NO. 67448-5

IN THE SUPREME COURT OF WASHINGTON

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,

Appellants/Cross-Respondents,

and

SHELTON SCHOOL DISTRICT NO. 309; PENINSULA SCHOOL DISTRICT NO. 401; CHENEY SCHOOL DISTRICT NO. 360; CAPE FLATTERY SCHOOL DISTRICT NO. 401; STEILACOOM HISTORICAL SCHOOL DISTRICT NO. 1; WALLA WALLA SCHOOL DISTRICT NO. 140; MONROE SCHOOL DISTRICT NO. 103; and their predecessors, successors, and assigns,

Cross-Respondents.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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ASSIGNMENTS OF ERROR

1. The trial court erred in holding that the school districts have no duty under the Washington constitution or statutes to provide basic or special education services to youth incarcerated in adult prisons.

2. The trial court erred in holding that the school districts have no duty under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., or § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to provide special education services to youth incarcerated in adult prisons.

3. The trial court erred in holding that the Secretary of the Department of Corrections and the Superintendent of Public Instruction have no duty under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., or § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to provide special education services to youth incarcerated in adult prisons.

ISSUES PRESENTED

1. Do school districts have a duty under the Washington constitution or statutes to provide basic or special education services to youth incarcerated in adult prisons?

2. Do school districts have a duty under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., or § 504 of

the Rehabilitation Act of 1973, 29 U.S.C. § 794, to provide special education services to youth incarcerated in adult prisons?

3. Do the Secretary of the Department of Corrections and the Superintendent of Public Instruction have a duty under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., or § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, to provide special education services to youth incarcerated in adult prisons?

STATEMENT OF THE CASE

The State of Washington is experiencing rapid growth in the number of youth confined in adult prisons. In April 1998, there were 1,027 prisoners under 21 incarcerated in adult prisons, including 99 under 18. CP 1608-1675, Ex. 4, p. 1, DOC/OSPI Report to the Legislature, May 1998. More than half of these youth will be released within two years. Id., p. 2. It is estimated that, by July 1999, there will be 241 youth under 18 in adult prisons. CP 1608-1675, Ex. 2.[1]

At the time this lawsuit was filed, school-aged youth incarcerated in adult prisons were denied the opportunity to earn a high school

[1] Much of this growth is attributable to the "mandatory decline" provisions of HB 3900, chapter 338, Laws of 1997, which requires 16 and 17 year olds charged with enumerated crimes to be tried as adults.

diploma. Moreover, disabled youth who need special education services did not receive such services. CP 1676-1760, Facts No. 26, 33, 42, 47.[2]

This class action, seeking basic and special education services for youth under age 22 who are incarcerated in adult prisons operated by the Washington Department of Corrections, was filed on November 21, 1997, in Thurston County Superior Court. CP 8-19. Initially named as defendants were Joseph Lehman, Secretary of the Department of Corrections (DOC), and Teresa Bergeson, Superintendent of Public Instruction (OSPI). Id. Later, the superintendents of the school districts where DOC major institutions are located were added as defendants. CP 205-218, first amended complaint.[3] The districts themselves were later substituted for the superintendents as defendants. CP 452-468, second amended complaint.

Plaintiffs' complaint alleges that the failure of Lehman, Bergeson, and the school districts to provide basic and special education to school-

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[2] In the trial court, the parties stipulated to some, but far from all, of the facts plaintiffs believe to be undeniable and material. The limited facts the parties have agreed upon are referenced herein as "Facts." The stipulation is found at CP 1676-1760.

[3] The Cape Flattery, Cheney, Monroe, Peninsula, Shelton, Steilacoom, and Walla Walla school districts. Id.

aged youth in adult prisons violates Article 9 of the Washington Constitution; the Basic Education Act, RCW 28A; the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq.; § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the due process and equal protection clauses of the Washington and United States Constitutions. The complaint seeks injunctive and declaratory relief. CP 846-862, third amended complaint.

On February 9, 1998, the trial court certified the following plaintiff class pursuant to CR 23(b)(2):

> 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.

CP 203-204.

On March 30, 1998, the Governor approved Engrossed Substitute Senate Bill 6600, chapter 244, Laws of 1998. This legislation provided some DOC prisoners under the age of 18 the opportunity to earn a high school diploma. Pursuant to ESSB 6600, education programs that could lead to a high school diploma were established at the Clallam Bay Corrections Center (CBCC) for male prisoners under the age of 18, and at the Washington Corrections Center for Women (WCCW) for female prisoners under the age of 18. CP 1676-1760, Fact No. 47. However, no

provision was made for the education of incarcerated youth between 18 and 22, except that youth who had begun the high school program before turning 18 could under some circumstances remain in the program after their 18th birthday. Chapter 244, Laws of 1998, § 4.

At the trial court's direction, the parties worked with a Special Master to develop stipulated facts (see CP 1676-1760), and then filed cross-motions for summary judgment. On October 9, 1998, the trial court delivered its oral ruling on the summary judgment motions. The trial court ruled that the school districts have no duty under the state or federal constitutions, or under the laws of Washington, to provide education to youth in prison, and granted their motion for summary judgment. However, the court ruled that Bergeson and Lehman have a paramount duty under Article 9 of the Washington Constitution and the Basic Education Act to provide basic education to incarcerated youth under 21, and to provide special education to disabled incarcerated youth under 22. The court also ruled that ESSB 6600 is unconstitutional in that it does not provide for special education, and limits basic education to incarcerated youth under 18. The court elected not to decide plaintiffs' federal claims against Bergeson and Lehman. This decision was reduced to a written order on November 6, 1998; on that date, the court also ordered Bergeson

and Lehman to submit a remedial plan by December 11, 1998. CP 2206-2215.

On November 20, 1998 (order entered nunc pro tunc, November 6, 1998), the trial court ruled that the school districts have no duty to plaintiffs under federal law, and entered final judgment dismissing the districts from the action. CP 2289-2298.

Bergeson and Lehman moved for a stay pending appeal. On December 3, 1998, the trial court denied the stay, but extended the deadline for the remedial plan until December 18, 1998. On the same date, the court dismissed plaintiffs' federal claims against Bergeson and Lehman, and entered final judgment. CP 2415-2426. Bergeson, Lehman, and plaintiffs filed timely notices of appeal. CP 2351-2410.

Bergeson and Lehman then moved this Court for a stay of the trial court's order. On December 11, 1998, the Commissioner granted the motion. Plaintiffs moved to modify the Commissioner's decision; this motion was denied by the Court on February 2, 1999.

SUMMARY OF ARGUMENT

The trial court correctly recognized that Article 9 of the Washington constitution imposes upon the state a paramount duty to provide basic and special education to youth in prison, and that this paramount duty creates an absolute right in plaintiffs. The trial court also

correctly held that ESSB 6600 is unconstitutional, in that it makes no provision for special education, and limits basic education to incarcerated youth who are under 18.

However, the trial court incorrectly ruled that school districts have no duty under state or federal law to provide education to youth who are incarcerated within their district boundaries. The trial court also erred in holding that Bergeson and Lehman have no duty under the IDEA and § 504 to provide special education to incarcerated youth.

For these reasons, the judgment of the trial court should be affirmed in part and reversed in part.

ARGUMENT

Youth in prison need an education to help redirect their lives. As the United States Supreme Court has recognized, "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. ... [E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." Plyler v. Doe, 457 U.S. 202, 221, 102 S. Ct. 2382, 2397, 72 L.Ed.2d 786 (1982). We can ill afford to turn our backs on school-aged youth incarcerated in

Washington prisons who have been denied the opportunity to obtain an education equal to that offered to non-incarcerated youth.

Defendants' failure to provide education through the public school system to all school-aged youth in our State prisons is not only costly to our society, but also violates the most important right guaranteed by the Washington Constitution -- the right to an education provided through a uniform public school system:

> [A]ll children residing within the State's borders have a 'right' to be amply provided with an education. That 'right' is constitutionally paramount and must be achieved through a 'general and uniform system of public schools.'

Seattle School Dist. v. State, 90 Wn.2d 476, 513, 585 P.2d 71 (1978).

In 1990, the State formed a Task Force to address the failure of the Office of the Superintendent of Public Instruction (OSPI), the Department of Corrections (DOC), and school districts to provide education in prisons. The Task Force was expressly formed "to plan the implementation of special education within the adult corrections system." CP 1608-1675, Ex. 1, p. 1, OSPI/DOC Task Force Report, June 1991. By 1991, the work of the Task Force resulted in such a plan for education in adult prisons. But the plan was never implemented or adopted by either OSPI or DOC. Id., Ex. 2.

Since the Task Force disbanded in 1991, DOC and OSPI have continued to repeatedly "study" the education needs of youth in prison, as well as their obligations to provide basic and special education to incarcerated school-aged youth. In November of 1997, plaintiffs filed this lawsuit because, despite the clear obligation to do so and repeated directives that the law required it, DOC, OSPI, and school districts persisted in their failure to provide basic and special education to youth in adult prisons.

Nearly eight years have now passed since OSPI, DOC, and school districts were so clearly advised by the State Task Force On Special Education In Adult Corrections of their obligation to educate youth in prisons. Still, DOC and OSPI are just now making provision for the education of only a handful of the more than one thousand school-aged youth who are currently incarcerated in prisons in this State. Most school districts responsible for providing education to all children in the geographic areas in which prisons are located simply refuse to provide education programs in prisons at all.

Since the right to an education ends at a certain age, every moment that passes diminishes the hope of every youth to better her future through learning. As stated by the United States Supreme Court, "In these days, it is doubtful that any child may reasonably be expected to succeed in life if

[s]he is denied the opportunity of an education. Such an opportunity ... must be made available to all on equal terms." Brown v. Board of Education, 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L.Ed. 873 (1954).

The Washington State Constitution grants *all* children in Washington, including those in prison, the paramount right to an education provided through the public school system. Plaintiffs urge this Court to uphold this fundamental right, and to hold the State accountable for so many years of denying youth in prison the critical opportunity for an education.

I. THE TRIAL COURT CORRECTLY HELD THAT DOC AND OSPI HAVE A PARAMOUNT DUTY UNDER THE STATE CONSTITUTION AND LAWS TO PROVIDE BASIC AND SPECIAL EDUCATION TO INCARCERATED YOUTH, BUT ERRED IN HOLDING THAT THE SCHOOL DISTRICTS HAVE NO SUCH DUTY.

A. Youth In Prison Have A Paramount Right To An Education Guaranteed By The Washington State Constitution.

The right of *all* children in Washington to an education is set forth in unmistakably clear language in the State constitution:

> 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.

Const. Art. 9, § 1 (emphasis added). The constitution also sets forth the specific instruction that "*a general and uniform system of public schools*"

be created to carry out the State's "paramount" education duty. Const. Art. 9, § 2 (emphasis added).

These constitutional provisions were analyzed extensively in Seattle School Dist. v. State, 90 Wn.2d 476, 585 P.2d 71 (1978), in which this Court recognized that the duties they impose are unique -- whether measured against the background of other duties imposed by the Washington Constitution, or against the background of the education provisions adopted in other states:

> Careful examination of our constitution reveals that the framers declared *only once* in the entire document that a specified function was the State's *paramount duty*. That singular declaration is found in Const. art. 9, § 1. Undoubtedly, the imperative wording was intentional. Theodore L. Stiles, a member of the 1889 constitutional convention wrote: "No other state has placed the common school on so high a pedestal."

Seattle School District, 90 Wn.2d at 510-11 (emphasis in original). The conclusion to be drawn from this uniquely forceful constitutional language was obvious to the Court:

> By imposing upon the State a *paramount duty* to make ample provision for the education of all children residing within the State's borders, the constitution has created a "duty" that is supreme, preeminent or dominant. Flowing from this constitutionally imposed "duty" is its jural correlative, a correspondent "right" permitting control of another's conduct. Therefore, all children residing within the borders of the State possess a "right," arising from the constitutionally imposed "duty" of the State, to have the State make ample provision for their education. Further,

> since the "duty" is characterized as *paramount* the correlative "right" has equal stature.

Id. at 511-12 (emphasis in original, footnotes omitted).

Neither the governing constitutional provision nor the landmark Seattle School District case recognizes any exception to the mandate that "*all*" children be provided a basic education. Indeed, the Seattle School District court struck down a statutory scheme that permitted children to be treated differently from one another in terms of their access to basic education services. The petitioners in the Seattle School District litigation complained that the State did not allocate sufficient revenue to school districts to enable the districts to comply with their statutory and regulatory obligations. In order to obtain additional revenue, the districts were required to resort to special excess levy elections. A district that experienced a levy failure could end up with widely different means for providing basic education than a district with better access to funds. Id. at 525-26 ("[T]he levy system's instability is demonstrated by the special excess levy's dependence upon the assessed valuation of taxable real property within a district. Some districts have substantially higher real property valuations than others thus making it easier for them to raise funds").

Against this legal landscape, the Seattle School District court affirmed the Superior Court's holding that the State had violated both its "paramount duty" to provide education (Art. 9 § 1), and the constitutional uniformity clause (Art. 9 § 2). 90 Wn.2d at 486. That holding makes clear that the constitutional requirement that the State provide a basic education to "all children . . . without distinction or preference" is a prohibition of *all* distinctions and preferences, not just the illustrative distinctions set forth in Art. 9 § 1. Cf. 90 Wn.2d at 546-47 ("the provision makes clear that this education must be provided 'without distinction or preference' among the state's children") (Utter, J., concurring).

While the Seattle School District litigation was pending on appeal, the Legislature was taking steps to provide for the "general and uniform system of public schools" required by the Washington Constitution and this Court. This took the form of the Basic Education Act, RCW 28A, the opening section of which acknowledges the State's constitutional duties, including the obligation to "make ample provision for the education of all children residing within its borders," and to "provide for a general and uniform system of public schools." RCW 28A.150.200. The public school system created by and defined in the Basic Education Act plainly envisions that school districts are to be the provider of public education services: "The basic reason school districts exist is for the education of

children through development and maintenance of schools and associated education programs." Seattle School Dist. v. State, 90 Wn.2d at 494.

The goals of the Basic Education Act are explicitly set forth in that statute:

> The goal of the Basic Education Act . . . shall be to provide students with the opportunity to become responsible citizens, to contribute to their own economic well-being and to that of their families and communities, and to enjoy productive and satisfying lives. To these ends, the goals of each school district, with the involvement of parents and community members, shall be to provide opportunities for all students to develop the knowledge and skills essential to:
>
> > (1) Read with comprehension, write with skill, and communicate effectively and responsibly in a variety of ways and settings;
> >
> > (2) Know and apply the core concepts and principles of mathematics; social, physical and life sciences; civics and history; geography; arts; and health and fitness;
> >
> > (3) Think analytically, logically, and creatively, and to integrate experience and knowledge to form reasoned judgments and solve problems; and
> >
> > (4) Understand the importance of work and how performance, effort, and decisions directly affect future career and educational opportunities.

RCW 28A.150.210.

Again, the Basic Education Act places the responsibility for fulfilling these objectives squarely on the school districts and OSPI. See,

e.g., RCW 28A.150.220(2) ("satisfaction of the basic education goal identified in RCW 28A.150.210" is to be implemented by programs made available by the school districts); RCW 28A.150.290 (the Superintendent of Public Instruction is given the "power and duty" to administer the Basic Education Act, and to establish the "terms and conditions" for funding the programs). See also, RCW 28A.300.040 (OSPI shall "have supervision over all matters pertaining to the public schools of the state").

In other provisions, the Basic Education Act defines the minimum program requirements necessary to satisfy the basic education goals, RCW 28A.150.220(2)(e); the curriculum requirements of a basic education program, RCW 28A.230.020; and mandatory student/teacher ratios, RCW 28A.150.250.

Importantly, the Act also requires that basic educational programs be made available to "*all students who are five years of age ... and less than twenty-one years of age.*" RCW 28A.150.220(5).

The Basic Education Act, like the constitutional provisions it was enacted to implement, extends to all children -- including children who are incarcerated. Five years after the legislation was passed, this Court explicitly stated that the Basic Education Act extends to children incarcerated in juvenile detention facilities. Tommy P. v. Board of Comm'rs, 97 Wn.2d 385, 394, 645 P.2d 697 (1982) (no exception to Basic

Education Act for juveniles in detention facilities). Thus under Tommy P., children explicitly do not lose their right to the education programs required by the Washington Constitution and implemented by the Basic Education Act simply because they are incarcerated. Under Tommy P., school-aged youth who are incarcerated have precisely the same right to a basic education provided by public schools as youth who are free.

The State constitution plainly guarantees youth in prison a right to an education provided through a uniform public school system, as defined in the Basic Education Act, equal to that provided to non-incarcerated youth. This paramount right cannot be legislatively abolished.[4]

B. ESSB 6600 Is Unconstitutional Because It Creates A Separate And Unequal System Of Education For Youth In Prison.

1. ESSB 6600 On Its Face Violates Article 9, §§ 1 and 2 Of The Washington Constitution.

In the 1998 legislative session, the Washington Legislature enacted ESSB 6600 (Chapter 244, Laws of 1998) in an attempt to limit the education rights of youth in prisons. ESSB 6600 purports to remove incarcerated youth from the public school system in Washington and sets a

[4] Defendants admit that, with very little exception, school-aged youth in prisons have not been and will not be provided an educational program that can lead to the attainment of a high school diploma as required by the Basic Education Act. See CP 1676-1760, Fact Nos. 33, 36-42 and 47.

new, lower standard of educational compliance for each of the public entities responsible for ensuring that school-aged youth in adult prisons are provided an education. As the trial court correctly recognized, the inferior education system created by ESSB 6600 exclusively for youth in prisons violates their paramount right to an education through a uniform public school system guaranteed under Article 9, §§ 1 and 2 of the State Constitution. Accordingly, it is void.

ESSB 6600 must be viewed with a heavy presumption *against* its constitutionality. It is well-settled that legislative restraint imposed on a fundamental right is presumed to be unconstitutional. See City of Mobile v. Bolden, 446 U.S. 55, 76, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) ("a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional"); Weden v. San Juan County, 135 Wn.2d 678, 690, 958 P.2d 273 (1998) (a "regularly enacted ordinance will be presumed to be constitutional, unless the statute involves a fundamental right or a suspect class, in which case the presumption is reversed") (internal quotation marks, citation omitted). Since education is a paramount right (see Section I.A. above), the *un*constitutionality of ESSB 6600 must be presumed.

ESSB 6600 purports to relieve school districts of *any* obligation to serve incarcerated youth. Under ESSB 6600, school districts may choose

not to offer an education program to youth in prisons located within the district's geographical boundaries. ESSB 6600, Sec. 3(1)(a).[5] In addition, the Department of Corrections (DOC) is no longer required to provide incarcerated youth with a program of education, but rather only with "access" to such a program. Id., Sec. 10.[6] Importantly, youth between 18 and 21 -- who have a right to an education under the Basic Education Act -- are not included *at all* in the education programs to be provided in prisons under ESSB 6600. Id., Sec. 4(3) and Sec. 10.[7]

The centerpiece of ESSB 6600 is a competitive bidding process

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[5] Defendant Bergeson admits that prisoners are the only category of students in Washington whom school districts may elect not to serve. CP 1608-1675, Ex. 3, Bergeson dep., p. 111, lines 8-13.

[6] Prior to the enactment of ESSB 6600, DOC was obligated, along with the school districts, to provide education in prisons. See former RCW 72.09.460.

[7] Under ESSB 6600 Sec. 4(4), 18 year olds who have already participated in the program established under 6600 "may continue in the program with the permission of the department of corrections and the education provider." But 18 year olds who are not already in the program are excluded, as are all 19 and 20 year olds. The percentage of school-aged youth covered by ESSB 6600 is thus very small: There are approximately 100 youth under the age of 18 in prison and more than 1,000 under the age of 21. CP 1676-1760, Fact Nos. 11 and 17.

that has no counterpart anywhere else in this State's education laws.[8] Under the new legislation, OSPI is to solicit proposals for education programs in prisons from interested entities, including school districts, educational service districts, private contractors and institutions of higher education. Id., Sec. 3(1). The school district where the prison is located has a right of first refusal; the educational service district has second priority, and also serves as the default provider in the event that OSPI fails to contract with another entity. Id., Sec. 3(1)(a), (b); 3(2). An education provider chosen under ESSB 6600 may be an entity that is not qualified to award a high school diploma.[9] And the educational service districts, which are ultimately responsible for providing education in prisons under ESSB 6600 if no other entity is available, are not experienced in providing

[8] Defendant Bergeson admits that there is no other bidding system like that created by ESSB 6600 to determine what entity will provide education services from year to year. CP 1608-1675, Ex. 3, Bergeson dep., p. 89, lines 9-24.

[9] For example, institutions of higher learning are not authorized to issue high school diplomas. CP 1608-1675, Ex. 3, Bergeson dep., p. 77, lines 12-18.

education programs.[10]

Thus, ESSB 6600 places the essential function of providing education in prisons up for annual bid to providers that are neither experienced in providing basic education nor bound by laws defining their duties or what an appropriate basic education is. By contrast, school districts with clearly defined statutory responsibilities are the entities within the public school system responsible for providing a public education to non-incarcerated youth.[11] The inequality and uncertainty inherent in the bidder-provider scheme established by ESSB 6600, that

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[10] The statutorily-defined purposes of educational service districts are to "(1) Provide cooperative and informational services to local school districts; (2) Assist [OSPI] and the State board of education in the performance of their respective statutory or constitutional duties; and (3) Provide services to school districts and to the school for the deaf and the school for the blind to assure equal educational opportunities." RCW 28A.310.010. Compare, RCW 28A.150.210 (basic education to be provided by school districts). Defendant Bergeson admits that there is no other category of students in Washington who are required to go to schools not operated by school districts. CP 1608-1675, Ex. 3, Bergeson dep., p. 89, lines 5-8 and p. 111, lines 21-24.

[11] As defendant Bergeson explains: "... the school district is the most geared up, obviously, to provide an educational program leading to a high school diploma. [T]hat's the unit in our system that does that ... as a matter of the normal procedure." CP 1608-1675, Ex. 3, Bergeson dep., p. 84, lines 6-11. Most importantly, school districts have statutorily defined obligations to meet standard program and curriculum requirements not imposed on other education providers under ESSB 6600. See RCW 28A.150.220(2).

applies exclusively to youth in prisons, cannot be reconciled with the right to an education through a uniform public school system.

2. ESSB 6600 As Implemented By the State For the 1998-1999 School Year Violates Article 9, §§ 1 and 2 Of the Washington Constitution.

Section 3 of ESSB 6600, which creates the provider bidding system, became effective March 30, 1998. See ESSB 6600, Sec. 17. To implement this section of ESSB 6600 for the 1998-1999 school year, OSPI solicited proposals from interested agencies to provide education to youth under 18 at Clallam Bay Corrections Center (CBCC) and the Washington Corrections Center for Women (WCCW). CP 1676-1760, Fact No. 44, 46. OSPI's requests for proposals were sent out on May 29, 1998. Id., Fact No. 44. In mid-August, OSPI and DOC contracted with the Peninsula and Cape Flattery School Districts to provide education services at WCCW and CBCC, respectively, beginning on September 1, 1998. Id., Fact No. 47. Education services will not be provided in any other prisons for the 1998-1999 school year. Id., Fact No. 46, 47.

This year, OSPI spent five months on the bidding and contracting process required by ESSB 6600 to find an education provider, even though providers were sought for only two prisons. More time may need to be invested in future years. Significantly, the bidding and contracting process may need to recur every year for services at WCCW and CBCC, since

both the Peninsula and Cape Flattery school districts have the right to terminate existing contracts. See id., Fact No. 47, Ex. 1-4. And youth will unquestionably be incarcerated at other adult institutions across the State (id., Fact Nos. 20 and 24), which means that DOC and OSPI will need to start the lengthy bidding and contracting processes anew to provide for youth in those prisons. These delays -- which have no counterpart outside the special system created by ESSB 6600 -- impermissibly and unconstitutionally burden prisoners' right to an education through a uniform public school system. See City of Akron v. Akron Center for Reprod. Health, 462 U.S. 416, 103 S. Ct. 2481, 76 L.Ed.2d 687 (1983) (parental consent, "informed" consent, and waiting period requirements unconstitutionally delay and burden the exercise of reproductive rights).

But delay is not the worst evil created by defendants' implementation of ESSB 6600. Because the State defendants have chosen to solicit bids for education providers in only two State prisons for the 1998-1999 school year, many youth will be *entirely* deprived of the educational services to which they are constitutionally entitled.

School-aged youth are located in every institution operated by DOC. CP 1676-1760, Fact No. 19. At any time in the future, class members will be incarcerated at every DOC facility. Id., Fact No. 20.

DOC also has the authority to transfer any prisoner, whatever his or her age, at any time, from one prison to another. Id., Fact No. 24. For the moment, male youth under the age of eighteen are incarcerated at Clallam Bay Corrections Center. Id., Fact No. 14. But as recently as a few months ago, most of the youth now at CBCC were housed at the Washington Corrections Center in Shelton, while others were scattered throughout several other prisons. CP 1608-1675, Ex. 4, OSPI/DOC Joint Report to the Legislature, May 1998, p. 6; id., Ex. 5, CLS Request to OSPI for Disability Assessment and Special Education Services.

Despite the fact that school-aged youth are and will be incarcerated at all prisons operated by DOC, the State has nevertheless implemented ESSB 6600 this year by making limited provision for the education of only those youth under the age of 18 who are currently imprisoned at CBCC and WCCW. CP 1676-1760, Fact Nos. 43-47. The implementation of ESSB 6600 in this manner violates the mandate in the Washington Constitution to make ample provision for the education of all children. By securing education providers at only two prisons -- when school-aged youth are and will be imprisoned at every facility operated by DOC -- the State has made scant, not ample, provision for only a few, not all, incarcerated school-aged youth. Indeed, as ESSB 6600 has been implemented by OSPI and DOC this year, *no* provision at all has been

made for youth between 18 and 21, or youth under 18 who are transferred to a DOC prison other than CBCC or WCCW, as some undoubtedly will be for custody, security, medical, or other reasons. CP 1676-1670, Fact No. 24.

By enacting ESSB 6600 and implementing it as it has, the State has impermissibly strayed from the constitutional mandate to provide for the education of *all* Washington children, and to do so by means of a *uniform system of public schools*. ESSB 6600 establishes a system that is anything but uniform. The basic education rights of youth in prison -- unlike the rights of free children -- are subjected to a lengthy and cumbersome bidding and contracting process that is not a part of the uniform public school system the constitution requires.[12] Even the small percentage of incarcerated youth who are eligible to participate in the education programs developed to implement ESSB 6600 -- again, 18, 19 and 20-year olds are simply not included -- are uncertain of the entity responsible for providing education from year to year, and are guaranteed

[12] The education available to youth in prison is also of a different and lower quality than that available to children incarcerated in juvenile facilities. The latter group of children is statutorily entitled to an education provided by the public school system through school districts; those children are also entitled to participate in education programs through the age of 21. RCW 28A.190.010; RCW 28A.190.030. See also infra, § I.C. (regarding ESSB 6600's violation of equal protection).

only an education program provided by an educational service district, a body that has never had as its primary function the operation of an education program. And when OSPI chooses, as it may, to employ a college or a private entity to provide education, the few youth eligible to participate will not even have the opportunity to earn a high school diploma.

This separate but unequal scheme violates Article 9 of the State Constitution. As noted, this Court in the Seattle School District litigation struck down a statutory scheme that provided non-uniform access to basic education services. 90 Wn.2d at 486, 525-26. The supreme courts of other states, applying the uniformity clauses in their own state constitutions, have more recently done the same. For example, in Hull v. Albrecht, 960 P.2d 634, 1998 WL 315825 (Ariz. June 16, 1998), the Arizona Supreme Court invalidated school finance legislation under the State constitution's uniformity clause because the statutory financing mechanism "itself cause[d] disparities between districts." Id. at *4. Similarly, in Edgewood Independent School v. Kirby, 777 S.W.2d 391 (Tex. 1989), the Texas Supreme Court held that the school financing system implemented by the legislature that resulted in disparity between the education received by children in wealthy districts and children in poor districts violated the Texas constitution. The constitutional uniformity

principle invoked by these decisions prohibits treatment that is nonuniform as to particular *groups* of students no less than treatment that is geographically nonuniform. See Hootch v. Alaska State-Operated School Sys., 536 P.2d 793, 802 (Alaska 1975) ("The word 'uniform' found in most State constitutions would seem to prohibit the tailoring of educational programs to different geographic areas or *groups* in a state") (emphasis added).

In short, ESSB 6600 implements a non-uniform system of education and denies youth in prisons their constitutionally protected right to the education provided by the public school system to every other school-aged youth in this State. The new legislation denies incarcerated youth the basic educational rights available to free children: The right to participate in a school program operated by a uniform public system that designates school districts, the entities that have expertise in and statutorily-defined responsibilities for operating education programs, as education providers, and the right to an education until the age of 21.

Far from heeding the constitutional mandate to provide a uniform public system of education, the State in enacting ESSB 6600 has deliberately created a program whose purpose is to ensure that one class of children is treated differently, and less favorably. Because both the Washington Constitution and this Court's cases interpreting the

Constitution clearly provide that such a result is impermissible, the trial court's judgment striking down ESSB 6600 should be affirmed.

C. ESSB 6600 Violates The Equal Protection Clause Of The Washington Constitution.

Article 1, § 12 of the Washington Constitution provides:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

(emphasis added).

> Const art. I, §12, the state's version of the equal protection clause, has been construed in a manner similar to that of the equal protection clause of the Fourteenth Amendment. Such construction, however, is not automatically compelled. Const. art. I, § 12 may be construed to provide greater protection to individual rights than that provided by the equal protection clause.

Darrin v. Gould, 85 Wn.2d 859, 868, 540 P.2d 882 (1975) (citations omitted). Art. 1, § 12 requires "that persons similarly situated with respect to the legitimate purpose of the law be similarly treated." State v. Shawn P., 122 Wn.2d 553, 560, 859 P.2d 1220 (1993).

As demonstrated in § I.B., supra, ESSB 6600 singles out school-aged youth in prison for treatment that is different and less favorable than that accorded all other school-aged youth in the State, including (1) non-incarcerated school-aged youth, and (2) school-aged youth incarcerated in

juvenile facilities.[13] This discriminatory legislation violates the equal protection clause of the Washington Constitution.

When a law is challenged as violative of the equal protection clause, the first step is to determine the level of scrutiny to which the law must be subjected. Under the "rational relationship" test, the law must rest upon a legitimate state objective and must not be wholly irrelevant to achieving that objective. State v. Ward, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994). However, when a statutory classification affects a suspect class or a fundamental right, it must be subjected to "strict scrutiny," and will be upheld only if it is necessary to achieve a compelling state interest. Id.[14]

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[13] See CP 1676-1670, Fact No. 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); id., Fact No. 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). See also n. 12, supra.

[14] "Intermediate scrutiny" is applied where strict scrutiny is not mandated, but important rights or semi-suspect classifications are affected. State v. Shawn P., 122 Wn.2d at 560. To withstand intermediate scrutiny, a law must further a substantial interest of the state. State v. Coria, 120 Wn.2d 156, 170, 839 P.2d 890 (1992).

This Court in Seattle School District made clear that the constitutional right to education is more than fundamental; it is absolute. In Seattle School District the Court recognized three categories of rights:

> (a) some are deemed absolute; (b) others may be impaired upon showing a compelling state interest; whereas, (c) a third group may be invaded with a showing of a mere reasonable relationship between legislation and the end sought to be accomplished.

90 Wn.2d at 513 n. 13. The Court then stated that the constitutional right to education falls in the first category. 90 Wn.2d at 514 n. 13 ("the mandate of Const. art. 9, §§ 1 and 2 is concerned with a true 'right' (or absolute)"). Thus, the constitutional right to an education cannot be impaired by legislative action, no matter how compelling the state interest in doing so. See 90 Wn.2d at 513 n. 13 ("These rights are absolute and cannot be invaded or impaired").

However, even if the right to education were only fundamental, rather than absolute, ESSB 6600 would still have to pass muster under strict scrutiny. That is, the State would have to show that the discrimination created by ESSB 6600 is "absolutely necessary to accomplish a compelling state interest." State v. Phelan, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983). This the State cannot do.

Strict scrutiny is "[the] most rigorous and exacting standard of constitutional review." Miller v. Johnson, 515 U.S. 900, 115 S. Ct. 2475,

2490, 132 L.Ed.2d 762 (1995). It requires the State to carry the burden of demonstrating that its legislative classification is "precisely tailored to serve a compelling governmental interest." Plyler v. Doe, 457 U.S. at 217, 102 S. Ct. at 2395. "[C]lassifications ... that infringe on fundamental constitutional rights, are presumptively invalid and will not often be justified by a legitimate state interest." Donatelli v. Mitchell, 2 F.3d 508, 513 (3d Cir. 1993). As the author of a leading constitutional law case book has put it, strict scrutiny is generally "'strict' in theory and fatal in fact." Gunther, Cases and [illegible] on Constitutional Law (10th ed. 1980) at 671.[15]

The courts of several states have concluded that, based on their state constitutions, education is a fundamental right, and therefore any discrimination that implicates the right to education is subject to strict scrutiny. In each of these cases, the court has struck down the discriminatory educational regime before it as violating the state constitution's equal protection guarantee. See, e.g., Opinion of the Justices, 624 So.2d 107, 159, 161 (Ala. 1993); Washakie Co. School Dist. No. One v. Herschler, 606 P.2d 310, 333, 335 (Wyo.), cert. denied, 449

[15] See, e.g., [illegible] F. Supp. 1423, 1442-43 (D. Ariz. 1997) (school district's policy of denying handicapped students educational services during long-term suspension for misconduct does not survive strict scrutiny).

U.S. 824, 101 S.Ct. 86, 66 L.Ed.2d 28 (1980); Serrano v. Priest, 18 Cal.3d 728, 135 Cal. Rptr. 345, 557 P.2d 929, 952-53, cert. denied, 432 U.S. 907, 97 S.Ct. 2951, 53 L.Ed.2d 1079 (1977); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359, 374 (1977). Given the "absolute" right to education under the Washington Constitution, this Court must do the same, and hold that ESSB 6600 violates Art. 1, § 12 of the Washington Constitution.

D. The State Constitution and the Basic Education Act Mandate that Special Education Services be Provided to All Youth with Disabilities Aged 3 to 21.

All disabled youth in Washington are entitled to special education services as part of the fundamental right to an education recognized by Article 9 of the State Constitution:

> The paramount duty of the State to make ample provision for the education of all resident children under Article IX, Section 1, includes the duty to fully fund an appropriate education for all handicapped children. This conclusion is mandated by the Constitution and is required independently of the intent expressed by the Legislature in its system of education statutes to make handicapped education part of the state program of basic education.

CP 1608-1675, Ex. 6, Seattle School Dist. v. State, Thurston County Superior Court No. 81-2-1713-1, Findings of Fact and Conclusions of Law, September 7, 1983, at 66-67 (Doran, J.).

RCW chapter 28A.155, titled "Special Education," was enacted "to ensure that all children with disabilities ... shall have the opportunity for

an appropriate education at public expense as guaranteed to them by the Constitution of this state." RCW 28A.155.010. To implement this paramount constitutional right, RCW 28A.155.020 provides as follows:

> The *superintendent of public instruction* shall require each *school district* in the state to insure an appropriate educational opportunity for *all children with disabilities between the ages of three and twenty-one, but when the twenty-first birthday occurs during the school year, the educational program may be continued until the end of that school year.*

RCW 28A.155.020 (emphasis added). See also RCW 28A.155.030 (OSPI shall "ensur[e] that all school districts provide an appropriate educational opportunity for all children with disabilities").[16]

OSPI is required to establish "appropriate sanctions," including withholding of funds, to be applied to any school district that fails to meet its special education obligations. RCW 28A.155.100. See also WAC 392-172-030(1):

> Each school district or other public agency shall provide *every* special education student between the age of three and twenty-one years, a free and appropriate educational program.

[16] "Appropriate education" is defined as "an education directed to the unique needs, abilities, and limitations of the children with disabilities." RCW 28A.155.020.

(emphasis added).[17] While a school district may contract with another approved agency to discharge this obligation, the duty ultimately rests with the district: "Nothing in this section shall prohibit the establishment ... of ... contracts with other agencies approved by the superintendent of public instruction, *which can meet the obligations of school districts to provide education for children with disabilities*[.]" RCW 28A.155.020 (emphasis added).

Thus, it is clear that, under Washington law, *all* youth with disabilities aged 3 to 21 are entitled to special education services. The law makes no exception for youth in adult prisons.[18]

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[17] "Special education student" means "[a]ny student, *enrolled in school or not*, whose unique needs cannot be addressed exclusively through education in general education classes with or without individual accommodations and is therefore determined to be in need of special education services." WAC 392-172-035(2) (emphasis added).

[18] The chief education administrator for DOC acknowledged the existence of this right when she stated in January 1998:

> Under the state constitution and statute, the obligation to provide education to children of the State of Washington includes children age three years through twenty-one years. ... Based on the advice of legal advisors to [DOC] and OSPI, those offenders under the age of eighteen who have achieved a general equivalency degree *continue to be eligible to receive basic and special education until they achieve a high school diploma or become twenty-two years of age.*

CP 1608-1675, Ex. 7, Memorandum from Jean Stewart to Vicki Rummig, dated January 22, 1998 (emphasis added). (continued ....)

II. THE TRIAL COURT ERRED IN HOLDING THAT DEFENDANTS ARE NOT OBLIGATED BY THE IDEA AND § 504 OF THE REHABILITATION ACT OF 1973 TO PROVIDE SPECIAL EDUCATION TO INCARCERATED YOUTH WITH DISABILITIES.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., was enacted

> to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.

20 U.S.C. § 1400(d)(1)(A).[19]

> "Special education" means
>
> specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including
>
> (A) instruction conducted in the classroom, in the home, in hospitals *and institutions,* and in other settings[.]

20 U.S.C. § 1401(25) (emphasis added).

Footnote 18, continued,
The enactment of ESSB 6600 does not alter this analysis. ESSB 6600 did not amend RCW 28A.155 in any way, and, of course, could not amend the Constitution. Indeed, as the trial court correctly recognized, "Senate Bill 6600 did not address special education whatsoever." CP 1608-1675, Ex. 8, Transcript of July 21, 1998 Tunstall hearing, p. 14, line 21 - p. 15, line 4.

[19] The IDEA was formerly entitled the Education for All Handicapped Children Act and the Education of the Handicapped Act. The 1990 amendment substituting the new title involved no change in text. Dell v. Board of Education, Township High School District 113, 32 F.3d 1053, 1054 n. 1 (7th Cir. 1994). For ease of reference, plaintiffs refer to the statute as "IDEA" throughout this memorandum.

"Related services" means

> ... such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education[.]

20 U.S.C. § 1401(22).

The IDEA requires all states receiving federal funding under the statute to ensure that

> a free appropriate public education is available to *all children with disabilities residing in the State between the ages of 3 and 21, inclusive,* including children with disabilities who have been suspended or expelled from school.

20 U.S.C. § 1412(a)(1)(A) (emphasis added).[20] A "free appropriate public education" (FAPE) means

> special education and related services that--
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

[20] The State of Washington receives funding under the IDEA. CP 1676-1760, Fact No. 52.

(D) are provided in conformity with the individualized education program [IEP] required under section 1414(d) of this title.

20 U.S.C. § 1401(8).[21]

A. Incarcerated Youth Aged 21 And Under Are Entitled To Special Education And Related Services.

It is well established that a State's obligation under the IDEA to provide FAPE to "all children with disabilities residing in the State between the ages of 3 and 21, inclusive," extends to youth in correctional facilities. See, e.g., State of New Hampshire v. Adams, 159 F.3d 680, 682 (1st Cir. 1998); Paul Y. By and Through Kathy Y. v. Singletary, 979 F. Supp. 1422, 1425 (S.D. Fla. 1997); Alexander S. v. Boyd, 876 F. Supp. 773, 800 (D.S.C. 1995); Donnell C. v. Illinois State Board of Education, 829 F. Supp. 1016, 1020 (N.D. Ill. 1993); Green v. Johnson, 513 F. Supp. 965, 977-78 (D. Mass. 1981) (granting preliminary injunction directing that special education be provided to all prisoners under age 22); see also 34 C.F.R. § 300.2(b)(4) (IDEA applies to "state correctional facilities").

Indeed, this result is compelled by the plain language of the statute. "[T]he IDEA's liberal use of the word 'all' is clear and unequivocal and

[21] The Individualized Education Program (IEP) is a statement of the disabled youth's skill level, educational goals for the youth, and services to be provided. The IEP is the "modus operandi" of the IDEA. School Comm. of Town of Burlington v. Department of Education, 471 U.S. 359, 368, 105 S. Ct. 1996, 2002, 85 L.Ed.2d 385 (1985).

should not be ignored. ... [T]his Court agrees, 'all means all.'" Magyar v. Tucson Unified School District, 958 F. Supp. 1423, 1439 (D. Ariz. 1997).[22]

[22] The IDEA was amended in 1997 to provide:

> The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children:
>
> * * *
>
> (ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility:
>
> (I) were not actually identified as being a child with a disability under section 1401(3) of this title; or
>
> (II) did not have an individualized education program under this subchapter.

20 U.S.C. § 1412(a)(1)(B)(ii).

However, as set forth above, Washington law requires that special education be provided to "*all* children with disabilities between the ages of three and twenty-one[.]" RCW 28A.155.020 (emphasis added). Thus, since State law *does* require that youth 18-21 in adult correctional facilities be provided with special education services, the exception set forth in 20 U.S.C. § 1412(a)(1)(B)(ii) does not apply in Washington. This is true notwithstanding ESSB 6600 because, as stated above, ESSB 6600 does not amend RCW 28A.155 or deal with special education in prison in any way except to require a study of the issue.

B. All Defendants In This Case Have A Duty To Ensure That Youth In Prison Receive Special Education And Related Services.

1. OSPI Has the Ultimate Duty to Ensure That Disabled Youth in Prison Receive Special Education.

Under the IDEA, OSPI is ultimately responsible for ensuring that

> (i) the requirements of [IDEA] are met; and
> (ii) all educational programs for children with disabilities in the State, *including all such programs administered by any other State or local agency*—
> (I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and
> (II) meet the educational standards of the State educational agency.

20 U.S.C. § 1412(a)(11)(A) (emphasis added); see also 34 C.F.R. 300.600. "The regulations make it clear that the reference to 'all programs' includes state correctional facilities and that the requirements of the IDEA apply to such facilities." Alexander S., 876 F. Supp. at 800.[23]

It is OSPI's duty to ensure that all public agencies of this State, including school districts, provide a free appropriate public education (FAPE) to all disabled children under their jurisdiction. 34 C.F.R. § 300.341(a). This includes a duty to arrange services for disabled children

[23] Under the IDEA, OSPI is the "State educational agency" (SEA) for the State of Washington. See 20 U.S.C. § 1401(28). "Local educational agencies" (LEA) include school districts. 20 U.S.C. § 1401(15).

who are not served by the local school district in which they reside. 20 U.S.C. § 1413(h); 34 C.F.R. § 300.360(a)(3); see also id. (note).

> The SEA must ensure that *every child with a disability in the State* has FAPE available, regardless of which agency, State or local, is responsible for the child. While the SEA has flexibility in deciding the best means to meet this obligation (e.g., through interagency agreements), *there can be no failure to provide FAPE due to jurisdictional disputes among agencies.*
>
> * * *
>
> The SEA, through its written policies or agreements, must ensure that IEPs are properly written and implemented for all children with disabilities in the State. This applies to each interagency situation that exists in the State, including any of the following:
>
> * * *
>
> (4) *when the courts make placements in correctional facilities.*

34 C.F.R. Part 300, App. C, at 73 (7-1-97 Edition) (emphasis added).

The Senate Report on the Education for All Handicapped Children Act of 1975, the predecessor of the IDEA, explained this assignment of responsibility as follows:

> This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency.
>
> * * *
>
> While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, *so that failure to deliver services or*

> *the violation of the rights of handicapped children is squarely the responsibility of one agency.*

S. Rep. No. 94-168, p. 24 (1975), quoted in 34 C.F.R. § 300.600 (note). Accord, Gadsby by Gadsby v. Grasmick, 109 F.3d 940, 952-53 (4th Cir. 1997) ("[U]ltimately, it is the SEA's responsibility to ensure that *each child within its jurisdiction* is provided a free appropriate public education") (emphasis added). "The violation of even one child's rights under the Act is sufficient to visit liability on the state." Cordero by Bates v. Pennsylvania Department of Education, 795 F. Supp. 1352, 1363 (M.D. Pa. 1992).

In short, the buck stops with OSPI.[24] Although the school districts have a duty under State and federal law to provide special education to disabled youth in prison, when they fail to do so it is OSPI that has the ultimate responsibility to ensure that FAPE is provided to these youth.

2. School Districts Have a Duty to Provide Special Education to Disabled Youth in Prison in the District's Service Area.

The IDEA imposes on school districts an obligation to serve all disabled children within their service area:

[24] Defendant Bergeson acknowledges this when she states: "We have ultimate responsibility to make sure that students who need specially designed instruction have appropriate educational offerings[.]" CP 1608-1675, Ex. 3, Bergeson dep., p. 156, lines 3-6.

> At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in its jurisdiction, an individualized education program[.]

20 U.S.C. § 1414(d)(2)(A). See Gadsby, 109 F.3d at 950 (school district violated IDEA by failing to develop IEP for disabled child); Magyar, 958 F. Supp. at 1435 (same); Bd. of Educ. of Oak Park v. Ill. State Bd. of Ed., 21 F. Supp.2d 862, 875 (N.D. Ill. 1998) (school district's failure to explore and respond to child's tentative diagnosis as learning disabled violated IDEA).

> The LEA is responsible for ensuring that all children with disabilities within its jurisdiction are identified, located, and evaluated, *including children in all public and private agencies and institutions within that jurisdiction.*

34 C.F.R. § 300.220 (note) (emphasis added). See also 20 U.S.C. § 1411(f)(4)(A) (providing for grants to local educational agencies to

provide "services for children in correctional facilities").[25]

3. DOC Has a Duty to Ensure That Special Education is Provided to All Disabled Youth in its Custody.

The regulations implementing the IDEA, 34 C.F.R. Part 300, apply

> to all political subdivisions of the State that are involved in the education of children with disabilities. These would include:
>
> (1) The State educational agency;
> (2) Local educational agencies and intermediate educational units;
> (3) Other state agencies and schools ...; and
> (4) *State correctional facilities.*

34 C.F.R. § 300.2(b) (emphasis added). This is so regardless of whether the state correctional agency receives IDEA funding. Id. (note). See also

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[25] One court recently described the relationship between the SEA (OSPI) and the LEA (school districts) as follows:

> IDEA delegates supervisory authority to the SEA, which is responsible for administering funds, setting up policies and procedures to ensure local compliance with IDEA, and filling in for the LEA by providing services directly to students in need where the LEA is either unable or unwilling to establish and maintain programs in compliance with IDEA. The LEA, on the other hand, is responsible for the direct provision of services under IDEA, including the development of an individualized education program (IEP) for each disabled student, the expenditure of IDEA funds to establish programs in compliance with IDEA, and the maintenance of records and the supply of information to the SEA as needed to enable the SEA to function effectively in its supervisory role under IDEA.

Gadsby, 109 F.3d at 943.

34 C.F.R. Pt. 300, App. C, at 84 (7-1-97 Edition) ("Each public agency must provide FAPE to all children with disabilities under its jurisdiction"); 34 C.F.R. § 300.341(a) (State educational agency "shall ensure that each public agency develops and implements an IEP for each of its children with disabilities"). These provisions make clear that DOC is responsible for ensuring that an IEP is developed for, and special education and related services provided to, all youth with disabilities under its jurisdiction.

C. Under § 504 Of The Rehabilitation Act Of 1973, All Defendants Have A Duty To Ensure That Disabled Youth In Prison Receive A Free Appropriate Public Education.

Section 504 of the Rehabilitation Act of 1973 provides:

> No otherwise qualified individual with a disability in the United States, ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]

29 U.S.C. § 794(a). "Program or activity" means "*all* of the operations of" an agency of State or local government, "*any* part of which is extended Federal financial assistance." 29 U.S.C. § 794(b)(emphasis added). OSPI, DOC, and the defendant school districts all receive federal financial assistance. CP 1676-1760, Fact Nos. 51-52.

The regulations implementing § 504 in the context of preschool, elementary, and secondary education are found at 34 C.F.R. Part 104, Subpart D. These regulations provide that

> A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to *each qualified handicapped person who is in the recipient's jurisdiction*, regardless of the nature or severity of the person's handicap.

34 C.F.R. § 104.33(a) (emphasis added). The Appendix to the regulation makes clear that "in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility." 34 C.F.R. Part 104, App. A, at 362 (7-1-97 Edition).[26]

The "qualified handicapped person" who is entitled to FAPE under § 504 is defined as

> [w]ith respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which non-handicapped persons are provided such services, (ii) of any age during which it is mandatory

[26] "Recipient" is defined as

> any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient[.]

34 C.F.R. § 104.3(f). Thus DOC, OSPI, and the school districts all qualify as "recipients." See CP 1676-1760, Fact Nos. 51-52.

> under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the [IDEA].[27]

34 C.F.R. § 104.3(k)(2). As explained in § I.D. and II.A., supra, both Washington law and 20 U.S.C. § 1412 require the provision of special education services to persons aged 3-21. See also 34 C.F.R. Part 104, App. A, at 354 (7-1-97 Edition) ("the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the [IDEA] -- generally, ... 3-21 ... are incorporated by reference in [34 C.F.R. § 104.3(k)(2)]"). Therefore, these persons are similarly entitled to FAPE under § 504 of the Rehabilitation Act.[28]

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[27] Now 20 U.S.C. § 1412.

[28] Although the IDEA and § 504 are similar, they are not identical. See, e.g., Muller v. Committee on Special Education of East Islip Union Free School District, 145 F.3d 95, 105 (2d Cir. 1998) (school district's proposed remedial action under § 504 did not satisfy IDEA). For example, the definition of "handicapped person" under § 504 is different than the definition of "child with a disability" under the IDEA; thus, some youth may be eligible for services under one statute but not the other. Compare 34 C.F.R. § 104.3(j) with 20 U.S.C. § 1401(3).

Similarly, "free appropriate public education" is defined differently under the two statutes. Compare 34 C.F.R. § 104.33(b)(1) with 20 U.S.C. § 1401(8). However, the § 504 regulations state that implementation of an IEP in accordance with the IDEA is one means of satisfying § 504's FAPE requirement. 34 C.F.R. § 104.33(b)(2).

Once again, there is no exception to the law for disabled youth who are incarcerated. Indeed, courts have explicitly recognized that the requirements of § 504 apply to the education of youth with disabilities in correctional facilities. Alexander S., 876 F. Supp. at 801; Donnell C., 829 F. Supp. at 1020.[29]

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[29] Some courts have held that a showing of "bad faith" or "gross misjudgment" is required to establish a violation of § 504 in the context of education of disabled youth. The leading authority for this proposition is Monahan v. Nebraska, 687 F.2d 1164, 1171 (8th Cir. 1982), cert. denied, 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983). However, the reasoning underlying this position has since been explicitly disapproved by Congress.

Monahan reasoned that, without a requirement of bad faith or gross misjudgment, § 504 would be duplicative of the IDEA in the context of education of disabled youth. This reasoning is similar to that of the Supreme Court in Smith v. Robinson, 468 U.S. 992, 104 S. Ct. 3457, 82 L.Ed.2d 746 (1984):

> Even assuming that the reach of § 504 is co-extensive with that of the [IDEA], there is no doubt that the remedies, rights, and procedures Congress set out in the [IDEA] are the ones it intended to apply to a handicapped child's claim to a free appropriate public education.

468 U.S. at 1019, 104 S. Ct. at 3472. However, in 1986, Congress overturned Smith by enacting 20 U.S.C. § 1415(l), which provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities[.]

Section 1415(l) was designed to "reestablish statutory rights repealed by the (continued ...)

III. DEFENDANTS HAVE LONG BEEN, AND CONTINUE TO BE, IN VIOLATION OF THEIR DUTY UNDER STATE AND FEDERAL LAW TO PROVIDE SPECIAL EDUCATION TO DISABLED YOUTH IN PRISON.

There are youth under the age of 22 confined in every correctional facility operated by DOC. CP 1676-1760, Fact No. 19. Many of these youth are disabled and therefore eligible for special education services under State and federal law. See CP 1608-1675, Ex. 9, plaintiffs' amended responses to OSPI Interrogatories Nos. 1-3 (identifying disabled youth currently incarcerated in DOC); id., Ex. 3, Bergeson dep., p. 30, line 25 - p. 31, line 7 (disabled youth are incarcerated in DOC); Green v. Johnson, 513 F. Supp. at 968 (according to one study, "some type of handicapping condition is found to exist in 42.4% of delinquent children committed to correctional institutions").

In spite of this great and obvious need, OSPI does not provide *any* school-aged youth in DOC prisons with special education services. CP 1676-1760, Fact No. 26. OSPI has *never*, and does not now, monitor

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Footnote 29, continued,
U.S. Supreme Court in Smith v. Robinson," and to "reaffirm, in light of this decision, the viability of section 504, 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. Rep. No. 296, 99th Cong., 1st Sess. 4 (1985). Because Monahan predates, and is inconsistent with, Congress' enactment of 20 U.S.C. § 1415(l), its requirement of a showing of "bad faith" or "gross misjudgment" to establish § 504 liability is no longer good law. Howell by Howell v. Waterford Public Schools, 731 F. Supp. 1314, 1317-19 (E.D. Mich. 1990).

education programs in DOC facilities. Id., Fact No. 27. DOC has *never*, and does not now, provide *any* special education services to youth in its custody. CP 1608-1675, Ex. 2, September 15, 1997 letter from defendant Lehman to defendant Bergeson. The defendant school districts have *never*, and do not now, provide *any* special education services to youth in DOC, except that, since the filing of this lawsuit, Peninsula and Cape Flattery School Districts have entered into contracts to provide some services only to youth under 18, and only to those incarcerated at two of the seven DOC prisons at issue in this lawsuit. CP 1676-1760, Fact No. 47. Adequate special education and related services are not, in fact, being provided at WCCW and CBCC. When plaintiffs deposed staff of the education program at WCCW, only one young woman out of ten had been given an IEP, and very few had been assessed for special education eligibility. CP 1608-1675, Ex. 10, Fessler dep., p. 68, line 3 - p. 76, line 18. And when the parties filed their cross-motions for summary judgment in September 1998, special education eligible youth under 18 at CBCC were not yet receiving special education and related services. See CP 1608-1675, Arthur decl., ¶ 13. *None* of the defendant school districts provide special education services to youth aged 18-22 in DOC prisons.

CP 1676-1760, Fact No. 47.[30]

Based on these undisputed facts, there can be no doubt that all defendants are in violation of their obligation, imposed by state and federal law, to provide special education services to all disabled youth under their jurisdiction. The trial court correctly recognized that defendants Bergeson and Lehman have violated their duty under state law, but erred in holding that the school districts have no such duty. The trial court further erred in holding that none of the defendants have a duty under federal law to provide special education to incarcerated youth with disabilities.

CONCLUSION

For all the reasons stated herein, the trial court's order granting summary judgment to plaintiffs should be affirmed. The trial court's orders dismissing plaintiffs' federal claims against defendants Bergeson and Lehman, and dismissing all plaintiffs' claims against the defendant school districts, should be reversed, and the case remanded to the trial

[30] ESSB 6600 does not require that the education program offered to youth in prison include special education services. However, the contracts entered pursuant to ESSB 6600 for the 1998-1999 school year do provide for special education services, but only for youth under 18 who are located at WCCW and CBCC. CP 1676-1760, Fact No. 47.

court with instructions to grant summary judgment to plaintiffs on these claims.

Plaintiffs seek their attorney fees and costs on this appeal.

Respectfully submitted this 31st day of March, 1999.

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