

EDUCATION—PUBLIC SCHOOL SYSTEM—RELIGION—SUPERINTENDENT OF PUBLIC INSTRUCTION—Constitutional Implications Of Adding Early Learning To Statutory Definition Of Basic Education

- 1. The Legislature may create a basic education program of early learning that is limited to students who are at risk of educational failure. However, article IX, section 1 of the Washington Constitution would preclude limiting such a program to students from low-income households, absent a showing that low family income is an accurate proxy for the risk of educational failure. This would include showing that other students facing the risk of educational failure are not excluded based on family income.**
- 2. Public funds may be used for the operation of early learning programs by sectarian organizations only if the programs remain free of sectarian control or influence, and if the funds are not used for a religious purpose.**
- 3. An early learning program defined to constitute a component of “basic education” must be supervised by the Superintendent of Public Instruction.**
- 4. If the Legislature defines “basic education” to include a program of early learning, but the state lacks facilities to fully implement such a program immediately, the Legislature must establish a plan to overcome or correct such limitations within a reasonable period of time.**
- 5. The Legislature may establish qualifications required for teachers in an early learning program that is incorporated within “basic education.”**
- 6. The Washington Constitution does not require that transportation be provided for students in a basic education program of early learning, except perhaps where the absence of transportation would make basic education unavailable.**

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Dear Senators:

By letter previously acknowledged, you requested our opinion on several questions concerning a task force recommendation and proposed legislation to create an early learning program for certain of Washington's children. For clarity and efficiency of analysis, we have paraphrased and reorganized your questions as follows:

1. **Article IX, sections 1 and 2 of the Washington Constitution require the state to make ample provision for the education of all resident children and to maintain a general and uniform system of public schools. Does either section constrain the state's ability to create a basic education program of early learning for only at-risk students from low-income families?**
2. **Does either article I, section 12 of the Washington Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution constrain the state's ability to create a basic education program of early learning for only at-risk children from low-income families?**
3. **Some existing state early learning grants are provided to sectarian organizations under article I, section 11 of the Washington Constitution. If the Legislature were to include an early learning program for at-risk, low-income children ages three and four in the definition of "basic education," would the constitutionality of such a program be assessed instead under article IX, section 4 of the Washington Constitution?**
4. **If the answer to question 3 is yes, would article IX, section 4 of the Washington Constitution prohibit the granting or appropriation of state funds to sectarian organizations?**
5. **Under article III, section 22 of the Washington Constitution, the Superintendent of Public Instruction supervises all matters pertaining to public schools. If the Legislature were to pass legislation that replaced the current Early Childhood Education and Assistance Program, as applied to at-risk children, with a new basic education program of early learning, would the new program need to be administered by the Office of the Superintendent of Public Instruction?**
6. **If the Legislature were to create a new basic education program of early learning that replaced the Early Childhood Education and**

Assistance Program, would the previously-mentioned constitutional provisions permit the state to maintain currently-established waiting lists of eligible students for the new basic education early learning program? Would the answer be different if the state currently does not have the building or staff capacity to provide an early learning program for all eligible children?

- 7. If the Legislature were to create a new basic education program of early learning, do the constitutional requirements for basic education require that teachers in the early learning program be certified and have completed an education degree program?**
- 8. If the Legislature were to include transportation to and from school as part of the K-12 basic education program, would it also have to provide transportation to students who participate in a basic education program of early learning?**

BRIEF ANSWERS

1. Article IX, sections 1 and 2 of the Washington Constitution do not preclude the state from creating a basic education program of early learning for children who otherwise would be at risk of educational failure. We conclude, however, that legislation providing a basic education program only to students from low-income families would be inconsistent with article IX, section 1, absent a showing that low family income is an accurate proxy for the risk of educational failure. This would include showing that other students facing the risk of educational failure are not excluded based on family income.¹
2. Because the United States Supreme Court has not recognized a fundamental right to education, and the contemplated basic education early learning program does not implicate a suspect class, a challenge under the Equal Protection Clause should be reviewed under rational basis review. Because the Washington Supreme Court has not recognized a fundamental right to education, there is no cognizable “privilege” conferred that would trigger heightened review under article I, section 12 of the Washington Constitution, and a challenge under that section also should be reviewed under rational basis review. Accordingly, the primary constraint imposed by article I, section 12 and the Equal Protection Clause is that the criteria used to determine eligibility for the program must be rationally related to the program’s objective: providing an early learning program to children who otherwise are at risk of educational failure.

¹ The provisions of the state constitution that are discussed in this opinion are set forth in full as an appendix to this opinion.

3. Once an early learning program is included as part of “basic education” in Washington, it must comply with both article I, section 11 and article IX, section 4 of the Washington Constitution.
4. Read together, article I, section 11 and article IX, section 4 of the Washington Constitution prohibit the granting or appropriation of public funds to support religious instruction or any basic education program that is subject to sectarian control or influence. Public funds may be granted or appropriated for the operation of early learning programs by sectarian organizations only if the programs remain free of sectarian control or influence, and the funds are not used for a religious purpose. We conclude that the granting or appropriation of state funds to sectarian organizations for the purposes described in SB 5444 can be accomplished in compliance with article I, section 11. However, absent a fact-specific analysis of the structure and operation of each sectarian organization, the particular early learning program operated by that organization, and the conditions imposed on the organization and enforced by the state, we cannot conclude that the granting or appropriation of state funds to sectarian organizations for the purposes described in SB 5444 can be accomplished in compliance with article IX, section 4.
5. A new basic education program of early learning must be supervised by the Superintendent of Public Instruction; however, the Legislature may create an agency or institution to administer the program under the Superintendent’s supervision.
6. Whether the state could maintain currently-established waiting lists of eligible students for the new basic education early learning program ultimately would require a fact-specific analysis. However, the Legislature would be establishing a new program, and Washington courts have evidenced a willingness to give latitude and time to a new educational program established by the Legislature. If the program includes a reasonable plan to address waiting lists and building and staff shortages in a reasonable time, we would not expect those shortcomings to support a successful constitutional challenge to a basic education program of early learning.
7. The Washington Constitution does not require that teachers in the contemplated early learning program be certified or that they have completed an education degree program. Qualifications for teachers are determined by the Legislature.
8. The Washington Constitution does not require that transportation be provided for students in a basic education program of early learning except, perhaps, where a student would be deprived of basic education if transportation were not available. However, where transportation is provided for other components of basic education, it would be prudent also to provide transportation for children attending a basic education program of early learning.

FACTUAL BACKGROUND

In your opinion request, you explain that your questions concern proposed legislation. You refer us specifically to Sections 110 and 111 of SB 5444, introduced but not enacted in the last session of the Legislature. You further advise us that Sections 110 and 111 of SB 5444 implement a recommendation of a Joint Task Force On Basic Education Finance created by the Legislature in 2007 to review the current basic education definition and funding formulas and to develop a new definition and funding structure options for basic education in Washington. See SB 5627 (2007).

The Task Force issued its final report on January 14, 2009, which recommended “defining basic education to include funding for pre-school programs for all children age three and four whose family income is at or below 130 percent of the federal poverty level, and whose parents choose to enroll in the program.” *Final Report of the Joint Task Force on Basic Education Finance* 14 (Jan. 14, 2009). Section 110(1) of proposed SB 5444 essentially mirrors this recommendation by providing that “the legislature intends to establish a basic education program of early learning for at-risk children that is part of the program of basic education under this chapter[.]” Section 110(3) of proposed SB 5444 defines “at-risk children” to mean “children aged three, four, and five who are not eligible for kindergarten and whose family income is at or below one hundred thirty percent of the federal poverty level, as published annually by the federal department of health and human services.” Participation in the program would be voluntary.

We analyze your questions in the context of this proposed legislation.

ANALYSIS

Because your questions ask about constitutional constraints on the Legislature’s authority, we preface our analysis by noting the general principles Washington courts apply when considering the constitutionality of legislation.

On many occasions, the Washington Supreme Court has recognized the Legislature’s authority to determine how to satisfy the state’s obligation to provide ample funding for the education of all of the state’s children through a general and uniform system of public schools. See, e.g., *Federal Way Sch. Dist. 210 v. State*, No. 80943-7, 2009 WL 3766092 (Wash. Nov. 12, 2009); *Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001); *Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 476, 518–20, 585 P.2d 71 (1978); *Newman v. Schlarb*, 184 Wash. 147, 153, 50 P.2d 36 (1935); *Sch. Dist. 20, Spokane Cy. v. Bryan*, 51 Wash. 498, 502, 99 P. 28 (1909). The Court has emphasized that while it ultimately has the responsibility to determine whether legislation satisfies constitutional standards, it is not the function of the judiciary to micro-manage Washington’s education system. See *Brown v. State*, 155 Wn.2d 254, 261–62, 119 P.3d 341 (2005); *Tunstall*, 141 Wn.2d at 223; see also *Seattle Sch. Dist. 1*, 90 Wn.2d at 496, 520 (“While the Legislature must *act* pursuant to the constitutional

mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature.”).

Legislation is presumed to be constitutional, and the burden is on a person challenging an enacted statute to prove its unconstitutionality beyond a reasonable doubt. *City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2009); *Tunstall*, 141 Wn.2d at 220. The “heavy burden” of establishing that a statute is unconstitutional is met only if the challenger demonstrates through “argument and research” that there “is no reasonable doubt that the statute violates the constitution.” *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006); *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 757, 131 P.3d 892 (2006). As the Court has explained, this “demanding standard of proof” is justified because, “as a coequal branch of government that is sworn to uphold the constitution, we assume the Legislature considered the constitutionality of its enactments and afford great deference to its judgment.” *Tunstall*, 141 Wn.2d at 220.

- 1. Article IX, sections 1 and 2 of the Washington Constitution require the state to make ample provision for the education of all resident children and to maintain a general and uniform system of public schools. Does either section constrain the state’s ability to create a basic education program of early learning for only at-risk students from low-income families?**

Article IX, sections 1 and 2 do not preclude the state from creating a basic education program of early learning for children who otherwise would be at risk of educational failure. We conclude, however, that legislation providing a basic education program only to students from low-income families is inconsistent with article IX, section 1, absent a showing that low family income is an accurate proxy for the risk of educational failure. This would include showing that other students facing the risk of educational failure are not excluded based on family income.

Article IX, section 1 of the Washington Constitution. Article IX, section 1 provides that “[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.” As interpreted by the Washington Supreme Court, this provision imposes a duty on the Legislature to define “basic education” and support it with ample funding from dependable and regular tax sources. *Seattle Sch. Dist. 1*, 90 Wn.2d at 519–22; *accord McGowan v. State*, 148 Wn.2d 278, 283–84, 60 P.3d 67 (2002).²

Article IX, section 1 also prohibits any “distinction or preference on account of race, color, caste, or sex.” Providing early education opportunities only to low-income families might be considered to be discrimination based on “caste,” in violation of article IX, section 1. While

² You have not asked us to address what constitutes “ample” funding for an early education program, and we do not do so.

no decision of the Washington Supreme Court has defined “caste,” the dissenting opinion in *Northshore School District 417 v. Kinnear*, 84 Wn.2d 685, 530 P.2d 178 (1974), *overruled in part by Seattle School District 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), excerpted from a dictionary definition of “caste” to focus on “differences of wealth,” from which it can be inferred that economic status is an important component of “caste.” See *Northshore Sch. Dist. 417*, 84 Wn.2d at 756 n.12.

The *Final Report of the Joint Task Force on Basic Education Finance* recommended that basic education be defined to include a program of early learning only for at-risk students from low-income families. Section 110 of SB 5444 would establish such a program, defining “at-risk children” solely by reference to family income level. SB 5444, § 110(3). Limiting the availability of a component of basic education to some children, but not others, based only on economic status, raises a possible conflict with the constitutional mandate that the state “make ample provision for the education of *all* children residing within its borders, without distinction or preference on account of . . . caste[.]” Wash. Const. art. IX, § 1 (emphasis added).

Article IX, section 1 does not preclude the Legislature from providing a program of early education preferentially to children who need such a program to access subsequent components of the program of basic education in Washington. We conclude, however, that without a sufficient demonstration that family income is an accurate index of educational need, the use of family income to determine eligibility for an early education program that is part of the state’s program of basic education likely would violate article IX, section 1. In other words, once a program of early education is incorporated as a component of basic education, it is no more permissible to limit its availability based on economic status than it would be, similarly, to limit the availability of elementary schools or secondary schools.

Article IX, section 2 of the Washington Constitution. Turning to article IX, section 2, that section provides, in part: “The legislature shall provide for a general and uniform system of public schools.” Article IX, section 2 long has been understood as imposing a fundamental duty upon the state to create a general and uniform public school *system*. See, e.g., *Federal Way Sch. Dist. 210*, 2009 WL 3766092 at *4, ¶ 18; *Tunstall*, 141 Wn.2d at 221; *Seattle Sch. Dist. 1*, 90 Wn.2d at 522; *Newman*, 184 Wash. at 152. The Legislature has authority to select the means of discharging this duty. *Seattle Sch. Dist. 1*, 90 Wn.2d at 520.

This uniformity requirement does not mandate a one-size-fits-all approach to education. It is not satisfied by rote equality of facilities and instruction for all students, but rather through “free access to certain minimum and reasonably standardized educational and instructional facilities” and a “degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing.” *Federal Way Sch. Dist. 210*, 2009 WL 3766092 at *4, ¶ 18 (quoting *Northshore Sch. Dist. 417*, 84 Wn.2d at 729).³ It

³ Much of the decision in *Northshore School District* was overruled in *Seattle School District*. The holdings in *Northshore School District* cited in this paragraph were not overruled.

does not preclude educational assistance to individuals or groups of individuals who need such assistance to “acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education.” *Northshore Sch. Dist.*, 84 Wn.2d at 729. “[T]he State is not obligated to provide an *identical* education to all children within the state regardless of the circumstances in which they are found.” *Tunstall*, 141 Wn.2d at 220. To conclude otherwise would require us to infer from the constitutional language a limitation on the Legislature’s authority that the Washington Constitution does not actually express. *See Washington State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007) (Legislature has plenary power to act, except as constitutionally limited).

In summary, we conclude that a basic education program of early learning for children who are at risk of educational failure could be implemented without violating article IX, sections 1 and 2 of the Washington Constitution. We do not read either section as mandating absolutely identical educational experiences for all children in disregard of their differing educational needs. *See Tunstall*, 141 Wn.2d at 220 (recognizing the differing circumstances of children). Accordingly, if the Legislature finds, in the exercise of its plenary authority to define basic education, that some children need a particular service and others do not, we see nothing in the constitution that would deny the Legislature the choice to provide the service to those who need it, without extending it to those who do not. That is, the Legislature need not choose between either ignoring the needs of children who are at risk of educational failure, or providing early education to all children, including those who do not need it to succeed. Consistent with article IX, section 1, however, where the Legislature defines an educational program as part of basic education, the program must be available freely to any child who needs that program, without “distinction or preference on account of race, color, caste, or sex.”

2. Does either article I, section 12 of the Washington Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution constrain the state’s ability to create a basic education program of early learning for only at-risk children from low-income families?

A basic education program of early learning only for children from low-income families could be implemented without violating either article I, section 12 or the Fourteenth Amendment, if it can be demonstrated that the use of family income to determine eligibility for the program is rationally related to the program’s objective: providing an early learning program to children who otherwise are at risk of educational failure. Absent a demonstration that family income is rationally related to educational risk, there is no rational basis for concluding that children who are at risk of educational failure are being served.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Under the Equal Protection Clause, the state may not “deny to any person within its jurisdiction the equal protection of the laws.” A statute that is challenged under the Equal Protection Clause ordinarily is upheld if it is rationally related to a legitimate government purpose. *See Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988). If the statute

interferes with a “fundamental right” or discriminates against a “suspect class,” an equal protection challenge triggers strict scrutiny, under which the statute must be supported by a compelling government interest and distinctions drawn in the statute must be necessary to further the statute’s purpose. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

Neither the United States Supreme Court nor the Washington Supreme Court has held that education is a fundamental right that should trigger strict scrutiny when the government interferes with an individual’s access to it. The United States Supreme Court has explicitly rejected that proposition. *See Kadrmas*, 487 U.S. at 458 (citing *Plyler v. Doe*, 457 U.S. 202, 223 (1982); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 16, 33–36). Although the Washington Supreme Court has held that article IX, section 2 imposes on the state a “fundamental duty” to create a common school system, *Tunstall*, 141 Wn.2d at 221, the Court has not translated that duty into a “fundamental right to education” that could be asserted in an equal protection challenge, explaining that such an abstract right, taken to its logical extreme, improperly “would subject *all* legislation involving *education* to strict scrutiny.” *Tunstall*, 141 Wn.2d at 226 n.21.

To qualify as a suspect class for purposes of an equal protection analysis, the class must have suffered a history of discrimination; have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society; and show that it is a minority or politically powerless class. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985); *American Legion Post 149 v. Dep’t of Health*, 164 Wn.2d 570, 609 n.31, 192 P.3d 306 (2008). Race, alienage, and national origin are examples of suspect classifications. *City of Cleburne*, 473 U.S. at 440; *American Legion Post 149*, 164 Wn.2d at 609. Accordingly, where an early learning program is made available to children who are at risk of educational failure, no suspect class is implicated that would raise an equal protection concern. Even where the eligibility is determined using family income as a proxy for educational risk, as in SB 5444, a successful equal protection challenge would be unlikely since socioeconomic condition—whether high or low—is not a suspect class. *Kadrmas*, 487 U.S. at 458 (citing *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973)); *Bowman v. Waldt*, 9 Wn. App. 562, 569, 513 P.2d 559 (1973).⁴

It, therefore, appears that the contemplated early learning program does not interfere with a judicially-recognized fundamental right, and implicates no suspect class. Accordingly, rational basis review would govern an equal protection challenge, under which a legislatively-established

⁴ Although the Washington Supreme Court has noted the possibility that a classification based on wealth “may form a semi-suspect class,” it has held that more is required to justify even an intermediate level of scrutiny. *In re the PRP of Runyan*, 121 Wn.2d 432, 853 P.2d 424 (1993). The Court there explained that “intermediate scrutiny will be applied only if the statute implicates both an important right and a semi-suspect class not accountable for its status.” *Id.* at 448. Where, as in SB 5444, the target class (poor children) is given assistance (access to any early learning program), a person outside the target class would have difficulty demonstrating he or she is in a suspect class (or semi-suspect class) under the criteria identified in *City of Cleburne*, 473 U.S. at 440–41, and *American Legion Post 149*, 164 Wn.2d at 609 n.31 (history of discrimination; irrelevant defining trait; political powerlessness).

program in which eligibility criteria are rationally related to legitimate educational interests would be accorded a strong presumption of validity and likely would survive an equal protection challenge under the Fourteenth Amendment. *See generally Heller v. Doe*, 509 U.S. 312, 319–20 (1993) (a classification involving neither fundamental rights nor a suspect class is accorded a strong presumption of validity and cannot run afoul of the Equal Protection Clause if there is a rational relationship between any disparity of treatment and some legitimate governmental purpose). *See also American Legion Post 149*, 164 Wn.2d at 608–09; *Andersen v. King Cy.*, 158 Wn.2d 1, 31, 138 P.3d 963 (2006) (plurality) (citing *Heller*, 509 U.S. at 319).⁵

Article I, section 12 of the Washington Constitution. Article I, section 12 provides that “[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Where the Equal Protection Clause is concerned with the discriminatory *deprivation* of rights to classes of persons, article I, section 12 is concerned with the discriminatory *granting* of rights to some classes to the disadvantage of others. *Grant Cy. Fire Prot. Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 807–09, 83 P.3d 419 (2004); *accord Madison v. State*, 161 Wn.2d 85, 96–97, 163 P.3d 757 (2007) (plurality). Article I, section 12 is analyzed independently from the federal Equal Protection Clause. *Grant Cy.*, 150 Wn.2d at 805–11.

The contours of the analysis used to assess alleged violations of article I, section 12 are not yet fully developed. *See Madison*, 161 Wn.2d at 95 (plurality); *Andersen*, 158 Wn.2d at 127 (Chambers, J., concurring in dissent). It is clear, however, that the only “privileges” addressed in article I, section 12 are those that implicate a fundamental right belonging to citizens of the state by reason of their state citizenship. *American Legion Post 149*, 164 Wn.2d at 607; *Grant Cy. Fire Prot. Dist. 5*, 150 Wn.2d at 812–13. A right to education has not been identified as a fundamental right of citizenship for purposes of article I, section 12. *See American Legion Post 149*, 164 Wn.2d at 607; *Grant Cy. Fire Prot. Dist. 5*, 150 Wn.2d at 813; *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902).⁶

⁵ Nor may a statute be challenged based upon an argument that it is not “narrowly tailored” to serve its purpose when the statute is not subject to strict scrutiny. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring) (applying the “narrow tailoring” requirement only to statutes subject to strict scrutiny).

⁶ In a case alleging sex discrimination in access to interscholastic sports teams, the Court suggested in dictum that in Washington there is a fundamental right to education free from discrimination:

The Supreme Court of Washington has not yet expressly held that education free of discrimination based upon sex is a fundamental right within the meaning of Const. art. 1, § 12 so as to call for strict scrutiny of a classification claimed to infringe upon that right. That in Washington, education (physical and cultural), free from discrimination based on sex, is a fundamental constitutional right, is a conclusion properly drawn from Const. art. 9, § 1 adopted in 1889.

Darrin v. Gould, 85 Wn.2d 859, 869–70, 540 P.2d 882 (1975). The quoted passage is dictum, however, because the Court ultimately decided the case based on article XXXI, Washington’s equal rights amendment. *Id.* at 870, 877.

Where no fundamental right of citizenship is at issue, Washington courts follow federal equal protection analysis to decide whether a violation of article I, section 12 has occurred. *Madison*, 161 Wn.2d at 97–98 (plurality); *Andersen*, 158 Wn.2d at 9 (plurality). As explained above, rational basis review is appropriate here, under which a legislatively-established program in which eligibility criteria are rationally related to legitimate educational interests would be accorded a strong presumption of validity and likely would survive a challenge under article I, section 12.⁷

We conclude that under existing case law, the basic education program of early learning described in SB 5444 probably would not be subjected to strict scrutiny under article I, section 12 of the Washington Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, because there is no “fundamental right to education” recognized by either the United States Supreme Court or the Washington Supreme Court, and because neither Court has recognized economic status as a suspect class. Accordingly, the primary constraint imposed by article I, section 12 and the Equal Protection Clause is the burden that the state must meet in a rational basis review: The classification must be rationally related to the legitimate educational interests served by the program. In other words, if family income is used to determine eligibility for the program, that basis for eligibility must be rationally related to the program’s objective: providing an early learning program to children who otherwise are at risk of educational failure.

3. Some existing state early learning grants are provided to sectarian organizations under article I, section 11 of the Washington Constitution. If the Legislature were to include an early learning program for at-risk, low-income children ages three and four in the definition of “basic education,” would the constitutionality of such a program be assessed instead under article IX, section 4 of the Washington Constitution?

If an early learning program were included as part of “basic education” in Washington, it would have to comply with article IX, section 4 of the Washington Constitution, but such inclusion would not release the program from the requirements of article I, section 11. Rather, the new program would be subject to both article I, section 11 and article IX, section 4.

⁷ In a due process analysis, the Washington Supreme Court stated that courts “should be reluctant to identify new fundamental rights because, in doing so, a matter is effectively placed ‘outside the arena of public debate and legislative action.’” *American Legion Post 149*, 164 Wn.2d at 600 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). If the Court nevertheless were to find that Washingtonians have a fundamental right to education by reason of their state citizenship, the early learning program described in SB 5444 might be considered a “privilege” under article I, section 12, because it would be part of basic education. If that program were subjected to strict scrutiny, the state presumably would have to show that eligibility based on family income is precisely tailored to serve the compelling educational interest served by the early education program.

All Washington state programs expending public funds are subject to the prohibition in article I, section 11 of the Washington Constitution, which provides that “[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]” This provision is violated if public money or property is transferred or made available for a religious purpose. *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 455–66, 48 P.3d 274 (2002) (citing *Malyon v. Pierce Cy.*, 131 Wn.2d 779, 799–800, 935 P.2d 1272 (1997)).

Programs that are part of the system of public schools are subject to article IX, section 4, as well as article I, section 11. *Gallwey*, 146 Wn.2d at 455–66. Article IX, section 4 of the Washington Constitution requires that “[a]ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.” By expanding the definition of “basic education” to include an early learning program for at-risk, low-income children, the Legislature effectively would make such a program part of the “general and uniform system of public schools” referenced in article IX, section 2 of the Washington Constitution.⁸

Article I, section 11 and article IX, section 4 do not operate in isolation from one another. Both sections arose from the same “driving concern of the state constitutional convention [regarding] religious influence in, and control over, public education.” *Malyon*, 131 Wn.2d at 794. As explained in *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 375, 173 P. 35 (1918), the two provisions operate together to “prevent the teaching of any of the beliefs, creeds, doctrines, opinions, or dogmas of any sect” in the public school system and to “prevent the appropriation of money for parochial and denominational schools[.]”

4. If the answer to question 3 is yes, would article IX, section 4 of the Washington Constitution prohibit the granting or appropriation of state funds to sectarian organizations?

Because article I, section 11 and article IX, section 4 of the Washington Constitution both apply to programs that are part of “basic education” in Washington, we turn to your question whether article IX, section 4 prohibits the granting or appropriation of state funds to sectarian organizations in support of an the early learning program described in SB 5444. Article IX, section 4, read together with article I, section 11, prohibits the granting or appropriation of public funds to support religious instruction or any basic education program that is subject to sectarian control or influence. Consistent with these provisions, public funds may be granted or

⁸ See *School Dist. 20, Spokane Cy.*, 51 Wash. at 504 (“common school,” within meaning of article IX, section 2 is one that is common to all children of proper age and capacity, and which is free and subject to, and under control of, qualified voters of the school district); *Litchman v. Shannon*, 90 Wash. 186, 191, 155 P. 783 (1916) (“public schools” are schools established under the laws of the state, maintained at public expense by taxation, and open without charge to all children in the district); see also *McGowan*, 148 Wn.2d at 293 (holding implicitly that basic education is to be defined by reference to types of “educational services” or “instruction”).

appropriated for the operation of early learning programs by sectarian organizations only if the programs remain free of sectarian control or influence and the funds are not used for a religious purpose. Factors useful in identifying sectarian control or influence are presented in the cases discussed below.

Article IX, section 4 of the Washington Constitution imposes a strict separation of religion and public education. In *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1973), *overruled on other grounds by Gallwey*, 146 Wn.2d at 455–66,⁹ the Court applied a two-part test for determining whether article IX, section 4 was violated: (1) Does the challenged program or enactment support the school or school program in question with any public funds; and (2) if so, is the school or school program under sectarian control or influence? *Weiss*, 82 Wn.2d at 206–09. If the answer to both questions is yes, the challenged program or enactment violates article IX, section 4. *Id.*

Your question assumes that state funds would be granted or appropriated to sectarian organizations to carry out the early learning program and that the early learning program would be part of the state’s program of basic education. Consequently, the answer to the first *Weiss* inquiry is yes: The early learning program described in SB 5444 would be supported by public funds. Although public support is assumed here, we note that the Court in *Weiss* took a broad view of what constitutes “support,” holding that “[a]ny use of public funds that benefits schools under sectarian control or influence—regardless of whether that benefit is characterized as ‘indirect’ or ‘incidental’—violates this provision [article IX, section 4].” *Weiss*, 82 Wn.2d at 211; *see also Mitchell v. Consol. Sch. Dist. 201*, 17 Wn.2d 61, 66–67, 135 P.2d 79 (1943) (statute providing free transportation for school children attending sectarian schools violates article IX, section 4 and article I, section 11 “unless it may be said that the transportation of pupils to and from the [sectarian] school is of no benefit to the school itself”).

Because public support for the early learning program described in SB 5444 is assumed, consistency with article IX, section 4 therefore depends on the answer to the second *Weiss* inquiry: whether individual early learning programs established under SB 5444 are free from sectarian control or influence. *Weiss*, 82 Wn.2d at 208–09. Sectarian control may be manifest, as it was in *Weiss*, where the schools at issue were owned and operated by a religious institution and under the control of parish pastors. *Id.* at 209. In less obvious situations, Washington courts have not set forth a list of specific factors for determining whether a school or program is free from sectarian control or influence, but the factual analysis in *Weiss* suggests some relevant requirements that must be satisfied to find that a particular program is not under sectarian control or influence: (1) The program and its curriculum may not provide instruction in religion or religious practice; (2) Devotional religious symbols or items may not be displayed in the room(s) used for the program; (3) The program may not discriminate against students or staff based on

⁹ In *Gallwey*, the Court stated “[n]othing in today’s decision is intended to disturb this court’s holding in *Weiss* as it relates to common schools.” *Gallwey*, 146 Wn.2d at 466.

religion or sect; (4) The content of the program and its curriculum may not be determined by a religious institution or its representatives or leaders. *Weiss*, 82 Wn.2d at 209–11. *Weiss* does not state or imply that these are exclusive or comprehensive factors in determining whether a school or program is under sectarian influence or control; they merely reflect the facts in the record considered in that particular case. Under other facts and circumstances, additional factors or different factors could be relevant.

Your question assumes state funds would be granted or appropriated to sectarian organizations. It might be possible to establish standards and limitations to ensure that individual early learning programs operated by those organizations are free from sectarian control or influence. Such standards and limitations incorporated into SB 5444 or a similar bill could deflect a facial challenge under article IX, section 4.¹⁰ As we noted above, the factors identified in *Weiss* could be useful in developing statutory standards and limitations, but that list of factors is neither complete nor exclusive.

Even if SB 5444 or a similar bill including statutory standards and limitations were enacted and withstood a facial challenge, specific grants or appropriations to sectarian organizations would be subject to as-applied challenges alleging a violation of article IX, section 4. Such a challenge would require a fact-specific analysis of the structure and operation of the sectarian organization and the particular early learning program operated by that organization, and the conditions imposed on the organization and enforced by the state.

Consequently, we cannot advise you that the granting or appropriation of state funds to sectarian organizations for the purposes described in SB 5444 can be accomplished in compliance with article IX, section 4. Compliance ultimately cannot be determined without analysis of the specific facts and circumstances.

5. Under article III, section 22 of the Washington Constitution, the Superintendent of Public Instruction supervises all matters pertaining to public schools. If the Legislature were to pass legislation that replaced the current Early Childhood Education and Assistance Program, as applied to at-risk children, with a new basic education program of early learning, would the new program need to be administered by the Office of the Superintendent of Public Instruction?

¹⁰ The term “facial challenge” is used to describe a lawsuit in which a plaintiff contends that a particular law is unconstitutional in all possible applications. *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008). In such a case, a plaintiff can succeed only if there are no circumstances under which the law could be constitutionally applied, and the Court will not speculate about hypothetical or imaginary cases in which unconstitutional results may be possible. *Id.* A statute that is constitutional on its face might still be challenged as unconstitutional in specific applications. *Id.* at 1191. A constitutional challenge to a specific application of a law is called an “as-applied challenge.”

A new basic education program of early learning must be supervised by the Superintendent of Public Instruction; however, the Legislature may create an agency or institution to administer the program under the Superintendent's supervision.

Article III, section 22 of the Washington Constitution provides, in part, that “[t]he superintendent of public instruction shall have supervision over all matters pertaining to public schools, and shall perform such specific duties as may be prescribed by law.” As indicated above, by defining “basic education” to include an early learning program, the Legislature is defining the state’s public school system to include an early learning program. Because the Superintendent of Public Instruction is designated in the constitution as the supervisor of the state’s public school system, the Superintendent necessarily would be the supervisor of the early learning program as well. As we observed in an earlier opinion, this constitutional authority of the Superintendent cannot be made subordinate to that of another officer or body. AGO 1998 No. 6 at 4 (citing AGO 1961-62 No. 2). Nor may the authority to supervise early learning, if it is defined as an element of basic education, be vested in any other officer or body not under the Superintendent’s supervision. AGO 1998 No. 6 at 4.

The constitution does not, however, limit the Legislature’s authority to design the organizational structure under which the public education system is administered. *See Washington State Farm Bureau Fed’n*, 162 Wn.2d at 290 (“It is a fundamental principle of our system of government that the Legislature has plenary power to enact laws, except as limited by our state and federal constitutions.”). While article III, section 22 precludes the Legislature from assigning supervisory authority over basic education to any other officer or body besides the Superintendent, it otherwise leaves “the Legislature . . . quite free to shape the state’s education system as it may choose, and to define the Superintendent’s role within that system.” AGO 1998 No. 6 at 4. Accordingly, article III, section 22 does not preclude the Legislature from creating an agency or department to *administer* a new basic education program of early learning, so long as the Superintendent retains his or her constitutional authority to *supervise* the program.

6. If the Legislature were to create a new basic education program of early learning that replaced the Early Childhood Education and Assistance Program, would the previously-mentioned constitutional provisions permit the state to maintain currently-established waiting lists of eligible students for the new basic education early learning program? Would the answer be different if the state currently does not have the building or staff capacity to provide an early learning program for all eligible children?

Since the Legislature would be establishing a new program, Washington courts would be likely to recognize some need for time to establish the program and its resources, but the answer to both questions ultimately would depend on the facts. In *Seattle School District 1*, 90 Wn.2d at 537–38, the Court evidenced a willingness to give latitude and time to a new educational program established by the Legislature. This willingness is consistent with the Court’s recognition that the Legislature establishes the means for discharging its statutory duty

under article IX, sections 1 and 2 of the Washington Constitution. *Seattle Sch. Dist. 1*, 90 Wn.2d at 520.

Article IX, section 1 requires that the Legislature define “basic education” and support it with ample funding from dependable and regular tax sources. *McGowan*, 148 Wn.2d at 283–84; *Seattle Sch. Dist. 1*, 90 Wn.2d at 519–22. As explained above, once the Legislature includes an early learning program within the definition of “basic education,” article IX, section 1 mandates that it be provided with ample funding. Whether currently-established waiting lists could be maintained consistent with article IX, section 1 likely would depend on why they are maintained and whether all children ultimately are served. For example, if children on waiting lists did not receive early learning instruction (whether because of inadequate funding, building or staff shortages, or some other reason), a violation of article IX, section 1 would be more likely than if the lists were used to allocate students among early learning programs with different start dates, but with every qualified student eventually being served.

Article IX, section 2 requires the Legislature to “provide for a general and uniform system of public schools.” As explained in *Parents Involved in Community Schools*, 149 Wn.2d at 672–74, this section was intended to ensure a free, statewide system of nonsectarian schools with uniform content and administration of education. The focus is on the uniformity in the educational program provided, not in the detail of funding or administration, and the Court presumes that program is constitutional. See *Federal Way Sch. Dist. 210*, 2009 WL 3766092 at *4–5, ¶¶ 18–24. A challenger conceivably could overcome that presumption of constitutionality if, for example, use of the existing waiting lists resulted in a significant disparity of educational opportunity or content across the state, or if building or staff shortages persisted over a long enough time period; again, the success of any such challenge would depend on the facts.

If access to a basic education program of early learning were limited by building or staff capacity, the legislative establishment of a reasonable plan to overcome or correct the limitations could be consistent with sections 1 and 2 of article IX of the Washington Constitution. In a challenge under article IX, sections 1 and 2, the Court deferred to the Legislature’s evolving formulas for funding basic education. *Federal Way Sch. Dist. 210*, 2009 WL 3766092 at *4–5. Similarly, in the equal protection context, the Court in *Dandridge v. Williams*, 397 U.S. 471, 487 (1970), noted that a state should not have to “choose between attacking every aspect of a problem or not attacking the problem at all.” Assuming, therefore, that the Legislature established a plan for providing the building and staff capacity in a reasonable amount of time, and assuming there were not persistent disparities among school districts as to availability of the program, the contemplated early learning program probably would withstand a constitutional challenge premised on alleged building or staff shortages.¹¹

¹¹ It may be that the use of private facilities, including those owned or operated by sectarian organizations, and the operation of early learning programs by sectarian organizations are means of responding to inadequate building and staff capacity. However, inadequate capacity cannot justify or excuse noncompliance with article I, section 11 and article IX, section 4, as we explained in response to your fourth question. See *Weiss*, 82 Wn.2d at

7. If the Legislature were to create a new basic education program of early learning, do the constitutional requirements for basic education require that teachers in the early learning program be certified and have completed an education degree program?

No. The qualifications for teachers are not set in the Washington Constitution, but only in statute. *See* RCW 28A.410. The constitution does not require certification, and does not restrict the Legislature’s authority to set qualifications in statute. *See* Wash. Const. art. IX (providing for a system of common schools without specifying required qualifications for teachers); *Cedar Cy. Comm. v. Munro*, 134 Wn.2d 377, 386, 950 P.2d 446 (1998) (explaining that the Legislature’s authority is unrestrained except as limited by the constitution). Teacher qualifications for early learning are accordingly within the Legislature’s authority to determine.

8. If the Legislature were to include transportation to and from school as part of the K-12 basic education program, would it also have to provide transportation to students who participate in a basic education program of early learning?

We have found no controlling appellate decision in Washington holding, as a matter of constitutional law, that if transportation is provided for one part of basic education, it must be provided for all parts of basic education. However, the Court in *Lane v. Ocosta School District 172*, 13 Wn. App. 697, 703, 537 P.2d 1052 (1975), implied that there may be a duty to provide transportation to school if a student otherwise would be deprived of his or her right to attend school. Similarly, on remand from *Seattle School District 1*, 90 Wn.2d 476, the trial court ruled that four programs outside the basic education act were part of the state’s basic education duty—special education, remedial assistance, bilingual instruction, and some transportation—because they were needed to provide some students access to basic education. *Seattle Sch. Dist. 1 v. State*, Thurston County Superior Court No. 81-2-1713-1. Under the reasoning of these courts, transportation might be required where necessary to provide access to an early learning program that has been made part of the state’s program of basic education.

If a court were asked to decide whether the Washington Constitution requires comparable transportation for children in a basic education program of early learning where transportation already is provided to students in the K-12 basic education program, we would expect it to apply the principle articulated in *Lane*—that transportation to school is mandated for children in a basic education program of early learning where they otherwise would be unable to attend the program, thereby depriving them of a component of basic education. The Legislature has substantial discretion in determining which transportation services must be provided to

206–07 (article IX, section 4 does not permit even a “de minimis” violation). *See also Perry v. Sch. Dist. 81, Spokane*, 54 Wn.2d 886, 896, 344 P.2d 1036 (1959) (public school teachers’ mere distribution of registration cards for voluntary, off-campus religious instruction held to be use of school facilities supported by public funds to promote a religious program in violation of article IX, section 4).

students. Presumably, the Legislature has exercised that discretion based upon an assessment of student need for transportation services; applying the *Lane* principle, transportation for children attending a basic education program of early learning should be provided if their need for transportation is comparable to that of K-12 students.

We trust the foregoing will be useful to you.

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APPENDIX

TABLE OF STATE CONSTITUTIONAL PROVISIONS CITED IN THIS MEMORANDUM

Citation and Subject	Text
Art. I, § 11 Religious Freedom	Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.
Art. I, § 12 Privileges and Immunities	No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.
Art. III, § 22 Superintendent of Public Instruction; Duties and Salary	The superintendent of public instruction shall have supervision over all matters pertaining to public schools, and shall perform such specific duties as may be prescribed by law. He shall receive an annual salary of twenty-five hundred dollars, which may be increased by law, but shall never exceed four thousand dollars per annum.
Art. IX, § 1 Education: Preamble	It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.
Art. IX, § 2 Public School System	The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.
Art. IX, § 4 Sectarian Control or Influence Prohibited	All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.