THE SUPREME COURT OF WASHINGTON

MATHEW & STEPHANIE McCLEARY, et al.,	)	**ORDER**
Respondents/Cross-Appellants,	)	Supreme Court No. 84362-7
v.	)	
STATE OF WASHINGTON,	)	King County No. 07-2-02323-2 SEA
Appellant/Cross-Respondent.	)	

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, 269 P.3d 227 (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.

7/9/12

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, 585 P.2d 71 (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 of K-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.[1]

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

[1] The State contends that the matter of salaries must be tied to reform of the local levy system, making this a particularly complex matter requiring time and study and discussion. Local levy reform is not part of the court's January 9, 2014, order, though in *McCleary* the court was critical of the use of local levy funds to make up for shortfalls caused by the State's failure to pay the full cost of staff salaries, and it determined that the State may not constitutionally rely on local levies to pay for basic education generally. *McCleary*, 173 Wn.2d at 536-39. We offer no opinion on whether full state funding of basic education salaries must be accompanied by levy reform, but how the State achieves full state funding is up to the legislature. And we note that the State has had ample time to deal with this matter, not just since *McCleary* but well before. *See Seattle Sch. Dist. 1*, 90 Wn.2d at 525-26 (holding unconstitutional the use of special excess local levies to fund basic education).

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, 63 P.2d 397 (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."). *See also In re Dependency of A.K.*, 162 Wn.2d 632, 645, 174 P.3d 11 (2007). 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.

DATED at Olympia, Washington this 13th day of August, 2015.

Madsen, C.J.
CHIEF JUSTICE

Wiggins, J.

González, J.

Gordon McCloud, J.

Fairhurst, J.

Stephens, J.

Yu, J.