

FILED
SUPREME COURT
STATE OF WASHINGTON
8/17/2022 4:09 PM
BY ERIN L. LENNON
CLERK

No. 101052-4

SUPREME COURT OF THE STATE OF WASHINGTON

WAHKIAKUM SCHOOL DISTRICT NO. 200

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

**APPELLANT'S
ANSWER TO MEMORANDUM OF *AMICUS CURIAE*
WASHINGTON ASSOCIATION OF
SCHOOL ADMINISTRATORS**

Thomas F. Ahearne, WSBA No. 14844
Bianca Chamusco, WSBA No. 54103
Christopher G. Emch, WSBA No. 26457
Adrian Urquhart Winder, WSBA No. 38071
Foster Garvey PC
1111 Third Avenue, suite 3000
Seattle, WA 98101-3299
Telephone: (206) 447-8934/447-4400
Telefax: (206) 749-1902/447-9700
E-mail: ahearne@foster.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii-iii

TABLE OF ABBREVIATIONS USED
FOR CITED COURT FILINGS iv

I. INTRODUCTION 1

II. ACKNOWLEDGMENT OF WASA’S BROAD
STATEWIDE PERSPECTIVE..... 2

III. RESPONSE TO WHAT WASA SEES FROM
ITS STATEWIDE PERSPECTIVE..... 3

 A. Student Learning..... 3

 B. Education Finance..... 4

 C. Public Import 5

 D. Legislative Role 7

 E. Supreme Court Duty 8

IV. CONCLUSION..... 11

TABLE OF AUTHORITIES

CONSTITUTION

Washington State Constitution,
Article IX, §1 passim

CASES

McCleary v. State, 173 Wn.2d 477, 269 P.3d 227
(2012) 8, 9, 10, 11

Seattle School District No. 1 v. State, 90 Wn.2d
476, 269 P.3d 227 (1978)..... 7, 8, 9, 10

State v. Huntley, 175 Wn.2d. 901, 287 P.3d 584
(2012) 7-8

In re Juvenile Director, 87 Wn.2d 232, 552 P.2d
163 (1976) 9

United States v. Nixon, 418 U.S. 683, 94 S.Ct.
3090, 41 L.Ed.2d 1039 (1974) 9-10

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2
L.Ed. 60 (1803))..... 10

COURT RULES

CR 12(b)(6) 11

RAP 4.2(a)(4) 3, 12, 14

RAP 18.17 15

STATUTES

RCW 28A.525.162 6-7
RCW 28A.525.166 6-7

OTHER AUTHORITIES

State of Washington’s Statement Of Grounds For
Direct Review of the superior court ruling in
the *McCleary* proceedings, 2010 WL 6208741
(2010) 12

Plaintiffs’ Answer to the State of Washington’s
Statement Of Grounds For Direct Review of the
superior court ruling in the *McCleary*
proceedings, 2010 WL 6208736 (2010) 12

**TABLE OF ABBREVIATIONS USED FOR
CITED COURT FILINGS**

ABBREVIATION	FULL TITLE OF COURT FILING
WASA 7/26/2022 <i>Amicus</i> Brief	July 26, 2022 Memorandum Of <i>Amicus Curiae</i> Washington Association Of School Administrators
WASA 7/26/2022 <i>Amicus</i> Motion	July 26, 2022 Motion To File Memorandum Of <i>Amicus Curiae</i> Washington Association Of School Administrators
Wahkiakum Statement Of Grounds For Direct Review	July 12, 2022 Statement Of Grounds For Direct Review Under RAP 4.2 filed by appellant Wahkiakum School District No. 200.

I. INTRODUCTION

Does the ample education funding duty commanded by Article IX, §1 exclude the education facilities needed to safely provide an education?

To some adults, this might not be a “fundamental and urgent” issue worthy of this Court’s prompt attention and ultimate resolution.

But it is to the mostly low-income kids in Wahkiakum. Wahkiakum’s second graders do not get a second chance at second grade. Nor do Wahkiakum’s other students get a second chance at the education they lose when their current lack of needed education facilities leaves them behind. Their education suffers every school day they go without the education facilities needed to provide them the education they need in today’s world.

The *amicus* brief of the Washington Association of School Administrators (“WASA”) addresses whether this is also true for the over 1 million other kids in our State’s public school system.

This filing is the Wahkiakum School District’s response.

II. ACKNOWLEDGMENT OF WASA’S BROAD STATEWIDE PERSPECTIVE

The Wahkiakum School District appreciates that in the eyes of Olympia, it’s just a tiny, economically insignificant rural district with less than 3500 voters on our State’s southwest border.

It also knows that WASA is the statewide association of over 1,900 public school administrators from all across our State who “prepare the annual budgets for school districts; plan and supervise the construction of school facilities; and design the educational programs offered to students.” WASA 7/26/2022 *Amicus* Brief at 3. As WASA’s corresponding motion noted, WASA is therefore “uniquely qualified to aid the court in understanding the relationship between school facility funding and providing all students with an opportunity to obtain the knowledge and skills to succeed in the 21st century”, as well as “how critical facilities funding is for schools to maintain safe, appropriate, and educationally-relevant programs for students.” WASA 7/26/2022 *Amicus* Motion at 3.

The appellant school district accordingly acknowledges that WASA has a broad statewide perspective on the whether this Court should accept direct review under RAP 4.2(a)(4) (“*Public Issues*. A case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.”).

The following pages address whether the boots-on-the-ground reality WASA sees across our State is consistent with what the appellant Wahkiakum School District sees from its southwest border perspective.

III. RESPONSE TO WHAT WASA SEES FROM ITS STATEWIDE PERSPECTIVE

A. Student Learning

Based on its statewide perspective, WASA confirms that “it is impossible to separate the acquisition of skills and knowledge from the facilities in which such subjects are taught” – e.g., teaching chemistry requires safe chemistry facilities, teaching mechanical trade skills requires safe workshop facilities, etc., etc., etc.. WASA 7/26/2022 *Amicus* Brief at 5-7.

This student learning fact is true in Wahkiakum. WASA confirms that it's also true across our State. WASA accordingly shows that from a student learning perspective, this Court cannot dismiss or disregard the education harm being caused in Wahkiakum as just an isolated anomaly.

B. Education Finance

Based on its statewide perspective, WASA reiterates that the dollars a district has for funding its education operating costs “are inextricably intertwined with the dollars available to provide safe and appropriate school facilities” – e.g., the dollars needed for capital costs such as roofing, HVAC, safe electrical wiring, door security locks, and seismic safety). WASA 7/26/2022 *Amicus* Brief at 7-8.

WASA further explains how the lack of needed funding for education facilities forces school districts to apply rob-Peter-to-pay-Paul band-aids (at best), or make fatal Sophie’s Choices (at worse) – either one of which harms the education the district

is able to provide its students. *WASA 7/26/2022 Amicus Brief* at 7-8.

This education finance reality is true in Wahkiakum. WASA confirms that it's also true across our State. Thus, from a education finance perspective, WASA shows that this Court cannot dismiss or disregard the education harm being caused in Wahkiakum as merely an isolated anomaly.

C. Public Import

Based on its statewide perspective, WASA points out that the constitutional question in this case “is of broad public importance because of its massive statewide scale as measured by numbers of students or dollars” – emphasizing that “[a]ny delay in a decision regarding the constitutional status of school facility funding will put more elections, more school buildings, and more students at risk”, and that delays serve only to further suppress “equitable educational opportunities for all students in some of the most racially and ethnically diverse communities in our state.” *WASA 7/26/2022 Amicus Brief* at 8-11.

This inequity regarding marginalized students and the education harms caused by delay apply in Wahkiakum. In fact, the irreparable education harm that the State’s ongoing history of baby steps, undersized band-aids, and delay continues to impose on Wahkiakum’s mostly low-income children is what finally forced the tiny Wahkiakum School District to take on the Goliath-sized State by filing its current lawsuit to protect its students.

Instead of belaboring this point, appellant notes just one example of the State’s undersized band-aids and baby steps which nibble around the edges instead of providing the education facilities public school children need today – i.e., the SCAP system that some State apologists cite as a “robust program” for today’s needed education facility costs. But “robust” it is not, for it (1) excludes kids in districts like Wahkiakum whose voters decline to pass construction bonds; (2) is confined to the legislature’s discretionary budget-balancing appropriation, and (3) is then further restricted to only a percentage portion of

eligible construction costs within that discretionary appropriation. See RCW 28A.525.162 & .166.

In short: WASA confirms that the ongoing education harm being caused by the lack of needed education facilities is not limited to just students in Wahkiakum. Instead, it's a widespread harm all across our State.

Thus, from a public import perspective, WASA shows that this Court cannot dismiss or disregard the education harm being caused in Wahkiakum as merely an isolated anomaly.

D. Legislative Role

WASA points out that it is not the legislature's role to decide if the education funding duty commanded by Article IX, §1 excludes the education facilities needed to safely provide an education – quoting this Court's *Seattle School District* and *Huntley* decisions holding that interpreting the Constitution is “a judicial issue rather than a matter to be left to the legislative discretion”, and that while the legislature can change a statute, the legislature cannot modify or impair our

constitution. WASA 7/26/2022 *Amicus* Brief at 11-12;¹ accord, *McCleary v. State*, 173 Wn.2d 477, 515-516, 269 P.3d 227 (2012) (“[I]t is a function of the judiciary, not the legislature, to interpret, construe and give substantive meaning to Const. art. 9, § 1”) (quoting *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 515).

WASA’s position is consistent with the appellant’s. Specifically: it is not the legislative branch’s role to decide if the ample education funding duty commanded by Article IX, §1 excludes education facilities needed to safely provide an education.

E. Supreme Court Duty

WASA points out that it is instead this Court’s role to decide if the ample education funding duty commanded by Article IX, §1 excludes education facilities needed to safely provide Washington children an education – quoting this Court’s

¹ Quoting *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 503, 269 P.3d 227 (1978) and *State v. Huntley*, 175 Wn.2d. 901, 914, 287 P.3d 584 (2012).

Seattle School District decision that it “has the ultimate power and the duty to interpret, construe and give meaning to words, sections, and articles of the constitution” – even when this Court’s interpretation “serves as a check on the activities of another branch of government or is contrary to the view of the constitution taken by another branch.” WASA 7/26/2022 *Amicus* Brief at 11;² accord, *McCleary*, 173 Wn.2d at 515 (“The judiciary has the primary responsibility for interpreting article IX, section 1 to give it meaning and legal effect. ... it is emphatically the province and duty of the judicial department to say what the law is ... 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”) (quoting & citing *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 496; *In re Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976); *United States v. Nixon*, 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d

² Quoting *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 503.

1039 (1974); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803)), and *McCleary*, 173 Wn.2d at 520 (“we cannot abdicate our judicial duty to interpret and construe article IX, section 1”) (citing *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 506).

The Wahkiakum School District acknowledges the obvious: its interpretation of the State’s paramount education funding duty under Article IX, section 1 – as well as the district’s interpretation of its students’ corresponding positive constitutional right to an amply funded education – is contrary to the interpretation preferred by politicians in the legislative branch and perhaps the executive branch’s Attorney General.

But the Wahkiakum School District agrees with WASA that it is this Court’s constitutional duty to accept this appeal directly in order to resolve this appeal’s fundamental question of Washington constitutional law, without instead requiring further delays that harm the education of the over 1 million kids in our public schools.

IV. CONCLUSION

This Court held in its published *McCleary* decision that:

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.

McCleary, 173 Wn.2d at 483.

The lower court based its dismissal as a matter of law on the following fact being true: the defendant State does not fund the education facilities required to safely provide Wahkiakum students the above “education”. Wahkiakum Statement Of Grounds For Direct Review at 4-8 (citing the specific fact statements that the State’s CR 12(b)(6) motion and lower court ruling presumed to be true).

The Washington Association of School Administrators has now confirmed from its statewide perspective that this fact in Wahkiakum is not an isolated anomaly – for the same is true in school districts all across our State.

Ironically, WASA here is making the same dispositive point that the State previously made in its successful demand for direct review by this Court in *McCleary*:

Public school education is the State's paramount constitutional duty. Public school funding affects the lives and futures of Washington families throughout the State's 295 school districts. The case thus involves fundamental and urgent issues of broad public import that require prompt and ultimate determination under RAP 4.2(a)(4).

State's Statement Of Grounds For Direct Review of the superior court's *McCleary* ruling, 2010 WL 6208741 (2010) at *10.³

The appellant school district recognizes that perhaps the State's legal interpretation might in the end prevail:

- *Perhaps* ... the "all children" promise in Article IX, §1 should be read to mean children privileged enough to live in districts with the high property values or the

³ See also the *McCleary* Plaintiffs' corresponding Answer, 2010 WL 6208736 at *4 ("the defendant State is correct that this case presents a fundamental and urgent issue of broad public import which requires a prompt and ultimate determination by this Court. Although plaintiffs do not agree with the less-than-objective presentation of this case in the State's Statement Of Grounds For Direct Review, Plaintiffs do agree that prompt, direct review is warranted under RAP 4.2(a)(4).").

generous local voters currently required to provide the education facilities needed for the 21st century education that today's children will need as adults.

- *Perhaps* ... the word “without” in Article IX, §1 should be read to also apply to education facilities – especially those required to provide a 21st century education to children in our State's lower income caste like Wahkiakum's kids.
- *Perhaps* ... when the unpublished procedural order cited by the State (1) said that “in *McCleary*, this court did not address capital costs” and (2) added that the prototypical school funding allocation model for the cost of operating an education program in a school building does not have to cover a specific type of capital cost relating to a K-3 classroom, this Court intended to issue a reported decision interpreting Article IX, §1 to categorically exclude capital costs required to provide K-12 students the “education” promised by Article IX, §1.

But the appellant school district does not believe that any of the above adhere to what the plain language of Article IX, §1 says.

And this Court – not the Court of Appeals – is the only court that can (a) explain the intended meaning of this Court's statement that *McCleary* “did not address capital costs”, and (b) decide the legal interpretation of Article IX, §1 for our State's 295 school districts and over 1 million school children.

The appellant school district accordingly agrees with the conclusion WASA draws from its statewide, boots-on-the-ground perspective: “This case presents an issue of practical and constitutional importance to all children, families, taxpayers, and residents of the state of Washington”, and this Court should accordingly grant direct review pursuant to RAP 4.2(a)(4) to expeditiously decide for our entire State whether the paramount education duty commanded by Article IX, §1 excludes the education facilities needed to safely provide Washington children the 21st century education they will need as adults. WASA 7/26/2022 *Amicus* Motion at 2; WASA 7/2022 *Amicus* Brief at 4 & 12.

When it comes to a child’s education, time really is of the essence. Maybe not urgent to adults, but urgent to the children upon whom Article IX, §1 confers a positive constitutional right to an amply funded education. For all the above reasons, the Wahkiakum School District agrees with WASA that this Court should not sit on the sidelines or kick the can down the road by

punting this case to the Court of Appeals. This Court granted direct review in the *McCleary* case addressing the prototypical school model's funding of operating costs required to provide Washington children the education needed in today's world. This Court should likewise grant direct review in this case addressing the State's funding of capital costs required to provide Washington children the education they need in today's world.

RAP 18.17(b) & (c)(9) Word Limit Certification:

I certify that this Answer, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits), contains 2357 words (less than 2500).

RESPECTFULLY SUBMITTED this 17th day of August, 2022.

Foster Garvey PC

s/ Thomas F. Ahearne

Thomas F. Ahearne, WSBA No. 14844

Bianca Chamusco, WSBA No. 54103

Christopher G. Emch, WSBA No. 26457

Adrian Urquhart Winder, WSBA No. 38071

Attorneys for Wahkiakum School District No. 200

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned been, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served copies of the attached document upon the defendant State's attorneys at the email addresses listed below:

Cristina Marie Hwang Sepe, WSBA #53609
Lauryn Kay Fraas, WSBA #53238
Washington State Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
Cristina.Sepe@atg.wa.gov
Lauryn.Fraas@atg.wa.gov
Nicole.beck-thorne@atg.wa.gov
ComCEC@atg.wa.gov

Leslie Ann Griffith, WSBA #47197
Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504-0100
Leslie.Griffith@atg.wa.gov

William McGinty, WSBA #41868
Washington State AGO
7141 Cleanwater Drive SW
P.O. Box 40124
Olympia, WA 98504-0124
William.McGinty@atg.wa.gov

Lester Porter Jr, WSBA # 23194
F. Chase Bonwell, WSBA # 58358
Porter Foster Rorick LLP
601 Union Street, Suite 800
Seattle, WA 98101
(206) 622-0203
Buzz@pfrwa.com
chase@pfrwa.com
cindy@pfrwa.com
maia@pfrwa.com

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

Executed on August 17, 2022, at Seattle, Washington.

s/ McKenna Filler
McKenna Filler

FOSTER GARVEY PC

August 17, 2022 - 4:09 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 101,052-4
Appellate Court Case Title: Wahkiakum School District No. 200 v. State of Washington
Superior Court Case Number: 21-2-00053-9

The following documents have been uploaded:

- 1010524_Answer_Reply_20220817160825SC008863_0121.pdf
This File Contains:
Answer/Reply - Other
The Original File Name was Wahkiakum School District Answer To WASA 7.26.2022 Amicus 100534387_6.pdf

A copy of the uploaded files will be sent to:

- Alicia.Mendoza@atg.wa.gov
- Nicole.Beck-Thorne@atg.wa.gov
- SGOOlyEF@atg.wa.gov
- Victoria.Johnson@atg.wa.gov
- alicia.mendoza@ago.wa.gov
- bianca.chamusco@foster.com
- buzz@pfrwa.com
- chase@pfrwa.com
- cindy@pfrwa.com
- cristina.sepe@atg.wa.gov
- lauryn.fraas@atg.wa.gov
- leslie.griffith@atg.wa.gov
- litdocket@foster.com
- maia@pfrwa.com
- william.mcginity@atg.wa.gov

Comments:

Appellant s Answer to Memorandum of Amicus Curiae Washington Association of School Administrators

Sender Name: Thomas Ahearne - Email: ahearne@foster.com

Address:

1111 3RD AVE STE 3000
SEATTLE, WA, 98101-3296
Phone: 206-447-8934

Note: The Filing Id is 20220817160825SC008863