

'98 DEC -3 P2:18

RETIRED COURT CLERK
THE HONORABLE CHRISTINE A. POMEROY
DEPUTY

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

NO. 97-2-02754-1

AMENDED ORDER

SUNSIRAE TUNSTALL, et al.,

Plaintiffs,

v.

TERESA BERGESON,
Superintendent of Public
Instruction, et al.,

Defendants.

- (1) GRANTING SUMMARY JUDGMENT TO PLAINTIFFS;
- (2) GRANTING SUMMARY JUDGMENT TO DEFENDANTS SCHOOL DISTRICTS;
- (3) DENYING SUMMARY JUDGMENT TO DEFENDANTS BERGESON AND LEHMAN;
- (4) GRANTING IN PART, AND DENYING IN PART, PLAINTIFFS' MOTION TO CLARIFY;
- (5) GRANTING PLAINTIFFS' MOTION TO RECONSIDER FEDERAL CLAIMS AND DISMISSING THOSE CLAIMS;
- (6) GRANTING DEFENDANTS BERGESON'S AND LEHMAN'S MOTION TO SHORTEN TIME;
- (7) DENYING DEFENDANTS BERGESON'S AND LEHMAN'S MOTION FOR STAY;
- (8) GRANTING DEFENDANTS BERGESON'S AND LEHMAN'S MOTION FOR ENTRY OF FINAL JUDGMENT

THIS MATTER having come on regularly before the Court on defendants Teresa Bergeson, Superintendent of Public Instruction's and Joseph Lehman, Secretary of Department of Corrections' motion for summary judgment and dismissal; motion to stay and motion to amend/revise judgment; motion for entry of a final judgment; and school districts' motion for summary judgment; and plaintiffs' motion for summary judgment; plaintiffs' motion to clarify Court's oral ruling of October 9, 1998; plaintiffs' motion for reconsideration of the Court's November 6, 1998 order; and plaintiffs appearing by and through their attorneys, Patricia J. Arthur,

Appendix A

1 David C. Fathi, Patricia H. Wagner, and Angela Luera; defendant Teresa Bergeson, appearing by
2 and through her attorneys, Christine O. Gregoire, Attorney General, Lisa L. Sutton, Assistant
3 Attorney General, W. Howard Fischer, Senior Assistant Attorney General, and Robert E. Patterson,
4 Senior Counsel, Assistant Attorney General; defendant Joseph Lehman, appearing by and through
5 his attorney, Thomas J. Young, Assistant Attorney General; defendant Dr. H. Jerome Hansen,
6 Superintendent, Shelton School District, appearing by and through his attorney, William A. Coats;
7 defendants Dr. Arthur Himmler, Superintendent, Steilacoom School District; Gene R. ~~Coats~~,
8 Superintendent, Cape Flattery School District, Dr. Bill Prenevost, Superintendent, Monroe School
9 District, Dr. Phil Snowdon, Superintendent, Cheney School District, Dr. Mark Mitrovich,
10 Superintendent, Peninsula School District, and Dr. Ellen Wolf, Superintendent, Walla Walla
11 School District, appearing by and through their attorney, Michael A. Patterson.

12 THIS MATTER having come before the Court for hearing on September 25, 1998,
13 October 9, 1998, November 6, 1998, November 20, 1998, and December ~~3~~^{nd CAP} 1998, and on
14 defendants' and plaintiffs' motions for summary judgment and dismissal, and the Court having
15 reviewed and considered the files and records herein, and the following documents:

16 DEFENDANTS BERGESON'S AND LEHMAN'S
17 MOTIONS FOR SUMMARY JUDGMENT

- 18 • Defendants Bergeson's and Lehman's Motion for Summary Judgment; Memorandum of
19 Authorities in Support of Summary Judgment and Dismissal; Declaration of Lisa L. Sutton
20 in Support of Motion for Summary Judgment and Dismissal by Bergeson and Lehman dated
September 8, 1998 with attached appendices 1-31 and stipulated facts 1-8.
- 21 • Appendices 1-31 to Defendants Bergeson's and Lehman's Motion for Summary Judgment:

21	Appendix #	
22	1	Plaintiffs' Third Amended Complaint for Injunctive and Declaratory Relief and 23 Compensatory Education (original complaint filed November 4, 1997, third amended complaint dated August 4, 1998)
24	2	Defendant Teresa Bergeson's Second Amended Answer and Defenses to 25 Plaintiffs' Third Amended Complaint
26	3	Defendant Joseph Lehman's Second Amended Answer and Defenses to Plaintiffs' Third Amended Complaint; Defendant Shelton School District's Amended

1		Appendix #
2		Answer; Defendant School Districts' Amended Answer
3	4	Stipulated Facts
4	5	Stipulated Legal Issues
5	6	Washington State Const. art. II, § 29; art. III, § 22; art. IX, §§ 1 and 2; and art. XIII, § 1
6	7	<i>Seattle School Dist. 1 v. State</i> , 90 Wn.2d 476, 585 P.2d 71 (1978) (<i>School Funding I</i>)
7		
8	8	Judge Robert Doran's Oral Opinion (April 29, 1983) and Declaratory Judgment (September 7, 1983) in <i>Seattle School Dist. No. 1 v. State</i> , (School Funding II); Thurston County Superior Court No. 81-2-1713-1.
9		
10	9	Black's Law Dictionary (6 th Ed. 1990), p. 33, 239, definition "adult" and "child"
11	10A	RCW 13.04.020(14); RCW 13.04.030(2)(iv); RCW 13.40.110
12	10B	<i>In Re Boot</i> , 130 Wn. 2d 553 (1996)
13	11	<i>Tommy P. v. Bd. Of Comm'rs</i> , 97 Wn.2d 385, 645 P.2d 697 (1982)
14	12	Washington State's Enabling Act §§ IV, X, XI, XIII, and XVII
15	13	RCW 28A.150.010, .020, and .200
16	14	<i>School Dist. No. 20 Spokane Co. v. Bryan</i> , 51 Wash. 498, 504, 99 P. 28 (1909)
17	15	RCW 28A.190.020
18	16	Laws of 1890, ch. 8, p. 271, §§ 1 and 4
19	17	Op. Att'y Gen. No. 6, (1998)
20	18	RCW 28A.155.090 (7)
21	19	Laws of 1998, ch. 244 (ESSB 6600)
22	20	<i>Aetna Life Insurance Co. v. Washington Life & Disability Insurance Guaranty Ass'n</i> , 83 Wn.2d 523, 528, 520 P.2d 162 (1974)
23		
24	21	<i>McDonald v. Board of Election Commissioners of Chicago</i> , 394 U.S. 802, 809, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969)
25	22	RCW 72.09.460; Laws of 1997, ch. 338 (E3SHB 3900)
26	23	<i>Board of Education of the Hendrick Hudson Central School Dist. v. Rowley</i> , 458

1		Appendix #
2		U.S. 176, 208, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)
3	24	<i>Commonwealth of Virginia, Dept. of Educ. v. Riley</i> , 106 F.3d 559, 566 (4 th Cir. 1997)
4		
5	25	20 U.S.C. § 1400 <i>et seq.</i> Individuals With Disabilities Act (selected portions)
6	26	34 C.F.R. § 300.300(b)(5)
7	27	<i>Yankton School District v. Schramm</i> , 93 F.3d 1369, 1376-77 (8 th Cir. 1996) <i>Timms v. Metro District of Wabash County</i> , 722 F.2d 1310, 1314 (7 th Cir. 1983) <i>Merrifield v. Lake Centennial School Corp.</i> , 770 F. Supp. 468 (N.D. Ind. 1991)
8	28	<i>Sellers v. School Bd. of Manassas, Va.</i> , 141 F.3d 524, 528-29 (4 th Cir. 1998)
9	29	<i>Monahan v. Nebraska</i> , 687 F.2d 1164, 1170 (8 th Cir. 1982)
10	30	29 U.S.C. § 794(a); § 504 Rehabilitation Act of 1973
11	31	34 C.F.R. §§ 104.3(k), 104.31, 104.33

- Reply Memorandum in Support of Defendants Lehman's and Bergeson's Motion for Summary Judgment; Declaration of Lisa L. Sutton in Support of Reply Memorandum for Summary Judgment and Dismissal by Bergeson and Lehman dated September 15, 1998 with attached appendix 32.

15		Appendix #
16	32	House Bill Report on ESSB 6600 and History of ESSB 6600
17		DEFENDANTS SCHOOL DISTRICTS' MOTION FOR SUMMARY JUDGMENT
18	•	Defendants Cheney, Monroe, Walla Walla, Peninsula, Cape Flattery, Steilacoom Historical and Shelton School Districts' Motion for Summary Judgment (and Memorandum); Declaration of William A. Coats dated September 8, 1998 with attached Exhibits 1-5:
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20		Exhibit #
21	1	Laws of 1997, ch. 338 (ESHB 3900)
22	2	Laws of 1998, ch. 244 (ESSB 6600)
23	3	Stipulated Facts
24	4	Stipulation of Legal Issues to be Determined on Summary Judgment
25	5	Transcript of Hon. Robert Doran's Oral Opinion in <i>Seattle School District No. 1 v. Washington</i> , pages 11-16
26		

- 1 • Defendants School Districts' Response to Summary Judgment Motion of Plaintiffs dated
2 September 15, 1998;
3 • Reply of Defendants School Districts in Support of Motion for Summary Judgment dated
4 September 21, 1998.

5 **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS'**
6 **MOTIONS FOR SUMMARY JUDGMENT**

- 7 • Plaintiffs' Memorandum In Opposition To Defendants' Motions For Summary Judgment
8 And To Dismiss; Supplemental Declaration of Patricia J. Arthur in Opposition to
9 Defendants' Summary Judgment Motion dated September 15, 1998 with attached Exhibits 1-
10 15:

11 Exhibit #

- 12 1 Memorandum dated November 6, 1997 from Terry Bergeson to Rep. Huff and Sen.
13 West (OSPI Document #07-00002500 - 07-00002502)
14 2 Letter dated September 22, 1997 from D. Savage, Deputy Secretary of DOC to J.
15 Hansen, Supt. Shelton School District. (OSPI Document #19-00000372)
16 3 "Staffing Paper" prepared by W. Johnson, OSPI Supervisor of Institutional Education
17 to Terry Bergeson, Superintendent of Public Instruction, dated October 2, 1997 (OSPI
18 Document #07-00002529 - 07-00002532)
19 4 OSPI 1998 Supplemental Budget Request
20 5 Transcript of Senate Education Committee Meeting of the Washington Legislature
21 held January 23, 1998
22 6 House Education Committee Meeting of the Washington Legislature held February 24,
23 1998 Document #07-00002413 - 07-00002420
24 7 List of all prisoners under DOC jurisdiction who have been transferred to prisons out-
25 of-state (DOC document #34 Correspondence)
26 8 Declaration of Donald Lambert undated
27 9 Correspondence between Patricia J. Arthur and counsel for the Department of
28 Corrections regarding communications with class members at Clallam Bay
29 Corrections Center and out-of-state-prisoners under age 18 dated September 9, 1998
30 10 Memorandum dated October 28, 1994, to C. Yates, DOC Assistant Div. Dir. Of
31 Management & Budget from A. Sweeney, DOC Education Services Admin, and J.
32 Elliott, DOC Educational Services Manager (DOC document # LEG-00030610 - LEG-
33 00030617)
34 11 Letter dated November 4, 1997 from J. Hansen, Supt. Shelton School District to D.
35 Savage, Deputy Secretary, DOC

- 1 12 United States Senate Report No. 94-168 (1975) regarding the Education For All
Handicapped Children Act of 1975
- 2
- 3 13 Transcript of proceedings on August 7, 1998 in *Tunstall v. Bergeson*, Thurston County
Superior Co. Superior Court No. 97-2-02754-1
- 4 14 Memorandum dated October 27, 1986 to K. Kautzky, Deputy Secretary, DOC, and R.
Fanning, Dir. Div. of Management & Budget from D. Carnahan, Educational
5 Administrator, DOC (DOC document # RPTS 00071792 - 00071797), including
6 attachments: (a) New Request Level for Special Education Teachers by Institutions,
(DOC Document # RPTS-00071794); (b) letter dated October 23, 1986, to J. Schrag,
7 Asst. Supt. OSPI from D. Carnahan, Educational Admin., (DOC document # RPTS-
00071795); (c) October 20, 1986 Memorandum to A. Lynch, OSPI Institutional
8 Education Coordinator, from D. Carnahan (DOC document # RPTS 00071796 -
00071797)
- 9 15 Declaration of Minh Thach dated September 15, 1998

10 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

11 • Plaintiffs' Motion for Summary Judgment; Memorandum in Support of Plaintiffs' Motion for
Summary Judgment; Declaration of Patricia J. Arthur in Support of Plaintiffs' Motion for
12 Summary Judgment dated September 8, 1998 with attached Exhibits 1-11:

13 Exhibit #

- 14 1 Excerpts from the 1991 OSPI/DOC Task Force Report on Special Education in Adult
15 Corrections. Document #03-00001278, produced during discovery by OSPI, is the
distribution cover memo, and document # RPTS-00070249-00070253, produced by
16 DOC, is the introductory section of the Task Force Report.
- 17 2 Letter dated September 15, 1997 from defendant Lehman to defendant Bergeson,
produced by OSPI during discovery as document #19-00000370
- 18 3 Excerpts of the deposition of Teresa Bergeson, Superintendent of Public Instruction,
that was taken in this case on May 18, 1998
- 19 4 OSPI/DOC Joint Report to the Legislature dated May 1998, produced by OSPI as
20 document #03-00001454- 03-00001462
- 21 5 A document entitled "Columbia Legal Services request to OSPI for disability
22 assessments and special education services" that was produced by OSPI as document
#19-00000380 - 19-00000381
- 23 6 Findings of Fact and Conclusions of Law in *Seattle School District v. State*, Thurston
24 County Superior Court No. 81-2-1713-1, by Honorable Robert Doran, entered on
September 7, 1983
- 25 7 Memo dated January 22, 1998 from Jean Stewart, DOC Educational Services
26 Administrator, to Vicki Rummig, produced by DOC as document #LEG-00030742-
00030744

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- 8 Pages 14 and 15 from the transcript of the discovery hearing conducted in this case on July 21, 1998
- 9 Plaintiffs' Amended Responses to OSPI's Interrogatories Numbers 1-3 dated July 30, 1998
- 10 Excerpts of the deposition of Ann Fessler, a teacher at the WCCW, that was taken in this case on May 27, 1998
- 11 Two letters (received February 18, 1998 and July 20, 1998) from Donald Lambert, a member of the plaintiff class in this case who is incarcerated at Clallam Bay Corrections Center
- Plaintiffs' Short Answers to the Issues of Law for Determination of Summary Judgment dated September 8, 1998 with attachments:
 - (1) Stipulated Facts;
 - (2) Clallam Bay Corrections Center Education Program Agreement Between The Superintendent of Public Instruction and Cape Flattery School District No. 401 (Exhibit 1);
 - (3) Interagency Cooperation Agreement Between The State of Washington's Department of Corrections and Cape Flattery School District (Exhibit 2);
 - (4) Washington Corrections Center for Women Education Program Agreement Between The Superintendent of Public Instruction and Peninsula School District No. 401 (Exhibit 3);
 - (5) Interagency Cooperation Agreement Between The State of Washington's Department of Corrections and Peninsula School District (Exhibit 4);
 - (6) Letter from Dr. Terry Bergeson to Representative Tom Huff, Senator Jim West, and Richard Thompson, Director, OFM dated November 6, 1997 (Exhibit 5);
 - (7) Letter from Dick Thompson, Director OFM to Dr. Terry Bergeson dated December 4, 1997 - 07-00002479 - 07-00002480 (Exhibit 6);
 - (8) Interagency Cooperation Agreement Between The State of Washington's Department of Corrections and The Office of The Superintendent of Public Instruction and Peninsula School District - 01-00000002 - 01-00000020 (Exhibit 7);
 - (9) Letter from Dr. Terry Bergeson to ESD Superintendents, Chief School District Administrators, School District Special Education Directors, ESD Special Education Directors, Universities and Colleges, and Private Education Contractors dated May 29, 1998 03-00001779 - 03-00001788 (Exhibit 8).
- Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment; Second Supplemental Declaration of Patricia J. Arthur in Support of Plaintiffs' Motion for Summary Judgment; Declaration of Maureen Janega dated September 21, 1998 with attached Exhibits 1-15:

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| 1 | Exhibit # |
| 2 | 1 Declaration of Donald Lambert dated September 17, 1998 |
| 3 | 2 Declaration of Willard Jimerson dated September 17, 1998* |
| 4 | 3 Declaration of Phillip Krist dated September 17, 1998 |
| 5 | 4 Declaration of Vernell Marshall dated September 17, 1998* |
| 6 | 5 An article published on August 27, 1998, in the <i>Seattle Weekly</i> titled "Little Fish In The Big House" |
| 7 | 6 Declaration of Terry Burkett dated September 17, 1998* |
| 8 | 7 Signed version of the Declaration of Minh Thach dated September 17, 1998 |
| 9 | 8 |
| 10 | 8 Testimony of Terry Werner, Asst. Superintendent for the Peninsula School District, before the Washington State Legislature, House Education Committee, September 17, 1998 |

11 (*The Court excluded from consideration hearsay statements by the school personnel
 12 contained in Plaintiffs' exhibits 2, 4, and 6 attached to the Second Supplemental Declaration of
 13 Patricia J. Arthur; see Court's Order dated October 9, 1998.)

14 PLAINTIFFS' MOTION TO CLARIFY COURT'S ORAL RULING
 15 OF OCTOBER 9, 1998

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| 16 | 1 Plaintiffs' Motion for Clarification of Court's Oral Ruling of October 9, 1998; Memorandum in Support of Plaintiffs' Motion; Declaration of David Fathi (with attached Verbatim Transcript of Ruling October 9, 1998) dated October 27, 1998 |
| 17 | |
| 18 | 2 Defendants Lehman's and Bergeson's Response to Plaintiffs' Motion for Clarification (with attachments) dated November 3, 1998 |
| 19 | |
| 20 | 3 Defendants School Districts' Response to Plaintiffs' Motion for Clarification dated November 3, 1998 |
| 21 | |
| 22 | 4 Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Clarification; Supplemental Declaration of David Fathi (with Exhibit A) dated November 5, 1998. |

23 PLAINTIFFS' MOTION FOR RECONSIDERATION
 24 OF THE COURT'S ORDER OF NOVEMBER 6, 1998

- | | |
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| 25 | 1 Plaintiffs' Motion to Shorten Time; Declaration In Support of Plaintiffs' Motion to Shorten Time; Motion for Reconsideration of the Court's Order of November 6, 1998; Memorandum in Support of Plaintiffs' Motion for Reconsideration of the Court's Order dated November 13, 1998 |
| 26 | |

1 2 Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Reconsideration
dated November 19, 1998

2
3 DEFENDANTS BERGESON'S AND LEHMAN'S MOTION
FOR STAY AND MOTION TO REVISE/AMEND JUDGMENT

4 1 Motion for Stay, and Motion to Amend/Revise Judgment, Memorandum in Support,
Affidavit of Jean Stewart and Jennifer Priddy (with attached RFP) dated November 12,
5 1998

6 2 Reply of Bergeson and Lehman in Support of Motion for Stay dated November 19,
1998

7 3 Declaration of David C. Fathi in Opposition to Defendants' Motion for Stay (with
8 Exhibit 1 dated November 30, 1998

9 DEFENDANTS BERGESON'S AND LEHMAN'S MOTION FOR
ENTRY OF A FINAL JUDGMENT/MOTION FOR AN ORDER SHORTENING TIME

10 1 Motion for An Order Shortening Time on Motion for Entry of a Final Judgment; Order
11 Shortening Time; Order Granting Motion to Stay and Motion to Amend/Revise
12 Judgment; Motion for Entry of Final Judgment Under CR 54(b) (with attached October,
9th and November 6th Orders); Memorandum of Authorities in Support of Motions;
13 Declaration of Lisa Sutton in Support of Motions; Amended Order for Summary
Judgment dated November 16, 1998

14 2 Plaintiffs' Memorandum in Opposition to Defendants Bergeson's and Lehman's Motion
for Stay Pending Appeal

15 FINDING OF UNDISPUTED FACTS

16 The Court finds that the parties have agreed that certain facts are undisputed. With the
17 exception of Stipulated Fact No. 14, the facts contained in the Stipulated Facts (document
18 incorporated herein by reference) are not in dispute.

19 CONCLUSIONS OF LAW

20 1. The Washington State Constitution, Article IX, requires the State to make ample
21 provision for the education of all children residing within its borders, without distinction.

22 2. The Basic Education Act, RCW 28A, requires that basic education services be
23 provided to children between the ages of 5 and 21 and special education to children with
24 disabilities between the ages of 3 and 22. This age range applies to all constitutional provisions
25 and statutes dealing with education, and the State may not discriminate based on caste or class.
26

1 3. The Court further finds that Article IX of the Washington Constitution imposes a
2 paramount duty on the State to provide basic and special education to prisoners of the
3 Department of Corrections in the age range specified in the Basic Education Act.

4 4. Any change in the age definition of "children" for educational purposes must be
5 uniform and must apply to all children who fit into any redefined age group.

6 5. The Court finds that the paramount duty under the Washington Constitution to
7 provide for basic and special education in prison creates an absolute right.

8 6. The Court finds that Engrossed Substitute Senate Bill 6600 (Chapter 244, Laws of
9 1998) impinges on the absolute right to basic and special education in that: 1) it does not
10 provide for special educational opportunities, and 2) it limits the availability of basic education to
11 children under the age of 18. Therefore, the Court presumes it to be unconstitutional. The State
12 has not carried its burden of showing that the infringement of this absolute right is necessary to
13 serve a compelling state interest.

14 7. The Court therefore finds that Chapter 244 of the Laws of 1998 is
15 unconstitutional.

16 8. The Court finds that the school districts have no obligation under the federal or
17 state constitutions or federal laws or Washington State laws to provide educational programs to
18 persons in the prisons of the State of Washington, and holds that the school districts are not
19 obligated under the state or federal constitutions or state or federal law to provide education in
20 prisons in Washington State.

21 9. The Court finds that defendants Bergeson and Lehman have no obligation under
22 either federal statutes or the federal constitution to provide special education in prisons in
23 Washington.

24 The Court having considered the records and files herein, having heard oral argument on
25 these motions, and being fully informed, it is now, therefore, ORDERED, ADJUDGED AND
26 DECREED as follows:

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ORDER

Having reviewed the above matter, the Court orders the following:

IT IS HEREBY FURTHER ORDERED that summary judgment is GRANTED in favor of plaintiffs.

IT IS HEREBY FURTHER ORDERED that defendants school districts' motion for summary judgment is GRANTED.

IT IS HEREBY FURTHER ORDERED that defendants Bergeson's and Lehman's motion for summary judgment is DENIED.

IT IS HEREBY FURTHER ORDERED that plaintiffs' motion to clarify is hereby GRANTED IN PART and DENIED IN PART.

IT IS HEREBY FURTHER ORDERED that plaintiffs' motion to reconsider the federal claims (the order dated November 6, 1998), is hereby GRANTED.

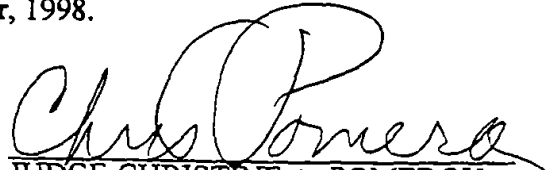
IT IS HEREBY FURTHER ORDERED that plaintiffs' federal claims are DENIED and DISMISSED with prejudice.

IT IS HEREBY FURTHER ORDERED that defendants Bergeson's and Lehman's Motion for Order shortening time is GRANTED.

IT IS HEREBY FURTHER ORDERED that defendants Bergeson's and Lehman's motion for stay is hereby DENIED. Defendants Bergeson and Lehman are GRANTED a continuance until December 18, 1998, to file a corrective action plan.

IT IS HEREBY FURTHER ORDERED that defendants Bergeson's and Lehman's motion for entry of final judgment is hereby GRANTED.

DATED this 3 day of December, 1998.


JUDGE CHRISTINE A. POMEROY
Thurston County Superior Court

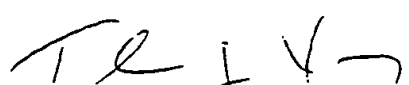
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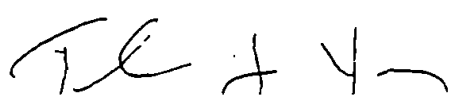


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School Districts

Approved as to form;
notice of presentation waived.

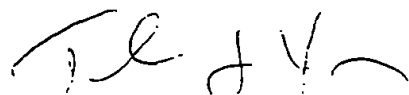


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