

1 SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF KING
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4 DUZANNE PORTER, MARTHA) VERBATIM REPORT OF
5 MCLAREN, and CLIFFORD) THE PROCEEDINGS
6 MASS,)
7 Plaintiffs,)
8 vs.) Cause No. 09-2-21771-8 SEA
9 SEATTLE SCHOOL DISTRICT) HEARING
10 NO. 1, IN KING COUNTY,)
11 STATE OF WASHINGTON,)
12 BOARD OF DIRECTORS OF)
13 SEATTLE SCHOOL DISTRICT)
14 NO. 1, and MARIA GOOD-)
15 LOE-JOHNSON, Super-)
16 intendent and Secretary)
17 of the Board,)
18 Defendants.)

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20 TRANSCRIPT
21 of the proceedings had in the above-entitled cause
22 before the HONORABLE Julie Spector, Superior Court
23 Judge, on the 26th day of January, 2010, reported
24 by Michelle Vitrano, Certified Court Reporter,
25 Reference No. 29906.

1 APPEARANCES:

2 FOR THE PLAINTIFFS: KEITH SCULLY

3 Attorney at Law

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5 FOR THE DEFENDANTS: SHANNON MCMINIMEE

6 Attorney at Law

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PROCEEDINGS

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January 26, 2010

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THE COURT: All right. Can I just -- we are on the record. This is Porter and McLaren, Mass as plaintiffs vs. the Seattle School District No. 1 in King County, et al. This is 09-2-21771-8 SEA. I'll have the attorneys identify themselves for the record and then we'll proceed.

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MR. SCULLY: Good morning, your Honor.

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I'm Keith Scully, Gendler & Mann, on behalf of plaintiffs.

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MS. MCMINIMEE: Shannon McMinimee on

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behalf of respondents.

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THE COURT: All right. Very well. The Court is going to take oral argument. I will tell you, thank you for sending me all my studies. I have started to work through most of the algebra that I wanted to do, not that I ever thought I would be revisiting this in my 50's, and I don't

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20 think I have the comparable books in calculus in
21 the Holt series.

22 MR. SCULLY: So your Honor, we're only
23 challenging the basic math test. The district
24 provided you with all the books they bought, but
25 this litigation is only about algebra, geometry,

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1 and advanced algebra. The rest of them are
2 surplusage for your edification.

3 MS. MCMINIMEE: And actually the district
4 doesn't quite agree with Mr. Scully's
5 representation. It's an appeal of a school board
6 decision. The entire school board decision is at
7 issue, because it was a whole issue, a whole
8 package of materials adopted by the school
9 district. While they're focusing the challenge,
10 the district believes the entire decision of the
11 school board is at issue.

12 THE COURT: All right. Very well. In any
13 event, I will hear argument. I'm not going to rule
14 today, for obvious reasons. The record is large.
15 I'm about halfway through the record, and I want --
16 then there is the supplemental record, which I

17 brought up here in case there's any reference to
18 it. My understanding is, just so we're clear on
19 the record, the record is agreed to by both sides
20 that's been submitted to the Court.

21 MS. MCMINIMEE: Yes, your Honor.

22 MR. SCULLY: Yeah.

23 THE COURT: Okay. Very well. Mr. Scully,
24 I'm going to hear from you, and then I will hear
25 from opposing counsel.

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1 MR. SCULLY: Thank you, your Honor. The
2 court reporter had requested me to come up to the
3 bar.

4 THE COURT: If you would be so kind.

5 MR. SCULLY: Good morning, your Honor.
6 Keith Scully of Gendler & Mann. I represent the
7 plaintiffs in this matter, Martha McLaren, Dazanne
8 Porter, and Clifford Mass. My clients are
9 concerned citizens. They have no economic or
10 employment or any other personal stake in this
11 matter, other than their concern with math
12 instruction in the Seattle School District.

13 Ms. Porter is the parent of a child in

14 Seattle Public Schools. Ms. McLaren, who's present
15 at counsel table, is a grandparent of a child in
16 Seattle Schools, and Dr. Mass is a professor at the
17 University of Washington. His concern is that he's
18 watched the quality of math ability amongst his
19 students decline over the last years or decades,
20 and he believes that that is in part due to the
21 experimental math methods being used in high
22 school.

23 His concern is that Seattle pick a series that
24 for the next 10 or 20 years of his career gives him
25 students who can keep up with the material that he

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1 is teaching. We are of course asking you to make a
2 narrow legal decision on one decision by the
3 Seattle School Board, the decision to adopt a
4 series of math tests. And while I think Ms.
5 McMinimee is technically correct that it was one
6 decision on a bunch of books, we're only asking you
7 to review these three books which provide basic
8 math skills at the high school level.

9 The basis of our appeal is of course RCW
10 28A.645.010, which provides that any decision of

11 the school board may be reviewed for whether it is
12 arbitrary, capricious, or contrary to law. And we
13 have two separate lines of argument on that. The
14 first is that the decision to select these books
15 for any student is an arbitrary and capricious
16 decision. Our second argument is that the decision
17 to select these books, given the racial disparity
18 in math achievement, violates the Constitution's
19 guarantee of equal education, and we're arguing
20 that that line of argument is evaluated under a de
21 novo standard.

22 Just an initial fact I would like to
23 highlight, this was a 4-3 decision of the Seattle
24 School Board, a very much split decision, a
25 contentious decision. It included some sections of

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1 what is basically the dissenting opinion of school
2 board president Michael DeBell, who raised many of
3 the concerns that I'm going to ask you to take a
4 look at today.

5 I'm also going to point out some evidence in
6 the record. For the most part we don't get a set
7 of findings and conclusions from the school board.

8 What we end up with in this record are Mr. DeBell's
9 concerns, and then an email that one of his school
10 board members who voted in favor of the series sent
11 to a parent outlining at least some of the reasons
12 why that particular school board member supported
13 the series.

14 Our argument today is that if you look at the
15 entirety of this record, both the evidence
16 questioning the Discovering series efficacy and the
17 lack of evidence supporting its ability to teach
18 math to students across the district spectrum, that
19 the only conclusion you can possibly reach is that
20 this was an arbitrary and capricious decision.

21 Because the evidence for both lines of
22 arguments, the equal education and the arbitrary
23 and capricious standard is roughly the same, I'm
24 going to talk about it in the lens of arbitrary and
25 capricious, and then have maybe two minutes at the

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1 end looking at it under this Constitution specific
2 requirement.

3 I'd like to ask you to take a look at three
4 different categories of evidence today. The first

5 is the books themselves, which we've provided to
6 you, and you also requested a set of a competing
7 series; we provided the teacher's edition to you.
8 I'd next like to ask you to take a look at the
9 citizen comments and the expert reports that are in
10 the record and, finally, to look at the only
11 objective evidence we have of whether this series
12 works, and that's the WASL scores from both
13 elementary education and then from the District's
14 short experiment at Cleveland and Garfield High
15 Schools.

16 Looking first at the texts themselves, it's
17 our argument that the challenges this series has in
18 teaching every student in the district are patent.
19 The student textbook is what is called an
20 inquiry-based mathematics textbook. Although the
21 district argues that the program is balanced, if
22 you read that book from start to finish, you will
23 find that in the student materials, it's all taught
24 using the same method.

25 There is another book, the condensed lessons,

1 which provides some direct instruction, but there

2 is no indication that students take that home or
3 how that book is to be used. The student book, the
4 core of this, is purely inquiry-based, and I won't
5 rehash the voluminous record on sort of the history
6 behind the inquiry-based experiments, but I would
7 like to just direct you to one problem set forth in
8 the student textbook, because it illustrates very
9 clearly how the inquiry-based system works and why
10 it's a problem for all but a few students.

11 Pages 10 and 11 of our brief, I set forth a
12 problem from the student textbook and then the same
13 problem taught from the condensed lesson. The
14 student textbook is inquiry-based; the condensed
15 lesson is direct instruction. Under the
16 inquiry-based system, what the book asks students
17 to do is do a set of problems and then try and
18 figure out what rule they just applied, and the
19 theory being that if they can sort it out for
20 themselves, they will learn it better, they will
21 have a richer and deeper understanding in math.

22 When I talk with experts in a minute, what's
23 patently obvious is bolstered by the expert
24 reports, and that is that some students can do
25 that. If you were interested in math, if you have

1 kept up with the lessons so far, if you speak
2 English as not only a primary language -- it's not
3 necessarily, you know, fluency but at least
4 competency in English, then you can do that. You
5 can figure out the rules of math from just applying
6 them.

7 If you take a look at the problems, one of the
8 first things they ask you to do in deciding on how
9 to solve an equation, a proportion, is a statement
10 that you can easily guess the value of M in the
11 proportion $\frac{2}{3} = \frac{M}{6}$. All of us can
12 probably do that, because we've all finished high
13 school math. An English speaking student that has
14 kept up with the lessons can probably think about
15 that for a moment and say, okay, sure, I can figure
16 that out, that's not that hard.

17 But what if you're struggling with the word
18 proportion because you speak a foreign language at
19 home and your English isn't quite up to the same
20 level of other classmates? What if you've been
21 sick for the month previous, and you haven't been
22 there for some of the basic concepts that you were
23 supposed to explore? What if you're worried about
24 difficult things that are going on in the home,
25 difficult things that are going on at school? What

1 if you are just not interested in math?

2 If you cannot guess the value of M in the
3 proportion of 2 over 3 or M over 6, that book isn't
4 going to tell you how to do it. You are dependent
5 on either sorting it out yourself or having a
6 teacher tell you what the answer to that is. The
7 book then goes on to take that basic assumption
8 that everybody knows what M is in that problem and
9 apply it to a series of other problems of
10 progressive -- of progressively greater difficulty.

11 After you do that, step 4 is to write a brief
12 explanation of one way to solve a proportion when
13 one of the numerators is a variable. In other
14 words, figure out what you just did, write the
15 rule, and then you will be able to apply it. If
16 you look at the exact same problem taught using the
17 condensed lessons, the direct instruction method,
18 you find it's reversed. Step 1 gives you the
19 answer. When you multiply both sides of an
20 equation by the same number, the two sides remain
21 equal to each other. That's the answer you were
22 supposed to come up with on your own had you been

23 using the inquiry-based method.

24 Using direct instruction, you were told what
25 the answer is; you then apply it to a variety of

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1 problems, which are steps, you know, 2, 3, and 4,
2 and by the end of it you understand how it actually
3 works and you can go on with it. As I mentioned,
4 the problems in that are patent. You don't need an
5 expert to tell you that you've got to be pretty up
6 to speed on math, pretty comfortable with school,
7 and pretty interested in it to learn through
8 inquiry-based instruction.

9 Turning now to the expert reports and the
10 citizen comments. What I just told you was patent
11 is exactly what the school district was told from a
12 variety of sources. My clients and other concerned
13 citizens certainly blanketed the district with
14 these comments and those observations. There's
15 also a thing called the NMAP report, the National
16 Math Assessment Project. The NMAP says exactly
17 what I just did, that mathematically gifted
18 students, students who are interested in math, can
19 do well with inquiry-based instruction. Students

20 with math difficulties require at least some direct
21 instruction in order to understand math.

22 Another expert report, and one on which the
23 district places great reliance, is the OSPI report,
24 the Office of the Superintendent of Public
25 Instruction, and the challenge in this case is that

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1 there's not one but two versions of the OSPI
2 report. There's an initial report, which evaluated
3 whether a range of series, including the
4 Discovering series, were congruent with state math
5 standards. That one ranked the Discovering series
6 as number 2, the second ranked textbook in the
7 state. Great. The problem with that is that that
8 only looked at whether the check boxes for what the
9 State said were good math instruction had been met.
10 Does it have real world problems? Check. Does it
11 have examples? Check. It did not evaluate
12 mathematical soundness or the ability to learn from
13 it.

14 There is a second OSPI report done by Drs.
15 Harold and Wilson which looked at mathematical
16 soundness. The purpose of that second report was

17 to take the book apart and determine whether, one,
18 it's solid math; two, whether you can learn from
19 it. And Drs. Harold and Wilson concluded that it
20 was mathematically unsound.

21 When that second expert report was provided to
22 the OSPI, the final recommendation was for only one
23 series, the Holt series, and not the Discovering
24 series. That recommendation is not binding on the
25 district. It is simply a recommendation. But

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1 arguing that there is expert support for the
2 efficacy of the Discovering series in the record
3 that the district had overlooks the fact that the
4 ultimate decision, the ultimate recommendation by
5 OSPI, was that this series is mathematically
6 unsound.

7 Last area I'd like you to look at are the WASL
8 scores. Two sets of them. First is elementary
9 math results from the Seattle School District
10 itself. Those elementary results were not using
11 these particular books because obviously elementary
12 students aren't learning algebra, but they were
13 using a range of different math instructional

14 materials, some direct instruction, some inquiry-
15 based, some hybrid. And what they show is that
16 there is a steady decline, a slow decline in math
17 ability, and that there is a stagnant or widening
18 achievement gap between the different racial groups
19 in Seattle.

20 Is that preclusive? No. But that should have
21 raised a red flag that the magic bullet to the
22 achievement gap is not inquiry-based instruction.

23 The second set of WASL data I argue is
24 preclusive, that with this data it is an arbitrary
25 and capricious decision to select this series, and

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1 that's the brief experiment the district did at
2 Cleveland and Garfield High School, used an
3 inquiry-based math series. And if you take a look
4 at the test scores over the course of this
5 experiment, they go down slowly, not precipitously,
6 but they're going down for all students. For
7 English language learners, people having difficulty
8 with English, they go down dramatically.

9 Now, one of the high schools, two years after
10 they instituted this pilot program, the pass rate

11 is zero percent. In other words, no one who is
12 having a challenge in English, whether it was
13 Cleveland or Garfield, can pass the WASL, versus
14 two years prior, when the number was admittedly
15 low, but nonetheless, some of them were making it
16 through.

17 So how did this happen? If I'm right and
18 there's really no support in the record that this
19 was the right series to pick, how on earth did four
20 members of the school board buy off on it? The
21 answer to that question is obviously not entirely
22 clear from the record, but some clues to it come
23 from both the selection process the district used
24 and, as I mentioned, some of the comments made by
25 one of the school board members.

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1 The district followed the required statutory
2 procedure and had an instructional materials
3 committee that was based of math teachers, other
4 individuals with knowledge about math instruction.
5 The district picked it, and there were criteria
6 that were set for that instructional materials
7 committee to apply. If you read those criteria

8 carefully, you'll find that just like the State
9 checklist, some of the things that they were
10 supposed to look into were the tenets of the
11 inquiry-based instruction.

12 So if one of the tenets is use of calculators,
13 and they check it off, then of course they're going
14 to pick an inquiry-based instructional book,
15 because part of inquiry-based instruction is using
16 calculators. If one of the selection criteria is
17 students explore math, then of course they're going
18 to pick an inquiry-based set of books, because
19 their criteria requires them to.

20 We also have some information in the record
21 about who was picked for the instructional
22 materials committee. Going too deeply into that,
23 I'm not sure it's that illustrative. But one of
24 the reasons why the school board was ultimately
25 asked to take an up or down vote on just this one

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1 series, from the start it was pushed by district
2 management, in the criteria and in the membership
3 of the committee.

4 The instructional materials committee did not

5 have the benefit of that later OSPI report. One of
6 the key reasons why the instructional materials
7 committee picked the Discovering series is that it
8 was ranked number 2 in the state recommendations.
9 That's fine. That's the information they had at
10 the time. But that's not the information the board
11 had when the board voted up or down.

12 If you read the school board action report,
13 which is the written report from the superintendent
14 to the school board, you will find no mention of
15 that later OSPI report. It was brought up in oral
16 testimony to the board, but I think it's a fair
17 guess that the board may have been a little
18 confused about what the State thought given the
19 glowing recommendation from the instructional
20 materials committee based upon the initial report,
21 and then the passing reference in oral testimony
22 that oh, yeah, there's this later report which does
23 raise some questions about mathematical soundness.

24 Lastly, I'd like to point your attention to a
25 comment made by one of the school board members as

1 to why she thought the Discovering series worked.

2 She got an email from a parent who was saying, hey,
3 I used this series in another school district; I
4 found it inscrutable. My student is having
5 problems in math. I can't understand it. I can't
6 help him learn math. Please don't pick this
7 series.

8 The school board member went home, sat down
9 with her child, and said, well, I thought it wasn't
10 that bad. My child can figure it out. Clearly it
11 works. The problem with that theory is that this
12 particular school board member is a Boeing
13 executive. Presumably her child speaks good
14 English, is comfortable with math, is probably
15 interested in math, and is fully up to speed on
16 what's going on in the school.

17 That it works for one set of students doesn't
18 mean it works for all. And picking a series
19 because one kid does well at it is an arbitrary and
20 capricious method of doing so.

21 Drawing your attention now briefly to the
22 Constitution's guarantee of equal education. The
23 evidence of that is obviously narrower, because the
24 focus there has to be on whether the district
25 protected the right of all students, regardless of

1 their race or ethnic background, to get an equal
2 education. The district said the right things.
3 They certainly put amongst the instructional
4 criteria, instructional materials criteria, that
5 all students must have an equal education.

6 The school board action report, the report
7 from the superintendent to the board, very clearly
8 says, we have a problem here. By looking at the
9 WASL scores, we know we have an achievement gap.
10 The resolution of the school board action report
11 is, and therefore pick the Discovering series. And
12 the problem with that is that there's no data
13 supporting the idea that the Discovering series
14 will help narrow or close that achievement gap.

15 It's our argument to you that the district did
16 not meet the Constitution's equal education
17 guarantee because it picked a book on the hope, on
18 the aspiration that it would fix a problem without
19 looking at either expert reports saying it would or
20 at the statistical data from their own district
21 suggesting that it would not.

22 In closing, what we're asking you to do is a
23 narrow review of a narrow decision, and we're of
24 course asking you to look at not only what I
25 pointed out as the problems with this series but

1 also at the dearth of evidence in the record
2 supporting the idea that this series was going to
3 work for all students and that this series was
4 going to narrow the achievement gap. Thank you.

5 THE COURT: Thank you, Mr. Scully.

6 MS. MCMINIMEE: Good morning. As was
7 explained at length in the district's brief, this
8 is not a case about how to teach math. And it is
9 also not a case about choosing among competing math
10 textbooks. This is a case about whether the
11 Seattle School Board acted arbitrary, capriciously,
12 or contrary to law when making a decision to adopt
13 basic high school instructional mathematics
14 materials.

15 There's a statute at issue, RCW 28A.320.230
16 and a school board policy, C21. Both are contained
17 within the record. Both recognize that the
18 importance of listening to educational
19 professionals in making decisions related to
20 textbooks and materials adoption. The statute
21 itself does not give the school board the authority
22 to pick a textbook. Rather, it gives the school
23 board the authority to appoint an instructional

24 materials committee and to consider an up or down
25 vote on the recommendations of that committee.

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1 I think it's reflective of a legislative
2 intent to not let the politics of the day rule and
3 to instead listen to the educational professionals
4 when it comes to making decisions about basic
5 instructional materials.

6 Most of what Mr. Scully argued today is really
7 not relevant to the issue at hand. This is not a
8 case about inquiry-based mathematics versus
9 traditional-based mathematics. As you will see
10 from a review of the district's brief and the
11 materials in the record, the key curriculum series
12 that they're taking issue with is not actually
13 considered to be a radical reform text, and the
14 mathematical professionals and the members of the
15 materials adoption committee found it to be a
16 balanced text that met the needs of several
17 different styles of teaching math and was a text
18 that was best suited to be flexible given variant
19 teaching styles.

20 The issue at hand is whether the Seattle

21 School Board complied with the relevant statute in
22 its own policy. And that is it. I believe Mr.
23 Scully acknowledged that he had not -- the
24 appellants aren't contesting that the district
25 appointed an instructional materials committee,

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1 that it followed its policy and created an
2 adoptions committee, and that that committee made
3 recommendations in the manner called for by the
4 school district policy.

5 With respect to the high school mathematics
6 adoption committee, it was formed with
7 representatives of eleven of the twelve district
8 comprehensive high schools, with representatives
9 from an alternative K-8, and district
10 representatives from special education English
11 language learning, and advanced learning
12 departments.

13 THE COURT: Can I interrupt you a minute,
14 Ms. McMinimee.

15 MS. MCMINIMEE: Sure.

16 THE COURT: I realize the procedural
17 history and what's before the Court, insofar as

18 determining whether or not the decision was made
19 arbitrarily and capricious, or this equal
20 protection challenge under the state Constitution.
21 I have a very narrow question for you, and that's
22 dealing with C21, the school board policy, in the
23 school board committee's application of making this
24 determination, which has -- even though it's
25 narrow, as it's been presented to the Court, it has

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1 a far-reaching implication for the entire Seattle
2 School District, and that's whether or not a member
3 of the school board committee can make her decision
4 based on her individual daughter's ability to use
5 the book or not. Could you answer that question.

6 MS. MCMINIMEE: Sure. Let me break it
7 out. I believe that they're referring to school
8 board director Sherry Carr, who is not a member of
9 the instructional materials committee, nor is she a
10 member of the adoption committee. Director Carr
11 listed out that she did do a lesson with her
12 daughter as one of the many reasons she gave for
13 her support of the adoption. If you watch the
14 video of the meeting, which has been provided to

15 you, you will see at length the reasoning that each
16 director had with respect to the vote they made.

17 Director Carr is also a parent. She certainly
18 was considering from her own testimony whether when
19 staff represented that this was materials that
20 parents could work with their students on and were
21 parent-friendly materials, she took it upon herself
22 to find that out for herself. Certainly that was
23 not the basis she gave for her decision. The basis
24 she gave for her decision was much longer and much
25 more detailed than reflected the recommendations of

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1 the adoptions committee and the concerns about
2 making sure that the materials would be balanced in
3 all areas of math, and would be accessible to
4 different types of learners, including English
5 language learners.

6 The Discovery Series came with materials
7 available in Spanish, which was one of the reasons
8 that was listed as a favorable reason for adopting
9 this particular series.

10 THE COURT: Dovetailing off of that, let
11 me ask you an additional question. Was there

12 anyone on this committee where English is not the
13 primary language or English was a secondary
14 language in the home, primary language being
15 anything but English?

16 MS. MCMINIMEE: A representative of the
17 district's English language learning department was
18 a member of the adoption committee. I don't know
19 if that person themselves is an English language
20 learner. Knowing the person, I believe that they
21 in fact come from a Spanish speaking background.

22 And additionally, beyond the district
23 representatives who were on the instructional
24 materials committee, there were three community
25 members, as the statute does provide for community

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1 family input to adoptions. All of those who were
2 involved were individuals who had experienced
3 tutoring, volunteering or supporting Seattle Public
4 Schools' students. One of those citizens is
5 herself a professor of mathematics and mathematics
6 education at Seattle University.

7 It was a very well formed group, and it
8 included people who had different viewpoints in

9 teaching math. In fact, one of the most vocal
10 critics of the district's math choices was
11 appointed to the adoption committee as well. So
12 there was certainly not an issue of screening out
13 members based on viewpoint. In fact, who was on
14 the committee is not an actual issue before your
15 Honor because RCW 28A, the statute under which 645,
16 the statute under which this case is brought, has a
17 strict 30-day statute of limitations, and the
18 composition of the adoption committee was not
19 timely challenged.

20 So no matter what arguments are made from
21 opposing counsel about who was on the committee or
22 how they were selected, that issue is not ripe
23 before your Honor. The only issue that's ripe
24 before your Honor is the ultimate school board
25 vote.

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1 The reasons that the adoption committee gave
2 for their particular choices, each choice, both of
3 the core and advanced level -- and it's important
4 to note that this is a review of the entirety of
5 the decision. As you will see from reviewing the

6 record and from the district's brief, many of the
7 choices played off each other. For example, the
8 choice as to what -- what calculus text to use
9 looked at what was being offered in the other
10 textbooks that were being proposed for adoption to
11 make sure areas were well covered in those prior
12 texts. So it's not three books in isolation. It's
13 an entire set of materials that the committees
14 thought of and made recommendations together.

15 The rationale for the adoption committee's
16 recommendation can be found on pages 11 and 12 of
17 the district's brief, with specific to the core
18 materials, given that Mr. Scully is acknowledging
19 they're not challenging the other books at issue.
20 You can find the rationale that was given from the
21 adoptions committee, which is also contained in the
22 transcript of evidence at 543.

23 The adoption committee also let the school
24 board know what their concerns were. This was not
25 an issue of presenting a one-sided set of materials

1 to the school board and hoping that they would go
2 in the same favor as the adoption committee. The

3 adoption committee spent a significant amount of
4 time identifying both the reasons they were
5 supporting the particular recommended adoptions and
6 also things that they found critical. If you look
7 at page 17 of the district's brief, you'll see the
8 table of contents of the materials that were given
9 to the school board, all of which are in the
10 record, that reflect all of the material sources
11 that the school board had available to them and
12 that reflect that they had the opinions both in
13 favor of the adoption and contrary to the adoption
14 in front of them.

15 Ms. de la Fuente, who is the district's
16 mathematics manager, testified or spoke before the
17 school board at three different meetings and
18 addressed concerns that different board members had
19 regarding the proposed adoptions. She also
20 addressed the second OSPI report that was at issue.
21 As she explains, textbooks are tools. They're just
22 one component of classroom instruction. It's the
23 overall instruction that impacts student learning,
24 not just the textbooks, and she did identify that
25 there's differing beliefs on the subject of math

1 instructional materials.

2 Another person who testified in front of the
3 school board was John Boyd, who is the principal of
4 Chief Sealth High School. He testified that all 19
5 of the district's then high school principals and
6 program managers were in favor of the adoption.
7 This is an issue where the educational
8 professionals, the people who knew Seattle public
9 school students best, were wholly in favor of the
10 adoption and spoke to the school board to provide
11 them the reasoning why they held their beliefs.

12 Pages 18 and 19 of the district's brief
13 outline the particular points regarding the key
14 series that illustrated what it was about that
15 particular series that the district felt -- that
16 the adoptions committee and the instructional
17 materials committee felt were best about that
18 particular series and why they were recommending it
19 as the option that was best for the district as the
20 whole, was most balanced, was in the middle on the
21 continuum of types of instructional materials, and
22 so forth.

23 The record is full of evidence that sets forth
24 the reasons why the school board made the decision
25 it did. Yes, it was a 4-3 decision. There are

1 many 4-3 decisions when you have a governmental
2 agency of seven people. It does not reflect that
3 this was an arbitrary or capricious or contrary to
4 law decision. In fact, it reflects that this was a
5 decision in which much thought and care was had,
6 and there are difference of opinions. We wouldn't
7 be here in court today if there were not people who
8 were passionate about the subject, but the subject
9 at hand is not how to do a particular type of math
10 problem, but it was about whether the school board
11 acted arbitrary, capriciously, or contrary to law.

12 THE COURT: Can you point the Court in the
13 record where the board discussed specifically the
14 discrepant grade passing rates between Cleveland
15 and Garfield in the tenth grade and the district-
16 wide WASL tenth grade pass rates, and I'll just put
17 them in the record. They're already mentioned in
18 page 15 of appellant's brief, and page 14, and let
19 me just indicate that the Cleveland 2006 was an
20 11.1 percent. Garfield was an 18.8 percent. And
21 the district-wide WASL tenth grade pass rate was
22 6.3.

23 The program was integrated. 2007, it drops to

24 5 percent from 11.1 percent for Cleveland.
25 Garfield it drops 3.4 percent down to 15.4 percent,

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1 and then the district-wide WASL tenth grade pass
2 rate is 13.6 percent, and that's inquiry-based for
3 Cleveland and Garfield. And then in 2008, we have
4 the stunning zero pass rate, and then Garfield's
5 pass rate drops precipitously to 4.8 percent and an
6 overall increase in the district-wide WASL tenth
7 grade pass rate of 19 and a half percent.

8 Where in the record do the members of this
9 committee grapple with these results?

10 MS. MCMINIMEE: Where does the school
11 board discuss the reasoning for its math adoption?
12 You can view that in 1084 through 86, which are the
13 videos of the school board meeting. It's important
14 to note that really that issue is not an issue
15 that's relevant to this case, because the materials
16 at issue were different materials. Additionally,
17 as has been recognized by the State of Washington,
18 the WASL test with respect to math is under
19 significant question.

20 In fact, the OSPI has delayed the

21 implementation of a math requirement with respect
22 to graduation in high school because they have seen
23 significant changes with respect to test score year
24 to year and don't themselves have an answer as to
25 what the basis for that is. The WASL is not

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1 designed to be a comparator among school years or
2 even cohorts. It's not valid -- it's not valid
3 data with respect to the issue at hand because it
4 doesn't reflect the instructional materials that
5 were at issue, but rather different books, an
6 entirely different series that was not being
7 recommended for adoption by the school board.

8 It would almost be like asking the Seattle
9 School Board to make a decision based upon
10 elementary school scores using elementary school
11 books with respect to a different set of high
12 school books entirely. It's not a comparator and
13 it's not a data point that's relevant to the issue
14 at hand, which is the adoption of these specific
15 materials.

16 With respect to the constitutional challenge,
17 the district does not believe that that's a de novo

18 issue. In fact, if you review some of the case law
19 with respect to RCW 28A.645, the cases indicate
20 clearly that it is not a vehicle for constitutional
21 challenges. Constitutional challenges can be made
22 in other venues, but under this particular statute,
23 it is a statute that is designed to ask a court, a
24 superior court, to review a school board decision
25 in an appellate capacity for arbitrary and

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1 capricious or contrary to law.

2 The Court is not considering either issue at
3 hand under a de novo review statute, and frankly no
4 evidence has been put forward as to whether or not
5 this is going to result in any sort of
6 constitutional violation one way or the other.
7 There is no data to support that this series would
8 impact -- that the adoption of this series will
9 impact minority learners any differently than other
10 students.

11 In fact, one of the reasons the school board
12 and the adoptions committee gave for preferring
13 this theory -- first for the adoption committee
14 preferring the series, and then for the school

15 board in adopting it, is its accessibility to
16 English language learners and the availability of
17 the materials in Spanish. If your Honor has no
18 further questions.

19 THE COURT: I don't.

20 Rebuttal, Mr. Scully.

21 MR. SCULLY: Thank you, your Honor.

22 Addressing the Cleveland and Garfield data first,
23 the answer to where in the record the school board
24 considered it is that they didn't. The only reason
25 it is in the record at all is that a concerned

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1 citizen sent it in as a public comment. The record
2 was supplemented by us in this case, and what we
3 supplemented the record with was all the citizen
4 comments. So although the board certainly received
5 it, there's no indication that they considered this
6 data at all in making their decision.

7 Counsel is correct that it is a different math
8 series, it was not the Discovering series, but it
9 was an inquiry-based series. And the reason why
10 that's important and the reason why we talk so much
11 about inquiry-based math is that although the

12 district makes the argument that the book is only
13 part of the teaching process, the book has a method
14 in it. The book sets forth a particular way of
15 learning math. And the argument that the
16 Discovering series is not inquiry-based is flatly
17 belied by either reading the series itself or if
18 you look at a note from the publisher on the page 4
19 of the Discovering Algebra, and I think on all of
20 them, the note from the publisher explains how the
21 series works, and the key sentence in there is
22 through the investigations that are the heart of
23 this series, students discover many important
24 mathematical principles themselves.

25 Any argument that this is not an inquiry-based

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1 series is based upon not reading it. There is no
2 two ways about it. It is inquiry-based
3 instruction. So the Cleveland and Garfield
4 results, although they were a different math
5 series, were using the same method, and it's the
6 method that we're arguing leads to the problem.

7 The argument raised by Ms. de la Fuente to the
8 board and by the district in its briefing is

9 basically that okay, fine, this may not work for
10 everybody, but the books are only part of the
11 series; teachers can teach around it. And I argue
12 that that's probably what they do, that teachers
13 who are having students with difficulty probably do
14 get stuff off the Web or come up with their own
15 supplemental materials, or maybe even use a
16 different math series to teach those students
17 having difficulty.

18 Simply because there is a work around to the
19 problem doesn't mean it's okay to pick that series.
20 If we're acknowledging that the series doesn't work
21 for all students, it's arbitrary and capricious to
22 pick one. Pick one that does, rather than saying,
23 our teachers will sort it out by coming up with
24 fixes to this defective series.

25 The last two points, I agree with counsel that

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1 we're not looking at the composition of the
2 instructional materials committee as the decision.
3 The buck stops with the board. And what we're
4 looking at is whether the board was justified in
5 giving the thumbs up, given what they were supposed

6 to do here, which is a searching evaluation of the
7 record in front of them to decide whether that
8 instructional materials committee's decision was
9 the right choice for the district.

10 The committee makes a recommendation. The
11 board makes a decision.

12 THE COURT: Let me ask you a question, Mr.
13 Scully, since that point is essentially agreed upon
14 by both sides of this issue. So if I were to
15 remand this case, as you suggest, that the board
16 did not adequately consider the second OSPI
17 recommendation, which was to use the Holt series,
18 and the board was to somehow reconsider, if you
19 will, on remand the second OSPI, and then they
20 still came out with the same decision, where are
21 you at that point?

22 MR. SCULLY: Right back here. I mean
23 that's -- I think that's unfortunate. I would like
24 to ask you to pick a series for us, but that's not
25 the law. I mean the law is the board gives up or

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1 down to the instructional materials committee. You
2 give up or down to the board. If you remand this,

3 the board then has to reconsider that decision on
4 the original instructional materials committee
5 recommendation, and I would hope they would give it
6 a thumbs down; it would then go back to the
7 instructional materials committee to look at this
8 series and all the other options all the way over
9 again. Is that inefficient? Yes. But that's what
10 we have.

11 The only additional piece of evidence I'd like
12 to point out in the instructional materials
13 committee is that like the board, at least one
14 instructional materials committee member described
15 why he voted in favor of the Discovering series,
16 and he did it based upon the same reason director
17 Carr did. It worked for his kid, whom he described
18 as mathematically gifted, and he liked the OSPI
19 report.

20 So there's no need to pick apart the IMC, but
21 arguing that, we therefore have to trust them.
22 That's not the task the school board had in front
23 of it. Their task was to look hard at how the IMC
24 reached its recommendation and see whether it made
25 sense for the district.

1 The argument on the WASL, that the WASL is
2 flawed and therefore we can't trust it, that's an
3 interesting argument coming from the school
4 district. I don't know what's going to happen with
5 the WASL, but that is the only objective data we
6 have, and what is missing from the record is what
7 Ms. McMinimee said in court today. The school
8 board or the school district did not say, we don't
9 trust the WASL and here's why. Instead, the school
10 superintendent said, we've got a problem with these
11 WASL scores, let's pick the Discovering series to
12 fix them.

13 They then said nothing about the fact that
14 these WASL scores showed a disparity at Cleveland
15 and Garfield. There's nothing in the record
16 indicating that the district had any reason not to
17 trust the WASL scores. And even if they did have a
18 reason not to trust the WASL scores, when you only
19 got one data set, you got to pay some attention to
20 it or pick a reason why you're not going to do so.

21 For all these reasons, what we're asking you
22 to do is send this back to the school board for
23 further consideration. Thank you.

24 THE COURT: Thank you, counsel.

25 All right. The Court, as it works its way

1 through the algebra, the geometry, now I
2 understand, I guess I don't have to do the
3 calculus, but I am going to look at the calculus,
4 I'm just going chronologically, but I will say I'm
5 going to skip over the precalculus. I just want to
6 see the beginning and end with what happens with
7 kids in high school.

8 I still only have some of the materials, but
9 that's not the issue, and I think it's pretty clear
10 that's not the issue. The issue is whether or not
11 the decision made by the board was arbitrary and
12 capricious and whether or not -- oh, I know, Mr.
13 Scully, did you want to respond to the comment
14 about the lack of ability for this Court to do a de
15 novo review under a constitutional challenge under
16 RCW 28A, et seq.?

17 MR. SCULLY: So the seminal case in that
18 is Haynes V. Seattle School District. Most of the
19 cases that counsel referenced are pre-Haynes, and I
20 do not have a case that says a constitutional
21 challenge is reviewed de novo. I have Haynes,
22 which say it's arbitrary and capricious, comma, or
23 contrary to law. And if it's only arbitrary or
24 capricious, then that's surplusage. So there's got

25 to be something else there. And I'm asking you to

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1 apply that to this theory. I don't have a case to
2 wave and say, it's been done before.

3 THE COURT: Right. Okay. Thank you very
4 much, counsel, for the briefing and the textbooks,
5 and I anticipate I will probably -- I am going to
6 try to get a ruling out by the 12th of February.

7 MR. SCULLY: I have one logistical
8 problem. The Holt series that we provided to you
9 was borrowed from an active teacher who is using it
10 in another district, so we're hoping to get it
11 back. I think he needs it soon unfortunately.

12 THE COURT: My question is this. Can I
13 have it until the end of the week or does he need
14 it now? I don't want to keep a teacher from
15 teaching. You know what, how about this?

16 This can be off the record, Michelle.

17 (Whereupon, the proceedings were
18 concluded.)

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1 C E R T I F I C A T E
2 STATE OF WASHINGTON)
3) SS.
4 COUNTY OF KING)
5 I, Michelle Vitrano, Certified Court Reporter,
6 in and for the State of Washington, do hereby
7 certify:
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9 is a true and correct transcription of my shorthand
10 notes as taken in the cause of DUZANNE PORTER, et
11 al., vs. SEATTLE SCHOOL DISTRICT NO. 1, et al., on
12 the date and at the time and place as shown on page
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14 That I am not a relative or employee or
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16 action, or a relative or employee of any such
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Dated this 9th day of February, 2010.

Michelle Vitrano
Certified Court Reporter