SUPREME COURT OF WASHINGTON

R. D. MALONE, GLORIA BRIGGS, LARA GRAUER; NORA WHEAT, SAHILA CHANGEBRINGER, SHELLY WILLIAMS, JOY ANDERSON, MAY OVALLES, GORDON GLASCOCK, DANAHER M. DEMPSEY Jr. MARTHA MCLAREN, and DOH DRIVER Petitioners, Vs. SEATTLE SCHOOL DISTRICT NO. 1, SEATTLE SCHOOL BOARD, MICHAEL DEBELL, STEVE SUNDQUIST, KAY SMITH-BLUM, HARIUM MARTIN-MORRIS, SHERRY CARR, PETER MAIER, BETTY PATU, and the KING COUNTY SUPERIOR COURT, THE HONORABLE JUDGE THERESA DOYLE, THE HONORABLE JUDGE LAURA INVEEN, THE HONORABLE JUDGE PARIS KALLAS, HONORABLE JUDGE LAURA MIDDAUGH Respondents.	NO. 84361-9 PETITIONERS' REDACTED REPLY TO RESPONSE BY JUDGES DOYLE, INVEEN, AND MIDDAUGH

Petitioners have previously submitted as evidence in this original proceeding Washington Auditor's Report No. 10003871 (Audit Report) as a supplemental appendix. The Audit Report is admissible as evidence pursuant to RCW 43.09.180. In the "Summary of Audit Issues" section the report states in pertinent part:

> "***RESULTS***
>
> **Summary of Audit Issues:**
>
> In all areas that we audited, we found the District did not comply with state laws and regulations and its own policies and procedures. These conditions were significant enough to report as findings ... Audit Report, p. 2.

The first finding of the Audit Report is "The Seattle School District did not comply with state law on recording meeting minutes and making them available to the public". Id., p. 6. The auditor found: "We determined the Board did not record minutes at retreats and workshops in the 2008 - 2009 school year. Id. These retreats and workshops were held to discuss the budget, ***student assignment boundaries***, ***school closures*** and strategic planning". [Emphasis Supplied] Id., p. 6. The school board's decisions regarding student assignment boundaries and school closures are the subject of the Commissioner's ruling denying review in the *Briggs* and *Ovalles* discretionary review proceedings and in this original action.

The Auditor described the effect of these violations to be: "When minutes of special meetings are not promptly recorded, information on Board discussions is not made available to the public". Id., p. 6. The Auditor recommended "the District establish procedures to ensure that meeting minutes are promptly recorded and made available to the public." Id., p. 6. The District's response was: "The District concurs with the finding and the requirement under OPMA that any meeting of the quorum of the board members to discuss district business is to be treated as a special or regular meeting of the OPMA." Id. p. 6. Thus, the school board admits the Transcripts of Evidence in the *Ovalles* and *Briggs* appeals contains no minutes of the discussions relating to student assignments and school closures, even though the law required otherwise. Additionally, there is no indication of what evidence the school board actually considered with regard to the school closures and the new student assignment plan at retreats and workshops devoted to these specific decisions.

The fifth finding of the Auditor's Report was: "5. The School Board and District Management have not implemented sufficient policies and controls to ensure the District complies with state laws, its own policies, or addresses concerns raised in prior audits". Id., p. 25. In a section entitled "description of the condition" the report states: "In all the

areas we examined we found lax or non-existent controls in District operations. ..." Id., p. 25. With regard to the Open Meetings Act the Auditor noted continuing violations of state law and that "the District did not develop policies and procedures to adequately address prior audit recommendations." Id, at p. 27. With regard to the District's records retention policies, the Auditor notes continuing violations and states: "The records retention issue was brought to the District's attention in last year's audit and remains unresolved." Id. p. 30. The cause of the condition was stated to be: "The District Superintendent and Executive management have not familiarized themselves with state law and district policy regarding school operations. Additionally, the Board does not provide oversight to ensure laws and policies are followed. ..." Id., at 31. The Auditor's Report also notes: "Further, although we have communicated internal controls weaknesses in prior audits in the areas noted above, the District has not addressed them." The Auditor concludes that one effect of this condition is: "[t]the District's Board and Management have placed public resources at risk".

RCW 28A.645.020 provides:

> Within twenty days of service of the notice of appeal, the school board, at its expense, or the school official, at such official's expense, shall file the complete transcript of the evidence and the papers and exhibits relating to the

> decision for which a complaint has been filed. Such filings shall be certified to be correct.

Exhibit 2 to Petitioner's Application for Extraordinary Writs is the District's responses to discovery ordered by Judge Inveen in the Briggs appeal. Interrogatory No. 9 requests:

> Please state whether the District had a written policy or procedure in place relating to ***certifying*** pursuant to RCW 28A.645.020 that the evidence and the papers and exhibits in Transcript of Evidence relating to decisions made by the school board in 2008 and 2009 were correct and complete. If your answer is yes, please set forth the language of each policy or procedure verbatim of provide a copy of each policy or procedure. [Emphasis in original]

The District responded:

> ANSWER: Subject to the foregoing objections, the District responds that it does not maintain a policy or procedure in place "relating to ***certifying*** pursuant to RCW 28A.645.020," nor is it aware of any regulation or statute requiring the District to maintain such a policy or procedure". [Emphasis in original]

The two sentences that comprise RCW 28A.645.020 are not ambiguous. They clearly require the school board to file a Transcript of Evidence and a certification that the filings are correct within 20 days of the complaint. The School Board has not complied with this requirement to certify the record to be correct in any of the appeals that have come before the Honorable Judges Doyle, Inveen, and Middaugh in those cases which are the subject of this original action and in those newer cases

which continue to stack up against the school board before these same and other judges of the King County Superior Court[1].

The attorneys for the King County Superior Court judges attempt in their brief to minimize the clarity of Commissioner's statement that the school board must certify the record to be correct pursuant RCW 28A.645.020. The judges and prosecutors refer to a statement by the Commissioner that the certification requirement does not by itself impose a duty to keep a discrete record of every decision the school board makes. Judges Reply brief, p. 9. While this may or may not be true, certainly the certification duty does, as the Commissioner acknowledges, require the school board to certify the record to be correct.

Indeed, if there was any doubt about the fact the Commissioner meant that the school board must certify the record to be correct pursuant to RCW 28A.645.020 one need only look to page 10 of the Ovalles' response to the petition for discretionary review. There the District vehemently argued that the school board does not have to certify the record to be correct. The Commissioner responded to that argument not only in his *Ovalles* ruling, but also in his rulings relating to this original action and the Anderson discretionary review action by clarifying the

[1] The Honorable Judge Middaugh was recently assigned the appeal of the school board decision extending the contract of the District's Superintendent by one additional year.

obvious; namely, that the school board must produce a record that it certifies to be correct.

To the extent the Commissioner intended that these King County Superior Court judges should have foisted on them the responsibility for creating an adequate record from whole cloth, rather than from filings that have been certified by the school board "to be correct", the Commissioner clearly erred. Superior Court judges do not have discretion to decide an appeal based on a record that the school board refuses to certify to be correct because the statute clearly provides for this.

The Judges' arguments at page 11 of their response that *Hattrick* and *Weems* establish that petitioners can obtain relief by way of an appeal ruling that orders the District to supplement the Transcript of Evidence for these legislative decisions is way off the mark. *Hattrick* and *Weems* involved quasi-judicial appeals where the school board kept a record of the evidence that was presented during the quasi-judicial review hearings. There was an index of evidence and testimony. This is not the case here. No one knows what evidence the school board considered except for the one sided stack of documents Holly Ferguson gave the school board to review before the members' decision to close several schools.

The argument by Judges Doyle, Middaugh, and Inveen that the school board's continuing violations of RCW 28A.645.020 as it legislates

closing and re-opening schools, assigning thousands of students to re-segregated schools, and spending millions of tax payer dollars on these and other projects rings hollow. The judges arguments that these ongoing legislative abuses do not constitute extraordinary circumstances meriting original review by this Court is belied by the very authority the judges cite. In *SEIU Healthcare, 775 NW Gregoire*, 168 Wn.2d 593, 598-599, 229 P. 2d 774 (2010) this Court stated:

> This court has express constitutional authority to issue mandamus directed to state officers as provided by article IV, section 4 of the state constitution. However, such a court order must be justified as an extraordinary remedy. Walker v. Munro, 124 Wn.2d 402, 424, 879 P.2d 920 (1994)

Walker v Monro, 124 Wn.2d at 402 expressly states "Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance."

None of the other cases cited at page 10 of the judges' brief approach the magnitude of the consequences presented here both in terms of practical effect (the impact the school board decisions have on public monies and the direct effect they have on the every day and long term learning environment for thousands of students) and legal effect (courts refusing to require the District to provide a record that is certified to be correct violates the separation of powers and appellants' right to prepare and prosecute an appeal based on a record that complies with the law.)

Certainly, this case raises issues at least as important as those involved in *Farris v. Munro*, 99 Wn.2d 326, 662 P.2d 821 (1983), where a taxpayer plaintiff challenged the State Lottery Act by way of an original writ of mandamus without first asking the Attorney General to bring the law suit. While the Supreme Court acknowledged this was in direct violation of the usual standing requirements for taxpayer actions, it nonetheless granted standing to bring a mandamus action because of the importance of the issues and the effect the case would have on a substantial number of members of the public.

> Despite appellant's failure to satisfy these standing requirements, he raised an issue vital to the state revenue process that remained unresolved at the time of this suit and might have affected a measure on the November 1982 ballot. Thus, the case presented issues of significant public interest that, by analogy to other decisions, allow this court to reach the merits. ***In suits not involving taxpayers this court has recognized that standing questions should be analyzed in terms of the public interests presented.***

This original action would also seem no less important than that allowed in *Wash. State Bar Ass'n v. State,* 125 Wash.2d 901, 890 P.2d 1047 (1995) where the Court granted an **original** action of prohibition to decide whether the legislature had affronted judicial power by attempting to allow bar association employees to collectively bargain.[2]

[2] Although this Court held in *Winsor v. Bridges*, 24 Wash. 540, 64 P. 780 (Wash. 1901) that it does not have original jurisdiction to issue a writ of

Sure, a public lottery is important. Also the issue of whether Bar Association employees should be able to collectively bargain may well be important important. But are these issues truly more compelling than those involved here; which invoke continuing violations of the same very clear statute in a way that offends the separation powers in the context of the State's paramount duties under Const., Art. IX, sections 1 & 2 and petitioners' access to the justice with regard to educational decisions pursuant to Const., Art. 1, Section 10?

The judges state at page 12 of their brief "petitioners seem to claim that an extraordinary writ is necessary because this Court [Commissioner] has denied their requests for discretionary review" and then quote portions of petitioners' opening motion. There should be no mistake that this is exactly what petitioners are saying. The law requires the school board to certify the record to be correct. The Commissioner acknowledged this, but then went on to deny discretionary review even though the Commissioner knew the school board was refusing to certify records to be correct and had no indication that school board would comply with the

---

prohibition, it appears to have declared otherwise in this decision. 125 Wash.2d at 906. While the Court's assertion of original jurisdiction over a writ of prohibition may be questionable under the language of Const., Art. IV, Sec. 4, what is clear about the opinion is that this Court can and did consider a violation of the separation of powers an adequate basis for exercising original jurisdiction.

certification requirement in the future or that these local judges would require them to do so. It is not consistent with the role of judicial review that American courts assumed early in this nation's history (and which is a power courts in most other countries do not have) to observe its inferior tribunals allowing political entities to break the law and do nothing. When judges give the school board a complete pass on obeying the law, without providing any reasonable analysis for doing so, the rule of law suffers. And the primary actor in subverting the rule of law are those judges that refuse to apply constitutional laws as the legislature has written them.

Finally, the judges argue at page 13 that the Commissioner correctly dismissed the writ because a court may not issue an extraordinary writ to compel judges to perform a judicial discretionary act. Once again the judges miss the point. The statute says, and the Commissioner acknowledges, that the record must be certified to be correct. The school board has not once acknowledged that the school board must certify the record "to be correct". Indeed, as previously mentioned in the *Ovalles* discretionary review action ***the District argued it did not have to certify the record to be correct.***. District's Response Brief, p. 10. Although the Commissioner promptly told the District this argument had no merit, *Ovalles* Ruling Denying Review, p. 3, he refused

to lift a finger to stop the judges from continuing to allow the school board to violate the law.

Now, in *Briggs* a different attorney for the District is arguing in a response brief that so long as the District certified that something that was found in its public records archive is a correct copy of what the District actually found, this satisfies the requirement of RCW 28A.645.020. But this is not true. It is the transcript of evidence, which contains the essential evidentiary materials the school board relied upon in making its decision, that must be certified "to be correct".

The school board's suggestion that it has legislative authority to create an administrative record after a decision has been made out of the public records archive is bogus. *See* RCW 42.56. Moreover, this argument is incredulous in light of the Auditor's findings that the school board routinely ignored the requirements of the Open Meetings Act and Public Records Act when it was making the school closure and student assignment decisions challenged in these superior court appeals presently before this Court pursuant to petitioners' motions to modify.

Rickie Malone's testimony in the Briggs' appeal and in the verified Petition for Extraordinary review shows just how ludicrous the judges' arguments are. Ms. Malone, a former Fullbright-Hays Fellow and Danforth mentor, founder of the African American Academy, and former

principal at several schools, submitted two papers totaling 17 pages for purposes of the record the school board was to consider with regard to the closure of the African American Academy. See *Briggs* Discretionary Review Appendix (PLEADINGS), pp. 42 - 68. None of these documents, or any documents from the public, were included in the records Ms. Ferguson asks the school board to specially review before deciding what schools to close. The District certified only this one sided pile of documents constituted the Transcript of Evidence which was being submitted pursuant to RCW 28A.645.020.

When Judge Inveen ordered the District to produce those records sufficient to actually comply with RCW 28A.645.020 the District only produced 3 pages of one the reports Ms. Malone had submitted for purposes of the record relating to closures of the African American Academy. See *Briggs* Discretionary Review Appendix (PLEADINGS), p. 213. The District's belated certification that these three pages are correct copies of those documents that made their way to the archives, is not the same thing as certifying the record is correct and includes the 17 pages of reports that was submitted as part of the record by Ms. Malone for the school board consideration.

Moreover, it cannot be ignored that petitioners requested a hearing from each of these judges regarding the Superior Court's jurisdiction to

decide an appeal based on a record that did not substantially comply with RCW 28A.645.020.

With all due respect to the King County judges and prosecutors who represent them there is no good faith argument that the District or they can make regarding the District's attempt to certify the record "filings" pursuant to RCW 28A.645.020. The District's Response to Interrogatory 9 clearly states that the school board was unaware that it had a duty to comply with RCW 28A.645.020's certification requirement:

> ANSWER: Subject to the foregoing objections, the District responds that it does not maintain a policy or procedure in place "relating to ***certifying*** pursuant to RCW 28A.645.020," nor is it aware of any regulation or statute requiring the District to maintain such a policy or procedure". [Emphasis in original]

The facts are the facts and notwithstanding the best efforts of counsel these facts cannot now be spun in such a way as to disprove the auditors findings that: "[t]he District Superintendent and Executive management have not familiarized themselves with state law and district policy regarding school operations. Additionally, the Board does not provide oversight to ensure laws and policies are followed. ..." Id., at 31.

Judges do not have discretion to allow the district to refuse to certify that the filings constituting the Transcript of Evidence are correct. When judges refuse to enforce the law they are as much responsible for its violation as those who are enabled to break the law with impunity. The

result of judicial indulgence of the school board's failure to comply with the law is that the Seattle community is left with the sorry state of affairs identified in the Audit Report.

CONCLUSION

This Court should reverse the Commissioner's ruling denying review of Petitioners' original action against Judges Doyle, Inveen, and Middaugh.

Respectfully Submitted,

s/Scott E. Stafne

Scott E. Stafne, WSBA #6964