

WASHINGTON STATE'S DUTY TO FUND K-12 SCHOOLS: WHERE THE LEGISLATURE WENT WRONG AND WHAT IT SHOULD DO TO MEET ITS CONSTITUTIONAL OBLIGATION

Daniel C. Stallings

Abstract: The Washington State Constitution makes education Washington State's top priority. Article IX, section 1 proclaims that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders . . ."¹ In the 1978 case of *Seattle School District v. State*,² the Washington State Supreme Court interpreted this language as a command to the state legislature. The Court ordered the legislature to fulfill its constitutional duty by defining and fully funding "basic education" and a "basic program of education."³ The legislature attempted to comply by passing and subsequently amending the Basic Education Act and, in 2009, by passing H.B. 2261.⁴ This Comment analyzes the state's school-funding duty in light of these legislative efforts and recent Washington school-funding cases. This Comment concludes that the legislature has not met its constitutional duty because it has not adequately defined a "basic program of education," and therefore recommends that the legislature amend H.B. 2261 to bring the state into compliance with article IX, section 1 of the Washington State Constitution.

INTRODUCTION

Washington State's constitution boasts one of the strongest K-12 school-funding mandates of any state constitution.⁵ Article IX, section 1 of the Washington State Constitution proclaims that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders . . ."⁶ The Washington State Supreme Court has said that "[n]o other state has placed the common school on so high a pedestal."⁷

Yet even with the strongly worded language of the state constitution, Washington repeatedly falls below the national average in educational

1. WASH. CONST. art. IX, § 1.

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

3. *Id.* at 518–19, 585 P.2d at 95.

4. Washington Basic Education Act of 1977, ch. 359, 1977 Wash. Sess. Laws 1606; Act of July 26, 2009, ch. 548, 2009 Wash. Sess. Laws 3331 (current version at WASH. REV. CODE § 28A.150).

5. *See Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 498, 585 P.2d 71, 84 ("Clearly, Const. art. 9, § 1 is unique among state constitutions.").

6. WASH. CONST. art. IX, § 1.

7. *Seattle Sch. Dist.*, 90 Wash. 2d at 511, 585 P.2d at 91.

expenditures per student.⁸ For example, in the 2007–08 school year, the national average educational expenditure per student was \$10,615, and the highest-spending states spent nearly twice that.⁹ In contrast, Washington spent \$9980 per student.¹⁰

The Washington State Supreme Court recognized the strength of Washington’s school-funding mandate in the landmark 1978 case *Seattle School District v. State*.¹¹ In that case, the Court considered a constitutional challenge to the use of local tax levies for K-12 school funding.¹² The Court determined that article IX, section 1 gives rise to a mandatory, judicially enforceable duty¹³ and that the words “paramount” and “ample” in article IX, section 1 have their ordinary robust meanings.¹⁴ Finally, the Court ordered the legislature to clarify the precise scope of the state’s article IX, section 1 duty and to define and fully fund what the Court called “basic education” and a “basic program of education.”¹⁵

Since 1977, the legislature has attempted to meet its constitutional duty by passing and amending several pieces of legislation. First, in 1977, following the trial court decision in *Seattle School District*, the legislature passed the Basic Education Act.¹⁶ In 1993, the legislature substantially amended the Act to more clearly articulate the concept of basic education.¹⁷ Most recently in 2009, the legislature enacted H.B. 2261, which will overhaul the state’s education funding system in 2011.¹⁸

Washington courts have heard several important challenges to these legislative efforts. In particular, the trial judge whose opinion was affirmed in *Seattle School District*, Judge Robert Doran, authored two

8. See SENATE WAYS AND MEANS COMMITTEE ET AL., A CITIZEN’S GUIDE TO THE WASHINGTON STATE K-12 FINANCE 21–23 (2009).

9. *Id.* Cost of living varies from state to state, which may contribute to larger expenditures in some states.

10. *Id.*

11. *Seattle Sch. Dist.*, 90 Wash. 2d at 511, 585 P.2d at 91.

12. *Id.* at 481, 585 P.2d at 76.

13. *Id.* at 500–04, 585 P.2d at 85–87.

14. *Id.* at 510–11, 516, 585 P.2d at 91, 93.

15. *Id.* at 520, 585 P.2d at 96. (“[T]he constitution requires more than a mere definition of ‘basic education’ or a basic program of education. . . . [T]he State also has an affirmative paramount duty to make ample provision for funding the ‘basic education’ or basic program of education defined.”).

16. Washington Basic Education Act of 1977, ch. 359, 1977 Wash. Sess. Laws 1606.

17. Act of July 25, 1993, ch. 336, § 1, 1993 Wash. Sess. Laws 1293, 1294.

18. Act of July 26, 2009, ch. 548, 2009 Wash. Sess. Laws 3331. H.B. 2261 has been passed but does not take effect until September 1, 2011. *Id.* § 804, 2009 Wash. Sess. Laws at 3375.

highly influential school-funding opinions in the 1980s that refined both the state's school-funding duty and the requirements of a constitutionally sufficient "basic program of education."¹⁹ Additionally in 2010, in *McCleary v. State*, King County Superior Court Judge John Erlick held that the state is currently breaching its constitutional duty to make ample provision for education.²⁰

Part I of this Comment analyzes the legislature's duty under article IX, section 1 and the *Seattle School District* decision. Part II reviews the legislature's attempts to fulfill its duty. Part III discusses how Washington school-funding decisions after *Seattle School District* have impacted the state's duty. Finally, Part IV concludes that the legislature has failed to meet its constitutional obligation and that this failure stems from an inadequate definition of a "basic program of education." It argues that the current definition is insufficient because the state can comply with its statutory requirements and yet still fail to "make ample provision for . . . education."²¹ This is because the legislature's current scheme imposes no statutory funding obligation on the legislature and, as a practical matter, makes it extremely difficult to enforce article IX, section 1 in court.

This Comment recommends that the legislature amend H.B. 2261 to bring the state into compliance with article IX, section 1 and *Seattle School District*. Such an amendment should do two things: First, it should establish formulas or standards to determine annual allocations for each program or service that is part of basic education. Second, it should require that the allocation for each program or service cover its actual cost. Such an amendment would provide a constitutionally adequate definition of a "basic program of education" and, in effect, would encompass the minimum cost of education within that definition. Moreover, amending the bill in these ways would impose a statutory funding obligation on the legislature²² and for practical purposes would

19. See *Seattle Sch. Dist. v. State*, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983); *Wash. State Special Educ. Coal. v. State*, No. 85-2-00543-8 (Wash. Super. Ct. Nov. 22, 1988). These opinions are not available in most legal databases. They are available upon request from the Office of the Thurston County Superior Court Clerk, and are also on file with the *Washington Law Review*.

20. *McCleary v. State*, No. 07-2-02323-2 (Wash. Super. Ct. Feb. 4, 2010).

21. WASH. CONST. art. IX, § 1.

22. However, any statutory funding obligation is subject to repeal or amendment by the legislature. See *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wash. 2d 284, 301, 174 P.3d 1142, 1150 (2007) ("Implicit in the plenary power of each legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power."); see also Kristen L. Fraser, *Method, Procedure, Means, and Matter: Washington's Law of Law-Making*, 39 GONZ. L. REV. 447, 478 (2004).

make H.B. 2261 enforceable in court by removing some of the barriers to enforcement that exist today. These steps would help bring the state into compliance with its constitutional duty.

I. *SEATTLE SCHOOL DISTRICT* CLARIFIED THE STATE'S DUTY UNDER ARTICLE IX, SECTION 1

Seattle School District is the leading case on Washington State's duty to fund K-12 schools.²³ Thurston County Superior Court first heard the case after the Seattle School District sued the State of Washington, alleging that the state was not meeting its duty to "make ample provision for . . . education" as required by article IX, section 1.²⁴ The school district argued that the state should not be able to rely on local tax levies to fund basic education because doing so would result in less than "ample" funding.²⁵ The problem was that school districts often had difficulty passing levies and, as a result, could not generate enough revenue to meet operating costs.²⁶ Judge Robert Doran, and ultimately the Washington State Supreme Court, agreed with the school district.²⁷ With its opinion, the state supreme court established a framework for understanding the state's duty under article IX, section 1.

This framework stressed three key foundations. First, article IX, section 1 gives rise to a mandatory and judicially enforceable duty.²⁸ Second, the words "paramount" and "ample" carry their ordinary robust meanings.²⁹ Finally, as part of its duty to make ample provision for education, the legislature must clarify the scope of the state's duty by defining and fully funding "basic education" and a "basic program of education."³⁰

23. See, e.g., McGowan v. State, 148 Wash. 2d 278, 283–85, 60 P.3d 67, 70–71 (2002) (providing an overview of school funding law in Washington and focusing heavily on *Seattle School District*).

24. *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 486, 585 P.2d 71, 78 (1978).

25. *Id.*

26. *Id.*

27. See *id.* at 481–84, 585 P.2d at 76–77.

28. *Id.* at 500–05, 585 P.2d at 85–87.

29. *Id.* at 510–11, 516, 585 P.2d at 91, 93.

30. *Id.* at 518–20, 585 P.2d at 95–96.

A. *Article IX, Section 1 Gives Rise to a Mandatory, Judicially Enforceable Duty*

Article IX, section 1 declares that “[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders”³¹ The strong tone of this wording was no accident. The Washington State Constitution’s framers were mindful that other states had neglected education, and they wanted to avoid similar problems in Washington.³² Thus, they made the state’s duty to fund education “paramount” and required the state to make “ample” provision for education.³³

Acknowledging that intent, the state supreme court in *Seattle School District* held that the state’s duty to make ample provision for education is both mandatory and judicially enforceable.³⁴ The Court noted that, unless otherwise stated, all constitutional provisions are mandatory.³⁵ The Court also held that article IX, section 1 is judicially enforceable: the courts can order a remedy for violations of article IX, section 1.³⁶ The Court rejected the State’s theory that, because the duty to make ample provision for education lies with the legislature, any remedy for breach of that duty should be “political not judicial.”³⁷ To the contrary, the Court held that the judiciary can and must provide a remedy for a breach of article IX, section 1 as part of its “power and . . . duty to interpret, construe, and give meaning to words, sections and articles of the constitution.”³⁸ The Court’s message was clear: the legislature must take steps to comply with article IX, section 1.³⁹

31. WASH. CONST. art. IX, § 1.

32. *Seattle Sch. Dist.*, 90 Wash. 2d at 511, 585 P.2d at 91 (“[T]he convention was familiar with the history of school funds in the older states, and the attempt was made to avoid the possibility of repeating the tale of dissipation and utter loss.” (quoting Theodore L. Stiles, *The Constitution of the State and Its Effects Upon Public Interests*, 4 WASH. HIST. Q. 281, 284 (1913))).

33. *Id.*; WASH. CONST. art. IX, § 1.

34. *Seattle Sch. Dist.*, 90 Wash. 2d at 500–05, 585 P.2d at 85–87.

35. *Id.* at 500, 585 P.2d at 85.

36. *Id.* at 503–04, 585 P.2d at 87.

37. *Id.*

38. *Id.*

39. *See id.* at 503–04, 585 P.2d at 87.

B. *The Words “Paramount” and “Ample” Carry Their Ordinary Robust Meanings*

After establishing that the duty in article IX, section 1 is mandatory and enforceable in court, the state supreme court in *Seattle School District* next had to determine what that duty entailed. The Court began by focusing on two words in article IX, section 1: “paramount” and “ample.”⁴⁰

In interpreting the meaning of these two words, the Court, recognizing the forceful wording in article IX, section 1, found that “paramount” and “ample” carry their ordinary robust meanings.⁴¹ “[P]aramount,” as it appears in article IX, section 1, means “chief in importance, supreme, preeminent . . . more important than all other things concerned.”⁴² Likewise, “ample,” as it appears in article IX, section 1, means “liberal, unrestrained, without parsimony, fully, sufficient.”⁴³ Article IX, section 1 describes the state’s obligation to make ample provision for education as “the paramount duty of the state.”⁴⁴ The phrase “paramount duty of the state” appears nowhere else in the Washington State Constitution,⁴⁵ leading the Court in *Seattle School District* to find that the obligation to fund education is “above others in rank and authority,” and “dominant.”⁴⁶ The Court found this interpretation consistent with the framers’ intent to place education above all other priorities.⁴⁷ Accordingly, the state must make education funding its top legislative priority.⁴⁸ As Judge Robert Doran stated in a later school-funding opinion, “[f]ull funding of the education program

40. *Id.* at 511, 516, 585 P.2d at 91, 93.

41. *Id.*

42. *Id.* at 511, 585 P.2d at 91 (quoting the definition of “paramount” in BERGAN EVANS, A DICTIONARY OF CONTEMPORARY AMERICAN USAGE 350 (1957)).

43. *Id.* at 516, 585 P.2d at 93.

44. WASH. CONST. art. IX, § 1.

45. *Seattle Sch. Dist.*, 90 Wash. 2d at 510, 585 P.2d at 91 (“Careful examination of our constitution reveals that the framers declared *only once* in the entire document that a specified function was the State’s *paramount duty*.”).

46. *Id.* at 511, 585 P.2d at 91 (quoting the definition of “paramount” in WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1638 (1971)).

47. *Id.* (“No other state has placed the common school on so high a pedestal. One who carefully reads Article IX might also wonder whether, after giving to the school fund all that is here required to be given, anything would be left for other purposes. But the convention was familiar with the history of school funds in the older states, and the attempt was made to avoid the possibility of repeating the tale of dissipation and utter loss.” (quoting Theodore L. Stiles, *The Constitution of the State and Its Effects Upon Public Interests*, 4 WASH. HIST. Q. 281, 284 (1913))).

48. *See id.*

required by Article IX, Section[] 1 . . . must be provided as a first priority before any statutory program is funded.”⁴⁹

C. *The Court Ordered the Legislature to Dictate the Precise Scope of the State's Article IX, Section 1 Duty by Defining “Basic Education” and a “Basic Program of Education”*

After reaffirming the definitions of “paramount” and “ample,” the state supreme court in *Seattle School District* turned to the question of what the state must do to meet its constitutional duty. Instead of defining the duty itself, the Court held that the legislature must define its precise scope.⁵⁰ This conclusion reflects the Court’s respect for the traditional roles of each branch of government, desire for constitutional consistency, and unwillingness to micromanage education.⁵¹ With these roles in mind, the Court ordered the legislature to first define “education,” and then to specify the educational programs and services necessary to provide that education.⁵² In the Court’s parlance, the legislature was to define “basic education” and a “basic program of education.”⁵³

1. *The Legislature Must Define “Basic Education”*

In ordering the legislature to define “basic education,” the Court acknowledged the argument that “education” can have no “conclusive, static or exact definition.”⁵⁴ Nevertheless, the Court sought to give meaning to “education” as it appears in article IX, section 1.⁵⁵

49. Findings of Fact and Conclusions of Law at 62, *Seattle Sch. Dist. v. State*, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983).

50. *Seattle Sch. Dist.*, 90 Wash. 2d at 518, 585 P.2d at 95 (“Although the mandatory duties of Const. art. 9, § 1 are imposed upon the *State*, the organization, administration, and operational details of the ‘general and uniform system’ required by Const. art. 9, § 2 are the province of the *Legislature*. In the latter area the judiciary is primarily concerned with whether the Legislature acts pursuant to the mandate and, having acted, whether it has done so constitutionally. Within these parameters, then, the system devised is within the domain of the Legislature.”).

51. *Id.* The Court noted twenty-seven years later in *Brown v. State* that “out of our respect for the constitution’s delegation of responsibility and authority to the legislature to provide education, this court declined to impose specific substantive requirements at [the time of *Seattle School District*], leaving that task to the legislature.” 155 Wash. 2d 254, 258, 119 P.3d 341, 343 (2005). The *Brown* Court also noted the practical reason for this decision, stating, “this court will not micromanage education.” *Id.* at 261, 119 P.3d at 344–45.

52. *Seattle Sch. Dist.*, 90 Wash. 2d at 517–19, 585 P.2d at 94–95.

53. *Id.*

54. *Id.* at 516, 585 P.2d at 94.

55. *Id.*

To do this, the Court began with generalities—it first established that the state’s duty under article IX, section 1 is to provide only a “basic education,”⁵⁶ as opposed to “‘total education’ in the sense of *all* knowledge or the offering of *all* programs, subjects, or services which are attractive”⁵⁷ Next, the Court articulated broad constitutional guidelines for what a basic education must include.⁵⁸ Those guidelines reflect the central role of education⁵⁹ in many facets of American society:

[T]he State’s constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the market place of ideas. Education . . . must prepare our children to participate intelligently and effectively in our open political system[,] . . . to exercise their First Amendment freedoms[,] . . . [and] to be able to inquire, to study, to evaluate and to gain maturity and understanding.⁶⁰

The Court held that any constitutionally sufficient definition of basic education must, at a minimum, conform to these guidelines.⁶¹ Finally, the Court expressly left all further specifics of defining “basic education” to the legislature.⁶² To this end, the Court in *Seattle School District* ordered the legislature to define and give substantive content to “basic education” within these broad constitutional guidelines.⁶³

56. *Id.* at 519, 585 P.2d at 95.

57. *Id.*

58. *Id.* at 517–18, 585 P.2d at 94–95.

59. The United States Supreme Court noted the importance of education in *Brown v. Board of Education*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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.

347 U.S. 483, 493 (1954).

60. *Seattle Sch. Dist.*, 90 Wash. 2d at 517–18, 585 P.2d at 94 (citations omitted).

61. *Id.*

62. *Id.* at 518–19, 585 P.2d at 95.

63. *Id.*

2. *The Legislature Must Define and Amply Fund a "Basic Program of Education"*

In addition to ordering the legislature to define "basic education," the state supreme court ordered the legislature to determine what educational programs and services the state must provide to give children a basic education⁶⁴ by defining what the Court called a "basic program of education."⁶⁵ The definition was supposed to reflect more than the system of public schools already in place in 1978.⁶⁶ Beyond that, the *Seattle School District* Court provided little guidance.⁶⁷ That guidance would not come until 1983 when Judge Doran interpreted *Seattle School District* as requiring a statutory definition of a "basic program of education" that establishes the educational programs and services that the state is required to provide as well as the formulas or standards by which full state funding of education can be determined.⁶⁸ However, the *Seattle School District* Court required the legislature to define only a "basic program of education" that would succeed in providing the state's children with a "basic education."⁶⁹

After describing how the legislature must define the scope of its article IX, section 1 duty, the *Seattle School District* Court confirmed that the state must also amply provide for basic education.⁷⁰ In sum, the

64. *Id.* The *Seattle School District* opinion repeatedly refers to the legislature as being required to provide a definition of "basic education" and a "basic program of education." See, e.g., *id.* at 518–19, 585 P.2d at 95 ("[T]he Legislature is obligated to give specific substantive content to the word ['education'] and to the program it deems necessary to provide that 'education.'") (emphasis added).

65. *Id.* at 519, 585 P.2d at 95 ("[W]e shall refer to the Legislature's obligation as one to provide 'basic education' through a basic program of education . . .") (emphasis added). As a corollary, any constitutionally sufficient basic program of education must provide education to the state's children at a level commensurate with the broad constitutional guidelines set forth by the Court in *Seattle School District*. *Id.* at 517–19, 585 P.2d at 94–95.

66. *Id.* at 519, 585 P.2d at 95 ("[W]e note that the Legislature has heretofore enacted laws to 'provide for a general and uniform system of public schools.' However, it has not as yet fully implemented Const. art. 9, §§ 1 and 2 by defining or giving substantive content to 'basic education' or a basic program of education. Thus, the Legislature must hereafter act to comply with its constitutional duty by defining and giving substantive meaning to them.")

67. See *id.*

68. Findings of Fact and Conclusions of Law at 60, *Seattle Sch. Dist. v. State*, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983) ("The State's constitutional duty to make ample provision for the educational program required by Article IX requires that the Legislature establish in law the educational programs and services to which all children are entitled and the formulas or standards by which full state funding of such education can be determined.")

69. *Seattle Sch. Dist.*, 90 Wash. 2d at 518–20, 585 P.2d at 95–96.

70. *Id.* at 520, 585 P.2d at 96 ("[T]he constitution requires more than a mere definition of 'basic education' or a basic program of education. . . . [T]he State also has an affirmative paramount duty

state can fulfill its duty under article IX, section 1 by defining “basic education,” defining a “basic program of education,” and then fully funding that program.⁷¹

II. THE LEGISLATURE ATTEMPTED TO COMPLY WITH ITS ARTICLE IX, SECTION 1 DUTY

After clarifying the state’s duty under article IX, section 1, the Court in *Seattle School District* expressed its “great faith in the Legislature and its ability to define ‘basic education’ and a basic program of education”⁷² The legislature appeared to make good on this “great faith” when it passed the Basic Education Act of 1977, even before the state supreme court handed down *Seattle School District* in 1978.⁷³ The Act and its subsequent amendments define “basic education” and attempt to define a “basic program of education.”⁷⁴

A. *The Basic Education Act of 1977 and Its Subsequent Amendments Define “Basic Education”*

The definition of “basic education” that appeared in the Basic Education Act of 1977 was phrased in extremely broad terms, and is now little more than a historical artifact.⁷⁵ That definition was part of Washington law from 1977 until 1993, when the legislature passed a new definition.⁷⁶

to make ample provision for funding the ‘basic education’ or basic program of education defined.”).

71. *Id.* at 522, 585 P.2d at 97 (“Thus we hold, compliance with Const. art. 9, §§ 1 and 2 can be achieved only if sufficient funds are derived, through dependable and regular tax sources, to permit school districts to provide ‘basic education’ through a basic program of education in a ‘general and uniform system of public schools.’”).

72. *Id.* at 537, 585 P.2d at 104.

73. Washington Basic Education Act of 1977, ch. 359, 1977 Wash. Sess. Laws 1606.

74. *See id.* §§ 1–6, 1977 Wash. Sess. Laws at 1606–12.

75. The definition read as follows:

[Basic Education must] provide students with the opportunity to achieve those skills which are generally recognized as requisite to learning. Those skills shall include the ability:

- (1) To distinguish, interpret and make use of words, numbers and other symbols, including sound, colors, shapes, and textures;
- (2) To organize words and other symbols into acceptable verbal and nonverbal forms of expression, and numbers into their appropriate functions;
- (3) To perform intellectual functions such as problem solving, decision making, goal setting, selecting, planning, predicting, experimenting, ordering and evaluating; and
- (4) To use various muscles necessary for coordinating physical and mental functions.

Id. §1, 1977 Wash. Sess. Laws at 1606–07.

76. *See* Act of July 25, 1993, ch. 336, § 101, 1993 Wash. Sess. Laws 1293, 1294.

The 1993 revision of the definition of “basic education” was part of a larger legislative effort to adopt mandatory education standards.⁷⁷ The legislature called these standards “essential academic learning requirements,” or “EALRs.”⁷⁸ The goal of the EALRs was to “develop a public school system that focuses more on the educational performance of students.”⁷⁹ The revised definition of “basic education,” which is substantially similar to the definition in place today, used language that matched the language in the EALRs:

[Basic education must] provide students with the opportunity to become responsible citizens, to contribute to their own economic well-being and to that of their families and communities, and to enjoy productive and satisfying lives. To these ends, the goals of each school district, with the involvement of parents and community members, shall be to provide opportunities for all students to develop the knowledge and skills essential to:

- (1) Read with comprehension, write with skill, and communicate effectively and responsibly in a variety of ways and settings;
- (2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history; geography; arts; and health and fitness;
- (3) Think analytically, logically, and creatively, and to integrate experience and knowledge to form reasoned judgments and solve problems; and
- (4) Understand the importance of work and how performance, effort, and decisions directly affect future career and educational opportunities.⁸⁰

By including an identifiable set of academic skills and language from the EALRs, the legislature provided a greater level of detail and specificity to its definition of basic education.⁸¹ This definition remains in place today with only a few minor changes enacted in 2007⁸² and 2009.⁸³ The

77. *See id.* § 1, 1993 Wash. Sess. Laws at 1293–94.

78. *Id.* § 201, 1993 Wash. Sess. Laws at 1295. EALRs are standards that define what each student is supposed to know at each grade level. The current EALRs can be found at <http://standards.ospi.k12.wa.us>.

79. Act of July 25, 1993 § 1, 1993 Wash. Sess. Laws at 1293.

80. *Id.* § 101, 1993 Wash. Sess. Laws at 1294.

81. *See id.* § 1, 1993 Wash. Sess. Laws at 1293–94.

82. *See* Act of July 22, 2007, ch. 400, 2007 Wash. Sess. Laws 1826. Most changes made in the 2007 revision were minor. For example, the legislature revised subsection (1) to read: “Read with comprehension, write effectively, and communicate successfully in a variety of ways and settings and with a variety of audiences.” *Id.* § 1, 2007 Wash. Sess. Laws at 1826–27.

legislature presently deems its definition of basic education compliant with the requirements of article IX, section 1.⁸⁴

B. The Legislature Also Attempted to Define a “Basic Program of Education”

In addition to defining “basic education,” the legislature has attempted to define a “basic program of education.”⁸⁵ The legislature’s first attempt came in the Basic Education Act of 1977,⁸⁶ and several minor amendments followed in subsequent years.⁸⁷ Then, in 2009, the definition of a “basic program of education” received a major overhaul with the passage of H.B. 2261.⁸⁸ At each step, the legislature has deemed its definition compliant with its duty under article IX, section 1.⁸⁹

The legislature’s first attempt to define a “basic program of education” in 1977⁹⁰ had two key components: a “minimum hours requirement,”⁹¹ and a requirement that the legislature adopt a formula for funding education every two years.⁹²

The “minimum hours requirement” defined the state’s “basic program of education” as comprising a minimum number of hours of instruction each school district needed to offer each student.⁹³ These minimums

83. See Act of July 26, 2009, ch. 548, 2009 Wash. Sess. Laws 3331. The 2009 changes came with H.B. 2261, which substantially altered basic education funding but left the definition of basic education largely intact, making only one minor change: whereas the 2007 version began with “The goal of the basic education act for the schools of the state of Washington set forth in this chapter shall be,” the 2009 version begins with “A basic education is an evolving program of instruction that is intended to . . .” *Id.* § 103, 2009 Wash. Sess. Laws at 3334.

84. WASH. REV. CODE § 28A.150.200 (2009) (“The program of basic education established under this chapter is deemed by the legislature to comply with the requirements of Article IX, section 1 of the state Constitution.”).

85. See WASH. REV. CODE §§ 28A.150.220, .260 (2009).

86. See Washington Basic Education Act of 1977, ch. 359, 1977 Wash. Sess. Laws 1606.

87. See *McGowan v. State*, 148 Wash. 2d 278, 285, 60 P.3d 67, 70 (2002) (“Additional legislation has been passed from time to time establishing or relating to various educational programs. Some of the legislation has been determined to be part of basic education and some has not (either by legislature or by a court determination).”).

88. See Act of July 26, 2009, ch. 548, 2009 Wash. Sess. Laws 3331.

89. WASH. REV. CODE § 28A.150.200 (2009) (“The program of basic education established under this chapter is deemed by the legislature to comply with the requirements of Article IX, section 1 of the state Constitution.”).

90. See Washington Basic Education Act of 1977.

91. *Id.* § 3, 1977 Wash. Sess. Laws at 1607–08 (codified as amended at WASH. REV. CODE § 28A.150.220 (2009)).

92. *Id.* § 5, 1977 Wash. Sess. Laws at 1609–11 (codified as amended at WASH. REV. CODE § 28A.150.260 (2009)).

93. *Id.* § 3, 1977 Wash. Sess. Laws at 1607–08.

were coupled with a requirement that the hours include instruction in specified subject areas such as math, social studies, and science.⁹⁴ The requirement did not list the programs or services—such as janitorial services, special education services, textbooks, classroom materials, and so on—that the state was required to fund to ensure it was providing students with a “basic education.”⁹⁵

The second component of the legislature’s original “basic program of education” required the legislature to adopt a funding formula for education every two years.⁹⁶ The requirements for this formula were minimal: First, the formula needed to “provide appropriate recognition” of certified staff costs (e.g., teachers, instructors, and administrators), classified staff costs (non-certified school district employees), “nonsalary” costs, and extraordinary costs associated with operating schools in remote areas.⁹⁷ Second, the formula needed to meet certain staffing ratio requirements.⁹⁸ The statute did not mention any specific programs or services that schools need in order to provide a basic education.⁹⁹

In subsequent years, the legislature made several adjustments to its definition of “basic program of education.”¹⁰⁰ It made only minor amendments between 1977 and 1991,¹⁰¹ but made more substantial changes in 1992.¹⁰² Even after 1992, the definition retained the

94. *Id.* For example, for students in grades one through three, a “minimum of ninety-five percent of the total program hour offerings shall be in the basic skills areas of reading/language arts, mathematics, social studies, science, music, art, health and physical education.” *Id.* § 3, 1977 Wash. Sess. Laws at 1607.

95. *See id.* § 3, 1977 Wash. Sess. Laws at 1607–11.

96. *Id.* § 5, 1977 Wash. Sess. Laws at 1609–11.

97. *Id.*

98. *Id.* § 5, 1977 Wash. Sess. Laws at 1610–11 (“[T]he formula adopted by the legislature shall reflect a ratio of not less than fifty certificated personnel to one thousand annual average full time equivalent students and one classified person to three certificated personnel.”).

99. *See* Washington Basic Education Act of 1977.

100. For a description of these amendments, see *McGowan v. State*, 148 Wash. 2d 278, 285, 60 P.3d 67, 70 (2002).

101. In 1979, the legislature made several modifications to the program-offering requirements for each grade level, including exempting special education students from certain requirements so that “the unique needs, abilities or limitations of such students may be met.” *See* Act of Sept. 1, 1979, ch. 250, § 1, 1979 Wash. Sess. Laws 2029, 2032. In 1982, the legislature extended the length of the kindergarten school year. *See* Act of June 10, 1982, ch. 158, 1982 Wash. Sess. Laws 633. In 1990, the legislature reorganized the Code and placed the basic program of education provisions in their current locations. *See* Act of June 7, 1990, ch. 33, 1990 Wash. Sess. Laws 170 (moving the basic education provisions to their current locations at RCW sections 28A.150.220 and .260).

102. *See* Act of June 11, 1992, ch. 141, 1992 Wash. Sess. Laws 574. The 1992 amendments made three major revisions. First, the legislature reduced the total number of hours school districts were

minimum-hours requirement and the biennial-funding-formula requirement.¹⁰³

It was not until 2009 that the legislature substantially altered the structure of the “basic program of education” by passing H.B. 2261.¹⁰⁴ That bill listed the educational programs and services the state must provide to give students a “basic education,”¹⁰⁵ revising the 1992 statute in three ways: First, H.B. 2261 defines a “basic program of education” as “that which is necessary to provide the opportunity to develop the knowledge and skills necessary to meet the state-established high school graduation requirements.”¹⁰⁶ Second, H.B. 2261 requires that school districts provide: (1) instruction in the essential academic learning requirements, (2) instruction that allows students an opportunity to graduate from high school, (3) supplemental instruction for underachieving students through the state’s learning assistance program, (4) transitional-bilingual education, (5) special education, and (6) programs for highly capable students.¹⁰⁷

Third, H.B. 2261 requires for the first time that the legislature, in adopting its biennial funding formula, make allocations for certain specific programs and services.¹⁰⁸ In particular, H.B. 2261 requires the legislature to allocate funds for (1) librarians and media, (2) student-health services, (3) guidance counselors, (4) professional-development coaches, (5) teaching assistance, (6) office and technology support, (7) custodians, (8) classified staff, (9) student technology, (10) utilities, (11) curriculum, (12) textbooks, (13) library materials, and (14) instructional supplies.¹⁰⁹ H.B. 2261 stops short of requiring the legislature to fund the actual cost of each of these programs, and instead specifies that the legislature must make “allocations” for these programs.¹¹⁰ The 2009 amendments, which take effect in 2011, represent a major change to the legislature’s definition of “basic program of education.”

required to offer and made alterations to the terminology used to describe these hours. *Id.* § 503, 1992 Wash. Sess. Laws at 587–88. Second, the legislature eliminated all grade-level differences in the minimum hours requirements. *Id.* § 503, 1992 Wash. Sess. Laws at 588–89. Finally, the legislature required school districts to offer programs that reflected the new EALR standards. *Id.* § 503, 1992 Wash. Sess. Laws at 589.

103. *See id.* §§ 503–507, 1992 Wash. Sess. Laws at 588–95.

104. Act of July 26, 2009, ch. 548, 2009 Wash. Sess. Laws 3331.

105. *Id.* §§ 104–106, 2009 Wash. Sess. Laws at 3336–42.

106. *Id.* § 101, 2009 Wash. Sess. Laws at 3333.

107. *Id.* § 104, 2009 Wash. Sess. Laws at 3336.

108. *Id.* § 106, 2009 Wash. Sess. Laws at 3339–42.

109. *Id.*

110. *Id.*

III. A NUMBER OF LENGTHY AND COMPLEX CASES REFINED THE STATE'S DUTY TO FUND K-12 SCHOOLS

In the wake of *Seattle School District* and the Basic Education Act of 1977, Washington courts reviewed numerous challenges to the adequacy of the state's school-funding system. Two early decisions by Thurston County Superior Court Judge Robert Doran clarified the nature of the state's duty and underscored the seriousness of the state's responsibility to fund K-12 schools.¹¹¹ Each of these decisions followed a lengthy and complex trial.¹¹² Most recently, after an eight-week trial that ended in February 2010,¹¹³ King County Superior Court Judge John Erlick concluded that the state is still failing to meet its duty to fund K-12 schools.¹¹⁴

A. *Judge Doran Clarified the State's Duty and Underscored Its Seriousness in Two Decisions Following Seattle School District*

After *Seattle School District* and the passage of the Basic Education Act of 1977, Washington courts were quickly called on to clarify the state's duty under article IX, section 1. The task fell largely to Judge Robert Doran, author of the trial court opinion that the Supreme Court of Washington affirmed in *Seattle School District*.¹¹⁵ In the decade following *Seattle School District*, Judge Doran authored two school-funding opinions that reaffirmed the strong mandate of article IX, section 1 and urged the state to make ample provision for education.¹¹⁶ Each of the opinions followed a complex trial involving difficult constitutional and statutory questions.¹¹⁷ Neither opinion was appealed

111. See *Seattle Sch. Dist. v. State*, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983); *Wash. State Special Educ. Coal. v. State*, No. 85-2-00543-8 (Wash. Super. Ct. Nov. 22, 1988).

112. The trial in *Seattle School District* lasted roughly six weeks. E-mail from Michael Hoge, General Counsel for Seattle School District during *Seattle School District* to author (May 21, 2010) (on file with the *Washington Law Review*). The legal challenge in *Washington Special Education Coalition* was narrower but still involved extensive briefing and presentation of evidence. The trial stretched over a period of several months due to scheduling difficulties, although presentation of evidence was limited to six to eight days and arguments lasted approximately two days. E-mail from Howard Powers, Counsel for the Washington Special Education Coalition in *Washington Special Education Coalition* to author (May 22, 2010) (on file with the *Washington Law Review*).

113. See *McCleary v. State*, No. 07-2-02323-2 (Wash. Super. Ct. Feb. 4, 2010).

114. *Id.*

115. See *Seattle Sch. Dist. v. State*, No. 53950, (Wash. Super. Ct. Jan. 14, 1977).

116. *Seattle Sch. Dist. v. State*, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983); *Wash. State Special Educ. Coal. v. State*, No. 85-2-00543-8 (Wash. Super. Ct. Nov. 22, 1988).

117. See *supra* note 116; see also *supra* note 112.

and both are regarded as persuasive, well-reasoned law.¹¹⁸

The first of these opinions was the 1983 case *Seattle School District v. State*,¹¹⁹ which resolved Seattle School District's challenge to the adequacy of K-12 school funding under article IX, section 1.¹²⁰ In that case, not to be confused with others of the same name, Judge Doran concluded that, as of 1983, the state was not amply funding basic education.¹²¹ Further, the judge held that full funding of basic education must be the legislature's first priority and must be funded before any other statutory program.¹²² To emphasize this point, he drew attention to the fact that the state's duty is not suspended during periods of fiscal crisis.¹²³

In the same opinion, Judge Doran provided clarification regarding the state's "basic program of education." Specifically, he held that the state is required to codify the programs and services to which children are entitled under article IX, section 1, and also to establish formulas or standards by which full state funding of those programs can be determined.¹²⁴ He also held that once the legislature has established full funding for a basic education program, the legislature cannot subsequently reduce funding for that program.¹²⁵ Finally, he held that certain programs (including transportation,¹²⁶ special education,¹²⁷ and remediation for students lacking basic skills¹²⁸) needed to be included in a "basic program of education" while others (including extracurricular

118. See, e.g., *Brown v. State*, 155 Wash. 2d 254, 262 n.2, 119 P.3d 341, 345 n.2 (2005) (citing Judge Doran's school-funding opinions with approval).

119. No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983). This opinion is also known as "Doran II," or "School Funding II."

120. See *id.*

121. Findings of Fact and Conclusions of Law at 65, *Seattle Sch. Dist. v. State*, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983) ("Petitioners have sustained their burden of proof that the State has not fully funded the educational program established to meet the current needs of the children of this State under Article IX, Sections 1 and 2.").

122. *Id.* at 62.

123. *Id.* at 62-63.

124. *Id.* at 60.

125. *Id.* at 65.

126. *Id.*

127. *Id.* at 66.

128. *Id.* at 68.

programs,¹²⁹ food services,¹³⁰ and programs for gifted and talented students¹³¹) did not.

Judge Doran's rulings, particularly his ruling that special education is part of basic education, foreshadowed the next challenge in 1987: *Washington State Special Education Coalition v. State*.¹³² In that case, after another highly involved trial over which he presided, Judge Doran set forth the principle that funding that falls below the "actual cost" of an educational program cannot be considered "ample" under article IX, section 1.¹³³ Judge Doran articulated this principle in the context of special education, finding the state's special-education funding formula unconstitutional under article IX, section 1¹³⁴ because the state's special education allocations must be "based as closely as reasonably practicable on the actual cost of the special education needs," and because the state's allocations did not cover the actual cost of special education in some school districts.¹³⁵

B. In February 2010, After an Eight-Week Trial, King County Superior Court Judge John Erlick Ruled that the State Is Not Meeting Its Constitutional Duty to Fund Basic Education

After Judge Doran's opinions in the 1980s, Washington courts issued additional school-funding opinions, none of which altered the core holdings of *Seattle School District*.¹³⁶ Legal challenges have occurred

129. *Id.* at 64.

130. *Id.* at 66.

131. *Id.* at 69.

132. No. 85-2-00543-8 (Wash. Super. Ct. Nov. 22, 1988). This opinion is also known as "Doran III," or "School Funding III."

133. Findings of Fact and Conclusions of Law at 9–10, 14, Wash. State Special Educ. Coal. v. State, No. 85-2-00543-8 (Wash. Super. Ct. Nov. 22, 1988).

134. *Id.*

135. *Id.* at 9, 14 ("The handicapped program funding allocation formula . . . [f]ails to satisfy to some extent the full funding mandate of Article IX, Sections 1 and 2, as determined by this Court in School Funding II that fully sufficient funds be provided and distributed in a manner that is based as close as reasonably practicable on the actual cost of the special educational needs . . ."). Special education also receives federal funds. *See generally* Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1400–1485 (2004).

136. After the Doran opinions, the Washington State Supreme Court considered three school funding cases prior to 2009. None of these decisions decided whether the state had properly defined a "basic program of education," or whether the state was amply funding education. In *Tunstall v. Bergeson*, 141 Wash. 2d 201, 5 P.3d 691 (2000), the Court interpreted Article IX's "all children residing within its borders" language, deciding that state prisoners over the age of eighteen do not have a constitutional right to a basic education. In *McGowan v. State*, 148 Wash. 2d 278, 60 P.3d 67 (2002), and *Brown v. State*, 155 Wash. 2d 254, 119 P.3d 341 (2005), the Court considered whether

more frequently in recent years, with two in 2009 alone.¹³⁷ This intensification came to a head in 2010, when King County Superior Court Judge John Erlick decided *McCleary v. State*.¹³⁸

McCleary was a declaratory judgment action by the Network for Excellence in Washington Schools (“NEWS”), a coalition of school districts and other organizations interested in education.¹³⁹ NEWS asked the court to declare that the state is not amply funding education as required by article IX, section 1.¹⁴⁰ After a comprehensive eight-week bench trial addressing both constitutional questions and contested issues of fact,¹⁴¹ Judge Erlick issued a decision on February 4, 2010.¹⁴² He held that the state is not amply funding education as required by article IX, section 1¹⁴³ and that H.B. 2261 does not bring the state into compliance with article IX, section 1 because it fails to impose mandatory funding obligations.¹⁴⁴ In other words, H.B. 2261 does not pass constitutional muster because it requires only that the legislature “make allocations” for programs, not that it make any particular allocations.¹⁴⁵ Judge Erlick ordered the state to comply with its duty, stating that “[i]t is the responsibility of the Legislature to effectuate that primary priority of

certain statutory programs had or had not been added to the legislature’s definition of a basic program of education.

137. *Sch. Districts’ Alliance for Adequate Funding of Special Educ. v. State*, 149 Wash. App. 241, 202 P.3d 990 (2009); *Federal Way Sch. Dist. v. State*, 167 Wash. 2d 514, 219 P.3d 941 (2009). In *School Districts’ Alliance*, Division II of the court of appeals rejected a challenge to the state’s special education funding formula, finding that the formula did make ample provision for special education. *School District’s Alliance*, 149 Wash. App. 241, 202 P.3d 990. However, the court of appeals did not weigh in on whether the state was meeting its broader duty to amply fund education for all children. *See id.* The Washington State Supreme Court granted review of this case on September 9, 2009. *See Sch. Districts’ Alliance for Adequate Funding of Special Educ. v. State*, 166 Wash. 2d 1024, 217 P.3d 337 (2009). In *Federal Way*, the Washington State Supreme Court rejected the Federal Way School District’s claim that the state’s education funding formulas were not “uniform.” Federal Way’s challenge was based primarily on article IX, section 2, not section 1, and the court dismissed the minimal article IX, section 1 claims. *Federal Way*, 167 Wash. 2d at 527–28, 219 P.3d at 948.

138. *McCleary v. State*, No. 07-2-02323-2 (Wash. Super. Ct. Feb. 4, 2010).

139. *See Findings of Fact and Conclusions of Law* at 6, *McCleary v. State*, No. 07-2-02323-2 (Wash. Super. Ct. Feb. 4, 2010).

140. *Id.* at 3.

141. *Id.* at 2.

142. *Id.* at 73.

143. *Id.* at 65. Judge Erlick found that the petitioners had proved this “beyond a reasonable doubt” despite needing to prove it only by a preponderance of the evidence.

144. *Id.* at 64.

145. *Id.*

funding basic education, and to determine how that can be accomplished. But it must be accomplished.”¹⁴⁶

IV. THE LEGISLATURE'S DEFINITION OF A "BASIC PROGRAM OF EDUCATION" IS INADEQUATE AND SHOULD BE AMENDED

Compliance with the Basic Education Act or H.B. 2261 is not enough to meet the state's constitutional obligation under article IX, section 1.¹⁴⁷ The problem with these statutes is that each fails to adequately define a "basic program of education." These inadequate definitions make it possible for the legislature to comply with all statutory school funding requirements while still failing to "make ample provision for . . . education."¹⁴⁸ This is particularly worrisome in light of the fact that the legislature currently deems compliance with the Basic Education Act and H.B. 2261 enough to fulfill its constitutional obligation under article IX, section 1.¹⁴⁹

The problem is twofold. First, neither "basic program of education" definition¹⁵⁰ places the legislature under any statutory obligation¹⁵¹ to amply fund any particular educational program or service in any given year or to amply fund the actual cost of providing the state's children with a basic education.¹⁵² Rather, the legislature can adjust its educational funding formula as needed to meet short-term political

146. *Id.* at 70.

147. *Id.* at 64–65.

148. Indeed, Washington courts have found that the state is failing in its constitutional duty to amply fund education in 1977, 1983, 1987, and 2010. *See* *Seattle Sch. Dist. v. State*, No. 53950 (Wash. Super. Ct. Jan. 14, 1977); *Seattle Sch. Dist. v. State*, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983); *Wash. State Special Educ. Coal. v. State*, No. 85-2-00543-8 (Wash. Super. Ct. Nov. 22, 1988); *McCleary v. State*, No. 07-2-02323-2 (Wash. Super. Ct. Feb. 4, 2010).

149. WASH. REV. CODE § 28A.150.200 (2009) ("The program of basic education established under this chapter is deemed by the legislature to comply with the requirements of Article IX, section 1 of the state Constitution."). It is questionable whether the separation of powers doctrine allows a legislature to deem its own law constitutionally sufficient. Nevertheless, it is enough for present purposes that this statement provides evidence of the legislature's position that statutory compliance is sufficient for constitutional compliance.

150. The state currently operates under the definition contained in the Basic Education Act, as amended. The amendments in H.B. 2261 do not take effect until September 1, 2011. Act of July 26, 2009, ch. 548, § 804, 2009 Wash. Sess. Laws 3331, 3375.

151. Note that any such statutory obligation would be subject to repeal or amendment by the legislature. *See supra* note 22.

152. *See* Washington Basic Education Act of 1977, ch. 359, 1977 Wash. Sess. Laws 1606; Act of July 26, 2009, ch. 548, 2009 Wash. Sess. Laws 3331.

goals¹⁵³ and still credibly maintain that it is in compliance with article IX, section 1.¹⁵⁴ Second, as a practical matter, the state's duty under current law is difficult to enforce without a lengthy and costly trial like *McCleary*.¹⁵⁵ Without the safeguards of practical enforceability or a statutory funding obligation, the legislature can easily run afoul of its constitutional duty.¹⁵⁶

This Part argues first that the legislature has not adequately defined a “basic program of education,” and second that the current law’s lack of safeguards—either in the form of a statutory obligation imposed on the legislature or a method for practical enforcement—allows the state to run afoul of its constitutional duty under article IX, section 1. Finally, it recommends amending H.B. 2261 to bring the state into compliance with its constitution.

A. *The Legislature Has Not Adequately Defined a “Basic Program of Education”*

Neither the Basic Education Act as amended nor H.B. 2261 provides a constitutionally sufficient definition of a “basic program of education.” As Judge Doran made clear, an adequate definition must identify the programs and services to which all children are entitled, and provide formulas or standards by which full state funding of these programs and services can be determined.¹⁵⁷ Defining a “basic program of education” in a manner that fails in either of these respects disobeys the constitutional command presented in Judge Doran’s 1983 *Seattle School District* opinion.¹⁵⁸

The current law, the 1977 Basic Education Act, as amended, does not adequately define a “basic program of education” because it fails to

153. See Washington Basic Education Act of 1977; Act of July 26, 2009, 2009 Wash. Sess. Laws 3331.

154. See *supra* note 149.

155. The first trial on this issue, *Seattle School District*, required more than fifteen weeks of trial. Memorandum Opinion at 2, *Seattle Sch. Dist. v. State*, No. 53950 (Wash. Super. Ct. Jan. 14, 1977). The most recent trial on this issue, *McCleary v. State*, required an eight-week trial. Findings of Fact and Conclusions of Law at 2, *McCleary v. State*, No. 07-2-02323-2 (Wash. Super. Ct. Feb. 4, 2010). See also *supra* note 112.

156. See *supra* note 148.

157. Findings of Fact and Conclusions of Law at 60, *Seattle Sch. Dist. v. State*, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983) (“The State’s constitutional duty to make ample provision for the educational program required by Article IX requires that the Legislature establish in law the educational programs and services to which all children are entitled and the formulas or standards by which full state funding of such education can be determined.”).

158. *Id.*

establish the educational programs or services to which all children are entitled.¹⁵⁹ Instead, the Basic Education Act establishes that the state's "basic program of education" consists of a minimum number of instructional hours.¹⁶⁰ It falls short of articulating which programs or services the state must fund.¹⁶¹ Instead, the Act requires only that the legislature provide funding for teachers, administrators, classified staff, and non-salary costs.¹⁶² Because funding these expenses alone would not provide the state's children with the "basic education" the state constitution requires,¹⁶³ the Basic Education Act fails to adequately define a "basic program of education."

The state's most recent attempt to define a "basic program of education," scheduled to take effect on September 1, 2011, also falls short of the constitutional minimum. H.B. 2261 fails to adequately define a "basic program of education" because it does not establish statutory formulas or standards by which full state funding of each educational program or service can be determined.¹⁶⁴ H.B. 2261, unlike the Basic Education Act, clearly articulates the programs and services the state is required to amply fund,¹⁶⁵ and for this reason represents a major step forward. However, H.B. 2261 requires only that the legislature "make allocations" for each program or service listed.¹⁶⁶ This vague, aspirational language does not meet the constitutional requirement that an adequate definition of a "basic program of education" include formulas or standards to determine full funding.¹⁶⁷

159. *See* WASH. REV. CODE §§ 28A.150.220, .260 (2009).

160. *Id.* § 28A.150.220.

161. *See id.* §§ 28A.150.220, .260.

162. *Id.* § 28A.150.260.

163. For example, the Basic Education Act does not require recognition of costs such as student health services, custodial costs, student technology, utilities, curriculum, textbooks, library materials, instructional supplies, preparatory and technical courses, or programs for underachieving students, transitional-bilingual education, special education, and highly capable students. *See id.* Without, for example, textbooks and instructional supplies, a school could not reasonably be expected to operate.

164. *See* Act of July 26, 2009, ch. 548, 2009 Wash. Sess. Laws 3331.

165. *Id.* §§ 104–106, 2009 Wash. Sess. Laws at 3336–42.

166. *Id.*

167. Findings of Fact and Conclusions of Law at 60, *Seattle Sch. Dist. v. State*, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983) ("The State's constitutional duty to make ample provision for the educational program required by Article IX requires that the Legislature establish in law . . . the formulas or standards by which full state funding of such education can be determined.").

B. *The Current Law's Lack of Safeguards Allows the State to Run Afoul of Its Constitutional Duty*

The legislature's inadequate definition of a "basic program of education" has consequences for the state. It allows the legislature to comply with all statutory school-funding requirements, credibly claim it is complying with its constitutional duty,¹⁶⁸ and yet still fail to "make ample provision . . . for education."¹⁶⁹ Two deficiencies are to blame: First, despite the fact that its language deems the legislature in compliance with article IX, section 1,¹⁷⁰ the current definition fails to impose any statutory funding obligation on the legislature.¹⁷¹ Second, the definition makes it exceedingly difficult to enforce the state's duty in court, thereby blunting an important regulator of legislative action.¹⁷²

The first of these deficiencies—the lack of a statutory obligation—is apparent in the definition of a "basic program of education" in the Basic Education Act. The Act would impose an obligation on the legislature if it actually *required* allocations for certain programs or services in all circumstances, despite budget shortfalls or other political considerations. However, under the current Act, the legislature need only adopt an education funding formula every two years and fund the newly adopted formula; with some limitations,¹⁷³ the Basic Education Act deems any formula adopted by the legislature adequate to meet the state's duty.¹⁷⁴ Thus, the legislature can alter the funding formula and cut school funding to meet budget shortfalls or achieve other political goals and still claim to be satisfying its constitutional duty.¹⁷⁵ In other words, the legislature is under *no* statutory obligation to make *any* specific dollar-amount allocation.¹⁷⁶

168. *See supra* note 149.

169. WASH. CONST. art. IX, § 1; *see supra* note 148.

170. *See supra* note 149.

171. *See* Washington Basic Education Act of 1977, ch. 359, 1977 Wash. Sess. Laws 1606; Act of July 26, 2009, ch. 548, 2009 Wash. Sess. Laws 3331.

172. *See supra* note 155.

173. For example, the formula is required to recognize certain minimum staffing ratios. *See* WASH. REV. CODE § 28A.150.260 (2009).

174. *See supra* note 149.

175. *See id.*

176. However, the legislature cannot reduce basic education allocations that have been determined by the legislature to be part of basic education. *See* Findings of Fact and Conclusions of Law at 65, Seattle Sch. Dist. v. State, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983). In addition, funding for special education must reflect the actual cost of providing special education. Findings of Fact and Conclusions of Law at 9–10, 14, Wash. State Special Educ. Coal. v. State, No. 85-2-00543-8 (Wash. Super. Ct. Nov. 22, 1988).

The same problem is inherent in H.B. 2261. H.B. 2261 would impose an obligation on the legislature if it were to *require* the legislature to make specific allocations in all circumstances, despite budget shortfalls or other political considerations. However, like the Basic Education Act, H.B. 2261 only requires the legislature to adopt an education funding formula every two years and fund the adopted formula.¹⁷⁷ While H.B. 2261 goes slightly further, requiring the legislature to make allocations for certain specific programs deemed to be part of basic education,¹⁷⁸ it does not require the legislature to make any *specific allocation* for any program or service.¹⁷⁹ Nor does it require allocations made for each program or service to reflect actual cost.¹⁸⁰ Instead, it requires only that the legislature “make allocations for” each of these programs.¹⁸¹ Without some obligatory¹⁸² funding amount or formula for each program or service, the legislature can change its allocations every two years to meet budget shortfalls or achieve other political goals. Therefore, under H.B. 2261, the state can fulfill its statutory obligation by funding whatever “allocations” emerge from the legislative process.¹⁸³ Like the Basic Education Act, H.B. 2261 fails to require the legislature to allocate funds beyond what it chooses to allocate.¹⁸⁴ This absence of a specific allocation requirement allows the state to comply with H.B. 2261, claim it is complying with its constitutional duty, yet still fail to “make ample provision for . . . education.”¹⁸⁵

The other deficiency is that as a practical matter both the Basic Education Act and H.B. 2261 are difficult to enforce in court.¹⁸⁶ There are two reasons for this. First, both the Basic Education Act and H.B. 2261 lack standards or formulas by which a judge could determine whether the state has met its duty to amply fund education.¹⁸⁷ Without these standards or formulas, a court must consider the entire school

177. Act of July 26, 2009, ch. 548, §§ 105–106, 2009 Wash. Sess. Laws 3331, 3337–42.

178. *Id.* § 104, 2009 Wash. Sess. Laws at 3336.

179. *See id.*

180. *See id.*

181. *Id.*

182. Of course, a statute is obligatory only to the extent that the legislature does not repeal or amend it. No legislature can prevent a future legislature from repealing or amending a statute. *See supra* note 22.

183. *See* Act of July 26, 2009 §§ 105–106, 2009 Wash. Sess. Laws at 3337–42.

184. *See id.*

185. *See supra* notes 148–49; WASH. CONST. art. IX, § 1.

186. *See supra* note 155.

187. *See* WASH. REV. CODE §§ 28A.150.220, .260 (2009); Act of July 26, 2009, 2009 Wash. Sess. Laws 3331.

funding system in the context of different constitutional interpretations of the state's duty, an analysis that requires more lengthy and costly trials than would be necessary otherwise.¹⁸⁸ This omission risks making it cost-prohibitive for school districts to exercise their rights under article IX, section 1 and for the judiciary to enforce the state's duty.¹⁸⁹ Unless a school district can afford extensive litigation, the state can run afoul of its constitutional duty with minimal consequences.¹⁹⁰

The second obstacle to enforcing the state's duty in court is that neither the Basic Education Act nor H.B. 2261 imposes a statutory obligation on the state. Under either approach, whatever formula the legislature adopts is deemed to comply with the state's article IX, section 1 duty.¹⁹¹ Setting aside for a moment the issue of whether the separation of powers doctrine allows the legislature to determine the constitutionality of its own laws, this nuance increases the risk of having to fund a more complicated trial because, just as a lack of formulas or standards requires a more complex legal analysis, plain language deeming the legislature's action constitutional forces courts' analyses to extend beyond the statute itself.

C. The Legislature Should Amend H.B. 2261 to Ensure Compliance with Article IX, Section 1

Under article IX, section 1, ample funding of education is the state's paramount duty.¹⁹² The state must fund education before funding any other statutory program.¹⁹³ The state's duty to amply fund education is not suspended during periods of fiscal crisis.¹⁹⁴ Moreover, courts should not have the responsibility to micromanage education.¹⁹⁵ Rather, compliance with article IX, section 1 is the legislature's responsibility.¹⁹⁶

188. *See supra* note 155.

189. *See id.*

190. *See supra* note 148.

191. *See* WASH. REV. CODE §§ 28A.150.220, .260 (2009); Act of July 26, 2009, ch. 548, 2009 Wash. Sess. Laws 3331.

192. WASH. CONST. art. IX, § 1.

193. Findings of Fact and Conclusions of Law at 62, *Seattle Sch. Dist. v. State*, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983).

194. *Id.* at 62–63.

195. *See Brown v. State*, 155 Wash. 2d 254, 258–261, 119 P.3d 341, 343–45 (2005) (discussing the “constitution’s delegation of responsibility and authority to the legislature to provide education,” and stating that “[t]his court will not micromanage education.”).

196. *Id.*

For these reasons, it is imperative that the legislature amend H.B. 2261 in two ways.

First, the legislature should establish statutory standards or formulas for funding each educational program or service that H.B. 2261 lists as part of basic education.¹⁹⁷ Instead of requiring the legislature simply to allocate funds for each statutory program or service, as H.B. 2261 currently requires, the legislature should codify formulas based on the variables that dictate the cost of each program or service. For example, the legislature's formula for textbook allocations might depend on the number of students in the school district and the average cost of a suitable textbook.

Second, the legislature should specify that allocations for each of these educational programs or services must reflect their actual costs.¹⁹⁸ An actual cost requirement would force the legislature's formulas and standards—as well as its allocations—to encompass the minimum costs of basic education. An amendment making these two changes would meet the requirements for a constitutionally sufficient definition of a “basic program of education.”¹⁹⁹

An amendment incorporating these two improvements would also create two safeguards to help ensure compliance with article IX, section 1. The first safeguard would be a statutory obligation for the legislature to amply fund education in accordance with standards or formulas and actual cost. Under this more detailed scheme, the legislature could not adjust allocations in response to budget shortfalls or political goals while still complying with its statutory obligations. Instead, education funding would be insulated from financial and political pressures. While future legislatures could choose to repeal or

197. See Act of July 26, 2009, ch. 548, §§ 104–106, 2009 Wash. Sess. Laws 3331, 3336–42.

198. The legislature, and not school districts, could probably best determine “actual cost.” A requirement that the legislature fund any costs school districts incur would likely result in inefficient spending. Conversely, a school district whose allocations for a particular program or service legitimately did not meet its costs could challenge the legislature's determination of actual cost in court. A court's resolution of an actual cost dispute would need to give appropriate deference to the legislature's findings, but could rectify glaring funding shortages.

199. Findings of Fact and Conclusions of Law at 60, *Seattle Sch. Dist. v. State*, No. 81-2-1713-1 (Wash. Super. Ct. Sept. 7, 1983) (“The State's constitutional duty to make ample provision for the educational program required by Article IX requires that the Legislature establish in law the educational programs and services to which all children are entitled and the formulas or standards by which full state funding of such education can be determined.”); Findings of Fact and Conclusions of Law at 9–10, 14, *Wash. State Special Educ. Coal. v. State*, No. 85-2-00543-8 (Wash. Super. Ct. Nov. 22, 1988) (“[F]ully sufficient funds [must] be provided and distributed in a manner that is based as close as reasonably practicable on the actual cost of the . . . educational needs.”). This second principle was formulated in the context of special education, but can be extended to basic education as a whole.

amend the statutory obligation,²⁰⁰ they could not avoid amply funding education within the revised statutory framework.

As a second safeguard, the amendment would remove the complex litigation hurdles that exist under the present scheme, making the state's duty easier to enforce in court. The amendment would give judges concrete standards by which to determine whether the state is fulfilling its duty without requiring the consideration of constitutional questions or an examination of the educational system as a whole. If a challenge arose, the judiciary would simply examine each challenged formula or standard to determine whether it amply funds the actual cost of the basic educational program or service.²⁰¹ Judges could look at evidence of the actual cost of a particular program and compare it to the legislature's allocation.²⁰² They could analyze school-funding challenges one program at a time, one formula at a time, or one school district at a time without examining the entire school system. In addition, deference to the legislature's duly enacted formulas and actual-cost determinations would relieve courts of the burden of micromanaging education. By minimizing the need for lengthy and complex trials so common in previous school-funding challenges,²⁰³ the scheme would allow courts to enforce the state's duty more efficiently and more effectively.

For these reasons, amending H.B. 2261 to establish standards or formulas for each educational program or service, and requiring that those formulas match actual costs would make H.B. 2261 a constitutionally adequate "basic program of education." The amendment's safeguards would also help bring the state into compliance with its constitutional duty to amply fund education.

200. *See* Wash. State Farm Bureau Fed'n v. Gregoire, 162 Wash. 2d 284, 301, 174 P.3d 1142, 1150 (2007) ("Implicit in the plenary power of each legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power."); *see also* Fraser, *supra* at 22.

201. Adding a requirement of "actual cost" to the statute does raise the question of how to determine actual cost. Legislatures would likely determine this figure. *See supra* note 198. A trial court, if called upon to examine the sufficiency of the legislature's determination, could hear evidence from both sides. A school district challenging an allocation for a particular program could present evidence of the actual cost of that program. Likewise, the legislature could conduct studies and make findings before establishing funding standards and formulas in law. The state could present these studies and findings as evidence of actual cost, and the trial court could make a decision with appropriate deference to the legislature's determinations.

202. *See supra* note 201.

203. *See supra* note 155.

CONCLUSION

The Washington State Constitution commands the state to amply fund education, and *Seattle School District* ordered the legislature to define a “basic program of education.” The legislature has failed to do so. Its current inadequate definition of a “basic program of education” allows the legislature to comply with all the funding statutes for basic education and claim constitutional compliance, while nevertheless failing to amply fund education as required by article IX, section 1. The legislature should bring the state into compliance with its constitution by amending H.B. 2261 to include mandatory funding formulas for each educational program or service and to require that allocations match the actual cost of each program or service listed in H.B. 2261. These amendments would not only define a constitutionally adequate “basic program of education,” but would also help bring the state into compliance with article IX, section 1 by providing safeguards to prevent the state from running afoul of its constitutional duty.