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Promises Made, Promises Broken: The Anatomy of Idaho's School Funding Litigation

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PROMISES MADE, PROMISES BROKEN: THE ANATOMY OF IDAHO'S SCHOOL FUNDING LITIGATION

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ABSTRACT

This Article discusses the protracted Idaho Schools for Equal Educational Opportunity ("ISEEO") K-12 school funding litigation in Idaho – litigation initiated by plaintiffs under Idaho's state constitutional education clause in the early 1990s, which resulted in six reported decisions by the Idaho Supreme Court and two additional decisions in follow-on federal and state court cases and which, although leading to the state Supreme Court's affirming the trial court's determination that the Idaho legislature had failed to adequately fund public education under the thoroughness provision of the education clause, resulted in the state high court's dismissing the case without addressing the remedial phase of the case or granting plaintiffs a remedy. The Article addresses the ISEEO cases in the context of judicial and scholarly treatment of state constitutional K-12 school funding cases. Specifically, the Article opines that the Idaho Supreme Court's failure to address the remedial phase of the case could be fairly predicted by its prior decisions in the ISEEO matter, was likely motivated by, among other reasons, a desire to avoid a constitutional confrontation with the Idaho legislature, and, although within the realm of school funding cases decided and scholarly views held nationally, given the stakes involved – the adequacy of public education being funded and delivered to Idaho's schoolchildren – and the manner in which the remedial phase of the case was (not) decided – without a hearing, briefing or evaluation of evidence, constituted a dark day in the annals of Idaho jurisprudence. The Article concludes by discussing and analyzing possible post-ISEEO steps forward by Idaho K-12 school funding advocates, including use of preclusion doctrines to build on the successes of the ISEEO plaintiffs and/or renewed use of the Idaho citizens' initiative process to increase funding for school funding in the state

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I. INTRODUCTION

Over thirty years ago, two groups of plaintiffs initiated legal proceedings which were intended to have a profound effect on the state of K-12 public education in Idaho, a subject area which the United States Supreme Court has recognized as "'perhaps the most important function of state and local governments'"[1] and whose "grave significance . . . both to the individual and to our

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society cannot be doubted."[2] During more than fifteen of those years, under a case entitled (and with a lead plaintiff named) Idaho Schools for Equal Educational Opportunity ("ISEEO"), the Idaho Supreme Court ruled on the merits of appeals and issued Opinions an unprecedented (for Idaho) six different times, a number which does not include follow-on cases litigated in both state and federal court.[3] This Article will address the Idaho high court's judicial decision making in the ISEEO matter, as well as its impact on public education in the State.

Part A of the Article will discuss the *ISEEO* cases, its predecessor Idaho Supreme Court K-12 public school funding decision, and follow-on cases litigated in both federal and Idaho state court.[4] In particular, Part A will discuss the protracted and tortuous path, as well as the aftermath of the Court's *ISEEO* Opinions, which (a) permitted litigation of a portion of the *ISEEO* plaintiffs' Idaho constitutional education clause claims on the merits, (b) defined the contours of the thoroughness provision of the Idaho education clause, (c) rejected attempts by the Idaho legislature, via statutory enactments, to derail the *ISEEO* litigation, (d) affirmed the trial court's determination that the Legislature had failed to adequately fund public education under the thoroughness provision, and (e) retained jurisdiction over the remedial phase of the case only to subsequently dismiss the case without addressing the remedial issues or granting the *ISEEO* plaintiffs a remedy and without conducting a hearing or issuing an Opinion concerning that matter, thereby causing plaintiffs to seek recourse in federal and (again) in state court.[5]

Part B will analyze significant aspects of the Court's *ISEEO* decisions—primarily the Court's decisions vis a vis the district court's appointment of a special master and, ultimately, to retain jurisdiction and dismiss the case without evaluating the need for or granting a remedy.[6] As to the latter decision, Part B will evaluate the available evidence concerning the reasons why the Court made the decision and assess the bona fides of the Court's decision as well.[7] Part B will conclude that the

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litigation and, more important, represented their respective clients in the finest tradition of Idaho's practicing Bar. The Author also wishes to thank Professor Christine Rienstra-Kiracofe for her valuable input on an earlier draft of this Article and his College of Law former and current Research Assistant Pat Fackrell and Brandon Helgeson, respectively, for their similarly valuable input and research on this Article. Lastly, the Author would like to thank his faculty colleagues for their comments and input when the Author presented an early draft of the Article at a University of Idaho College of Law Faculty Scholarship Retreat. The usual admonitions and disclaimers apply, i.e. the opinions expressed by the Author in this Article, as well as any mistakes or omissions in or not in it, are the Author's alone.

1. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954)).

2. *Id.* at 30.

3. The Author is not aware of any other case in Idaho that has spawned six or more reported decisions by the Idaho Supreme Court.

4. *See infra* notes 13–227 and accompanying text.

5. *Id*.

6. *See infra* notes 228–317 and accompanying text.

7. *See infra* notes 250–317 and accompanying text. The Author views this portion of the Article as a "first pass" concerning assessing the Court's reasons for dismissing the *ISEEO* matter without conducting a remedial phase of the case or granting a remedy – a task made more difficult by the Court's never making any public statement at a hearing or via an opinion to explain or justify its decision. The

Court's decision to not conduct the remedial phase of the case was likely based on, among other things, a desire to avoid a confrontation with the Idaho Legislature.[8] Equally, if not more, significant, Part B will conclude that, although the Court's decision fell within the range of school funding cases decided and scholarly views held nationally, given the stakes and interests involved in the case—the adequacy of public education being funded for and delivered to the schoolchildren of Idaho—the Court's decision was a dark day in the history of Idaho jurisprudence which resulted in both the Court and the Legislature not living up to their state constitutional duties.[9]

Part C will conclude by analyzing possible steps forward after the *ISEEO* litigation, i.e. steps that might be or already have been taken to further the *ISEEO* plaintiffs' goals of adequately funding K-12 public schools in Idaho.[10] Specifically, Part C will address strategies involving the possible use of judicial preclusion doctrines by new plaintiffs to take advantage of the Court's justiciability and liability determination in *ISEEO V* to once again pursue school funding goals.[11] Part C will also assess the possible renewed use of the citizens' initiative process to increase K-12 school funding, a process that was launched in 2019, but not consummated because of the COVID-19 pandemic.[12]

Author hopes that further investigative efforts by a journalist or legal historian will ultimately reveal a more definitive assessment of the Court's reasoning than any insight this Article may be able to bring to the endeavor.

8. *See infra* notes 286–295 and accompanying text.

9. *See infra* notes 296–317 and accompanying text. Idaho has ranked extremely low in per-pupil funding throughout the years, with a United States Census Bureau report for 2010-11 showing that Idaho spent less per K-12 public school student than 48 other states. Kevin Richert, *Idaho Ranks No. 50 in Per-Pupil Spending*, IDAHO EDUCATION NEWS, (May 21, 2013) https://www.idahoednews.org/news/idaho-ranks-no-50-in-per-pupil-spending/ (citing Mark Dixon, *Public Education Finances: 2011*, U.S. CENSUS BUREAU (2013)). Idaho State officials have attempted to minimize this problem, suggesting that "the amount of money a state spends per child isn't a silver bullet to high academic achievement." Emilie Ritter Saunders, *Superintendent Luna: Per-Student Funding Isn't the Only Measure of Success*, NAT'L PUB. RADIO: STATE IMPACT IDAHO, https://stateimpact.npr.org/idaho/2012/06/21/superintendent-luna-per-student-funding-isnt-the-only-measure-of-success/ (June 12, 2012, 4:00 PM). The Author agrees that money is not a panacea and that other factors may contribute to low school quality and student achievement; however, when school funding has been so consistently and comparatively low in Idaho for so many years, the Author also believes that denying the importance of funding for public schools is reckless and ignores the demonstrated causal relationship between school funding, quality of schools and student achievement. *See* Abbott *ex rel.* Abbott v. Burke, 575 A.2d 359, 403, 405-06 (N. J. 1990) (noting "that even if not a cure, money will help, and that . . . students are constitutionally entitled to that help" and further that "what money buys—improved staff ratios, higher teacher salaries, expanded course offerings, more equipment—makes a difference" and finally that "[t]his 'conventional wisdom' is . . . the fundamental premise of decision-making by those in charge of education in the districts and in the state"). For these reasons, the Author and this Article operate on the premise that money or lack thereof makes a significant difference in the quality of K-12 public education.

10. *See infra* notes 318–344 and accompanying text.

11. *See infra* notes 319–326 and accompanying text.

12. *See infra* notes 327–344 and accompanying text. As of this writing, plaintiffs have pursued litigation challenging the legality of state systems for funding K-12 public schools under state constitutional provisions in approximately forty-five states. *See School Funding Court Decisions*, SCHOOLFUNDING.INFO, www.schoolfunding.info/school-funding-court-decisions/ (last visited February 19, 2021); *see also* Larry L. Obhof, *School Finance Litigation and the Separation of Powers*, 45 MITCHELL HAMLINE L. REV. 539, 543 & n.18 (2019); James E. Ryan & Thomas Saunders, *Foreword to Symposium on*

II. DISCUSSION

A. The Cases

1. *Thompson v. Engelking*—Pre-ISEEO Judicial Treatment

Prior to the *ISEEO* cases, the Idaho Supreme Court first addressed the issue of whether Idaho's system of funding K-12 public education complied with the requirements of both the United States and Idaho Constitutions in *Thompson v. Engelking*.[13]

In *Thompson*, the district court determined that Idaho's primary and secondary public school funding system complied with the Equal Protection clauses of the United States and the Idaho Constitution, but violated the Idaho Constitution's requirement that the legislature maintain a uniform system of public schools.[14] On appeal, the Idaho Supreme Court affirmed the district court's decision on plaintiffs' equal protection claims.[15] In so holding, the Court first concluded that the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*[16] foreclosed a federal equal protection challenge under the deferential (to the legislature) rational basis test.[17] The Court further concluded, under that same rational basis test, and even though significant financial disparities in funding existed amongst school districts across the state, the Legislature "acted rationally and without unconstitutional discrimination in setting up a system of financing, wherein a large portion of revenues for the public schools are levied and raised by and for the local school districts."[18] As such, plaintiffs' claim under Idaho's state constitutional equal protection clause likewise failed.[19]

The Court, however, reversed the district court's holding that the Legislature had failed to comply with the uniformity provision of the Idaho Constitution.[20] In this regard, Article IX, Section 1 of the Idaho Constitution provides:

School Finance Litigation: Emerging Trends or New Dead Ends?, 22 YALE L. & POL. REV. 463, 464 (2004). This Article will primarily focus on Idaho's *ISEEO* school funding litigation and related Idaho cases; however, without attempting to be encyclopedic, the Article will cite to and discuss cases outside of Idaho and secondary sources to place in context the Idaho Supreme Court's decisions concerning the panoply of issues taken up by the Court during the course of the *ISEEO* and follow-on litigation.

13. Thompson v. Engelking, 537 P.2d 635, 96 Idaho 793 (1975).

14. *Id.* at 636–38, 96 Idaho at 794–95.

15. *Id.* at 636, 96 Idaho at 794.

16. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). In *Rodriquez*, the United States Supreme Court upheld the Texas legislature's system of funding K-12 public education as against a federal equal protection challenge, holding that the system was rationally related to Texas's governmental interest in allowing for local control of school district fiscal matters. *Id.* at 47–55. In reaching its decision, the Court refused to apply the more exacting strict scrutiny test, rejecting plaintiff's arguments that Texas's legislative scheme–even though it resulted in substantial disparities in funding as between local school districts—constituted a suspect classification because it discriminated, in among other ways, on the basis of wealth, *id*. at 17–29, or that it violated Texas parents' and schoolchildren's fundamental rights, including the right to an education. *Id.* at 29–40.

17. *Thompson*, 537 P.2d at 642, 96 Idaho at 800.

18. *Id.* at 642–47, 96 Idaho at 800-05.

19. *Id*.

20. *Id.*

> The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.

The Court, reviewing the debates of Idaho's founders and other legislators concerning the meaning of the above-quoted provision, concluded "those debates fail . . . to support the trial court's conclusion that the education article requires a public education system wherein equal amounts are expended per pupil on a statewide basis."[21] Based on that reading, the Court held that "Art. 9, and in particular, Sec. 1, does not guarantee to the children of this state a right to be educated in such a manner that all services and facilities are equal throughout the State."[22] Instead, the Court determined that the provision required only uniformity of curriculum, further holding that

> A general and uniform system, we think, is . . . one in which every child in the state has free access to certain minimum and reasonably standardized educational and instructional facilities and opportunities to at least the 12th grade—a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education. . . .[23]

Having rejected all of plaintiffs' constitutional challenges to Idaho's system of financing K-12 public education, the Court reversed the decision of the district court.[24]

2. *ISEEO I*—Judicial Supremacy in Constitutional Matters, Justiciability and Thoroughness

The Idaho Supreme Court again took up state constitutional challenges to Idaho's K-12 school funding system—in a legal and political journey that would last for nearly twenty years—in *Idaho Schools for Equal Educational Opportunity v. Evans* ("*ISEEO I*").[25] In *ISEEO I*, during Summer 1990, a group of citizens/taxpayers,

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21. *Id.* at 647–48, 96 Idaho at 805–06.
22. *Id.* at 647, 96 Idaho at 805.
23. Thompson v. Engelking, 537 P.2d at 652, 96 Idaho at 810.
24. *Id.* at 653, 96 Idaho at 811.
25. Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 123 Idaho 573 (1993) [hereinafter *ISEEO I*]. Scholars categorizing school funding cases have used a "wave" metaphor in describing the cases over the years. *See* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990) (initially coining the term). Each wave represents a different theory of liability under the United States Constitution or a state counterpart: the first wave stands for equality under the Fourteenth Amendment to the U.S. Constitution; the second wave stands for equity under state constitutional equal protection and education clauses; and the third wave stands for adequacy under state constitutional education clauses. Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL'Y,

school districts, superintendents and a superintendent's association filed two lawsuits, later consolidated, against various state officials, including the Legislature and the Governor.[26] One of the lawsuits again alleged that Idaho's system of funding K-12 public schools violated Article IX, Section 1 of the Idaho Constitution because it failed to provide a uniform system of public education and the other lawsuit alleged an equal protection clause violation.[27] Both lawsuits further alleged that the State's funding system violated another requirement of that same constitutional provision because it did not provide a thorough education in that the State had failed to provide schools with necessary resources due to lack of funding.[28] After the district court dismissed the action on both substantive and justiciability, i.e. standing, grounds, plaintiffs appealed.[29]

The Idaho Supreme Court affirmed in part and reversed in part.[30] The Court began its Opinion by describing the sources of funding for Idaho K-12 public schools:

> Public schools in Idaho are funded by a combination of local, state, and federal funds. The State partially or totally reimburses the districts for certain expenses (80% of costs of exceptional education personnel; 85% of transportation costs; and 100% of teacher retirement benefits, Social Security, and unemployment insurance). Money is also received from the State Educational Support Program. This program is funded by state revenues, allocated by a "support unit" formula and based on average daily attendance in the district. Each school district's portion is reduced by a projected "local contribution" equal to the money which would be collected by a .36% property tax levy by the school district. Because a school district with low assessed property value will collect less money than a district with high property values under the .36% formula, a low property value district contributes less money to the Educational

346, 352, n.52 (2018) [hereinafter *Aligning Education Rights*]. The *ISEEO* matter, focusing as it did on the adequacy of K-12 school funding under the thoroughness provision of Idaho's state constitutional education clause, clearly falls under the third wave category.

Some scholars have suggested that a fourth wave of liability theories is beginning to emerge. *See*, *e.g.*, Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equity in Public Schools*, 1 DUKE F.L. & SOC. CHANGE 47, 58 (2008). Although these fourth wave theories focus less on funding than their predecessors, no consensus concerning the existence or contours of a fourth wave in constitutional school challenges to school funding systems has yet emerged. Weishart, *Aligning Education Rights*, *supra* at 352, 354–55. For a critique of the accuracy of the wave metaphor, *see* William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1186–87, 1264–65 (2003).

26. *ISEEO I*, 850 P.2d at 729, 123 Idaho at 578. The consolidated lawsuit consisted of the *ISEEO* case, filed on June 21, 1990, and the *Frazier-Meridian* case, filed on September 20, 1990. Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ., 912 P.2d 644, 647, 128 Idaho 276, 279 (1996) [hereinafter *ISEEO II*]; *ISEEO II* is discussed *infra* at Section II.A.3.

27. *ISEEO I*, 850 P.2d at 729, 123 Idaho at 578.

28. *Id.*

29. *Id.* Substantive challenges, of course, address the legal merits of a claim, Weisel v. Beaver Springs Owners Ass'n, 272 P.3d 491, 497, 152 Idaho 519, 525 (2012), while justiciability challenges are jurisdictional, i.e. go to whether a court has the power or authority to hear the matter. State v. Rhoades, 809 P.2d 455, 458, 119 Idaho 594, 597 (1991).

30. *ISEEO I*, 850 P.2d at 730, 123 Idaho at 579.

> Support Program fund than a high property value school district. The school district may also, with voter approval, raise more money through supplemental levies. Supplemental levies are used for both capital construction and day-to-day maintenance and operations . . . . [C]hartered school districts have greater authority to levy money than do non-chartered districts. Finally, a relatively small amount of a school district's budget comes from lottery proceeds and various federal programs.[31]

The Court next turned to its legal analysis, concluding that it had resolved the meaning of the State's duty to provide a uniform system of public education in *Thompson*.[32] Specifically, the Court believed it had reached the correct result in *Thompson* and, as such, "decline[d] the appellants' invitation to extend the reach of *Thompson* because [it] . . . continue[d] to believe the uniformity requirement in the education clause requires only uniformity in curriculum, not uniformity in funding."[33] As to the state law equal protection claim, the Court held that its resolution of the claim in *Thompson* constituted a holding, not dicta, and therefore had precedential effect.[34] It next held that "education is not a fundamental right because it is not a right directly guaranteed by the state constitution" but must occur based on legislative action under Article IX, Section 1.[35] As such, the Court held that strict scrutiny did not apply and that, with one small exception, intermediate judicial scrutiny did not apply either.[36] Applying the rational basis test to the state law equal protection challenge, the Court "adhere[d]" to its holding in *Thompson* that Idaho's K-12 school funding system, other than its differential treatment of chartered school districts from non-chartered school districts in matters of local taxation, withstood constitutional scrutiny under that standard.[37] The Court concluded its equal protection analysis by observing that inter-school district funding disparities had not changed since *Thompson*, noting "the school funding system is substantially the same today as it was when *Thompson* was decided. If anything, the disparities which today exist between districts appear to be less significant than at the time *Thompson* was decided."[38]

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31. *Id.* at 528–29, 123 Idaho at 577–78.
32. *Id.* at 730, 123 Idaho at 579.
33. *Id.* at 730-31, 123 Idaho at 579-80.
34. *Id.* at 731, 123 Idaho at 580.
35. *ISEEO I*, 850 P.2d at 733, 123 Idaho at 582.
36. *Id.* at 732–34, 123 Idaho at 581–83. The Court "concluded that the only aspect of the funding scheme . . . which blatantly discriminates is . . . [the] statute [that] treats chartered school districts differently than non-chartered school districts in their respective powers to levy additional taxes. Thus, as to this small part of the appellants' equal protection challenge, the intermediate standard of review applies." *Id.* at 733–34, 123 Idaho at 582–83. The Court remanded this challenge to the district court for resolution under the intermediate review. *Id.* Chartered school districts are school districts created by the Idaho territorial legislature prior to Idaho becoming a state in 1898. *See* Howard v. Independent Sch. Dist. No.1 of Nez Perce Cty., 106 P. 692, 693–94, 17 Idaho 537 (1910). Chartered school districts should not be confused with charter schools, which are a type of public school created by the Idaho Legislature one hundred years after Idaho attained statehood. *See* IDAHO CODE § 33-5201 (1998) (Public Charter Schools Act of 1998).
37. *ISEEO I*, 850 P.2d at 734, 123 Idaho at 583.
38. *Id.* at 734 n.1, 123 Idaho at 583 n.1.

Turning to the remaining substantive challenge to Idaho's system of K-12 school funding, the Court addressed appellants' claim that the funding system violated the thoroughness requirement of Article IX, Section 1's education clause. The Court first clarified that neither it nor the district court had addressed the requirements of the thoroughness provision in *Thompson*.[39] The Court next forcefully championed the importance of judicial review and, ultimately, judicial supremacy in matters of constitutional exposition:

> The respondents argue that the Court should not involve itself in the complicated determination of what is a "thorough" education and that we should defer to the other branches of government in this matter. . . [W]e decline to accept the respondents' argument that the other branches of government be allowed to interpret the constitution for us. That would be an abject abdication of our role in the American system of government.
>
> > Passing on the constitutionality of statutory enactments, even enactment with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison* . . . .
>
> Likewise, we are fully confident that once we have fulfilled our constitutional duty to interpret the constitution "the other branches of government also will carry out their defined constitutional duties in good faith and in a completely responsible manner."[40]

Although the Court refused to abdicate its "constitutional duty to define the meaning of the thoroughness requirement of art. 9 § 1," it acknowledged that the "task has been made simpler for this Court because the executive branch of the government has already promulgated educational standards pursuant to the

39. *Id.* at 734, 123 Idaho at 583.

40. *Id*. (quoting Miles v. Idaho Power, 778 P.2d 757, 762, 116 Idaho 635, 640 (1989) and Seattle Sch. Dist. No. 1 of King Cty. v. State*,* 585 P.2d 71, 88–89 (Wash. 1978)(en banc)). Although the Court did not expressly define it as such, the issue concerning the Court's decision to review the constitutionality of the Legislature's school funding enactments involves application of justiciability principles under the political question or separation of powers doctrines. *See* Troutner v. Kempthorne, 128 P.3d 926, 930, 142 Idaho 389, 393 (2006) (citing *Miles*, 778 P.2d at 761, 116 Idaho at 639). Courts in other states have been divided over whether K-12 school funding systems should be susceptible to state constitutional challenges, with some courts holding that such controversies are justiciable as against political question doctrine or separation of powers arguments or defenses, *see, e.g*., Lobato v. State, 218 P.3d 358, 368–74 (Colo. 2009) (en banc); Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238, 1264–65 (Wyo. 1995), while other courts have refused to reach the merits of those challenges under those same justiciability principles. *See, e.g*., Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996); Coal. for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 407–08 (Fla. 1996). For commentary discussing and decrying judicial application of the political question doctrine to avoid adjudicating school funding cases on the merits, *see* Christine M. O'Neill, Comment, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J. L. & SOC. PROBS. 545 (2009).

legislature's directive in I.C. § 33–118."[41] After examining those standards, the Court "h[e]ld that, under art. 9, § 1, the requirements for school facilities, instructional programs and textbooks, and transportation systems as contained in those regulations presently in effect, are consistent with our view of thoroughness."[42] The Court concluded its analysis by reversing the district court's dismissal of plaintiffs' thoroughness claim, holding that "[s]hould the plaintiffs [i.e., school superintendents and school districts] be able to prove that they cannot meet the standards established by the State Board of Education, noted above, with the money provided under the current funding system they will have presented an apparent prima facie case that the State has not established and maintained a system of thorough education."[43]

Lastly, the Court concluded that at least some of the plaintiffs had suffered sufficient injury based on the State's alleged state constitutional violation to bring the case, holding that *ISEEO*—the superintendents' organization—and the school districts had standing to sue, but that citizens and taxpayers did not.[44] Having reversed on both justiciability and substantive grounds, the Court remanded the case to the district court for further proceedings consistent with its opinion.[45]

3. *ISEEO II* – More Justiciability Issues: Mootness and its Exceptions

Three years later, the *ISEEO* matter came before the Court again in *Idaho Schools for Equal Educational Opportunity v. Idaho State Board of Education* ("*ISEEO II*").[46] In *ISEEO II*, the district court, on remand of *ISEEO I*, had granted summary judgment in favor of the State defendants and dismissed the plaintiffs' fourth amended complaint on the grounds that certain enactments that had been or would be made to Idaho's funding and standards rendered the matter moot and,

41. *ISEEO I*, 850 P.2d at 734, 123 Idaho at 583 (citing State Board of Education Rules and Regulations for Public School K-12, IDAPA 08.02).

42. *Id.* By acknowledging and adopting the IDAPA educational standards, the Court believed it had "appropriately involve[d] the other branches of state government" in the resolution of the state constitutional thoroughness inquiry. *Id*. The Court, however, expressed no opinion regarding whether the IDAPA standards would be consistent with the definition of thoroughness if the State Board were to amend them. *Id*. at 735 n.2, 123 Idaho at 584 n.2.

43. *Id*. at 735, 123 Idaho at 584.

44. *Id*. at 735–36, 123 Idaho at 584–85. Like the political question or separation of powers doctrines, standing is a subcategory of justiciability. Young v. City of Ketchum, 44 P.3d 1157, 1159, 137 Idaho 102, 104 (2002) (citing *Miles*, 778 P.2d at 761, 116 Idaho at 639). Courts in other states have likewise held that school districts have standing to bring state constitutional challenges to the adequacy of K-12 school funding, *see*, *e.g.*, Gannon v. State, 319 P.3d 1196, 1212 (Kan. 2014); Olson v. Guidon, 771 N.W.2d 318, 320–24 (S.D. 2009); Seattle Sch. Dist. No. 1 of King Cty. v. State, 585 P.2d 71, 80–81 (Wash. 1978) (en banc), and have reached the same conclusion regarding standing for students, parents and education advocacy groups. *See*, *e.g.*, Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 176 A.3d 28, 43–53 (Conn. 2018). Conversely, other courts outside of Idaho have held that school districts do not have standing to bring similar state constitutional challenges regarding alleged inadequacy in school funding, *see*, *e.g.*, E. Jackson Pub. Sch. v. State, 348 N.W.2d 303, 306 (Mich. Ct. App. 1984), and have likewise held that students, parents and guardians lack standing in those cases. *See*, *e.g.*, *Gannon*, 319 P.3d at 1212–13.

45. *ISEEO I*, 850 P.2d at 736, 123 Idaho at 585.

46. Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ., 912 P.2d 644, 647, 128 Idaho 276, 279 (1996) [hereinafter *ISEEO II*].

therefore, non-justiciable.[47] Specifically, the district court, in reaching its decision, pointed to the following four matters:

> 1) The 1994 legislature appropriated $653,310,000 for public schools which is the largest appropriation in the history of the state and which is materially larger than appropriations in the past;
> 2) The legislature changed the funding formula which may significantly impact the funding of schools;
> 3) The 1994 legislature enacted a definition of thoroughness which is outside matters considered by the Supreme Court; and
> 4) The State Board of Education regulations in effect at the time of the Supreme Court decision, which the Court determined were consistent with the standard of thoroughness, will be replaced by new standards by April 1, 1996.[48]

The Court, concluding that the matter was not moot, vacated the district court's summary judgment and remanded the matter to the lower court.[49] It first defined the mootness standard, largely focusing on whether the case—and cases involving amendments to regulatory schemes and appropriation of funds generally—presented a live controversy and not an abstract or hypothetical problem.[50] In turn, the Court asked whether the case "admitt[ed] of specific relief through a decree of conclusive character" or, conversely, "the plaintiff would be unable to obtain further relief based on the judgment."[51] Put another way, the Court wanted to know whether the "amendment or replacement . . . otherwise resolve[s] the parties' claims."[52] The Court then summarized the district court's reasoning behind its ruling and held as follows:

> [T]he district court did not expressly find that the case was non-justiciable due to the changes made by the 1994 legislature. Rather, it appears that the court essentially determined it could not grant any relief or resolve the controversy because it found the funding by the legislature to be a shifting target and that the standards of thoroughness had changed . . . .

47. *Id.* at 647–49, 128 Idaho at 279–81. Like political questions and standing, mootness is a subcategory of the justiciability doctrine. Wylie v. State, Idaho Trans. Bd., 253 P.3d 700, 705, 151 Idaho 26, 31 (2011) (citing *Miles*, 778 P.2d at 761, 116 Idaho at 639).

48. *ISEEO II*, 912 P.2d at 648-49, 128 Idaho at 280–81.

49. *Id*. at 647, 652–53, 128 Idaho at 279, 284–85. Judge Gerald Schroeder issued the district court decisions in *ISEEO I and II*. Judge Schroeder was appointed to the Idaho Supreme Court in 1995 and retired from the Court in 2007. Gerald F. Schroeder, Ballotpedia – The Encyclopedia of American Politics, https://ballotpedia.org/Idaho_Supreme_Court. Because of his involvement in the *ISEEO* matters as a district judge, Justice Schroeder recused himself from and did not participate in the Court's decision in *ISEEO II* or any subsequent *ISEEO* or *ISEEO*-related decision issued by the Court.

50. *Id*. at 649–50, 128 Idaho at 281–82.

51. *Id*. at 650, 128 Idaho at 282.

52. *Id*.

> We do not agree that the actions of the 1994 legislature render this action moot, and hold that a justiciable issue does indeed exist. Although the legislature made the changes noted above, at the time that the summary judgment motion was heard, there still remained in place the Idaho constitutional requirement of a *thorough* education . . .
>
> This provision has not been amended or repealed during the pendency of this litigation. The increases in the legislature's appropriations, the revising of the funding formulas, the adopting of the statutory definition of "thoroughness," and the sunsetting of the Board of Education's regulations do not answer the question whether a constitutionally "thorough" education is provided. Even though these statutes and regulations may be amended or even repealed, there remains a constitutional provision requiring that the state provide a thorough education. Thus, we hold that all of the legislature's enactments and changes in 1994 did not render this action moot.[53]

The Court went on to provide alternative grounds for allowing the case to proceed, articulating and applying two exceptions to the mootness doctrine.[54] First, it opined that, because the State Board of Education could successively repeal standards related to school funding each year and thereby moot each lawsuit brought to challenge them under the thoroughness provision, plaintiffs' claims were excepted from the mootness doctrine because they were "capable of repetition, yet evading review."[55] Second, it believed that the public interest exception to the mootness doctrine applied.[56] Thus, the Court stated that

> Even were we to determine that this controversy is technically moot due to the sunsetting of the Board's regulations, the issue whether current levels of state funding meet the constitutionally-mandated requirement of "thoroughness" is a matter of great fundamental importance. The "thoroughness" of the system of public education affects the present and future quality of life of Idaho's citizens and its future leaders, its children.[57]

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53. *Id*. at 650–51, 128 Idaho at 282–83.

54. *ISEEO II*, 912 P.2d at 651–52, 128 Idaho at 283–84.

55. *Id*.

56. *Id.* at 652, 128 Idaho at 284.

57. *Id.* Unless an exception to the mootness doctrine applies, the determination concerning whether a state legislature has taken action sufficient to render its state constitutional obligation moot (thereby causing dismissal of the underlying school funding case) has led to divergent results based on the court's assessment of the legislative action. Thus, like the Idaho Supreme Court decision in *ISEEO II*, several courts (including one cited to by the Idaho high court in the second *ISEEO* appeal), evaluating legislative appropriation decisions, have refused to dismiss school funding cases on mootness grounds. *See*, *e.g.*, Comm. for Educ. Equal. v. State, 294 S.W.3d 477, 486 (Mo. 2009) (en banc); Coal. for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116, 118 (Or. 1991) (en banc), *cited in ISEEO II*, 912 P.2d at 651, 128 Idaho at 284; Knowles v. State Bd. of Educ., 547 P.2d 699, 705–06 (Kan. 1976). In contrast, several courts, finding and concluding that the legislature had provided sufficient funding to K-12 schools (often after years of litigation), have dismissed state constitutional challenges on mootness grounds. *See*, *e.g.*, Order

The Court concluded by holding that (1) the district court had also erred in not allowing the plaintiffs to further amend their complaint to meet the State defendants' mootness challenge[58] and (2) the plaintiffs were not entitled to an award of attorney's fees at trial or on appeal under the private attorney general doctrine.[59] The Court then remanded the matter to the district court for further proceedings consistent with its (the high court's) opinion.[60]

4. *ISEEO III*—Thoroughness Defined, Scope of Challenge Limited, and Third-Party Claims Against School District Superintendents Rejected

After district court proceedings on remand, the Idaho Supreme Court again took up plaintiffs' K-12 school funding claims under Idaho's constitutional thoroughness provision in *Idaho Schools for Equal Educational Opportunity v. State* ("*ISEEO III*").[61] In *ISEEO III*, then-district court judge, Daniel Eismann, granted summary judgment in favor of the State defendants on plaintiffs' thoroughness claim and denied the State defendants' motions to file a third-party complaint against the superintendents and their association and to dismiss certain plaintiffs as improper parties.[62] Judge Eismann reached his decision granting summary judgment on plaintiffs' substantive claims based on the view that, despite Article IX, Section 1's requirement that "[t]he Legislature . . . establish and maintain a thorough system of public, free common schools," the framers of the Idaho Constitution did not intend that the Legislature provide *funding* for school facilities, but rather, left that task to local school districts.[63]

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of June 7, 2018 at 4, McCleary v. State, 269 P.3d 227 (Wash. 2012) (No. 84362-7), https://www.courts.wa.gov/content/publicUpload/McCleary/843627PublicOrderOther06072018.pdf; Londonderry Sch. Dist. SAU #12 v. State, 958 A.2d 930, 932 (N.H. 2008); Order of July 20, 1998, Hull v. Albrecht, 960 P.2d 634 (Ariz. 1998) (No. CV-98-0238-SA).

58. *ISEEO II*, 912 P.2d at 652, 128 Idaho at 284.

59. *Id.* at 652–53, 128 Idaho at 284–85.

60. *Id.* at 653, 128 Idaho at 285.

61. Idaho Sch. for Equal Educ. Opportunity v. State, 976 P.2d 913, 132 Idaho 559 (1998) [hereinafter *ISEEO III*].

62. *Id.* at 917–18, 132 Idaho at 563–64.

63. *Id.* at 918–19, 132 Idaho at 564–65. Specifically, Judge Eismann reasoned and concluded as follows:

> Prior to the adoption of the Idaho Constitution, school houses were funded by the electors of each school district voting to tax themselves . . . . The framers of the Idaho Constitution did not seek to change that manner of funding school houses. If the people of the State of Idaho want to change the Idaho Constitution to require the State to fund school houses, they can do so. They can likewise elect legislators who would vote to appropriate funds to construct or repair school houses. Absent a provision in the Constitution requiring that result, however, it is not the province of the Court to require the State to provide such funding.
>
> ***
>
> This Court's conclusion, based upon the intent of the framers of our Constitution, is that Article IX, § 1, does not require the Legislature to provide funding for school facilities.

The Court vacated in part and affirmed in part the district court's decision granting summary judgment on plaintiffs' thoroughness claim, but affirmed its decisions denying the State defendants' motion to file the third-party complaint and to dismiss several plaintiffs.[64] Reviewing the proceedings before the district court on remand after *ISEEO II*, the Court first rejected the State defendants' contention that plaintiffs had abandoned their thoroughness claim.[65] The Court, harkening back to its decision in *ISEEO I* and again referencing the need to *both* respect the co-equal branches of state government *and* maintain its independence in interpreting the state constitution, next defined Article IX, Section 1's thoroughness requirements.[66] In working toward the definition of thoroughness, the Court noted that the "[t]he statute defining thoroughness enacted by the Legislature after *ISEEO I* provides that a thorough system of public schools is one in which '[a] safe environment conducive to learning is provided' and requires the State Board to 'adopt rules . . . to establish a thorough system of public schools . . . .'"[67] The Court further noted that "[t]he new rules the State Board adopted . . . state that facilities are 'a critical factor in carrying out educational programs' and that '[t]he focus of concern in each school facility is the provision of a variety of instructional activities and programs, with the health and safety of all persons essential.'"[68] Having summarized the post-*ISEEO I* legislative and executive branch enactments, the Court then defined the state constitutional thoroughness requirement as follows:

> In the same spirit with which we accepted the prior rules as consistent with our view of thoroughness, we conclude that the new rules and [statute] . . . are consistent with our view of thoroughness with respect to facilities. Even without these expressions from the Legislature and the State Board, however, *we conclude that a safe environment conducive to learning is inherently a part of a thorough system of public, free common schools that Article IX, § 1 of our state constitution requires the Legislature to establish and maintain*. Certainly, the constitutional obligation of the Legislature cannot be read to allow a system of schools that do not provide a safe environment conducive to learning.[69]

It does not require the Legislature to provide such funding directly by appropriating tax dollars, nor does it require the Legislature to provide such funds indirectly by some other means.

Id.

64. *Id.* at 914, 922, 132 Idaho at 560, 568.
65. *Id.* at 918–19, 132 Idaho at 564–65.
66. *Id.* at 919–20, 132 Idaho at 565–66; *see supra* notes 38–43 and accompanying text.
67. *ISEEO III*, 976 P.2d at 919, 132 Idaho at 565.
68. *Id.* at 919–20, 132 Idaho at 565–66.
69. *Id.* at 920, 132 Idaho at 566 (emphasis added). As did the Idaho Supreme Court in *ISEEO III*, courts in at least four other states–Connecticut, New Jersey, Kansas and Alabama–have interpreted education clauses, including thoroughness provisions, in their state constitutions by reference to state

The Court concluded that, because the State defendants had not presented evidence attempting to eliminate genuine issues of material fact under this newly articulated and refined thoroughness standard, the plaintiffs had no obligation to respond with an evidentiary showing of its own and further concluded that the district court erred in granting summary judgment in favor of the State defendants on plaintiffs' thoroughness claim.[70]

The Court next addressed two other iterations of plaintiffs' state constitutional challenge to Idaho's K-12 school funding system. First, the Court rejected plaintiffs' contention based on the Arizona Supreme Court's decision in *Roosevelt Elementary School v. Bishop*,[71] that Art IX, Sec. 1 of the Idaho Constitution requires the Legislature to provide substantially equal funding for capital expenditures to each school district.[72] As to this contention, the Court noted that that the *Roosevelt* decision addressed a school funding challenge under the "general and uniform" education article of the Arizona Constitution, but that, in interpreting Art. IX, Section 1, the Idaho high court had twice previously held that the uniformity provision requires uniformity in curriculum, not uniformity in funding.[73] Thus, relying on precedent and the law of the case,[74] the Court affirmed the district court's decision granting summary judgment to the State defendants on the plaintiffs' equalized funding claim.[75] Second, the Court rejected plaintiff's contention, based on the Washington Supreme Court's decision in *Seattle School District No. 1 v. State,*[76] that "to the extent that the school districts are required to submit special override levy elections to the voters . . . in order to fund basic maintenance and operation needs, and . . . for special facilities levies," Article IX,

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statutory enactments or administrative rules and have concluded that, among other statutorily– and regulatorily–derived requirements, legislatures are duty bound to maintain K-12 public schools that are safe environments conducive to learning. Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 212 (Conn. 2010); Abbott v. Burke, 710 A.2d 450, 523 (N.J. 1998) (*Abbott V*), *cited in* Lonegan v. State, 809 A.2d 91, 106 (N.J. 2002); Unified School Dist. No. 229 v. State, 885 P.2d 1170, 1187 (Kan. 1994), *cited in* Montoy v. State, No. 99-C-1738, 2003 WL 22902963, at *17 (3d Jud. Dist. Dec. 2, 2003); Alabama Coal. for Equity, Inc. v. Hunt, Civ. A. Nos. CV-90-883R,CV-91-0177-R, 1993 WL 204083, at *21 (Ala. Cir. 1993), *aff'd*, Opinion of Justices, 624 So. 2d 107 (Ala. 1993), *abrogated on other grounds by* Ex parte James, 836 So. 2d 813 (Ala. 2002). Even though the Idaho legislature similarly defined a thorough system of public education to include a number of factors beyond providing safe facilities, Idaho appears to be the only state where the state high court defined constitutional thoroughness singularly and exclusively as a safe environment conducive to learning. *ISEEO III*, 976 P.2d at 919–20, 132 Idaho at 565–66.

70. *ISEEO III*, 976 P.2d at 919–20, 132 Idaho at 565–66.

71. 877 P.2d 806 (Ariz. 1994).

72. *ISEEO III*, 976 P.2d at 920, 132 Idaho at 566.

73. *Id*. (citing *Thompson*, 537 P.2d at 647, 96 Idaho at 805 and *ISEEO I*, 850 P.2d at 740–41, 123 Idaho at 579–80).

74. The law of the case doctrine "requires that when an appellate court, in 'deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal.'" Berrett v. Clark County School Dist. No. 161, 454 P.3d 555, 564, 165 Idaho 913, 922 (2019) (quoting Regan v. Owen*,* 413 P.3d 759, 763, 163 Idaho 359, 363 (2018)).

75. *ISEEO III*, 976 P.2d at 920, 132 Idaho at 566.

76. 585 P.2d 71 (Wash. 1978).

Section 1 likewise has been violated.[77] Specifically, the Court distinguished *Seattle School District No. 1,* noting that, although the Washington state high court had interpreted a "unique state constitutional provision" imposing a "paramount duty" on the Washington legislature to educate Washington state schoolchildren, the Idaho Constitution imposed no such duty on the Idaho legislature.[78] For these reasons, the Court affirmed the district court's grant of summary judgment in favor of the State defendants on this claim.[79]

Rejecting a theory germane to a statutory provision previously enacted and later amended by the Idaho Legislature to respond to the *ISEEO* case and future school funding matters,[80] the Court next took up the district court's decision denying the State defendants' motion to file a third-party complaint against the school district superintendents and their association who were plaintiffs in the case.[81] Under the proposed pleading, the State defendants sought to allege and prove that, if they were liable for failing to satisfy their constitutional obligation under the thoroughness clause, any failing was "due in whole or in part to those superintendents' (1) discretionary decisions, (2) inefficient management, (3) failure to recommend levies authorized by law or consolidation of districts, and (4) administration of the districts."[82] The Court succinctly affirmed the district court's decision.[83] Specifically, the Court held that, although Idaho Rule of Civil Procedure 14(a)'s impleader provision "authorizes third-party claims against 'a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against the third party plaintiff,'" the superintendents and their association could not be liable to the State defendants for the plaintiffs' (the superintendents' and others') thoroughness claim, since the claim was directed at the Legislature and its failure to provide adequate funding for K-12 public education.[84]

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77. *ISEEO III*, 976 P.2d at 920, 132 Idaho at 566. Plaintiffs limited their argument to the State defendants' failure to provide sufficient funding to school districts for maintenance and operation ("M & O") expenses related to facilities only, and not to school district M & O expenses generally. *Id.*

78. *Id*. at 920–21, 132 Idaho at 566–67 (citing *Thompson,* 96 Idaho at 805, 537 P.2d at 647 (holding that the right to public education under Article IX, § 1 is not a fundamental right)).

79. *Id*.

80. In 1996, the Legislature enacted the Constitutionally Based Education Claims Act ("CBECA"), 1996 Idaho Sess. Laws 845, codified at Idaho Code § 6-2201 and following. The CBECA, among other things, allows the State to bring a parens patriae action, i.e. a suit on behalf of a school district patron, against a school district on the grounds that the school district has failed to provide constitutionally required educational services, Idaho Code §6-2205(2), and requires plaintiffs challenging the adequacy of educational services to first sue their local school district before being allowed by the district court to add the State as a defendant. Idaho Code §6-2205(3). In 2000, the Court upheld the CBECA as against state constitutional challenges. State v. Osmunson, 17 P.3d 236, 135 Idaho 292 (2000). The Legislature amended the CBECA in 2003 to require, among other things, dismissal of any pending school funding lawsuits, including the *ISEEO* lawsuit, against state officials. IDAHO CODE § 6-2215. *See infra* notes 97-98, 222–226, 326 and accompanying text.

81. *ISEEO III*, 976 P.2d at 921, 132 Idaho at 567.

82. *Id.*

83. *Id*.

84. *Id*. Although the Court did not rely on alternative grounds, it also could have affirmed the district court's decision because, under the express language of Rule 14(a), the superintendent plaintiffs could not be impleaded because they were already parties to the action. *See* Stahl v. Ohio River Co., 424 F.2d 52, 56 (3rd Cir. 1970) (holding that third-party pleading practice is not permissible against plaintiff,

Resolving the remaining issue before it, the Court concluded by affirming the district court's decision refusing to dismiss certain plaintiffs—school children whose school districts had not been named as plaintiffs—as improper parties.[85] Here, the State defendants argued that, because the unnamed school districts could be liable to those students for failing to provide a thorough education, those school districts were indispensable parties to the ISEEO lawsuit and, as such, plaintiffs in those school districts could not proceed without their (the unnamed school district's) joinder.[86] The Court, however, quickly dispatched the State defendants' argument, noting that an unnamed defendant's "indispensability" is determined by whether the relief sought against them and further that, as discussed previously,[87] plaintiffs had not sought to recover against any school district (or superintendent) on their thoroughness claim.[88]

The Court then returned the matter to the district court, ordering it to conduct further proceedings as follows:

> On remand, the trial court shall conduct a trial or other appropriate proceeding to determine whether the Legislature has provided a means to fund facilities that provide a safe environment that is conducive to learning. When the trial court has done so, it shall make its decision granting or denying relief. We do not express any opinion at this time about the appropriate relief that should be granted if the trial court decides that Plaintiffs are entitled to relief.[89]

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because they are already "a party to the action" under essentially identical Federal Rule of Civil Procedure 14(a)); Cobb v. Nye, No. 4:14-cv-0865, 2015 WL 3702515, *2 (M.D. Pa. 2015) (same); *see also* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1446 n. 27 (3d Ed. August 2019 Update) and cases cited therein.

85. 976 P.2d at 921, 132 Idaho at 567.

86. *Id*. at 922, 132 Idaho at 568.

87. *See supra* note 84 and accompanying text.

88. *Id*. at 922, 132 Idaho at 568.

89. *Id*. By Order, issued in mid-May 1999, the Court declined to rehear the matter. *Id.* Less than a month later, Judge Eismann, having received the mandate of the Court, accused the Court of "amending the Idaho Constitution under the guise of construing it" and placing itself "above the law" by allowing the case to proceed. Order of Disqualification, Case No. 94008, filed June 9, 1999 at 2. In Judge Eismann's view, his "oath of office was intended to be . . . a guarantee of integrity" and "to implement the decision of the Idaho Supreme Court in this case would require that [he] violate [his] oath of office." *Id*. at 3. As such, he recused himself from acting further in the case. *Id*. After discussing Judge Eismann's decision to recuse himself, one scholar cogently pointed out that "[i]n general, of course, a trial court judge is bound by the legal rulings of a superior appellate court. It is extremely rare for a trial judge to refuse to hear a case based on his view that the appellate court made an erroneous legal ruling. If many judges acted so willfully, the administration of justice would be seriously undermined." John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L. J. 217, 242 (2001). Indeed, a Comment to the Idaho Code of Judicial Conduct provides that "[a]though there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts and further that "[u]nwarranted disqualification may bring public disfavor to the court and to the judge personally." Comment to Canon 2, Rule 2.7. The Comment concludes that unwarranted disqualification may negatively impact several important considerations, including "[t]he dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper

5. *ISEEO IV*—The Legislature Strikes Back Unconstitutionally, as well as Initial Legislative Discontent about Judge Bail, the Special Master and the Remedial Phase of the Case

Plaintiffs' school funding challenge next came before the Court in *Idaho Schools for Equal Educational Opportunity v. State* ("*ISEEO IV*").[90] After remand in *ISEEO III*, Judge Deborah Bail, the district judge assigned to the case after Judge Eismann recused himself, conducted a court trial on the thoroughness issue.[91] After trial, "the district court concluded that the system of school funding established by the Legislature was insufficient to meet the constitutional requirement because reliance on local property taxes alone to pay for major repairs or the replacement of unsafe school buildings was inadequate for those districts with a low property tax base or low per capita income."[92] The State defendants appealed that judgment.[93] Initially, the district court did not take any remedial measures so that the Legislature would have time to respond to its findings.[94] However, when the district court concluded that the Legislature had not taken appropriate action, the court "began implementing its remedial measures, including a phase of information gathering and the appointment of a special master."[95]

During the 2003 Legislative session and while the State defendants' appeal was pending, the Legislature enacted House Bill 403,[96] which was an amendment to the Constitutionally Based Education Claims Act ("CBECA").[97] The Court summarized HB 403's provisions as follows:

> HB 403 . . . established among other requirements, that the plaintiffs and the State sue school districts where unsafe school buildings exist;

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concern for the burdens that may be imposed upon the judge's colleagues . . . . " *Id*. Given the above-noted concerns and Judge Eismann's role as trial judge in the case, it is fair to say that Judge Eismann, by disqualifying himself, placed himself above the law and acted with less than appropriate judicial integrity.

A far better example of judicial integrity under similar circumstances occurred with Judge William Sweigert's handling of two Viet Nam War-era cases. In *Mottola v. Nixon*, Judge Sweigert allowed several military reservists to challenge the constitutionality of the war in Viet Nam, rejecting several justiciability challenges by the government. 318 F. Supp. 538, 545–54 (N.D. Cal. 1970). On appeal, the Ninth Circuit disagreed, concluding that Judge Sweigert had erred in holding that the reservists had standing to sue and "reversed, with directions to dismiss the amended complaint." Mottola v. Nixon, 464 F.2d 178, 184 (9th Cir. 1972). On remand, Judge Sweigert expressed his disagreement, albeit in dicta, with the Ninth Circuit's ruling, complied with the mandate and holding of the appellate court, and dismissed both the *Mottola* case and a similar case pending before him. *See* Campen v. Nixon, 56 F.R.D. 404, 404–07 (N. D. Cal. 1972).

Judge Eismann was elected to the Idaho Supreme Court in 2000 and retired from the Court in 2017. Daniel Eismann, Ballotpedia – The Encyclopedia of American Politics, https://ballotpedia.org/Daniel_Eismann. Because of his prior involvement with the *ISEEO* matter as a district judge, Justice Eismann recused himself from, and did not participate in, the *ISEEO* matter or *ISEEO*-related matters during his time on the Court.

90. Idaho Sch. for Equal Educ. Opportunity v. State, 97 P.3d 453, 140 Idaho 586 (2004) [hereinafter *ISEEO IV*].

91. *Id*. at 456, 140 Idaho at 589.

92. *Id*.

93. *Id*. at 455, 140 Idaho at 588.

94. *Id*. at 456, 140 Idaho at 589.

95. *Id*.

96. *Id*.

97. *See supra* note 80 and *infra* note 227.

> that venue for these suits would be changed to the judicial districts in which the defendant school districts lie; that the parties of the current case would be dismissed if they did not follow the procedures of HB 403; and that state district courts could impose an educational necessity levy to repair or replace unsafe school buildings.[98]

In mid-June 2003, the Court ordered the district court to resolve all motions regarding HB 403's constitutionality.[99] The district court rendered its decision in late-October 2003, declaring HB 403 unconstitutional in all respects.[100] The Court then heard the State defendants' appeal concerning that issue.[101]

The Court essentially affirmed the district court's decision. In so holding, the Court rejected the State defendants' argument, based on HB 403, that the school district plaintiffs no longer had standing to pursue its thoroughness claim against the State defendants.[102] The Court further held that HB 403 was unconstitutional for three reasons: first, because it was a special law directed at a particular case, i.e. the *ISEEO* matter; second, because it impermissibly altered the rules of civil procedure in violation of the Court's rulemaking authority; and, third, because its levy/taxation provisions violated the separation of powers doctrine.[103]

As to the standing issue, the Court, relying on and refusing to revisit its holding in *ISEEO I*,[104] succinctly held that the State defendants' argument was without merit.[105] Thus, the Court stated that

> The State maintains that the school districts represented in ISEEO have no standing to bring suit against the State because HB 403 has abolished their right to sue the State without first following the procedures set forth in HB 403.
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> The State made similar arguments in *ISEEO I* as it does now, arguing that a school district cannot sue its creator. However, this Court upheld the school districts' right to seek relief when they allege they are being deprived of funds they are entitled to, and that right cannot be legislatively withdrawn when it is based not only on a statutory grant of

98. 97 P.3d at 589–90, 140 Idaho at 456–57.

99. *Id*. at 457, 140 Idaho at 590.

100. *Id*.

101. *Id*.

102. *Id*. at 590–91, 140 Idaho at 457–58.

103. *Id*. at 591–97, 140 Idaho at 458–64. In a subsequent non-*ISEEO* matter involving a state constitutional challenge to certain fees imposed by school districts and attempting to revive the school funding challenges, the Court made clear that "*ISEEO IV* did not address whether the CBECA, as a whole, was unconstitutional; rather, the case addressed whether HB 403 was unconstitutional." Joki v. State, 394 P.3d 48, 53, 162 Idaho 5 (2017); *see infra* notes 220–227 and accompanying text.

104. *See supra* note 44 and accompanying text.

105. *ISSEO IV*, 97 P.3d at 591, 140 Idaho at 458.

> standing [under Idaho Code § 33-301] but a constitutional mandate over the Legislature as well to fulfill this very duty.[106]

Turning to plaintiffs' contention that HB 403 constituted an unenforceable special law, the Court first quoted Article III, § 19 of the Idaho Constitution, which provides that "[t]he legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . [r]egulating the practice of the courts of justice."[107] The Court then reiterated its standards for determining whether a law was an unenforceable special law or an enforceable general law, stating that "[a] special law applies only to an individual or number of individuals out of a single class similarly situated and affected or to a special locality. . . . A statute is general and not special if its . . . provisions operate upon all persons and subject matters in like situations"[108] and further that "[t]he test for determining whether a law is local or special is whether the classification is arbitrary, capricious, or unreasonable."[109] Applying the first part of the standard to HB 403's legislative findings and substantive statutory provisions, the Court held as follows:

> [I]t is very clear that, though the State asserts on appeal the Legislature intended to create a general law applicable to a wide class of parties, the Legislature was in reality enacting special legislation directed specifically at the ISEEO case and particularly, the Plaintiffs and their cause of action against the Legislature. Though the State argues that HB 403 applies to all school districts equally, the language of the bill plainly states that it is meant to specifically apply to the current litigation. *HB 403 is aimed at essentially disbanding the ISEEO case and restructuring it in a manner that destroys the Plaintiffs' cause of action against the Legislature.* This is a special enactment designed only to affect one particular lawsuit and is clearly a special law in violation of Article III, § 19.[110]

The Court next addressed the plaintiffs' contention that HB 403, by requiring dismissal of the plaintiffs' action against the Legislature, violated the state constitution by altering the rules of civil procedure and thereby undermining the Court's rulemaking authority.[111] Referencing Article V, Section 13, the Court has repeatedly recognized that it has the inherent power to formulate rules of practice and procedure for Idaho courts.[112] That constitutional provision makes limited inroads into the Court's inherent rulemaking power, stating that

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106. *Id.*

107. *Id*. (quoting IDAHO CONST., art. III, § 19).

108. *ISSEO IV*, 97 P.3d at 591, 140 Idaho at 458 (quoting Sch. Dist. No. 25, Bannock Cty. v. State Tax Comm'n, 612 P.2d 126, 134, 101 Idaho 283, 291, (1980)).

109. *Id.* (quoting Concerned Taxpayers of Kootenai Cty. v. Kootenai Cty., 50 P.3d 991, 994, 137 Idaho 496, 499 (2002)).

110. *ISSEO IV*, 97 P.3d at 592, 140 Idaho at 459.

111. *Id*.

112. *See, e.g.,* Talbot v. Ames Constr., 904 P.2d 560, 563, 127 Idaho 648, 651 (1995); State v. Badger, 525 P.2d 363, 365, 96 Idaho 169, 170 (1974); R.E.W. Construction Co. v. District Court of Third Jud. Dist., 400 P.2d 390, 397, 88 Idaho 426, 437–38 (1965). The Legislature "recognized and confirmed"

> The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, *when necessary*, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution.[113]

Recognizing that the Legislature had made findings that HB 403's procedural and dismissal provisions were necessary,[114] the Court then framed the question as whether the Legislature could solely determine whether "a law altering procedural rules is necessary."[115] The Court answered the question "no," holding that "'[w]hether legislative action in this context is necessary within the meaning of Article V, Section 13 is a constitutional determination to be passed upon by this Court.'"[116]

In making the "when necessary" determination, the Court pointed out that both I.R.C.P. 41 regarding involuntary dismissal of law suits and I.R.C.P. 62 regarding the stay of proceedings in pending actions require court approval.[117] In contrast, HB 403 amended Idaho Code Sections 6–2215(3) and 6-2215(2), respectively, to establish dismissal and stay provisions for constitutionally based educational claims as follows:

> School districts that were parties to a lawsuit that presented constitutionally based educational claims or counterclaims . . . that are not defendants in any complaint filed pursuant to subsection (2) of this section shall no longer be parties and shall be dismissed from any proceedings that were suspended. Any defendant to a lawsuit that presented constitutionally based educational claims or counterclaims on the effective date of this section and who is not a defendant authorized by this chapter shall be dismissed from any proceeding that was suspended.

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the Supreme Court's "inherent power . . . to make rules governing procedure in all the courts of Idaho" by enacting Idaho Code § 1-212. Cather v. Kelso, 652 P.2d 188, 192, 103 Idaho 684, 688 (1982).

113. IDAHO CONST., art. V, § 13 (emphasis added).

114. H.R. 403, 57th Leg., 1st Reg. Sess. (Idaho 2003). HB 403 contained legislative findings, stating, among other things, that "[t]he Legislature . . . determines it can best exercise its constitutional duty to establish and maintain a general, uniform and thorough system of public, free common schools by altering the procedure of the existing lawsuit to bring it under the Constitutionally Based Educational Claims Act . . . ." *Id.* (quoted in *ISEEO IV*, 97 P.3d at 592, 140 Idaho at 459).

115. *ISSEO IV*, 97 P.3d at 593, 140 Idaho at 460.

116. *Id*. (quoting *In re* SRBA Case No. 39576, 912 P.2d 614, 622, 128 Idaho 246, 254 (1995)).

117. *ISSEO IV*, 97 P.3d at 592–93, 140 Idaho at 459–60. Specifically, Rule 41(b)(1)'s involuntary dismissal provision provides that "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." IDAHO R. CIV. P. 41(b)(1). Similarly, although Rule 62 largely focuses on stays of proceedings involving enforcement of judgments, the Court has made clear that a stay of proceedings generally "is a matter vested in the sound discretion of the trial court." Cont'l Cas. Co. v. Brady, 907 P.2d 807, 811, 127 Idaho 830, 834 (1995).

[and]

> If this chapter applies to a lawsuit pending on the effective date of this amendment to this section, all proceedings in the lawsuit shall be suspended for fifty-six (56) days from the effective date of this amendment to this section.[118]

As to the above-quoted dismissal provision, the Court opined that "[t]his portion of the legislation directly contradicts Idaho court procedure and effectively dismisses parties to a pending lawsuit without any court action."[119] Moreover, as to the stay provision, the Court believed that "[a]gain, the Legislature purports to make decisions regarding . . . [the ISEEO] litigation that only the district court can make."[120] The Court then concluded as follows:

> That the Legislature is attempting to invoke its powers as a branch of government to direct the outcome of a case in which it is the defendant cannot entirely be attributed to the rationale that it is merely seeking to effectuate the best outcome for all involved or that its decision is entirely policy oriented. … However, contrary to the arguments of the State, this lawsuit was not brought to seek action from the plaintiffs or the courts, but rather, from the Legislature to fulfill a constitutionally mandated duty. *The State is attempting to end legislatively the ISEEO suit and effectively remove itself from any further responsibility or liability.* Such a motive may be a necessity as viewed by the Legislature but, given the claims made by the school districts, it is not sufficiently necessary so as to justify rewriting the Court's rules of procedure. . . . Consequently, we find that there is no necessity present pursuant to Article V, § 13 of the Idaho Constitution meriting the legislature's attempt to legislate itself out of this lawsuit[121] by rewriting the Idaho Rules of Civil Procedure.[122]

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118. HB 403.

119. *ISSEO IV*, 97 P.3d at 593, 140 Idaho at 460.

120. *Id.*

121. At least two other state legislatures have attempted to legislate themselves out of a K-12 school funding lawsuit by taking actions other than meeting its school funding obligation under a state constitution. The Kansas legislature, among other things, proposed (but ultimately did not adopt) legislation that would have deprived Kansas courts of jurisdiction over school funding claims. Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385, 1414 & n.142 (2019); Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021, 1093 & n.350 (2006). Similarly, after the Ohio Supreme Court ruled in favor of plaintiffs at the outset of the *DeRolph* school funding litigation, the Ohio legislature threatened to, but did not ultimately, enact legislation that would have stripped Ohio courts of jurisdiction in school funding matters. Larry L. Obhof, DeRolph v. State *and Ohio's Long Road to an Adequate Education,* 2005 B.Y.U. EDUC. & L. J. 83, 112 (2005) [hereinafter *Ohio's Long Road*]; Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 153 (2013).

122. *ISSEO IV*, 97 P.3d at 593, 140 Idaho at 460 (emphasis added). The Court stated that "[s]uch a law is arbitrary, capricious, and unreasonable" at the conclusion of its discussion of plaintiffs' "when necessary" challenge. *Id*. Given the Court's articulation of those terms as part of the test for determining whether a legislative enactment constitutes an unenforceable special law, the Court's use of those terms at this juncture appears misplaced.

The Court next took up the issue of whether HB 403's provision allowing the district court to impose an educational necessity levy on school districts violated the separation of powers provision of the Idaho Constitution.

HB 403 amended Idaho Code § 6-2214 to provide for educational necessity levies and describe the circumstances under which district courts may order their imposition:

> [T]he district court may impose an educational necessity levy for the purpose of raising revenues to abate unsafe or unhealthy conditions that have been identified by findings of fact or a judgment of the district court, by a consent agreement that has been accepted (with or without modification) by the district court or by a local school district plan to abate unsafe or unhealthy conditions that has been accepted (with or without modification) by the district court. The district court shall impose an educational necessity levy if it finds that the school district has no alternative source of revenue to use to abate unsafe or unhealthy conditions that have been identified . . . .[123]

In turn, Article II, §1 of the Idaho Constitution sets forth limitations on the power of each branch of government, providing that

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.[124]

The Court then reiterated basic separation of power principles, stating that "[j]ust as Article II of the Idaho Constitution prohibits the Legislature from usurping powers properly belonging to the judicial department, so does that provision prohibit the judiciary from improperly invading the province of the Legislature"[125] and, specifically, that "[t]he power to tax, or to exempt from taxation, remains with the Legislature."[126]

Applying these principles and distinguishing Idaho and federal case law cited by the State defendants, the Court rejected the State defendants' argument that HB 403's educational necessity levy provision did not violate Idaho's separation of power limitations because "district courts would merely be implementing a tax created and authorized by the Legislature."[127] Rather, the Court characterized HB 403 and held as follows:

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123. *ISEEO IV*, 97 P.3d at 461, 140 Idaho at 594.

124. IDAHO CONST. art. II § 1.

125. *Id.* at 464, 140 Idaho at 597 (quoting *In re SRBA Case No. 39576*, 912 P.2d at 623, 128 Idaho at 255).

126. *Id.* (quoting *Williams v. Baldridge*, 284 P. 203, 207, 48 Idaho 618, 630 (1930)).

127. *ISEEO IV*, 97 P.3d at 461–64, 140 Idaho at 594–97.

> HB 403 . . . creates a legislative process in which taxing authority is given directly to a separate branch of government—the judiciary—whose powers and purposes were not meant to involve the taxation of Idaho citizens. It is one thing for the courts to direct a governmental entity to carry out its legislatively assigned duty to tax; it is quite another for the court itself to impose the tax. Though the State is effectively seeking to get rid of the middleman in this transaction by giving the courts the power up front to fix the problem, in doing so it ignores foundational principles of separation of powers.
>
> . . .
>
> Because I.C. § 6–2214 as amended by HB 403 assigns the power to tax to the judiciary, it violates the Idaho Constitution.[128]

Near the conclusion of its opinion in *ISEEO IV*, the Court addressed an issue concerning the remedial phase of the case – Judge Bail's appointment of a special master.[129] After her liability determination, Judge Bail eventually appointed a special master to investigate the condition of certain K-12 school buildings in Idaho and required the State to pay the special master's fees.[130] The State defendants challenged Judge Bail's order and, specifically, sought to disqualify her from sitting as a judge in the case because she had become a party or material witness by filing a response to the challenge.[131] The Court disagreed with the State defendants' argument, tersely concluding that "[t]he district judge's impartiality in this case has not been credibly brought into question by her justified response to the State's petition and there is no basis for finding that she cannot continue to sit on this case."[132]

6. *ISEEO V* – Lack of Thoroughness Proven and Affirmed, but the Court Retains Jurisdiction Over the Remedial Phase of the Case and Suggests Remedial Measures to the Legislature

After addressing four previous appeals in the *ISEEO* matter, the Court took up the district court's determination that the State defendants violated the thoroughness provision of Article IX, Section 1 of the Idaho Constitution in *Idaho Schools for Equal Educational Opportunity v. State* (*ISEEO V*).[133] The Court first noted that on remand from *ISEEO III*, "the district court was directed to determine the narrow issue of whether the Legislature had provided a means to fund facilities that provide a safe environment conducive to learning, pursuant to the thoroughness

128. *Id.* at 464, 140 Idaho at 597.

129. *Id*.

130. *Id*. The issue concerning Judge Bail's ordering the State to pay the special master's costs during the pendency of the litigation came before the Court several years later in *State v. District Court of Fourth Judicial District*, 152 P.3d 566, 143 Idaho 695 (2007) ("*ISEEO VI*"); *see infra* notes 181–193 and accompanying text.

131. *Id*.

132. *Id*.

133. Idaho Sch. for Equal Educ. Opportunity v. State, 129 P.3d 1199, 142 Idaho 450 (2005) [hereinafter *ISEEO V*].

requirement of Article IX, § 1."[134] The Court then summarized the post-*ISEEO III* proceedings before the district court:

> The district court held a court trial in 2000, and in 2001 entered its Findings of Fact and Conclusions of Law (2001 Findings). The district court concluded the system of school funding established by the Legislature was insufficient to meet the constitutional requirement because reliance on loans alone to pay for major repairs or the replacement of unsafe school buildings was inadequate for the poorer school districts. The district court deferred any remedial action to allow the Legislature time to address the court's findings. However, in late 2002 when the Legislature, in the district court's opinion, had failed to take appropriate action, the district court began implementing its remedial measures, including a phase of information gathering and the appointment of a Special Master.[135]

The Court followed by framing the issue before it and its conclusion in favor of plaintiffs on that issue, stating as follows:

> [T]his appeal finally addresses the district court's 2001 Findings and the court's final determination that the current state "system based upon loans alone is not adequate to meet the constitutional mandate to establish and maintain a general, uniform, and thorough system of public, free common schools in a 'safe environment conducive to learning' for Idaho's poorest school districts." We agree with this conclusion.[136]

The Court began its analysis by noting what it would *not* be deciding, i.e. issues "concern[ing] the remedial phase of the litigation" because issues relating to the special master were "raised in another appeal pending before this Court."[137] Surprisingly, given this disclaimer, the Court then turned to issues intertwined, at least in part, with the remedial phase of the case: the scope of the evidence plaintiffs could properly present concerning the safety of school facilities and the scope of any resulting judgment.[138] As to those issues, the Court held that

> [T]he focus of this litigation is on the adequacy of the Legislature's mechanism for funding public school districts; a judgment that such a funding mechanism is unconstitutional will necessarily affect all school districts throughout the state, regardless of whether those districts

134. *Id.* at 1202–03, 142 Idaho at 453–54; *see supra* note 89 and accompanying text.

135. *Id*. at 1203, 142 Idaho at 454.

136. *Id.* The Court also noted that, after the district court's liability determination and appointment of a special master, the Legislature enacted HB 403, which restricted and altered various procedures concerning K-12 school funding lawsuits, including the *ISEEO* matter, but that the Court had held HB 403 unconstitutional in *ISEEO IV*. *Id.*; *see supra* notes 90–128 and accompanying text.

137. *Id.*

138. *Id*.

> presented evidence at trial, previously settled, or were never even parties to this lawsuit. ISEEO, though not technically representing certain school districts, is entitled to show statewide safety problems caused by the Legislature's current methods and levels of funding.[139]

The Court next addressed the State defendants' contention that the district court had improperly turned the definition of the thoroughness standard from a question of law into a question of fact and, in so doing, had expanded the definition beyond the meaning previously established by the Court.[140] The Court made clear that, having fulfilled its constitutional duty to define a thorough system of education in *ISEEO I*, the definition is a question of law.[141] The Court then held that the district court, by analyzing the adequacy of state standards relating to educational coursework and programs, went beyond the administrative standards concerning safe buildings and facilities previously adopted by the Court and acted improperly by considering irrelevant matters.[142] As such, the Court "decline[d] to analyze thoroughness as it relates to course work and programming" on the State defendants' appeal.[143]

The Court then turned to an analysis of the adequacy of the evidence that the district court used to support its findings, which were both specific as to structural problems and fire hazards in specific school districts and more generalized concerning Idaho schools—particularly those in rural areas.[144] The Court rejected the State defendants' argument that the Court's mandate in *ISEEO III* required the district court to limit itself to making specific findings concerning the safety of particular facilities in specific school districts and did not permit generalized findings.[145] Thus, the Court held as follows:

> In making this argument, the State attempts to refocus this litigation into small, district-by-district battles instead of addressing the larger, overall issue of the Legislature's constitutional duty towards public education in Idaho. The State has mischaracterized this Court's order on remand, which was to determine whether the Legislature has provided a means to fund facilities that provide a safe environment conducive to learning, not whether each Plaintiff school district's

139. *Id.* at 1203–04, 142 Idaho at 454–55.

140. *Id.* at 1204, 142 Idaho at 455.

141. *Id.* (citing *ISEEO I*, 850 P.2d 724, 734, 123 Idaho 573, 583 (1993)).

142. *Id.* at 1204, 142 Idaho at 455.

143. *Id.* The district court's analysis of the adequacy of course work and programs vis-à-vis the thoroughness requirement was not entirely misplaced. To be sure, the administrative rules adopted by the Court as to the thoroughness standard focused primarily on the need for building safety and its effect on student learning. *ISEEO III*, 976 P.2d 913, 919, 132 Idaho 559, 565 (1999); *see supra* notes 61–63 and accompanying text. However, the Court noted in *ISEEO III* that those same rules provided that "'[t]he focus of concern in each school facility is the provision of a variety of *instructional activities and programs* . . . ,'" *Id.* at 919–20, 132 Idaho at 565–66 (emphasis added); *see supra* note 68 and accompanying text, and further that uniformity in *curriculum*, not funding, was required. *Id.* at 918–19, 132 Idaho at 564–65 (emphasis added); *see supra* note 73 and accompanying text.

144. *ISEEO V*, 129 P. 3d at 1204, 142 Idaho at 455. For example, the district court made a generalized finding that "Idaho's schools, particularly those in rural areas, are stretched to the breaking point in meeting the educational needs of their charges." *Id.*

145. *Id.* at 1204, 142 Idaho at 455.

> facilities were adequate to provide a safe environment. In short, the State fails to grasp the relevance of the adage "the whole is greater than the sum of its parts." Since the issue is systemic in nature and the admitted evidence so voluminous, the district court did not commit any error in making some generalized findings about facility problems, after pointing out some specific and illustrative examples.[146]

The Court next discussed the adequacy of the district court's specific findings.[147] Again pointing to the forest of evidence, rather than the individual trees, presented to the district court concerning the thoroughness issue, the Court first stated that

> While the State quibbles with some of the evidence used to support the 2001 Findings the State has failed to show how the disputed findings were material to the overall conclusion the Legislature has failed in its constitutional duty to provide a thorough public education system. The record in this case involves a transcript of more than 3,500 pages, thousands of pages of pre-filed testimony and thousands of pages of exhibits. The record also includes uncontradicted testimony from numerous school administrators and superintendents outlining facility problems and the barriers to correcting them. The State's pedantic focus on [certain] . . . details . . . distracts from the overwhelming evidence in the record documenting serious facility and funding problems in the state's public education system.[148]

In particular, the Court pointed to the damning nature of the State's own reports concerning the condition of school facilities:

> Among such evidence is the State of Idaho's own 1993 Statewide School Facilities Needs Assessment, which documented facility deficiencies and concluded fifty-seven percent of all Idaho school buildings had "serious" safety concerns. A 1999 update to that report noted fifty-three of the buildings needing serious and immediate attention in 1993 had deteriorated even further.[149]

The Court moved next to the evidence concerning structural and safety problems at specific Idaho schools and the problems encountered by school districts in funding school improvements.[150] The Court pointed to three schools—Wendell Middle School, American Falls High School and Troy Junior Senior High School—noting in each instance that the buildings suffered from structural problems due to lack of funding for repairs that rendered them unfit for

146. *Id.*
147. *Id.*
148. *Id.* at 1204–05, 142 Idaho at 455–56.
149. *ISEEO V*, 123 P.3d at 1205, 142 Idaho at 456.
150. *Id.*

occupancy.[151] The Court then turned to two, related funding problems identified by the district court as undermining a number of school districts' ability to provide safe school buildings. First, the Court approvingly quoted the district court's conclusion that the "glaring gap" in the funding system was the "lack of any mechanism to deal quickly with major, costly, potentially catastrophic conditions by districts which are low in population, have a low tax base and are in economically depressed areas."[152] Second, the Court agreed with the district court about the difficulties school districts face in passing supplemental bonds and levies under the supermajority electoral requirement,[153] illustrating the difficulty by describing one school district's—Jerome School District's—repeated, narrow losses at the polls when the funds sought were crucial to providing a thorough education for its schoolchildren.[154]

The Court concluded its analysis by affirming the district court's conclusion concerning the State defendants' failure to satisfy the Legislature's thoroughness obligation under the Idaho Constitution:

> The list of safety concerns and difficulties in getting funds for repairs or replacements is distressingly long; the overwhelming evidence not only supports, but compels the district court's conclusion of law: the funding system in effect in 2001 was simply inadequate to meet the constitutional mandate to provide a thorough system of education in a safe environment. Thus, to the extent there are any inaccuracies in the 2001 Findings, they are very minor and not clearly erroneous in light of the extensive evidence in the record supporting the district court's conclusion.[155]

The Court next addressed the State defendants' contention that the enacted legislation and funding provided to school districts after the district court trial in 2000 rendered the matter moot.[156] The Court spoke favorably about the Legislature's funding efforts—a topic that would have significance later in the case—noting

> the significant strides the Legislature has made in providing additional funds to Idaho schools for building replacement and repair. The Legislature amended the School Safety and Health Revolving Loan

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151. *Id.*

152. *Id.*

153. Article VIII, § 3 of the Idaho Constitution provides that "[n]o . . . school district . . . shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose . . . ." Likewise, prior to 1987, Idaho Code § 33-804 required at least two-thirds of the electors voting in a school district election to vote in favor of a school facilities levy and the concomitant bonded indebtedness to approve additional local funding to repair or construct school facilities. After 1987, § 33-804's supermajority voting requirement remained, with the two-thirds vote requirement remaining for larger projects and lesser percentage amounts, albeit sixty percent (60%) and fifty-five percent (55%), being required for smaller valued facilities projects.

154. *ISEEO V*, 123 P.3d at 1205, 142 Idaho at 456.

155. *Id.* at 1205–06, 142 Idaho at 456–57.

156. *Id.* at 1206–07, 142 Idaho at 457–58. The State defendants had previously made a mootness argument in *ISEEO II*. *See supra* notes 46–60 and accompanying text.

> Fund, created in 2000, to a Loan and *Grant* Fund in 2001. . . . The fund provided $10 million to seven school districts enabling them to finance some facility repair or replacement. Indeed, several of those districts were addressed in the district court's 2001 Findings. The Legislature took another major step forward by enacting the Idaho Uniform Public School Building Safety Act . . . which allows for the creation of uniform safety standards and requirements for the inspection of the structural integrity of Idaho's existing school buildings. Also, the Legislature has increased the time to pay for a plant facilities levy from ten to twenty years, reducing the annual payments and possibly making such levies a more attractive option for voters. . . . The Legislature is to be commended for taking these steps towards providing a safe environment conducive to learning.[157]

The Court, however, did not believe the subsequent legislation had rendered the case moot.[158] Indeed, the Court suggested that funding to school districts from other non-state legislative sources, including federal forest funds, had helped to alleviate unsafe building conditions.[159] Further, the Legislature's Loan and Grant program funding had not necessarily satisfied constitutional thoroughness requirements and had expired with no guarantee that additional funds would be forthcoming.[160] The Court felt that "there is little to show that the present system of funding is adequate to stop the further accumulation of dangerous or inadequate buildings."[161] Thus, the Court concluded that "the evidence in the record clearly supports the district court's 2001 Findings. We affirm the conclusion of the district court that the current funding system is simply not sufficient to carry out the Legislature's duty under the constitution."[162]

157. *ISEEO V*, 129 P.3d at 1206, 142 Idaho at 457.

158. *Id*.

159. *Id*.

160. *Id.*

161. *Id.* at 1206–07, 142 Idaho at 457–58. As it did in *ISEEO II*, the Court also held that, because "the issue of whether the State has met its constitutional mandate to provide a safe environment conducive to learning . . . is . . . a matter of great public importance[,]" it could also resolve the issue under the public interest exception to the mootness doctrine. *Id.* at 1207, 142 Idaho at 458.

162. *ISEEO V*, 129 P.3d at 1208, 142 Idaho at 459; *see also id.* at 1209, 142 Idaho at 460 ("We affirm the district court's conclusion that the current method of funding as it relates to school facilities is unconstitutional. . . ."). In so holding, the Court agreed with the Ohio Supreme Court's sentiment – expressed concerning Ohio's constitutional thoroughness provision – that "[t]he valuation of local property has no connection whatsoever to the actual education needs of the locality, with the result that a system overreliant on local property taxes is by its very nature an arbitrary system that can never be totally thorough." *Id.* at 1208 n.2, 142 Idaho at 459 n.2 (quoting DeRolph v. State*,* 728 N.E.2d 993, 999 (Ohio 2000)).

By affirming the trial court's decision that Idaho's system for funding K-12 public school's violated state constitutional thoroughness requirements, the Idaho Supreme Court joined a solid majority of courts nationally that had sided with plaintiffs in school funding cases over the years. *See* Robert A. Shapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 CAL. L. REV. 1531, 1557 (2020) (citing MICHAEL A. REBELL, COURTS & KIDS: PURSUING EDUCATIONAL EQUITY THROUGH STATE COURTS 8-9 (Supp. 2017), http://schoolfunding.info/wp-

The Court next discussed the remedial phase of the litigation.[163] At the outset of its discussion, the Court declined to address remedial issues on the pending appeal, but instead decided to retain jurisdiction and thereby take the remedial phase of the case from the district court:

> Any issues relating to the second, or "remedy," phase of the litigation are not part of this appeal. For the reasons that follow, we believe it more appropriate at this point for the case to remain before this Court. Thus, any remedy phase before the trial court is unnecessary and, likewise, we need not address, in this appeal, any issues which arose during that part of the litigation below.[164]

The Court—consistent with its previous decisions in *ISEEO I* and *ISEEO III* allowing the Legislature to play a significant role in setting the constitutional thoroughness standard, albeit subject to judicial review for constitutionality—explained as follows:

> While the Legislature has made laudable efforts to address the safety concerns of various school districts, the task is not yet complete. The appropriate remedy, however, must be fashioned by the Legislature and not this Court. Quite simply, Article IX of our constitution means what it says: "[I]t shall be the duty of the Legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools." Thus, it is the duty of the State, and not this Court or the local school districts, to meet this constitutional mandate.
>
> We are mindful of our duty to determine whether the current funding system passes constitutional muster, and we likewise respect the duties of the Legislature, as a separate branch of government, to make policy and funding decisions. It is not our intent to substitute our judgment on how to establish criteria for safe buildings or create a proper funding system for that of the Legislature.[165]

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content/uploads/2017/07/COURTS-AND-KIDS-2017-Supplement.-07.12.17-.pdf [https://perma.cc/3BXP-HAVU]); *see also* Molly A. Hunter & Kathleen J. Gebhardt, *Legal Precedent and the Opportunity for Educational Equity: Where Now, Colorado?* 50 U. RICH. L. REV. 893, 894 (2016) (citing *Litigation in the States*, EDUC. L. CTR., http://www.edlawcenter.org/cases/litigation-in-the-states.html. Specifically, although scholars disagree on the precise numbers, empirical studies have shown that, between 1989 and 2016 or 2017, plaintiffs had an overall success rate of anywhere from fifty-eight percent to sixty-seven percent in cases alleging that state public school funding systems violated state constitutional provisions. Shapiro, *Id.*; Hunter & Gebhardt, *Id.*

163. *ISEEO V*, 129 P.3d at 1207–08, 142 Idaho at 459–60. Before addressing remedial issues, the Court discussed two subsidiary issues – the district court's orders admitting into evidence a number of post-trial affidavits offered by the plaintiffs and awarding plaintiff's costs from the State for expenditures made on lead testing in Idaho's Silver Valley. *Id.* at 1208–09, 142 Idaho at 458–59. The Court affirmed the district court's decision concerning the evidentiary issue, but reversed its decision on the costs issue. *Id.*

164. *Id.* at 1208, 142 Idaho at 459.

165. *Id.*; *see supra* notes 25–45, 61–89 and accompanying text.

Again stressing that the Court did not intend to "direct . . . the Legislature on its further responsibilities," it then provided the Legislature with "a number of alternatives [used by other state legislatures] to assist school districts in providing a safe environment conducive to learning."[166] The Court listed those alternatives as follows:

> 1) Reducing the majority necessary to pass a bond;
> 2) Allowing taxpayers to designate a portion of their income tax refund to cover repairs of school facilities;
> 3) Funding school facilities out of the state general fund;
> 4) Authorizing a study to determine the actual cost of providing a thorough education;
> 5) Establishing a school facilities fund supported by a percentage of corporate income tax revenue; or
> 6) Creating an emergency school building repair program to fund school districts' urgent repair needs.[167]

The Court then reiterated what it perceived as its limited role in the remedial phase of the case[168] and concluded as follows:

> In adopting Article IX, the citizens of Idaho placed their trust in the collective wisdom, creativity, and expertise of our legislators, and we do the same. We are firmly convinced the Legislature will carry out its constitutional duties in good faith and in a timely manner. At this juncture, we will not remand the case to the district court, but will retain jurisdiction to consider future legislative efforts to comply with the constitutional mandate to provide a safe environment conducive to learning so that we may exercise our constitutional role in interpreting the constitution and assuring that its provisions are met.[169]

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166. *ISEEO V*, 129 P.3d at 1209, 142 Idaho at 460.

167. *Id.*

168. Thus, the Court stated:

> Of course, we do not, and cannot, today pass on the constitutionality of any or all of these options as they may apply to school funding in Idaho, as that question has not yet been presented to us. By listing these alternatives, we are in no way usurping the Legislature's role; we leave the policy decisions to that separate branch of government, subject to our continuing responsibility to ensure Idaho's constitutional provisions are satisfied.

Id.

169. *Id.* At least two trial court judges have pointed out that, during the many years that state constitutional challenges to the adequacy of K-12 school funding have been pending, "courts in several States have struggled with the question of remedy after reaching a conclusion that the particular State was not meeting its State constitutional obligation regarding public school education." Hancock *ex rel.* Hancock v. Driscoll, No. 02-2978, 2004 WL 877984, at *145 (Super. Ct. Mass. April 26, 2004), *quoted in*,

The Court issued its standard Remittitur in *ISEEO V* a few days later, stating that "having announced its Opinion in this cause December 21, 2005, which has now become final . . . IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required."[170]

7. *ISEEO VI* – The Court Resolves the Issue of Payment of the Special Master's Costs, but "The Case is Over" – in Both the Trial Court and Idaho Supreme Court – while Remedial Issues Remain Unresolved

In April 2006, Plaintiffs filed a report with the Court advising it that, during the 2006 legislative session, the Legislature had failed to fulfill its constitutional mandate regarding funding of the public school system.[171] In their report, plaintiffs requested that the Court release its retention of jurisdiction and provide directions to Judge Bail on how to proceed with the remedial phase of the case.[172]

In late-May 2006, at an informal scheduling conference in the *ISEEO* case and a related matter,[173] plaintiffs' counsel asked the Clerk of the Court about the status of the case. The Clerk replied that the case was over.[174] Counsel sought clarification by asking, "You mean it's over in the Supreme Court?"[175] The Clerk then repeated,

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Montoy v. State, No. 99-C-1738, 2004 WL 1094555, at *8 (Kan. Dist. Ct. May 11, 2004). Those same two judges recommended to their respective state appellate courts "that . . . [each] court continue to retain jurisdiction over the case to allow the court, or a single justice, or a judge of the superior court to monitor the remedial phase and provide whatever direction may be necessary." *Hancock*, 2004 WL 877984 at *146, *quoted in*, *Montoy*, 2004 WL 1094555, at *8. Appellate courts have generally agreed with this sentiment in school funding cases, deciding variously to retain jurisdiction themselves concerning the remedial aspect of the case, Gannon v. State, 402 P.3d 513, 554 (Kan. 2017); DeRolph v. State, 728 N.Ed.2d 993, 1020–22 (Ohio 2000) ("*DeRolph II*"); Abbott v. Burke, 643 A.2d 575, 576 (N. J. 1994) ("*Abbott III*"); Helena Elementary Sch. Dist. v. State, 769 P.2d 684, 693 (Mont. 1989), or refusing to retain jurisdiction itself, but remanding the remedial phase of the case to the trial court so the lower court could monitor legislative compliance (or lack thereof) with the appellate court's liability determination. DeRolph v. State, 678 N.E.2d 886, 887–88 (Ohio 1997) ("*DeRolph I*"). A few appellate courts, however, have refused to retain jurisdiction in these circumstance, Montoy v. State, 138 P.3d 755, 766 (Kan. 2006), or allow the trial judge to so. Bismarck Public Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 263 (N.D. 1994). For a further discussion concerning the rationale underlying an appellate court's decision to retain jurisdiction over the remedial phase of school funding litigation and, specifically, the Idaho Supreme Court's decision in *ISEEO V* to do so, *see infra* notes 231–241 and accompanying text.

170. Kress v. Copple-Trout, No. CV-07-261-S-BLW, 2008 WL 352620, *1, *3 (D. Idaho Feb. 7, 2008). When used to effect a remand, the remittitur sends the case "back to the court from which it came." Slater v. Slater, 241 P.2d 1189, 1190, 72 Idaho 383, 385 (1952).

Justice Jim Jones concurred and dissented. Justice Jones agreed with much of the majority's opinion in what he referred to as "this marathon case." 129 P.3d at 1209, 142 Idaho at 460. However, Justice Jones "decline[d] to affirm the district court's factual findings" for three reasons. *Id.* at 1210, 142 Idaho at 461. "First, the district court failed to define the components of a 'safe environment conducive to learning.' Second, the district court's ruling is based upon insubstantial and inadequate evidence. Third, the district court failed to consider the effect of the laws enacted in 2000." *Id*. Although Justice Jones was not inclined to remand the case to the district court for further proceedings, he believed that the high court itself should appoint a special master to assist the Court in bringing the matter to a conclusion. *Id.* at 1213, 142 Idaho at 464.

171. *Kress*, 2008 WL 352620 at *1.

172. *Id*.

173. The related matter was State v. District Court of Fourth Judicial District, 152 P.3d 566, 143 Idaho 695 (2007) ("*ISEEO VI*"); *see infra* notes 181–193 and accompanying text.

174. *Kress*, 2008 WL 352620 at *1.

175. *Id*.

"No, it's over."[176] Plaintiffs' counsel sought further clarification by asking whether the Clerk meant that the case was over on both the district court and supreme court levels.[177] The Clerk responded that it was.[178] No formal decision accompanied the Clerk's pronouncement.[179]

By Order, dated December 1, 2006, district judge Bail confirmed her understanding regarding the Court's Opinion and Remittitur in *IEESO V*, stating that "because the Idaho Supreme Court has retained jurisdiction and has not remanded any aspect of the remedial phase to the trial court at this time, no action will be taken on any pending motions because this Court lacks jurisdiction to consider them."[180]

Approximately two months later, and little over a year after its decision in *ISEEO V*, the Court took up matters it had reserved in that case, i.e., issues related to the district court's appointment of a special master prior to the Court's retaining jurisdiction.[181] In *ISEEO VI*, The Court first summarized the circumstances existing in the remedial phase of the case that had caused the district court to appoint the special master:

> The district court bifurcated the proceeding and the "remedy phase" of the trial was deferred to give the Legislature time to address the school funding issue. After waiting for the Legislature to respond, the district judge concluded both that the Legislature had failed to take appropriate action and that she had been tasked with finding a remedy to the problem based on the Supreme Court's decision in *ISEEO III*.
>
> To remedy the problem, the district judge decided it was necessary for her to evaluate the present condition of Idaho's school districts and to find a cost-effective method for addressing their deficiencies. In a December 2002 written order (Order), the district court confirmed its November 2002 referral of the matter to a special master. . . . [A]s a part of the Order, the district judge assessed all of the costs of the special master against the State, giving as a reason that "the only reason that the Court is appointing a special remedial master to assist in the remedy phase is that the Legislature has not yet established a system which would meet its responsibility to ensure that the schools had a 'safe environment conducive to learning.' "[182]

Next, as it had done in *ISEEO V*, the Court framed the issue before it by pointing out what it would be deciding and what it would not:

176. *Id*.
177. *Id*.
178. *Id*.
179. *Id*.
180. *Kress*, 2008 WL 352620 at *2.
181. *See ISEEO VI*, 152 P.3d 566, 143 Idaho 695.
182. *Id.* at 568–69, 143 Idaho at 697–98.

> [I]t is important to point out what has not been raised by the State as an issue in this case and, therefore, what issues this Court is not deciding in this opinion. The State has raised no challenge regarding the district judge's ability to appoint a special master and allocate costs, nor is the State challenging the district judge's determination . . . that exceptional circumstances existed . . . which she believed justified the appointment of a special master. Neither has the state raised a challenge regarding the level of detailed direction the special master received. The only issue the State has raised . . . is a narrow one: whether or not the judge properly ordered the State to pay the special master's costs during the pendency of the litigation.[183]

The Court affirmed the district court's decision on that narrow issue.[184] Specifically, the Court held that the district court had the statutory authority to order the State defendants to pay the costs for the special master either before or after entry of judgment, the costs could be paid out of the State general fund, and the district court did not abuse its discretion in making its order.[185] In so holding, the Court, downplaying the gravity of the State being ordered by the judiciary to pay for significant aspects of the remedial phase of the case,

> recognize[d] that the district judge, in assessing costs against the State, presented three possible sources from which funds to pay the special master could be drawn. Under I.C. § 12–118,[186] the judge need only have entered an order of costs against the State. . . . Idaho Code § 12–118 is sufficient in its provision that the state controller shall draw upon the general fund to pay costs against the State. How the State proceeds with appropriation from particular accounts is the business of the State and not of this Court.[187]

Justice Jim Jones specially concurred, primarily for the reasons stated in his concurrence in *ISEEO V*.[188] Justice Pro Tem Kidwell dissented, pointing to the lack of legislative appropriation and separation of powers issues:

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183. *Id*. at 571, 143 Idaho at 700. The State's decision not to appeal Judge Bail's appointment of the special master (as opposed to her decision requiring the State to pay his costs while the case was pending) was not surprising. Numerous courts have either appointed or approved the appointment of special masters to resolve factual issues in K-12 school funding litigation – particularly when the court believes the legislature has not taken sufficient measures to provide additional funding for schools. Abbott by Abbott v. Burke, 693 A.2d 417, 444–46 (N. J. 1997) ("*Abbott IV*"); Lake View School Dist. No. 25 v. Huckabee, 144 S.W.3d 741, 742 (Ark. 2004) (appointment) and 210 S.W.3d 28, 30 (Ark. 2005) (reappointment); Durant v. State Board of Educ., 381 N.W.2d 662, 675 (Mich. 1985). Other courts, however, have declined requests to appointment special masters in school funding cases. DeRolph v. State, 728 N.E.2d 993, 1022 (Ohio 2000); Claremont School Dist. v. Governor, 744 A.2d 1107, 1108-09 (Ohio 1999).

184. *ISEEO VI*, 152 P.3d at 572, 143 Idaho at 701.

185. *Id*. at 571–73, 143 Idaho at 695.

186. Idaho Code § 12-118 (2020) provides that "[w]hen the state is a party and costs are awarded against it, they must be paid out of the state treasury, and the state controller shall draw his warrant therefor on the general fund."

187. *ISEEO VI*, 152 P.3d at 573, 143 Idaho at 702.

188. *Id.* at 573–74, 143 Idaho at 702–03; *see supra* note 170.

> Here the issue is the separation of powers clash presented when two branches of government see the issue through a different prism. Until the legislative branch of government that controls the purse strings gives its approval, no state funds exist to pay the special master.
>
> . . . .
>
> Further, this Court acknowledged that there would not be a remedial phase of the trial and that the responsibility to remedy an unconstitutional system is the duty of the legislative branch. The special master proceeding, as all seem to agree, is a part of the remedial phase.
>
> Thus, given the facts before this Court and the Writ of Prohibition that has been requested, the relief should be granted and the special master should have to await action of the Legislature for his payment.[189]

On February 20, 2007, i.e. less than a month after the Court's decision in *ISEEO VI* concerning the issues relating to the special master, the Court issued an Amended Remittitur in *ISEEO V.*[190] In the Amended Remittitur, the Court made absolutely clear that, after nearly seventeen years of litigation and six appeals to the state high court, the *ISEEO* case was indeed over at both the district court and supreme court levels.[191] In that document, the Court stated that the "Court having announced its Opinion in this cause December 21, 2005, which has now become final . . . IT IS HEREBY ORDERED that this appeal is CLOSED and consistent with the Remittitur issued February 20, 2007, in *State of Idaho v. District Court of the Fourth Judicial District,* Docket No. 29203, the District Court shall have no further jurisdiction in this matter."[192] On June 6, 2007, in response to plaintiffs' motion for clarification, the Court filed an "Order Denying Motion for Clarification of Amended Remittitur."[193]

8. *Kress v. Copple-Trout* – A Federal Court "Hail Mary"

The *ISEEO* plaintiffs, having been denied a remedy in state court, turned to federal court. On June 13, 2007, one week after the Court's denial of their motion for clarification, plaintiffs filed a Complaint in Idaho federal district court against the individual Justices of the Idaho Supreme Court who had ruled against them after the Court's decision in *ISEEO V*.[194] In their Complaint, Plaintiffs sought an order

189. *Id.* at 574–75, 143 Idaho at 703–04.

190. Kress v. Copple-Trout, No. CV-07-261-S-BLW, 2008 WL 352620, at *2 (D. Idaho Feb. 7, 2008).

191. *Id*.

192. *Id*.

193. *Id.* For a discussion concerning the various approaches taken by state Supreme Courts and scholars on the issue of adjudicating and granting remedies for proven violations of state constitutional education clause provisions, including categorization of the Idaho Supreme Court's decision to not grant a remedy to plaintiffs in the *ISEEO* matter, *see infra* notes 242–249 and accompanying text.

194. *Id.*; Plaintiff Kress and the other plaintiffs in the federal court action were plaintiffs in the *ISEEO* matter.

requiring the Court to direct or allow the state district court to conduct a remedial phase of the trial.[195] Alternatively, Plaintiffs sought a declaratory judgment that the Court had violated Plaintiffs' due process rights.[196] The case was assigned to Idaho district court judge B. Lynn Winmill.[197] The Justices then moved to dismiss the Complaint and, in turn, the plaintiffs sought summary judgment on their due process claim.[198]

The Justices sought dismissal under the *Rooker-Feldman* doctrine.[199] According to Judge Winmill, the *Rooker–Feldman* doctrine precludes "lower federal courts . . . from exercising appellate jurisdiction over final state-court judgments, because jurisdiction over such appeals is vested exclusively with the United States Supreme Court."[200] Thus, under *Rooker–Feldman,* "'[i]f the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for relief, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.'"[201] Judge Winmill noted, however, that *Rooker-Feldman* "is 'a narrow doctrine, confined to cases . . . brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'"[202]

Judge Winmill first distinguished the case before him from the typical *Rooker-Feldman* circumstances:

> This case does not fit that narrow definition. Plaintiffs do not complain about a state-court judgment. In fact, Plaintiffs are not the state-court losers; Plaintiffs prevailed on both the lower court level and on appeal

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195. *Id*.

196. *Kress*, 2008 WL 352620, at *2. Because challenging a state's system for funding K-12 public education under a state constitutional provision does not raise a federal question, plaintiffs seldom have reason or are able to seek redress related to such state constitutional challenges in federal court. *See, e.g.*, Bd. of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982) (state's public school finance system does not violate equal protection clause of state or federal constitution or the education article of state constitution), *appeal dismissed*, Bd. of Educ. v. Nyquist, 459 U.S. 1138 (1983) (dismissed for want of substantial federal question). Certainly, follow-on federal court litigation seeking to vindicate student federal antidiscrimination or disability rights after state courts have ruled in plaintiffs' favor on their state constitutional claims has occasionally occurred. *See, e.g.*, Friends of the Lakeview School Dist. Inc., No. 25 of Phillips Cnty v. Huckabee, No. 2:04CV00184GH, 2005 WL 2076478 (E.D. Ark. Aug. 25, 2005) (racial discrimination claims); Thompson v. Ohio, No. C2-91-464, 2000 WL 1456995 (S.D. Ohio Sept. 13, 2000) (disability rights claims). That said, however, the *ISEEO* plaintiffs' pursuit of their state constitutional remedial rights in federal court was both laudable and unusual to say the least. *See* Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 734 (2012) [hereinafter *Education Duty*] ("Although [*Kress v. Copple-Trout*] . . . was ultimately dismissed on *Rooker-Feldman* Doctrine grounds, it stands as a powerful rejoinder to those who would dismiss the interests of plaintiffs who are told that they have rights and that these rights have been violated, but who receive no specific relief.").

197. *Kress*, 2008 WL 352620, at *1.

198. *Id.*

199. *Id.* at *2.

200. *Id.* (citing Lance v. Dennis*,* 546 U.S. 459, 464 (2006)) (citing Rooker v. Fidelity Trust Co*.,* 263 U.S. 413 (1923) and D.C. Court of Appeals v. Feldman*,* 460 U.S. 462 (1983)).

201. *Kress*, 2008 WL 352620 at *2 (quoting Bianchi v. Rylaarsdam, 334 F.3d 895. 898 (9th Cir. 2003) (citing D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983)).

202. *Kress*, 2008 WL 352620 at *2 (quoting *Lance*, 546 U.S. at 464).

> to the Idaho Supreme Court with respect to their claim that the current school funding system in Idaho is insufficient to carry out the legislature's duty under the Idaho Constitution. Instead, Plaintiffs take issue with the apparent lack of a remedy and final judgment. As outlined above, the Idaho Supreme Court affirmed the lower court's declaratory judgment, and retained jurisdiction over the matter, clearly indicating that the state district court would have no further jurisdiction to fashion a remedy.[203]

Judge Winmill then pointed out the ambiguity in the Court's treatment of the remedial phase of the case:

> However, what the Idaho Supreme Court did from that point is more difficult to unravel. On the one hand, the Idaho Supreme Court indicated that it was retaining jurisdiction "to consider future legislative efforts to comply with the constitutional mandate" so that the court could "exercise [its] constitutional role in interpreting the constitution and assuring that its provisions are met." . . . This seemed to suggest that the Idaho Supreme Court would oversee the legislature's compliance with its decision. On the other hand, when Plaintiffs attempted to reopen the case to establish that the Idaho legislature did nothing during its 2006 session to cure the constitutional deficiency in the funding of public schools, Plaintiffs were met with an informal announcement from the Clerk of the Court that the case was over. Plaintiffs later received an order from the Idaho Supreme Court informing them that the appeal was closed. . . . No other explanation was provided.[204]

The Judge next described the untenable position in which the Court had left plaintiffs after seventeen years of litigation:

> Thus, Plaintiffs are seemingly stuck in limbo. They have succeeded on the merits before both the state district court and the Idaho Supreme Court. However, they have been neither granted nor expressly denied a remedy by the Idaho Supreme Court. It is unclear whether they have any further remedies before the Idaho Supreme Court. It is equally unclear whether they have a final decision that they could appeal to the United States Supreme Court.[205]

Again pointing out plaintiffs' Court-induced conundrum and again distinguishing *Rooker-Feldman*, Judge Winmill concluded as follows:

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203. *Kress*, 2008 WL 352620 at *3.
204. *Id*.
205. *Id*.

> Because the Idaho Supreme Court has retained jurisdiction, Plaintiffs cannot seek a remedy through the state district court, and they have nothing to appeal to the United States Supreme Court. Likewise, Plaintiffs cannot seek further relief from the Idaho Supreme Court because the appeal has been closed. Assuming, without deciding, that Plaintiffs' quandary entitles them to assert a Fourteenth Amendment due process claim, it is clear that such a claim (1) is not one asserted by a state-court loser complaining of injuries caused by a state-court judgment, and (2) does not invite the exercise of appellate jurisdiction over a final state-court judgment. Therefore, the *Rooker–Feldman* doctrine does not bar Plaintiffs' action. Accordingly, the Court will deny Defendants' Motion to Dismiss.[206]

Judge Winmill turned next to plaintiffs' motion for summary judgment on their due process claim.[207] After recounting the Court's treatment of the remedial phase of the case,[208] Judge Winmill pondered several questions concerning the Court's compliance with its constitutional responsibilities:

> [T]he current posture of the case is uncertain. It is unclear how, or whether, the Idaho Supreme Court intends to proceed in " . . . exercis[ing][its] constitutional role in interpreting the constitution and assuring that its provisions are met." . . . The evidence before the Court leaves this Court asking a series of questions: (1) has the Idaho Supreme Court expressly refused to provide Plaintiffs with a remedy by closing the appeal, but retaining jurisdiction; (2) has the Idaho Supreme Court effectively refused to provide Plaintiffs with a remedy by refusing to set any reasonable time-lines for a remedy phase of the case; and (3) does the Idaho Supreme Court intend to take other steps to ensure that the state legislature complies with the Idaho Constitution. The scenario suggested by the first question would appear to create a due process violation. . . . The scenarios suggested by the second and third questions may or may not constitute a due process violation depending on the steps contemplated and taken by the Idaho Supreme Court.[209]

206. *Id.*

207. *Id.* at **4–5.

208. *Id.* at *4; *see supra* notes 163–169 and accompanying text.

209. *Kress*, 2008 WL 352620 at *5. In *Marbury v. Madison*, Chief Justice John Marshall, quoting Blackstone, stated that "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" 5 U.S. 137, 163 (1803) (quoting 3 Blackstone Commentaries at 23). Following on Marshall's pronouncement, courts and commentators have recognized that fundamental principles of due process require that aggrieved plaintiffs have access to meaningful judicial remedies for constitutional violations. *See, e.g.*, Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 101–02 (1993); Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982); Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004); Richard H. Fallon, Jr., *Some Confusion About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUMBIA L. REV. 309, 338 (1993).

Given the posture of the case, Judge Winmill denied plaintiffs' motion for summary judgment.[210] The Judge concluded by sending a message to the Court, "not[ing] that an expedited order by the Idaho Supreme Court clarifying the posture of the state-court action may be all that is needed to facilitate a quick and inexpensive resolution of this case."[211]

The Court and its individual justices, rather than providing the clarification suggested by Judge Winmill, moved to reconsider his ruling on their motion to dismiss.[212] Specifically, the defendants argued that, no matter how plaintiffs attempted to characterize their claims, plaintiffs were seeking mandamus relief, which was not available under the circumstances of the case.[213]

Judge Winmill agreed and reversed his prior decision.[214] The Judge first noted that principles of judicial immunity do not bar a federal court from ordering injunctive or declaratory relief against state judicial officers acting in their judicial capacity.[215] However, he pointed out that "'federal courts are without power to issue writs of mandamus to direct state courts or their judicial officers in the performance of their duties'"[216] and cited a number of cases which had held that "a request for injunctive or declaratory relief, which asks a federal court to order a state officer or agency to perform certain duties, is not a request for injunctive or declaratory relief—it is a request for a writ of mandamus."[217]

Applying these principles of federalism, Judge Winmill concluded that he had erred initially and had no choice but to grant defendants' motions to reconsider and to dismiss:

> Plaintiffs are attempting to re-define a request for mandamus relief as one for declaratory relief. As discussed above, the Court cannot do this. Plaintiffs' claim has all the indicia of a request for mandamus relief, and this Court cannot construe it as anything but a request for mandamus relief. As the saying goes, if it looks like a duck, swims like a duck and quacks like a duck, then it's a duck. Accordingly, because "federal courts are without power to issue writs of mandamus to direct state courts or their judicial officers in the performance of their duties," this Court is

210. *Id.*

211. *Id*.

212. Kress v. Copple-Trout, No. CV-07-261-S-BLW 2008 WL 2095602 (D. Idaho May 16, 2008).

213. *Id.* at *1.

214. *Id.* at *2.

215. *Id.* (quoting Pulliam v. Allen, 466 U.S. 522, 541–42 (1984)).

216. *Kress,* 2008 WL 2095602 at *2 (quoting Clark v. Washington, 366 F.2d 678, 681 (9th Cir. 1966)).

217. *Kress*, 2008 WL 2095602 at *2 (citing Oliver v. Sup. Ct. of Plymouth Cty.*,* 799 F. Supp. 1273, 1274 (D.Mass.1992) (plaintiff's ostensible request for injunctive relief against the Superior Court, asking the court to perform various administrative functions, is a request for a writ of mandamus); Nat'l Wildlife Fed'n v. United States, 626 F.2d 917, 918 (D.C. Cir. 1980) (an action purportedly requesting a mandatory injunction against a federal official is analyzed as a request for mandamus relief, despite appellant's suggestion otherwise); Johnson v. Bigelow, 2007 WL 1170756, *1 (5th Cir. 2007) (Court acknowledged that judicial immunity does not bar claims for injunctive or declaratory relief in civil rights actions, but federal courts have no authority to direct state courts or their judicial officers in the performance of their duties)).

> without jurisdiction to consider Plaintiffs' claim. . . . Thus, the Court will, after careful reconsideration of its prior decision, grant Defendants' Motion to Dismiss.[218]

9. *Joki v. State of Idaho* – A Second "Hail Mary" in State Court

The plaintiffs did not appeal Judge Winmill's decision and judgment in *Kress*.[219] Their attorney, however, did re-assert the ISEEO plaintiffs' state constitutional thoroughness claim several years later in *Joki v. State of Idaho*.[220] In *Joki*, a student's guardian and several other plaintiffs filed a complaint against the State of Idaho, the state legislature, the State Board of Education, the Superintendent of Public Instruction, every Idaho school district and one charter school seeking reimbursement of certain fees imposed by school districts, and, via an amended complaint, a declaratory judgment that the system of funding K-12 public education was unconstitutional.[221] The district court dismissed both claims against the State defendants on the grounds that (1) plaintiffs' claims – including their second claim, which sought, in effect, to enforce the Court's determination in *ISEEO V* that the Legislature's system of funding schools was unconstitutional – were governed by the procedural requirements of the Constitutionally Based Educational Claims Act ("CBECA")[222] and (2) by suing the State defendants without first pursuing claims and exhausting remedies against school districts, the plaintiffs had failed to comply with the CBECA.[223]

On appeal, the Court affirmed the district court's decision.[224] The Court reiterated that, although it had held HB 403's amendment to CBECA unconstitutional in *ISEEO IV*, it had not ruled on the constitutionality of CBECA as a whole in that case[225] and, indeed, had subsequently upheld CBECA's constitutionality in *Osmunson v. State*.[226] The Court then agreed with the district court's dismissal of the claims against the State defendants, opining regarding the CBECA's procedural requirements and the plaintiffs' failure to comply with them as follows:

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218. *Kress,* 2008 WL 2095602 at *2 (quoting *Clark*, 366 F.2d at 681).

219. During oral argument on the individual justices' motion for reconsideration, Judge Winmill variously opined that the case was "a head-scratcher," "I think if you were to run this by 100 law professors . . . 95 would say there's no way in the world you can enjoin a state court, [b]ut five would say you can, and they may be right," and "I think you'll be on your way to the 9th Circuit in short order, after I take a stab at it." Betsy Z. Russell, *Judge Hears School Funding Suit*, SPOKESMAN-REVIEW (May 2, 2008), https://www.spokesman.com/stories/2008/may/02/judge-hears-school-funding-suit/?clearUserState=true. It is unclear why the *Kress* plaintiffs never appealed Judge Winmill's decision. Although plaintiffs and their counsel certainly know best, the decision to forego appellate review of the decision was likely based on a combination of the long odds for success and the cost of pursuing the matter with the Ninth Circuit.

220. 394 P.3d 48, 162 Idaho 5 (2017).

221. *Id.* at 49, 162 Idaho at 6.

222. *See supra* notes 96–98, 118 and 123 and accompanying text.

223. *Joki*, *394* P.3d at 50–51, 162 Idaho at 7–8.

224. *Id.* at 54, 162 Idaho at 11.

225. *Id.* at 53, 162 Idaho at 10 (citing *ISEEO V*, 97 P.3d at 464, 140 Idaho at 597); *see supra* note 103.

226. 394 P.3d at 52, 162 Idaho at 9 (citing *Osmunson v. State*, 17 P.3d 236, 240, 242, 135 Idaho 292, 296 and 298 (2000)).

> [A] patron . . . may bring a suit against the state "on the ground that the state has not established and maintained a general, uniform and thorough system of public, free common schools." . . . Crucially, though, [this] . . . type of standing requires that the patron first sue the local school district and obtain authorization from a district court to add a state defendant. . . . "Any patron suit against the state . . . not authorized by the district court pursuant to this section shall be dismissed."
>
> . . . .
>
> Because Joki did not obtain authorization from the district court to add the State Defendants, the district court's dismissal of the State Defendants was not in error.[227]

After nearly twenty years of litigation in state and federal court over a period of twenty-seven years, and after the ISEEO plaintiffs had obtained a ruling from the Idaho Supreme Court that the Legislature had failed to comply with its constitutional duty to provide a thorough system of K-12 public education, but had received no judicial determination on whether any remedial action taken by the Legislature was constitutionally sufficient, the case unceremoniously came to an end.

B. Analysis

Because the Idaho Supreme Court did not conduct a hearing or issue an Opinion setting forth its reasons for dismissing the *ISEEO* case, there has never been any public pronouncement by the Court explaining or justifying its decision. Thus, unless the members of the Court or their judicial papers reveal their thinking on the issue in the future,[228] the many individuals and institutions interested in understanding the Court's reasoning – Idaho citizens and residents, the parties to the litigation, including the schoolchildren of Idaho, their parents and guardians, school administrators, school districts and the Legislature, lower Idaho courts, the practicing bar, and academics, as well as their peers in other states – have very little to go on in answering the following two, related questions:

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227. 394 P.3d at 52, 54, 162 Idaho at 9-10, 14 (quoting IDAHO CODE § 6-2205).

228. Idaho Code of Judicial Conduct, Rule 2.10, Comment [3], provides as follows:

> A judge may comment on legal terms, statutory language, procedural rules and legal concepts if any allegation is made concerning the judge's official conduct. The judge would be well advised to issue any such comments through the Administrative Office of the Courts. *Judges are cautioned, however, there should never be comments on the results of a case consistent with Rule 2.10(A*) (emphasis added)

One well known former Solicitor General, Circuit Court Judge, and law school dean has commented that "justices and judges speak only through formal, written opinions, not by appearances at the National Press Club or out on the hustings." Kenneth W. Starr, *The Supreme Court, the Constitution and the Rule of Law*, 73 JUDICATURE 159, 161 (1989).

> 1) First, and preliminarily, although the subject of some explanation in the Court's *ISEEO V* decision, why did the Court choose to retain jurisdiction concerning the remedial phase of the case after affirming Judge Bail's decision holding that the Idaho Legislature had failed to meet its obligation to provide a thorough system of K-12 public education under the Idaho Constitution? and
> 2) Second, and far more important and perplexing, why did the Court, after affirming Judge Bail's liability determination in its *ISEEO V* decision, dismiss the case without hearing, deciding or otherwise adjudicating the remedial phase of the case?[229]

Given the Court's failure to provide any reasons (at least as to the second question), at this juncture, those interested in finding definitive answers to these questions ultimately must be satisfied with uncertain explanations, albeit explanations informed by the seven *ISEEO* or *ISEEO*-related Idaho Supreme Court Opinions and Judge Winmill's two decisions in the *Kress* federal court case. Based on those decisions, this Article will take up each question in turn.

1. The Court's Decision to Retain Jurisdiction over the *ISEEO* Matter

As discussed previously, courts in school funding cases have ample discretion, after affirming that the state legislature has not met its state constitutional obligation to adequately fund K-12 public schools, to either return decision making concerning the remedial phase of the case to the trial court or retain jurisdiction itself.[230] Indeed, both inside and outside the school funding context, i.e. in civil litigation generally, when an appellate court enunciates a legal standard or affirms a trial court's application of that standard, the appellate court invariably remands remaining and/or previously unresolved issues in the case, including remedial questions, to the trial court.[231]

The school funding case law suggests two diametrically opposite reasons why an appellate court would decide to retain jurisdiction over the remedial phase of the case when the legislature has not complied with a determination by the appellate court that it (the legislature) has a justiciable obligation under the state constitution to adequately or equitably fund K-12 public schools and either the trial court or the appellate court (or both) has determined that the legislature has not met its remedial duties. In most of the cases, the state appellate court has retained jurisdiction under those circumstances because it perceives the legislature as malingering or stalling by failing to provide constitutionally sufficient funding to

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229. The questions are related, because they demarcate the critical decision points in the *ISEEO* litigation where the Court first signaled and then made abundantly clear that the Idaho judiciary would not take an active—and, ultimately, any—role in the remedial phase of the case.

230. *See supra* note 169.

231. *See id.*; *see also* ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE – FEDERAL AND STATE CIVIL APPEALS, JUDGMENT AND MANDATE IN TRIAL COURT, § 17.2 at p.262 (1983) ("When the mandate and record are returned to the trial court, . . . [t]he trial court . . . may conduct further proceedings not inconsistent with the mandate, including deciding any issues left open by the mandate.") and CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND EDWARD H. COOPER, 18B FEDERAL PRACTICE AND PROCEDURE, MANDATE RULE, § 4478.3 at p.713 (3rd ed. 2019) ("When further trial-court proceedings are appropriate after remand, the appellate mandate commonly leaves the trial court free to decide matters that were not resolved on appeal.").

public schools and, in effect, has decided to "up the ante" in the remedial phase of the case.[232] As the Washington Supreme Court eloquently put it in retaining jurisdiction in that state's second protracted school funding case:

> What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education. Article IX, section 1 is a mandate, not to a single branch of government, but to the entire state. . . . We will not abdicate our judicial role.[233]

In some cases, however, the appellate court has retained jurisdiction and not remanded the matter to the trial court when, although not concluding that the legislature had completely complied with its state constitutional duty to sufficiently fund K-12 public schools, the appellate court has largely been satisfied with the efforts of the legislature and also viewed the trial court and/its relationship with the legislature as problematic.[234] Thus, In Kansas's similarly protracted school funding litigation, the Kansas Supreme Court retained jurisdiction after noting that

> A review of sixteen other state Supreme Court decisions that have declared their systems for funding public education unconstitutional reveals that a majority of those decisions remanded the case to a trial court. However, it is those states that have had the most difficulty producing a final plan that met the Supreme Court's opinion of constitutionality. . . . In each of these states, either the final public school funding plan is not yet approved by the Supreme Court of the state after several years of litigation after remand or the plan has been approved only after several years of litigation.[235]

Indeed, under these latter circumstances, the Kansas Supreme Court retained jurisdiction and directed the trial court to dismiss the long running school funding litigation in the Sunflower (or Jayhawk) State.[236]

In *ISEEO V*, the Idaho Supreme Court appeared to retain jurisdiction and not remand the case to Judge Bail at the trial court for the more legislatively deferential reasons expressed by the Kansas Supreme Court in *Montoy* and by Chief Judge Moyer, concurring and dissenting in Ohio's school funding ligation in *DeRolph* and not for the more legislatively critical reasons expressed by the State Supreme Courts in *McCleary* and a later opinion in *DeRolph*. Thus, the Idaho high court

232. See *supra* note 169.

233. McCleary v. State, 269 P.3d 227, 259 (Wash. 2012) (en banc); *see also* DeRolph v. State, 728 N.E.2d 993, 1018–19 (Ohio 2000).

234. *See*, *e.g.*, Montoy v. State, 138 P.3d 755 (Kan. 2006).

235. *Montoy*, 138 P.3d at 765–66 (quoting DeRolph v. State, 78 Ohio St. 3d 419, 421–22, 678 N.E.2d 886, 888 (Ohio 1997) (Moyer, C.J., concurring in part and dissenting in part) (disagreeing with the majority's decision to remand the case to the district court pending legislative compliance so the trial court could hear evidence concerning the remedy after it is enacted and determine any new legislation's constitutionality)).

236. *Montoy*, 138 P.2d at 765–66.

"commended" the Legislature concerning the efforts it had made to address the Court's decision in *ISEEO III* and, more specifically, to address Judge Bail's decision after trial.[237] To be sure, the Court affirmed Judge Bail's liability determination when it found and concluded that the Legislature had not met its thoroughness obligation under the Idaho Constitution[238] and reiterated its holding in *ISEEO I*, stating that "[w]e are mindful of our duty to determine whether the current funding system passes constitutional muster."[239] Also, unlike its brethren on the Kansas Supreme Court, the Idaho high court did not capture the case to kill it, at least immediately, i.e. the Court did not retain jurisdiction and then order immediate dismissal of the case. The Court, however, did make clear in *ISEEO V* that "[t]he appropriate remedy . . . must be fashioned by the Legislature and not this Court," and "[i]t is not our intent to substitute our judgment on how to establish criteria for safe buildings or create a proper funding system for that of the Legislature."[240] And, in the next *ISEEO* case that came before it, the Court all but directly stated that Judge Bail had overstepped the bounds of her remedial jurisdiction while the case had remained with her. Thus, in evaluating Judge Bail's actions after she determined that the Legislature had not met its constitutional responsibilities and before the Court took remedial jurisdiction away from her, the Court opined that Judge Bail had "concluded both that the Legislature had failed to take appropriate action and that she had been tasked with finding a remedy to the problem based on the Supreme Court's decision in *ISEEO III*."[241]

In sum, the available evidence suggests that, rather than retaining jurisdiction in *ISEEO V t*o monitor what it believed was a recalcitrant Idaho legislature and push that legislative body (and the Governor's office) toward a constitutionally sufficient level of funding, the Court more likely retained jurisdiction to cabin in Judge Bail who the Court viewed as becoming increasingly and inappropriately proactive (and not sufficiently deferential to a co-equal branch of government) regarding the remedial phase of the case.

2. The Court's Decision to Dismiss the *ISEEO* Case without Granting a Remedy or Determining whether, Post-*ISEEO V*, the Legislature had Sufficiently Funded K-12 Schools to Meet its Thoroughness Obligation Under the Idaho Constitution

a. The Lay of the State Constitutional Education Clause Land Concerning Enforcement and Remediation – Judicial Decisions and Scholarship

To understand the dynamics at play concerning the Idaho Supreme Court's decision to dismiss the *ISEEO* litigation without granting a remedy and without affording the plaintiffs a hearing after previously affirming Judge Bail's liability determination, it is helpful to place the Court's decision in the context of decision

237. *See supra* note 157 and accompanying text.
238. *See supra* note 162 and accompanying text.
239. *See supra* note 40 and accompanying text.
240. *See supra* note 165 and accompanying text.
241. *See supra* note 162 and accompanying text. The Court further pointed out that, "[t]o remedy the problem, the district judge decided it was necessary for her to evaluate the present condition of Idaho's school districts and to find a cost-effective method for addressing their deficiencies" and, to assist her in doing so, to appoint a special master. *Id*.

making by other state Supreme Courts concerning similar state constitutional adequacy challenges. Professor Scott Bauries cogently has addressed this judicial dilemma, framing the issue as follows:

> Given both the indeterminacy in constitutional language and the understandable tendency to reach for lofty and aspirational standards, approaching the education clause substantively gives rise to a significant concern—whether a state court may, consistent with the separation of powers, mandamus or otherwise enjoin a legislature to raise or allocate additional revenue for the state's education system where the court sees current funding levels as not "thorough," "efficient," "suitable," "adequate," or "high quality."[242]

Professor Bauries then summarized the several approaches taken by state high courts on the adjudication and remediation issue, stating as follows:

> Facing this concern, courts have taken one of three paths. About a third of courts have dismissed cases asking for such enforcement on grounds of non-justiciability, concluding that, because affirmative duty provisions are directed at state legislatures and because their terms are so subjective, these legislatures are vested with complete and unreviewable discretion. Another third or so have engaged the merits of the claims and chosen either a deferential form of review--such as the federal "rational basis" test, upholding the legislation against the challenge--or a non-deferential form of review, construing the education clause as an absolute command to create an "adequate" system of schools (or some variant of the term). These courts ultimately hold against the state and use that holding as a justification for a public law injunction to legislate the system into constitutionally valid status. A final third have engaged in review of the merits of such cases, applied a non-deferential form of review, and found the state constitution violated, only to step back at that stage and deny the plaintiffs any sort of directive remedial order against the legislature.[243]

Roughly tracking the several paths taken by courts in state education clause cases, scholars have advocated for varying degrees of judicial enforcement and

242. *Education Duty*, *supra* note 196, at 730.

243. *Education Duty*, *supra* note 196, at 730–31; Bauries has written several other articles concerning judicial enforcement of state constitutional education clauses and remediation (or lack thereof of) of legislative violations of those same provisions. *See* Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation,* 18 GEO. MASON L. REV. 301, 340–49 (2011) [hereinafter *Conceptual Convergence*]; Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 721–34 (2010) [hereinafter *Judicial Review of Educational Adequacy*].

remediation in those matters.[244] Thus, regarding cases like *ISEEO*, where the Idaho Supreme Court adjudicated the merits of plaintiffs' thoroughness claim and found in plaintiffs' favor but did not issue a remedial order against the legislature, some scholars have endorsed this middle ground approach as striking an appropriate balance between judicial or remedial abstention and activism, characterizing the approach as proper "dialogic" judicial decision making.[245] In contrast, regarding cases falling on the judicial abstention end of the spectrum, i.e. cases where state Supreme Courts have found state education clauses to either place no limits on the legislature's sovereign prerogative or have dismissed such claims as non-justiciable, other scholars have viewed education clauses as merely "aspirational" and, therefore, not properly enforceable by the judiciary.[246] And, regarding cases on the judicial activism end of the spectrum, i.e. cases where state Supreme Courts have adjudicated education clause claims on the merits and, after holding against the legislature, issued remedial orders, scholars have agreed that courts can and should either enjoin state officials from continuing to utilize unconstitutional funding systems,[247] or impose more forceful, policy-specific decrees against state legislatures.[248]

The Idaho Supreme Court, in its handling and ultimate disposition of the *ISEEO* litigation, clearly falls within the "final third" of the courts identified by Bauries. [249] But why did the Court affirm Judge Bail's determination that the Idaho Legislature had not met its state constitutional obligation to thoroughly fund Idaho K-12 public schools, but then dismiss the case without granting a remedy? And was that disposition proper? As alluded to previously, given the lack of any Opinion by the Court accompanying its dismissal order, a definitive answer to the first question is not knowable at this juncture, although something approaching an explanation can be gleaned from the Court's numerous *ISEEO* Opinions and the circumstances and choices facing the Court when it dismissed the case. An answer to the second question, however, can be informed by the normative considerations identified in the state constitutional school funding cases and scholarship discussed immediately

244. S*ee* Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 270–80 (2017) (summarizing scholarship) (citing Bauries, *Judicial Review of Educational Adequacy*, *supra* note 243, at 721–35).

245. Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 76–84, 93–104 (2000) (cited in Weishart, *supra* note 244, at 273).

246. R. Craig Wood, *Justiciability, Adequacy, Advocacy, and the "American Dream,"* 92 KY. L. J. 739, 776–78 (2010) (cited in William E. Thro, *Originalism and School Finance Litigation*, 335 ED. LAW REP. 538, 549 (2016)).

247. Bauries, *Education Duty*, *supra* note 196, at 763–64.

248. James E. Ryan, *Standards, Testing, and School Finance*, 86 TEX. L. REV. 1223, 1225–26, 1256 (2008) [hereinafter *Standards*], and James E. Ryan, *A Constitutional Right to Preschool*, 94 CAL. L. REV. 49, 84–86 (2006) (both cited in Bauries, *Judicial Review of Educational Adequacy*, *supra* note 243, at 730–31).

249. Bauries, Conceptual Convergence, *supra* note 243 at 342–45 & n.240; see also Kayla Louis, Comment, State Constitutional Law – Minimally Adequate Education Standards in the South Carolina Constitution, 69 RUTGERS U. L. REV. 1457, 1469 & n.97 (2017). As discussed above, Bauries refers to judicial decisions following into this category as engaging in a "non-deferential form of review" of the constitutional liability issue. See *supra* note 243 and accompanying text. That characterization, however, does not mean that a court falling into this category avoids deferring to the legislative or executive branches in other significant ways. *See infra* notes 251–254, 257–261 and accompanying text.

above and, as such, is within this Article's grasp. The Article turns now to those questions.

b. Why the Idaho Supreme Court Dismissed the *ISEEO* Case without Discussing the Need for or Granting a Remedy

i. Predictive Signals regarding Executive and Legislative Branch Deference from the *ISEEO* Decisions Themselves

Before getting into the substance of this question, a review of the Court's Opinions during the protracted *ISEEO* litigation sheds substantial, predictive light on the Court's ultimate disposition of the case. To be sure, the Court's reasoning across the numerous Opinions in the case is less than a straight line toward its decision dismissing the *ISEEO* matter fourteen years later. As such, the Court's Opinions do not consistently reveal the nature of its resolve (or lack thereof) for taking on the Idaho Legislature concerning that body's obligation to satisfy state constitutional requirements. Ultimately, however, several of the Court's prior *ISEEO* decisions on substantive matters fairly predict its later decision to dismiss the case without addressing the remedial issue.

Starting with *ISEEO I*, the Court refused to reverse any aspect of its decision in *Thompson*, which had rejected a state law equal protection challenge to legislative disparities in funding amongst and between Idaho school districts.[250] The Court likewise refused to revisit its holding in *Thompson* that the uniformity clause of Art. IX, Section 1 of the Idaho Constitution, although requiring uniformity in curriculum, did not require uniformity in funding K-12 public schools throughout the State.[251] In addition, even as the *ISEEO I* Court laudably espoused principles of judicial supremacy and refused to abdicate decision making authority to the Idaho Legislature concerning responsibility for providing a thorough system of education under the Idaho Constitution when it rejected the Legislature's justiciability defense, the Court simultaneously deferred to its co-equal branches of government in two respects. First, the Court expressed confidence that the legislature and executive branches would fulfill their state constitutional duties "in a completely responsible manner"[252] (a reasonable expression of optimism at this relatively early point in the *ISEEO* litigation). Second, the Court agreed that "the requirements for school facilities, instructional programs and textbooks, and transportation systems"

250. *See supra* notes 30–38 and accompanying text. Although the Idaho high court had shown a willingness to interpret Idaho constitutional provisions differently than their similarly worded federal constitutional counterparts, *see, e.g.*, State v. Henderson, 756 P.2d 1057, 1063, 114 Idaho 293, 299 (1988) (recognizing more expansive individual rights under Idaho Constitution's search and seizure provisions than under the Fourth Amendment to the United States Constitution), the Court concluded that the United States Supreme Court's decision in *Rodriguez*, which held that wealth was not a suspect classification and education was not a fundamental right and which applied the legislatively deferential rational basis test under the federal equal protection clause, was a powerful analogous precedent concerning interpreting Idaho's equal protection clause in a similar K-12 school funding case. *See supra* notes 18–19, 34–35 and accompanying text.

251. *See supra* notes 32–37 and accompanying text.

252. *See supra* note 40 and accompanying text.

promulgated in regulations issued by the Idaho State Board of Education ("SBE") – an executive branch agency – under Idaho Code § 33-118 "are consistent with our view of thoroughness" under Art. IX, Section 1.[253] Indeed, the Court went on to state that if the school district and school administrator plaintiffs in *ISEEO* could prove they could not comply with the SBE's above-mentioned regulatory requirements with the funding made available to them by the Legislature, plaintiffs would have made a prima facie case for violation of Idaho's constitutional thoroughness requirement.[254]

Likewise, in *ISEEO III*, the Court, in further limiting and defining the contours of plaintiffs' state constitutional challenges, refused to revisit its prior uniformity provision decisions[255] and also rejected more expansive and equity-based definitions of thoroughness derived from education clause decisions from other states.[256] As it had in *ISEEO I*, the Court deferred to and, indeed, adopted executive and, this time, a portion of legislative branch definitions of thoroughness.[257] In this latter regard, the Court agreed that SBE regulations pertaining to school facilities and student safety and the Legislature's post-*ISEEO I*'s statutory enactment, i.e. Idaho Code § 33-1612, were "consistent with [its] . . . view of thoroughness," which the Court defined as a "safe environment conducive to learning."[258]

And, in *ISEEO IV*, the Court, although rejecting the State's renewed mootness challenge and affirming Judge Bail's decision that the State had violated the constitutional thoroughness provision,[259] once more "commended" the Legislature for its school funding efforts and "laudable efforts" concerning school safety issues and creating a safe environment for school children that was conducive to learning.[260] Thus, after fifteen years of litigation, i.e. at a time when the Court could (and should) have expressed significant concern about the State's constitutional violation and impatience with the Legislature's failure to remedy the continued funding shortfall on its own, the Court continued to compliment the Legislature for its efforts, made non-binding suggestions to the Legislature concerning funding policy matters, and retained jurisdiction over the case for reasons that, as discussed above, were not designed to light a fire under its legislative counterpart.[261]

Regarding the Idaho Supreme Court's deference to and adoption of SBE regulations and legislative enactments as constitutional benchmarks, executive and legislative branch standards undoubtedly may be a legitimate starting point for

253. *See supra* note 42 and accompanying text. The then-existing version of Section 33-118 spoke only to curricular matters – a uniformity concern under the Court's narrow view of that term – and did not purport to regulate school facilities, transportation, and the like.

254. *See supra* note 43 and accompanying text.

255. *See supra* notes 73–75 and accompanying text.

256. *See supra* notes 71–79 and accompanying text.

257. *See supra* notes 67–69 and accompanying text.

258. *See supra* note 69 and accompanying text. In defining thoroughness, Section 33-1612 enumerated eight specific "assumptions" governing a thorough system of public education requirements, only one of which pertained to providing a safe environment conducive to learning. The other seven statutory provisions, which addressed providing with students with certain curricula and educational programming, as well as training in the areas of values, discipline, skills, and technology were not included in the Court's constitutional definition of thoroughness. *Id.*

259. *See supra* notes 136, 156–162 and accompanying text.

260. *See supra* note 157 and accompanying text.

261. *See supra* notes 237–241 and accompanying text.

courts performing their judicial duty of defining thoroughness or other state constitutional education clause terms.[262] However, using standards developed by other branches of government, rather than assisting courts in properly performing their constitutional duties, may lead to significant undesirable and improper consequences. First, using those non-judicially developed standards may result in a narrow definition of education clause terms and, hence, adequacy standards.[263] Second, reliance on executive or legislative branch standards to define thoroughness or adequacy may cause states to lower, via statute or administrative regulation, constitutional requirements.[264] Third, using non-judicially developed standards to define thoroughness or other constitutionally required indicia of educational adequacy would lead to an improper delegation of judicial authority.[265] Fourth, related and most important, using executive branch standards to set thoroughness or adequacy requirements "would be to cede to a state agency the power to define a constitutional right."[266]

The Idaho Supreme Court's initial definitional decisions in *ISEEO I* and *ISEEO III* regarding the Art. IX, Section 1's uniformity and thoroughness requirements had an obvious, limiting impact on the scope of the *ISEEO* plaintiffs' claims and the contours of the Idaho Legislature's obligations under Idaho's state constitutional provisions. Thus, in *ISEEO V*, the Court, in reviewing the breadth of Judge Bail's trial court decision concerning thoroughness, believed that she had improperly expanded the inquiry by evaluating arguments and evidence relating to the adequacy of state standards concerning course work and programming.[267] Although perhaps less obvious, the Court's willingness in *ISEEO I*, *III* and *V* to limit the scope of plaintiffs' state constitutional claims, defer to the SBE's standards regarding thoroughness, and acquiesce in the Legislature's insufficient funding efforts, portended the Court's later decisions to defer and subsequently abdicate to the Idaho Legislature during the remedial phase of the case.

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262. *See* REBELL, *supra* note 162 at 62–64 (noting that "[a]t times, legislatively enacted state academic standards have strongly influenced, without fully determining, the content of the constitutional standards that were ultimately formulated by the state courts").

263. Ryan, *Standards*, *supra* note 248 at 1240.

264. *Id*. In *ISEEO I*, the Idaho Supreme Court guarded against this possible outcome by reserving judgment regarding whether the SBE rules would continue to set the constitutional thoroughness standard if they were ever amended. *See supra* note 42.

265. Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2249-50 (2003) ("The use of existing standards finds no support in state education clauses . . . . Instead, this approach suggests an easy way to measure adequacy without truly defining it or identifying appropriate remedies . . . . Adopting such a definition makes no sense without a constitutional delegation of definitional power to the legislative or executive branch. As the judiciary typically defines constitutional terms, one would expect a particularly clear delegation of power were this the case. No state constitution contains such a delegation.")

266. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 893, 907 (Ct. App. N.Y. 2003), cited in Anne D. Gordon, *California Constitutional Law: The Right to an Adequate Education*, 67 HASTINGS L. J. 323, 359–60 & n.233 (2016). As the trial court made clear in Campaign for Fiscal Equity v. State, 187 Misc. 2d 1, 719 N.Y.S.2d 475 (S. Ct. 2001), "this approach would essentially define the ambit of a constitutional right by whatever a state agency says it is. This approach fails to give due deference to the State Constitution and to courts' final authority to 'say what the law is.'" *Id*. at 12, 719 N.Y.S.2d at 484, quoting Marbury v. Madison, 5 U.S. 137, 177 (1803).

267. *See supra* note 142 and accompanying text.

ii. Eliminating Non-starters: Possible Reasons for the Supreme Court's Dismissal of the Case Without Conducting a Remedial Phase or Granting a Remedy that are not Supported by the Record

(1) The Court's Decision in *ISEEO V* Clearly Contemplated Remedial Proceedings in that Court or, at the Very Least, an Assessment by the Court Concerning Legislative Compliance with its Constitutional Duty

One possible explanation for the Court's decision to dismiss the case without conducting a remedial phase or granting a remedy involves the meaning and scope of the Court's Opinion in *ISEEO V* to retain jurisdiction. The Court's statement toward the end of that Opinion was quoted earlier and bears repeating here:

> [W]e leave the policy decisions to that separate branch of government, subject to our continuing responsibility to ensure Idaho's constitutional provisions are satisfied.
>
> … At this juncture, we will not remand the case to the district court, but will retain jurisdiction to consider future legislative efforts to comply with the constitutional mandate to provide a safe environment conducive to learning so that we may exercise our constitutional role in interpreting the constitution and assuring that its provisions are met.[268]

The above-quoted language clearly and unambiguously contemplated that the Court was retaining jurisdiction to "exercise [its] . . . constitutional role" by assessing the Legislature's compliance with the Court's decision in *ISEEO V*.[269] Moreover, that conclusion follows based on the Court having concluded in *ISEEO V* that the Legislature's efforts concerning K-12 school funding, while "commendable," had not been sufficient to satisfy its state constitutional obligation.[270] Stated another way, there was nothing about the Court's statement at the conclusion of *ISEEO V* that remotely suggested that the Court meant to retain jurisdiction so that it could capture and kill the case, i.e. dismiss the case without assessing the Legislature's subsequent efforts and compliance with its thoroughness obligation, as the Kansas Supreme Court had done in the *Montoy* matter. For these reasons, any suggestion that the Court's eventual dismissal of the *ISEEO* matter without addressing the remedial issue was proper cannot fairly be based on the language in *ISEEO V*, which clearly set forth the Court's continued constitutional role.[271]

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268. *See supra* notes 168–169 and accompanying text.

269. *Id*.

270. *See supra* notes 157 and 162 and accompanying text.

271. *See supra* notes 165 and 169 and accompanying text. After the Idaho Supreme Court Clerk informed the attorneys in the *ISEEO* matter that the case was over, Idaho Supreme Court Justice Linda Copple Trout, when questioned by a regional newspaper about the case being dismissed, stated that "I think the [*ISEEO V*] opinion said that while we keep retaining authority to review what the legislature does, as a policy matter, the decision about addressing these issues is up to the legislature. . . . We thought it was clear, but apparently it's not." Betsy Z. Russell, *High Court Washes Hands of School-Funding Suit*, SPOKESMAN-REVIEW (September 9, 2006), https://www.spokesman.com/stories/2006/sep/09/high-

(2) Nothing in the Available Evidence Suggests that the Court Dismissed the *ISEEO* Case because the Court believed that, post-*ISEEO V*, the Idaho Legislature had Sufficiently Funded K-12 Schools to meet its Constitutional Obligation

Another possible explanation for the Idaho Supreme Court's decision to dismiss the *ISEEO* case without addressing the remedies issue hinges on whether the Court believed that, after *ISEEO V*, the Idaho Legislature had satisfied its thoroughness obligation by sufficiently funding K-12 public schools.

Certainly, the Idaho Legislature took some steps after the Court's *ISEEO V* Opinion to increase funding for public schools.[272] Specifically, the Legislature focused on increasing funding for school facilities – the area of concern most directly implicated by the Court's narrow definition of thoroughness in *ISEEO III* – by passing the School Facilities Improvement Act ("SFIA") during the 2006 Legislative session.[273] In turn, the SFIA, by creating an emergency fund to address the most urgent school facilities needs and by funding school facilities from the State general fund, tracked two of the policies suggested by the Court in *ISEEO V* to the Legislature to address unsafe school facilities.[274]

Conversely, however, the *ISEEO* plaintiffs, in requesting that the Court relinquish jurisdiction back to Judge Bail, filed a report taking the position that the 2006 Idaho Legislature had fallen woefully short of financially complying with its state constitutional thoroughness obligation.[275] More important, the Court never received or evaluated evidence concerning the compliance issue, never conducted

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court-washes-hands-of-school-funding-suit/, quoted in Jessica L. Tonn, *Funding Advocates Accuse Idaho High Court of 'Cop-Out,'* EDUCATION WEEK (November 28, 2006), https://www.edweek.org/policy-politics/funding-advocates-accuse-idahos-high-court-of-cop-out/2006/11. The Court had been clear in *ISEEO V*, but not in the manner suggested by Justice Copple Trout. The Court in *ISEEO V*, rather than deciding the case would not have a remedial phase or the Court would not continue to scrutinize the Idaho Legislature's compliance with its obligation to adequately fund K-12 schools under the state constitutional thoroughness provision, made clear (as did Justice Copple Trout's in the first part of her quoted remark) that Idaho Supreme Court review of the Legislature's post-*ISEEO V* funding efforts was envisioned by the Court.

272. Jeffrey J. Grieve, Note and Comment, When Words Fail: How Idaho's Constitution Stymies Education Spending and What Can Be Done About It, 50 IDAHO L. REV. 99, 109–11 & nn.81, 83 (2014).

273. *Id.* at 109 & n.73.

274. *Id.* at 110 & n.81; *see supra* note 167 and accompanying text. During a Special Legislative session called by interim Governor Jim Risch in August 2006, the Idaho Legislature enacted the Property Tax Relief Act ("PTRA"). Grieve, *supra* note 272 at 112 & n.88. The PTRA eliminated the state property tax levy as a source of revenue supporting public schools and replaced that revenue source by raising the sales tax by 1%. *Id*. at 112. In addition to providing property tax relief, the shift in the source of school funding derailed a funding initiative backed by the state teachers' union, the Idaho Education Association, which likewise sought to increase the sales tax by 1% to increase funding for Idaho public schools. Kevin Richert, The 2006 Tax Shift Still Divides Idaho Leaders, IDAHO EDUCATION NEWS (August 25, 2016), https://www.idahoednews.org/news/ten-years-later-tax-shift-still-divides-idaho-leaders/. Overall, because of the PTRA's slightly less than 1:1 replacement ratio as between sale tax and property tax revenues and because of the decline in sales tax revenue during the 2008 Recission, the PTRA caused a net reduction in public school funding. *Id*.; *see also* Grieve, *supra* note 272 at 112 & n.89.

275. *See supra* notes 171–172 and accompanying text.

a hearing concerning the matter, and never stated any reasons for dismissing the case without addressing the remedial issues it left unanswered.[276]

For these reasons, there may possibly be some generalized disagreement regarding whether the Idaho Legislature, during the 2006 Legislative Session, complied with its constitutional thoroughness obligation, as defined by the Idaho Supreme Court in *ISEEO III* and as applied to the then-existing K-12 funding system in *ISEEO V*; however, it is clear that the Court never suggested that the Legislature had adequately and thoroughly funded public schools at any time after its Opinion in *ISEEO V* or at any time pertaining to its post-*ISEEO V* dismissal of the case.

iii. The Likely Reasons Why the Court Dismissed the *ISEEO* Matter Without Conducting the Remedial Phase of the Case or Granting a Remedy

As discussed above, the Idaho Supreme Court, although ruling against the State concerning liability issues in the *ISEEO* matter, deferred to the Legislature and SBE regarding thoroughness standards and continued to commend the Legislature concerning its efforts related to increasing K-12 public school funding long past the time any continued deference and commendations might have been properly due.[277] However, the Court paid ultimate judicial deference to the other two branches of state government by dismissing the *ISEEO* case without exploring the need for or without granting a remedy. Although never explained or justified by the Court, the Court's decision dismissing the case was likely based on a combination of buyer's remorse, battle fatigue, and the Court's lack of desire to provoke a constitutional confrontation with the Legislature. These intertwined reasons—related to school funding lawsuits generally and other Idaho and *ISEEO* case-specific considerations—underlie this explanation.

(1) The Court Likely Suffered from Buyer's Remorse

By the time the Court dismissed the case in 2007 without ordering a remedy, it had the benefit (or curse) of fourteen years of hindsight since it determined in 1993 that *ISEEO* plaintiffs' claims were justiciable in *ISEEO I*. During that time, the Court well knew the tortuous path the case had taken over the course of six appeals. Equally important, the Court also knew that, in all likelihood, if it were to conduct a remedial phase of the case, and almost irrespective of whether it took a deferential or aggressive stance toward the Legislature concerning the remedial issue, additional years of litigation might follow. The Court also knew that, had it initially joined the not insubstantial camp of State high courts who had declined to find the case justiciable on separation of power and/or political questions grounds, it would have avoided the past and likely future morass in which the Court found or likely predicted for itself. Thus, at a very basic level, the Court's decision to dismiss the *ISEEO* matter constituted a judicial form of buyer's remorse.

276. Grieve, *supra* note 272, at 109–11 & n.81 (describing the evidence regarding whether the SFIA constituted an "adequate legislative response" as "murky," pointing out that "[t]he Court has never said whether the SFIA corrected the system's ills," and concluding that the current system of funding Idaho K-12 public education is inadequate).

277. *See supra* note 261 and accompanying text.

(2) The Court Also Likely Suffered from Battle Fatigue

The Court's dismissal order may have resulted from what school funding scholars have referred to as battle fatigue.[278] The Nebraska Supreme Court, who decided not to join the battle in the first instance by finding a state education clause challenge non-justiciable, justified its decision and warned its judicial brethren that "[t]he landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp."[279] The Rhode Island Supreme Court, under similar circumstance and with similar disdain, pointed out that a fellow court in a nearby state (the New Jersey Supreme Court) "has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort, and court attention. The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature."[280]

Several state Supreme Courts, including the Ohio and Texas high courts, who failed to heed the above-quoted or similar judicial warnings when they initially decided that state constitutional challenges to K-12 school funding systems were justiciable, eventually decided, after many years of litigation, multiple appeals, and recalcitrance and challenges to their authority by state legislatures, that the battle over school funding was no longer worth it.[281] For those courts, the remedial issue was the point of disembarkation: "[r]emedial concerns . . . prompted most courts that waded into the battle to retreat . . . . [C]ourts courageously declared a constitutional violation but declined to specify a remedy or give guidance about necessary remedial action out of deference to legislative prerogatives and separation of powers."[282] And, state supreme courts who forced the remedial issue wound up fighting contentious and protracted battles with their state legislatures. Thus, as pointed out by Professor Joshua Weishart:

> The few courts that have advanced resolutely into battle exercised less judicial restraint, specifying a remedy or giving guidance about remedial measures to cure the constitutional violation. The paradigm example here is the New Jersey Supreme Court which "has been the most aggressive of any in enforcing education rights and duties." Its battle has been waging in one form or another since the early 1970s. "If Ohio's

278. Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J. L. & PUB. POL'Y 346, 349 (2018) [hereinafter *Aligning Education Rights*] (citing Obhof, *Ohio's Long Road*, *supra* note 121 at 140).

279. Nebraska Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 183 (Neb. 2007).

280. City of Pawtucket v. Sundlun, 662 A.2d 40, 59 (R.I. 1995).

281. Weishart, *Aligning Education Rights*, *supra* note 278 at 347–49, (citing DeRolph v. State, 780 N.E.2d 529, 529–32 (Ohio 2002)) ("*DeRolph IV*"); Albert Kauffman, *The Texas Supreme Court Retreats from Protecting Texas Students*, 19 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 145, 151, 164, 168 n.173 (2017).

282. Weishart, *Aligning Education Rights*, *supra* note 278, at 348, (citing to Bauries, *Judicial Review of Educational Adequacy*, *supra* note 243, at 742) (identifying courts in eleven states that have engaged in such "remedial abstention"); *see supra* note 246 and accompanying text.

> struggle seems exhausting, New Jersey endured the legal equivalent of the Thirty Years' War." Make that a Forty Years' War, provoking more than twenty decisions in which the court has taken the state to task for failing to adequately and equitably fund schools.
>
> ***
>
> The New Jersey Supreme Court is not alone in bearing the scars of battle. In an unprecedented move, the Washington Supreme Court was forced to impose contempt sanctions ($100,000 per day) on the legislature for its repeatedly (sic) failure to devise a remedial school finance plan as ordered . . . . In Kansas, the "War of Judicial Independence" culminated in a "well-financed effort to unseat four Supreme Court justices," with all four nevertheless winning their retention elections. In the buildup to that effort, the legislature purported to strip the court of authority to enjoin funding and to appoint chief judges, threatened to change the means of judicial selection to exert more control over the process, and imposed deadlines for issuing appellate decisions.[283]

At the time of its dismissal order, the Idaho Supreme Court was, of course, well aware of the history of the *ISEEO* litigation, including, among other things, the efforts by the Legislature "to legislate itself out of [the *ISEEO*] lawsuit" in an unconstitutional manner by enacting HB 403[284] and the Legislature's failure to sufficiently fund K-12 public schools under its thoroughness obligation under the Idaho Constitution.[285] Thus, as of the date of its decision in *ISEEO V*, the Court knew that the *ISEEO* matter had been hotly contested by the Legislature for almost fifteen years and also knew that litigation concerning the remedial phase of the case could potentially prolong the case for many more years. Undoubtedly, the Court, at the time it issued its dismissal order, was also aware of the battles that had been waged or were still waging between the judiciaries and legislatures in several other states over school funding matters.

For these additional reasons, battle fatigue may have caused or contributed to the Court's decision to dismiss the *ISEEO* case in 2006 without addressing remedial issues or granting a remedy.

(3) The Court Likely Wanted to Avoid a Constitutional Confrontation with the Legislature

The Idaho Supreme Court's dismissal of the *ISEEO* case—a case against the State legislature where the Court has held that the legislature has violated the state constitution and where the dismissal avoided addressing the remedial phase of the case or granting a remedy— was, at a very basic level, a paradigmatic example of a court avoiding a constitutional confrontation with the legislature. However, the reasons—stated or unstated—underlying the dismissal order are crucial because

283. Weishart, *Aligning Education Rights*, *supra* note 278, at 349–50 (citations omitted).
284. *See supra* note 121 and accompanying text.
285. *See supra* notes 136, 155 and 162 and accompanying text.

those reasons will inform the evaluation of whether the decision to avoid further confrontation with the Legislature was jurisprudentially proper or not.

On the one hand, if the Court had decided it was not proper under separation of powers principles and Idaho's tripartite system of state government for the Court to be adjudicating remedial issues in the *ISEEO* matter, the Court's decision for that reason, although properly subject to severe criticism, would have had some semblance of legitimacy. Indeed, it would have fallen within the range of judicial decision making concerning state education clause litigation, i.e. would have been within the "final third" of cases, discussed previously by Bauries and other scholars.[286] On the other hand, if the Court's decision to dismiss was motivated by concerns about further legislative backlash, i.e. backlash beyond HB 403, to the Court's performing its constitutional duties in the *ISEEO* matter, then the bona fides of the decision may be seriously questioned (and the reasons why the Court never provided the reasons for its dismissal decision would be better understood). At least two important factors—one stemming directly from the Court's *ISEEO* decisions themselves and the other related to the Legislature's control over funding to the Court—point to the latter explanation.

In *ISEEO VI,* the Court affirmed Judge Bail's decision requiring the State to pay the special master's fees during the pendency of the litigation from the State general fund.[287] Although seemingly not a momentous decision at the time—particularly since the Court had retained jurisdiction over the *ISEEO* matter in *ISEEO V* [288] and Judge Bail had confirmed and followed the Court's order by staying proceedings in the trial court shortly thereafter[289] —the Court's decision concerning the State's obligation to pay the special master's fees had significant implications for the Legislature. Paying the special master's fees from the general fund meant that, if the remedial phase of the case went forward, the Legislature would have an obligation to finance a not insignificant portion of the expenses associated with the development of facts that might ultimately lead to the Legislature having to substantially increase funding for K-12 public education. As pointed out by Justice Kidwell in dissenting from the Court's decision in *ISEEO VI*, the Court's decision affirming Judge Bail's order meant that the Court, in effect, was requiring the Legislature to appropriate funds on an ongoing basis.[290] According to Justice Kidwell, this turn of events raised significant separation of powers concerns beyond those already implicated in the case due to the Legislature's near exclusive constitutional prerogative concerning the "power of the purse."[291] Certainly, both the Court and Legislature knew the implications of the Court's decision concerning

286. *See supra* notes 243–249 and accompanying text.

287. *See supra* note 185 and accompanying text.

288. *See supra* notes 169 and accompanying text.

289. *See supra* note 180 and accompanying text.

290. *See supra* note 189 and accompanying text.

291. *Id.*; IDAHO CONST. art. XIII § 4 provides that "[n]o money shall be drawn from the treasury, but in pursuance of appropriations made by law." The Court has long held and recently reiterated that "[t]he legislature has absolute control over the finances of the state. The power of the legislature as to the creation of indebtedness, or the expenditure of state funds, or making appropriations, is plenary, except only as limited by the state Constitution." Davis v. Moon, 289 P.2d 614, 617, 77 Idaho 146, 151 (1955) (cited in Ybarra v. Legislature by Bedke, 466 P.3d 421, 432, 166 Idaho 902 (2020)).

funding the services of the special master. At the very least, the Court's incursion into this aspect of the Legislature's domain heightened the prospect that the Legislature would be less than receptive to broader remedial measures imposed by the Court.

The Legislature's control over the State's purse strings also had (and has) implications for the Court's own operations. In Idaho, like most states, the Legislature has authority over appropriations for the state judiciary, including the Idaho Supreme Court.[292] Notwithstanding the Idaho high court's inherent power and constitutional right to operate the judicial system free of interference from the Legislature,[293] the prospect of the Legislature cutting its judicial budget in retaliation for the Court's handling of the *ISEEO* matter was real, not imagined.[294] Thus, the Court had ample incentive to abdicate its remedial role in the *ISEEO* matter to avoid a confrontation with the Legislature and, thereby, preserve its own funding for staff, facilities and other essential aspects of the Court's operations.[295]

In sum, a combination of buyer's remorse, battle fatigue, and concern about confrontation with the Legislature may have caused the Court to dismiss the *ISEEO* matter in 2006 without conducting remedial proceedings or granting a remedy.

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292. CARL BARR, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES 25 (1975) (cited in Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111, 122 (1994)); State v. Bennion, 720 P.2d 952, 968, 112 Idaho 32, 48 (1986) (Bistline, J., neither concurring nor dissenting) (noting that the Idaho judicial system makes budget requests annually to the legislature).

293. *See* IDAHO CONST. art. V § 13 ("The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government"); *see also* Twin Falls Cty. v. Cities of Twin Falls and Filer, 146 P.3d 664, 667, 143 Idaho 398, 401 (2005) (stating that the Idaho Supreme Court has "'inherent authority to incur and order paid all such expenses as are necessary for the holding of court and the administration of the duties of courts of justice'") (quoting Schmelzel v. Board of Comm'rs of Ada County, 100 P. 106, 107, 16 Idaho 32, 35 (1909))

294. *See* Christopher S. Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders*, 59 WM. & MARY L. REV. 1601, 1633 (2018) (noting that, in educational adequacy cases, "[r]emedial orders may be ignored. Legislators who do not want courts telling them how much to spend or where to spend it may retaliate by cutting the judiciary's budget"); Deborah Fauver, *ABA Commission Recommends All Judges Be Appointed*, ST. LOUIS DAILY REC., July 2, 2003 (finding that legislatures have cut judicial budgets in a number of states out of retaliation for adverse decisions).

295. During the 2021 Legislative Session, the Idaho Legislature twice withheld funding or attempted to withhold funding from state educational entities or offices with whom a majority of the Legislature disagreed ideologically – first, from Boise State University because of its adoption and maintenance of a curriculum that contained a significant diversity and social justice component, Blake Hunter, *Idaho Legislative Committee Cuts $409,000 from Boise State's Budget Over Social Justice*, ARBITER (March 4, 2021), https://arbiteronline.com/2021/03/04/breaking-idaho-legislative-committee-cuts-409000-from-boise-states-budget-over-social-justice/; Kevin Richert, *'We are Left with No Other Options:' Lawmakers Cut Into Boise State's Budget*, IDAHO EDUC. NEWS (March 3, 2021), https://www.idahoednews.org/legislature/we-are-left-with-no-other-option-lawmakers-cut-into-boise-states-budget/, and, second, from the Idaho Attorney General's Office because it did not join a lawsuit filed by a number of other States Attorney General Offices challenging the outcome of the 2020 Presidential election (which lawsuit was immediately dismissed by the United States Supreme Court). Alexandra Garrett, *Idaho GOP Proposing to Cut Attorney General Lawrence Wasden's Budget, Prevent Certain Investigations*, NEWSWEEK (March 9, 2021), https://www.newsweek.com/idaho-gop-proposing-cut-attorney-general-lawrence-wasdens-budget-prevent-certain-investigations-1574903; William L. Spence, *Washington Attorney General Defends his Idaho Counterpart for Resisting Texas Lawsuit*, LEWISTON TRIBUNE (REPRINTED BY THE SEATTLE TIMES) (April 1, 2021), https://www.seattletimes.com/seattle-news/washington-attorney-general-defends-his-idaho-counterpart-for-resisting-texas-lawsuit/.

c. Assessing the Legitimacy of the Idaho Supreme Court's Dismissal Decision in ISEEO or, in Other Words, Was the Court's Decision Proper?

i. Because the Court Failed to Fulfill its Proper Role Under the Idaho Constitution, its Decision Dismissing the *ISEEO* Matter was Improper

As discussed previously, the case law and scholarship on what constitutes proper judicial decision making in state constitutional school funding cases is both voluminous and contains divergent and legitimate points of view.[296] As such, any assessment of the bona fides of the Idaho Supreme Court's decision to dismiss the *ISEEO* matter without addressing remedial issues or granting a remedy largely hinges on the perspective one adopts concerning the proper role of courts vis a vis the legislature on issues of enforcement and remediation under state education clause provisions. In other words, an answer to the question, "Was the Court's decision proper?" depends on whether one takes the view that the Court's proper role in adjudicating claims under the education clause provisions of Idaho's Constitution calls for abstention, abdication, dialogue or remediation.[297]

Based on essentially the same reasons that state Supreme Courts outside of Idaho, as well as scholars have taken the position that courts should and must take an active role in enforcing state constitutional education clause provisions and remedying their violation,[298] this Article adopts the view that the Idaho Supreme Court, after concluding in *ISEEO V* that the Legislature had not fulfilled its state constitutional duty to provide a thorough education for Idaho's K-12 public schoolchildren, was constitutionally duty bound to take an active role in monitoring and ultimately requiring compliance with its decision. As such, the Court—either directly (by retaining jurisdiction, as it did) or by remanding the matter to Judge Bail—should have done far more than it did after delivering its Opinion in *ISEEO V*. Specifically, depending on the nature of the Legislature's response to its *ISEEO V* Opinion and any follow-on orders, the Court should have used the special master to engage in factfinding,[299] adopted specific requirements or benchmarks for school funding,[300] set specific deadlines for legislative compliance[301] or, although one would hope the compliance issue would not have come to this, utilized the Court's contempt power to enforce its orders.[302] In short, the Court should have conducted the remedial phase of the case that it had promised in *ISEEO V*, but never delivered.

By not engaging in this more forceful remedial role, the Court failed to fulfill *Marbury v. Madison*'s legacy of "saying what the law is"[303] as it had done concerning

296. *See supra* notes 243–248 and accompanying text.

297. *Id*.

298. S*ee supra* notes 243, 247 and 248 and accompanying text.

299. *See supra* note 183.

300. *See, e.g.*, Abbott v. Burke, 710 A.2d 450 (N.J. 1998).

301. *See, e.g.*, DeRolph v. State, 677 N.E.2d 733, 747 (Ohio 1997).

302. *See, e.g.*, McCleary v. State, No. 84362-7 at 4 (Wash. Sept. 11, 2014) (cited with approval in Education Law — Washington Supreme Court Holds Legislature in Contempt for Failing to Make Adequate Progress Toward Remedying Unconstitutional Education Funding Scheme, 128 HARV. L. REV. 2048 (2015)).

303. *See supra* note 40 and accompanying text; *see also supra* note 266.

the liability phase of the case in *ISEEO I* and *III*, but also failed to comport with *Marbury*'s and Blackstone's "indisputable rule, that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded."[304] By dismissing the case, the Court denied the ISEEO plaintiffs their full day in court, thereby denying them relief after telling them they had rights and their rights had been violated.[305] But more important, the Court, by abdicating its remedial role, failed, along with the Legislature, to fulfill its constitutional responsibility to ensure that Idaho's schoolchildren receive a thorough education as that term had been interpreted by the Court. As pointed out by Professor Weishart in discussing the consequences of judicial abdication in school funding cases across the United States:

> Ceding authority to interpret and enforce the education clauses in their constitutions, however, . . . [comes] at a high cost: the right to education in those states has been downgraded to a nominal, nonjusticiable duty. As collateral damage, millions of schoolchildren with claims under that right lack a legal remedy because the judicial branch of government is essentially closed to them, perhaps indefinitely. Judicial restraint rather than abdication would have been more defensible, considering that the source of judges' trepidation lies not with their authority to interpret the constitution but their ability to enforce it with a remedy that the other branches would be willing and able to execute.[306]

As Weishart further describes, judicial abdication at the remedial stage of school funding litigation and the resulting failure "to protect children from the harms of educational deprivations and disparities"[307] has very specific consequences for a State, its citizenry and its schoolchildren:

> In a number of states, the education clauses . . . declare explicitly why a quality education matters: It is "essential to the preservation of rights and liberties of the people" and to a "free," "good," or "republican form" of government "by the people." Several courts have also acknowledged that education for citizenship is democracy-reinforcing absent such explicit language in the state constitution. Courts have been unequivocal about the importance of education to the common good—as one put it, the state is "dependent *for its survival* on citizens who are able to participate intelligently in the political, economic, and social functions of our system." Regarding those economic functions, a few state constitutions specifically identify "commerce, trades, manufactures" as well as "vocational," "mining," "agricultural," "scientific," and "industrial" improvements as dependent on an educated workforce. Again, even where state constitutions are not that specific, courts interpreting them have said that education equips children with the capabilities "to attain productive employment

304. *See supra* note 209.
305. *See supra* note 196.
306. Weishart, *Aligning Education Rights*, *supra* note 278, at 353.
307. *Id.* at 347.

> and otherwise contribute to the state's economy," "to compete favorably" on the job market, and "lead economically productive lives to the benefit [of] us all." [308]

Thus, the Idaho Supreme Court initially fulfilled its proper constitutional role in *ISEEO I* and *III* by holding the Legislature accountable for complying with its thoroughness obligation under Art. IX, Section 1 of the Idaho Constitution, compliance with which Idaho's founders thought was necessary to enhance "the intelligence of the people" so as to promote "[t]he stability of a republican form of government."[309] However, the Court, by abdicating its remedial role after *ISEEO V*, failed to fulfill its remedial duties, properly understood—to the *ISEEO* plaintiffs, to be sure, but more profoundly, to Idaho, its citizens and its schoolchildren.[310]

ii. The Court's Failure to Conduct a Hearing or Issue an Opinion Explaining its Dismissal Order Compounded the Problem

The Idaho Supreme Court has stressed the importance of due process, agreeing with the United States Supreme Court that "'the phrase expresses the requirement of 'fundamental fairness.'"[311] Specifically, the Idaho high court has indicated the right to a hearing is an important aspect of due process[312] and that "[a] fair and open hearing is the absolute demand of all judicial inquiry."[313] Similarly, many years ago, the United States Supreme Court reviewed a quasi-judicial administrative proceeding and stated that "the rudimentary requirements of fair play . . . . demand 'a fair and open hearing'—essential alike to the legal validity of the [proceeding] and to the maintenance of public confidence in the value and

308. *Id.* at 361–62 (citations omitted).

309. *See supra* note 20 and accompanying text.

310. As a dissenting justice lamented regarding the Texas Supreme Court's decision in its school funding litigation and its effect on schoolchildren:

> The majority's remarkable willingness to abandon precedent so recently announced demonstrates not only disregard for the law and indifference to the taxpayer, but also abandonment of the children of this state. Our school children have long suffered from the failure of the school finance system. Today they suffer anew from the failure of the justice system to deliver on the promise of the Texas Constitution. The majority offers our children only delay, and they have already had plenty of that. A child who began the first grade when this cause was originally filed in state court is already in high school and will probably have graduated before any new finance plan becomes effective.

Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 576 (Tex. 1992) (Doggett, J., dissenting).

311. Williams v. Idaho State Bd. of Real Estate Appraisers, 337 P.3d 655, 664, 157 Idaho 496, 505 (2014) (quoting Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C., 452 U.S. 18, 24–25 (1981)).

312. *See, e.g.,* Johnson v. Bonner County School Dist. No.82, 887 P.3d 35, 35–39, 126 Idaho 490, 490–94 (1994).

313. Grindstone Butte Mut. Canal Co. v. Idaho Power Co., 574 P.2d 902, 907, 98 Idaho 860, 865 (1978).

soundness of this important governmental process."[314] In the same vein, Justice Felix Frankfurter opined concerning the right to be heard as follows:

> The validity and moral authority of a conclusion largely depend on the mode by which it has been reached . . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[315]

The Idaho Supreme Court has likewise held that providing a statement of reasons as part of the quasi-judicial or judicial decision making process is often a requirement of due process.[316] Thus, the Idaho high court, applying a three-factor due process test articulated by the United States Supreme Court, held that a teacher who was discharged after a school board hearing is entitled to know the reasons for the board's decision, stating as follows:

> First, the interest of a teacher with renewable contract rights is substantial. Secondly, the administrative cost of providing a statement of reasons would be minimal. We discern no ancillary disruptive effect on administrative efficiency. Thirdly, the benefits of such a requirement are evident. It dispenses with the appearance of arbitrariness which attends a discharge without explanation; encourages the board to come to grips with and articulate its reasoning process; encourages fairness by holding the decision up for public and judicial scrutiny; [and] enhances the visibility of the decision making process . . . .[317]

As discussed above, the *ISEEO* matter involved issues of unsurpassed importance to the *ISEEO* plaintiffs (and the State official defendants), as well as the citizens and schoolchildren of Idaho. In addition, affording the *ISEEO* plaintiffs a hearing before dismissing the case could have been easily accomplished, would have given them the opportunity to (a) present argument concerning both the meaning of the Court's *ISEEO V* Opinion retaining jurisdiction and the Court's proper role vis a vis the remedial phase of the case and (b) present evidence concerning whether, post-*ISEEO V*, the Legislature had complied with its thoroughness obligation under the Idaho Constitution. Similarly, providing reasons for the Court's dismissal order in *ISEEO* – again, a case of significant statewide importance – in an Opinion, Memorandum of Decision, or the like would not have burdened the Court in any significant way, would have forced the Court to articulate its reasoning process and justify its decision, and would have informed the *ISEEO* plaintiffs, the

314. Morgan v. United States, 304 U.S. 1, 15 (1938).

315. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring). Professor Laurence Tribe has described procedural due process and the right to be heard as having both instrumental and intrinsic aspects. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 666-67 (2d ed. 1988). The instrumental aspect leads to accurate decision making, while the intrinsic aspect gives an individual or group whose rights are being affected the feeling that they have been heard. *Id.*

316. Bowler v. Bd. of Trustees of Sch. Dist. No. 392, 617 P.2d 841, 847, 101 Idaho 537, 543 (1980).

317. *Id.* at 847–48, 101 Idaho at 543–44 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

State defendants and all others interested in the case of the reasons for the Court's dismissal decision.

Instead, the Court dismissed the *ISEEO* matter without addressing the remedial phase of the case or granting a remedy by having its Court Clerk inform the attorneys for the parties in the hallways of the Supreme Court building that "the case is over," not conducting any kind of hearing, and not issuing any kind of Opinion or writing explaining the reasons for its dismissal decision. Given the Court's championing of fair procedures and due process, a more arbitrary way to end a case that had spanned seventeen years and spawned six state Supreme Court opinions would be hard to imagine.

C. Possible Paths Forward after *ISEEO*

Certainly, the Idaho Supreme Court's decision in *ISEEO* dismissing the case without granting a remedy dashed the hopes of the *ISEEO* plaintiffs and others who looked to the Court to force the Legislature to comply with its school funding obligations under the Idaho Constitution's thoroughness provision. Moreover, given the Court's 2007 dismissal decision, [318] over fourteen years have now passed since the Legislature last faced any possible form of compulsion to increase K-12 school funding. The question, then, arises whether there are any means presently available to require the Legislature to provide constitutionally sufficient funding to Idaho's K-12 public schools. Two possibilities – one premised on subsequent litigants enforcing the Court's liability determination against the State in *ISEEO V* and the other involving Idaho's citizens' initiative process – are worth discussing.

1. Under Preclusion Doctrines, the Idaho Supreme Court's Justiciability and Liability Decisions in ISEEO Could be Used to Aid New School Funding Litigants and the Court's Dismissal Decision Would not Bar New Litigants from Seeking a Remedy

Like courts in most jurisdictions, the Idaho Supreme Court recognizes finality doctrines, variously described as issue preclusion (or collateral estoppel) and claim preclusion (res judicata).[319] The preclusion doctrine encompasses both issue preclusion and claim preclusion and "serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims."[320]

The Idaho Supreme Court has held that the following five elements must be satisfied for the doctrine of issue preclusion to apply:

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318. *See supra* note 192 and accompanying text.

319. Carter v. Gateway Park, LLC, No. 47246, 2020 WL 6387860, *5 (Nov.2, 2020) (citing Ticor Title v. Stanion, 157 P.3d 613, 617, 144 Idaho 119, 123 (2007).

320. *Id*.

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the present action; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.[321]

The Court has also made clear that, although a dismissal may or may not constitute a final judgment for claim preclusion purposes, "for purposes of issue preclusion, a final judgment 'includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.'"[322] As to the other preclusion doctrine, the Court has stated that "[f]or claim preclusion to bar a subsequent action, there are three requirements: (1) same parties; (2) same claim; and (3) final judgment."[323]

Although the preclusion doctrines have not seen much application in the school funding context,[324] erstwhile plaintiffs who might want to pursue post-*ISEEO* school funding litigation in Idaho should be able to benefit from the *ISEEO* plaintiffs' successes and would not be stymied by the Court's decision dismissing the matter without granting a remedy. Tracking the elements of the issue preclusion doctrine, the State defendants clearly had a full and fair opportunity to litigate the *ISEEO* matter, including the Court's justiciability determination in plaintiffs' favor in *ISEEO I* and the Court's affirmance of Judge Bail's liability determination in the plaintiffs' favor in *ISEEO V*. In addition, the issue in any follow-on litigation would be identical to the primary issue resolved in the *ISEEO* case, i.e. whether the Legislature has continued to violate the thoroughness requirements of the Idaho Constitution. Further, the justiciability and liability issues under Idaho's thoroughness provision

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321. *Ticor*, 157 P.3d at 618, 144 Idaho at 24.

322. Rodriguez v. Dept. of Corr., 29 P.3d 401, 405, 136 Idaho 90, 94 (2001) (quoting Eastern Idaho Agric. Credit Ass'n v. Neibaur, 987 P.2d 314, 320 ,133 Idaho 402, 408 (1999) (quoting Restatement (Second) of Judgments § 13 (1982))); *see also* Picatta v. Miner, 449 P.3d 403, 412, 165 Idaho 611, 620 (2019).

323. Andrus v. Nicholson, 186 P.3d 630, 633, 145 Idaho 774, 777 (2008) (citing *Ticor*, 157 P.3d at 618, 144 Idaho at 24).

324. One Idaho Supreme Court justice invoked res judicata, i.e. claim preclusion, as grounds for barring the *ISEEO* plaintiffs from relitigating the Idaho and federal equal protection claims that had been decided adversely to plaintiffs in the *Thompson* litigation, *ISEEO I*, 850 P.2d at 738, 123 Idaho at 587 (Bakes, J. pro tem., concurring in part and dissenting in part), although given that the *ISEEO* plaintiffs were not parties to the *Thompson* litigation, the *Thompson* Court's equal protection rulings might more properly be regarded as stare decisis, rather than res judicata, for the *ISEEO* litigation. Outside of Idaho, preclusion doctrine principles barred a plaintiff from relitigating a school funding case in Washington state, where she had previously been a plaintiff in prior unsuccessful litigation. Camer v. Seattle Sch. Dist. No. 1, 762 P.2d 356, 359 (Wash. Ct. App. 1988). One scholar has discussed the State defendants unsuccessful attempt in Ohio to use res judicata principles to preclude plaintiffs from pursuing the *DeRolph* matter. William S. Koski, *The Politics of Judicial Decision-making in Educational Policy Reform Litigation*, 55 HASTINGS L. J. 1077, 1146 (2004). And, in Rhode Island, commentators have discussed possible preclusion issues stemming from state court school funding litigation in contemplated federal court litigation related to some of the issues litigated in state court. David V. Abbott & Stephen M. Robinson, *School Finance Litigation: The Viability of Bringing Suit in Rhode Island Federal District Court*, 5 ROGER WILLIAMS U. L. REV. 441, 487–88 (2000).

were actually decided in the *ISEEO* litigation. Moreover, the Court's justiciability and liability determination against the State defendants were certainly not tentative, but rather, were sufficiently firm so as to be accorded conclusive effect in any subsequent Idaho school funding case seeking to enforce Idaho's constitutional thoroughness requirement. And, of course, the Legislature was a party defendant throughout the *ISEEO* matter litigation. Thus, any subsequent plaintiffs seeking to enforce the thoroughness provision of Idaho's Constitution could make a strong argument, based on the elements of the issue preclusion doctrine and its underlying purpose encouraging enforcement of rulings on issues fairly and finally determined, that they should reap the benefits of the Court's prior rulings in the liability phase of the case and not have to litigate those issues a second time.

Conversely, plaintiffs in a follow-on school funding suit would not be barred by either of the preclusion doctrines from revisiting – and have the Court take up for the first time – the remedial issues left unresolved in the *ISEEO* matter. As a matter of issue preclusion, the remedial issue was never actually litigated in the *ISEEO* matter. Likewise, as to claim preclusion, any subsequent plaintiffs would almost certainly not be the same plaintiffs who litigated the *ISEEO* matter.[325] As such, recognizing that the costs of, including attorneys' fees associated with, ligating a school funding case can be prohibitive for client or counsel and further recognizing that the *ISEEO* plaintiffs' prior experience with the Court and Legislature might dissuade a prospective plaintiff from taking up the matter, the preclusion doctrines appear to play in a plaintiff's favor and against the State defendants – with one caveat. Based on the Supreme Court's holding in the *Joki* matter, any plaintiff who might wish to take up the *ISEEO* plaintiffs' cause must satisfy Idaho's CBECA's procedural requirements by first suing in district court and then obtaining authorization from the district court to add the State as a defendant. [326]

2. The Idaho Citizens' Initiative Process is Available to K-12 School Funding Advocates as Well

Idaho, like several Western states, allows direct participation by citizens in lawmaking by providing for an initiative and referendum process in the Idaho

325. An issue may arise in any subsequent Idaho school funding litigation concerning whether the final judgment requirement for invocation of the claim preclusion doctrine is satisfied by a dismissal order where the remedial issue was not actually litigated in the case. The Idaho Supreme Court has held that a dismissal order entered based on the stipulation of the parties constituted a final judgment for claim preclusion purposes. Maravilla v. J. R. Simplot Co., 387 P.3d 123, 126–27, 161 Idaho 455, 458–59 (2016). In contrast, the Idaho high court refused to afford claim preclusion to a prior decision where, in a court trial, defendant moved for directed verdict on plaintiff's claim, plaintiff did not oppose the motion and the trial judge issued a dismissal order, but the trial judge did not make findings under Idaho Rule of Civil Procedure ("IRCP") 52(a) and did not certify partial judgment under IRCP 54(a). Pocatello Hosp., LLC v. Quail Ridge Medical Inv'r, LLC, 339 P.3d 1136, 1143, 157 Idaho 732, 739 (2014). Thus, although the "same parties" requirement for claim preclusion purposes can easily be evaluated and disposed of, the resolution of the final judgment issue under the claim preclusion is not entirely clear.

326. *See supra* note 227 and accompanying text.

Constitution.[327] Because the constitutional provision is not self-executing,[328] the Idaho Legislature has provided for the initiative process by statute.[329] In order to qualify a citizens' initiative for the ballot, the proponents of the initiative must, among other things, place the language of the initiative on a petition, garner a sufficient number of signatures from qualified electors in a number of counties within a certain time frame, and once the initiative is placed on the ballot, obtain the vote of a majority of those voting in the general election.[330]

In September 2019, a citizens' group calling themselves Reclaim Idaho began circulating an initiative petition entitled "Invest in Idaho."[331] The initiative, if it qualified for the ballot and was approved by the voters, would have raised approximately $170 million annually by increasing corporate and high-end income tax rates.[332] By early-March 2020, signature gatherers for the Invest in Idaho initiative had obtained approximately 30,000 of the 55,000 signatures needed by the statutory April 30, 2020 deadline to place the initiative on the ballot for the November 2020 election.[333] In effect, the Reclaim Idaho citizens group was attempting to achieve by ballot initiative what the *ISEEO* plaintiffs had not been able to obtain through the litigation process.

However, in mid-March 2020, Idaho suffered its first case of the COVID-19 pandemic.[334] From that point forward, the pandemic made face-to-face signature gathering essentially impossible.[335] In June, 2020, after Idaho state officials denied Reclaim Idaho's request to gather signatures on-line, Reclaim Idaho filed a lawsuit in federal court asserting that Idaho had violated its First Amendment rights and would continue to do so by refusing to allow it to gather signatures electronically.[336] In late June 2020, Judge Winmill agreed, issuing a preliminary injunction requiring the State to either agree to place the Invest in Idaho initiative on the November

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327. Brian Kane, *If the Citizens Speak, Listen: Idaho's Local Initiative Process*, 50 ADVOC. 17, 17 (2007). Art. III, § 1 of the Idaho Constitution provides in pertinent part regarding the initiative power as follows:

> The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

328. Idaho State AFL-CIO v. Leroy, 718 P.2d 1129, 1135, 110 Idaho 691, 697 (1986).

329. IDAHO CODE §§ 34-1801 (1997) through § 34-1823 (1997).

330. *Id.*

331. Kevin Richert, *Reclaim Idaho Launches Education Funding Initiative,* IDAHO EDUC. NEWS (Sept. 30, 2019), https://www.idahoednews.org/kevins-blog/reclaim-idaho-launches-education-funding-initiative/ [hereinafter "Richert I"]; Kevin Richert, *Reclaim Idaho Launches Online Petition Drive for K-12 Proposal*, IDAHO EDUC. NEWS (July 13, 2020), https://www.idahoednews.org/news/reclaim-idaho-launches-online-petition-drive-for-k-12-proposal/.

332. *Id.*

333. Kevin Richert, *Federal Judge Revives Reclaim Idaho Initiative*, IDAHO EDUC. NEWS (June 23, 2020), https://www.idahoednews.org/news/federal-judge-revives-reclaim-idaho-initiative/.

334. Kevin Richert, *Reclaim Idaho Launches Online Petition Drive for K-12 Proposal*, IDAHO EDUC. NEWS (July 13, 2020) https://www.idahoednews.org/news/reclaim-idaho-launches-online-petition-drive-for-k-12-proposal/.

335. *Id.*

336. Reclaim Idaho v. Little, 469 F. Supp.3d 988, 992–97 (D. Idaho 2020).

2020 ballot or "allow Reclaim Idaho an additional 48-days to gather signatures through online solicitation and submission."[337]

The State refused to accept either alternative, eventually filing a petition for certiorari and stay of Judge Winmill's order with the United States Supreme Court.[338] The Supreme Court granted the State's petition for stay on July 30, 2020, thereby effectively ending Reclaim Idaho's Invest in Idaho initiative efforts at least until the next general election in November 2022.[339]

Reclaim Idaho's use of Idaho's initiative process to garner voter approval of a substantial infusion of funds into Idaho's K-12 public schools was a direct response – albeit a response delayed by many years – to the Idaho Legislature's failure to sufficiently fund public education in violation of the thoroughness requirements of the Idaho Constitution dating back to the *ISEEO* matter and before and the Idaho Supreme Court's failure to conduct the remedial phase of the case or grant a remedy to the *ISEEO* plaintiffs.[340] To be sure, pursuing or continuing to pursue the initiative process to substantially increase funding to Idaho K-12 public schools has not been and would continue not to be easy. Certainly, many Idaho voters hold an anti-taxation sentiment.[341] In addition, the Idaho legislature has placed and continues to seek to place increasing strictures on the signature gathering and time line requirements for qualifying a citizens' initiative on the ballot.[342] And, even if voters approve an initiative to substantially increase funding for K-12 public schools, Idaho law permits the Idaho legislature to amend or negate the initiative's provisions at the Legislature's next regular session.[343] These realities, taken either singularly or in the aggregate, would pose substantial barriers to direct democratic action by Idaho voters to address public school funding problems in the State.

337. *Id.* at 1002.

338. Little v. Reclaim Idaho, 140 S. Ct. 2616 (2020).

339. *Id.* at 2616; *see also* Reclaim Idaho v. Little, 826 Fed. Appx. 592, 594 (9th Cir. 2020).

340. As previously discussed, the Idaho Education Association had previously used the initiative process to increase the sales tax to provide additional funding for K-12 public schools. *See supra* note 274. Idaho voters, however, rejected that initiative. *Id.*

341. Richert I, *supra* note 331.

342. James Dawson, *New Bill Revives Idaho Ballot Initiative Restrictions*, BOISE ST. PUB. RADIO (Feb. 12, 2021), https://www.boisestatepublicradio.org/post/new-bill-revives-idaho-ballot-initiative-restrictions#stream/0. During the 2021 Legislative Session, the Legislature enacted – and the Governor signed into law – SB 1110, which places additional, severe limitations on Idaho's initiative and referendum process. Betsy Russell, *Governor Has Signed SB 1110 on Future Voter Initiatives*, IDAHO STATE JOURNAL (April 19, 2021), https://www.idahostatejournal.com/news/local/governor-has-signed-sb-1110-on-future-voter-initiatives/article_be0d8536-af52-5096-b5b4-be49ca20a157.html. Less than a month later, two groups, including Reclaim Idaho, and one individual filed lawsuits challenging the constitutionality of SB 1110. Betsy Z. Russell, *Lawsuits Filed to Overturn New Initiative Laws as Unconstitutional*, BIG COUNTRY NEWS (May 7, 2021) https://www.bigcountrynewsconnection.com/news/state/idaho/lawsuits-filed-to-overturn-new-initiative-laws-as-unconstitutional/article_38eea084-b3df-563a-8225-ff5ee39a51c4.html. Just as this Article was going to press, the Idaho Supreme Court struck down SB 1110 as unconstitutional under Article III, Section 1 of the Idaho Constitution. Reclaim Idaho/Gilmore v. Denney, Docket Nos. 48784 and 48760 (Opinion filed August 23, 2021).

343. Gibbons v. Cenarrusa, 92 P.3d 1063, 1067, 140 Idaho 316, 320 (2002) (citing Luker v. Curtis, 136 P.2d 978, 979-80, 64 Idaho 703, 706-07 (1943)).

However, K-12 public school referenda have worked for citizen groups before[344] and, given the stakes involved – the education of Idaho schoolchildren and, ultimately, the wellbeing of Idaho's citizenry and progress of the State as a whole – the possibility of using the citizen initiative process should not be discounted.

III. CONCLUSION

The Education Clause of Idaho's Constitution constitutes a promise made by Idaho's founders to the citizens of Idaho and Idaho schoolchildren that the Legislature would, among other things, establish and maintain a thorough system of K-12 public schools. When all has been said and done – when one chronicles the history of the *ISEEO* litigation with all its twists and turns, when one places the *ISEEO* matter in the context of proper judicial decision making in state constitutional funding adequacy challenges across the many states that have addressed the issue, and when one looks at the high stakes involved – the Idaho Legislature and the Idaho Supreme Court have broken this promise. But given the alternatives available to those who are concerned about sufficiently funding Idaho's public schools, broken promises, although often long lasting, need not stay broken forever.

344. *See* BOISE ST. PUB. RADIO, *Voters Resoundingly Reject Propositions 1, 2 and 3*, https://www.boisestatepublicradio.org/topic/idaho-voters-resoundingly-reject-propositions-1-2-and-3#stream/0. In 2012, Idaho voters, via referendum, overwhelming repealed the so-called Luna laws, which had made sweeping changes to Idaho statutes protecting teacher rights and collective bargaining and which diverted funding for teachers' salaries to funding for laptop computers. *Id.*