

NOTE

Depriving Washington State's Incarcerated Youth of an Education: The Debilitating Effects of *Tunstall v. Bergeson*

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"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."¹

I. INTRODUCTION

Although the United States Constitution does not guarantee a fundamental right to education, all U.S. states recognize a right to primary and secondary education in state constitutions or confer that right by statute.² As the United States Supreme Court has observed, "education is perhaps the most important function of state and local governments."³ Both compulsory school attendance laws and the great expenditures for education demonstrate the recognition of the importance of education to our democratic society.⁴ "Today, [education] is a principal instrument in awakening [a] child to cultural values, in preparing him for later professional training, and in helping

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1. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

2. Molly McUSIC, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991).

3. *Brown*, 347 U.S. at 493. The U.S. Supreme Court has also observed that education "provides the basic tools by which individuals might lead economically productive lives" and "has a fundamental role in maintaining the fabric of our society." *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

4. *Brown*, 347 U.S. at 493.

him to adjust normally to his environment.”⁵ The failure of some correctional facilities to provide juvenile⁶ inmates an adequate education, including special education, deprives juveniles of a critical resource that can assist them in becoming productive members of society upon release.⁷

Approximately 125,000 young people are now in custody in public and private correctional facilities in the United States.⁸ “The majority of youth enter correctional facilities with a broad range of intense educational, mental health, medical, and social needs.”⁹ A recent study has estimated that 35.6% of juvenile offenders have learning disabilities and an additional 12.6% have mental retardation.¹⁰ Another twenty-two percent of those incarcerated have significant mental health problems.¹¹ “Large numbers of incarcerated juveniles are marginally literate or illiterate and have experienced school failure and retention.”¹² These youths are also disproportionately male, African-American, poor, and have significant learning and/or emotional problems that entitle them to special education and related services.¹³ While illiteracy and poor academic performance are not direct causes of delinquency, studies demonstrate a strong link between marginal

5. *Id.*

6. WASH. REV. CODE § 72.05.020(3) (2003) defines “juvenile” as “a person under the age of twenty-one who has been sentenced to a term of confinement under the supervision of the department of corrections under RCW § 13.40.185.” WASH. REV. CODE § 13.80.020(1) (2003) also defines “Court-involved youth” as

those youth under the age of twenty-one who, within the past twenty-four months (a) have served a court-imposed sentence; (b) are or have been on probation or parole; or (c) are involved in a legal proceeding in which the youth may be found to have committed a criminal or juvenile offense

Id.

7. Unfortunately, Washington State’s incarcerated juveniles (namely those between the ages of 18 and 21) are among many in the United States who do not receive the educational services to which they are entitled.

8. See National Center on Education, Disability and Juvenile Justice, *Juvenile Correctional Education Programs*, at <http://www.edjj.org/education.html> (last modified Jan. 25, 2002) [hereinafter EDJJ Report].

9. *Id.*

10. See P. Casey and I. Keilitz, *Estimating the Prevalence of Learning Disabled and Mentally Retarded Juvenile Offenders: A Meta-Analysis*, in UNDERSTANDING TROUBLED AND TROUBLING YOUTH 82, 96 (P. Leone ed., 1990).

11. See R.K. Otto et al., *Prevalence of Mental Disorders Among Youth in the Juvenile Justice System*, in RESPONDING TO THE MENTAL HEALTH NEEDS OF YOUTH IN THE JUVENILE JUSTICE SYSTEM (J.J. Coccozza ed., 1992).

12. EDJJ Report, *supra* note 8.

13. Donna Murphy, *The Prevalence of Handicapping Conditions Among Juvenile Delinquents*, REMEDIAL AND SPECIAL EDUCATION, May/June 1986, at 7.

literacy skills and the likelihood of becoming involved in the juvenile justice system.¹⁴

The negative consequences of marginal literacy extend well beyond the greatly heightened risk for incarceration among adolescents.¹⁵

The rate of poverty among those in the labor force without a high school diploma is approximately three times that of high school graduates. Eighteen to twenty-three year olds least proficient in the basic skills of reading and mathematics are more likely to be unemployed, living in poverty, and not enrolled in any type of schooling.¹⁶

Educating juveniles in correctional institutions serves as an effective method in preventing crime and reducing the rate of recidivism. According to the Washington Department of Corrections ("DOC"), in 1998, eighty-six percent of the 1,027 youth incarcerated in Washington's adult prisons served sentences of ten years or less.¹⁷ National studies have estimated a recidivism rate among prisoners as high as seventy percent.¹⁸ A recent U.S. Department of Education study, however, has shown that inmates who receive schooling through vocational training or classes at the high school or college level are far less likely to return to prison within three years of their release.¹⁹ Inmates who receive two years of post-high school education while in prison have a re-arrest rate of ten percent compared to the national rate of sixty percent.²⁰ Thus, educating juvenile inmates during incarceration can help them to redirect their lives and effectively reduce juvenile delinquency and recidivism.

Despite compelling evidence that educating incarcerated youths reduces recidivism while increasing post-release success in employment and other life endeavors, the lack of attention given to educational rights of delinquent youth is part of a disturbing national trend in providing incarcerated youth with minimal or no educational ser-

14. *Id.*; In 1994, the National Center for Education Statistics reported that eighty-two percent of prisoners nationwide were high school dropouts. Katsiyannis, "Academic Remediation/Achievement and other Factors Related to Recidivism Rates Among Delinquent Youths, *Behavioral Disorders*, 24(2), 93-101, February 1999, p. 99, citing U.S. Department of Education, *Mini-digest of education statistics, 1994*, Washington D.C. (1994).

15. EDJJ Report, *supra* note 8.

16. *Id.*

17. *Tunstall v. Bergeson*, 141 Wash. 2d 201, 208, 5 P.3d 691, 695 (2000).

18. William R. Toller, *Education—An Important Part of the Puzzle for Inmates*, SHERIFF, Sept.–Oct. 1997, at 11.

19. Tamar Lewin, *Inmate Education is Found to Lower Risk of New Arrest*, N.Y. TIMES, Nov. 16, 2001, at A18.

20. Alexandria Marks, *One Inmate's Push to Restore Education Fund for Prisoners*, CHRISTIAN SCIENCE MONITOR, Mar. 20, 1997, at 2.

vices. In many states around the country, the education offered to delinquent and incarcerated youths is seriously deficient. Applicable correctional standards generally fail to protect the rights of children in detention to receive an adequate education. In Pennsylvania, an expelled student under the age of seventeen has a right to only minimal education (about five hours per week, versus the usual 27.5 hours), and an expelled student seventeen or older is not entitled to education at all.²¹ In Maryland, the only standards with which all jails and detention facilities in the state are required to comply make no provision for inmate education.²² Sadly, the State of Washington has been, and continues to be, a part of this trend in light of the recent Washington Supreme Court decision, *Tunstall v. Bergeson*.²³

The state high court in *Tunstall* effectively ruled incarcerated individuals over age eighteen do not have a statutory or constitutionally protected right to basic education.²⁴ Furthermore, the Court held the State was not required to provide *special* education to inmates between eighteen and twenty-two years of age.²⁵ The Court's failure to provide education to all school-aged youth in Washington 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 under Article IX.²⁶

Tunstall v. Bergeson was wrongly decided because the Basic Education Act and Article IX both require state-funded education for incarcerated youths up to age twenty-one, and the Education Programs for Juvenile Inmates Act is unconstitutional as it violates Equal Protection. This Note discusses the impact of *Tunstall v. Bergeson*, and the educational rights of incarcerated youth, specifically those between the ages of eighteen and twenty-one, who are denied their statutory and constitutional right to basic and special education while confined in Washington State's correctional facilities. The Note reviews the relevant state and federal laws and constitutional provisions that enti-

21. *Brian B. v. Commonwealth of Pennsylvania Dep't of Educ.*, 230 F.3d 582 (3d. Cir. 2000) (citing 22 Pa. Code §12.6 (e)).

22. MICHAEL BOCHENEK, NO MINOR MATTER CHILDREN IN MARYLAND'S JAILS (1999), available at <http://www.hrw.org/reports/1999/maryland/Maryland-08.htm> (last visited May 3, 2003).

23. 141 Wash. 2d 201, 5 P.3d 691 (2000).

24. *Id.*; Of the more than 1,000 youth in adult prisons in Washington in 1998, only about 100—those under age eighteen—were being provided some basic and special education programs mandated by the Washington Constitution and Basic Education Act, WASH. REV. CODE § 28A.150 (2003).

25. *Tunstall*, 141 Wash. 2d at 207, 5 P.3d at 694–695.

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

tle incarcerated juveniles to educational services they are wrongfully denied as a result of the *Tunstall* decision.

The analysis begins in Section II with a general overview and summary of *Tunstall v. Bergeson*. Section III presents a brief legislative background of the statute at issue in *Tunstall*, Education Programs for Juvenile Inmates, RCW section 28A.193. Section IV discusses *Tunstall's* misinterpretation of these statutory provisions, demonstrating the Education Programs for Juvenile Inmates' disregard of the paramount duty to provide education to youth under twenty-one pursuant to the Basic Education Act and violation of the Washington Constitution, as discussed in Section V. Next, Section VI argues that because the right to education is a fundamental right under state law, the Education Programs for Juvenile Inmates statute violates the Equal Protection Clause of the Washington Constitution. Finally, Section VII examines the juvenile inmates' right to *special* education, both under the state Special Education Act, and the federal Individuals with Disabilities Education Act.

II. SUMMARY OF *TUNSTALL V. BERGESON*

In 1998, the Washington State Legislature passed the Engrossed Substitute Senate Bill ("ESSB") 6600, providing for the education of inmates under the age of eighteen who are incarcerated in adult prisons.²⁷ That year, a class of inmates under age twenty-one and inmates with disabilities brought suit against the State Superintendent of Public Instruction, the Secretary of the Department of Corrections ("DOC"), and several school districts in the state, challenging ESSB 6600, now codified as RCW chapter 28A.193.²⁸ RCW chapter 28A.193 provides for the education of juveniles incarcerated in adult prisons; however, it limits the availability of basic education to inmates under the age of eighteen and fails to provide for special educational opportunities.²⁹ The inmates claimed the newly enacted statute violated Article IX of the Washington Constitution, the Basic Education Act, the federal Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and Due Process and Equal Protection under the Washington Constitution and the United States Constitution.³⁰

27. 1998 Wash. Laws 244 (codified at WASH. REV. CODE § 28A.193).

28. *Tunstall*, 141 Wash. 2d at 208, 5 P.3d at 695.

29. WASH. REV. CODE § 28A.193.030(3)-(4) (2003).

30. *Tunstall*, 141 Wash. 2d at 208-209, 5 P.3d at 695-696. The class of plaintiffs that certified by the court included: 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 ac-

The trial court granted summary judgment for the inmates on their state constitutional claims, ruling that the State had a paramount duty under Article IX of the Washington Constitution and the Basic Education Act to provide basic education to incarcerated juveniles under twenty-one, and to provide special education to disabled, incarcerated youth under twenty-two.³¹ The trial court also ruled RCW chapter 28A.193 unconstitutional for not providing for special education for disabled juvenile inmates and for impermissibly limiting basic education to incarcerated youths under the age of eighteen.³² The trial court dismissed all of the plaintiffs' federal claims.³³

On appeal, the State, as appellants and cross-respondents, challenged the trial court rulings regarding the inmates' state law claims.³⁴ The inmates, as respondents and cross-appellants, challenged the trial court's dismissal of their federal claims.³⁵ On direct review of the trial court's summary judgment rulings, the high court reversed, holding although the statutory right to public education for non-incarcerated persons in Washington extends to persons under age twenty-one, Article IX of the Washington Constitution, guaranteeing a public education to "all children," applies only to persons under age eighteen.³⁶ Moreover, the court held RCW chapter 28A.193 satisfied Article IX by providing educational programs designed to address the particular educational and rehabilitative needs of children incarcerated in adult prisons.³⁷ The court found state educational programs for incarcerated youths did not violate equal protection because the programs were rationally related to the state objective of meeting the inmates' unique educational needs.³⁸ The court also held that the rational basis test, rather than strict scrutiny, applied because RCW chapter 28A.193 did not infringe upon a fundamental right, and the inmates' incarceration and juvenile status did not place them in a suspect class.³⁹

The state high court declined to address the claim that the Washington Constitution guarantees special education to inmates who are under twenty-two and disabled.⁴⁰ The court concluded that the

cess to basic or special education during that custody, under the age of twenty-one, or disabled and under the age of twenty-two. *Id.* at 208, 5 P.3d at 695.

31. *Id.* at 209, 5 P.3d at 696.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 233, 5 P.3d at 708.

37. *Id.* at 223, 5 P.3d at 702.

38. *Id.* at 227, 5 P.3d at 705.

39. *Id.* at 226, 5 P.3d at 704.

40. *Id.* at 207, 5 P.3d at 695.

record and plaintiffs' briefings were not sufficiently developed to decide the issue.⁴¹ Given the importance and complexity of the issue, the court decided to reserve the matter for future determination "in a case where the record and briefing are adequately developed."⁴² One justice dissented maintaining that RCW chapter 28A.193 threatens a fundamental right to education by allowing a separate and unequal system and failing to provide uniform, general, and ample education for all children.⁴³ Furthermore, he argued that all children should have the same constitutional right to a high school education, regardless of their criminal past.⁴⁴

III. STATUTORY BACKGROUND OF EDUCATIONAL OPPORTUNITIES FOR JUVENILE INMATES

Tunstall v. Bergeson is currently the leading Washington case addressing an incarcerated juvenile's right to a public education. The court's ruling in *Tunstall* has helped define the right, but did little to effectively address the problem of education for juvenile offenders. Historically, neither the State of Washington nor any of its school districts have provided any educational opportunities leading to a high school diploma for inmates in a DOC facility, though the State has provided some opportunities to inmates through community colleges for the acquisition of a GED.⁴⁵ In addition, no educational programs for persons with disabilities have been provided within these settings.⁴⁶

In enacting "Education Programs for Juvenile Inmates,"⁴⁷ the Legislature sought to address this issue by conferring a right to education upon incarcerated juveniles; however, in doing so, it erroneously ignored the Basic Education Act's requirement that all Washington children up to twenty-one years of age have access to educational opportunities. The following subsections provide an overview of these statutory provisions.

A. Washington's Basic Education Act

All children residing within the State's borders have a right to be amply provided with an education.⁴⁸ The right is constitutionally

41. *Id.*

42. *Id.*

43. *Id.* at 244, 5 P.3d at 713.

44. *Id.*

45. *Id.*

46. *Id.*

47. WASH. REV. CODE § 28A.193

48. WASH. CONST. art. IX

paramount, and the state must fulfill the obligation through “a general and uniform system of public schools.”⁴⁹ The purpose of the Basic Education Act is to fulfill the State’s paramount constitutional duty to provide an education to “*all children*” residing in Washington, and to do so by means of the “general and uniform system of public schools” also required by the Washington Constitution.⁵⁰ Accordingly, the Basic Education Act requires that “[e]ach school district’s kindergarten through twelfth grade basic educational program shall be accessible to *all students* who are five years of age. . . and less than twenty-one years of age”⁵¹ The goals of the Act are explicitly set forth in the 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, 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.⁵²

The Basic Education Act, like the constitutional provisions it was enacted to implement, establishes an education system available to *all*

49. WASH. CONST. art. IX § 3; *Seattle School District v. State*, 90 Wash. 2d 476, 513, 585 P.2d 71,91 (1978).

50. WASH. REV. CODE § 28A.150.200 (2003); *Tommy P. v. Board of County Comm'rs*, 97 Wn.2d 385, 645 P.2d 697 (1982).

51. WASH. REV. CODE § 28A.150.220(3) (2003) (emphasis added).

52. WASH. REV. CODE § 28A.150.210(2003).

students ages five through twenty-one, and excludes none.⁵³ Therefore the Basic Education Act confers the right upon all students ages five through twenty-one to have access to educational opportunities regardless of whether they are incarcerated.

B. Education Programs for Juvenile Inmates Legislation

In March 1998, the Washington Legislature attempted to address the problem of the lack of education for juvenile inmates by passing the Engrossed Substitute Senate Bill (“ESSB”) 6600, now codified as RCW chapter 28A.193, titled “Education Programs for Juvenile Inmates.” The legislation provided some DOC inmates under the age of eighteen the opportunity to earn a high school diploma. However, no provision was made for the education of incarcerated youth between ages eighteen and twenty-two, except that youths who had begun a high school program during incarceration before turning eighteen could, under some circumstances, remain in the program after their eighteenth birthday.⁵⁴

Moreover, while the Legislature intended the act to satisfy any constitutional duty to provide education services to juveniles in adult correctional facilities, it failed to address any constitutional duty to provide special education.⁵⁵ Furthermore, despite the Legislature’s recognition of the State’s obligation to improve programs and to provide an education consistent with the Basic Education Act,⁵⁶ the resulting statute limited the duty of a juvenile educator to provide education programs for inmates under the age of eighteen.⁵⁷ The relevant portion of the statute reads as follows:

Except as otherwise provided for by contract under RCW 28A.193.060, 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

53. Similarly, the Act repeatedly asserts that *all* children with disabilities are entitled to special education services.

54. Eighteen-year olds who have already participated in the program “may continue in the program with permission of the department of corrections and the education provider.” WASH. REV. CODE § 28A.193.030(4) (2003). But eighteen-year olds, who are not already in the program, are excluded, as are all nineteen- and twenty-year olds. The percentage of school-aged youth covered is thus very small. At the time of the lawsuit, there were approximately 100 youth under the age of eighteen in prison and more than 1,000 under the age of twenty-one.

55. Washington Legislature House Bill Report, ESSB 6600, (1998) *available at* http://www.leg.wa.gov/pub/billinfo/1997-98/senate/6600-6624/6600-s_hbr_030998.txt. “This bill is a start but does not address the issues of juveniles in jails or issues regarding special education.” *Id.*

56. *Id.*

57. WASH. REV. CODE § 28A.193.030(3) (2003).

vate contractor to provide for education programs under this chapter are limited to the following:

(3) Conducting education programs for inmates under the age of eighteen in accordance with program standards established by the superintendent of public instruction.⁵⁸

This provision is manifestly inconsistent with the Basic Education Act's requirement that educational programs be accessible to all students less than twenty-one years of age.⁵⁹

IV. TUNSTALL'S MISINTERPRETATION OF THE BASIC EDUCATION ACT AND THE EDUCATION PROGRAMS FOR JUVENILE INMATES LEGISLATION

Despite the clear language of the statute, the *Tunstall* court found that the Basic Education Act does not specifically address the educational needs of youths incarcerated in DOC facilities and, thus, did not apply to the inmate class.⁶⁰ The court concluded RCW chapter 28A.193 was enacted with the intent "to provide for the operation of education programs for DOC inmates."⁶¹ Given the apparent conflicts between the statutes, the court relied on principles of statutory construction⁶² to determine whether the Basic Education Act applied to the inmate class, finding that RCW chapter 28A.193 was the more recent and far more specific statute regarding inmate education and thus giving it preference.⁶³

The court's ruling that the Basic Education Act does not apply to incarcerated youth is foreclosed by the statute's plain language and the court's decision in *Tommy P. v. Board of County Commissioners*.⁶⁴ The court in *Tommy P.* concluded that the Basic Education Act extended to all children incarcerated in juvenile detention facilities.⁶⁵ *Tommy P.* makes clear that children do not lose their right to education required by the Washington Constitution and implemented by the Basic Education Act simply because they are incarcerated.⁶⁶ Rather, the court

58. *Id.*

59. WASH. REV. CODE § 28A.150.220(3) (2003).

60. *Tunstall*, 141 Wash. 2d 201 at 212, 5 P.3d at 697.

61. WASH. REV. CODE § 28A.193.005 (2003).

62. *See In re Estate of Little*, 106 Wash. 2d 269, 283, 721 P.2d 950, 958 (1986).

63. *Tunstall*, 141 Wash. 2d at 211, 5 P.3d at 697.

64. 97 Wash. 2d 385, 391-93, 645 P.2d 697 (1982).

65. *Id.* at 391, 645 P.2d at 700 (stating that the Act "provides for the education of every child in this state"); *id.* at 392, 645 P.2d at 701 (stating that the Act "recognizes the critical importance of providing education to every child in the state, a duty the constitution of this state recognizes as paramount").

66. *Id.*

recognized that a proper education is one of the most urgent needs of many juvenile offenders and that there are compelling reasons for responding to such needs.⁶⁷

Notwithstanding the court's acknowledgment of the importance of education for these youth, the *Tunstall* court chose to distinguish *Tommy P.* by noting that the plaintiffs in that case involved juvenile offenders detained in juvenile detention facilities, not youths who had been incarcerated in adult correctional facilities.⁶⁸ This distinction, however, is questionable. Regardless of where a child may be confined, the court nonetheless deprives him or her of a constitutional right to an education simply because that child has committed a crime.

Although providing an education to detained or incarcerated juveniles may not be essential to achieve the policy goals of punishment and accountability, it does further the goal of rehabilitation, one of the primary principles underlying the Juvenile Justice Act ("JJA") of 1977.⁶⁹ The court has interpreted this act as placing an emphasis on the interest, welfare, and rehabilitation of the child when committed to an institution.⁷⁰ In fulfillment of this policy, an educational program suited to the needs of the juvenile offender is consistent with the purpose of providing the "necessary treatment" under the Act.⁷¹ The *Tommy P.* court recognized that the provision of education in detention is a particularly effective response to a critical need of juvenile offenders and an important step in achieving rehabilitation.⁷² The provision of education, therefore, may reasonably be considered an aspect of the "treatment" that offenders are required to be provided.⁷³

One teacher has amply expressed the special, educational needs of juvenile offenders while being held in detention facilities:

For many youngsters it means the difference between whether or not they will go on and get a GED certificate and become self-sufficient adults . . . or whether they're going to be delinquents and eventually be in jail or prison

It also gives them a feeling of achievement, of success. Most of them have never had that feeling, that I can succeed or do something. They get so tickled when they get a good score on a paper or when they pass a test just as though it is the first time in their

67. *Id.*

68. *Tunstall*, 141 Wash. 2d at 214, 5 P.3d at 698.

69. WASH. REV. CODE § 13.40; see also *In re Personal Restraint of Tapley*, 72 Wash. App. 440, 445, 865 P.2d 12, 15 (1994).

70. See *State v. Lawley*, 91 Wash. 2d 654, 657, 591 P.2d 772 (1978).

71. WASH. REV. CODE § 13.40.010(2)(f) (2003).

72. *Tommy P.*, 97 Wash. 2d at 397-398, 645 P.2d at 703-704.

73. *Id.*

life it has happened to them, and that feeling of achievement is something that we all need desperately, but these children [need it] more than anybody else because it is something that they have missed out on so many times in the past.⁷⁴

The clear purpose and policy behind the Basic Education Act is consistent with the educational needs of juvenile offenders, whether they are detained in the State's juvenile detention centers or in adult correction facilities. The *Tunstall* court's ruling that the Basic Education Act does not apply to incarcerated youths ignores the constitutional rights of these individuals and fails to further the policy of rehabilitating and equipping these youths with the skills and education to become responsible citizens. By giving preference to and upholding RCW chapter 28A.193, the court essentially permitted the denial of an education that would necessarily lead to the attainment of a high school diploma, as required by the Basic Education Act.

The enactment of RCW chapter 28A.193, Education Programs for Juvenile Inmates, effectively removes incarcerated juveniles from the public school system and sets a new, lower standard of educational compliance for the public entities responsible for ensuring that school-aged juveniles in adult prison are provided an education. Because the statute creates an inferior education system exclusively for juvenile inmates in prisons, its implementation violates the mandate in the Washington State Constitution to make ample provision for the education of all children.

Furthermore, the court's holding in *Tunstall* will deprive many juveniles of constitutionally entitled educational services because the court specifically excluded eighteen- to twenty-one-year olds from educational services under RCW chapter 28A.193,⁷⁵ even though the same group is entitled to public educational services under the Basic Education Act. Thus, RCW chapter 28A.193 impinges on the right of a juvenile inmate to receive basic education by not providing for educational opportunities for those between the ages of eighteen and twenty-one.

The answer to why the Legislature chose to deny these juveniles their right to education is simple; the State Legislature has not adequately funded high school education programs for all youth under the age of twenty-one in prison, nor has the Department of Corrections or the Office of the Superintendent of Public Instruction ("OSPI") made

74. *Tommy P.*, 97 Wash. 2d at 397, 645 P.2d at 703.

75. Providers under WASH. REV. CODE § 28A.193 are not bound by statutorily defined education standards governing for example, curriculum requirements, minimum hours of instruction, and mandatory teacher ratios.

prison education funding a priority. In effect, the strategy of limiting the age at which an individual may be educated while in prison is simply a means of cutting prison costs, purporting to relieve a tax burden on the public. What the Legislature has failed to recognize, however, is that educating prisoners is cost-effective. Prisoners who are involved in educational programs require less supervision and are less prone to violence. The effect is not only a reduction in recidivism, but also a reduction in prison staff and housing costs.

Furthermore, educating prisoners has long-term societal benefits. Educated individuals are more likely to obtain work, to keep a job, and to become tax-paying contributors to the economy instead of a drain on other taxpayers' dollars. Thus, a quality education in prison is not only an effective form of crime prevention, it is fiscally sound as well.

While the Legislature aims to cut prison costs by limiting the availability of educational services, the inmates ultimately bear the expense; the denial of their absolute right to education under the Washington Constitution and, consequently, the opportunity to prepare themselves to assume constructive roles in society.

V. WASHINGTON'S PARAMOUNT DUTY TO PROVIDE EDUCATION FOR ALL CHILDREN

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, cast or sex.⁷⁶

The legislature shall provide a *general 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 common schools shall be exclusively applied to the support of the common schools.⁷⁷

These constitutional provisions were analyzed extensively in *Seattle School District v. State*,⁷⁸ in which the Washington Supreme Court recognized that the duties these provisions impose are unique—whether measured against the background of other duties imposed by

76. WASH. CONST. art. 9, § 1.

77. WASH. CONST. art. 9, § 2 (emphasis added).

78. 90 Wash. 2d 476, 585 P.2d 71 (1978).

the Washington Constitution, or against the background of the education provisions in other states:

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 and 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.⁷⁹

Neither the governing constitutional provision nor the landmark *Seattle School District* case recognize 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 *Seattle School District* 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.⁸⁰ The *Seattle School District* court affirmed the superior court's holding that the State had violated both its "paramount duty" to provide education, and the constitutional uniformity clause.⁸¹ The court's holding made 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 Article IX.⁸²

While the *Seattle School District* litigation was pending on appeal, the Washington Legislature was taking steps to provide for the "general and uniform system of public schools" required by the Washington Constitution and the Supreme Court. This legislation

79. *Id.* at 511–512, 585 P.2d at 91 (emphasis in original).

80. *Id.* at 525–526, 585 P.2d at 97–99 (stating that "[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.").

81. *Id.* at 485, 585 P.2d at 77–78.

82. *Id.* at 546–47, 585 P.2d at 109 (stating that "[T]he provision makes clear that this education must be provided 'without distinction or preference' among the State's children.").

took the form of the Basic Education Act (discussed earlier in Section III).⁸³ 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."⁸⁴

The *Tunstall* court construed Article IX, section 2 as establishing a fundamental right to the creation of a "common school system."⁸⁵ The court reasoned that individuals incarcerated in DOC facilities are by definition *outside* of the common school system, and are therefore not covered under the Basic Education Act.⁸⁶ However, the court failed to recognize that all children possess a right "to be amply provided with an education," and the State's constitutional duty is not merely to provide for a general and uniform, "common" school system. Rather, the State's duty is to make "ample provision" for the education of all children residing within its borders. This duty is separate and distinct from the duty to provide for a uniform common school scheme found in Article IX, section 2. The Washington Supreme Court noted this distinction in *Seattle School District*: "We also disagree . . . that the framers only intended that a general and uniform school system be provided."⁸⁷ Had this been the intent of the framers, however, it would have been superfluous to use the words "ample provision" in Article IX, section 1.

The Washington State Constitution couples the State's paramount duty with the words "ample provision." Thus, all children, regardless of whether they are incarcerated, have a constitutional right to be amply provided with an education. The question then becomes whether the State's constitutional duty to provide educational services runs to persons up to age twenty-one (or twenty-two with regard to children with special education needs).

Despite the clear language of Article IX, and the *Seattle School District* court's recognition that all children shall be provided an education without distinction or preference, it was necessary for the *Tunstall* court to examine whether the constitutional provision required the State to provide basic and special education to persons up to age twenty-one or twenty-two who are incarcerated in DOC prisons. In

83. WASH. REV. CODE § 28A.150 et. seq.

84. *Seattle School Dist.*, 90 Wash. 2d at 494, 585 P.2d at 82.

85. *Tunstall*, 141 Wash. 2d at 223, 5 P.3d at 703.

86. *Id.* at 215-216, 5 P.3d at 699.

87. *Seattle School Dist.*, 90 Wash. 2d at 476, 585 P.2d at 85.

doing so, the court took on the task of defining the term “children” for purposes of Article IX.⁸⁸

The court held “children” under Article IX includes individuals up to age eighteen, including those children incarcerated in adult DOC facilities.⁸⁹ While the trial court relied on the Basic Education Act’s definition of children,⁹⁰ the Washington State Supreme Court found that the Basic Education Act did not actually define or even use the term “children.”⁹¹ Rather, the Legislature merely identified the age group to which the statute applies.⁹² The court further held that, although the Basic Education Act complies with Article IX, the Act does not declare that education for individuals at age twenty-one or twenty-two is constitutionally required.⁹³ The court reasoned that the Legislature found that RCW chapter 28A.193 satisfied its constitutional duty under Article IX, by providing for the education of DOC inmates up to age eighteen, and not up to age twenty-one.⁹⁴ The court presumed that if the Legislature actually intended to create a constitutional definition of “children” in the Basic Education Act, it would have been constrained by that definition when it enacted chapter RCW chapter 28A.193.⁹⁵ Ultimately, the court recognized that even if the Legislature had intended to extend the definition of “children” under Article IX to include persons up to age twenty-one, this definition would not be controlling because the court had the “ultimate power to interpret, construe, and enforce the Constitution of [the] State.”⁹⁶ The court exercised this power by settling on the age of eighteen as the upper limit for the purposes of defining the term “child.”

Although the court was correct in noting that it was its duty to interpret the meaning of the term “child” under Article IX, the Legislature’s definition under the Basic Education Act should have controlled. Notwithstanding that the common understanding of the term “children” includes only those individuals up to age eighteen, the constitutional limit the court placed on the definition in the context of the

88. *Tunstall*, 141 Wash. 2d at 216–217, 5 P.3d at 699–700.

89. *Id.*

90. “Each school district’s kindergarten through twelve grade educational program shall be accessible to all students who are five year of age . . . and less than twenty-one years of age.” WASH. REV. CODE § 28A.150.220(3).

91. *Tunstall*, 141 Wash. 2d at 218, 5 P.3d at 700.

92. *Id.* at 217, 5 P.3d at 700.

93. *Id.* at 216, 5 P.3d at 700.

94. *Id.* at 217, 5 P.3d at 700; WASH. REV. CODE § 28A.193.030(3)–(4) (2003); WASH. REV. CODE § 72.09.460(2) (2003).

95. *Id.* at 218; *State v. Fagalde*, 85 Wash. 2d 730, 736, 539 P.2d 86, 96 (1975).

96. *Tunstall*, 141 Wash. 2d at 218, 5 P.3d at 700.

constitutional right to an education is entirely unsound. Because the court in *Seattle School District* recognized the right to education under a "common school system" as fundamental,⁹⁷ that right properly applies to all individuals under twenty-one years of age, consistent with the requirements of the Basic Education Act.⁹⁸

VI. THE EDUCATION PROGRAMS FOR JUVENILE INMATES LEGISLATION VIOLATES EQUAL PROTECTION

All children should have the same constitutional right to a high school education, regardless of their criminal past. Despite this proposition, the *Tunstall* Court held that the State is not obligated to provide an identical education to all children within the state regardless of the circumstances in which they are found.⁹⁹ While the State may not be obligated to provide an *identical* education to all children, by placing correctional institution programs on an entirely different plane than public education programs, an incarcerated youth's fundamental right to education is thereby threatened.

It is well settled that a legislative restraint imposed on a fundamental right is presumed to be unconstitutional.¹⁰⁰ Since education is a fundamental right under the State Constitution, the unconstitutionality of RCW chapter 28A.193 must be presumed.

Article I, section 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.

Article I, section 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. Article I, section 12 may be construed to provide greater protection to individual rights than that provided by the federal equal protection clause.¹⁰¹ Article I, section 12 requires that "persons similarly situated with respect to the legitimate purpose of the law be similarly treated."¹⁰²

97. *Seattle Sch. Dist.*, 90 Wash. 2d at 475, 585 P.2d at 71.

98. WASH. REV. CODE § 28A.150.220 (2003).

99. *Tunstall*, 141 Wash. 2d at 219, 5 P.3d at 700-701.

100. *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980) (if a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution . . . strict scrutiny is required").

101. *See Darrin v. Gould*, 85 Wash. 2d 859, 868, 540 P.2d 882, 888 (1975).

102. *See State v. Shawn P.*, 122 Wash. 2d 553, 560, 859 P.2d 1220, 1223 (1993).

Chapter 28A.193 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) incarcerated school-aged youth, and (2) school-aged youth incarcerated in juvenile facilities.¹⁰³ This discriminatory legislation violates the equal protection clause of the Washington Constitution, impinging on the inmates' paramount right to education.

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 basis test, the law must rest upon a legitimate state objective and must not be wholly irrelevant to achieving that objective.¹⁰⁴ However, when a statutory classification affects a suspect class or a fundamental right, it must be subject to strict scrutiny, and will be upheld only if it is necessary to achieve a compelling state interest.¹⁰⁵

The constitutional right to education is more than fundamental; it is absolute. In *Seattle School District*, the court held that the constitutional right to education cannot be impaired by legislative action, no matter how compelling the state interest in doing so.¹⁰⁶ Even if the right to education were only fundamental rather than absolute, RCW chapter 28A.193 would still be subject to strict scrutiny.

The *Tunstall* court dismissed this argument, finding RCW chapter 28A.193 did not infringe upon an inmate's fundamental right to education under the Washington Constitution.¹⁰⁷

The court held absent a fundamental right or involvement of a suspect class, rational basis review applied.¹⁰⁸ Applying the rational basis standard, the court found the Legislature's decision to treat individuals under age eighteen in prison differently with respect to education from individuals under age eighteen who are in the normal school system completely justified.¹⁰⁹ Because incarcerated and non-incarcerated youths were not similarly situated for the purpose of education, the court held the state's provision of education under chapter

103. Students in Washington between the ages of five and twenty-one 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. Disabled children and youth in Washington between the ages of five and twenty-two 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.

104. See *State v. Ward*, 123 Wash. 2d 488, 516, 869 P.2d 1062, 1077 (1994).

105. *Id.*

106. *Seattle Sch. Dist.*, 90 Wash. 2d at 513, 585 P.2d at 92-93.

107. *Tunstall*, 141 Wash. 2d at 226, 5 P.3d at 704-705.

108. *Id.* at 226-227, 5 P.3d at 704-705.

109. *Id.* at 228, 5 P.3d at 708.

28A.193 was rationally related to the legitimate state objective of meeting the unique education needs of inmates.¹¹⁰

Courts of several other states, however, 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.¹¹¹ In each of these cases, the court struck down the discriminatory educational regime before it as violating the state constitution's equal protection guarantee.¹¹²

The State of Washington does not have a compelling interest in discriminating against eighteen- to twenty-one-year-old juvenile inmates. The court in *Tunstall* did not show that denying education to juvenile offenders over eighteen is necessary "to provide for the operation of education programs for the department of corrections' juvenile inmates."¹¹³ Because equal protection requires that classification systems treat like people alike, all Washington citizens, whether incarcerated or not, have a right to work toward a high school diploma until they are twenty-one or twenty-two years old. Incarcerated Washington residents are, however, wrongfully denied this opportunity.

Implicit in the right to education is the view that appropriate education is a critical component of rehabilitation. For this reason, the denial of educational opportunities to children who are incarcerated undermines one of the primary purposes of the treatment of juveniles in the justice system. Those incarcerated youths, who normally would have until age twenty-one or twenty-two to earn a high school diploma, now only have the opportunity until age eighteen. Denying individuals between the ages of eighteen and twenty-two their fundamental right to both basic and special education undermines the criminal justice system's goal of rehabilitation and deprives these individuals of the basic skills necessary to become productive members of society.

VII. JUVENILE INMATES' RIGHT TO SPECIAL EDUCATION

It is undisputed that a substantial number of children in the juvenile delinquency system are children with education-related disabili-

110. *Id.* at 227, 5 P.3d at 705 ("[I]ncarcerated children may have different educational needs and may require different training programs more appropriate to their circumstances.").

111. *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 U.S. 824 (1980); Serrano v. Priest, 557 P.2d 929, 952-953, *cert. denied*, 432 U.S. 907 (Cal. 1977); Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977).

112. *Id.*

113. WASH. REV. CODE § 28A.193.005 (2003).

ties.¹¹⁴ Poor educational performance among children in the delinquency system is, in significant part, a function of the high percentage of children in that system who have education-related disabilities and who have not received the benefit of appropriate, effective special education services.¹¹⁵ People in positions of authority who make decisions that affect the categorization and treatment of children in the delinquency system are typically not sufficiently aware of the existence and nature of education-related disabilities.¹¹⁶ In the same way, these officials are not aware of their legal obligations to identify and accommodate children with disabilities. Thus, government officials in the delinquency system fail to develop policies and programs aimed at identifying and serving children with disabilities.

Consistent with the trend of failing to accommodate children with disabilities in the juvenile delinquency system, the court in *Tunstall* neglected to address the class of inmates' state constitutional right to special education, and further held that neither the state Special Education Act¹¹⁷ nor the federal Individuals with Disabilities Education Act ("IDEA")¹¹⁸ required the State to provide special education services to persons over age eighteen who are incarcerated in adult prisons.

A. Washington's Special Education Act

The law unequivocally requires that all disabled students be provided a free, appropriate education in the least restrictive environment—even when the student is incarcerated.¹¹⁹ Like the Basic Education Act, Washington's Special Education Act similarly applies to youths incarcerated in DOC facilities.¹²⁰ The Special Education Act's purpose is "to ensure that *all children with disabilities* have the opportunity for an appropriate education¹²¹ at public expense as guaranteed

114. See, e.g., Patricia Puritz and Mary An Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, OJJDP REPORT, 16–17 (January 1998) (citing, *inter alia*, a meta-analysis conducted by Pamela Casey and Ingo Keilitz demonstrating that 35.6 percent juvenile offenders have learning disabilities).

115. Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation In the Delinquency System*, at <http://www.edjj.org/Publications/RXessay1-00.pdf> (last visited May 11, 2003).

116. *Id.*

117. WASH. REV. CODE § 28A.155.020 (2003).

118. 20 U.S.C. §§ 1400–1436 (2003).

119. WASH. REV. CODE § 28A.155.020 (2003).

120. WASH. REV. CODE § 28A.155.

121. "Appropriate education" is defined as "an education directed to the unique needs, abilities, and limitations of the children with disabilities." WASH. REV. CODE § 28A.155.020 (2003).

to them by the Constitution of this state.”¹²² “Children with disabilities” includes individuals between the ages of three and twenty-two who are:

In school or *out of school* who are temporarily or permanently retarded in normal educational processes by reason of physical or mental disability, or by reason of emotional maladjustment, or by reason of other disability, and those children who have specific learning and language disabilities resulting from perceptual-motor disabilities, including problems in visual and auditory perception and integration.¹²³

The *Tunstall* court reasoned that because the Special Education Act did not specifically include youths incarcerated in DOC facilities, the statute consequently excluded the group.¹²⁴ The court referenced the Act’s section titled “Superintendent of public instruction’s duty and authority,” which states the superintendent is required to “promulgate such rules as are necessary to implement the several provisions of the [basic and special education acts] and to ensure educational opportunities *within the common school system* for all children with disabilities who are not institutionalized.”¹²⁵ The court reasoned that the superintendent is not responsible for ensuring educational opportunities to inmates, and individuals incarcerated in DOC facilities are not covered under the Basic Education Act. Thus, the court concluded the class of inmates is *outside* “the common school system” and not covered under the act.¹²⁶ The court justified its conclusion based upon the Special Education Act’s silence regarding DOC inmates.¹²⁷ However, it is plausible to conclude that had the Legislature intended to specifically exempt inmates with disabilities from being covered by the Act, the exemption would have been made explicit. The court’s conclusion was ill-reasoned and inconsistent both with the clear language of the Act and with Article IX of the State Constitution. Under the Special Education Act, is it clear *all* disabled youths between three- and twenty-one years old are entitled to special education services, and the law makes no exception for youths in adult prisons.¹²⁸

122. WASH. REV. CODE § 28A.155.010 (2003) *emphasis added*).

123. WASH. REV. CODE § 28A.155.020 (2003).

124. *Tunstall*, 141 Wash. 2d at 215, 5 P.3d at 699.

125. WASH. REV. CODE § 28A.155.090(7) (2003) (*emphasis added*).

126. *Tunstall*, 141 Wash. 2d at 215, 5 P.3d at 699.

127. *Id.* at 216, 5 P.3d at 699.

128. WASH. REV. CODE § 28A.155.020 (2003).

B. The Federal Individuals with Disabilities Education Act (IDEA)

The Individuals with Disabilities Education Act ("IDEA"), passed by Congress under the auspices of its spending power, mandates that states receiving federal support for education of students with disabilities ensure that all eligible students receive a free appropriate public education (FAPE).¹²⁹ Specifically, the IDEA requires that public schools and state-operated correctional facilities provide each eligible child with a FAPE in the least restrictive environment.¹³⁰ The IDEA requires that states identify, locate, and evaluate *all* children with disabilities residing in the state who need special education and related services. Education agencies are responsible for conducting a full, individual evaluation to determine whether a child is eligible for services under the IDEA and to determine the needs of the child.

Imprisoned youth with disabilities are entitled to seven basic services under the IDEA: (1) screening, identification, and referral; (2) comprehensive evaluation or assessment to determine the nature and extent of the disability and what special services are needed; (3) development of an individualized education program (IEP), including a specific written plan for services, how they will be provided, goals and immediate objectives and specific means to accomplish those goals; (4) special individually tailored educational services for each student in the least restrictive setting possible within the institution; (5) related services necessary to assist a student to benefit from special education (such as psychological counseling or speech therapy); (6) procedural protections; and (7) transition planning to prepare for transition from correction institution to school, work, family or independent living.¹³¹

It is well established that a State's obligation under the IDEA to provide a FAPE to "all children with disabilities residing in the State between the ages of 3 and 21, inclusive," extends to youth in correctional facilities. In the landmark case *Green v. Johnson*, the U.S. District Court of Massachusetts ruled that students with disabilities do not forfeit their rights to an appropriate education because of incar-

129. IDEA, 20 U.S.C. § 1415, the Education for All Handicapped Children's Act, was passed in 1975 and went into effect in 1977. Among other things, and as a condition of receiving federal funds, states guarantee that all children with disabilities will receive a free appropriate public education in the least restrictive environment. Additionally, IDEA provides a number of procedural rights to parents and requires that schools use nondiscriminatory procedures to assess children suspected of having a disability. For a detailed discussion of the original law and the forces that precipitated its passage, see LEVINE & WEXLER, PL 94-142: AN ACT OF CONGRESS (1981).

130. 20 U.S.C. § 1415 (2003).

131. Osa D. Coffey, Ph.D, *Handicapped Youth and Young Adults in Prison: Forgotten Clients in Search of Assistance*, in SEVERE BEHAVIOR DISORDERS OF CHILDREN AND YOUTH 99-100 (Robert B. Rutherford and John W. Maag, eds. 1998).

ceration.¹³² Furthermore, in *Donnell v. Illinois*, the federal court allowed the plaintiffs to maintain a cause of action under the IDEA where twenty-three school-aged detainees alleged they had been denied complete access to regular and special educational services during their period of pretrial detention.¹³³ The court found the Department of Education intended the Act to apply to state correctional facilities, pursuant to 34 C.F.R. section 300.2(b)(4).¹³⁴ Similarly, in *Christina A. v. Bloomberg*, a federal district court in South Dakota certified a class of plaintiffs under the age of twenty-one to pursue their claim of deprivation of special education and related services to which they were entitled under the IDEA while confined in a juvenile correction facility.¹³⁵ These court decisions, among others, ensure that students with disabilities will receive a FAPE, and these assurances clearly extend to students in correctional facilities.

Implementation of the IDEA in state correctional facilities can be challenging given the Act's 1997 amendments, which limited a state's obligation somewhat in providing special education in correctional facilities. The IDEA amendments of 1997 revised the eligibility provisions so that states may choose not to provide special education services to youths with disabilities, ages eighteen to twenty-one, who, in the educational placement prior to their incarceration in an adult correctional facility: (a) were not actually identified as being a child with a disability under the IDEA or (b) did not have an individualized education program (IEP) under the IDEA.¹³⁶ Washington law, however, requires that special education be provided to "all children with disabilities between the ages of three and twenty-one."¹³⁷ Thus, since State law *does* require that youth eighteen to twenty-one in adult correctional facilities be provided with special education services

132. See *Green v. Johnson*, 513 F. Supp. 965 (D. Mass. 1981) (granting preliminary injunction directing that special education be provided to all prisoners under age twenty-two); see also 34 C.F.R. § 300.2(b)(iv) (2003) (stating that the IDEA applies to "state correctional facilities).

133. 829 F. Supp. 1016, 1020 (N.D. Ill. 1993)

134. *Id.*

135. 197 F.R.D. 664 (D. S.D. 2000).

136. 20 U.S.C. §§ 1400-1436 (2003); The IDEA as amended in 1997 provides: The obligation to make a free appropriate 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) (2003).

137. WASH. REV. CODE § 28A.155.020 (2003) (emphasis added).

(under the Special Education Act set forth above), the exception under the 1997 amendments does not and should not apply in Washington. This is true notwithstanding RCW chapter 28A.193 because that statute does not amend the Special Education Act or deal with special education in prison in any way.

Under the IDEA, the Office of the Superintendent of Public Instruction (“OSPI”) has the ultimate duty to ensure that disabled youths in prison receive special education. The 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.¹³⁸

These 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.¹³⁹

VIII. CONCLUSION

The failure of Washington State to provide educational programs to youth in correctional facilities that are equivalent to those provided to all other youth within the State is both unconstitutional and unwise. A great majority of these youth will return to society, and most of them will not return to any kind of formal educational setting. The difficulties associated with providing both basic and special educational services to these youths are intertwined with the current political climate—where rehabilitation is often cited as a primary purpose in juvenile corrections, but punishment and retribution seem to be higher priorities. Typically, education services for young people both with and without disabilities are a low priority for many correctional administrators. To provide education services for young people, corrections programs must meet the state constitutional duty to provide

138. 20 U.S.C. § 1412(a)(11)(A) (2003) (emphasis added); see also 34 C.F.R. § 300.600 (2003).

139. See *Alexander S. v. Boyd*, 876 F. Supp. 773, 800 (D. S.C. 1995).

all children ample provision for education. Ultimately, improving the access to, and quality of, educational services for young people requires involvement from state and local administrators of correctional facilities and programs, advocates for children, and correctional educators. In light of *Tunstall's* erroneous holding, the first and most critical step is to urge the Washington State Legislature to amend the Education Program for Juvenile Inmates statute so as to provide a right to both basic and special education to juvenile inmates up to the age of twenty-one.