

Guest opinion: Without action on school funding, state may face crisis

By Stephen K. Eugster
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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.

Washington. Constitution. Art. IX, Section 1

For decades, the state of Washington has failed to provide acceptable school funding for its K-12 students. Immediately, the reader will say, yes but the state is not adequately funding other state activities. K-12 education is different. The Washington Constitution makes school funding a positive right and the primary duty of the state. Proper school funding for K-12 children is the only positive right in our constitution.

Over the years, Washington courts have addressed the school funding issue several times. The cases have gone nowhere except for the McCleary Case. It was begun in 2007 by the McCleary and Venema families. It reached the Washington Supreme Court and was decided in 2012. The Court decided that Washington Constitution. Art. IX, Sec. 1 means the state must adequately fund K-12 education over all other state-funded programs.

In 2009, the Legislature passed its plan to adequately fund basic education by adopting Engrossed Substitute House Bill 2261. ESHB 2261 is an education reform bill. It defines the state's "Program of Basic Education" and the funding amounts and methods needed for full support of Basic Education. In McCleary, the court ordered full funding of ESHB 2261 be completed by 2018.

The court retained jurisdiction of McCleary and its decision and has been monitoring the Legislature's progress. In September 2014, the court found the state in contempt of the court because it had not, by that time, made sufficient progress toward full funding. Under its contempt order, the court has given the Legislature to the end of the second special session this year to pass legislation to provide full funding of ESHB 2261.

After the Legislature adjourns, another McCleary hearing will take place for the court to decide whether the Legislature is meeting its full funding duty. At this hearing, and if the Legislature is not meeting its full funding duty, the court, using its inherent power to enforce its decisions, might impose various remedies and sanctions against the state.

The McCleary lawyers suggest some rather severe actions: imposing monetary or other contempt sanctions; prohibiting expenditures on certain other matters; ordering the Legislature to pass legislation to fund specific amounts or remedies; ordering the sale of state property to fund constitutional compliance; invalidating education funding cuts in the budget; prohibiting any funding of an unconstitutional education system, etc. These remedies and sanctions are dramatic and, some would say, drastic, even harsh.

The court will be questioned about its authority to impose any of these measures. A major difficulty is that the only defendant in the McCleary case is the State of Washington. It is doubtful orders addressed to the state will have any consequence. In addition, the power of the court to act in any way suggested, will raise serious constitutional concerns, namely the Separation of Powers Doctrine.

Chief Justice Barbara Madsen, in her concurring-dissenting opinion in McCleary, said the way to enforce the court's decision is provided by the court's "original jurisdiction" over petitions for writs of mandamus against state officials. (Washington Constitution, Art. IV, Section 4 – "The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers.") Using this original jurisdiction, the McCleary parents, or any other parents of K-12 children with a proper interest, could file a mandamus action in the Supreme Court against state officers, individual state legislators and the governor.

The court could then, after proper procedures and hearing, issue writs of mandamus ordering the state officers, individually, to provide full funding of ESHB 2261. If the officers did not fulfill the writs of mandamus, they would be punished, possibly with continuing fines, until the mandamus was fulfilled.

If the Legislature does not fulfill its duty by the end of the second special session, the state will be faced with a major constitutional crisis, the likes of which have never been faced before by the governor, legislators, Supreme Court and, most significantly, K-12 children and their parents.

Stephen K. Eugster is an attorney and former member of the Spokane City Council.