

NO. 101052-4

SUPREME COURT OF THE STATE OF WASHINGTON

WAHKIAKUM SCHOOL DISTRICT No. 200,

Appellant,

v.

STATE OF WASHINGTON,

Respondent

AMICUS CURIAE MEMORANDUM OF
ATTORNEYS FOR EDUCATION RIGHTS

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I. INTRODUCTION

The Washington Constitution promises ample provision for the education of *all* children, including those with disabilities. That cannot happen without safe and accessible school buildings. A child in a wheelchair cannot receive a basic education without a ramp to the schoolhouse door. An asthmatic child cannot safely attend a moldy or drafty school. More generally, children with disabilities cannot be mainstreamed without school buildings to bring diverse children together.

The State does not want to finance safe and accessible facilities for *all* children. So the State makes the logic-defying argument that a basic education does not include the educational setting, as if school districts can somehow deliver a substantive program for learning essential skills without classrooms or labs. The message is “tough luck” to children whose local communities cannot pass levies for school construction and repair.

The State is wrong. The Legislature’s own funding formula belies the absurd notion that basic education can be amply provided without buildings. The pandemic demonstrated all too painfully that learning is lost when schoolhouse doors are closed. Especially for students with severe disabilities, a basic educational opportunity is inseparable from a welcoming and safe environment. To include *all* children in the

Constitutional promise, this Court must hold that article IX, section 1 requires full state funding of those facilities needed for a basic education.

II. INTEREST OF AMICUS

Attorneys for Education Rights (AFER) is a Washington nonprofit corporation created in 2019 to advance the rights of students with disabilities. AFER advocates for legislative and policy change, assists members with practicing education law on behalf of students with disabilities and their parents, and increases public awareness of educational civil rights. AFER is interested in this case because safe and accessible school buildings are necessary for students with disabilities to receive a basic education. Also, AFER believes that full and equitable funding of facilities is important to fulfilling the State's obligation to provide a free appropriate public education to the 143,000 students qualifying for special education in Washington.

III. STATEMENT OF THE CASE AND STANDARD OF REVIEW

Because the trial court ordered dismissal under CR 12(b)(6), the only matters considered are those stated in the complaint. *Brown v. MacPherson's Inc.*, 85 Wn.2d 17, 18, 530 P.2d 277 (1975). Allegations in the complaint are presumed to be true. *Id.* at 330; *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Accordingly, AFER adopts the Wahkiakum School District's recitation of facts in its complaint. Brief of

App., pp. 3-15 and Appendix. As asserted in the complaint, building components required by the Americans with Disabilities Act (ADA) and Individuals with Disabilities in Education Act (IDEA) are among the basic education facilities at issue. Appellant Appendix ¶121.

Dismissals under CR 12(b)(6) are reviewed de novo. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Group*, 180 Wn.2d 954, 963, 331 P.3d 29 (2014). “Dismissal is warranted only if the court concludes, beyond a reasonable doubt, that the plaintiff cannot prove ‘any set of facts which would justify recovery.’ ” *Id.*, quoting *Tenore v. AT & T Wireless Servs.*, 136 Wn. 2d 322, 329–30, 962 P.2d 104 (1998). CR 12(b)(6) motions are granted “sparingly and with care” and “only in the unusual case” in which allegations “show on the face of the complaint that there is some insuperable bar to relief.” *Tenore*, 136 Wn.2d at 330.

IV. ARGUMENT

A. The State Must Fully Fund Actual Costs of a Basic Education.

Article IX, section 1 of the Washington Constitution declares, “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders.” This imposes an affirmative duty on the State to make ample provision for the basic program of education “by means of dependable and regular tax sources.” *McCleary v. State*, 173 Wn.2d 477, 517, 269 P.3d 227 (2012). The basic educational

program “shall be accessible to all students” who are school-aged. RCW 28A.150.220(5)(a).

The required program consists of the opportunity to obtain the knowledge and skills described in *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476 (1978), ESHB 1209, and the Essential Academic Learning Requirements (EALRs). *McCleary*, 173 Wn.2d at 525-26. Thus, the state is constitutionally required to:

provide opportunities for every student to develop the knowledge and skills essential to:

- (1) Read with comprehension, write effectively, and communicate successfully in a variety of ways and settings and with a variety of audiences;
- (2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history, including different cultures and participation in representative government; geography; arts; and health and fitness;
- (3) Think analytically, logically, and creatively, and to integrate technology literacy and fluency as well as different experiences and knowledge to form reasoned judgments and solve problems; and
- (4) Understand the importance of work and finance and how performance, effort, and decisions directly affect future career and educational opportunities.

Id.; RCW 28A.150.210. The mandate includes “broad educational opportunities ... to equip our children for their role as citizens and as potential competitors in today’s market.” *McCleary* at 516, citing *Seattle School Dist.*, 90 Wn.2d at 517-18. This aligns with the IDEA goal “of ensuring equality of opportunity, full participation, independent living,

and economic self-sufficiency for individuals with disabilities.” 20 U.S.C. 1400(c).

The State may not rely on local levies to pay for basic education. *McCleary*, 173 Wn.2d at 539. As this Court explained, “Reliance on levy funding to finance basic education was unconstitutional 30 years ago in *Seattle School District*, and it is unconstitutional now.” *McCleary* at 539. The State violates article IX, section 1 when its allocations for basic education fall short of actual costs. *McCleary* at 537.

B. The Legislature Has Defined Basic Education to Include Facilities and Grounds.

Within the substantive guidelines identified by this Court, the Legislature must define what a basic education consists of. *McCleary*, 173 Wn.2d at 521, 526.¹ The State mischaracterizes the question here as whether “capital costs” are part of the basic education defined by the Legislature. Brief of Resp. 59-60. That is a return to the backwards thinking, rejected in *McCleary*, that a basic education is whatever the Legislature decides to pay for. On the contrary, this Court has said that the “education” in article IX, section 1 is the “substantive content” of a program, not the cost. *McCleary*, 173 Wn.2d at 517. More specifically,

¹ See also *McCleary* at 517 (quoting *Seattle Sch. Dist.*, 90 Wn.2d at 518–19): “[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.”

this Court found that the Legislature provided “specific substantive content to the word ‘education’ ...by adopting the four learning goals in ESHB 1209 and developing the EALRs.” *Id.* at 523. Thus, the *substantive program drives the funding*, not the other way around.

The real question here is whether the substantive program of essential knowledge and skills, as defined by the Legislature, requires buildings and grounds. The answer is obviously “yes.” Therefore, the buildings and grounds necessary for a constitutionally required education must be fully funded by the State. *McCleary*, 173 Wn.2d at 537.

The State correctly notes that the Legislature’s definition of basic education is spelled out in RCW 28A.150.200 through RCW 28A.150.260. Brief of Resp. p. 60; RCW 28A.150.200(1) (“The program of basic education established under this chapter is deemed by the legislature to comply with the requirements of Article IX, section 1 of the state Constitution”). RCW 28A.150.220(2)(a) requires an average of at least 1,000 hours of instruction a year for grades 1-12. RCW 28A.150.220(3)(a) requires instruction in the EALRs as set forth in RCW 28A.655.070. Of critical importance, RCW 28A.150.260 outlines the formula for distributing state funds needed to provide the required program. RCW 28A.150.260 states:

The purpose of this section is to provide for the allocation of state funding that the legislature deems necessary to support school districts in offering the minimum instructional program of basic education under RCW 28A.150.220.

The allocation formula is based on “minimum staffing *and nonstaff costs* the legislature deems necessary to support instruction and operations in prototypical schools.” RCW 28A.150.260(3)(a) (italics added). While the prototypes are only for allocation purposes and do not constrain how schools are structured or operated, they “illustrate the level of resources needed” to operate a Washington school of prototypical size. *Id.*

The “resources needed,” as defined in RCW 28A.150.260, include buildings and grounds. For example, the formula provides for “two laboratory science classes” in high school. RCW 28A.150.260(4)(a)(ii). Science labs are *physical* facilities involving interaction with *physical* equipment or elements.² By including “laboratory science” in the prototypical school formula, the Legislature effectively declared that buildings are part of basic education. RCW 28A.150.260(4)(a)(ii).

The funding formula also includes principals and other “building-level administrators,” as well as custodians and safety staff. RCW

² See <https://www.lawinsider.com/dictionary/laboratory-science> (laboratory science “provides opportunities for students to interact directly with the material world”); <https://dictionary.cambridge.org/dictionary/english/laboratory> (a laboratory is “a room or building with scientific equipment for doing scientific tests or for teaching science”).

28A.150.260(5)(a). The reference to “building-level” administrators shows an intent for basic education to be delivered in school buildings. *Id.* Also, the Legislature would not allocate money for “custodians” unless a basic education requires clean buildings. *Id.* Safety, too, is a physical need. The Legislature would not allocate money for safety staff unless a basic education requires safe buildings. RCW 28A.150.260(5)(a).

Most obviously, the separate allocation for “facilities, maintenance and grounds” staffing should erase any doubt that the substantive program of basic education includes buildings and grounds. RCW 28A.150.260(6)(a). Facilities maintenance is similarly included in RCW 28A.150.260(8)(a). The Legislature would not identify such allocations as “resources needed” by a prototypical school if it did not intend for a basic education to take place in buildings.

In sum, the Legislature itself has identified laboratories, buildings, facilities and grounds as necessary for the substantive program of education required by article IX, section 1. RCW 28A.150.200(1); RCW 28A.150.260. The fact that the Legislature chose not to fully fund “capital costs” does not alter the analysis. It is the substantive program that drives the State’s funding obligations. The substantive program obviously requires safe, clean, regularly maintained buildings for students to learn in. Therefore this Court should reverse the dismissal and hold that the State

must make ample provision for those buildings and grounds that are needed to deliver the education required by article IX, section 1.

C. Basic Education Must Meet the Needs of Students With Disabilities to be in Supportive School Facilities.

The notion that a basic education program does not require safe and welcoming buildings is especially ludicrous when it comes to students with disabilities. There is no question that basic education includes special education for students with disabilities. RCW 28A.150.220(3)(f). That means the State must fully fund implementation of the individualized education plans (IEPs) designed to help students meet appropriately ambitious goals. *Id.*; 20 U.S.C. 1414(d); *Endrew F. v. Douglas County Sch. Dist.*, 580 U.S. 386, 399, 137 S. Ct. 988 (2017). IEPs often require therapy in specialized rooms.³ In general, every IEP must say *where* the student will be educated, and it is usually in a regular school building. 20 U.S.C. § 1412(a)(5)(A) (students with disabilities must be educated with nondisabled students “to the maximum extent appropriate”). To divorce a basic education from its physical setting, as if one can exist without the other, is to ignore the placement requirements of the IDEA. More

³ The range of services is highly variable and can include specially designed academic instruction, physical and occupational therapy, sign language interpreters, specialized transportation, adapted physical education, assistive technology and aides enabling students with disabilities to learn in general education classrooms. *See, e.g.*, WAC 392-172A-03010; WAC 392-172A-01180; WAC 392-172A-01185; WAC 392-172A-01155; WAC 392-172A-01030.

importantly, it dismisses the importance of school buildings in bringing diverse children together to learn from each other.

A core principle of the IDEA, supported by “a wealth of academic literature and peer-reviewed studies,” is that “the vast majority of children with developmental disabilities perform better academically when they are educated in an inclusive general education environment as opposed to an isolated special education environment.” *D. R. by & through R. R. v. Redondo Beach Unified Sch. Dist.*, 56 F.4th 636, 645 (9th Cir. 2022). Mainstreaming also provides non-academic benefits such as “development of social and communication skills from interaction with nondisabled peers.” *D.R.*, 56 F.4th at 643, quoting *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). This mainstreaming obligation depends on access to school buildings where children of different abilities can learn together. It is simply impossible to provide a basic education for *all* children, including special education for those with disabilities, without the facilities required by IEPs.

Nor is it humane to deny small school districts such as Wahkiakum the funds needed for physical accessibility under the ADA, 42 USC § 12132. Consider the story of Shantell Swenson, born with cerebral palsy and confined to a wheelchair for most of her life. *Swenson v. Lincoln Co. Schl. Dist. No. 2*, 260 F.Supp.2d 1136 (2003). Her family fought a “long,

hard struggle” to make her elementary, junior and high schools accessible. *Id.* at 1139. While enduring a lack of ADA parking, blocked seats and doors, and being excluded from activities, “Every day Plaintiff attended high school, she felt like she was not a normal person.” *Id.* at 1141. Here, the State is inviting similar anguish by denying full funding to tax-poor communities for ADA facilities, as if they are not necessary for basic education. They are necessary. 42 USC § 12132; RCW 28A.150.220(5)(a).

The pandemic-related school closure demonstrated the importance of school buildings to learning. A peer-reviewed study found “students made little or no progress while learning from home.”⁴ The impact was especially hard on students with disabilities who lost accommodations and support when school buildings closed. In Washington state, students with disabilities failed classes or received incomplete or no credit at significantly higher rates than students without disabilities.⁵ After a year of school closures, Gov. Jay Inslee declared a youth mental health crisis

⁴ P. Engzell, A. Frey, M.D. Verhagen, “Learning loss due to school closures during the COVID-19 pandemic,” Proceedings of the National Academy of Sciences of the United States of America, April 27, 2021. See <https://pubmed.ncbi.nlm.nih.gov/33827987/>.

⁵ I. Kwakye and E. Kibort-Crocker, “Facing Learning Disruption: Examining the Effects of the COVID-19 Pandemic on K-12 Students,” Washington Student Achievement Council, March 2021, p. 8. See <https://wsac.wa.gov/sites/default/files/2021-03-30-COVID-Learning-Disruption-Report.pdf>.

and ordered all schools to offer in-person learning, stating: “for many Washington children, it is feared that the lack of in-person learning and other school-based supports may result in gaps in students’ learning and development that may last a lifetime.” Emergency Proclamation 21-05 ([Proclamations | Governor Jay Inslee \(wa.gov\)](#)). Against that painful backdrop, it is untenable to pretend that students can obtain essential knowledge and skills – the cornerstone of basic education – without the school buildings that the State refuses to fully fund.

D. Constitutional Funding Challenges in Other States Have Redressed Facility Needs.

Finally, it is worth noting that courts around the country have recognized facilities as part of constitutionally required school systems. *DeRolph v. State*, 677 N.E.2nd 733, 740, 743 (Ohio 1997) (finding that the Classroom Facilities Act was insufficiently funded to meet needs of districts that are poor in real property value, despite “deplorable” and “alarming” conditions); *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 145 (1993) (finding that poorer districts lacked funds necessary for an adequate educational system, as evidenced by decaying physical plants, non-functioning showers, buckling floors, leaking roofs and inadequate science labs); *Abbott v. Burke*, 710 A.2d 450, 470 (N.J. 1998) (a “grave state of disrepair not only prevents children from

receiving a thorough and efficient education, but also threatens their health and safety”); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 335 (N.Y. 2003) (finding that overcrowding negatively affected student performance); *Columbia Falls Elem. School Dist. No. 6 v. State*, 109 P.3d 257, 262-63 (Mont. 2005) (evidence that the system is constitutionally deficient includes deterioration of school buildings and inadequate funds for repair and construction). As the Ohio Supreme Court said: “Obviously, state funding of school districts cannot be considered adequate if the districts lack sufficient funds to provide their students a safe and healthy learning environment.” *DeRolph*, 677 N.E.2nd at 744. The same principle applies in Washington, where education is the State’s paramount duty.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse dismissal of Wahkiakum School District’s lawsuit and order the trial court to determine which facilities are necessary to provide a basic education.

This document contains 2,590 words, excluding the parts of the document exempted from the word count by RAP 18.7.

Dated this 27th day of January 2023.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on January 27, 2023, I served registered parties through the Court's electronic filing system.

s/ Katherine A. George
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