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**SANDERS**

NO. 67448-5

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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SUNSIRAE TUNSTALL, a minor, by and through her mother, TANYA TUNSTALL; PHILLIP KRIST, a minor, by and through his grandmother and legal guardian, FRANCES KRIST; JEFFERY COATS, a minor, by and through his mother, TERRY WALKER; MINH THACH, a minor, by and through his mother, SOPINH THACH; JIMI HAMILTON; DARICK ARNDT; DALE BARR; and DANIEL LOZANO, on behalf of themselves and all others similarly situated.,

Respondents/Cross-Appellants,

v.

TERESA BERGESON, Superintendent of Public Instruction; and JOSEPH LEHMAN, Secretary, Department of Corrections; and their predecessors, successors, and assigns,

Appellants/Cross-Respondents.

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**CORRECTED**  
**BRIEF OF APPELLANTS/CROSS RESPONDENTS**

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## TABLE OF CONTENTS

I.	NATURE OF THE CASE.....	1
II.	ASSIGNMENTS OF ERROR.....	1
III.	ISSUES RELATING TO ASSIGNMENTS OF ERROR.....	2
IV.	STATEMENT OF THE CASE .....	3
	A. Procedural History.....	3
	B. Factual Background.....	6
V.	ARGUMENT .....	13
	A. The State's Constitutional Obligation Under Article IX Of The State Constitution Is To Establish A Uniform, General And Appropriately Funded Public School System. ....	13
	B. The State Has Provided A Publicly Funded General And Uniform System Of Common Schools. That The Inmate Class Members Have Disqualified Themselves From Attending The Public School System Does Not Diminish The Fact that The State Has Satisfied Its Constitutional Obligation. ....	14
	C. The Beneficiaries Of Article IX Are Children Residing In The State. The Members Of The Inmate Class Are Not Children Within The Meaning Of Article IX.....	18
	D. The Equal Protection Clause Does Not Compel The State To Provide The Same Program Of Education To Criminal Offenders Incarcerated In The State's Prisons, As The State Provides To Persons Who Are Not Incarcerated. The Trial Court Erred In Invalidating Laws Of 1998, Chapter 244.....	22

E.	The Basic Education Act Establishes A General And Uniform System Of Public Schools Available To Those Persons Free To Attend Them. It Does Not Apply To Persons Incarcerated In Adult Prisons. ....	29
VI.	CONCLUSION .....	34
APPENDIX A	Amended Order	
APPENDIX B	Verbatim Transcript of Ruling of October 9, 1998	
APPENDIX C	Stipulated Facts	
APPENDIX D	Laws of 1998, ch. 244 (ESSB 6600)	

## TABLE OF AUTHORITIES

### CASES

<i>Fray v. Spokane County</i> , 134 Wn.2d 637, 952 P.2d 601 (1998) .....	31
<i>Gregory v. Ashcroft</i> , 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) ...	25
<i>Haberman v. WPPSS</i> , 109 Wn.2d 107, 744 P.2d 1032 (1987) .....	25, 26
<i>In re Boot</i> , 130 Wn.2d 553, 925 P.2d 964 (1996) .....	20, 24
<i>In re Sehome Park Care Center, Inc.</i> , 127 Wn.2d 774, 903 P.2d 443 (1995) .....	31
<i>In re Young</i> , 95 Wn.2d 216, 622 P.2d 373 (1980) .....	17
<i>Lindstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998) .....	31
<i>Malyon v. Pierce County</i> , 131 Wn.2d 779, 935 P.2d 1272 (1997) .....	18
<i>Monroe v. Soliz</i> , 132 Wn.2d 414, 939 P.2d 205 (1997) .....	23
<i>Planned Parenthood v. Casey</i> , 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) ...	29
<i>Price v. Johnston</i> , 344 U.S. 266 (1974) .....	17
<i>San Antonio School District v. Rodriguez</i> , 411 U.S. 1 (1973) .....	25
<i>Sandin v. Conner</i> , 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995) ...	17

<i>School Dist. No. 20 Spokane County v. Bryan</i> , 51 Wash. 498, 99 Pac. 28 (1909).....	32
<i>Seattle School District v. State</i> , 90 Wn.2d 476, 585 P.2d 71 (1978) .....	13, 15, 16, 27
<i>State ex rel. O'Connell v. Slavin</i> , 75 Wn.2d 554, 452 P.2d 943 (1969) .....	18
<i>State v. Barnes</i> , 117 Wn.2d 701, 818 P.2d 1088 (1991) .....	22
<i>State v. Schaaf</i> , 109 Wn.2d 1, 743 P.2d 240 (1987) .....	23, 24
<i>State v. Shawn P.</i> , 122 Wn.2d 553, 859 P.2d 1220 (1994) .....	22, 24, 25
<i>Tommy P. v. Board of Commissioners</i> , 97 Wn.2d 385, 645 P.2d 697 (1982) .....	21
<i>Turner v. Safely</i> , 482 U.S. 78 (1987).....	27
<i>Westerman v. Cary</i> , 125 Wn.2d 277, 892 P.2d 1067 (1994) .....	18
<i>Western Petroleum Importers, Inc. v. Friedt</i> , 127 Wn.2d 420, 899 P.2d 142 (1995) .....	31

## STATUTES

20 U.S.C. § 1400, <i>et seq.</i> .....	4
20 U.S.C. § 794 .....	4
Laws of 1997, ch. 338 .....	9
Laws of 1997, ch. 338, § 41 .....	8
Laws of 1997, ch. 388, § 43 .....	8
Laws of 1998, ch. 244 .....	4, 5, 9, 22
Laws of 1998, ch. 244, § 10 .....	26
Laws of 1998, ch. 244, § 14 .....	32

Laws of 1998, ch. 244, § 15 .....	11
RCW 9.94A.010 .....	22
RCW 13.04.030 .....	20
RCW 13.04.030(1)(e)(iv) .....	20
RCW 13.40.110 .....	20
RCW 26.28.010 .....	19
RCW 26.28.015 .....	19
RCW 28A. 225.010(1) .....	19
RCW 28A.150 .....	2, 4
RCW 28A.150.010 .....	32
RCW 28A.150.020 .....	32
RCW 28A.150.170 .....	14
RCW 28A.150.200, <i>et seq.</i> .....	29
RCW 28A.150.200 .....	15
RCW 28A.150.210 .....	16, 30
RCW 28A.150.220 .....	14, 30
RCW 28A.150.220(5) .....	20, 30
RCW 28A.150.250 .....	15
RCW 28A.150.250 through .260 .....	30
RCW 28A.150.295 .....	14, 30
RCW 28A.193, <i>et seq.</i> .....	9
RCW 28A.193 .....	4, 22
RCW 28A.193.020 .....	10
RCW 28A.193.020(2) .....	10

RCW 28A.225.010(1)(d).....	32
RCW 28A.300.040 .....	14
RCW 28A.600.010(3) .....	17
RCW 72.09.010 .....	22, 32
RCW 72.09.460 .....	32
RCW 72.09.460(3) .....	26

### CONSTITUTIONAL PROVISIONS

Constitution, Article IX.....	2, 3, 4, 5, 14, 15, 17, 19, 20, 25
Constitution, Article IX , § 1 .....	13, 18
Constitution, Article IX, § 2.....	13

### OTHER AUTHORITIES

Black's Law Dictionary 239 (6 <sup>th</sup> ed. 1990).....	19
Webster's II New Riverside University Dictionary 255 (1984).....	19

## **I. NATURE OF THE CASE**

The basic question presented by this case is whether the State has a constitutional or statutory duty to provide an identical program of education to adult criminal offenders between the ages of 18 and 21 incarcerated in the state prisons, and to juveniles who are tried, convicted and sentenced as adults, and similarly incarcerated, as the State provides to children free to attend the public schools. The State appeals from a trial court judgment imposing such a constitutional and statutory duty.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering its Amended Order Granting Summary Judgment To Defendants School Districts, Granting Summary Judgment To Plaintiffs, And Denying Summary Judgment To Defendants Bergeson and Lehman. CP 2339-50. This Order is set forth in full in Appendix A.



2. The trial court erred in entering Conclusions of Law 1 through 7 of said Order. CP 2347-48.

### **III. ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Does Article IX of the State Constitution impose on the State a duty to guarantee a kindergarten through 12<sup>th</sup> grade (K-12) education to adult criminal inmates between the ages of 18 and 21, or juveniles tried, convicted, sentenced and incarcerated as adults ?

2. Does equal protection require the State to provide an identical program of education to adult criminal inmates between the ages of 18 and 21, or to juveniles tried, convicted, sentenced and incarcerated as adults, as the State provides to children in the public school system?

3. Does the Basic Education Act, RCW 28A.150, apply to such inmates?

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural History**

This suit was filed as a class action by certain inmates in the State prisons against the Superintendent of Public Instruction (SPI) and the Secretary of the Department of Corrections (DOC). CP 988-1004.<sup>1</sup> The trial court certified a class defined as:

All individuals who are now, or who will in the future be, committed to the custody of the Washington Department of Corrections who are allegedly denied access to basic or special education during that custody, and who are, during that custody, under the age of 21 or disabled and under the age of 22.

(Hereinafter the "inmate class".) CP 203-04.

Insofar as the State's appeal is concerned, the inmate class alleged that its members are beneficiaries of Article IX of

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<sup>1</sup> After this suit was commenced, the inmate class amended its complaint, adding certain school districts as defendants. CP 205-18. The trial court granted summary judgment to the school districts, concluding that unlike the state, school districts have no obligation to educate the inmate class. CP 2220-21, 2349. See Appendix A, Conclusion of Law 8 and Order. CP 2349.

the State Constitution and the Basic Education Act, RCW 28A.150. In this respect, the inmate class alleges that it is entitled to the identical education, through the identical educational system, as that provided in the public schools. The inmate class further alleged that Laws of 1998, ch. 244, RCW ch. 28A.193, violates equal protection by providing a course of education to members of the inmate class under the age of 18 that is different from the education provided in the public school system and by directing further study of appropriate educational programs for inmates between the ages of 18 and 21.<sup>2</sup> CP 1002.

The inmate class sought a judgment declaring that its members are beneficiaries of Article IX and the Basic

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<sup>2</sup> The inmate class also alleged that the state violated the Individuals With Disabilities In Education Act (IDEA), 20 U.S.C. § 1400 et seq. and chapter 504 of the Rehabilitation Act of 1973, 20 U.S.C. § 794. CP 1001-02. The trial court granted summary judgment to the state dismissing these claims by the inmate class. CP 2349. The inmate class cross appeals from the trial court's judgment on these claims. CP 2391-2410.

Education Act. CP 1001. The inmate class also sought injunctive relief requiring the State to provide class members the same course of instruction, through the same educational system, provided in the public school system and “compensatory education” identical to that provided in the public schools to inmates who had been allegedly denied such an education in the past. CP 1003-04.

On stipulated facts and cross motions for summary judgment, the trial court granted judgment to the inmate class on its claims under Article IX of the state constitution, the Basic Education Act and equal protection and invalidated Laws of 1998, chapter 244.<sup>3</sup> CP 903-1294, 1294A-1607, 1893-2016, 2138-49, 2216-26, 2277-80, 2378-89.

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<sup>3</sup> The trial court’s oral decision is set forth in Appendix B. CP 2216-2225. The stipulated facts are set forth in Appendix C (attachments omitted). See CP 1010-20; 1479-1569.

**B. Factual Background**

This is not a case about whether the inmate class will be afforded educational opportunities. The class members are afforded educational opportunities. CP 1015-17. Instead, this case is about whether the state must operate the public school system in adult prisons.

Pursuant to statutes governing the adult prison system, the DOC offers all prisoners the opportunity to participate in several programs of education. CP 1015-17. These programs include adult basic education, English as a second language, general educational development (GED) preparation, vocational skills training, crime related programs, and job readiness training. CP 1015-16.

Adult basic education includes instruction in reading, writing, mathematics, interpersonal and problem solving skills. CP 1016. The competency-based GED preparation program involves preparation courses for taking the GED examination

in the five areas covered by the examination: writing, social studies, science, interpreting literature and the arts, and mathematics. English as a second language courses include instruction in speaking, reading and writing skills for offenders whose primary language is a language other than English. Job readiness training includes introductory instruction in those basic skills necessary for workplace success such as industrial safety, job dynamics, and computer basics. Vocational skills training includes preparation for various occupations, including building construction/maintenance, business computers, welding, barbering, etc. Crime related programs include courses in anger/stress management, victim awareness and similar programs. CP 1015.

Historically, the DOC, through contracts with local community colleges, provided educational programs at some institutions that led to the granting of a high school diploma. CP 1014. These programs were discontinued in 1996 when

DOC adopted competency-based instruction. This decision reflected the fact that most offenders obtained GED certificates instead of high school diplomas. CP 1014-15; 1019. For fiscal years 1991-1996, an average of 37 high school diplomas were awarded per year to inmates incarcerated in DOC, while for the same years an average of 567 GED certificates were awarded per year to inmates. *Id.*

In 1997 and 1998, in compliance with Laws of 1997, ch. 338, § 41, DOC decided to concentrate all male inmates under age 18 at the Clallam Bay Corrections Center (CBCC) and all female inmates under age 18 at the Washington Corrections Center for Women (WCCW). *See* CP 1012. The purpose of this concentration was to separate the under age 18 inmates from older inmates as required by Laws of 1997, ch. 338, § 41. As required by § 43 of that statute, DOC entered into a contract with the Peninsula School District to provide educational services to

the female population at WCCW for the period of February 2, 1998 through August 31, 1998. CP 1018, 1526-40.<sup>4</sup>

As of April 1998, there were approximately 100 offenders incarcerated in the DOC under age 18. CP 1012. Of these, about 10 were women and 90 were men. As of the same date, there were approximately 1,027 inmates under the age of 21 incarcerated in prisons operated by the DOC. CP 1012. Approximately 209 of the offenders under age 21 were documented as having a high school diploma or GED. CP 1015. The number of inmates under 18 is expected to increase over the next several years as a result of the mandatory decline provisions of Laws of 1997, ch. 338. CP 1012.

In 1998, the Legislature passed ESSB 6600. Laws of 1998, ch. 244, RCW ch. 28A.193, et seq. CP 1343-50.<sup>5</sup> ESSB

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<sup>4</sup> DOC was in the process of negotiating a similar contract for the male inmates when the Legislature changed the law in 1998 as set forth below. See CP 1937.

<sup>5</sup> The record on review did not contain all numbered pages to ESSB 6600. See CP 1343-50. Thus, ESSB 6600 is attached hereto as Appendix D.



6600 provides generally that the SPI shall solicit proposals from education providers to provide educational services to inmates under the age of 18 in adult prisons. RCW 28A.193.020; CP 1343A-1344. The school district in which the inmates are located has a right of first refusal to provide the education program. If the school district declines, other providers such as community colleges, Educational Service Districts and the like, may provide the service. In the event all providers decline, the Educational Service District in which the inmates are located must provide the service. CP 1344; RCW 28A.193.020(2).

The Legislature in ESSB 6600 required SPI to solicit education providers for inmates because it was concerned that requiring local school districts to provide education programs to inmates would place an unfair burden on districts with prisons in their jurisdictions. *See* CP 1937, 1959, 1969. According to the House Bill Report, the Legislature did not believe that school districts should be required to serve prison inmates:

Local school districts should not be required to provide education services in adult correctional facilities. This bill will establish a process for finding a willing and capable education provider.

CP 2078 (House Bill Report ESSB 6600); *see* CP 1936 (“Districts are also concerned about issues of liability, employee safety and other contract issues, and servicing a population and environment with which they do not have experience.”).

ESSB 6600 called for a study from SPI and DOC regarding the educational needs of inmates aged 18-21. Laws of 1998, ch. 244, § 15; CP 1349A-1350. The purpose of the study is to determine:

the impact of providing educational services and special educational services to those inmates on the security and penological interests of the correctional institutions that incarcerate those inmates, and the ability of local school districts, the community and technical colleges, private vendors, juvenile detention centers, and the correctional institutions to provide those educational and special services.

*Id.*

The reason the Legislature chose to study the issue of educating 18-21-year-old inmates was that there were "a great many unanswered questions" regarding the needs of that population, the costs of educating them, and who the provider should be. *See* CP 1969-70.

To implement ESSB 6600, SPI issued a request for proposals for the provision of educational services to inmates under the age of 18. CP 1018, 1542-1551. Cape Flattery School District, in which Clallam Bay Corrections Center is located, signed contracts with DOC and SPI to provide educational services to the under 18-year-old population at Clallam Bay for the 1998-99 school year, and continuing from year to year until terminated by the parties. CP 1018, 1488-1505. Peninsula School District signed similar contracts for the under age 18 population at the women's prison. CP 1018; 1483-86; 1507-17. These contracts provide that inmates who turn 18 while in the

program may complete the academic year before leaving the program. CP 1489, 1496, 1508.

## V. ARGUMENT

### A. **The State's Constitutional Obligation Under Article IX Of The State Constitution Is To Establish A Uniform, General And Appropriately Funded Public School System.**

Article IX, § 1 of the State Constitution provides:

It is the paramount duty of the State to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

The State Constitution directs the Legislature to make ample provision for the education of all children by establishing a general and uniform system of public schools.

*Seattle School District v. State*, 90 Wn.2d 476, 513, 585 P.2d 71 (1978) (*School Funding I*). Article IX, § 2 provides:

The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for the common schools

shall be exclusively applied to the support of the common schools.

**B. The State Has Provided A Publicly Funded General And Uniform System Of Common Schools. That The Inmate Class Members Have Disqualified Themselves From Attending The Public School System Does Not Diminish The Fact that The State Has Satisfied Its Constitutional Obligation.**

The State does not question that Article IX places on it a constitutional duty to provide adequate public educational opportunities for children residing in Washington and that the constitution requires the State to satisfy its obligation by creating a general and uniform system of public schools. The State has established just such a public school system. See RCW 28A.150.295.

The Legislature has put in place an elaborate framework for administering the public school system through the Office of the Superintendent of Public Instruction, the State Board of Education and school districts. RCW 28A.150.170, 28A.150.220, 28A.300.040. The Legislature has defined the scope of basic education to be delivered by the public school

system in grades kindergarten through 12, and in response to *School Funding I*, the Legislature has established a system for funding the public schools. RCW 28A.150.250. These actions fully satisfy the State's obligation under Article IX. *Seattle School District*, 90 Wn.2d at 518-20; CP 1305. See RCW 28A.150.200.

Despite the fact that the State has a publicly funded general and uniform system of public schools, the inmate class alleges that the State has not satisfied its constitutional duty. CP 1001-02. In effect, the inmate class argues that the State is constitutionally compelled to ensure that every child residing in Washington actually receives a publicly funded K-12 education, regardless of criminal conduct that causes his or her removal from society and incarceration in the adult prison system. CP 1001. Article IX does not require the State to guarantee that every individual receives a publicly funded K-12 education. What the constitution requires and what the State

has done is to put in place a public school system that offers every child, without regard to “race, color, caste, or sex, the *opportunity* for a K-12 education. See RCW 28A.150.210.

These provisions [Article IX, §§ 1 and 2] together contemplate an educational system in which to the extent practical through statewide planning and financial support, each child is afforded an equal *opportunity* to learn, regardless of differences in his or her family and community resources.

*Seattle School District*, 90 Wn.2d at 547, Utter, J. concurring (emphasis added).

The simple fact of the matter is that by virtue of their own criminal behavior, the members of the inmate class have disqualified themselves from taking advantage of the State’s public school system. While this criminal wrongdoing reflects serious shortcomings on the part of the inmate class members, it does not amount to a constitutional shortcoming on the part of the State. See *Seattle School District v. State*, 90 Wn.2d at 513 (“the State may discharge its ‘duty’ only by performance unless performance is prevented by the holder of the right”).

The criminal conduct of the inmate class members compels their removal from the general public, including the school system that the Legislature has established to serve the public, and requires their incarceration in adult prison facilities. The criminal conduct of the inmate class and the legal consequences of that conduct hardly amount to a failure by the State to provide an opportunity for class members to receive an education in the public schools. Rather, it amounts to a failure on the part of the inmate class to take advantage of the opportunity that the State provides.<sup>6</sup>

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<sup>6</sup> It is not a novel concept that persons convicted and incarcerated for serious criminal offenses lose many opportunities that they otherwise would have had. *In re Young*, 95 Wn.2d 216, 219-20, 622 P.2d 373 (1980) ("Persons sentenced to incarceration necessarily lose many of the rights and privileges of ordinary citizens, 'a retraction justified by the considerations underlying our penal system'."), citing *Price v. Johnston*, 344 U.S. 266, 285 (1974); see also *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418 (1995) ("lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights."). Indeed, students expelled from the public schools similarly deprive themselves of the opportunity for a public school education. See RCW 28A.600.010(3). But their expulsion does not mean that the State has failed to meet its obligations under Article IX.



**C. The Beneficiaries Of Article IX Are Children Residing In The State. The Members Of The Inmate Class Are Not Children Within The Meaning Of Article IX.**

Even if the State were constitutionally obligated to guarantee that each child residing in Washington receives a K-12 education, and the State is not, the constitutional claim of the inmate class would fail.

In interpreting a constitutional provision, the court is to ascertain and give effect to the purpose for which it was adopted. *Westerman v. Cary*, 125 Wn.2d 277, 288, 892 P.2d 1067 (1994). In this regard, the court looks first to the language used in the provision, and gives the language its ordinary meaning. *Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997); *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969).

Under Article IX, § 1, the State's obligation to make ample provision for public education is a duty owed to "children residing within its borders". CP 1030. The term

“children’ is not defined in Article IX. In its ordinary usage, a child is a “person between birth and puberty”. *Webster’s II New Riverside University Dictionary* 255 (1984). Black’s Law Dictionary 239 (6<sup>th</sup> ed. 1990) includes the following definition of the term “child”: “At common law one who had not attained the age of fourteen years, though the meaning now varies in different statutes[.]” CP 1266.

In Washington law, “all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years.” RCW 26.28.010. Specifically, such persons may marry, vote, contract, execute a will, make decisions regarding their own medical care and may sue or be sued in their own right. RCW 26.28.015. The state’s compulsory education law similarly applies only to persons under the age of 18. RCW 28A. 225.010(1).

In this case, the majority of the inmate class is comprised of persons over the age of 18. *See* CP 1012. These class

members are not children as that term is ordinarily defined. Rather, they are adults, having reached the age of legal majority. Article IX does not compel the state to provide a public common school education to adults. The trial court erred in so holding.<sup>7</sup>

The remaining members of the inmate class are persons under age 18 who have committed particularly serious crimes. *See* CP 1012. The criminal law and the constitution allow these members of the inmate class to be treated as adults. RCW 13.04.030(1)(e)(iv); RCW 13.40.110. CP 1268-71. *See In re Boot*, 130 Wn.2d 553, 572, 925 P.2d 964 (1996) (sustaining RCW 13.04.030 against constitutional challenge).

The inmate class members under the age of 18 lawfully have been tried, convicted, sentenced and incarcerated as

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<sup>7</sup> The trial court erroneously elevated to constitutional stature the provisions of RCW 28A.150.220(5) which make each school district's program of basic education available to persons at least 5 years old and less than 21. CP 2221-22, 2386-87. The fact that the Legislature has chosen to make a public school K-12 education available to persons up to age 21 does not mean that it constitutionally is compelled to do so. For

adults. As to perhaps the most fundamental of their constitutional interests -- their very liberty -- these members of the inmate class are deemed adults. There is no reason to treat them as anything less for purposes of education. Indeed, the very history and circumstances of these members of the inmate class suggest that their educational needs are quite different from children who are free to attend the public schools and who presumably will remain free upon completion of their K-12 educations.

As this court has recognized, the education and training appropriate for juvenile offenders incarcerated in juvenile detention facilities may be different from those of other juveniles. *Tommy P. v. Board of Commissioners*, 97 Wn.2d 385, 398, 645 P.2d 697 (1982) ("While we do not attempt to specify the content of such a program of education, it should reasonably address the special needs of juvenile offenders and

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reasons discussed above, the State is not, and the trial court erred in ruling otherwise.

the policy of the Legislature of rehabilitating such offenders into productive members of society.”). This is all the more true of inmates in the adult prison system, where the primary objective of incarceration is punishment and education plays a secondary role. *See* RCWs 9.94A.010, 72.09.010; *State v. Barnes*, 117 Wn.2d 701, 711, 818 P.2d 1088 (1991).

**D. The Equal Protection Clause Does Not Compel The State To Provide The Same Program Of Education To Criminal Offenders Incarcerated In The State's Prisons, As The State Provides To Persons Who Are Not Incarcerated. The Trial Court Erred In Invalidating Laws Of 1998, Chapter 244.**

The trial court held that ESSB 6600, Laws of 1998, chapter 244 (chapter 28A.193 RCW) violates the equal protection clause because it treats members of the inmate class differently for educational purposes from free children, at liberty to attend the public school system. The trial court erred in so holding.

Statutes are presumed to be constitutional. *State v. Shawn P.*, 122 Wn.2d 553, 560-61, 859 P.2d 1220 (1994). To

invalidate a statute, the challenging party must prove beyond a reasonable doubt that the statute violates the constitution. *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987).

In this case, the inmate class challenges ESSB 6600 under the equal protection clause. CP 1002. Equal protection of the laws requires only that persons similarly situated with respect to the purpose of the law receive similar treatment. It does not require similar treatment for persons dissimilarly situated. *Monroe v. Soliz*, 132 Wn.2d 414, 427, 939 P.2d 205 (1997). The inmate class and children free to attend the public schools are not similarly situated with respect to educational programs. By virtue of their criminal conduct, members of the inmate class are incarcerated. They are confined to a penal institution. They are not free to leave prison to attend the public school system or to take advantage of other programs and amenities available generally in free society. By law, the inmate class resides in and must remain in a secured facility.

In addition, their criminal misconduct and attendant incarceration indicates that educational and training programs appropriate to their circumstances may be very different from those appropriate for law abiding children. In short, equal protection considerations are not implicated by ESSB 6600.

Moreover, a statute generally will be upheld against an equal protection challenge if it is rationally related to a legitimate state interest. *See State v. Shawn P.*, 122 Wn.2d 553, 560-61, 859 P.2d 1220 (1994). The trial court erroneously applied a strict scrutiny test to ESSB 6600. Such scrutiny applies only if the legislative classification effects a suspect class or threatens a fundamental right. *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987). ESSB does neither.

Juveniles are neither a suspect nor a semi-suspect class. *In re Boot*, 130 Wn.2d 553, 572-73, 925 P.2d 964 (1996). Distinctions based on age generally are subject to rational basis

review. *Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S. Ct. 2395, 2406, 115 L. Ed. 2d 410 (1991).

Nor is there a fundamental right to an education under the United States Constitution. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973). Moreover, as demonstrated above, the State has fully satisfied its obligation under Article IX. And for reasons previously explained, the inmate class members are not children and thus are not beneficiaries of Article IX of the State Constitution. The trial court therefore erred in applying strict scrutiny to ESSB 6600.

Under the rational basis test, the legislative classification will be upheld unless it rests on grounds that are wholly irrelevant to achievement of legitimate state objectives. *State v. Shawn P.*, 122 Wn.2d at 561. "Under the rational basis test, a statutory classification will be upheld if any conceivable state of facts reasonably justifies the classification." *Id.* at 563-64 citing *Haberman v. WPPSS*, 109 Wn.2d 107, 140, 744 P.2d



1032 (1987). The rational basis need not have actually motivated the Legislature. *Haberman*, 109 Wn.2d at 140.

Here, the Legislature has authorized different types of educational programs for inmates than it provides to law abiding children. As to law abiding children, the Legislature chose in the Basic Education Act to make a high school education available through age 21. For inmates under 18, SPI has contracted to offer that type of education, as ESSB 6600 authorizes. *See* Laws of 1998, ch. 244 § 10, CP 1558-59. As to inmates over 18, educational programs include GED preparation, English as a second language, job readiness, vocational training, and the like. CP 1016; *see also* RCW 72.09.460(3) (requiring DOC to prioritize its resources to meet the goals of “[a]chievement of basic academic skills through obtaining a high school diploma or its equivalent and achievement of vocational skills . . .”).

The legislative distinction between inmates and law abiding children is rationally related to the legitimate state objective of meeting the unique educational needs of prisoners. The Legislature rationally could have concluded that inmates have different educational needs than law abiding children. Inmates, by virtue of their criminal history, are less likely to need purely academic instruction than they are to need competency-based programs that teach basic skills like reading and writing and vocational programs that teach marketable employment skills. Arguably, the purpose of an inmate educational program should be to enable inmates to obtain gainful employment upon release rather than to provide them with college preparation.<sup>8</sup>

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<sup>8</sup> In *School Funding I*, the court emphasized that the content of any educational program should be decided by the Legislature. *Seattle School District v. State*, 90 Wn.2d at 518-19. Also, the courts traditionally have recognized that the problems of prison administration are unique and intractable and best left to the discretion of prison officials. See *Turner v. Safely*, 482 U.S. 78 (1987).

As to under 18-year-old inmates, the Legislature rationally could have concluded that such inmates are the most appropriate to receive a high school diploma program. The small number of such inmates and their relatively young age could be seen to justify the provision of a high school program for these inmates and not for those inmates over age 18. Judged by a rational basis standard, the legislative classifications made by ESSB 6600 plainly are rational.

The inmates contended below that the education program provided under ESSB 6600 was unconstitutional even as to those inmates under age 18 because the statute allegedly burdened or delayed the exercise of their rights. CP 1002. The inmates speculate that the request for proposal process may cause a delay in selecting a provider or may result in choosing an unqualified provider. This contention is meritless. Even assuming that ESSB 6600 delays the selection of a provider, that delay does not rise to the level of requiring strict scrutiny

of the statute. *See Planned Parenthood v. Casey*, 505 U.S. 833, 886, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (upholding 24-hour waiting period prior to exercise of abortion rights). Due to school district concerns regarding safety, and their unfamiliarity with the prison environment, the Legislature chose not to require them to provide a program. Instead, the Legislature authorized a request for proposal process to select a willing and capable provider. CP 2078. Since the process requires the selection of a capable provider, the statute does not “burden” these inmates alleged educational rights so as to warrant strict scrutiny.

**E. The Basic Education Act Establishes A General And Uniform System Of Public Schools Available To Those Persons Free To Attend Them. It Does Not Apply To Persons Incarcerated In Adult Prisons.**

The trial court held that the Basic Education Act, chapter RCW 28A.150.200 *et seq.*, applies to the inmate class. The trial court erred.

The Basic Education Act establishes a uniform system of public schools, available to those free to attend them. *See* RCW 28A.150.295; CP 1304. The Act goes on to define the course of education to be provided in those schools and to establish the administrative apparatus to operate them. The Basic Education Act states the goals for the common school system (RCW 28A.150.210); the requirements to be followed by the school districts (RCW 28A.150.220); and determines how State resources are to be distributed to fully fund the constitutionally required education program (RCW 28A.150.250 through .260). Pursuant to RCW 28A.150.220(5), school districts throughout the State deliver basic education to students in the common school system, ages 5 and less than 21 years of age, who reside in that particular school district. CP 1306.

Several rules of statutory construction are relevant and dictate that the Basic Education Act does not apply to the inmate class. The primary purpose of statutory interpretation is

to identify and give effect to the intention of the Legislature. *Lindstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998). The court looks to the language of the statute read as a whole, and considered in light of related statutes, to discern legislative intent. *Western Petroleum Importers, Inc. v. Friedt*, 127 Wn.2d 420, 428, 899 P.2d 142 (1995); *Fray v. Spokane County*, 134 Wn.2d 637, 649, 952 P.2d 601 (1998). Great weight is accorded to contemporaneous construction placed on a statute by officials charged with its enforcement, especially where the Legislature has acquiesced in that construction over a long period. *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995).

Nothing in the Basic Education Act read as a whole and considered in context suggests or implies that it was intended to apply in prisons or to prisoners. Read as a whole, it seems evident that the Act applies to the public school system, not the adult prison system. Key terms such as “common schools” and

“public schools” provide the frame of reference for the entire Act and do not include prisons. RCW 28A.150.010, .020; *School Dist. No. 20 Spokane County v. Bryan*, 51 Wash. 498, 504, 99 Pac. 28 (1909). This also is consistent with the trial court’s ruling that school districts have no duty to educate inmates. CP 2366, 2376, 2387.

In addition, over much of the time that the Act has been in effect, the Legislature has provided separately for the education of prisoners. *See* CP 1015-16 (facts 36-39); RCW 72.09.010; RCW 72.09.460 (providing an education program for inmates). The Legislature’s very enactment of ESSB 6600 demonstrates that it does not consider the Basic Education Act to apply to the inmate class. The Legislature explicitly excluded prisoners from the compulsory attendance provisions of the Act in ESSB 6600. *See* Laws of 1998, ch. 244, § 14; RCW 28A.225.010(1)(d); CP 1348A. This too expresses the Legislature’s view that prisoners do not have a statutory right

to basic or special education services under the Basic Education Act.

Finally, prior to the trial court's ruling, the Act had never been applied to persons incarcerated in adult prisons. *See* CP 1013-14 (facts 25-30). The Basic Education Act has been law for 21 years, since 1978, yet school districts under the Act have never provided a K-12 program of education to inmates incarcerated in adult prisons. *See* CP 1018 (stipulated fact 47).

In sum, the Basic Education Act simply does not apply to the inmate class.

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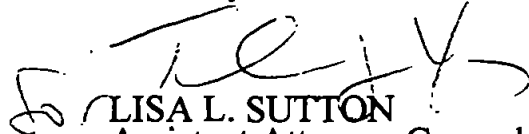



## VI. CONCLUSION

For the reasons stated above, defendants Bergeson and Lehman request that this court reverse the trial court's order granting summary judgment to the inmate class.

RESPECTFULLY SUBMITTED this 1 day of  
April, 1999.

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'98 DEC -3 P2:18

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DEPT. 1

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

NO. 97-2-02754-1

AMENDED ORDER

SUNSIRAE TUNSTALL, et al.,

Plaintiffs,

v.

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

Defendants.

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

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

Appendix A

AMENDED ORDER GRANTING SJ TO  
SDs & PLTFs & DENYING SJ TO OSPI &  
DOC; & RULING ON OTHER MOTIONS.

1

CP 2339

ATTORNEY GENERAL OF WASHINGTON  
Criminal Justice Division  
PO Box 40116  
Olympia, WA 98504-0116  
(360) 586-1445

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

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

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

- 18 • Defendants Bergeson's and Lehman's Motion for Summary Judgment; Memorandum of  
19 Authorities in Support of Summary Judgment and Dismissal; Declaration of Lisa L. Sutton  
20 in Support of Motion for Summary Judgment and Dismissal by Bergeson and Lehman dated  
21 September 8, 1998 with attached appendices 1-31 and stipulated facts 1-8.
- 22 • Appendices 1-31 to Defendants Bergeson's and Lehman's Motion for Summary Judgment:
- | 23 | Appendix # |  |
|----|------------|--|
| 24 | 1          | Plaintiffs' Third Amended Complaint for Injunctive and Declaratory Relief and<br>25 Compensatory Education (original complaint filed November 4, 1997, third<br>26 amended complaint dated August 4, 1998) |
|    | 2          | Defendant Teresa Bergeson's Second Amended Answer and Defenses to<br>Plaintiffs' Third Amended Complaint   |
|    | 3          | Defendant Joseph Lehman's Second Amended Answer and Defenses to Plaintiffs'<br>Third Amended Complaint; Defendant Shelton School District's Amended  |

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

1		Appendix #
2		U.S. 176, 208, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)
3	24	<i>Commonwealth of Virginia, Dept. of Educ. v. Riley</i> , 106 F.3d 559, 566 (4 <sup>th</sup> Cir. 1997)
4	25	20 U.S.C. § 1400 <i>et seq.</i> Individuals With Disabilities Act (selected portions)
5	26	34 C.F.R. § 300.300(b)(5)
6	27	<i>Yankton School District v. Schramm</i> , 93 F.3d 1369, 1376-77 (8 <sup>th</sup> Cir. 1996)
7		<i>Timms v. Metro District of Wabash County</i> , 722 F.2d 1310, 1314 (7 <sup>th</sup> Cir. 1983)
8		<i>Merrifield v. Lake Centennial School Corp.</i> , 770 F. Supp. 468 (N.D. Ind. 1991)
9	28	<i>Sellers v. School Bd. of Manassas, Va.</i> , 141 F.3d 524, 528-29 (4 <sup>th</sup> Cir. 1998)
10	29	<i>Monahan v. Nebraska</i> , 687 F.2d 1164, 1170 (8 <sup>th</sup> Cir. 1982)
11	30	29 U.S.C. § 794(a); § 504 Rehabilitation Act of 1973
12	31	34 C.F.R. §§ 104.3(k), 104.31, 104.33
13	•	Reply Memorandum in Support of Defendants Lehman's and Bergeson's Motion for Summary Judgment; Declaration of Lisa L. Sutton in Support of Reply Memorandum for Summary Judgment and Dismissal by Bergeson and Lehman dated September 15, 1998 with attached appendix 32.
14		
15		Appendix #
16	32	House Bill Report on ESSB 6600 and History of ESSB 6600
17		DEFENDANTS SCHOOL DISTRICTS' MOTION FOR SUMMARY JUDGMENT
18	•	Defendants Cheney, Monroe, Walla Walla, Peninsula, Cape Flattery, Steilacoom Historical and Shelton School Districts' Motion for Summary Judgment (and Memorandum); Declaration of William A. Coats dated September 8, 1998 with attached Exhibits 1-5:
19		
20		Exhibit #
21	1	Laws of 1997, ch. 338 (ESHB 3900)
22	2	Laws of 1998, ch. 244 (ESSB 6600)
23	3	Stipulated Facts
24	4	Stipulation of Legal Issues to be Determined on Summary Judgment
25	5	Transcript of Hon. Robert Doran's Oral Opinion in <i>Seattle School District No. 1 v. Washington</i> , pages 11-16
26		

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

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

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

11 Exhibit #

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

- 1 12 United States Senate Report No. 94-168 (1975) regarding the Education For All  
2 Handicapped Children Act of 1975
- 3 13 Transcript of proceedings on August 7, 1998 in *Tunstall v. Bergeson*, Thurston County  
4 Superior Co. Superior Court No. 97-2-02754-1
- 5 14 Memorandum dated October 27, 1986 to K. Kautzky, Deputy Secretary, DOC, and R.  
6 Fanning, Dir. Div. of Management & Budget from D. Carnahan, Educational  
7 Administrator, DOC (DOC document # RPTS 00071792 - 00071797), including  
8 attachments: (a) New Request Level for Special Education Teachers by Institutions,  
9 (DOC Document # RPTS-00071794); (b) letter dated October 23, 1986, to J. Schrag,  
10 Asst. Supt. OSPI form D. Carnahan, Educational Admin., (DOC document # RPTS-  
11 00071795); (c) October 20, 1986 Memorandum to A. Lynch, OSPI Institutional  
12 Education Coordinator, from D. Carnahan (DOC document # RPTS 00071796 -  
13 00071797)
- 14 15 Declaration of Minh Thach dated September 15, 1998

10 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

13 Exhibit #

- 14 1 Excerpts from the 1991 OSPI/DOC Task Force Report on Special Education in Adult  
15 Corrections. Document #03-00001278, produced during discovery by OSPI, is the  
16 distribution cover memo, and document # RPTS-00070249-00070253, produced by  
17 DOC, is the introductory section of the Task Force Report.
- 18 2 Letter dated September 15, 1997 from defendant Lehman to defendant Bergeson,  
19 produced by OSPI during discovery as document #19-00000370
- 20 3 Excerpts of the deposition of Teresa Bergeson, Superintendent of Public Instruction,  
21 that was taken in this case on May 18, 1998
- 22 4 OSPI/DOC Joint Report to the Legislature dated May 1998, produced by OSPI as  
23 document #03-00001454- 03-00001462
- 24 5 A document entitled "Columbia Legal Services request to OSPI for disability  
25 assessments and special education services" that was produced by OSPI as document  
26 #19-00000380 - 19-00000381
- 27 6 Findings of Fact and Conclusions of Law in *Seattle School District v. State*, Thurston  
County Superior Court No. 81-2-1713-1, by Honorable Robert Doran, entered on  
September 7, 1983
- 28 7 Memo dated January 22, 1998 from Jean Stewart, DOC Educational Services  
Administrator, to Vicki Rummig, produced by DOC as document #LEG-00030742-  
00030744

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



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

11                   (\*The Court excluded from consideration hearsay statements by the school personnel

12       contained in Plaintiffs' exhibits 2, 4, and 6 attached to the Second Supplemental Declaration of

13       Patricia J. Arthur; see Court's Order dated October 9, 1998.)

14                               PLAINTIFFS' MOTION TO CLARIFY COURT'S ORAL RULING

15   OF OCTOBER 9, 1998

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

23                               PLAINTIFFS' MOTION FOR RECONSIDERATION

   OF THE COURT'S ORDER OF NOVEMBER 6, 1998

- 24          1       Plaintiffs' Motion to Shorten Time; Declaration In Support of Plaintiffs' Motion to
- 25                   Shorten Time; Motion for Reconsideration of the Court's Order of November 6, 1998;
- 26                   Memorandum in Support of Plaintiffs' Motion for Reconsideration of the Court's
- Order dated November 13, 1998

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

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

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

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

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

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

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

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

15                    FINDING OF UNDISPUTED FACTS

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

19                    CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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**I**

3

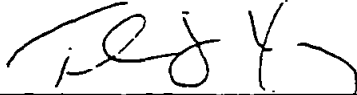
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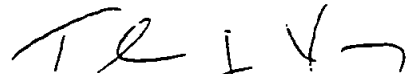
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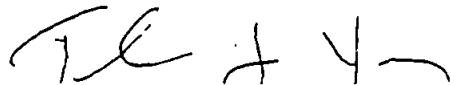
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Superintendent of Public Instruction  
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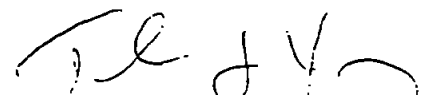
9  
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MICHAEL A. PATTERSON, WSBA #7976  
Attorney for Defendants Superintendents of  
11 Steilacoom; Cape Flattery; Monroe;  
Cheney; Peninsula; and Walla Walla  
12 School Districts

13 Approved as to form;  
14 notice of presentation waived:  
15

16   
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Attorneys for Plaintiffs



1 OLYMPIA, WASHINGTON, FRIDAY, OCTOBER 9, 1998

2 11:00 a.m.

3  
4 <<<<<< >>>>>>

5  
6 THE COURT: Good morning. This is  
7 my decision in Tunstall versus Bergeson.

8 This case came before the Court on respective  
9 parties' motions for summary judgment. The central  
10 issue in the case is whether, under the Washington  
11 Constitution, Washington Basic Education Act and the  
12 Federal IDEA provisions, the defendants have a duty to  
13 provide the opportunity to obtain a high school diploma  
14 to all inmates in DOC facilities under the age of 22.

15 The undisputed facts in this case are the  
16 plaintiff class is composed of persons below the age of  
17 22 who are incarcerated in the Washington State  
18 Department of Corrections due to adult criminal  
19 conviction.

20 Historically, neither the State of Washington nor  
21 the school district defendants have provided any  
22 educational opportunities leading to a high school  
23 diploma for these inmates in a DOC facility. The State  
24 has provided opportunities through the community  
25 colleges for the acquisition of a GED.

1           In addition, no educational programs for persons  
2           who have disabilities, within this setting, has been  
3           provided.

4           In 1998, the legislature attempted to address  
5           these issues arising from this case by passing Engross  
6           Substitute Senate Bill 6600. The plaintiffs' class  
7           challenges this enactment as unconstitutional.

8           The language in the Washington Constitution,  
9           Article IX, Sections 1 and 2, is critical to the  
10          decision in this case. These provide, as in their  
11          entirety, as follows:

12          "It is the paramount duty of the State to make  
13          ample provision for the education of all children  
14          residing within its borders without distinction or  
15          preference on account of race, color, cast or sex.

16          "The legislature shall provide a general and  
17          uniform system of public schools. The public school  
18          system shall include common schools and such high  
19          schools, normal schools and technical schools as may  
20          hereafter be established. But the entire revenue  
21          derived from the Common School Fund and the State tax  
22          for common schools shall be exclusively applied to the  
23          support of the common schools."

24          These provisions were considered in School Funding  
25          One, which is 90 Washington Second 476, 1977, wherein



1 the Washington Supreme Court noted the following:

2 "We also disagree with the appellant's suggestion  
3 that the framers only intended that a general and  
4 uniform school system be provided. See Constitution,  
5 Article IX, Section 2."

6 Had this been their intent, it would have been  
7 unnecessary to use the words "ample provision" in  
8 Section 1. Unlike other states, our constitution  
9 couples the State's "paramount duty" with the words  
10 "ample provision."

11 The duty to make ample provision as opposed to  
12 merely providing for a general and uniform school  
13 system is the only instance in which our constitution  
14 declares a specific State function to be a "paramount  
15 duty" of the State.

16 Had the framers intended that the paramount duty  
17 was to provide a general and uniform school system, the  
18 constitution would have so provided.

19 They further write, "The Constitution, Article IX,  
20 Section 1, does not merely seek to broadly declare  
21 policy, explains goals or designate objectives to be  
22 accomplished. It is declarative of a constitutionally  
23 imposed duty. Thus, we hold that the Constitution,  
24 Article IX, Section 1, is not a preamble."

25 This was our Washington Supreme Court in 1977.

1           Consistent with this holding, I find the duty  
2           contained in Section 1 is a separate and distinct duty  
3           from the duty to provide for a uniform, in general,  
4           common school scheme found in Section 2.

5           It is worth noting that even Section 2 recognizes  
6           the possibility that there may be more than one type of  
7           public school, distinguishing as it does between the  
8           common schools and high schools, normal schools and  
9           technical schools.

10          It is also of significance that Section 2 provides  
11          that the funding for the common schools from the Common  
12          School Fund and State taxes for the common schools may  
13          not be used for other than that of common schools.

14          The legislature has recognized that there are two  
15          types of schools authorized by the constitution, the  
16          common school as defined for purposes of educational  
17          law in Washington. As schools maintained for public  
18          expense in each school district in carrying on a  
19          program from kindergarten through the 12th grade, I  
20          refer to RCW 28(a), 150.020.

21          Public schools, on the other hand, are defined as  
22          consisting of the common schools and other schools  
23          below the college age supported at public expense.

24          The school districts in this case are creatures of  
25          statute, not of the constitution. As public agencies,

1           they have only those powers and rights granted by the  
2           statutes creating them. School districts are  
3           authorized by Chapter 28(a) 315. And those created are  
4           given certain authority in Chapter 28(a) 320, together  
5           with other provisions throughout the Basic Education  
6           Act, which is RCW 28(a).

7           I find other than Engross Substitute Senate Bill  
8           6600, this court cannot find any statute in which the  
9           school districts are given either the power or the  
10          right to go into DOC facilities to provide educational  
11          programs. Even 6600 does not mandate school districts  
12          to provide educational services in DOC facilities. It  
13          merely authorizes them to do so if satisfactory  
14          contractual arrangements can be made.

15          Therefore, this court finds that the school  
16          districts have no obligation under the constitution,  
17          Federal or State, or the laws of Washington to provide  
18          any educational programs to inmates in the prisons of  
19          the State of Washington and grants summary judgment in  
20          their favor.

21          As noted above, the constitution provides that the  
22          State has a paramount duty to make ample provision for  
23          the education of all children residing within its  
24          border without distinction. This duty is carried on in  
25          part by the creation and maintaining of common schools

1 under Section 2, Article IX.

2 However, the Basic Education Act provides that the  
3 act covers children from age 3 to 22 under various  
4 circumstances. Since the legislature has seen fit to  
5 define children for purposes of education as reaching  
6 up to the age of 22, this is the age range which  
7 applies to all constitutional provisions and statutes  
8 dealing with education. And the State cannot  
9 discriminate based on cast or class.

10 Therefore, this court finds the State has a duty  
11 to make provisions for basic education for juvenile  
12 inmates in adult DOC facilities. However, the issue of  
13 how the State carries forth this duty is not before the  
14 Court at the present time.

15 This court finds the legislature retains the right  
16 to restrict the age definition for children for  
17 educational purposes and may change their definition as  
18 they see fit. However, such a change in definition  
19 must be uniform and applied to all children who fit  
20 into the redefined definition of children.

21 The legislature attempted to do this during this  
22 past year's session with the passage of 6600. However,  
23 in doing so, it has distinguished between inmates in a  
24 DOC facility and persons who are not inmates. Since  
25 the duty to provide basic education is a "paramount

1 duty," it has been recognized by the Supreme Court as  
2 creating the paramount or absolute right.

3 A right which is absolute is a right that is  
4 somehow greater than one that is merely fundamental.  
5 It has been held by the Supreme Court that a statute  
6 which infringes on a fundamental right is presumed  
7 unconstitutional. See State versus Copfer  
8 Enterprises, 82 Washington Second 994, 1973.

9 To overcome this presumption, the State bears the  
10 burden of justification and must show a compelling  
11 State interest in the regulation of the subject within  
12 the State's constitutional power to regulate. And that  
13 connection between the statute and the State interests  
14 must be a necessity and not merely a rational,  
15 reasonable or even a substantial relationship.

16 The same analysis will apply with at least equal  
17 force to a right which is paramount or absolute.  
18 Therefore, Engross Substitute Senate Bill 6600 impinges  
19 on the right of a juvenile inmate to receive a basic  
20 education by not providing for special educational  
21 opportunities by limiting the availability of basic  
22 education to under the age of 18.

23 This statute is presumed unconstitutional, and the  
24 burden is on the State to demonstrate a compelling  
25 State interest that necessitates the infringement on

1 the right to a basic education.

2 The interests which have been cited to the Court  
3 have been in the area of security and the need to  
4 restrain or maintain control over the inmates. While  
5 these interests are certainly rational and reasonable  
6 and may even bear a substantial relationship to the  
7 structure created in 6600, they do not necessitate the  
8 infringement of the right to a basic education which is  
9 needed in order for the State to prevail.

10 In summary, the constitution mandates that the  
11 State make ample provision for basic education for the  
12 children residing within the borders of the state. The  
13 duty to provide for the basic education remains  
14 through, and as such, it remains the duty of the State.

15 Further, so long as the Basic Education Act  
16 applies to persons up to the age of 22, the State  
17 cannot constitutionally limit these services to  
18 juvenile inmates in DOC facilities without also  
19 limiting these services in the same manner to  
20 non-inmates.

21 In summary, it is my decision today as follows:

22 One, the school district defendants' motion for  
23 summary judgment is granted, and the school district  
24 defendants are now dismissed.

25 Two, plaintiffs' motion regarding the Washington

1 Constitution is granted, and the State of Washington  
2 Office of Superintendent of Public Instruction and the  
3 Department of Corrections defendants' motion for  
4 summary judgment is now denied, as the Court finds that  
5 Article IX, Section 1 places a paramount duty on the  
6 State to provide educational opportunities to inmates  
7 of DOC under the age of 22.

8 The plaintiffs' motion for summary judgment  
9 regarding Engross Substitute Senate Bill 6600 is  
10 granted, and the chapter is held unconstitutional.

11 The Court now elects not to decide the issues  
12 raised by the Federal questions at this time as I have  
13 now granted relief under the Washington Constitution.

14 MS. ARTHUR: Thank you, your Honor.

15 THE COURT: I'll sign judgments on  
16 the 6th of November.

17 Thank you very much.

18

19 <<<<< >>>>>

20

21

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23

24

25

## SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

SUNSIRAE TUNSTALL; et al.,

Plaintiffs,

v.

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

Defendants.

CLASS ACTION

No. 97 2 02754 1

STIPULATED FACTS

THE PARTIESDefendants

1. Joseph Lehman is the Secretary of the Department of Corrections (DOC). He is responsible for the administration of Washington state prisons.

2. The Department of Corrections (DOC) is a state agency organized under the laws of Washington. The DOC is responsible for the incarceration of adult convicted felons committed to prison by the superior courts of the state. The DOC also is responsible for the incarceration of juveniles convicted as adults and committed to prison pursuant to ch. 13.40 and 13.04 RCW.

3. Teresa Bergeson is the Superintendent of Public Instruction (SPI or OSPI).

## Appendix C

## STIPULATED FACTS - 1

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FACSIMILE # (253) 343-6377



1 4. Shelton School District No. 309 is a school district organized under the laws of the  
2 State of Washington. The Washington Corrections Center (WCC), operated by DOC, is located in  
3 the geographic area served by the Shelton School District.

4 5. Peninsula School District No. 401 is a school district organized under the laws of the  
5 State of Washington. The Washington Corrections Center for Women (WCCW), operated by DOC,  
6 is located in the geographic area served by the Peninsula School District.

7 6. Cheney School District No. 360 is a school district organized under the laws of the  
8 State of Washington. The Airway Heights Corrections Center (AHCC), operated by DOC, is located  
9 in the geographic area served by the Cheney School District.

10 7. Cape Flattery School District No. 401 is a school district organized under the laws of  
11 the State of Washington. The Clallam Bay Corrections Center (CBCC), operated by DOC, is located  
12 in the geographic area served by the Cape Flattery School District.

13 8. Steilacoom Historical School District No. 1 is a school district organized under the  
14 laws of the State of Washington. The McNeil Island Corrections Center (MICC), operated by DOC,  
15 is located in the geographic area served by the Steilacoom School District.

16 9. Walla Walla School District No. 140 is a school district organized under the laws of  
17 the State of Washington. The Washington State Penitentiary (WSP), operated by DOC, is located in  
18 the geographic area served by the Walla Walla School District.

19 10. Monroe School District No. 103 is a school district organized under the laws of the  
20 State of Washington. The Monroe Corrections Complex (MCC), operated by DOC, is located in the  
21 geographic area served by the Monroe School District.

22 STIPULATED FACTS - 2

1 Plaintiffs

2 11. As of April 1998, there were approximately 100 offenders incarcerated in the DOC  
3 under age 18. Of these, approximately 10 were women and 90 were men.

4 12. All female offenders under age 18 incarcerated in the DOC are presently housed at  
5 WCCW.  
6

7 13. The DOC operates a Youthful Offender Program (YOP) at WCCW for female  
8 offenders under the age of 18.

9 14. All male offenders under the age of 18 are presently housed at CBCC.

10 15. Prior to the execution of the contracts attached hereto as Exhibits 1-4, there were  
11 youth under the age of 18 incarcerated in prisons operated by the DOC who were not being offered  
12 the opportunity to participate in a school program that can lead to the attainment of a high school  
13 diploma.  
14

15 16. The DOC anticipates that the number of juvenile inmates under age 18 will increase  
16 over the next several years due to the passage in 1997 of E3SHB 3900.

17 17. As of April 1998, there were approximately 1,027 youth under the age of 21  
18 incarcerated in prisons operated by the DOC.  
19

20 18. Offenders aged 18-21 incarcerated in the DOC are scattered throughout DOC's  
21 facilities.  
22

23 19. Since November 21, 1997, there have been and currently are youth under the age of  
24 22 confined in every correctional facility operated by the Washington Department of Corrections  
25 (DOC).  
26

STIPULATED FACTS - 3

F:\00000-09999\03\44003\440.41007\PLEADINGS\WAC\104 DOC

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1 20. In the future, youth under the age of 22 are likely to be incarcerated at any of the  
2 correctional facilities operated by the DOC.

3 21. There are youth who are under the age of 21 incarcerated in prisons operated by the  
4 DOC who are not offered the opportunity to participate in a school program that can lead to the  
5 attainment of a high school diploma.  
6

### 7 DOC ADMINISTRATION

8 22. Offenders committed to the custody of the DOC are assigned a classification level  
9 based on their crime of conviction, their escape history, their age, and other factors. This  
10 classification level may be maximum, close, medium or minimum security. An offender's  
11 classification level, along with other factors, determines an offender's placement within the DOC.  
12 For example, an offender classified as maximum security ordinarily will be housed in a maximum  
13 security facility.  
14

15 23. An offender's classification level impacts the privileges he may have while in prison.  
16 Generally, an offender classified as maximum security has fewer privileges than an offender  
17 classified as minimum security. An offender's classification level may change at any time while in  
18 prison due to his behavior or for other reasons.  
19

20 24. DOC has the authority to transfer any prisoner incarcerated at MICC, WSP, CBCC,  
21 WCC, MCC, WCCW, and AHCC to another prison.  
22

### 23 HISTORICAL FACTS

24 25. OSPI does not evaluate or assess school age youth in any school districts or in prisons  
25 operated by DOC for their eligibility to receive special education and related services.  
26

STIPULATED FACTS - 4

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1 26. OSPI does not provide any school age youth in any school district or in DOC prisons  
2 basic or special education and related services.

3 27. Because OSPI claims it has no duty to do so, OSPI has never and does not now  
4 monitor the educational programs in DOC correctional facilities.  
5

6 28. Before the 1998 session of the Washington Legislature, defendant Bergeson never  
7 included funding for education programs for youth in DOC prisons in OSPI's legislative budget  
8 requests.

9 29. Prior to 1998, the Washington Legislature has never appropriated funds to OSPI for  
10 distribution to school districts for education programs for youth in prisons operated by DOC.  
11

12 30. Defendant Bergeson has never sought funding from the Washington Legislature for  
13 the provision of basic and special education and related services to youth aged 18-22 in DOC  
14 prisons.

15 31. The Office of Special Education Programs (OSEP) of the United States Department  
16 of Education conducted reviews of Washington's compliance with federal special education laws in  
17 at least 1984, 1988, and 1994.  
18

19 32. Attached hereto as Exhibit 5 is a true and correct copy of a November 6, 1997 letter  
20 from Teresa Bergeson, Superintendent of Public Instruction, to Senator James West, Representative  
21 Tom Huff, and Richard Thompson, Director, Office of Financial Management. Attached hereto as  
22 Exhibit 6 is a true and correct copy of Richard Thompson's reply.  
23

24 33. Historically, the DOC, through its community college contracts, provided educational  
25 programs at some institutions that led to the granting of a high-school diploma. These programs  
26

#### STIPULATED FACTS - 5

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1 were discontinued in 1996 because of a policy decision by DOC to adopt competency-based  
2 instruction and because most offenders obtained GED certificates instead of high-school diplomas.  
3 For fiscal years 1991-96, an average of 37 high-school diplomas were awarded per year to inmates  
4 incarcerated in DOC, while for the same years an average of 567 GED certificates were awarded per  
5 year to inmates. Of the approximately 1,027 offenders incarcerated in the DOC under age 21 as of  
6 April 1998, approximately 209 were documented as having a high-school diploma or a GED.

8 34. Historically, the number of juveniles under age 18 incarcerated in DOC facilities was  
9 less than it is now. The number of juveniles under age 18 committed to DOC began to increase after  
10 passage in 1997 of E3SHB 3900. The 1997 Legislature appropriated approximately \$4,600 per  
11 student per year to DOC for the first year, and \$3,600 per student per year thereafter, to implement  
12 the education program. The appropriation under E3SHB 3900 for the second year was deleted and  
13 replaced in ESSB 6600 by the institutional funding formula for the 1998-99 school year. The  
14 Institutional Funding Formula will generate an average reimbursement of \$8,415 per student per  
15 year.  
16

17  
18 35. Neither the Governor of Washington, his designee, nor any other executive official  
19 has made any designation pursuant to 20 USC § 1412(a)(11)(C) regarding the education of youth  
20 with disabilities in prisons operated by the DOC.  
21

#### 22 PROGRAMS AVAILABLE IN DOC

23 36. The DOC contracts with local community colleges for the provision of education  
24 services at its facilities. Through these contracts, all DOC institutions except work releases and  
25 Ahtanum View Corrections Center (AVCC) offer adult basic education (ABE) courses, General  
26

STIPULATED FACTS - 6

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1 Educational Development (GED) preparation, English as a second language (ESL), vocational skills  
2 training, crime related programs, and job readiness training. At AVCC, only ABE and crime-related  
3 programs are offered. ESL is not offered at Tacoma Pre-Release or Pine Lodge Pre-Release. Larch  
4 Corrections Center and Olympic Corrections Center do not currently offer vocational skills training.

5  
6 37. Adult basic education includes instruction in reading, writing, mathematics, inter-  
7 personal and problem-solving skills. GED preparation involves preparation courses for taking the  
8 GED examination in the five areas covered by the examination: writing, social studies, science,  
9 interpreting literature and the arts, and mathematics. English as a second language courses include  
10 instruction in speaking, reading and writing skills for offenders whose primary language is a  
11 language other than English. Job readiness training includes introductory instruction in those basic  
12 skills necessary for workplace success such as industrial safety, job dynamics, and computer basics.  
13 Vocational skills training includes preparation for various occupations, including building  
14 construction/ maintenance, business computers, welding, barbering, etc. Crime-related programs  
15 include courses in anger/stress management, victim awareness and similar programs.

16  
17  
18 38. The hours of instruction offered in DOC educational programs varies from institution  
19 to institution. The course offerings for vocational skills training and crime-related programs differ at  
20 the various institutions. No educational programs are offered at DOC's work release facilities. The  
21 educational provider at each institution generally is the local community college, although some job  
22 readiness programs are provided by Corrections Clearinghouse. Also, occasionally, crime-related  
23 programs are taught by DOC employees. DOC's Division of Correctional Industries provides some  
24 vocational skills courses at WCCW and AHCC. The community college providers generally do not  
25  
26

STIPULATED FACTS - 7

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1 use certificated teachers, although some teachers employed by the community colleges and utilized  
2 in DOC facilities may have teaching certificates.

3 39. DOC policy requires offenders under the age of 22 who do not have a GED or high-  
4 school diploma to enroll in basic skills programming. Basic skills programming includes ESL,  
5 GED, ABE and job readiness training. Under DOC policy, if an offender in an educational program  
6 is unduly disruptive or otherwise presents a security risk, the superintendent of the institution  
7 terminate the offender from the program.

8 40. All offenders committed to the custody of the DOC are received at the reception  
9 centers. The male reception center is presently at WCC and the female reception center is presently  
10 at WCCW. At each of the reception centers, offenders are tested to determine basic academic skill  
11 levels. The test administered is the Test of Adult Basic Education (TABE). The offender's  
12 education test results and education history are reviewed to determine placement in DOC educational  
13 programs. Offenders who have obtained a GED or high-school diploma who have grade level scores  
14 for basic skills less than ninth grade level may be enrolled in basic skills programs on a space  
15 available basis.

16 41. The DOC does not permit inmates to leave institutional grounds to attend education  
17 programs.

18 42. Adult basic education programs provided by community colleges in DOC prisons are  
19 designed primarily for adults age 18 and over and do not lead to a high school diploma.

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STIPULATED FACTS - 8

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ESSB 6600

43. Attached hereto as Exhibit 7 is a true and correct copy of the contract between Peninsula School District, the Office of Superintendent of Public Instruction, and the Department of Corrections, signed on 2/2/98 to provide an education program as referenced in the contract.

44. On May 29, 1998, to implement Chapter 244 of the Laws of 1998, the SPI solicited proposals from interested agencies to provide educational services to youth under the age of 18 who are imprisoned at the WCCW and CBCC for an 11 month, 220 school day program period during the 1998-1999 school year.

45. Applicants eligible to apply to SPI to become the provider of educational services to youth under 18 at WCCW and CBCC during the 1998-1999 school year include school districts, educational services districts (ESD's), public institutions of higher education, private contractors, or any combination thereof.

46. Attached hereto as Exhibit 8 is a true and correct copy of OSPI's Request for Proposals (RFP) for education services to youth under the age of 18 who are imprisoned at CBCC and WCCW, dated May 29, 1998.

47. At all times relevant to this case, defendant school districts have not provided educational services to youth under the age of 22 incarcerated in prisons operated by Department of Corrections except:

- (a) Peninsula School District contracted for services as provided in Exhibit 7;
- (b) Cape Flattery and Peninsula School Districts have entered into the contracts attached as Exhibits 1 through 4.

STIPULATED FACTS - 9

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NON-INCARCERATED STUDENTS

48. Students in Washington between the ages of 5 and 21 who are not incarcerated in a prison operated by the DOC are eligible to participate in a school program that includes the basic education program requirements that can lead to the attainment of a high school diploma pursuant to RCW 28A.150.

49. Disabled children and youth in Washington between the ages of 5 and 22 who are not incarcerated in a prison operated by the DOC are eligible to receive special education and related services if they otherwise qualify for those services.

50. The GED certificate is not the same as a high school diploma. DOC has a policy that for the purposes of prisoners age 18 and older, a GED certificate is considered the equivalent of a high school diploma.

FUNDING

51. Historically, DOC has received federal funding through the office of Superintendent of Public Instruction (SPI) under the Title I program for its adult education programs. Some of these funds are being provided to Peninsula School District and Cape Flattery School District for the 1998-99 school year pursuant to the contracts attached hereto as Exhibits 1-4. DOC also receives federal money under the basic skills program through the Office of Adult Literacy, State Board for Community and Technical Colleges. The DOC does not receive any other federal funding for education purposes.

STIPULATED FACTS - 10

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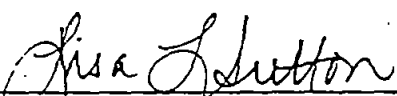
1 52. OSPI receives federal funding under the Individuals with Disabilities Education Act  
2 (IDEA) and distributes some of these funds to the defendant school districts to be used for such  
3 educational programs as the law provides.

4  
5 53. The Washington State Legislature has the exclusive authority to provide state funding  
6 for education in the State of Washington.

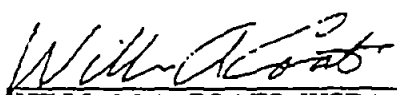
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26 STIPULATED FACTS - 11

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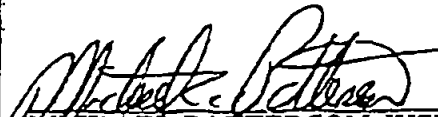
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## CHAPTER 244

[Engrossed Substitute Senate Bill 6600]

## EDUCATION OF JUVENILES INCARCERATED IN ADULT CORRECTIONAL FACILITIES

AN ACT Relating to education of juveniles incarcerated in adult correctional facilities; amending RCW 72.09.460, 41.59.080, 28A.310.300, and 28A.225.010; adding a new section to chapter 41.56 RCW; adding a new section to chapter 28B.150 RCW; adding a new chapter to Title 28A RCW; providing an effective date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

**NEW SECTION.** Sec. 1. The legislature intends to provide for the operation of education programs for the department of corrections' juvenile inmates. School districts, educational service districts, or any combination thereof should be the primary providers of the education programs. However, the legislature does not intend to preclude community and technical colleges, four-year institutions of higher education, or other qualified entities from contracting to provide all or part of these education programs if no school district or educational service district is willing to operate all or part of the education programs.

The legislature finds that this chapter fully satisfies any constitutional duty to provide education programs for juvenile inmates in adult correctional facilities. The legislature further finds that biennial appropriations for education programs under this chapter amply provide for any constitutional duty to educate juvenile inmates in adult correctional facilities.

**NEW SECTION.** Sec. 2. Any school district or educational service district may operate all or any portion of an education program for juveniles in accordance with this chapter, notwithstanding the fact the services or benefits provided extend beyond the geographic boundaries of the school district or educational service district providing the service.

**NEW SECTION.** Sec. 3. The superintendent of public instruction shall solicit an education provider for the department of corrections' juvenile inmates within sixty days as follows:

(1) The superintendent of public instruction shall notify and solicit proposals from all interested and capable school districts, educational service districts, institutions of higher education, private contractors, or any combination thereof. The notice shall describe the proposed education program's requirements and the appropriated amount. The selection of an education provider shall be in the following order:

(a) The school district where there is an educational site for juveniles in an adult correctional facility maintained by the state department of corrections has first priority to operate an education program for inmates at that site. The district may elect to operate an education program by itself or with another school district, educational service district, institution of higher education, private contractor, or any combination thereof. If the school district elects not to exercise its priority, it shall notify the superintendent of public instruction within thirty calendar days of the day of solicitation.

(b) The educational service district where there is an educational site for juveniles in an adult correctional facility maintained by the state department of corrections has second priority to operate an education program for inmates at that site. The educational service district may elect to do so by itself or with a school district, another educational service district, institution of higher education, private contractor, or any combination thereof. If the educational service district elects not to exercise its priority, it shall notify the superintendent of public instruction within forty-five calendar days of the day of solicitation.

(c) If neither the school district nor the educational service district chooses to operate an education program for inmates as provided for in (a) and (b) of this subsection, the superintendent of public instruction may contract with an entity, including, but not limited to, school districts, educational service districts, institutions of higher education, private contractors, or any combination thereof, within sixty calendar days of the day of solicitation. The selected entity may operate an education program by itself or with another school district, educational service district, institution of higher education, or private contractor, or any combination thereof.

(2) If the superintendent of public instruction does not contract with an interested entity within sixty days of the day of solicitation, the educational service district where there is an educational site for juveniles in an adult correctional facility maintained by the state department of corrections shall begin operating the education program for inmates at the site within ninety days from the day of solicitation in subsection (1) of this section.

NEW SECTION. Sec. 4. Except as otherwise provided for by contract under section 7 of this act, the duties and authority of a school district, educational service district, institution of higher education, or private contractor to provide for education programs under this chapter are limited to the following:

(1) Employing, supervising, and controlling administrators, teachers, specialized personnel, and other persons necessary to conduct education programs, subject to security clearance by the department of corrections;

(2) Purchasing, leasing, or renting and providing textbooks, maps, audiovisual equipment, paper, writing instruments, physical education equipment, and other instructional equipment, materials, and supplies deemed necessary by the provider of the education programs;

(3) Conducting education programs for inmates under the age of eighteen in accordance with program standards established by the superintendent of public instruction. The education provider shall develop the curricula, instructional methods, and educational objectives of the education programs, subject to applicable requirements of state and federal law. The department of corrections shall establish behavior standards that govern inmate participation in education programs, subject to applicable requirements of state and federal law;

(4) Students age eighteen who have participated in an education program governed by this chapter may continue in the program with the permission of the

department of corrections and the education provider, under the rules adopted by the superintendent of public instruction.

NEW SECTION. Sec. 5. School districts and educational service districts providing an education program to juvenile inmates in an adult corrections facility, notwithstanding that their geographical boundaries do not include the facility, may:

(1) Award appropriate diplomas or certificates to inmates who successfully complete graduation requirements;

(2) Spend only funds appropriated by the legislature and allocated by the superintendent of public instruction for the exclusive purpose of maintaining and operating education programs under this chapter, including direct and indirect costs of maintaining and operating the education programs, and funds from federal and private grants, bequests, and gifts made for that purpose. School districts may not expend excess tax levy proceeds authorized for school district purposes to pay costs incurred under this chapter.

NEW SECTION. Sec. 6. To support each education program under this chapter, the department of corrections and each superintendent or chief administrator of a correction facility shall:

(1) Through construction, lease, or rental of space, provide necessary building and exercise spaces for the education program that is secure, separate, and apart from space occupied by nonstudent inmates;

(2) Through construction, lease, or rental, provide vocational instruction machines; technology and supporting equipment; tools, building, and exercise facilities; and other equipment and fixtures deemed necessary by the department of corrections to conduct the education program;

(3) Provide heat, lights, telephone, janitorial services, repair services, and other support services for the building and exercise spaces, equipment, and fixtures provided under this section;

(4) Employ, supervise, and control security staff to safeguard agents of the education providers and inmates while engaged in educational and related activities conducted under this chapter;

(5) Provide clinical and medical evaluation services necessary for a determination by the education provider of the educational needs of inmates; and

(6) Provide such other support services and facilities as are reasonably necessary to conduct the education program.

NEW SECTION. Sec. 7. Each education provider under this chapter and the department of corrections shall negotiate and execute a written contract for each school year or such longer period as may be agreed to that delineates the manner in which their respective duties and authority will be cooperatively performed and exercised, and any disputes and grievances resolved through mediation, and if necessary, arbitration. Any such contract may provide for the performance of duties by an education provider in addition to those set forth in this chapter, including duties imposed upon the department of corrections and its agents under

section 6 of this act if supplemental funding provided by the department of corrections is available to fully pay the direct and indirect costs of these additional duties.

NEW SECTION. Sec. 8. By April 15th of each school year, the department of corrections shall provide written notice to the superintendent of public instruction and education providers operating programs under this chapter of any reasonably foreseeable education site closures, reductions in the number of inmates or education services, or any other cause for a reduction in certificated or classified staff the next school year. In the event the department of corrections fails to provide notice as required by this section, the department is liable and responsible for the payment of the salary and employment-related costs for the next school year of each employee whose contract would or could have been nonrenewed but for the failure of the department to provide notice. Disputes arising under this section shall be resolved in accordance with the alternative dispute resolution method or methods specified in the contract required by section 7 of this act.

NEW SECTION. Sec. 9. The superintendent of public instruction shall:

(1) Allocate money appropriated by the legislature to administer and provide education programs under this chapter to school districts, educational service districts, and other education providers selected under section 3 of this act that have assumed the primary responsibility to administer and provide education programs under this chapter. The allocation of moneys to any private contractor is contingent upon and must be in accordance with a contract between the private contractor and the department of corrections; and

(2) Adopt rules in accordance with chapter 34.05 RCW that establish reporting, program compliance, audit, and such other accountability requirements as are reasonably necessary to implement this chapter and related provisions of the biennial operating act effectively.

Sec. 10. RCW 72.09.460 and 1997 c 338 s 43 are each amended to read as follows:

(1) The legislature intends that all inmates be required to participate in department-approved education programs, work programs, or both, unless exempted under subsection (4) of this section. Eligible inmates who refuse to participate in available education or work programs available at no charge to the inmates shall lose privileges according to the system established under RCW 72.09.130. Eligible inmates who are required to contribute financially to an education or work program and refuse to contribute shall be placed in another work program. Refusal to contribute shall not result in a loss of privileges. The legislature recognizes more inmates may agree to participate in education and work programs than are available. The department must make every effort to achieve maximum public benefit by placing inmates in available and appropriate education and work programs.

(2) The department shall provide access to a program of education to all offenders who are under the age of eighteen and who have not met high school graduation or general equivalency diploma requirements in accordance with chapter 28A.—RCW (sections 1 through 9 of this act). The program of education established by the department and education provider under section 3 of this act for offenders under the age of eighteen must provide each offender a choice of curriculum that will assist the inmate in achieving a high school diploma or general equivalency diploma. The program of education may include but not be limited to basic education, prevocational training, work ethic skills, conflict resolution counseling, substance abuse intervention, and anger management training components.

(3) The department shall, to the extent possible and considering all available funds, prioritize its resources to meet the following goals for inmates in the order listed:

(a) Achievement of basic academic skills through obtaining a high school diploma or its equivalent and achievement of vocational skills necessary for purposes of work programs and for an inmate to qualify for work upon release;

(b) Additional work and education programs based on assessments and placements under subsection (5) of this section; and

(c) Other work and education programs as appropriate.

(4) The department shall establish, by rule, objective medical standards to determine when an inmate is physically or mentally unable to participate in available education or work programs. When the department determines an inmate is permanently unable to participate in any available education or work program due to a medical condition, the inmate is exempt from the requirement under subsection (1) of this section. When the department determines an inmate is temporarily unable to participate in an education or work program due to a medical condition, the inmate is exempt from the requirement of subsection (1) of this section for the period of time he or she is temporarily disabled. The department shall periodically review the medical condition of all temporarily disabled inmates to ensure the earliest possible entry or reentry by inmates into available programming.

(5) The department shall establish, by rule, standards for participation in department-approved education and work programs. The standards shall address the following areas:

(a) Assessment. The department shall assess all inmates for their basic academic skill levels using a professionally accepted method of scoring reading, math, and language skills as grade level equivalents. The department shall determine an inmate's education history; work history, and vocational or work skills. The initial assessment shall be conducted, whenever possible, within the first thirty days of an inmate's entry into the correctional system, except that initial assessments are not required for inmates who are sentenced to life without the possibility of release, assigned to an intensive management unit within the



first thirty days after entry into the correctional system, are returning to the correctional system within one year of a prior release, or whose physical or mental condition renders them unable to complete the assessment process. The department shall track and record changes in the basic academic skill levels of all inmates reflected in any testing or assessment performed as part of their education programming;

(b) Placement. The department shall follow the policies set forth in subsection (1) of this section in establishing criteria for placing inmates in education and work programs. The department shall, to the extent possible, place all inmates whose composite grade level score for basic academic skills is below the eighth grade level in a combined education and work program. The placement criteria shall include at least the following factors:

(i) An inmate's release date and custody level, except an inmate shall not be precluded from participating in an education or work program solely on the basis of his or her release date;

(ii) An inmate's education history and basic academic skills;

(iii) An inmate's work history and vocational or work skills;

(iv) An inmate's economic circumstances, including but not limited to an inmate's family support obligations; and

(v) Where applicable, an inmate's prior performance in department-approved education or work programs;

(c) Performance and goals. The department shall establish, and periodically review, inmate behavior standards and program goals for all education and work programs. Inmates shall be notified of applicable behavior standards and program goals prior to placement in an education or work program and shall be removed from the education or work program if they consistently fail to meet the standards or goals;

(d) Financial responsibility. (i) The department shall establish a formula by which inmates, based on their ability to pay, shall pay all or a portion of the costs or tuition of certain programs. Inmates shall, based on the formula, pay a portion of the costs or tuition of participation in:

(A) Second and subsequent vocational programs associated with an inmate's work programs; and

(B) An associate of arts or baccalaureate degree program when placement in a degree program is the result of a placement made under this subsection;

(ii) Inmates shall pay all costs and tuition for participation in:

(A) Any postsecondary academic degree program which is entered independently of a placement decision made under this subsection; and

(B) Second and subsequent vocational programs not associated with an inmate's work program.

Enrollment in any program specified in (d)(ii) of this subsection shall only be allowed by correspondence or if there is an opening in an education or work program at the institution where an inmate is incarcerated and no other inmate who is placed in a program under this subsection will be displaced; and

(e) Notwithstanding any other provision in this section, an inmate sentenced to life without the possibility of release:

(i) Shall not be required to participate in education programming; and

(ii) May receive not more than one postsecondary academic degree in a program offered by the department or its contracted providers.

If an inmate sentenced to life without the possibility of release requires prevocational or vocational training for a work program, he or she may participate in the training subject to this section.

(6) The department shall coordinate education and work programs among its institutions, to the greatest extent possible, to facilitate continuity of programming among inmates transferred between institutions. Before transferring an inmate enrolled in a program, the department shall consider the effect the transfer will have on the inmate's ability to continue or complete a program. This subsection shall not be used to delay or prohibit a transfer necessary for legitimate safety or security concerns.

(7) Before construction of a new correctional institution or expansion of an existing correctional institution, the department shall adopt a plan demonstrating how cable, closed-circuit, and satellite television will be used for education and training purposes in the institution. The plan shall specify how the use of television in the education and training programs will improve inmates' preparedness for available work programs and job opportunities for which inmates may qualify upon release.

(8) The department shall adopt a plan to reduce the per-pupil cost of instruction by, among other methods, increasing the use of volunteer instructors and implementing technological efficiencies. The plan shall be adopted by December 1996 and shall be transmitted to the legislature upon adoption. The department shall, in adoption of the plan, consider distance learning, satellite instruction, video tape usage, computer-aided instruction, and flexible scheduling of offender instruction.

(9) Following completion of the review required by section 27(3), chapter 19, Laws of 1995 1st sp. sess. the department shall take all necessary steps to assure the vocation and education programs are relevant to work programs and skills necessary to enhance the employability of inmates upon release.

**Sec. 11.** RCW 41.59.080 and 1975 1st ex.s. c 288 s 9 are each amended to read as follows:

The commission, upon proper application for certification as an exclusive bargaining representative or upon petition for change of unit definition by the employer or any employee organization within the time limits specified in RCW 41.59.070(3), and after hearing upon reasonable notice, shall determine the unit appropriate for the purpose of collective bargaining. In determining, modifying or combining the bargaining unit, the commission shall consider the duties, skills, and working conditions of the educational employees; the history of collective bargaining; the extent of organization among the educational employees; and the desire of the educational employees; except that:

(1) A unit including nonsupervisory educational employees shall not be considered appropriate unless it includes all such nonsupervisory educational employees of the employer; and

(2) A unit that includes only supervisors may be considered appropriate if a majority of the employees in such category indicate by vote that they desire to be included in such a unit; and

(3) A unit that includes only principals and assistant principals may be considered appropriate if a majority of such employees indicate by vote that they desire to be included in such a unit; and

(4) A unit that includes both principals and assistant principals and other supervisory employees may be considered appropriate if a majority of the employees in each category indicate by vote that they desire to be included in such a unit; and

(5) A unit that includes supervisors and/or principals and assistant principals and nonsupervisory educational employees may be considered appropriate if a majority of the employees in each category indicate by vote that they desire to be included in such a unit; and

(6) A unit that includes only employees in vocational-technical institutes or occupational skill centers may be considered to constitute an appropriate bargaining unit if the history of bargaining in any such school district so justifies; and

(7) Notwithstanding the definition of collective bargaining, a unit that contains only supervisors and/or principals and assistant principals shall be limited in scope of bargaining to compensation, hours of work, and the number of days of work in the annual employment contracts; and

(8) The bargaining unit of certificated employees of school districts, educational service districts, or institutions of higher education that are education providers under chapter 28A.— RCW (sections 1 through 9 of this act) must be limited to the employees working as education providers to juveniles in each adult correctional facility maintained by the department of corrections and must be separate from other bargaining units in school districts, educational service districts, or institutions of higher education.

NEW SECTION. Sec. 12. A new section is added to chapter 41.56 RCW to read as follows:

This chapter applies to the bargaining unit of classified employees of school districts, educational service districts, or institutions of higher education that are education providers under chapter 28A.— RCW (sections 1 through 9 of this act). Such bargaining units must be limited to the employees working as education providers to juveniles in each adult correctional facility maintained by the department of corrections and must be separate from other bargaining units in school districts, educational service districts, or institutions of higher education.

Sec. 13. RCW 28A.310.300 and 1990 c 33 s 283 are each amended to read as follows:

In addition to other powers and duties as provided by law, each educational service district superintendent shall:

(1) Assist the school districts in preparation of their budgets as provided in chapter 28A.505 RCW.

(2) Enforce the provisions of the compulsory attendance law as provided in RCW 28A.225.010 through ~~((28A.225.150))~~ 28A.225.140, 28A.200.010, and 28A.200.020.

(3) Perform duties relating to capital fund aid by nonhigh districts as provided in chapter 28A.540 RCW.

(4) Carry out the duties and issue orders creating new school districts and transfers of territory as provided in chapter 28A.315 RCW.

(5) Perform the limited duties as provided in chapter 28A.— RCW (sections 1 through 9 of this act).

(6) Perform all other duties prescribed by law and the educational service district board.

Sec. 14. RCW 28A.225.010 and 1996 c 134 s 1 are each amended to read as follows:

(1) All parents in this state of any child eight years of age and under eighteen years of age shall cause such child to attend the public school of the district in which the child resides and such child shall have the responsibility to and therefore shall attend for the full time when such school may be in session unless:

(a) The child is attending an approved private school for the same time or is enrolled in an extension program as provided in RCW 28A.195.010(4);

(b) The child is receiving home-based instruction as provided in subsection (4) of this section;

(c) The child is attending an education center as provided in chapter 28A.205 RCW;

(d) The school district superintendent of the district in which the child resides shall have excused such child from attendance because the child is physically or mentally unable to attend school, is attending a residential school operated by the department of social and health services, is incarcerated in an adult correctional facility, or has been temporarily excused upon the request of his or her parents for purposes agreed upon by the school authorities and the parent: PROVIDED, That such excused absences shall not be permitted if deemed to cause a serious adverse effect upon the student's educational progress: PROVIDED FURTHER, That students excused for such temporary absences may be claimed as full time equivalent students to the extent they would otherwise have been so claimed for the purposes of RCW 28A.150.250 and 28A.150.260 and shall not affect school district compliance with the provisions of RCW 28A.150.220; or

(e) The child is sixteen years of age or older and:

(i) The child is regularly and lawfully employed and either the parent agrees that the child should not be required to attend school or the child is emancipated in accordance with chapter 13.64 RCW;

(ii) The child has already met graduation requirements in accordance with state board of education rules and regulations; or

(iii) The child has received a certificate of educational competence under rules and regulations established by the state board of education under RCW 28A.305.190.

(2) A parent for the purpose of this chapter means a parent, guardian, or person having legal custody of a child.

(3) An approved private school for the purposes of this chapter and chapter 28A.200 RCW shall be one approved under regulations established by the state board of education pursuant to RCW 28A.305.130.

(4) For the purposes of this chapter and chapter 28A.200 RCW, instruction shall be home-based if it consists of planned and supervised instructional and related educational activities, including a curriculum and instruction in the basic skills of occupational education, science, mathematics, language, social studies, history, health, reading, writing, spelling, and the development of an appreciation of art and music, provided for a number of hours equivalent to the total annual program hours per grade level established for approved private schools under RCW 28A.195.010 and 28A.195.040 and if such activities are:

(a) Provided by a parent who is instructing his or her child only and are supervised by a certificated person. A certificated person for purposes of this chapter and chapter 28A.200 RCW shall be a person certified under chapter 28A.410 RCW. For purposes of this section, "supervised by a certificated person" means: The planning by the certificated person and the parent of objectives consistent with this subsection; a minimum each month of an average of one contact hour per week with the child being supervised by the certificated person; and evaluation of such child's progress by the certificated person. The number of children supervised by the certificated person shall not exceed thirty for purposes of this subsection; or

(b) Provided by a parent who is instructing his or her child only and who has either earned forty-five college level quarter credit hours or its equivalent in semester hours or has completed a course in home-based instruction at a postsecondary institution or a vocational-technical institute; or

(c) Provided by a parent who is deemed sufficiently qualified to provide home-based instruction by the superintendent of the local school district in which the child resides.

(5) The legislature recognizes that home-based instruction is less structured and more experiential than the instruction normally provided in a classroom setting. Therefore, the provisions of subsection (4) of this section relating to the nature and quantity of instructional and related educational activities shall be liberally construed.

NEW SECTION. Sec. 15. A new section is added to chapter 28A.150 RCW to read as follows:

(1) The department of corrections and the superintendent of public instruction shall conduct a study to determine the educational needs of inmates under the age

of twenty-one incarcerated in jail and prison, the impact of providing educational services and special educational services to those inmates on the security and penological interests of the correctional institutions that incarcerate those inmates, and the ability of local school districts, the community and technical colleges, private vendors, juvenile detention centers, and the correctional institutions to provide those educational and special services.

(2) The department and the superintendent of public instruction shall consult with the following groups:

- (a) The Washington association of school administrators;
- (b) The individual school districts and educational service districts in which the department or a county jail may operate a school for inmates under age twenty-one;
- (c) The Washington association of counties;
- (d) The state board for community and technical colleges;
- (e) The higher education coordinating board;
- (f) The United States department of education office of special education programs and the office for civil rights;
- (g) The juvenile rehabilitation administration's residential school programs;
- (h) The juvenile court administrators;
- (i) The attorney general;
- (j) Columbia legal services;
- (k) The Washington association of prosecuting attorneys;
- (l) The school districts that provide educational services to juvenile offenders incarcerated in state juvenile residential schools; and
- (m) Any other person or association that in the opinion of the department or the superintendent of public instruction may assist in the study.

(3) No later than May 1, 1998, the department and the superintendent of public instruction shall provide to the committees on education in the house and senate, the criminal justice and corrections committee in the house, the human services and corrections committee in the senate, and the house and senate fiscal committees, a profile of all offenders under the age of twenty-one who are incarcerated in a department of corrections' facility. The profile shall identify the offenders individually by the following:

- (a) Age;
- (b) Offense or offenses of commitment;
- (c) Criminal history;
- (d) Anticipated length of stay;
- (e) The number of serious infractions committed by the offender during incarceration and the number of times, if any, the offender has been placed in an intensive management unit;
- (f) The offender's custody level;
- (g) Whether the offender has a high school diploma or a general equivalency diploma;
- (h) The last grade the offender completed;

(i) Whether the offender, in the educational placement prior to incarceration was identified as a child with a disability or had an individualized education program;

(j) Whether the offender would qualify for transition planning and services under 20 U.S.C. Sec. 1414(d)(6);

(k) Whether the department has security or penological interests that warrant modification of an existing individualized education program or placement as provided by 20 U.S.C. Sec. 1414(d)(6);

(l) Whether the offender has participated in any educational programs offered by the department; and

(m) Whether the offender may be in need of special education and related services. This subsection does not require the department or the superintendent to evaluate an offender to determine if the offender is a child with disabilities in need of special education and related services.

(4) No later than September 1, 1998, the department of corrections and the superintendent of public instruction shall provide to the committees identified in subsection (3) of this section a profile of inmates under the age of twenty-one confined in county jails between the effective date of this section and August 1, 1998. The profile shall identify the inmates' characteristics as listed in subsection (3) of this section and shall include all inmates detained in a county correctional facility whether arrested, charged, pending trial, or convicted. The department and the superintendent of public instruction shall assist the counties in gathering this information.

(5) No later than September 1, 1998, the department and the superintendent of public instruction shall make a preliminary report to the committees listed in subsection (3) of this section, identifying the educational needs of inmates under the age of twenty-one in adult correctional facilities, the impact of providing educational services to those inmates on the security and penological interests of the correctional institutions that incarcerate those inmates, and the ability of local school districts, the community and technical colleges, private vendors, juvenile detention centers, and the correctional institutions to provide those educational services. The department and the superintendent, in consultation with the office of financial management, shall estimate the various capital and operating costs of providing basic educational services or basic skills education to offenders under age twenty-one, and special education and related services to all inmates under age twenty-one or to just those inmates under age eighteen and between the ages of eighteen and twenty-one who were identified as a child with a disability or had an individualized education program in the educational placement prior to incarceration in an adult correctional facility. The department and the superintendent of public instruction shall inform the committees as to which educational entity or entities are able and willing to provide those educational services.

(6) No later than November 1, 1998, the department and the superintendent of public instruction shall make final recommendations to the committees.

NEW SECTION. Sec. 16. Sections 1 through 9 of this act constitute a new chapter in Title 28A RCW.

NEW SECTION. Sec. 17. Sections 1 through 9 and 11 through 15 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and take effect immediately.

NEW SECTION. Sec. 18. Section 10 of this act takes effect September 1, 1998.

NEW SECTION. Sec. 19. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed the Senate March 9, 1998.

Passed the House March 5, 1998.

Approved by the Governor March 30, 1998.

Filed in Office of Secretary of State March 30, 1998.