we recognize that Plaintiffs' proposal to

set an absolute deadline for compliance in the next year is unrealistic. The changes that have taken place during the pendency of this case illustrate that any firm deadline will, of necessity, be moved.

A better way forward is for the judiciary to retain jurisdiction over this case to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty. This option strikes the appropriate balance between deferring to the legislature to determine the precise means for discharging its article IX, section 1 duty, while also recognizing this court's constitutional obligation. This approach also has the benefit of fostering dialogue and cooperation between coordinate branches of state government in facilitating the constitutionally required reforms. The court below did not evaluate options for retaining jurisdiction, and the parties have not had an opportunity to address the issue. Our prior experience and the experience of other courts suggests there are numerous options, including retaining jurisdiction in the trial court, retaining jurisdiction in this court, or perhaps appointing a special master or oversight entity. While we recognize that the issue is complex and no option may prove wholly satisfactory, this is not a reason for the judiciary to throw up its hands and offer no remedy at all. Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty under article IX, section 1. Accordingly, we direct the parties to provide further briefing to this court addressing the preferred method for retaining jurisdiction.

CONCLUSION

Article IX, section 1 of the Washington State Constitution makes it the paramount duty of the State to amply provide for the education of all children within its borders. This duty requires the State to provide an opportunity for every child to gain the knowledge and skills outlined in *Seattle School District*, ESHB 1209, and the EALRs. The legislature must develop a basic education program geared toward delivering the constitutionally required education, and it must fully fund that program through regular and dependable tax sources.

The State has failed to meet its duty under article IX, section 1 by consistently providing school districts with a level of resources that falls short of the actual costs of the basic education program. The legislature recently enacted sweeping reforms to remedy the deficiencies in the funding system, and it is currently making progress toward phasing in those reforms. We defer to the legislature's chosen means of discharging its article IX, section 1 duty, but the judiciary will retain jurisdiction over the case to help ensure progress in the State's plan to fully implement education reforms by 2018. We direct the parties to provide further briefing to this court addressing the preferred method for retaining jurisdiction. The clerk's office will set an appropriate briefing schedule.

A noted scholar in the area of school-finance litigation has observed that success depends on "continued vigilance on the part of courts." James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1260 (2008). This court intends to remain vigilant in fulfilling the State's constitutional responsibility under article IX, section 1.

WE CONCUR: CHARLES W. JOHNSON, TOM CHAMBERS, SUSAN OWENS, MARY E. FAIRHURST, and CHARLES K. WIGGINS, Justices and GERRY L. ALEXANDER, Justice Pro Tem.

MADSEN, C.J. (concurring/dissenting).

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. However, I disagree with the majority that the judiciary should retain control over this case.

As we noted in resolving prior school funding challenges, our "traditional judicial function[ ]" is to interpret article IX, section 1 of our state constitution and to determine whether our state is meeting its constitutional responsibility. *Seattle Sch. Dist. No. 1 v. State*, 90 Wash.2d 476, 508 (1978). In the current case, we have defined "education," "paramount," "all," and "ample" and ordered the State to carry out its constitutional duty. We have done our job; now we must defer to the legislature for implementation.

Indeed, there is precedent for judicial deference to the legislature with regard to the execution of article IX, section 1. In *Seattle School District*, we held that once the constitutional ends have been defined by the courts, the means of compliance are firmly within the realm of the legislative power. *Id.* at 520, 585 P.2d 71. We described the trial court's decision to retain jurisdiction in that case as "inconsistent" with the assumption that the legislature, as a sworn "constitutional body, would comply with the constitutional mandate" under article IX, section 1. *Id.* at 538-39. Although the majority is ostensibly "defer[ing] to the legislature's chosen means of discharging its article IX, section 1 duty[,]" it has taken the extraordinary step of "retain[ing] jurisdiction over [a] case to help facilitate progress in the State's plan to fully implement the reforms by 2018." Majority at 231.

The majority claims that by retaining jurisdiction, the judiciary will "facilitate progress" within the legislative branch, but it fails to discuss how it will fulfill such a role. Generally, in cases where a court retains jurisdiction, the court sets forth clear benchmarks and ascertainable standards against which to measure compliance. For example, the federal courts' supervision of school desegregation used identifiable factors to determine if a school district had achieved its mandate. To aid the federal district courts in implementing their desegregation order, the United States Supreme Court identified six factors that "are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown* [*v. Board of Education*, 347 U.S. 483 (1954)]." *Freeman v. Pitts*, 503 U.S. 467, 486 (1992). The factors constituting specific aspects of a school system are the assignment of students by race, physical facilities, extracurricular activities, faculty and staff assignments, transportation, and resource allocation. District courts then weighed the effectiveness of a school district's desegregation plans under these factors and directed action to remedy specific areas of noncompliance.

In contrast, the majority here fails to define the desired outcomes or to provide criteria or benchmarks against which a court, special master, or other oversight entity can measure the legislature's compliance. In fact, as in *Seattle School District*, the majority has *declined* to identify specific requirements or goals, such as required deployment of staff, student to staff ratios, or minimum employee salaries, which would objectively indicate whether the State has complied with its constitutional duties. In addition, the majority vacated the trial court's order to the legislature to "establish the actual cost of amply providing all Washington children with" the constitutionally mandated education and "establish how the Respondent State will fully fund that actual cost." Majority at 259. Without clear, identified goals, judicial supervision will be unhelpful, can assure no compliance, and, at worst, will be obstructive.

But, in any event, I do not believe this court should attempt to establish goals or benchmarks for the legislature to meet. Rather, as we held in *Seattle School District*, it is the legislature's duty to define what constitutes basic education and how to adequately fund education at that level. Adopting specific standards or guidelines for defining and funding basic education is a legislative responsibility; it is not a judicial function.

The sentiment behind the majority's decision is understandable. Thirty years after our decision in *Seattle School District* the legislature has failed to adequately fund basic education. Nevertheless, the majority correctly identifies ESHB 2261 as "promising reform." Majority at 261. This court should

exercise judicial restraint and permit the legislature to implement the statute without the burden to confer and report to the judiciary at every step.

I believe the majority's largely symbolic decision disturbs the comity enjoyed between the judiciary and the legislative branch without providing any effective guidance to the legislature. To decline to retain jurisdiction is not an "abdication" of our responsibility, rather, it is recognition of the limits of our institution's role and competency. If the legislature fails to carry out its constitutional duty as directed, this court has the appropriate tools to compel compliance, including recalling its mandate, or issuing a writ of mandamus to the legislature.

In deciding the issues presented, we have met our constitutional responsibility; we should allow the legislature to do the same. With these concerns, I respectfully concur.

WE CONCUR: JAMES M. JOHNSON, Justice.

"MCCLEARY V. STATE—CONTEMPT ORDER"

Washington State Supreme Court

MATHEW & STEPHANIE McCLEARY, et al., Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON, Appellant/Cross-Respondent

No. 84362-7
Decided September 11, 2014

In *McCleary v. State,* 173 Wn.2d 477 (2012), this court unanimously affirmed a declaratory judgment of the King County Superior Court finding that the State is not meeting its "paramount duty . . . to make ample provision for the education of all children residing within its borders." Wash. Const. art. IX, § 1. The court initially deferred to the legislature's chosen means of discharging its constitutional duty, but retained jurisdiction over the case to monitor the State's progress in implementing by 2018 the reforms that the legislature had recently adopted. Pursuant to its retention of jurisdiction, the court has called for periodic reports from the State on its progress. Following the State's first report in 2012, the court issued an order directing the State to lay out its plan "in sufficient detail to allow progress to be measured according to periodic benchmarks between now and 2018," noting it must indicate the "phase-in plan for achieving the State's mandate to fully fund basic education and demonstrate that its budget meets its plan." Order, *McCleary v. State,* No. 84362-7, at 2-3 (Wash. Dec 20, 2012).

Following the 2013 legislative session, the Joint Select Committee on Article IX Litigation (Committee) issued the second of these reports, on the basis of which the court found (as it had after the Committee's first report) that the State was not making sufficient progress to be on target to fully fund education reforms by the 2017-18 school year. Reiterating that the State had to show through immediate and concrete action that it was making real and measurable progress, the court issued an order on January 9, 2014, directing the State to submit by April 30, 2014, "a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year," including "a phase-in schedule for fully funding each of the components of basic education." Order, *McCleary v. State,* No. 84362-7, at 8 (Wash. Jan. 9, 2014).

After the 2014 legislative session, the Committee issued its report to the court. In it, the Committee admitted that "[t]he Legislature did not enact additional timelines in 2014 to implement the program of basic education as directed by the Court in its January 2014 Order." REPORT TO THE WASHINGTON STATE SUPREME COURT BY THE JOINT SELECT COMMITTEE ON ARTICLE IX LITIGATION at 27 (May 1, 2014). In light of this concession, the court issued an order on June 12, 2014, directing the State to appear before the court and show cause why it should not be held in contempt for violating the court's January 2014 order and why, if it is found in contempt, sanctions or other relief requested by the plaintiffs in this case should not be granted.

Pursuant to its show cause order, the court held a hearing on September 3, 2014. As it did in its briefing, the State again admitted that it did not comply with the court's January 2014 order, but it urged the court not to hold the State in contempt and instead give the legislature the opportunity during the 2015 budget session to develop and enact a plan for fully funding K-12 public education by 2018. The State assured the court that a contempt order is not necessary to get the legislature's attention, that school funding is the number one issue on the legislature's agenda, and that the 2015 session will provide the best opportunity to take meaningful action on the matter.

The court has no doubt that it already has the legislature's "attention." But that is not the purpose of a contempt order. Rather, contempt is the means by which a court enforces compliance with its lawful orders when they are not followed. The State has suggested throughout these proceedings that the court may be approaching its constitutional bounds and entering into political and policy matters reserved to the legislature. But as the court has repeatedly stated, it does not wish to dictate the means by which the legislature carries out its constitutional responsibility or otherwise directly involve itself in the choices and tradeoffs that are uniquely within the legislature's purview. Rather, the court has fulfilled its constitutional role to determine whether the State is violating constitutional commands, and having held that it is, the court has issued orders within its authority directing the State to remedy its violation, deferring to the legislature to determine the details. These orders are not advisory or designed only to get the legislature's "attention"; the court expects them to be obeyed even though they are directed to a coordinate branch of government. When the orders are not followed, contempt is the lawful and proper means of enforcement in the orderly administration of justice.

The court is not persuaded by the State's argument that a finding of contempt is unwarranted because the admitted violation was neither "disrespectful" nor the result of a "concerted effort by the Legislature to disregard the Court's order." A violation need not be "disrespectful" or result from "concerted effort" or even be motivated by literal "contempt" or other ill feeling toward the court. It is necessary only that a party's action be intentional. RCW 7.21.010(l)(b). The State suggests that one measure of whether a finding of contempt is warranted is whether an order has been repeatedly violated. Assuming that is a consideration, the current order is only the latest order that the court has issued since its decision in *McCleary.* It directed the State to provide its detailed plan in December 2012, prior to the 2013 legislative session, and it has repeatedly emphasized that the State is engaged in an ongoing violation of its constitutional duty to K-12 children. The State, moreover, has known for decades that its funding of public education is constitutionally inadequate. This proceeding is therefore the culmination of a long series of events, not merely the result of a single violation. In retaining jurisdiction in *McCleary,* the court observed that it "cannot stand idly by as the legislature makes unfulfilled promises for reform." *McCleary,* 173 Wn.2d at 545. Neither can the court "stand idly by" while its lawful orders are disregarded. To do so would be to abdicate the court's own duty as a coordinate and independent branch of the government.

Accordingly, the court unanimously finds the State in contempt for failing to comply with the court's January 9, 2014 order. The question remains whether sanctions are immediately warranted. The State has assured the court that education funding is the legislature's top priority and that the

legislature is determined to (and the State expects it to) take meaningful action in the 2015 budget session. In the interest of comity and continuing dialogue between the branches of government, the court accepts the State's assurances that it will be compliant by the end of the 2015 session. Thus, the court will not presently impose sanctions or other remedial measures, and will provide the State the opportunity to purge the contempt during the 2015 legislative session by complying with the court's order. If the contempt is not purged by adjournment of the 2015 legislature, the court will reconvene and impose sanctions or other remedial measures.

Now, therefore, it is hereby

ORDERED:

That the State is in contempt of court for violating the court's order dated January 9, 2014.

The State failed to submit by April 30, 2014 a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year. Sanctions and other remedial measures are held in abeyance to allow the State the opportunity to comply with the court's order during the 2015 legislative session. If by adjournment of the 2015 legislative session the State has not purged the contempt by complying with the court's order, the court will reconvene to impose sanctions and other remedial measures as necessary. On the date following adjournment of the 2015 session, if the State has not complied with the court's order, the State shall file in the court a memorandum explaining why sanctions or other remedial measures should not be imposed. This memorandum is separate from the court's order requiring an annual progress report. No other pleadings should be filed by any of the parties except at the direction of the court.

DATED at Olympia, Washington this 11th day of September, 2014.

"MCCLEARY V. STATE—SANCTIONS ORDER"

Washington State Supreme Court

MATHEW & STEPHANIE McCLEARY, et al., Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON, Appellant/Cross-Respondent

No. 84362-7
Decided August 13, 2015

The Washington Constitution imposes only one "paramount duty" upon 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." WASH. CONST. art. IX, § 1. In *McCleary v. State*, 173 Wn.2d 477 (2012), we held that the State's program of basic education violated this provision. We declined, however, to impose an immediate remedy, recognizing the legislature's enactment of "a promising reform program in [Laws of 2009, ch. 548] ESHB 2261," *id.* at 543, designed to remedy the deficiencies in the prior funding system 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."

Since then, we have repeatedly ordered the State to provide its plan to fully comply with article IX, section 1 by the 2018 deadline. The State has repeatedly failed to do so, offering various explanations as to why. Last Fall, we found the State in contempt of court, but held in abeyance the

matter of sanctions until the completion of the 2015 legislative session. After the close of that session and following multiple special sessions, the State still has offered no plan for achieving full constitutional compliance by the deadline the legislature itself adopted. Accordingly, this court must take immediate action to enforce its orders. Effective today, the court imposes a $100,000 per day penalty on the State for each day it remains in violation of this court's order of January 9, 2014. As explained below, this penalty may be abated in part if a special session is called and results in achieving full compliance.

HOW WASHINGTON GOT TO THIS POINT

In *McCleary,* 173 Wn.2d at 520, we held that the State's "paramount duty" under article IX, section 1 is of first and highest priority, requiring fulfillment before any other State program or operation. This duty not only obligates the State to act in amply providing for public education, it also confers upon the children of the state the right to be amply provided with an education. *Seattle Sch. Dist. 1 v. State,* 90 Wn.2d 476, 513 (1978). And while we recognized that the legislature enjoys broad discretion in deciding what is necessary to deliver the constitutionally required basic education, we emphasized that any program the legislature establishes must be fully and sufficiently funded from regular and dependable State, not local, revenue sources. *McCleary,* 173 Wn.2d at 526-28. The court deferred to the legislature's chosen means of discharging its constitutional duty, but it retained jurisdiction over the case to monitor the State's progress in implementing the reforms that the legislature had recently adopted by the 2018 deadline that the legislature itself had established. Pursuant to its retention of jurisdiction, the court called for periodic reports from the State on its progress. Following the State's first report in 2012, the court issued an order directing the State to lay out its plan "in sufficient detail to allow progress to be measured according to periodic benchmarks between now and 2018," noting that it must indicate the "phase-in plan for achieving the State's mandate to fully fund basic education and. demonstrate that its budget meets its plan." Order, *McCleary v. State,* No. 84362-7, at 2-3 (Wash. Dec 20, 2012).

Following the 2013 legislative session, the Joint Select Committee on Article IX Litigation (Committee) issued the second of these reports, on the basis of which the court found in a January 9, 2014, order (as it had after the Committee's first report) that the State was not demonstrating sufficient progress to be on target to fully fund education reforms by the 2017-18 school year. In that order, the court noted specifically that funding appeared to remain inadequate for student transportation, and that the legislature had made no significant progress toward fully funding essential materials, supplies, and operating costs (MSOCs). Further, the court stressed the need for adequate capital expenditures to ensure implementation of all-day kindergarten and early elementary class size reductions. And finally, the court determined that the State's latest report fell short on personnel costs. Stressing, as it had in its opinion in *McCleary,* that quality educators and administrators are the heart of Washington's education system, the court noted that the latest report "skim[med] over the fact that state funding of educator and administrative staff salaries remains constitutionally inadequate." Order, *McCleary v. State,* No. 84362-7, at 6-7 (Wash. Jan. 9, 2014). Overall, the court observed, the State's report showed that it knew what progress looked like and had taken some steps forward, but it could not "realistically claim to have made significant progress when its own analysis shows that it is not on target to implement ESHB 2261 and SHB 2776 by the 2017-18 school year." *Id.* at 7. Reiterating that the State had to show through immediate and concrete action that it was achieving real and measurable progress, not simply making promises, the court in its order directed the State to submit by April 30, 2014, "a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year," addressing "each of the areas of K-12 education identified in ESHB 2261, as well as the implementation plan called for by SHB, and must include a phase-in schedule for fully funding each of the components of basic education." *Id.* at 8.

After the 2014 legislative session, the Committee issued its report to the court, acknowledging that the legislature "did not enact additional timelines in 2014 to implement the program of basic education as directed by the Court in its January 2014 Order." Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation at 27 (May 1, 2014) (corrected version). In light of this concession, the court issued an order on June 12, 2014, directing the State to appear before the court and show cause why it should not be held in contempt for violating the court's January 2014 order and why, if it is found in contempt, sanctions or other relief requested by the plaintiffs in this case should not be granted.

Following a hearing on September 3, 2014, the court issued an order on September 11, 2014, finding the State in contempt for failing to comply with the court's January 9, 2014, order. But the court held any sanctions or other remedial measures in abeyance to allow the State the chance to comply with the January 2014 order during the 2015 legislative session. The court directed that if by the end of that session the State had not purged the contempt, the court would reconvene to impose sanctions and other remedial measures .as necessary. The court further directed the State to file a memorandum after adjournment of the 2015 session explaining why sanctions or other remedial measures should not be imposed if the State remained in contempt. When the legislature failed to enact a budget for the 2015-17 biennium by the end of the regular session, the court held sanctions further in abeyance until the final adjournment of the legislature after any special session. At a third special session, the legislature adopted a 2015-17 biennial budget that included funding for basic education, and at the court's direction, the State submitted its annual post-budget report to the court on July 27, 2015.

THE STATE STILL HAS NOT ADOPTED A PLAN TO MEET ARTICLE IX, SECTION 1 BY 2018

It is evident that the 2015-17 general budget makes significant progress in some key areas, for which the legislature is to be commended. The budget appears to provide full funding for transportation, and the superintendent of public instruction agrees. Further, it meets the per-student expenditure goals of SHB 2776 for MSOCs during the 2015-17 biennium in accordance with the prototypical school model established by ESHB 2261. The budget also makes progress in establishing voluntary all-day kindergarten, appropriating $179.8 million, which the State asserts will result in the establishment of all-day kindergarten in all schools by the 2016-17 school year, one year ahead of the schedule specified by SHB 2776. *See* RCW 28A.150.315(1). In addition, the current budget appropriates $350 million for K-3 class size reduction, an amount the State says will achieve the target average class size of 17 for kindergarten and first grade in lower income schools by the 2016-17 school year.

But while there is some progress in class size reduction, there is far to go. The target for all ofK-3 is an average of 17 students, RCW 28A.150.260(4)(b), but low-income schools will reach only 18 students in the second grade and 21 in the third by 2016-17. And in other schools, no class will reach the goal of 17 by 2016-17. With a deadline of 2018 for compliance, the State is not on course to meet class-size reduction goals by then. The appropriation of $350 million for the 2015-17 biennium is considerable, but the legislature's own Joint Task Force on Education Funding (JTTEF) estimated in 2012 that $662.8 million would be needed this biennium for K-3 class size reduction, and that the 2017-18 biennium would require an expenditure of $1.15 billion. The State has presented no plan as to how it intends to achieve full compliance in this area by 2018, other than the promise that it will take up the matter in the 2017-19 biennial budget.

And as to both class size reductions and all-day kindergarten, it is unclear, and the State does not expressly say, whether the general budget or the capital budget makes sufficient capital outlays to ensure that classrooms will be available for full implementation of all-day kindergarten and reduced

class sizes by 2018. The State indicates that the legislature allocated $200 million for grants devoted to K-3 class size reduction and all-day kindergarten, but as this court noted in its January 2014 order, the superintendent of public instruction had previously estimated that additional capital expenditures of $599 million would be needed just for K-3 class size reductions. The State has provided no plan for how it intends to pay for the facilities needed for all-day kindergarten and reduced class sizes. As the court emphasized in its January 2014 order, the State needs to account for the actual cost to schools of providing all-day kindergarten and smaller K-3 class sizes. It has not done so. Furthermore, in its latest report the Joint Select Committee notes an analysis estimating that there will be a shortage of about 4,000 teachers in 2017-18 for all-day kindergarten and class size reduction. It says nothing in the report about how that shortfall will be made up and what it will cost. Report at 16.

This leads to the matter of personnel costs, for which the State has wholly failed to offer any plan for achieving constitutional compliance. As this court discussed in *McCleary,* a major component of the State's deficiency in meeting its constitutional obligation is its consistent underfunding of the actual cost of recruiting and retaining competent teachers, administrators, and staff. *McCleary*, 173 Wn.2d at 536. The court specifically identified this area in its January 2014 order as one in which the State continues to fall short, finding it an "inescapable fact" that "salaries for educators in Washington are no better now than when this case went to trial." Order (Jan. 9, 2014) at 6. The legislature in ESHB 2261 recognized that "continuing to attract and retain the highest quality educators will require increased investment," and it established a technical work group, which issued its final report and recommendations in 2012. ESHB 2261 § 601(1). The State is correct that it is not constitutionally required to adopt precisely those recommendations, but it must do something in the matter of compensation that will achieve full *state* funding of public education salaries. In the current budget, the legislature approved modest salary increases (across state government) and fully funded Initiative 732 cost of living increases (which had long been suspended), and it provided some benefit increases; but the State has offered no plan for achieving a sustained, fully state-funded system that will attract and retain the educators necessary to actually deliver a quality education.

The State devotes the bulk of its latest report to detailing proposed legislation on salaries and levy reform considered during the 2015 legislative session, and the State urges that "sophisticated efforts toward that goal already are underway." *See* State of Washington's Memorandum Transmitting the Legislature's 2015 Post-Budget Report, at 30. But the bottom line is that none of these proposals was enacted into law, and they remain, in the State's words, only matters of "discussion." We have, in other words, further promises, not concrete plans.

As to all of these matters, the court emphasizes, as it has throughout these proceedings, that it will not dictate the details of how the State is to achieve full funding of basic education, nor has the court required that full funding be achieved in advance of the 2018 deadline. It is not within this court's authority to enact legislation, appropriate state funds, or levy taxes. Rather, in accordance with its obligation to enforce the commands of the Washington Constitution, and pursuant to its continuing jurisdiction over this matter to ensure steady progress towards constitutional compliance, the court has only required, and still requires, the State to present its *plan* for achieving compliance by its own deadline of 2018. The State acknowledges that it has not submitted a written plan listing benchmarks for assessing its progress, as this court has required, but it urges that SHB 2776 constitutes the "plan" and that it is on pace toward fulfilling that plan. But this court's order requires the State to explain not just what it expects to achieve by 2018, as SHB 2776 dictates, but to fully explain *how* it will achieve the required goals, with a phase-in schedule and benchmarks for measuring full compliance with the components of basic education.

SANCTIONS ARE APPROPRIATE FOR THE STATE'S CONTINUED FAILURE TO COMPLY WITH COURT ORDERS

Despite repeated opportunities to comply with the court's order to provide an implementation plan, the State has not shown how it will achieve full funding of all elements of basic education by 2018. The State therefore remains in contempt of this court's order of January 9, 2014. The State urges the court to hold off on imposing sanctions, to wait and see if the State achieves full compliance by the 2018 deadline. But time is simply too short for the court to be assured that, without the impetus of sanctions, the State will timely meet its constitutional obligations. There has been uneven progress to date, and the reality is that 2018 is less than a full budget cycle away. As this court emphasized in its original order in this matter, "we cannot wait until 'graduation' in 2018 to determine if the State has met minimum constitutional standards." Order of December 20, 2012 at p.3.

The court has inherent power to impose remedial sanctions when contempt consists of the failure to perform an act ordered by the court that is yet within the power of a party to perform. *Blanchard v. Golden Age Brewing Co.,* 188 Wash. 396, 423 (1936) ("The power of a court, created by the constitution, to punish for contempt for disobedience of its mandates, is inherent. The power comes into being upon the very creation of such a court and remains with it as long as the court exists. Without such power, the court could ill exercise any power, for it would then be nothing more than a mere advisory body."). Monetary sanctions are among the proper remedial sanctions to impose, though the court also may issue any order designed to ensure compliance with a prior order of the court. When, as here, contempt results in an ongoing constitutional violation, sanctions are an important part of securing the promise that a court order embodies: the promise that a constitutional violation will not go unremedied.

Given the gravity of the State's ongoing violation of its constitutional obligation to amply provide for public education, and in light of the need for expeditious action, the time has come for the court to impose sanctions. A monetary sanction is appropriate to emphasize the cost to the children, indeed to all of the people of this state, for every day the State fails to adopt a plan for .full compliance with article IX, section 1. At the same time, this sanction is less intrusive than other available options, including directing the means the State must use to come into compliance with the court's order.

Now, therefore, it is hereby

ORDERED:

Effective immediately, the State of Washington is assessed a remedial penalty of one- hundred thousand dollars ($100,000) per day until it adopts a complete plan for complying with article IX, section 1 by the 2018 school year. The penalty shall be payable daily to be held in a segregated account for the benefit of basic education. Recognizing that legislative action complying with the court's order can only occur in session, but further recognizing that the court has no authority to convene a special session, the court encourages the governor to aid in resolving this matter by calling a special session. Should the legislature hold a special session and during that session fully comply with the court's order, the court will vacate any penalties accruing during the session. Otherwise, penalties will continue to accrue until the State achieves compliance.

As it has since the constitutionality of Washington's school funding system was first litigated in *Seattle School District,* the court assumes and expects that the other branches of government will comply in good faith with orders of the court issued pursuant to the court's constitutional duties. *Seattle Sch. Dist. 1,* 90 Wn.2d at 506-07. Our country has a proud tradition of having the executive branch aid in enforcing court orders vindicating constitutional rights.