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LEGISLATIVE MEMO

Why the McCleary process is not working

In adopting a strategy of "retained jurisdiction," supreme court justices sought to assert control over the state education program

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Key Findings:

1. **Through a series of hearings and fines, judges have sought to push the legislature into carrying out their policy orders regarding public education.**

2. **Lawmakers have increased education spending by $4.6 billion, or 34 percent, since 2012.**

3. **When the *McCleary* process started, per-student spending was $9,418; today it is $12,652, more than tuition at many private schools.**

4. **The judges say they are not satisfied, yet since the court intervened, voters have sent newly-elected lawmakers to Olympia three times, without any improvement in the *McCleary* process.**

5. **The court's unusual decision to hold the legislature in contempt has had little impact on the public and almost no effect on candidates in the recent election.**

6. **After five years, the *McCleary* process appears to have reached its functional limit, and lawmakers will likely re-assert control over the state education program.**

Introduction

For the last several years, members of Washington's state supreme court have sought to manage a multi-billion-dollar state-funded program, public education, through a judicial enforcement process they created called "retained continuing jurisdiction." Through a series of judicial hearings and daily fines, the judges have sought to cajole, threaten and push members of the elected legislature to carry out the judges' policy orders in regard to funding.

By one standard, the judges' "retained continuing jurisdiction" over the legislature has been successful – lawmakers have boosted education spending by $4.6 billion, or some 34 percent, since 2012.

At the same time, measures of student learning remain flat, administrators continue to send students to failing schools based on zip code, and executives at the powerful WEA union maintain a firm grip on the day-to-day management of schools, adamantly blocking innovative learning reforms and financial incentives for the best teachers.

Given the policy stalemate, the legislature is experiencing fatigue over the protracted *McCleary* process, now entering its fifth year after the state supreme court's ruling of January 5th, 2012. The timeline below helps explain why this unprecedented judicial enforcement process is reaching a dead end.

Since the court's intervention into education policy, the voters have sent newly-elected lawmakers to Olympia three times – without any appreciable improvement in the *McCleary* process. For that reason, this

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paper recommends a more constructive approach to education policy for the 2017 legislative session.

The *McCleary* process timeline

The basic problems with the McCleary process are demonstrated by the real-world experience of the legislature and the public in attempting to satisfy the shifting standards of the court. The following timeline shows why the process has not worked as intended.

2007 – Executives at the Washington Education Association (WEA) union, along with some school superintendents and education activists, filed a lawsuit, *McCleary v. State of Washington,* in King County arguing that the state had failed to meet its constitutional duty to fund public schools.[1]

Public funding for schools at the time was $9.1 billion, or $9,418 per student. Most of the legal fees for the *McCleary* lawsuit were paid with union funds taken involuntarily from teacher paychecks.[2]

May 2009 – The legislature, then under Democratic control, narrowly passed HB 2261, but did not fund it.[3] This legislation, on paper, significantly expanded the definition of "basic education," adding full-day kindergarten, class size reductions to 17 students in grades K-3, and higher operating and transportation expenses.

January 5, 2012 – The state supreme court ruled in *McCleary* that the state had failed to fully fund basic education, but initially said the elected legislature should provide the chosen means for defining and funding public education. The judges also said that, "Fundamental reforms are needed for Washington to meet its constitutional obligation to its students. Pouring more money into an outmoded system will not succeed."[4]

June 2013 – The legislature passed the 2013-15 state biennial budget, and increased K-12 school funding by $1.7 billion, from $13.55 billion to $15.26 billion, added funds for all-day kindergarten, transportation, materials, supplies and operating costs, reduction in class sizes in grades K-3, and other education programs. The court said this action did not satisfy the *McCleary* process.

January 9, 2014 – Supreme court judges directed the legislature to add more funding to the education budget. The judges also ordered the legislature to spend more on

1 Some superintendents diverted public funds to pay for the lawsuit, as reported in, "Was public education money used to fund the *McCleary* lawsuit," by Travis Strawn and Liv Finne, Policy Note, Washington Policy Center, June 2015, at /www.washingtonpolicy.org/library/docLib/Finne-_Was_public_education_money_used_to_fund_the_McCleary_lawsuit.pdf.

2 Lawyers' fees exceed $4 million and are being paid by the WEA union, as reported in, "Teachers paid most of bill for *McCleary* case to fund schooling," by Donna Blankenship, Associated Press, *The Seattle Times*, October 14, 2014, at http://www.seattletimes.com/seattle-news/teachers-paidmost-of-bill-for-mccleary-case-to-fund-schooling/.

3 The Senate narrowly passed HB 2261 but did not provide funding for this bill, after being told by Senate legal counsel that the bill was a non-binding plan, not a mandate, and that future legislatures would not be required to fund this program, as reported by Senator Jim Kastama (D-Puyallup) in, "Respected former Democratic senator recommends review of 'basic education' definition," by Liv Finne, Blog, Washington Policy Center, January 5, 2015 at http://www.washingtonpolicy.org/publications/detail/respected-former-democratic-senator-recommends-review-of-basic-education-definition.

4 *McCleary et al. v. Washington State,* Case Number 84362-7, Supreme Court of Washington State, January 5, 2012, majority opinion, page 69, at http://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.McCleary_Education.

teacher pay and capital projects, or face contempt of court sanctions. Increases in teacher pay benefit the WEA union financially, since payments to union executives tend to rise with teacher compensation. Washington is not a right-to-work state. School teachers must pay dues and fees to the WEA union or face termination.

This 2014 order contradicted the judges January 2012 ruling, in which the court said it would defer to the legislature's chosen means for funding the schools. The legislature acted in 2013, but the new order indicated the judges' intent to expand their direction of the public education program.

April 2014 – Former state supreme court judge and state senator Phil Talmadge released a legal analysis showing that the court's unprecedented involvement in public policy had taken the judiciary into "uncharted waters."[5]

September 11, 2014 – Supreme court judges decided to hold elected lawmakers in contempt for not increasing school funding to their satisfaction, but they decided to delay any punishment or fine of lawmakers until the end of the 2015 legislative session.

June 2015 – The legislature passed the 2015-17 biennial state budget, and increased K-12 funding by $2.9 billion, from $15.26 to $18.19 billion, expanding the program of basic education by 34 percent in four years. Per-student spending in public schools rose to $12,652, more than tuition at many private schools.[6]

August 13, 2015 – Supreme court judges decided, for the first time in state history, to impose a fine on the legislature of $100,000 per day, as punishment for not increasing state education spending as much as they thought lawmakers should.

February 2016 – In a broadcast interview, Chief Justice Barbara Madsen tells reporter Austin Jenkins of TVW that she sees no limit on the court's power to apply force on the legislature to adopt the court's policy directives.[7]

April 2016 – The legislature added $40 million to the enacted level of education funding in the 2015-17 supplemental budget.[8]

May 2016 – Executives at the WEA union instruct their lawyers to recommend that the supreme court close the public schools or impose court-ordered taxes on the public to increase education spending and teacher pay (and thus the amount of public money going to the union).

September 2016 – The daily fine imposed by the court amount to $39 million, with no discernible effect on elected lawmakers. The

5 "Legal analysis: Constitutional Implications of Washington Supreme Court's Remedy in *McCleary v. State*," by Phil Talmadge, Policy Brief, Washington Policy Center, April 2014, at /www.washingtonpolicy.org/library/doclib/Talmadge-LegalAnalysisMcCleary2.pdf.

6 "Statewide and school district enrollment, staffing and finance data," Washington State, K-12 Finance Data, Office of Financial Management at fiscal.wa.gov, and Senator Hill's Paramount Duty Series, footnote 29, at http://andyhill.src.wastateleg.org/the-paramount-duty-series-2/, and "Organization and Financing of Schools," figure 39, Office of Superintendent of Public Instruction.

7 "Interview of Chief Justice Barbara Madsen," by Austin Jenkins, *Inside Olympia*, TVW, February 25, 2016, at time mark 25:35, at http://www.tvw.org/watch/?eventID=2016021266.

8 "State of Washington, Legislative Budget Notes, 2016 Supplemental," Legislative Evaluation and Accountability Program (LEAP), August 2016, page 24, at leap.leg.wa.gov/leap/budget/lbns/2016LBNOp.pdf.

funds are paid by the state and placed in an account devoted to education.

October 2016 – Supreme court judges decided to extend their $100,000-a-day fine on the legislature. Justice Susan Owen expressed frustration with the *McCleary* process and indicated the court had run out of options.

Justice Owen noted that if the court ordered closure of public schools, the legislature would simply re-open them; if the court ordered that people must pay more in taxes, the legislature would simply lower tax rates. She also said the legislature could change the education plan "from a Cadillac plan to a Ford plan" in order to control rising costs.[9]

The mistake in creating "retained continuing jurisdiction"

The judges decided to create "retained continuing jurisdiction" in the case, in an effort to direct the elected legislature in the management of the state's public education program. The unusual decision to "retain continuing jurisdiction" reversed court precedent, as established by the judges in the *Doran* case of the late 1970s. In that case, the supreme court explicitly declined to retain jurisdiction, in recognition of the reasonable limits set on judicial power in the state constitution.[10]

The judges' decision to "retain continuing jurisdiction" in *McCleary* represented a radical departure from normal judicial practice and is unprecedented in a public education funding case. Normally, the tactic is used by the court to oversee a settlement between two parties – one that is easily defined and achievable.

In the *McCleary* process, however, "retained continuing jurisdiction" has created an open-ended political dispute, one that involves management of a multi-billion-dollar public program, the education of nearly one million children, and an ever-shifting standard of what "adequate" funding means.

Policy analysis

The reason the *McCleary* process is not working is that the state supreme court is ill-suited to oversee the management of a large public spending program. Courts are well-designed to settle peaceful disputes between contending parties and to interpret the law.

Where the state supreme court went wrong in the *McCleary* case was to reverse the sensible precedent set in the *Doran* decision and to establish a program of "retained continuing jurisdiction" instead. While the phrase sounds impressive, it simply means the court intended to assume from the legislature ongoing oversight of a major portion of the state budget.

Given the limitations and administrative weakness of the judiciary branch, it is not surprising that the *McCleary* process shows signs of breaking down. Lawmakers have enacted large increases in education spending, but not to a level that satisfies the court. The judges continue to impose punishments in an attempt to bend elected lawmakers to their will.

The trouble for the court is that in 2016 voters, for the third time since the *McCleary* process began, elected a new legislature. Lawmakers may be reluctant to increase the financial burden for education much beyond

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9 "Justice Susan Owens reveals the Achilles' heel of the *McCleary* case," by Liv Finne, Blog, Washington Policy Center, September 12, 2016, at www.washingtonpolicy.org/publications/detail/justice-susan-owens-reveals-the-achilles-heel-of-the-mccleary-case.

10 *McCleary et al. v. Washington State*, Case Number 84362-7, Supreme Court of Washington State, January 5, 2012, majority opinion, page 70, citing Seattle School District, 90 WA 2d at 538-39, at http://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.McCleary_Education.

the $4.6 billion increase (up 34 percent in four years) they have already enacted. In our democratic system, elected representatives are generally more in tune with the public than judges.

Lawmakers may also consider expanding family choice in public education, as other states have done, as a way of improving access to a quality education for all children, rather than simply adding money to the current traditional system. A policy based on family choice is particularly effective in communities where administrators send children to failing public schools based on zip code.

In these communities, public charter schools have proved particularly popular, as parents seek alternatives to low-quality traditional schools. Interestingly, charter schools often provide a better learning environment for hard-to-teach children, even as they spend less money per student than traditional schools.

Conclusion

After five years of court orders, reports, elections, and public debate, the McCleary process continues to face problems. The fundamental reason is that the courts are not well equipped to set education policy. The $18.2 billion state education budget is a complex, multi-faceted program for sending public money to 295 school districts across the state. Experience is showing that the elected legislature, not the state supreme court, has more expertise and better capacity for fulfilling this complicated administrative and political task.

There are signs the judges realize the limits of their "retained continuing jurisdiction" process, as they say they are dissatisfied with the amount of education spending increase so far. There are also signs lawmakers recognize the declining utility of McCleary in forcing the court's policy choices in the area of education.

The court's unusual decision to hold the legislature in contempt had little impact on the public, and almost no effect on candidates in the recent election. Similarly, the court's tactic of imposing a $100,000 daily fine on the legislature has had no discernible effect. The public is indifferent, and lawmakers are simply paying the fine with public money, which they will later fold into the state's $18.2 billion education budget.

The $39 million in court fines the legislature has "paid" so far is equal to about one year's worth of mandatory teacher dues that the public must pay to WEA union executives, so it is unlikely to have much affect on considerations in the broader state budget.

After five years, and as the McCleary process reaches its functional limits, lawmakers are likely to re-assert legislative control over the state education budget. Lawmakers will of course go along with the court's ongoing insistence on more hearings and court filings, but the real policy decisions on the future of public education in Washington will likely be made in the normal process of enacting legislation.

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