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SUPERIOR COURT OF WASHINGTON  
IN AND FOR THURSTON COUNTY

SCHOOL DISTRICTS' ALLIANCE FOR  
ADEQUATE FUNDING OF SPECIAL  
EDUCATION, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.

Defendants.

NO. 04-2-02000-7

COURT'S OPINION

Plaintiffs seek a judgment from this court declaring that the State's funding of special education in Washington violates the Washington Constitution, article IX, section 1, which declares that:

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.

No remedy other than a declaratory judgment is sought, so the acts of the State, acting through the legislature and the Office of Superintendent of Public Instruction, that are subject to scrutiny are those acts that reflect the State's current funding approach. The last complete school year when most preparation of this case occurred was sy2005-6. What occurred before may have historical relevance, but is not what is judged here.

1 Plaintiffs have summarized their claims in seven parts,<sup>1</sup> the first, overarching claim contends  
2 that the legislature has underfunded support for special education to such a degree that it has failed  
3 its paramount duty under article IX, section 1, to make ample provision for education. Hereafter I  
4 refer to this overarching claim as the funding formula claim. Plaintiffs contend that the funding  
5 formula deficit is so large that proof of the existence of the deficit, without more, is proof that the  
6 funding formula is unconstitutional. Following the funding formula claim are five subclaims and a  
7 request for retained jurisdiction. I designate the five as subclaims because each challenges the  
8 constitutionality of a discrete part of the State's approach for special education funding.

9 The litigants and counsel are very familiar with the background discussed here, but since  
10 this case has engendered public interest, a very basic explanation of the process for school funding  
11 may be helpful.

12 The legislature's approach to school funding is fairly described as a formula that calculates  
13 the cost of educating a student through the application of uniform statewide ratios of students to  
14 staff and the state average costs of staff. The product is a basic education allocation (BEA) for each  
15 student that, after adjustments unique to each district, is paid to a district for each FTE student<sup>2</sup>

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17 <sup>1</sup> **Synopsis of plaintiffs' claims**

18 1. The State has been underfunding special education programs over the last four years in at least the following  
19 amounts:

20 2002-03 \$101,977,191

21 2003-04 \$108,908,593

22 2004-05 \$134,133,659

23 2005-06 At least \$117,000,000 for those school districts applying for Safety Net funding

24 2. Safety Net is unconstitutional in that it does not provide a sufficient means of access for all school districts'  
25 full demonstration of need.

26 3. The 12.7% cap on excess cost funding is unconstitutional without a Safety Net that allows school districts to  
27 recover their legitimate demonstration of need.

28 4. The State cannot categorically refuse to fund the indirect costs of special education programs. The State  
cannot artificially limit Safety Net demonstration of need based on a lower indirect rate.

5. The State cannot categorically refuse to fund necessary special education supplemental contracts.

6. The State cannot divert federal funds to pay for state obligations for salary increases, as federal funds are no  
more dependable and reliable than local levy funding.

7. This Court should retain jurisdiction to satisfy itself that the Legislature takes reasonably prompt action to  
correct features of the funding system that the Court has found to be unconstitutional.

<sup>2</sup> An average full-time equivalent student. RCW 28A.150.260.

1 enrolled in the district. The choices and responsibility for educating are left to the local districts  
2 through Individualized Education Programs (IEPs), subject to statewide minimum standards  
3 imposed by the legislature pursuant to its constitutional duty in article IX, section 2, to provide a  
4 “general and uniform” educational system in Washington.<sup>3</sup> The BEA is the same for all students in  
5 a district, regardless of grade, gender, or skill at learning. It is based on the average cost of  
6 educating an average student. RCW 28A.150.260.

7 The funding formula is expanded for special education students. As with the BEA, a district  
8 receives revenue calculated as a per capita allocation for each special education student in the  
9 district.<sup>4</sup> This special education allocation is the amount required in excess of the BEA to provide a  
10 basic education to a student with a disability. Like the BEA, this excess cost allocation is based on  
11 an average cost – it is the additional cost of educating an average special education student, with  
12 average disabilities, in excess of the BEA for that student. Since 1995, the legislature has allocated  
13 this excess cost on a formula of 0.9309 times the BEA.

14 This formulaic approach has never been approved by our Supreme Court. Cf, *Brown v.*  
15 *State*, 155 Wn.2d 254, 261, 119 P.3d 341(2005) (“But this court has never held, nor do we now  
16 hold, that the Basic Education Act defines the scope of the State’s paramount constitutional duty to  
17 provide education.”) A formulaic approach for special education was approved generally in *School*  
18 *Funding III*<sup>5</sup> by Judge Doran.

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20 <sup>3</sup> And also subject to an extensive set of federal regulations imposed on the states as a condition of federal funding for  
21 education. Federal funding for Washington is annually around \$200 million. OSPI has promulgated rules that mostly  
22 mirror federal regulations.

23 <sup>4</sup> Special education population is counted differently; it is a headcount of all students receiving special education service  
24 in the district, without conversion to full-time equivalency. A special education student is, “Any student, enrolled in  
25 school or not, (i) who has been identified as having a disability, (ii) whose disability adversely affects the student’s  
26 educational performance, and (iii) whose unique needs cannot be addressed exclusively through the education in general  
27 education classes with or without individual accommodations and is determined to be eligible for special education  
28 services; . . .” WAC 392-172-035(2).

<sup>5</sup> Three school funding cases were decided in this Superior Court by Judge Robert Doran between 1977 and 1988. Only  
the first case was appealed to an appellate court; it is reported as *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 458  
P.2d 71 (1978). The second and third cases are *Seattle School Dist. v. State*, Thurston County Cause No. 81-2-01713-1  
(1983), and *Washington State Special Education Coalition*, Thurston County Cause No. 85-2-00543-8 (1988).  
Throughout this trial the parties have referred to these three cases as *Doran I*, *Doran II*, and *Doran III*. However, the

1 A special education student is first and foremost a basic education student all during the  
2 school day. Thus, a district must expend all of the BEA and all of the excess cost allocation  
3 received for its special education students before the district can contend that the legislature has  
4 underfunded its special education program. Because both the BEA and the excess cost formulas are  
5 based on average costs and average students (and for the excess cost formula, average disabilities),  
6 a district with a large special education population will be able to educate a significant number of  
7 its special education students for less than the combined BEA and excess cost allocations, and of  
8 course the opposite is true for students who need more than average services; state funding is based  
9 on averages.

### 10 **The standards for Judicial Review**

11 The process for judicial review in a constitutional challenge to a legislative act begins with  
12 an understanding of the power and duty of the court as provided in the Washington Constitution and  
13 the separation of powers doctrine.

14 The ultimate power to interpret, construe and enforce the constitution of this State  
15 belongs to the judiciary.

16 *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 496, 458 P.2d 71 (1978).

17 Nevertheless, we are sensitive to the fact that our state government is divided into  
18 legislative, executive and judicial branches with the sovereign powers allocated  
19 among the co-equal branches. We are equally aware that those charged with the  
20 exercise of power in one branch must not encroach upon power exercisable by  
21 another. But, the compartments of government are not rigid. In fact, the  
22 practicalities of government require that each branch take into account the power of  
23 the others. None was intended to operate with absolute independence.

24 *Id.* at 505-506

25 Even within the separation of powers doctrine, a court cannot abdicate its duty to interpret,  
26 construe, and enforce the constitution, and where the constitution has been violated a court must act  
27 to enforce the constitution regardless of the views of a co-equal branch of government. *Id.* at 508.

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28 Supreme Court and Judge Doran himself referred to the cases as *School Funding I*, *School Funding II*, and *School Funding III*. The latter references are used in this opinion.

1 Nevertheless, the hallmark of judicial review of legislative acts is caution. A court must not  
2 encroach upon the legislature’s exclusive power to legislate and thereby violate separation of  
3 powers in the guise of constitutional review. This hallmark of caution finds expression in several  
4 doctrines well engrained in our law:

- 5 • A court should conduct constitutional review of legislative acts with deference to the role of the  
6 legislature in the separation of powers doctrine, and in the unique role of the legislature in  
7 crafting law, a role totally foreign to the traditional role of courts.

8 In specific area of article IX legislation, the Supreme Court has declared:

9 This court will not micromanage education and will give great deference to the acts  
10 of the legislature.

11 *Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341(2005). Great deference means great caution,  
12 but it does not mean that constitutional review of article IX is less precise or less important.

- 13 • A court should “presume” that an act of the legislature is constitutional.  
14 Presumptions in the law normally apply to facts, not the law; and constitutional review is a matter  
15 of law. Here the presumption is that the legislature is well aware of its responsibility to craft  
16 legislation that is constitutional, has intended to do so, and believes that it has.

- 17 • A court should overturn a legislative act only if the court concludes beyond a reasonable doubt  
18 that the act is unconstitutional.

19 A conclusion beyond a reasonable doubt may be reached after consideration of the deference and  
20 presumption discussed above; but if that quantum of assurance is reached, a court may not fail to  
21 declare the act unconstitutional.

22 I have been guided by these principles in deciding this case.

23 Throughout this trial, the litigants disagreed on the standard of review that this court must  
24 apply. Plaintiffs contend that the preponderance standard should apply to my decision making,  
25 relying on a passage from *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 528,  
26 458 P.2d 71 (1978). Defendant counters that the standard is proof beyond a reasonable doubt and  
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1 that this standard applies to findings of fact that support a court’s analysis of constitutional issues.  
2 Neither is entirely correct.

3 The standard of review in a case where the constitutionality of a statute is challenged is that  
4 the burden is on the party challenging the statute to prove its unconstitutionality beyond a  
5 reasonable doubt. A recent statement of these well established principles is found in *Island County*  
6 *v. State*, 135 Wn.2d 141, 146-147, 955 P.2d 377 (1998), where the standard of review for  
7 constitutional challenges is discussed at length and distinguished from the standard of evidence that  
8 requires proof beyond a reasonable doubt in a criminal case.

9 The reasonable doubt standard, when used in the context of a criminal proceeding as  
10 the standard necessary to convict an accused of a crime, is an evidentiary standard  
11 and refers to ‘the necessity of reaching a subjective state of certitude of the facts in  
12 issue.’ *State v. Smith*, 111 Wn.2d 1, 17, 759 P.2d 372 (1988) (Utter, J., dissenting)  
(quoting *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368  
(1970)).

13 In contrast, the beyond a reasonable doubt standard used when a statute is  
14 challenged as unconstitutional refers to the fact that one challenging a statute must,  
15 by argument and research, convince the court that there is no reasonable doubt that  
16 the statute violates the constitution.

15 *Id.* at 147

16 Constitutional challenges are questions of law. Perusal of a representative sample of  
17 appellate decisions addressing constitutional challenges to statutes shows that they seldom involve  
18 disputed issues of fact. This is axiomatic for “facial” challenges to the constitutionality of statutes,  
19 and it is usually the case for “as applied” challenges.<sup>6</sup> Occasionally an as applied challenge  
20 involves findings about disputed facts that must be resolved before the constitutional challenge is  
21 addressed. When that is the case, it does not follow that the evidentiary standard for disputed facts  
22 changes to conform to the standard of review for the constitutional challenge. The two are apples  
23 and oranges; the first involves findings of fact, the latter conclusions of law.

24 In civil actions there are several recognized burdens of proof, but the paramount evidentiary  
25 standard is proof by a preponderance of evidence. For example, in a civil enforcement action  
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28 <sup>6</sup> These challenges are often decided on agreed facts or on summary judgment.

1 brought by a government agency against an individual for violation of a statute, the evidentiary  
2 standard for proving the violation may be proof by a preponderance. If so, a defense asserting that  
3 the statute is unconstitutional as applied against the individual does not change the evidentiary  
4 burden of proof required for proving violation of the statute. If the government may prove violation  
5 of the statute by a preponderance, that burden does not change to proof beyond a reasonable doubt  
6 merely because the constitutionality of the statute is challenged. And in a declaratory judgment  
7 action brought under RCW 7.24.020 by an individual challenging the validity of a statute on as  
8 applied constitutional grounds, issues of fact are tried and determined in the same manner as issues  
9 of fact are tried and determined in other civil actions. RCW 7.24.100. The evidentiary standard for  
10 contested issues of fact does not change because the declaratory judgment is sought on  
11 constitutional grounds rather than some other asserted ground. For contested issues of fact, the  
12 evidentiary burden remains proof by a preponderance even though the standard for reviewing the  
13 constitutionality of the statute is that the statute is presumed constitutional unless the court is  
14 convinced beyond a reasonable doubt that the statute is unconstitutional.

15 In this case plaintiffs have sought a declaratory judgment that the appropriations of the  
16 legislature to fund payment of the special education costs of the districts are unconstitutional on  
17 both “facial” and “as applied” grounds. In the as applied challenges there are many disputed factual  
18 issues that are material to the questions of law – for example, what number of special education  
19 students in the school districts’ accounting actually have current, properly formulated IEPs? Proof  
20 of this issue must be determined on a preponderance standard; it does not shift to the evidentiary  
21 standard of proof beyond a reasonable doubt.

22 *Seattle School Dist. No. 1 of King County v. State*, supra, is in accord. The Supreme Court  
23 addressed the issue of whether a higher evidentiary standard applied and rejected such a contention.

24 Thus, contrary to appellants’ contention, the normal civil burden of proof, i.e.,  
25 preponderance of the evidence, applies.

1 *Id.* at 528. The Supreme Court did not specifically address the standard of review because that  
2 issue was not raised. However, at the trial court level, and in all the *School Funding* cases, Judge  
3 Doran applied the beyond a reasonable doubt standard for constitutional review.

4 In this case I have applied the preponderance standard for questions of fact and the beyond a  
5 reasonable doubt standard for review of constitutional issues of law.

### 6 **The “Facial” Constitutional Challenge**

7 The task of a court when deciding a facial challenge – *i.e.*, deciding whether a statute or act  
8 of the legislature is unconstitutional on its face, without regard to the manner in which enforcement  
9 of the statute or act is attempted – is whether the language of the statute or act violates the  
10 constitution. In this exercise, a court interprets and construes (“gives legal meaning to”) the  
11 language of the constitution, but views the language of the statute or act using the meaning directed  
12 by the legislature,<sup>7</sup> or where the legislature is silent, the plain meaning of the language.

13 In *Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000), the Supreme Court opined:

14 [A] facial challenge must be rejected unless there exists *no set of circumstances* in  
15 which the statute can constitutionally be applied.

16 Facial challenges are decided by a two step process, as declared in *Tunstall*, at page 221: First,  
17 determine what article IX, section 1 (“the paramount duty to make ample provision [for special  
18 education students]”) requires; and second, determine whether there is no set of circumstances in  
19 which the acts of the legislature could satisfy article IX, section 1.

20 It is settled law that in fulfilling this broad constitutional duty, the legislature must define  
21 basic education and create a basic program of education. *Seattle School Dist. No. 1 v. State*, 90  
22 Wn.2d 476, 482, 458 P.2d 71 (1978). Further, the legislature has the authority to select the means  
23 to discharge this duty and the judiciary should restrain its role to providing only broad  
24 constitutional guidelines within which the legislature may work. *Seattle School Dist. No. 1*, 90

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26 <sup>7</sup> “[I]n interpreting a statute it is the duty of the court to ascertain and give effect to the intent and purpose of the  
27 Legislature, as expressed in the act. The act must be construed as a whole, and effect should be given to all the language  
28 used.” *Tommy P. v. Board of Commissioners*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

1 Wn.2d at 518; *Tunstall*, 141 Wn.2d at 223. The legislature has addressed its constitutional duty to  
2 make ample provision for special education by enacting chapter 28A.150 RCW, the Basic  
3 Education Act, and specifically including chapter 28A.155 RCW and RCW 28A.150.370 and .390,  
4 and by making annual appropriations for special education that appear in section 507 of the current  
5 General Government Appropriation Act.<sup>8</sup> The plaintiffs do not assert that the codified laws, chapter  
6 28A.155 RCW and RCW 28A.150.370 and .390 are facially unconstitutional; rather they contend  
7 that section 507 is facially unconstitutional in both the amount appropriated and the funding  
8 formula contained in the conditions and limitations of section 507.<sup>9</sup> In support of these contentions,  
9 the plaintiffs assert:

10       Accordingly, if there is no set of circumstances where the disputed [sic] statutory  
11       provision amply provides for *all* students in special education programs, the Court  
12       must find that the funding formula is facially unconstitutional. Since the State's  
13       funding formula does not, and cannot, adequately fund all students in all school  
14       districts all of the time, Plaintiffs' facial challenges are valid.

15 *Plaintiffs' Supplemental Trial Brief*, p. 7. Plaintiffs' argument on the facial unconstitutionality of  
16 section 507 seems encapsulated in the following exchange at oral argument:

17       The Court: [You seem to contend that] The [12.7 percent] cap is only constitutional  
18       if you have a mechanism that eliminates the cap.

19       Ms Abel: Right. To be able to apply, to show that they have a need. . . . And that  
20       was the original intention when they created the Safety Net system, as you heard  
21       evidence. There was a mechanism to apply for students that were over the cap.

22       I am not persuaded. Section 507 is not unconstitutional on its face. The test in a facial  
23       challenge is whether there is any set of circumstances that permits a conclusion that school districts

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24 <sup>8</sup> At trial, Laws of 2005, chapter 518, section 507, was used (Ex. 550, pdf 15); currently it is Laws of 2006, chapter 372,  
25       section 507. The sections are the same except that the amount appropriated for FY2007 was increased by about \$7 million  
26       in the 2006 appropriation act. Over the past 10 years, the appropriation for special education appears in much the same  
27       form in each appropriation act. The language of the special education section contains the amount of the appropriation  
28       followed by conditions and limitations that have been mainly consistent from one year to the next. This declaratory  
      judgment action pertains only to the law as it currently exists. In discussion of the issues, I have used the 2005  
      appropriation amount in order to be consistent with the evidence. The conditions and limitations are exactly the same in  
      both appropriation acts. At trial and in this opinion, the special education appropriation and the conditions and limitations  
      are referred to as section 507.

<sup>9</sup> In my research I did not discover any appellate decision that declared an appropriation act (or bill) of the legislature  
unconstitutional on its face, as distinguished from a codified statute enacted by the legislature. Defendants did not raise  
this issue, so I have proceeded as if this claim is available to plaintiffs. I have not resolved that question.

1 receive sufficient money from the State to pay the districts’ costs of providing a basic education to  
2 the districts’ special education students. The language of section 507 permits that conclusion. In  
3 the language of section 507, there is a limitation (the 12.7 percent cap) and a safety net (with an  
4 appropriation for safety net that has not been exhausted). The conditions and limitations in section  
5 507 that address the 12.7 percent cap and the safety net do not create the impediment to access of  
6 safety net awards that are the core of plaintiffs’ argument on this facial challenge. Subsection (8) of  
7 section 507 appropriates approximately \$47.5 million for safety net awards and directs the  
8 superintendent of public instruction to an additional source if necessary. Subparts (a) and (b) of  
9 subsection (8) direct, first, “The committee shall consider unmet needs for districts that can  
10 convincingly demonstrate that all legitimate expenditures for special education exceed all available  
11 revenues from state funding formulas” and, second, “The committee shall then consider the  
12 extraordinary high cost needs of one or more special education students.” These provisions do not,  
13 on their face, limit districts’ access to safety net funds in the manner plaintiffs contended at trial.  
14 Those limitations arise from application of the safety net process to the districts’ alleged excess  
15 need, and should be analyzed under the “as applied” challenge. Subparts (c), (d), and (e) of  
16 subsection (8), do potentially restrict safety net awards, but the language of these subparts is not  
17 nearly sufficient to convince me beyond a reasonable doubt that they unconstitutionally restrict  
18 “ample provision”.

19 Subsection (9) of the conditions and limitations in section 507 delegates to the  
20 superintendent of public instruction the power to adopt rules and procedures to administer the safety  
21 net process – and the effect of some rules are clearly part of this case. However, delegation of this  
22 authority and rules promulgated by the superintendent cannot make the challenged act of the  
23 legislature facially unconstitutional.

24 Finally, the amount appropriated in section 507 is not on its face so deficient that the  
25 appropriation is facially unconstitutional. The evidence in this case is that the fund for safety net  
26 awards was not exhausted. The reason for that occurrence is properly addressed in the as applied  
27 challenge, but not in this facial challenge.  
28

# The “As Applied” Constitutional Challenges

## The Funding Formula Claim

This claim contends that the State has been underfunding special education programs over the last four years in at least the following amounts:

2002-03	\$101,977,191
2003-04	\$108,908,593
2004-05	\$134,133,659
2005-06	At least \$117,000,000 for those school districts applying for safety net funding.

Consistent with the evidence offered at trial, I have focused on the last school year with complete records, sy2005-06, where the deficit is alleged to be \$134 million. Included in that figure is \$21.6 million attributed to the 12.7 percent cap on excess cost allocation. This claim is addressed in a following section and so the \$21.6 million can be deducted from the \$134 million to give a more accurate picture of the magnitude of deficit claimed here. This remaining portion, \$112.4 million in sy2005-06, is directly attributable to plaintiffs’ claim that the excess cost allocation is so inadequate that it is a violation of the State’s paramount duty to make ample provision for special education.

I conclude that the claimed amount of excess cost funding deficit does not prove that the legislature’s allocation for special education is unconstitutional. For each special education student under the 12.7 percent cap, the State pays a district an excess cost allocation equal to 0.9309 of the BEA. This is in addition to the full BEA for that student. Except for the cap, plaintiffs acknowledge that this excess cost formula is consistent with national data that fixes the cost of educating a special education student at approximately 190 percent of the cost of educating a basic education student. It is also consistent with the opinion of plaintiffs’ expert, Dr. Parrish, whose study, according to plaintiffs, “found that nationwide the total excess expenditures for special education in addition to basic education expenditures were about 90% of total basic education expenditures.” *Plaintiffs’ Proposed Findings of Fact*, No. 207. Nevertheless, plaintiffs argue that special education is grossly under funded and rely upon the opinion of Dr. Parrish and statewide accountings of special education expenditures for proof of that contention. Plaintiffs explain that

1 the State’s formula is constitutionally deficient because the 0.9309 multiplier is applied against the  
2 BEA, not the expenditures for basic education. Plaintiffs also argue that the required cost  
3 accounting methodology proves their claim by showing such a large deficit of the excess cost  
4 allocation compared to special education costs that the deficit itself is sufficient to prove that the  
5 appropriation is constitutionally deficient. I am not persuaded.

6 The 0.9309 multiplier is not an unconstitutional application of the ample provision  
7 requirement of article IX, section 1. There is persuasive evidence that the legislature acted  
8 rationally in establishing this multiplier. The legislature had before it the 1995 *Special Education*  
9 *Fiscal Study*, Exhibit 92, pdf 21, that reported a 0.87 multiplier for Washington education. Further,  
10 as noted above, the multiplier is consistent with national standards, and evidence has shown that it  
11 has remained relatively constant over time.<sup>10</sup> At the end of the trial, it seems evident that the  
12 alleged shortfall in the special education appropriation, if it is found to exist at all, is the product of  
13 an inadequate BEA, not an inadequate excess cost multiplier. The adequacy of the BEA is not an  
14 issue before this court. I have read reports that other cases in other courts are addressing the  
15 constitutionality of basic education funding, but that issue is not here.<sup>11</sup>

16 Plaintiffs argue that Dr. Parrish’s study, and others, applied a multiplier to the actual costs of  
17 basic education, while the 0.9309 multiplier in this state has been applied to the BEA, a revenue  
18 rather than a cost allocation. I am not persuaded that there is a difference; the BEA is required by  
19 law to be the cost of basic education (“fully funded”, RCW 28A.150.250), and that issue is not  
20 before this court.

21 Plaintiffs have not shown the funding deficit for special education that they claim. They  
22 rely upon the F196 reports of all districts statewide submitted annually to OSPI. These voluminous  
23 reports, provided here in Exhibit 501, include an accounting of special education expenditures from  
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25 <sup>10</sup> Plaintiffs argue that the 0.9309 multiplier not a rational legislative choice, but rather is a “construct” selected by the  
26 legislature to comply with the federal requirement of “maintenance of effort”. Carried to the last 9/10,000 of the formula  
that may be so. Still, that does not detract from the rationality of the number for all the reasons identified here.

27 <sup>11</sup> Plaintiffs’ proposed findings of fact numbered 226 and 227 address this matter indirectly, but the evidence referred to is  
28 peripheral to the issues here and falls well short of that required for constitutional review of basic education funding.

1 Program 21 (Special Ed – Supplemental, State) and Program 24 (Special Ed – Supplemental,  
2 Federal). The reports also include an accounting of revenue received by the district, including the  
3 BEA, the excess cost allocation, federal IDEA revenue, federal Medicaid reimbursement revenue,  
4 and often a small amount received from other districts for transfer students. Plaintiffs compiled  
5 these statewide reports of special education expenditures and revenue in Exhibit 131a, totaled  
6 expenditures and revenues, and concluded that the deficits reported above are the result.

7 This evidence does not prove the contention that special education is underfunded at a level  
8 anywhere near the magnitude claimed. Plaintiffs have not accounted for all the revenue available to  
9 pay the cost of educating special education students. While F196 reports include all of the revenue  
10 sources identified above, including the BEA, plaintiffs did not include the BEA in Exhibit 131a.  
11 For example, the \$134 million deficit shown by the totals for sy2005-06 in Exhibit 131a includes a  
12 \$1,305,776 deficit for Bellingham School District. In the accounting for that district, \$8,339,487 is  
13 stated as the cost of special education, and is the sum of Program 21 and 24 costs shown in  
14 Bellingham’s F196. \$7,033,711 is stated as the revenue to pay those costs, and is the sum of four of  
15 the five revenue sources listed above, but not including BEA. In Exhibit 131a, plaintiffs have not  
16 accounted for any part of the \$5.4 million BEA received that year by Bellingham School District  
17 for its 1,279 special education students,<sup>12</sup> or for any other school district.

18 Plaintiffs do contend that the BEA for special education students is used to pay the costs of  
19 basic education in the district, including some of the costs for special education students. They  
20 offer the State’s 1077 methodology as proof of their contention. Plaintiffs misconstrue the law and  
21 fail to prove the factual underpinnings of their contention that the 1077 methodology accounts for  
22 all special education students’ BEA in basic education services.

23 The 1077 report is an annual report required by the federal government to show the  
24 allocation between basic and special education services by school districts receiving IDEA special  
25 education supplemental funds (State Program 24). The State has used the report to develop its 1077

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27 <sup>12</sup> The example of Bellingham School District was explored in the cross examination of Dr. Dale Kinsley, superintendent  
28 of that district.

1 methodology for the purpose of providing uniform statewide allocation of basic education support  
2 for special education services. The methodology includes two key assumptions relevant to this  
3 issue:

- 4 • Special education students receive their appropriate share of basic education support  
5 from basic education staff when served in the regular classroom.
- 6 • When special education students are served outside the regular classroom, basic  
7 education dollars follow them to partially support special education services they  
8 receive.

9 Exhibit 4, pdf 167. These assumptions are consistent with the law, as provided in Section  
10 507(2)(a):

The superintendent of public instruction shall use the excess cost methodology developed  
and implemented for the 2001-02 school year using the S-275 personnel reporting system  
and all related accounting requirements to ensure that:

- 11 (i) Special education students are basic education students first;
- 12 (ii) As a class, special education students are entitled to the full basic education  
13 allocation; and
- 14 (iii) Special education students are basic education students for the entire school day.

15 Exhibit 86.

16 The 1077 methodology is solely for allocation of costs; it does not allocate revenue or  
17 identify sources of revenue. Its primary purpose is to uniformly identify special education costs in  
18 the districts' F196 reports. (It is also for use in preparing safety net applications, but in recent past  
19 that has been limited to high cost individual students.) The 1077 worksheet is a series of reasonably  
20 complex calculations that allocates the cost of a special education teacher whose duties are part  
21 basic education and part special education. In the examples offered at trial, the average (rounded  
22 off) allocation of cost was 38 percent to basic education and 62 percent to special education. The  
23 38 percent allocated to basic education costs is significantly less than the percentage of state  
24 support for a special education student that is BEA. And when a special education student moves  
25 out of the basic education classroom, by law the BEA follows that student and is applied to special  
26 education costs. The 1077 methodology does not prove that school districts expend all BEA for  
27 special education students in the basic education classrooms. The 1077 methodology does not  
28 prove that BEA can be omitted from the calculation of alleged funding formula deficit.

1 Plaintiffs also attempted to show even larger funding formula deficits using first, the opinion  
2 of Dr. Thomas Parrish and second, a formula that applies the 0.9309 multiplier to the average per  
3 pupil expenditures (APPE) calculated by OSPI.<sup>13</sup> Dr. Parrish’s conclusions concerning the need to  
4 change staffing ratios for special education were not persuasive. The APPE is a federally directed  
5 calculation of expenditures that includes more than basic education. It includes costs for  
6 supplemental contracts, class size reductions, local choice programs, and undefined extracurricular  
7 activities. The APPE calculation brings me full circle to the point first made in this section: that it  
8 seems evident that the alleged deficit in the special education appropriation, if it exists, is the  
9 product of an inadequate BEA, not an inadequate excess cost multiplier. As before, adequacy of  
10 the BEA is not an issue before this court.

11 Plaintiffs’ contention addressed in this section of the court’s opinion, that the funding  
12 formula deficit is so large that the deficit itself is evidence of constitutionally inadequate funding,  
13 seeks in essence to decouple special education funding from BEA funding. This coupling<sup>14</sup> of the  
14 excess cost allocation to the BEA allocation is a basic feature of the legislature’s funding approach;  
15 and the coupler, the 0.9039 multiplier, is acknowledged as a reasonable approach supported by  
16 national experience and expert opinion. However, because the BEA is so inadequate in plaintiffs’  
17 view, they ask this court to decouple the multiplier from the BEA allocation and instead couple it to  
18 a school district’s expenditures for its special education students. This would create a funding  
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21 <sup>13</sup> Just as plaintiffs assert more than one basis for their claim, the State’s challenge to plaintiffs’ accounting of revenue is  
22 not the only defense asserted against the funding formula claim. A substantial defense was offered by Dr. Douglas Gill,  
23 State Director of the Special Education Section of OSPI, in his testimony and Exhibit 722. In testimony and the exhibit,  
24 Dr. Gill identified 7 broad categories where he contends plaintiffs improperly account for expenditures or fail to account  
25 for revenue; and he assigns a dollar amount to each. In each of the three school years addressed by plaintiffs where  
26 records are complete, Dr Gill’s dollar totals exceed the amount of deficit claimed by plaintiffs. For example, in sy2005-  
27 06, where plaintiffs claim a deficit of \$134 million (or \$112.5 million excluding the cap impact), Dr Gill identifies \$310.  
28 million to offset that claim. Four of the largest categories identified by Dr. Gill, “2(c) Undeclared Revenue Acct 7121,”  
“5 State Levy Equalization Funding,” “6 Inconsistent Indirect Cost Calculation,” and “7 Over ID of Sp. Ed. Students by  
15%,” comprise \$217 million of his total. I was not persuaded by the evidence on these categories; nevertheless, the  
remaining amounts for the other categories raise significant issues about plaintiffs’ claim. I have not addressed this  
defense in detail because it was not necessary to my decision.

<sup>14</sup> In his testimony, Dr. Gill of OSPI spoke of the legislature’s changes to funding in 1995 as “decoupling”. Dr. Gill’s  
decoupling was of a different relationship than is discussed here.

1 approach to special education independent of the funding approach to basic education and would  
2 permit me to consider the legislature’s funding of special education separate and apart from basic  
3 education funding.

4 Such a course is permitted only if I conclude beyond a reasonable doubt that the coupled  
5 funding approach is unconstitutional. I cannot reach that conclusion. As developed above, the  
6 legislature’s approach of using the multiplier to couple special education funding to BEA funding is  
7 rational.<sup>15</sup> Of the two principal variables in this approach, the BEA allocation and the multiplier,  
8 only the adequacy of the multiplier is part of this case – and plaintiffs have not proved it  
9 inadequate. There is no basis here for me to declare the legislature’s approach unconstitutional. To  
10 do so would be an unwarranted usurpation of the legislature’s prerogatives in the field of education.  
11 *Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005) (“This court will not micromanage  
12 education and will give great deference to the acts of the legislature.”)

### 13 **Application and History of Safety Net**

14 Parts two and three of plaintiff's claims address the safety net in special education funding.  
15 Before deciding those issues, I here address the safety net generally, as it currently exists and as it  
16 has existed in the past.

17 Counsel often referred to Judge Doran's decision in *School Funding III* on the issue of safety  
18 net. As noted earlier, *School Funding III* does not have preclusive effect. Nevertheless, in his  
19 closing, Mr. Bjorkman urged the court to:

20 Remember in *Doran III*, the judge said, if you are going to fund based on averages, you  
21 have to have a system in place where a district can go get more money. The state set up  
22 a system to allow districts to do that.

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23 <sup>15</sup> Indeed, the finance subcommittee report of the K-12 Advisory Committee of Washington Learns recommended,  
24 “Students eligible for special education services should be allocated additional funding; the formula should continue to b  
25 a derivative of Basic Education Funding.” Exhibit 69, pdf 20. Mike Merlino, a member of the finance subcommittee,  
26 testified to various tweaks recommended in the report that would increase the amount of the BEA allocation to which the  
27 0.9309 multiplier would be applied. The tweaks were mainly recognized enhancements to the BEA allocation. While th  
28 inclusion of these enhancements would be significant (about \$40 million) and may be wise, they do not rise to the level c  
constitutional significance. To declare that the legislature’s present approach is unconstitutional because of failure to  
include the enhancements in its current funding formula is precisely the type of micromanagement cautioned against in  
*Brown v. State, Id.* at 261.

1 I conclude that *School Funding III* does not support such a broad characterization of the State’s  
2 obligation to provide a safety net. *School Funding III* addressed the use of averaged populations of  
3 special education students to determine the levels of special education support from the State.  
4 Judge Doran concluded that a safety net was necessary for that plan. The current excess cost  
5 methodology depends on average costs, not average population. Further, I find that the State has  
6 never had a safety net program of broad application; rather it has had an inconsistent history of  
7 narrowly focused safety nets.

8 In *School Funding III*, the court considered a special education funding plan that awarded  
9 excess cost allocations to districts based on a presumed average population of special education  
10 students in four specific learning disability (SLD) categories, A-B-C-D. Excess cost allocation for  
11 a fifth SLD, category E (the least disabled students), was paid on a per capita basis up to four  
12 percent of the district’s total population of students. Above this four percent cap, the State provided  
13 reduced allocations for “E” students on a diminishing scale.

14 Judge Doran decided the SLD-E category case apart from the other categories, and declared  
15 that its four percent cap and sliding scale of allocation violated (“is inconsistent with”) the State  
16 Education for All Act, chapter 28A.13 RCW. He also declared, somewhat enigmatically, that it  
17 “Fails to satisfy to some extent the full funding mandate of Article IX, Sections 1 and 2, . . .”  
18 *Conclusion of Law 1.20*. In regard to safety net for SLD-E, he said nothing at all.

19 The complaint of *School Funding III* plaintiffs about the other four categories of SLD was  
20 that allocation was based on average populations of special education students. If a district had  
21 more students in a category than the average permitted, the district got no excess cost allocation for  
22 those students. In *School Funding III*, this was called the A-B-C-D formula. Judge Doran did not  
23 declare that formula unconstitutional. Instead he opined that the legislature could use the formula if  
24 it had a safety net. His conclusions, including his view of deference to the legislature, are provided  
25 here:

26 1.14. There is no perfect formula and the formula must necessarily evolve and  
27 undergo change in order to reflect changing public policy and factual patterns. No  
28 formula or element of the formula should be set in constitutional concrete as long as the

1 formula selected and the public policy determined provides fully sufficient funds to  
2 districts which permit districts then to offer handicapped students, who are eligible for  
the program, the education that is constitutionally required.

3 1.15. Whether the State devises another formula or restructures the A-B-C-D  
formula is for the Legislature to decide.

4 1.16. However, if the present formula is to continue as the basis for the  
5 allocation of funds for the handicapped programs, provision would have to be made for  
6 the districts that can establish their programs of special education are underfunded to  
obtain the additional or supplemental funds necessary to provide the constitutionally-  
mandated program of education for their handicapped students.

7 . . .  
8 1.18. There is no constitutional requirement that all costs be recognized in a  
9 single formula for funding the handicapped program, and School Funding II Conclusion  
of Law 6 does not so hold. The Legislature may, but is not Constitutionally required to,  
fund the handicapped program by means of a single formula. . . .

10 The limitation of the A-B-C-D formula in *School Funding III* is similar to the 12.7 percent cap in  
11 this case because both categorically exclude some special education students from excess cost  
12 allocation if a population ceiling is exceeded; but it has no direct relationship to plaintiffs' claim  
13 that there must be safety net access to protect from a funding formula deficit. *School Funding III* is  
14 not binding precedent, but even if it was, it would not compel a safety net on what plaintiffs  
15 characterize as "their demonstrated unmet need"<sup>16</sup> – i.e., the funding formula issue.

16 After *School Funding III* was decided in 1988, the legislature did not create a safety net  
17 until 1995. At some point not made clear by this record, the legislature scrapped the A-B-C-D  
18 formula and instituted an approach that provided special education funding for all special education  
19 students. In 1995, the legislature overhauled the system and instituted the methodology that is  
20 before the court today. Since 1995, safety net has had a limited but still discernable role in excess  
21 cost funding.

22 The overhaul of the special education funding plan reflected, in significant part, the  
23 legislature's intention to connect the growth in cost of special education more closely to the growth  
24 in cost of basic education. A key to accomplishing that goal was to control growth in special  
25 education by capping excess cost allocations at 12.7 percent of the basic education population. The

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28 <sup>16</sup> *Plaintiffs' Supp'l Trial Brief*, p 10.

1 cap was phased in gradually, in part because of the federal restriction against using federal funds to  
2 supplant state funds. A safety net category, called MOESR (maintenance of effort – state revenue)  
3 was created for sy1995-96, and as shown below in Exhibit 710, paid out safety net awards in  
4 decreasing amounts over the seven year phase-in of the 12.7 percent cap. In 1995 there was an  
5 additional category, Special Characteristics, that morphed into the Percentage and Demographics  
6 categories for sy1997-98. Demographics was a category to relieve school districts that attract  
7 special education students because of the high quality of medical and social services available to the  
8 disabled in the area encompassed by the district. Spokane is an example of such a district.  
9 Beginning in sy2000-01, the legislature eliminated the funding for the Demographics category.

10 High Cost Individual Students (HCI) has been a safety net category from the beginning. It  
11 is available only after costs exceed a minimum established by the State. Until sy2005-06, the State  
12 minimum has been the same as (or exceeded) the federal minimum for a concurrent federal safety  
13 net program. Accordingly, federal funds have been used exclusively to pay those needs until last  
14 year when the federal minimum was raised to about \$21,000, while the state minimum remained at  
15 about \$15,000.

16 Although MOESR was designed to soften the blow of the 12.7 percent cap, the Percentage  
17 category was intended to directly address the impact of the cap on school districts whose special  
18 education population exceeded the cap. Within a few years of applying the Demographics  
19 category, it became evident that this category was serving the same need as Percentage.  
20 Demographics was eliminated, and by sy2001-02, Percentage safety net awards totaled  
21 approximately \$5.4 million. For sy2002-03, Percentage was essentially eliminated by the  
22 legislature's decision to withhold funding for that category. Since sy2001-02, the State has not  
23 awarded any money for safety net, except the past year for HCI. Although Exhibit 710 shows  
24 appropriations of \$8.5 million for safety net after sy2001-02, that appropriation was for HCI only.

25 Exhibit 710 shows the history of safety net categories and awards.  
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1           The 12.7 percent cap was created as a way to control the growth of special education  
2 population as a percentage of total student population by compelling school districts to confront  
3 over-identification of special education students. The cap was a rational choice by the legislature to  
4 meet a significant problem. When the cap was created in 1995, special education population was  
5 growing at a rate of 10 percent per year, or about twice as fast as the basic education population. It  
6 was growing about twice as fast as the revenue limitations of I-601 would permit. The legislature  
7 had before it three studies, Exhibits 92, 93, and 94, that each concluded the then current approach  
8 encouraged over-identification of special education students. Setting 12.7 percent as the level for  
9 imposition of the cap was also a rational choice. It was, and is today, supported by similar  
10 percentages nation wide, and at the time of enactment the 12.7 percent level was higher than the  
11 percentage of special education population in Washington.

12           The State’s funding formula approach to special education funding (the excess cost  
13 methodology) is rational (and constitutional) because while it is based on average services and  
14 costs, those averages are computed on a whole spectrum of disabilities and needs. For each eligible  
15 special education student, a school district receives an average basic education allocation and an  
16 average excess cost allocation based upon the 0.9309 multiplier. Some students will be educated  
17 for less, some will cost more, but the theory of the funding formula approach is that the cost of each  
18 student will be funded. This applies whether the special education population of the district is 10  
19 percent or 15 percent; the funding for the district is based on a per capita amount for each eligible  
20 student. A cap without a safety net changes that. It assures that districts whose special education  
21 population exceed 12.7 percent will not receive any excess cost allocation for those students above  
22 the cap. As noted above, the funding formula approach is based on averages that provide the same  
23 excess cost allocation whether the cost of educating the student is above or below average.

24           However, no evidence in this case suggests that the cost of educating a special education student  
25 above the cap is averaged into the allocation paid for students below the cap – and neither party  
26 contended that it was. Accordingly, it is clear that while the State’s funding formula approach can  
27 amply provide for a special education student even if the costs of educating that student exceed  
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1 1.9309 times BEA, the same formula does not amply provide for a student above the cap who is  
2 simply excluded from the funding formula.

3 A safety net is not the only approach to addressing the constitutional imperative to provide  
4 for students above the cap. It is addressed here because it was the solution originally implemented  
5 by the legislature when the cap was created, before it was eliminated by lack of funding in sy2002-  
6 03.

7 A cap with a safety net permits a school district to seek the excess cost allocation for its  
8 students over the cap, but gives the State the opportunity to analyze the district's entire special  
9 education program, to assure before payment of safety net funds that the district's special education  
10 students are eligible and have current, properly formulated IEPs, that the district is accessing all  
11 available revenue, and that it is operating a reasonably efficient special education program. Such  
12 close scrutiny for every district every year would not be practical, so a cap with a safety net is a  
13 very rational alternative; it addresses the State's interest in preventing over-identification of special  
14 education students by permitting close scrutiny of districts that exceed the cap, while at the same  
15 time providing ample funding for all eligible special education students.

### 16 **Application of the Safety Net to the Funding Formula Deficit**

17 In part two of their Summary of Claims,<sup>17</sup> plaintiffs contend:

18 Safety Net is unconstitutional in that it does not provide a sufficient means of access for  
19 all school districts' full demonstration of need.

20 As explained in their *Supplemental Trial Brief*, p 9-10, plaintiffs' argument has two parts:  
21 first, the safety net is inadequate because it does not address the gap "between overall demonstrated  
22 need" and State funding; and second, safety net funding of any kind is unconstitutional because it is  
23 not sufficiently dependable and regular to serve as an adequate funding source, citing *Seattle School*  
24 *Dist. No. 1 v. State*, 90 Wn.2d 476, 524-27, 458 P.2d 71 (1978). The apparent inconsistency in  
25 these two parts is difficult to address, so I will not try. I reject the second part and will address the  
26 first.

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27 <sup>17</sup> Plaintiffs' Closing Argument Rebuttal, p 5.  
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1 I reject the second part because the case cited by plaintiffs does not make dependable and  
2 regular funding a constitutional requirement. Rather, *Seattle School Dist.* required that revenue for  
3 schools come from a dependable and regular tax source. The court rejected special levies as a  
4 taxing source. *Seattle School Dist.*, 90 Wn.2d at 526. Dependable and regular funding by the  
5 legislature has never been a constitutional test.

6 As regards the first part, I am not persuaded that safety net must be part of the State's  
7 constitutional duty of ample provision for special education, and therefore am not persuaded that  
8 inadequate access to safety net revenue violates the constitution. This claim is denied. Safety net is  
9 not any part of a constitutionally mandated duty of the legislature, it is a tool available to the  
10 legislature to use as it chooses. It is a tool that may in some instances be used by the legislature to  
11 save a feature of its education funding program that might otherwise violate the constitution – for  
12 example, a feature that caps the number students for whom excess cost allocation will be paid and  
13 categorically excludes those over the cap, as in this case with the 12.7 percent cap, or in *School*  
14 *Funding III*, with the A-B-C-D formula. In constitutional review of an education funding approach,  
15 a court may consider the legislature's choice to include a safety net when determining whether the  
16 funding approach satisfies the constitution; but a court cannot declare that the legislature's decision  
17 to forgo safety net unconstitutional. Courts must defer decisions about the details of a funding  
18 approach to the legislature; courts must avoid micromanaging policies that are clearly the province  
19 of the legislature. In addressing the constitutionality of the 12.7 percent cap, I declared that feature  
20 of the legislature's approach unconstitutional. I further opined that the safety net for that feature,  
21 authorized in section 507 but unfunded, could save the cap. I did not declare that the legislature  
22 must have a safety net for the cap. Such a declaration is beyond my power, it is a decision for the  
23 legislature. Here, in the second part of the safety net claim, plaintiffs contend that safety net is  
24 underfunded and too restrictive to meet the districts' demonstrated unmet need. That is an issue to  
25 defer to the legislature. My judicial responsibility is to consider the funding approach as  
26 implemented by the legislature and to consider whether the approach is so inadequate that it  
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1 violates article IX, section 1. I have done that in the Funding Formula section of this opinion and  
2 declared against the plaintiffs.

### 3 **Indirect Costs**

4 This claim fails for lack of proof. All school district indirect expenditures are accounted for  
5 in Program 97 of the State's program of accounting for expenditures and revenue. Program 97  
6 includes all indirect costs. It does not matter which program generates the cost, it can be basic  
7 education, special education, or any other program operated by a school district. The school  
8 districts report Program 97 expenditures on their annual F196 reports, but do not allocate these  
9 indirect expenditures to the programs that generate them. The State pays most of these costs, and  
10 no attempt is made to break out the payments into allocation among basic education, special  
11 education or other programs. For example, the Lake Washington School District F196 report for  
12 sy2004-05 shows Program 97 expenditures of \$20,084,105. In the accounting of Program 97  
13 revenue for these costs, state revenue paid \$15,106,206, federal revenue paid \$152,860, and the  
14 balance of \$4,824,968 was paid by other resources, which witnesses identified as local levy money.  
15 Plaintiffs contend they should receive additional excess cost allocation to pay for special education  
16 related indirect expenditures, but at trial no attempt was made to show how reported Program 97  
17 expenditures should be broken out. In the Lake Washington School District example, about 24% of  
18 indirect expenditures were paid for by local levy money, but it is impossible to determine what  
19 proportion of this money was used to pay special education related indirect expenditures, if any.  
20 Exhibit 50, pdf 49.

21 In the safety net applications for districts with high cost individual students (HCI safety net  
22 category), the demonstration of need application permits a school district to show indirect costs of  
23 approximately 4% in making application for additional safety net excess cost allocation. This is  
24 reasonable because Program 97 expenditures and payments are not otherwise reflected in the  
25 application. The fact that additional indirect costs can be included in a safety net application does  
26 not prove that State payment of Program 97 indirect expenditures is constitutionally inadequate.  
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1 Plaintiffs also contend that the 4% indirect cost rate permitted by the State for safety net  
2 applications should be higher. They point to the 16.7% rate for indirect expenditures that school  
3 districts are permitted to deduct from the reimbursement they must make to the State for unspent  
4 federal IDEA funds. The basis for this difference is not explained in the evidence; but in any event,  
5 judicially compelled higher rates would be a micromanaging education. *Brown v. State*, 155 Wn.2d  
6 254, 261, 119 P.3d 341 (2005) (“This court will not micromanage education and will give great  
7 deference to the acts of the legislature.”)

### 8 **Supplemental Contracts**

9 Plaintiffs contend that it is unconstitutional to exclude supplemental contracts from the  
10 State’s obligation to fund basic education for special education students. The prohibition against  
11 State payment of supplemental contracts is not limited to special education, it encompasses all basic  
12 education. RCW 28A.400.200(4) provides, in relevant part:

13 Salaries and benefits for certificated instructional staff may exceed the limitations in  
14 subsection (3) of this section only by separate contract for additional time, additional  
15 responsibilities, or incentives. Supplemental contracts shall not cause the state to incur  
any present or future funding obligation.

16 This statute directs that supplemental contracts cannot be part of the State’s funding obligation, and  
17 so by implication they are not part of basic education. Although the proposition is not stated  
18 directly, plaintiffs contend that the statute is unconstitutional, at least for special education. At trial  
19 they demonstrated that most special education programs offer supplemental contracts and TRI pay  
20 in order to attract and retain special education teachers and administrators, but plaintiffs did not  
21 show why such contracts and extra pay are a component of basic education.

22 Basic education is not specifically defined in the Basic Education Act, instead the legislature  
23 has enacted a set of goals and declared that the purpose of the Act, “shall be to provide  
24 opportunities for all students to develop the knowledge and skills essential to” accomplish those  
25 goals. RCW 28A.150.210. The Act is a plan to provide administration and revenue to accomplish  
26 the goals, with the actual delivery of services left to local school boards. The focus of the Act is  
27 clearly on students and the services necessary to educate them.

1 In addition to the Basic Education Act, the legislature has enacted a myriad of other  
2 education related laws. The authority to enact these additional education laws falls within the  
3 general power and constraints granted the legislature in the constitution, but they are not governed  
4 by article IX, section 1. The provision for supplemental contracts, including TRI pay, is such a law.  
5 It is included in chapter 28A.400 RCW, which addresses education employees. Given the  
6 invaluable service they provide, the level of pay for teachers and staff and the manner in which they  
7 are paid are matters of great concern for citizens and the legislature. Nevertheless, those issues are  
8 not part of an article IX, section 1, analysis. There is no basis here for declaring RCW  
9 28A.400.200(4) unconstitutional.

### 10 **Federal IDEA Funds Diversion**

11 In this part, plaintiffs contend:

12 The State cannot divert federal funds to pay for state obligations for salary increases, as  
13 federal funds are no more dependable and reliable than local levy funding.

14 *Plaintiffs' Closing Argument Rebuttal*, p 5. The only evidence of this issue offered at trial was the  
15 cryptic testimony of Dr. Brian Benzel, superintendent of the Spokane School District, who testified  
16 that the district's excess cost allocation for sy2004-05 was reduced by \$127.35 per student because  
17 federal IDEA funds were used to offset teacher salary and benefit increases, thereby reducing the  
18 BEA and consequently the excess cost allocation. No explanation of why this occurred was  
19 offered, except a single short paragraph in the State's *Administrative Budgeting and Reporting*  
20 *Handbook* . . . , Exhibit 4, pdf 79, where it is noted, "The Legislature assumes that the districts will  
21 obtain funding for these increases from the district's increase in IDEA funding for 2004-05. This  
22 integration will not impact the amount of IDEA funding received by a district." This evidence is  
23 wholly inadequate to prove violation of the constitution beyond a reasonable doubt.

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**Retained Jurisdiction**

I decline to retain jurisdiction in this case.

[A] trial court’s decision to retain jurisdiction is inconsistent with the assumption that the Legislature will comply with the [court’s] judgment and its constitutional duties.

*Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 538, 458 P.2d 71 (1978)

Dated March 1, 2007

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Thomas McPhee, Judge