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SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN THE COUNTY OF THURSTON

REID WILKES AND ADRIENNE STUART,  
on their own behalf and on behalf of J.W. and  
C.W., their two children in public schools,  
CRISTINE BECKWITH, on her own behalf  
and on behalf of B.B. and G.B., her two  
children in public schools, and CAROLINA  
LANDA, on her own behalf and on behalf of  
Z.L., her child in public schools,

Petitioners,

v.

WASHINGTON STATE BOARD OF  
EDUCATION and WASHINGTON OFFICE  
OF THE SUPERINTENDENT OF PUBLIC  
INSTRUCTION,

Respondents.

NO:

PETITION FOR JUDICIAL REVIEW

INTRODUCTION

In response to the COVID-19 pandemic, the Washington State Board of Education and Office of the Superintendent of Public Instruction adopted emergency rules that strip away the basic education constitutionally required for every student. Petitioners seek to restore access to a

1 basic education for children whose learning needs cannot be met remotely. They bring this rule  
2 challenge to ensure that health and safety are protected without additional damage to the  
3 educational opportunities of students. Petitioners respectfully ask the Court to immediately  
4 invalidate the rules as a shortcut around constitutional and statutory rights of students, so that the  
5 State will promptly develop and fully fund safe, adequate and fair solutions to the school  
6 system's current health crisis.

### 7 CONSTITUTIONAL AND STATUTORY FRAMEWORK

8 Article IX, section 1 of the Washington Constitution states: "It is the paramount duty of  
9 the state to make ample provision for the education of all children residing within its borders,  
10 without distinction or preference on account of race, color, caste, or sex." As interpreted by the  
11 Washington Supreme Court, article IX, section 1 imposes an affirmative duty on the State to  
12 fully fund a "basic education" by means of dependable and regular tax sources. It also gives all  
13 Washington children a positive right to have the State make ample provision for their education.

14 The Legislature has defined the program of "basic education" necessary to satisfy its  
15 paramount duty. This includes the program outlined in the Basic Education Act, RCW  
16 28A.150.200 through .510. Under RCW 28A.150.220, the "minimum instructional program of  
17 basic education" requires each school district to provide an annual average of at least 1,000  
18 instructional hours a year in grades 1-8 and 1,080 instructional hours a year in grades 9-12. Each  
19 district's basic educational program "shall be accessible to all" school-aged students and shall  
20 consist of at least 180 school days per school year. Under RCW 28A.150.203, a "school day"  
21 means a day in which students "are engaged in academic and career and technical instruction  
22 planned by and under the direction of the school." Under RCW 28A.150.205, "instructional  
23 hours" means "those hours students are provided the opportunity to engage in educational

1 activity planned by and under the direction of school district staff,” including class changes and  
2 recess but not lunch.

3 As an additional protection, article IX, section 2 of the Constitution says: “The legislature  
4 shall provide for a general and uniform system of public schools.” The Washington Supreme  
5 Court has interpreted “uniform” to mean that “every child shall have the same advantages and be  
6 subject to the same discipline as every other child.” Title 28A RCW’s “Common School  
7 Provisions,” which include the Basic Education Act’s minimum instructional hours and days,  
8 were found to satisfy the “general and uniform” portion of the State’s article IX duty.

9 Under *McCleary v. State*, the State may not eliminate an offering from the basic  
10 education program for reasons unrelated to educational policy, such as fiscal crisis. Rather, the  
11 State must show that a program once considered central to basic education no longer serves the  
12 same educational purpose or should be replaced with a superior program or offering. Against this  
13 framework, the emergency rules – which stretch the definition of “instructional hours” and  
14 “school days” to include time at home without instruction - cannot withstand judicial scrutiny.

### 15 JURISDICTION AND VENUE

16 1.1 This Court has jurisdiction pursuant to the Administrative Procedure Act, RCW  
17 34.05.570(2).

18 1.2 Venue lies in this court pursuant to RCW 4.12.010(1), RCW 4.12.010(5) and  
19 RCW 4.12.025.

### 20 PETITION FOR REVIEW

21 RCW 34.05.546 requires setting forth the following information:

22 2.1 *Petitioner addresses.* Reid Wilkes, Adrienne Stuart, C.W. and J.W. live at 6135  
23 Panorama Drive NE, Tacoma, Washington, 98422. Cristine Beckwith, B.B. and G.B. live at

1 18125 Brittany Drive SW, Normandy Park, Washington, 98166. Carolina Landa and Z.L. live at  
2 121 Foote Street NW, Olympia, Washington, 98502.

3 2.2 *Attorney address.* The petitioner’s attorney is Katherine A. George of Johnston  
4 George LLP, located at 2101 Fourth Avenue, Suite 860, Seattle, Washington, 98121.

5 2.3 *Agency addresses.* The state agencies whose actions are at issue are the  
6 Washington State Board of Education and the Washington Office of the Superintendent of Public  
7 Instruction (OSPI), both of which are located at 600 Washington Street SE, Olympia,  
8 Washington, 98504.

9 2.4 *Agency actions at issue.* This petition challenges emergency rulemaking that  
10 changed the basic education program in Washington without the public notice and comment that  
11 ordinarily ensures diverse interests are considered. On April 29, 2020, OSPI adopted “Special  
12 Rules for Emergency School Closures in the 2019-20 School Year,” published as Washington  
13 State Register 20-10-044 and codified as new WAC Chapter 392-901. On July 21, 2020, the  
14 State Board of Education adopted amendments to WAC Chapter 180-16, published as  
15 Washington State Register 20-15-153. Copies of the rules are attached.

### 16 **The OSPI Rule**

17 In signing the rule on April 29, Superintendent of Public Instruction Chris Reykdal  
18 allowed school districts to receive full State funding for basic education in the 2019-20 school  
19 year without satisfying requirements for at least 180 school days and 1,000 instructional hours  
20 that year. With the stroke of a pen, effectively immediately, OSPI authorized itself to waive the  
21 school-day and instructional-hour requirements for any districts claiming to meet OSPI’s  
22 minimum standards for the COVID-19 closure period. These standards required implementing  
23 and adopting by May 29, 2020 (a few weeks before the school year ended) a “continuous

1 learning plan” offering all students “the opportunity to engage in *educational opportunities*  
2 planned by and under the direction of” the district staff. Thus, instead of offering at least 1,000  
3 hours of “*educational activity*” planned and directed by district staff as required by RCW  
4 28A.150.205(1) and RCW 28A.150.220(2), districts could offer an uncertain and lesser amount  
5 of “*educational opportunities*” planned and directed by staff in the 2019-20 school year.

6 OSPI did not require districts to submit their continuous learning plans for review.  
7 Rather, under WAC 392-901-035, a district could get a waiver of basic education program  
8 requirements by submitting a statement that it “has implemented a plan for continuous learning  
9 for all students” in compliance with the relaxed standards of the emergency rule.

10 OSPI’s rule defined “continuous learning” as “establishing and maintaining connections  
11 with students and families to provide learning materials and supports using a variety of  
12 modalities including, but not limited to, email, telephone, printed learning materials, or available  
13 online platforms, taking into account recommendations provided by [OSPI] in its published  
14 guidance and as required under this chapter and applicable state and federal law.” Thus,  
15 continuous learning is not the same as instruction or “educational activity” directed by school  
16 staff. Districts could (and did) get full funding by sending learning materials to families rather  
17 than providing the minimum instruction required for a basic education. Adding to the problem,  
18 OSPI guidance during the March-June 2020 school closure did not require any particular amount  
19 of remote instruction nor prohibit reliance on parents to make education accessible to their  
20 children. This led to widespread inequities in learning opportunity.

21 The “emergency” rule will expire on August 27, 2020, but its effects will continue.  
22 Petitioners seek to declare the rule invalid in order to establish a clear line against diminishing  
23 the basic education program through administrative rulemaking, and so that schools will have to

1 make up the missing instructional hours and days (adhering to public health standards) in order  
2 to maintain full funding for the 2019-20 school year.

3 **The Board Rule**

4 On July 21, 2020, the State Board of Education adopted an emergency rule to count  
5 remote modalities as “instructional hours” for purposes of the 1,000-hour annual requirement.  
6 The rule changes the definition of “instructional hours” for the entire 2020-21 school year  
7 although, by statute, an emergency rule may not last more than 120 days. Instructional hours are  
8 defined as “hours of educational activity planned by and under the direction of school district  
9 staff that are delivered through...distance learning, hybrid classrooms, rotating schedules, or  
10 other methods” of providing basic education services during COVID-19. The rule also redefines  
11 school days, stating: “Days in which instructional hours are offered shall count as school days for  
12 the purpose of meeting the minimum one hundred eighty-day school year requirement.” This is  
13 different than the definition in RCW 28A.150.203(10), which counts only those days when  
14 students are *engaged in instruction* planned and directed by the school.

15 According to a policy memo prepared for the Board’s July work session, the emergency  
16 rule is “designed to allow districts the maximum latitude to respond to public health needs and  
17 still count their delivery of basic education as instructional hours” for purposes of receiving full  
18 funding. The memo said that traditionally, when advising districts how to count instructional  
19 hours under the Basic Education Act funding model, the Board’s guidance was simply to count  
20 from the beginning of the school day to the end, excluding lunch. The memo said: “This rule  
21 change allows districts that are utilizing modalities other than traditional seat time to count as  
22 instructional hours for delivery of basic education.” The official filing in the Washington State  
23 Register said the rule “allows modalities other than in-person delivery of instruction” to count as

1 instructional hours. The rule requires districts to submit reopening plans to the Board and OSPI  
2 two weeks before school begins.

3 2.5 *Adjudicative parties.* There were no adjudicative proceedings leading to the  
4 agency actions at issue.

5 2.6 *Entitlement to review.* Petitioners are parents of students enrolled in public  
6 schools in Washington. When districts shifted to “continuous learning” in March 2020, the  
7 petitioners’ children no longer could access a basic education, including special education and  
8 related services designed to meet their unique needs arising from disabilities. The petitioners  
9 were expected to take over services themselves, despite having full-time jobs and lacking  
10 educator training. Their children were not capable of self-directed learning. They did not receive  
11 the minimum number of instructional hours and school days required by statute and article IX,  
12 sections 1 and 2 in the 2019-20 school year. If the State Board of Education rule is upheld, they  
13 will experience another school year without the basic education that is constitutionally and  
14 statutorily required, and they will fall further behind peers. Petitioners live in school districts  
15 planning entirely virtual offerings in the fall.

16 Petitioners’ rights were substantially prejudiced by the emergency rulemaking at issue.  
17 The OSPI rule interfered with and impaired the rights of petitioners’ children to receive a basic  
18 education in the spring. The Board rule poses an immediate threat to their basic education rights  
19 in the fall. Both rules shifted responsibility for basic educational activity from the school districts  
20 to the parents.

21 **J.W.**

22 J.W. is 6 years old, and an emerging communicator. He does not use spoken words to  
23 communicate. He is learning to use a Tobii eye-gaze device to interact with the world. This

1 device requires daily practice with his paraeducator and family, and guidance of an experienced  
2 speech language pathologist, which he was receiving at school before the closure.

3 In March and April 2020, J.W. did not receive any speech language therapy, and no  
4 support from his 1:1 paraeducator, both services guaranteed in his Individualized Education Plan  
5 (IEP). He also did not receive occupational therapy or physical therapy from the school. Instead,  
6 he received a half hour of story time during a TEAMS call, once per week. Parents were  
7 expected to independently deliver all educational services and related therapies during that time.

8 In May and June 2020, story time and peer interactions increased to 1.5 hours per week,  
9 and speech therapy was attempted remotely, with little success. Parents were expected to be  
10 present and interactive at all times. No occupational or physical therapies were delivered or  
11 attempted between March 12, when schools closed, and June 19, the last day of school. In total,  
12 J.W. was deprived 13 weeks of education and related therapies.

13 J.W. is unable to participate in remote or distance learning. He is fully dependent on adult  
14 assistance per his individualized educational plan. J.W. was not allowed to have help from his  
15 paraeducator for the duration of the school closure in 2019-2020 or during the Extended School  
16 Year for the summer of 2020, also part of his IEP. J.W.'s parents were told that J.W. would only  
17 have help from a paraeducator if he was physically in the school building. With school buildings  
18 being closed, J.W. is unable to access any meaningful educational opportunities or related  
19 therapies.

20 **C.W.**

21 C.W. was supposed to start preschool in May 2020, per his IEP. However, school was  
22 already cancelled and no provision for in-person services has been communicated to parents for  
23 the 2020-2021 school year. In fact, the Tacoma School District currently plans to do all



1 instruction remotely. In total, C.W. was deprived of 6 weeks of education in the 2019-2020  
2 school year. C.W. is relying on private therapies to acquire and maintain his emerging  
3 communication skills.

4 **B.B.**

5 B.B. is 10 years old. He has been diagnosed with Anxiety, Attention Deficit  
6 Hyperactivity Disorder and Oppositional Defiant Disorder. Poor frustration tolerance and task  
7 perseverance are major hurdles for B.B.'s success academically, limiting his ability to engage in  
8 the learning process. He had increasing behavior challenges in school before moving to an  
9 intensive support classroom in January 2020. He made steady progress there, which abruptly  
10 halted when schools closed in March 2020. Having lost the structure and support of school, he  
11 quickly regressed to frightening levels. In early April 2020 he became so agitated when his  
12 longtime nanny, a former paraeducator, tried to do schoolwork with him that he sprained her  
13 wrist. On another day, he threw a large knife at the nanny. Due to his severe disabilities, and the  
14 lack of structure and support necessary for him to learn, B.B. was unable to access an education  
15 after schools closed.

16 **G.B.**

17 G.B. had a Section 504 accommodation plan during the 2019-20 school year. While  
18 schools were closed, she had no supports that met her 504 plan requirements. The Highline  
19 School District took from mid-November 2019 until June 2020 to develop an IEP providing for  
20 special education and related services. That IEP now requires her to have language arts and math  
21 co-taught. The purpose of the special education in these classes is to support her staying on task  
22 and meeting behavioral goals. At home, the mother struggled to even get her to comply with  
23

1 opening the laptop and had to type the answers that G.B. would dictate to get any school work  
2 done.

3 **Z.L.**

4 Z.L. is 13 years old. He is autistic and non-verbal. He communicates minimally using  
5 Snap and Core on his communication tablet, the Picture Exchange Communication System and  
6 some sign language. These various forms of communication require 2:1 paraeducators and an  
7 experienced speech pathologist which he was receiving at school. In order for Z.L.'s family to  
8 master these different forms of communication, there is a learning curve.

9 From March to April 2020, Z.L. received no speech therapy and no support from his  
10 paraeducators, contrary to Z.L.'s IEP. His mother received instructions via email and was tasked  
11 with doing all of the teaching.

12 From May to June 2020, Z.L. started to receive Zoom meetings with his classroom staff.  
13 These meetings lasted about 30 minutes and contained no instruction, but rather were a time for  
14 Z.L. to see the staff. The family received his school activities, with no success in learning from  
15 home. Z.L. is environmentally receptive and driven by routine, and has an expectation that  
16 learning occurs at school, not home.

17 Z.L. is unable to participate in remote or distance learning because of sensory processing  
18 disorder and autism. Z.L. is fully dependent on adult assistance per his individualized education  
19 plan. Z.L. requires 2:1 paraeducators during the day at school. When schools were closed, Z.L.  
20 had no access to paraeducators, speech therapy or meaningful education from March to June  
21 2020.

22 *2.7 Reasons for relief.* OSPI and the State Board of Education exceeded their  
23 authority in adopting the emergency rules. The State Board is charged with adopting rules to

1 “implement and ensure compliance with” the program requirements of RCW 28A.150.220,  
2 including offering 1,000 instructional hours and 180 school days a year and making basic  
3 education “accessible to all students.” But the Board’s new definitions of “instructional hour”  
4 and “school day” are designed to relax requirements, and do not ensure compliance with the  
5 Legislature’s definition of basic education in RCW 28A.150.220. A pandemic is a time of  
6 heightened need and not a time to cut corners.

7 OSPI’s rule waived instructional hour and school day requirements although, under RCW  
8 28A.150.222, “minimum instructional hours may not be waived.” Statutory criteria for waivers  
9 were not met.

10 Besides exceeding their statutory rulemaking authority, the agencies violated article IX,  
11 sections 1 and 2 of the Washington Constitution by reducing the basic educational offerings to  
12 Washington students. It is the State’s paramount duty to fully fund a basic education for all  
13 Washington children, and offerings may not be scaled back for reasons unrelated to educational  
14 policy. The emergency rules reduced instructional requirements for a basic education, not for  
15 educational reasons but because the State has not developed and funded an effective plan to  
16 safely maintain basic educational offerings. Remote services are inaccessible to those students  
17 with disabilities who need intense support in order to learn and make progress. Reliance on such  
18 services for all students violates the uniformity requirement by effectively cutting off basic  
19 education to certain populations.

20 Another reason for invalidation is the lack of a public process in enacting the rules. The  
21 State Board’s rule could have been timely developed in accordance with public participation  
22 procedures. Even after adoption, the rule was not posted on the State Board’s rulemaking web  
23 page and had to be ferreted out of a July 2020 meeting packet.

