COMMENTS

“Virtual” Schools: Real Discrimination

Edward Lin

I. INTRODUCTION

In December 2000, the bipartisan, Congressional Web-based Education Commission stated: “The Internet is perhaps the most transformative technology in history, reshaping business, media, entertainment, and society in astonishing ways. But for all its power, it is just now being tapped to transform education.”\(^1\) Since 2000, the growth of online education has spurred the technological transformation of K-12 public education.\(^2\) A majority of states now allow students to supplement their school education with online classes or even to enroll full-time in online schools.\(^3\)

Washington has at least six online schools, hosted by local school districts, that enroll students statewide.\(^4\) For example, K12, Inc. (“K12”), one of the largest operators of online schools in the nation, and Steilacoom Historical School District No. 1 opened the Washington Virtual

\(^1\) J.D. Candidate, Seattle University School of Law, 2009; B.A., East Asian Studies, Macalester College, 2000. The author thanks his family for their patience and support and thanks his colleagues at the Seattle University Law Review for their hard work and contributions.


3. JOHN WATSON, KEEPING PACE WITH K-12 ONLINE LEARNING: A REVIEW OF STATE-LEVEL POLICY AND PRACTICE 6 (2007) [hereinafter WATSON, KEEPING PACE 2007]. available at http://www.nacol.org/docs/KeepingPace07-color.pdf (noting that 42 States have supplemental online programs, full-time online programs, or both).

4. Id. at 143–44 (providing an overview of Washington’s online programs).
Academy ("WAVA") in 2006. By November 2007, WAVA was the largest online school in Washington, with an enrollment of around 2,500 students.6

Online education has numerous benefits. It can offer flexibility in the time, place, and pace of instruction.7 It can also level the educational playing field8 for students in small schools who can take Advanced Placement and other specialty classes previously offered only by larger schools with superior resources.9 Students who are failing classes can take otherwise unavailable make-up courses.10 Moreover, online education can reach across the globe: for example, one online program partners with a school in China and uses native teachers to develop and deliver a Mandarin language course.11

Online education, however, is failing to live up to its promise of providing greater opportunity for all. Fewer minority, lower-income, and special-education students attend online schools like WAVA than attend traditional public schools.12 Few or no transitional bilingual students attend online schools in Washington.13 Although these facts alone do not prove that online schools discriminate against certain types of students, they do raise concerns.

As part of the public school system, online schools "have a responsibility to provide equal access to [their] educational opportunities,14 and restricting access to these opportunities can be problematic, if not ille-
Given the rapid growth of online education in Washington, legislators must examine whether online schools that receive public education funding are benefiting the entire public or are benefiting merely a select group of students.

Part II of this Comment briefly discusses the history of online schools in Washington, including how they receive funding within Washington's unique statutory and regulatory framework. Part III then examines how online schools discriminate against minority, lower-income, special education, and transitional bilingual students. Part IV argues that online schools that are not equally accessible to all students should not receive public education funding. Lastly, Part V advocates for creation of a state-led task force to continually monitor the growth and development of online schools to ensure that policymakers stay informed and have a voice in this rapidly evolving industry.

II. FUNDING ONLINE SCHOOLS IN WASHINGTON

In Washington, the history of funding online schools with public funds can be divided into three stages. The first stage began in 1996 when the Federal Way School District opened the Federal Way Internet Academy ("Internet Academy"), one of the first online schools in the nation. At that time, the fiscal rules promulgated by the Office of the Superintendent of Public Instruction (OSPI) permitted public funding of the Internet Academy. During the second stage, from 2003 to 2005, Washington State conducted significant audits of online schools, jeopardizing funding for schools like the Internet Academy. By the third stage, which began in 2005, statutes authorized funding for online

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18. See id.
schools. Online schools have since boomed in Washington, especially with private companies like K12 entering the market.

A. Online Schools: The Early Years

The Federal Way Internet Academy is an example of an alternative education program in Washington called “Alternative Learning Experiences.” The purpose of funding Alternative Learning Experience (ALE) programs is to give schools flexibility to serve a diverse student population, including “at-risk” students, nontraditional learners, and students who receive instruction at home.

Washington’s funding of ALE programs, including online schools, is unique. For example, only nine other states provide funding to support at-home instruction. In addition, Washington is the only state without charter schools to have numerous statewide online schools.

Early on, ALE programs were not authorized by statute but operated under funding regulations promulgated by OSPI. These regulations allowed ALE programs to receive full per-pupil funding from the state for off-campus instruction. ALE programs were limited to high

20. See Holtzman, Online Teaching Firms Grab State Dollars, supra note 5.
22. Id. at 1–2.
23. JLARC FINAL REPORT, supra note 19, at 87–88 (briefly describing programs for homeschooling families in Alaska, California, Colorado, Iowa, Massachusetts, Minnesota, New Mexico, North Dakota, and Oregon).
25. JLARC FINAL REPORT, supra note 19, at 2 (citing WASH. ADMIN. CODE 392-121-182). The Washington Constitution designates the superintendent as the entity that “shall have supervision over all matters pertaining to public schools.” WASH. CONST. art. III, § 22. In addition, according to statute, the superintendent has the “power and duty to make such rules and regulations as are necessary for the proper administration of [Chapter 28A.150 of the Revised Code of Washington],” which includes apportionment of basic education funds. WASH. REV. CODE § 28A.150.290(1) (2006).
26. In Washington, the state has the responsibility to fully fund “basic education.” See Seattle School Dist. No. 1 of King County v. Wash., 90 Wash. 2d 476, 518, 585 P.2d 71, 95 (1978) (holding that reliance on local levies to fund basic education was unconstitutional). Local school districts can supplement state funding only for “enrichment programs.” Id. at 526, 585 P.2d at 99. For more information about the particulars of school financing in Washington, see OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION, ORGANIZATION AND FINANCING OF WASHINGTON PUBLIC SCHOOLS (2006), available at http://www.k12.wa.us/safs/PUB/ORG/06/2006OrgFin_Final.pdf.
27. JLARC FINAL REPORT, supra note 19, at 33–37.
school students until 1995, when OSPI amended its rules to allow K-8 programming and to allow parents to provide part of the ALE instruction.  

While substantially increasing the number and scope of ALE programs, the new rules raised concerns both about the accountability of ALE program providers and about the quality and efficiency of ALE programs. Despite these concerns, however, the state provided little oversight. First, the absence of direct statutory authorization limited the legislature’s control over ALE programs. Second, although OSPI created the regulatory framework to promote ALE programs, OSPI did not provide oversight or monitoring and instead relied on local districts to comply with ALE rules. This absence of oversight by OSPI and the legislature allowed ALE programs to operate unnoticed by policymakers for nearly a decade until 2003, when concerns of home-schooling parents about the quality and funding of ALE programs prompted the State Auditor’s Office to investigate.

B. State Audits of ALE Programs

The 2003 audit conducted by the State Auditor’s Office found several compliance problems. These findings spurred the legislature to mandate that the Joint Legislative Audit and Review Committee (JLARC) complete a legal and financial review of all ALE programs. Part of the audit focused on digital and online programs, which received temporary funding pending the outcome of the JLARC study.

28. Id. at 5.
29. OSPI REPORT, supra note 16, at 3.
31. JLARC FINAL REPORT, supra note 19, at 5.
32. Id. at 17.
33. Id. at 17.
34. No case law has analyzed whether OSPI had authority to promulgate the ALE rules. However, an informal Attorney General Opinion prepared in 1998 concluded that OSPI did have such authority. See id. at 2 n.4.
35. Id. at 17.
36. JLARC FINAL REPORT, supra note 19, at 6.
37. Id. at 24.
38. Id. at 47.
The audit found that statewide online programs, such as the Internet Academy, were not meeting three important regulatory requirements for ALE programs. First, the programs did not provide individualized learning plans.\textsuperscript{40} Second, the programs did not document student hours.\textsuperscript{41} Finally, the programs did not satisfy the requirement that students either attend school for at least five hours per week or meet one-on-one, face-to-face with school staff for at least one hour per week.\textsuperscript{42}

JLARC addressed the first two regulatory issues by recommending, first, that course syllabi be substituted for individualized learning plans and, second, that estimated weekly hours be used instead of tracking actual student hours.\textsuperscript{43} JLARC was most concerned about the face-to-face contact requirement: a lack of in-person supervision might not be appropriate for all programs, like those serving younger children.\textsuperscript{44} This requirement was also, however, the most difficult for statewide online programs to satisfy. For example, the majority of Federal Way’s Internet Academy students lived outside the Federal Way School District; some students lived more than 100 miles away.\textsuperscript{45} Accordingly, JLARC recommended that OSPI create new regulations that waived face-to-face requirement in appropriate circumstances.\textsuperscript{46}

\textit{C. Legislative Action, the Growth of Online Education, and New Concerns}

The same month that JLARC released its report on online education,\textsuperscript{47} Senators Tracey J. Eide of Federal Way, Rosemary McAuliffe of Bothell, and Jeanne Kohl-Welles of Seattle proposed Senate Bill 5828,\textsuperscript{48} which statutorily authorized full per-pupil funding for online alternative learning experiences.\textsuperscript{49} The Washington State legislature passed the bill

\begin{flushright}
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. The rationale for allowing programs to receive full basic education funding while requiring only one hour of face-to-face contact with school staff was that in a traditional high school setting there would be 25 students in a classroom with one teacher for 25 hours per week. \textit{Id.} at 16. As such, one hour of student/teacher contact per week was considered roughly comparable. \textit{Id.}
\textsuperscript{43} Id. at 20–22. This requirement was contingent on students making satisfactory progress in monthly assessments. \textit{Id.}
\textsuperscript{44} Id. at 18.
\textsuperscript{45} Id. at 16.
\textsuperscript{46} Id. at 18.
\textsuperscript{47} The interim report was issued in February 2005, as required by the study’s mandate. \textit{Id.} at 1.
\end{flushright}
unanimously, finding that digital learning courses and programs could provide students with opportunities to study subjects that may not otherwise be available. Online courses could meet the instructional needs of students with scheduling conflicts, students who learned best from technology-based methods, and students who needed to enroll in school only part-time.

The legislature also noted, however, that "the state rules used by school districts to support some digital learning courses were adopted before these types of courses were created, so the rules were not well-suited to the funding and delivery of digital instruction." Thus, the legislature intended that the statute would clarify the funding and delivery requirements for digital learning courses. The statute did not contribute much to regulating online schools beyond adopting most of the recommendations in the JLARC audit and endorsing online schools that were already in place, like the Internet Academy.

Since the law’s passage in 2005, online schools have grown rapidly in Washington, primarily with the introduction of private companies like K12, which now runs the largest online school in the state. This tremendous growth and the increasing role of private companies operating them are starting to cause concern. For example, one of the authors of Senate Bill 5828 recently said that he did not expect that the new law would allow for-profit companies to receive millions of dollars

50. See id.
51. See id.
52. Id.
53. Id.
54. See id.
56. In fact, the new law allows for-profit companies like K12 to enroll only "eligible students." See WASH. REV. CODE § 28A.150.262(2) (2006) (allowing school districts to contract with outside providers under WASH. REV. CODE § 28A.150.305 (2006), which in turn limits enrollment to "eligible students"). Eligible students are defined as "students who are likely to be expelled or who are enrolled in the school district but have been suspended, are academically at risk, or who have been subject to repeated disciplinary actions due to behavioral problems." Id. § 28A.150.305(2) (2006). However, WAVA does not limit enrollment in accordance with WASH. REV. CODE § 28A.150.305 (2006). See, e.g., Wash. Virtual Acads., FAQ – Enrollment & Attendance, http://www.k12.com/wava/faq/enrollment_attendance (last visited Aug. 14, 2008) (stating that "[a]ny student in grades K-12 who resides within the state of Washington is eligible for enrollment").
in education funding from the state when the state lacks commensurate power to “exert some quality control” over the schools.\textsuperscript{58}

III. ONLINE DISCRIMINATION

Although online schools can theoretically increase opportunities for diverse students,\textsuperscript{59} the schools are, in reality, discriminatory. As noted by the North American Council for Online Learning (NACOL), one of the leading proponents of online education, it is a myth that “[i]n cyberspace, everyone is treated equally because ‘everyone looks the same.’\textsuperscript{60}

This Part looks at enrollment figures of some of Washington’s largest online schools and explores why these schools have lower numbers of special education, economically disadvantaged, transitional bilingual, and minority students compared to statewide averages.

A. Enrollment Figures of Online Schools

Enrollment at three of the largest online schools in Washington in 2006–2007 differed significantly from the state’s overall student enrollment:\textsuperscript{61}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
 & Statewide & WAVA & Insight of Washington & FWIA \\
\hline
October 2006 Student Count & 1,026,682 & 1,022 & 604 & 296 \\
\hline
Ethnicity (October 2006) & & & & \\
\hline
American Indian or Alaskan Native & 2.7\% & 1.2\% & 2.3\% & 2.0\% \\
\hline
Asian & 7.8\% & 2.8\% & 1.7\% & 4.4\% \\
\hline
Black & 5.6\% & 3.3\% & 2.2\% & 5.7\% \\
\hline
Hispanic & 14.0\% & 3.2\% & 3.0\% & 4.4\% \\
\hline
\end{tabular}
\caption{Enrollment Demographics of Statewide Online Schools (2006-2007)}
\end{table}

\textsuperscript{58} Id. The author, State Representative Ross Hunter, also stated that he might propose new legislation in 2009 for online schools after considering possible reforms such as a greater role for the state in approving online curriculum, in monitoring the online schools’ performance through state testing, and in looking at the finances of online schools. Id.

\textsuperscript{59} See discussion supra Part I.

\textsuperscript{60} ROSE & BLOMEYER, supra note 14, at 5–6.

\textsuperscript{61} The figures can be found at the following OSPI webpage: http://reportcard.ospi.k12.wa.us/summary.aspx?year=2006-07 (search by School District and then by name of the program: 1) Steilacoom Hist. School District/Washington Virtual Academy; 2) Quillayute Valley School District/Insight School of Washington; 3) Federal Way School District/Internet Academy).
These figures show that online schools in Washington lack student bodies that are representative of the state’s demographics.62

In contrast, online schools in other states have had greater success admitting a more diverse student body than online schools in Washington.63 For example, a survey of sixteen online schools in other states found that, collectively, an average of 35% of their students were eligible for free or reduced lunch.64 In addition, some online schools in other states enroll special education students at roughly the same percentage as traditional public schools.65 The contrast between student bodies in online schools in Washington and online schools in other states raises the concern that the Washington schools are discriminating against certain types of students.

B. Discriminatory Recruiting, Admission, and Programming Policies

Online schools in Washington discriminate by requiring significant parental participation,66 which necessarily excludes certain types of stu-

62. See id.
63. There is little demographic information for online schools nationwide for comparison with Washington. WATSON, KEEPING PACE 2007, supra note 3, at 31.
64. See id. at 32.
65. Id. at 33 (spotlighting Connections Academy which enrolls approximately 12% special education students who have a wide range of disabilities).
66. In general, younger students in online schools require greater parental supervision than older students. For example, WAVA’s school for K-8 students says that “[d]irect parental participation can range from 80 percent for early grades to about 50 percent for higher grades.” Wash. Virtual Acads., Myths About Virtual Schools, archived at http://web.archive.org/web/20070714040103/http://www.wava.org/who-chooses-wava/myths-about-virtual-schools.html (last visited Aug. 14, 2008). A compatibility survey on WAVA’s website tells potential applicants that “your children will need to spend about 4 to 5 hours on schoolwork each day . . . [and] you must be willing to spend a significant part of your day engaged in your children’s academic activities.” Wash. Virtual Acads., OnLine Compatibility Tutorial, http://nl.k12.com/mk/get/wava_osqt (last visited Aug. 14, 2008). And a recent Colorado State audit found that at the Colorado Virtual Academy (one of K12’s other cyber schools), “parents are expected to play the leading role in day-to-day lesson delivery and receive guidance from licensed teachers.” See COLO. OFFICE OF THE STATE AUDITOR, DEPARTMENT OF EDUCATION ONLINE EDUCATION PERFORMANCE AUDIT 42 (2006). Insight of Washington’s school, which enrolls high school age students, states that parents do not have to be at home while their child is doing school work. See Insight Sch. of Wash., Frequently Asked Questions, http://www.insightwa.net/faqs.asp (last visited Aug. 14, 2008).
students. First, not all parents have the time, energy, or resources to participate directly in their child’s education.\textsuperscript{67} Second, some parents do not have the skills, discipline, education, or technical background to supervise the student’s online learning.\textsuperscript{68} Third, many students in Washington come from families that do not speak English at home.\textsuperscript{69} It is difficult for these parents to supervise their child’s education when instructions and lessons are all in English.\textsuperscript{70} Collectively, these difficulties for many parents mean that online schools that require parental participation exclude many students for reasons outside the student’s control and regardless of the student’s desire and ability to learn.

Online schools also discriminate by failing to provide students with the technology necessary to access their programs.\textsuperscript{71} Many online schools require that students provide their own computer, printer, and Internet connection.\textsuperscript{72} For example, the WAVA website stipulates that, at a minimum, students need a computer, speakers, microphone, high-speed Internet connection, scanner, color printer, antivirus software, and fax machine.\textsuperscript{73} Online schools like WAVA reinforce a “digital divide”\textsuperscript{74} between students from families with resources and students from minor-

\textsuperscript{67} For example, some parents at the Pennsylvania Virtual Charter School (another K12 affiliate) had to drop out of the program because of the heavy workload of supervising their child’s online education. See Shira J. Boss, \textit{Virtual Charters: Public Schooling, At Home}, CHRISTIAN SCI. MONITOR, Jan. 8, 2002, at 14, available at http://www.csmonitor.com/2002/0108/pl4s1-lepr.html.

\textsuperscript{68} For example, the WAVA compatibility survey suggests that parents should have basic computer skills as well as strong time management skills, especially if the parent is supervising multiple children. The compatibility survey can be found online at http://ml.k12.com/mk/get/wava \_req? (last visited Aug. 25, 2008).

\textsuperscript{69} See, e.g., WASH. REV. CODE § 28A.180.010 (2006) (stating the legislative finding that a transitional bilingual education program can meet the needs of the large number of children who come from homes where the primary language is not English).

\textsuperscript{70} A sample of K12 lessons are advertised online and are available at http://www.k12.com/get_a_taste_of_k12/k12_lessons/. There do not appear to be any instructions in languages other than English. Low numbers of bilingual students is typical for online schools. See Watson, \textit{Keeping Pace 2007}, supra note 3, at 32 ("the few programs that reported data on students of limited English proficiency had very few LEP students").

\textsuperscript{71} See Rose & Blomeyer, supra note 14, at 3 (noting that some students do not have computers or high-speed internet at home and therefore schools that operate programs that are available only through students’ home computers are not truly accessible). Moreover, while the school may be online, children nevertheless need a physical space conducive to studying. In other words, unless the program provides a physical location for the student to study, families need to pay for heat and electricity and provide a clean, quiet space with a desk or table and chair.


\textsuperscript{73} See Wash. Virtual, Acads., Frequently Asked Questions – Technical, supra note 72.

\textsuperscript{74} Students of all backgrounds can access computers at school but many students from disadvantaged backgrounds do not have computer access at home. See Carole Vinograd Bausell & Elizabeth Klemick, Tracking U.S. Trends, EDUC. WEEK, March 29, 2007, at 42.
ity, less-educated, and lower-income families or single parent households, which are all less likely to have technological resources at home.\textsuperscript{75} In fact, enrollment for minority students in online schools is much lower than statewide averages.\textsuperscript{76}

Another critical way that online schools discriminate against bilingual and minority students is in their recruitment and admissions practices. In its advice to charter schools, the Department of Education Office of Civil Rights (OCR) stated: "[T]he fact that your students are not simply assigned to attend your charter school underscores your need to be mindful [of discrimination] . . . when publicizing your school to attract students and when evaluating their applications for admission."\textsuperscript{77} Like charter schools, students are not assigned to online schools. Instead, online schools self-promote via their websites, and the three largest privately-run online schools in Washington rely heavily on newspaper advertising for enrollment.\textsuperscript{78} As noted by the OCR, schools must be mindful to recruit students from all segments of the community.\textsuperscript{79} This means that an online school that serves the entire state should recruit from all segments of the state. In addition, online schools must ensure that parents who are not proficient in English or who have disabilities have the same opportunity to understand recruiting and other outreach information provided to other parents.\textsuperscript{80}

Online schools in Washington must also be more accessible to special education students. Special education students often require in-person services such as physical and occupational therapy,\textsuperscript{81} but some online schools make the parents responsible for providing these services.\textsuperscript{82} Requiring parents to teach or provide services discriminates against students whose parents are not in a position to do so.

\textsuperscript{75} See NAT’L TELECOMMS. \\& INFO. ADMIN., U.S. DEP’T OF COMMERCE, FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE, at xiii (1999), available at http://www.ntia.doc.gov/ntiahome/ftm99/FTTN.pdf ("The ‘digital divide’ – the divide between those with access to new technologies and those without – is now one of America’s leading economic and civil rights issues.").

\textsuperscript{76} See chart supra Part III.A.

\textsuperscript{77} OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., APPLYING FEDERAL CIVIL RIGHTS LAWS TO PUBLIC CHARTER SCHOOL 5 (2000) [hereinafter OCR].

\textsuperscript{78} Holtzman, Online Schools Need More Oversight, supra note 54.

\textsuperscript{79} See OCR, supra note 77, at 5.

\textsuperscript{80} See id. at 5–6.

\textsuperscript{81} See EVE MULLER \\& EILEEN M. AHEARN, VIRTUAL SCHOOLS AND STUDENTS WITH DISABILITIES 6–7 (2004), available at http://www.nasdse.org/Portals/0/Documents/Download%20Publications/DFR-0407.pdf (highlighting some of the issues policymakers must address regarding the provision of services to students with disabilities through online schools).

\textsuperscript{82} For example, in a survey of two well-established online schools and two state education agencies, one interviewee stated that parents need to be prepared to spend "a good five-and-a-half hours per day really providing support for their [disabled] child." \textit{id. at 6}. WAVA advertises that
It is the responsibility of all schools, including online schools, to educate all students, including students with special needs. To receive public school funding, online schools should provide traditional in-person services by contracting either with special education teachers or with local schools. Although, admittedly, this requirement may be difficult for online schools with students located over a large geographical area, there neither is nor should be any excuse for discriminatory programming in public education.

Because online school administrators are probably best able to explain the details of their practices and policies, they should bear the burden of justifying the disparate impact on certain types of students, including those requiring special education or those from bilingual and minority families. If online schools cannot justify their practices and policies, then they should not qualify for public school funding.

IV. WHY DISCRIMINATORY SCHOOLS SHOULD NOT RECEIVE STATE FUNDING

Online schools that employ discriminatory policies or practices should not receive public school funding because they violate both article IX of the Washington Constitution and state education statutes and regulations.

A. Online Schools That Do Not Provide a Free Education Violate Article IX

According to the Washington State Constitution, “[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.” The Constitution further requires that “[t]he legislature shall provide for a general and uniform system of public schools.” Read together, these two requirements mandate that all children in Washington are entitled to a free public education and that


83. See MULLER & AHEARN, supra note 81, at 1 (quoting guidance letter from the U.S. Department of Education’s Office of Special Education Programs that States cannot waive or relax the requirements of the Individuals with Disabilities Education Act for online schools).

84. See id. at 7.


86. Early on, the Washington Supreme Court held that a “common school” under article IX is “one that is common to all children of proper age and capacity, free, and subject to, and under the
"each child is afforded an equal opportunity to learn, regardless of differences in . . . family and community resources." 87

Online schools violate these constitutional guarantees of a free public education and equal opportunities regardless of a student’s family resources. First, some online schools require students to bear certain programming costs, such as paying for their own computer, Internet access, and place of study. Second, some online schools require parents to take on the job of teaching.

1. Online School “Fees”

Although online schools like WAVA do not directly charge student fees, 88 they still fail to provide a free education by not supplying all required materials, such as a computer or Internet connection. 89

Although the issue has never been addressed in Washington case law, 90 courts from other states have examined whether K-12 public schools can constitutionally charge students fees or require students to pay for necessary educational materials. 91

control of, the qualified voters of the school district.” Sch. Dist. No. 20, Spokane County v. Bryan, 51 Wash. 498, 504, 99 P. 28, 30 (1909). More recently, the Washington Supreme Court has stated:

Education is a bulwark of this democracy. A system of free public schools, like a system of open courts, not only helps make life worth living but sustains our long-cherished ideas of individual liberty. Where the nation’s constitution provides for a system of open courts, however, it makes no mention of free public schools. The people of this state found this oversight unacceptable in 1889 when they brought Washington Territory into the Union. Not only did they establish a judicial system, but at the same time they provided for a system of free public schools, imposing then and there a duty upon the state to make ample provision for the education of all children within its borders. Northshore Sch. Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 686–87, 530 P.2d 178, 180 (1974) (emphasis added), overruled on other grounds by Seattle Sch. Dist. No. 1 v. Wash., 90 Wash. 2d 476, 585 P.2d 71 (1978). Indeed, as the opinion later states: “no one denies that free public education is one of the great responsibilities of the state.” Id. at 714, 530 P.2d at 195.

87. Seattle Sch. Dist. No. 1, 90 Wash. 2d at 547, 585 P.2d at 109 (Utter, J., concurred).
88. See Wash. Virtual Acadms., How it Works (K-8), http://www.k12.com/wava/how_it_works /how_it_works_k8/ (last visited Aug. 14, 2008) (“Because we are part of the public school system, the Washington Virtual Academies is tuition free. The entire K12 curriculum and access to a state-certified teacher is provided free of charge.”).
89. See, e.g., Granger v. Cascade County Sch. Dist. No. 1, 499 P.2d 780 (Mont. 1972) (holding that fees related to a student’s basic education “cannot be levied, directly or indirectly, against the student or his parents”) (emphasis added).
90. The Washington Supreme Court has examined whether school districts must provide free text books as a matter of statutory law. See Hand v. Sch. Dist. No. 1 of Walla Walla County, 118 Wash. 439, 203 P. 940 (1922). For an analysis of whether current education statutes allow similar costs, see infra Part IV.B.
91. See generally Randolph County Bd. of Educ. v. Adams, 467 S.E.2d 150 (W. Va. 1995) (providing a compilation and explanation of how other courts have analyzed the constitutionality of student fees). It is important to note that these courts would have examined different state constitutions.
Some courts have held that public schools cannot charge for materials, such as textbooks, that are integral to a basic education. For example, in Paulson v. Minidoka County School District No. 331, the Idaho Supreme Court invalidated a high school policy requiring students to pay $25 for textbooks and extra-curricular activities. The court held that a school could charge for social and extra-curricular activities if the fees and participation are voluntary because these activities are not necessary elements of a high school education. However, a school cannot charge for necessary and fixed expenses peculiar to education, such as textbooks. The Court distinguished other expenses, such as paper and pencils, because students have control over the quality and quantity of their use.

"Necessary and fixed” expenses in online schools depend on programming requirements. At WAVA, necessary and fixed expenses include owning a computer with minimal specifications and high-speed Internet. At Insight of Washington, a student needs "little more than a dial-up connection." Accordingly, a court following the reasoning in Paulson would hold that schools like WAVA and Insight of Washington do not provide a free education because they require students to pay for necessary and fixed expenses. In contrast, the Federal Way Internet Academy would not be in violation because students need only to have access to a computer and the Internet, albeit preferably at home.

93. 463 P.2d 935 (Idaho 1970)
94. Id. at 935. A pair of students had claimed that the fees violated article IX of the Idaho State Constitution, which provides that the Idaho legislature shall maintain “free common schools.” Id. at 936–37.
95. Id. at 938–39.
96. Id.
97. Id.
98. See Wash. Virtual Acad., Frequently Asked Questions – Technical, supra note 72 (“Each family will be required to have a computer that meets the minimum specifications necessary to access the K12 Online School (OLS) and Learning Management System (LMS) [and] must also have reliable high-speed Internet access in order to participate in the school.”). Although WAVA does not provide a computer or internet access, it does “provide all the textbooks and instructional materials that are needed to complete the program.” Wash. Virtual Acad., Frequently Asked Questions – General, supra note 82.
100. The Internet Academy warns that students without computer and internet access at home “will find it very challenging to have enough time to complete classes”; however, “[s]ome students use computers at school or the public library.” Federal Way Internet Acad., Is Online Learning Right for Me? Technology Skills Quiz, http://www.iacademy.org/OnlineLearningQuiz/TechQuiz.html (in response to statement number one, “I have use of a computer with Internet access at home,” click “No” and then click “Submit”).
Unlike the Idaho Supreme Court in Paulson, some courts have allowed schools to charge reasonable fees, noting that many schools have historically charged students for textbooks and other materials.\textsuperscript{101} For example, in Sneed v. Greensboro City Board of Education,\textsuperscript{102} the Supreme Court of North Carolina held that there was no constitutional prohibition against charging “modest, reasonable fees” as long as the school building and personnel salaries were publicly funded.\textsuperscript{103} Thus, the court upheld certain minimal charges: “instructional fees” to buy supplemental educational materials; “course fees” to defray the costs of fungible materials in art and science classes; or “rental and use fees” for things like locker rentals and gym uniforms.\textsuperscript{104}

The Sneed court noted, however, that even minimal charges could be unconstitutional if imposed on students who cannot afford them.\textsuperscript{105} Therefore, schools must “affirmatively notify students and their parents of the availability of a waiver or fee reduction.”\textsuperscript{106} Without affirmative notice, unknowing students who qualify for a fee waiver or reduction will lose educational opportunities.\textsuperscript{107}

In online schools, “modest and reasonable” fees depend on the school’s requirements.\textsuperscript{108} For example, a court might uphold a requirement that students pay a damage deposit or a small rental fee for a computer. A court should not hold, however, that requiring students to pay up front large sums of money for their own computer, software, and Internet access is modest or reasonable.

Furthermore, courts following the Sneed reasoning would, and should, hold that online schools that do not provide waivers or financial assistance, or affirmatively advertise what they provide, violate constitu-

\textsuperscript{101} See Randolph County Bd. of Educ. v. Adams, 467 S.E.2d 150, 161–62 (W. Va. 1995) (discussing but distinguishing cases which held that charging for textbooks was permissible).

\textsuperscript{102} 264 S.E.2d 106 (N.C. 1980).

\textsuperscript{103} Id. at 112. For example, he court held that fees such as a $4.00 per semester charge for a typing course and a $5.00 per semester charge for the rental of a musical instrument were reasonable and de minimis. Id. at 113.

\textsuperscript{104} Id. at 109–10.

\textsuperscript{105} Id. at 113 (noting that the school district conceded that “it would be unconstitutional to penalize or deny enrollment to a student who cannot pay required fees because of real economic hardship.”).

\textsuperscript{106} Id. at 114.

\textsuperscript{107} Id. Note, however, that waiving fees for students who cannot afford them does not establish whether such fees violate the constitutional requirement of a “free” public education. See, e.g., Granger v. Cascade County Sch. Dist. No. 1, 499 P.2d 780, 786 (Mont. 1972) (noting that “[c]onstitutional requirements are a matter of right and cannot be satisfied by their denial in the first instance and subsequent waiver of the effects of such denial.”).

\textsuperscript{108} See Sneed, 264 S.E.2d at 113 n.5 (stating that what is modest and reasonable depends on the particular facts of each case).
tional guarantees. The argument that online schools cannot "waive" fees they do not charge directly in the first place is unpersuasive. Students should not be denied educational opportunities for lack of financial resources. Accordingly, regardless of whether they charge the fees directly or indirectly as a required expense, online schools should provide "waivers" in the form of financial or technological assistance and should affirmatively advertise that no students will be excluded because they cannot afford the required technology.

2. Online School "Tuition" |

Online schools like WAVA claim they do not charge "tuition." By requiring significant parental participation, however, these online schools do make parents take on the job of teaching. This practice puts an enormous burden on parents with limited means. Teaching even a couple of hours a day for an entire school year quickly adds up. Parents who do not have the time must find a substitute to supervise their child's online education or must forego the opportunity altogether.

Although courts have not examined whether requiring significant parental participation amounts to denial of a free education, courts in other states have addressed tuition in the traditional "brick and mortar" school context. A common approach is to allow schools to charge tu-
tion for extra-curricular or supplemental activities but to invalidate tuition for classes or activities central to a basic education. For example, the Supreme Court of Montana stated that reasonable fees could be imposed for “supplementary instruction” offered during the summer recess or at special times outside the regular academic year.\textsuperscript{117} Similarly, the North Carolina Court of Appeals held that a school could charge tuition for an after-school program that was a “supplemental educational experience” because it was not part of a student’s “basic education.”\textsuperscript{118} In contrast, K-8 online schools like WAVA require that parents take the lead role in providing their child’s daily instruction, not just supplementary classes.\textsuperscript{119} These schools violate article IX because they rely on parents to provide students with a “basic education.”

**B. Online Schools Violate State Education Statutes and Regulations**

These schools also violate state education statutes and regulations.\textsuperscript{120} In 1992, the legislature enacted the “Performance-Based Education” law to meet the increasing educational needs of students.\textsuperscript{121} To achieve better educational results, the legislature decided to expand the broad powers and authority of local school boards while still holding schools accountable for their performance.\textsuperscript{122} More specifically, the legislature gave school boards “broad discretionary power to determine and adopt written policies not in conflict with other laws” as long as the board exercised its power to promote the education of K-12 students or to promote the effective, efficient, or safe management and operation of the school district.\textsuperscript{123} This broad grant of authority, however, does not authorize, implicitly or explicitly, a school district to charge fees or tuition or to offer unequal opportunities based on family resources.

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\textsuperscript{117} See Granger v. Cascade County Sch. Dist. No. 1, 499 P.2d 780, 786 (Mont. 1972).


\textsuperscript{119} See supra Part III.B.

\textsuperscript{120} School districts are municipal corporations and their boards have only those powers (1) expressly granted by the legislature, (2) necessarily or fairly implied or incident to the powers granted, and (3) essential to the stated purposes of the district. Seattle High Schs. Chapter No. 200 of Amm. Fed’n of Teachers v. Sharples, 159 Wash. 424, 428, 293 P. 994, 995 (1930).


\textsuperscript{122} Id.

\textsuperscript{123} See id. § 301 (codified at WASH. REV. CODE § 28A.320.015(1) (2006)).
1. Statutes and Regulations Relating to Tuition and Fees in General

Many statutes and regulations authorize tuition and fees in some instances but prohibit them in others. For example, one relevant statute provides

"[e]very school district shall admit on a tuition free basis all persons of school age who reside within this state, and do not reside within another school district carrying the grades for which they are eligible to enroll: PROVIDED, That nothing in this section shall be construed as affecting RCW 28A.225.220 or 28A.225.250."\(^{124}\)

In other words, school districts cannot charge tuition other than under certain exceptions.

Section 28A.225.250 of the Revised Code of Washington gives the Superintendent of Public Instruction authority to adopt rules for cooperative programs among school districts to assure "[p]rotection of the right of residents of Washington under twenty-one years of age to a tuition-free program of basic education."\(^{125}\) This statute reinforces the proposition that Washington resident students have a "right" to tuition-free public education.

However, section 28A.225.220 allows school districts to charge tuition to educate adults and, in some instances, to educate children from other districts. More specifically, the statute prohibits school districts from charging transfer fees or tuition for nonresident students under certain circumstances,\(^{126}\) as when students transfer because of a "financial, educational, safety, or health condition" or "a special hardship or detrimental condition."\(^{127}\)

By implication, however, this statute means that a school district can charge tuition to educate nonresident students who do not meet these conditions. School districts can also charge tuition and fees for summer and other student vacation period programs\(^ {128}\) and do not have to provide textbooks free of charge.\(^ {129}\) Thus, school districts statutorily can charge

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\(^{127}\) Id. § 28A.225.220(3) (2006).


\(^{129}\) See id. § 28A.320.230(1)(f) (2006) ("Every board of directors, unless otherwise specifically provided by law, shall . . . [p]rovide free text books, supplies and other instructional materials to be loaned to the pupils of the school, when, in its judgment, the best interests of the district will be
non-resident students tuition in certain circumstances and can charge resident students tuition for summer and other vacation programming, but school districts cannot charge resident students for basic education.

2. Statute and Regulations Specific to Online Learning

After the passage of the online learning law, the OSPI adopted new regulations that specified the requirements all ALE programs, including online learning programs, must satisfy to receive basic education funding. Although these regulations directly addressed many discriminatory aspects of online learning, they have failed to solve the problems with discrimination in many of Washington’s online schools.

First, the regulations state that ALE programs “shall be accessible to all students, including those with disabilities.” Nevertheless, there are still many ways that online schools can be inaccessible to certain students, including those with special education needs. Second, the regulations state that the school district or contractor must ensure that students have “all curricula, course content, instructional materials, and other learning resources essential to successfully complete the requirements of the written student learning plan.” This meaning is clear and unambiguous: all resources that are critical for the school—including computers, printers, and Internet connections—must be provided by the online school. Nevertheless, schools such as WAVA fail to provide these critical resources. Third, the regulations state that school staff have the primary responsibility and accountability for the student’s education, including “supervision and monitoring, and evaluation and assessment of the student’s progress.” However, it is the parents who are often the primary persons supervising the child’s education in younger grades.

subserved thereby . . .” The language “in its judgment” implies that a board of directors does not have to provide free textbooks or supplies.).

130. JLARC FINAL REPORT, supra note 19, at 2. Although the statute authorizing digital learning does not directly address tuition, fees or discriminatory practices, the statute does give the Superintendent of Public Instruction authority to adopt rules to implement the law. WASH. REV. CODE § 28A.150.262 (2006).


132. Id. at 392-121-182(3)(b).

133. Id. at 392-121-182(4).

134. The regulations address parental involvement. The regulations allow for a parent, under the supervision of school staff, to provide or implement a portion of the student’s education if the parent agrees. See id. at 392-121-182(2)(c). In other words, online schools can allow parents to implement their child’s education but cannot require parents to teach. If the statute or regulation did not explicitly or implicitly provide such authorization, online schools could be in violation of statutes which require anyone teaching students in a public school to have a teaching license. See Johnson v. Burmaster, 744 N.W.2d 900, 906–09 (Wis. Ct. App. 2007) (holding that teacher licensing statute prevented online school from allowing parents to implement child’s online education). The regulations go on to provide that the school board can appoint others to supervise the child’s educa-
Moreover, there are additional regulations that are not uniformly followed by school districts that contract with outside providers, like WAVA and Insight of Washington. For example, the contractor must comply with all relevant state and federal laws that are applicable to the school district. In other words, school districts cannot avoid legal duties by outsourcing their program, and school district contractors like WAVA are under the same obligations as traditional schools. The regulations provide that outside contractors must serve the student "at no cost to the student for tuition and fees[,]" and "no student or person [may be] unlawfully excluded from participation on the grounds of race, creed, color, national origin, sex, marital status, or presence of any sensory, mental, or physical handicap." Additionally, when an outside contractor "exercises primary responsibility for the student's written learning plan, the program shall be for academically at-risk students and shall comply with RCW 28A.150.305."

Although these regulations fail to solve the many problems that online schools have with discrimination, there are solutions. First, online schools can pay all necessary and fixed expenses or at least provide financial assistance to students without access to a computer and the Internet at home. Second, online schools can pay teachers or teaching aides to provide in-person services for younger students, special education students, transitional bilingual students, and all other students who need direct assistance and supervision. For example, the Federal Way Internet Academy and the Evergreen Internet Academy, operated by the Evergreen School District, both have computer labs where teachers are available to assist students in person. Similarly, the second largest online school in Colorado operates "learning centers" where mentors supervise students' online learning. Third, online schools can translate their websites and advertising into other languages to ensure that students and families from all communities and cultures have equal access to outreach.
materials. These solutions, however, will never be widely adopted without greater state oversight of online schools in Washington.

V. THE NEED FOR GREATER STATE OVERSIGHT

Recently, other states have been taking a closer look at online education. In late 2006 and early 2007, three states released audits of their full-time online schools. In Colorado, the audit’s critical findings received significant media coverage and led to new state legislation requiring greater oversight. In Wisconsin, a recent court of appeals decision held that an online school run by K12 did not comply with state laws designed for traditional schools and should not receive state funding. After this decision, the Wisconsin legislature compromised by imposing a cap on the number of students statewide who can enroll in online schools but still allowing online schools to receive funding.

Like programs in other states, ALE programs in Washington, including online schools, underwent scrutiny from 2003 to 2005 for failure to comply with regulatory requirements. The JLARC audit found that the lack of oversight by either the legislature or OSPI was problematic. That lack of oversight continues to be problematic in online education.

The legislature should require and pay for greater state oversight for three reasons. First, the legislature is constitutionally required to provide for the public education of all students in Washington, which implies paying for proper oversight and management. Second, online education is a new and rapidly developing field, and policymakers need to remain informed and have a voice in how online education develops. Third, online education breaks the mold of “local control” and, therefore, requires greater statewide management and coordination.

A. The Legislature Must Provide Sufficient Funding for OSPI to Oversee Education in Washington

Article IX of the Washington Constitution requires the state legislature to pay for basic education. In addition, the legislature must make educational opportunities equally available “without distinction or pref-

140. Id. at 10.
141. See id.
142. See id.; see also Nancy Mitchell, Online Schools Slammed Performance Issues, Oversight of Online Programs Examined, ROCKY MOUNTAIN NEWS, Dec. 12, 2006, at 4A.
145. See supra Part II.B.
146. JLARC FINAL REPORT, supra note 19, at 17.
erence on account of race, color, caste, or sex.\textsuperscript{148} The Superintendent of Public Instruction has the duty to supervise "all matters pertaining to public schools."\textsuperscript{149} Consequently, OSPI has the duty to ensure that educational programs in Washington are not discriminatory.

The state constitution does not make exceptions for OSPI to avoid this duty based on impracticality or because the OSPI lacks funding or resources. Nor does the constitution permit OSPI to disregard this duty by deferring to local school boards. In sum, the legislature has the duty to pay for education, which should include providing sufficient resources so that OSPI can properly supervise all educational programming. Moreover, once the state decides to offer a type of programming, such as online education, the state should make the opportunity available equally.\textsuperscript{150} If the state finds that a program is impractical to provide to all students equally or too expensive to supervise properly, the state should discontinue the programming.

\textbf{B. The Legislature Has a Duty to Define "Basic Education" and to Make Informed Decisions About The Role of Online Education}

Unfortunately, many educators, policymakers, and much of the public do not know how online schools operate or what online classes look like.\textsuperscript{151} Because of this lack of knowledge and experience, many states have failed to tackle difficult policy issues or to provide guidance to school administrators and program operators. This, in turn, "create[s] a vacuum that is being filled by the practitioners, who are creating de facto policy through their practices."\textsuperscript{152}

It is the legislature alone, however, that must define the scope of a basic education in Washington and make decisions about "the organization, administration, and operational details" of the state's public school system.\textsuperscript{153} The legislature should not defer to the judgment of proponents of online education, and especially not to operators of privately-run online schools, because they are unelected and do not represent the interests of the state as a whole.

\textsuperscript{148} WASH. CONST. art. IX, § 1.
\textsuperscript{149} WASH. CONST. art. III, § 22 (emphasis added). According to one dictionary, supervision means "the act of managing, directing, or overseeing persons or projects." BLACK'S LAW DICTIONARY (8th ed. 2004).
\textsuperscript{150} Seattle Sch. Dist. No. 1, 90 Wash. 2d at 547, 585 P.2d at 109 (Utter, J., concurring).
\textsuperscript{152} JLARC INTERIM REPORT, supra note 16, at 29 (quoting from N. CENT. REG'L EDUC. LAB., KEEPING PACE WITH K-12 ONLINE LEARNING: A SNAPSHOT OF STATE-LEVEL POLICY AND PRACTICE (2004)).
\textsuperscript{153} Seattle Sch. Dist. No. 1, 90 Wash. 2d at 518, 585 P.2d at 95.
Moreover, the legislature should not look at online schools in isolation. The legislature has the duty to provide for a "general and uniform system" of public schools.\textsuperscript{154} Accordingly, the legislature should decide how various aspects of online education can either supplement or detract from the public school system as a whole and make sure that opportunities are open to all so that online education does not divide public schools into the haves and have-nots.

C. Online Education Does Not Fit Traditional Models of Local Control

Under the traditional model of local control, parents and community members can voice concerns, stay informed, and influence educational policy by visiting schools in-person, by attending school board meetings, and by voting for school board members and school levies.\textsuperscript{155} These traditional forms of communication and governance, however, face new obstacles in the context of online schools, which enroll students statewide. For example, parents living outside the district cannot vote for the local school board and might find it difficult to meet in-person with school administrators or to attend a school board meeting.\textsuperscript{156} In addition, local school board members might not be aware of problems with online schools they have established when students are located in other districts and their learning takes place at home, out of the public eye.\textsuperscript{157} Accordingly, the state should determine how to best ensure that parents and community members are engaged in the system and should help coordinate such a system.

VI. CONCLUSION

Online education, in some form or another, will play an increasingly important role in our public education system. The time is ripe for policymakers to take a closer look at how online schools potentially discriminate and to question whether current online schools are really providing a free, public education. The legislature should find that schools that are not equally accessible to all students or that indirectly charge fees or tuition are ineligible for public education funding. The legislature should also create an ongoing task force to stay informed of the rapidly changing field of online education and should fund an online learning department in the OSPI to strictly monitor compliance with state laws and regulations.

\textsuperscript{154} WASH. CONST. art. IX, § 2.
\textsuperscript{155} See COLO. OFFICE OF THE STATE AUDITOR, supra note 66, at 86.
\textsuperscript{156} See id.
\textsuperscript{157} See id.
Although it may be daunting for the legislature to get up to speed about the particulars of online learning, the legislature must do so to make informed decisions about how online education fits into and contributes to the state's uniform system of education. Only by making the investment now can the legislature ensure that public school funds are being spent wisely for the benefit of all.