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LEAGUE OF WOMEN VOTERS OF WASHINGTON, a Washington non-profit corporation; EL CENTRO DE LA RAZA, a Washington non-profit corporation; WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, a Washington non-profit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington non-profit corporation; WAYNE AU, PH.D., on his own behalf; PAT BRAMAN, on her own behalf; DONNA BOYER, on her own behalf and on behalf of her minor children; and SARAH LUCAS, on her own behalf and on behalf of her minor children,

Appellants/Cross-Appellees,

v.

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

WASHINGTON STATE CHARTER SCHOOLS ASSOCIATION;
LEAGUE OF EDUCATION VOTERS; DUCERE GROUP; CESAR CHAVEZ SCHOOL; TANIA DE SA CAMPOS; and MATT ELISARA,

Intervenors/Cross-Appellants.

BRIEF OF *AMICUS CURIAE* NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, BLACK ALLIANCE FOR EDUCATIONAL OPTIONS, AND THE NATIONAL CENTER FOR SPECIAL EDUCATION IN CHARTER SCHOOLS

Received
Washington State Supreme Court

SEP 26 2014

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Federal Way Sch. Dist. No. 210 v. State, 167 Wn.2d 514 (Wash. 2009) . 13

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RCW 28A.655.070..... 19

RCW 28A.710 et seq. passim

Other Authorities

- Allie Bidwell, *House Steams Ahead on Charter School Expansion* (May 9, 2014), <http://www.usnews.com/news/articles/2014/05/09/bipartisan-charter-school-bill-sails-through-house-of-representatives> 7
- Center for Research on Education Outcomes, *National Charter School Study Executive Summary 2013* at 10, <http://credo.stanford.edu/documents/NCSS%202013%20Executive%20Summary.pdf> (last visited September 1, 2014) (the “CREDO Study”) 4,5
- Closing the Achievement Gap, Charter School FAQ*, PBS, <http://www.pbs.org/closingtheachievementgap/faq.html> (last visited Sept. 4, 2014) 1-2, 6
- Imagine Schools, data from Spring 2012 Imagine Schools Family Survey, <http://www.imagineschools.com/measures-of-excellence/parent-choice/> (last visited Sept. 2, 2014) 5
- Motoko Rich, *Charter Schools Win Support in Georgia Vote*, *New York Times* (Nov. 7, 2012), <http://www.nytimes.com/2012/11/08/us/politics/georgia-approves-charter-school-measure-washington-state-still-counting.html> 11
- NAPCS, Dashboard, *A Comprehensive Data Resource From the National Alliance for Public Charter Schools* (“NAPCS Dashboard”), <http://dashboard.publiccharters.org/dashboard/home> (last visited September 1, 2014) 4
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- NAPCS, *President Obama Declares This Week National Charter Schools Week* (May 5, 2014), <http://www.publiccharters.org/press/presidential-proclamation-2014> 7

NAPCS, *Public Charter School Success: A Summary of the Current Research on Public Charters' Effectiveness at Improving Student Achievement* at 1 (April 2013) (“NAPCS Summary of Current Research”), http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS_2013_Research_Summary_20130424T145509.pdf..... 4,5

New York City Charter School Center, *Survey Says: Parents Love Charter Schools* (Aug. 7, 2012), <http://www.nyccharterschools.org/blog/survey-says-parents-love-charter-schools> 5

Press Release, The White House, National Charter Schools Week, 2008 (May 2, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/05/20080502-10.html> 6

Press Release, The White House, National Charter Schools Week, 2009 (May 4, 2009), http://www.whitehouse.gov/the_press_office/Presidential-Proclamation-National-Charter-Schools-Week 6

Program Brief on Charter Schools, Oregon Department of Education, <http://www.ode.state.or.us/pubs/eii/charterschoolsbrief.pdf> (last visited Sept. 4, 2014) 7

U.S. Department of Education, *Evaluation of the Public Charter Schools Program: Year One Evaluation Report*, <https://www2.ed.gov/rschstat/eval/choice/pcsp-year1/edlite-intro.html> (last visited September 4, 2014) 6

William J. Bushaw & Valerie J. Calderon, *Try it again, Uncle Sam, The 46th Annual PDK/Gallup Poll of the Public's Attitudes Toward the Public Schools*, Table 18A at 19, http://pdkintl.org/noindex/PDK_Poll_46.pdf (last visited Sept. 4, 2014) 5

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I. INTRODUCTION

Like any new idea—in particular one that brings modern thinking to an issue of long-standing public interest—the introduction of charter schools to Washington has generated great debate. While these debates are new to Washington, they are long-settled elsewhere. Beginning in 1991, 42 states (plus the District of Columbia) have enacted charter school laws as a means for enhancing the public school options available to students. In every instance, the laws were the subject of spirited debate. And in some instances, as in Washington, even litigation. Yet in the end, none of these states turned away from charter schools and parental choice, either in the legislature, the voting booth, or the courts.

Amici here have deep experience with these issues. Over the now two-decade history of charter schools, *amici* have participated in the development of charters in every state to adopt them. Through these collective experiences, *amici* have witnessed three critical trends that should inform this Court's consideration of Washington's new charter law.

First, charter schools improve public school options for students. Charters serve more than two million children nationwide. As “schools of choice, they are held to the highest level of accountability—consumer demand.” *Closing the Achievement Gap, Charter School FAQ*, PBS, <http://www.pbs.org/closingtheachievementgap/faq.html> (last visited

Sept. 4, 2014). Charters often outperform their school district peers. They likewise enroll a greater proportion of low-income and minority students, many of whom were underserved by a traditional school.

Second, charter schools enjoy broad public support. Parents, for one, embrace charter schools. No student is required to attend a charter school, yet national enrollment numbers continue to grow. So do political leaders, Presidents Clinton, Bush, and Obama included. To be sure, change is often met with resistance by those asked to adapt in the face of new thinking. But outside of certain, albeit fierce, pockets of resistance, charters have been welcomed in communities around the nation.

Third, courts faced with constitutional legal challenges like those posed here routinely reject such claims. From California to New Jersey, opponents of parental choice have filed lawsuits challenging the constitutionality of state charter school programs. The theories have consistent themes: charters are not part of a “general and uniform” system of “common schools,” and they divert money from traditional public schools. Yet in every comparable instance, appellate courts have rejected those challenges. *Amici* believe this Court should reach the same result.

II. STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Alliance for Public Charter Schools (“NAPCS”) is the leading national non-profit organization committed to advancing the

public charter school movement. NAPCS endeavors to grow the high-quality public charter schools options available to families, especially those without access to high-quality traditional district public schools.

The National Center for Special Education in Charter Schools is a national nonprofit organization focused on ensuring that students with diverse learning needs are able to access and thrive in charter schools.

The Black Alliance for Educational Options (BAEO) works to increase access to quality educational options for Black children. BAEO supports educational reforms and parental choice policies that empower low-income and working-class Black families. BAEO believes charter schools are powerful vehicles for increasing community involvement in public education, and for enhancing achievement for Black children.

III. ARGUMENT

A. Charter Schools Enhance Public School Options, Serve Underserved Populations, and Outperform Districts.

Historically, impoverished parents dissatisfied with their neighborhood school had little choice but to send their children anyway, and hope for the best. Spawned from this dubious reality, the charter school movement aims to offer educational choices to families with few others. Today, the charter movement includes 6,000 schools and 2.3

million students nationwide.¹ The students come predominantly from minority and disadvantaged families; 54% live in poverty.² Charter schools likewise serve students with disabilities. Washington’s Charter Schools Act, for example, prioritizes the creation of programs that serve at-risk students, such as those with disabilities. *See* RCW 28A.710.140.

Charter schools are making a difference for these children. As a Stanford-based study recently revealed, “[c]harter school enrollment has expanded among students in poverty, black students, and Hispanic students. *These are precisely the students that, on average, find better outcomes in charter schools.*” *Id.* at 18 (emphasis added). Those “better outcomes” include improved academic achievement. Indeed, there is “a strong upwards trend . . . in the effect of public charter schools on student performance.”³ At the elementary level, for example, 69% of charter

¹ *See* NAPCS, Dashboard, *A Comprehensive Data Resource From the National Alliance for Public Charter Schools* (“NAPCS Dashboard”), <http://dashboard.publiccharters.org/dashboard/home> (last visited September 1, 2014).

² Center for Research on Education Outcomes, *National Charter School Study Executive Summary 2013* at 10, <http://credo.stanford.edu/documents/NCSS%202013%20Executive%20Summary.pdf> (last visited September 1, 2014) (the “CREDO Study”).

³ NAPCS, *Public Charter School Success: A Summary of the Current Research on Public Charters’ Effectiveness at Improving Student Achievement* at 1 (April 2013) (“NAPCS Summary of Current Research”), http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS_2013_Research_Summary_20130424T145509.pdf.

schools performed the same or better in math than their traditional school counterparts, and 81% did so in reading. CREDO Study at 10.

These results are consistent from state to state. In Florida, charter students outperform district students on state reading tests for all grades. NAPCS Summary of Current Research at 3. In Massachusetts, charter students gain more learning per year than their district peers. *Id.*

B. Charter Schools Enjoy Wide Community Support.

Charter schools have broad appeal. Parents, for one, consistently rate charter schools above their traditional district counterparts.⁴ Due to charter popularity and success, over one million students nationally are awaiting charter admission.⁵

Broader communities have likewise voiced their support for charters. Nationally, 70% of Americans support charter schools as a means for providing local, community-based, public education.⁶ A driving force behind the charter movement is the notion of increased local

⁴ See, e.g., New York City Charter School Center, *Survey Says: Parents Love Charter Schools* (Aug. 7, 2012), <http://www.nyccharterschools.org/blog/survey-says-parents-love-charter-schools>; Imagine Schools, data from Spring 2012 Imagine Schools Family Survey, <http://www.imagineschools.com/measures-of-excellence/parent-choice/> (last visited Sept. 2, 2014).

⁵ See NAPCS, *Names on Charter Schools Waiting Lists Top 1 Million* (May 5, 2014), <http://www.publiccharters.org/press/waiting-list-2014/>.

⁶ See William J. Bushaw & Valerie J. Calderon, *Try it again, Uncle Sam, The 46th Annual PDK/Gallup Poll of the Public's Attitudes Toward the Public Schools*, Table 18A at 19, http://pdkintl.org/noindex/PDK_Poll_46.pdf (last visited Sept. 4, 2014).

involvement and support. “Parents, teachers, community groups, organizations, or individuals interested in creating [] additional educational opportunities for children can start charter schools.” *Closing the Achievement Gap, Charter School FAQ, supra*. These individuals “write the charter plan describing the school’s guiding principles,” and local and state educational bodies can authorize them. *Id.*

President Obama has touted this local engagement. Declaring “National Charter Schools Week,” as he has done every year of his presidency, President Obama proclaimed: “Founded by parents, teachers, and civic or community organizations, our Nation’s public charter schools enjoy broad leeway to innovate.”⁷ Indeed, parental choice in education has drawn presidential support for years. President Clinton first proposed the Public Charter Schools Program’s federal funding for charter schools.⁸ President Bush embraced charters as a means to “foster a culture of educational innovation, accountability, and excellence.”⁹ And President Obama, in his 2014 National Charter Schools Week proclamation, called

⁷ Press Release, The White House, National Charter Schools Week, 2009 (May 4, 2009), http://www.whitehouse.gov/the_press_office/Presidential-Proclamation-National-Charter-Schools-Week.

⁸ U.S. Department of Education, *Evaluation of the Public Charter Schools Program: Year One Evaluation Report*, <https://www2.ed.gov/rschstat/eval/choice/pcsp-year1/edlite-intro.html> (last visited September 4, 2014).

⁹ Press Release, The White House, National Charter Schools Week, 2008 (May 2, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/05/20080502-10.html>.

“on States and communities to support . . . charter schools.”¹⁰ Congress has done the same. In May 2014, the House of Representatives, by a vote of 360-45, authorized \$300 million for charter school programs.¹¹ Charters also enjoy “broad bipartisan support from governors, state legislators, as well as past and present secretaries of education.”¹²

C. State Appellate Courts Routinely Reject Constitutional Challenges Like Those Asserted Here.

Washington is not the first state to experience constitutional litigation aimed at shuttering charter schools. Yet claims brought under analogous constitutional provisions have consistently failed.

1. Charter Schools Are “Common Schools.”

Appellants first argue that Washington’s voter-approved Charter Schools Act is unconstitutional when measured against the constitutional requirement in Article IX, § 2, that the common school fund and the state tax for common schools be used exclusively for “common schools.” According to Appellants, charter schools are not “common schools”

¹⁰ NAPCS, *President Obama Declares This Week National Charter Schools Week* (May 5, 2014), <http://www.publiccharters.org/press/presidential-proclamation-2014>.

¹¹ Allie Bidwell, *House Steams Ahead on Charter School Expansion* (May 9, 2014), <http://www.usnews.com/news/articles/2014/05/09/bipartisan-charter-school-bill-sails-through-house-of-representatives>.

¹² Program Brief on Charter Schools, Oregon Department of Education, <http://www.ode.state.or.us/pubs/eii/charterschoolsbrief.pdf> (last visited Sept. 4, 2014).

because they are not subject to the control of voters in a school district.

Several states have rejected similar “common schools” challenges.

The California constitution requires the legislature to “provide for a system of *common schools* by which a free school shall be kept up and supported in each district” *Wilson v. State Bd. of Edn.*, 75 Cal. App. 4th 1125, 1134 (Cal. App. 1st Dist. 1999) (emphasis added). Charter school opponents there argued that the program created an unconstitutional system of schools independent from the districts. *Id.* at 1136. Rejecting this contention, the court held that charters satisfied the common schools requirement because the legislature, which enjoys “comprehensive powers in relation to our public schools, including broad discretion to determine the types of programs and services which further the purposes of education,” created charters as free schools open to all students, subject to statewide standards. *Id.* at 1134-38 (citation omitted).

Ohio’s constitution similarly requires that the legislature provide “a thorough and efficient system of common schools throughout the state” *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St. 3d 568, ¶ 24 (Ohio 2006). As in Washington, opponents in Ohio argued that charter schools run by unelected boards were not subject to uniform statewide standards and thus did not qualify as common schools. *Id.* at ¶ 25. Citing the legislature’s “authority and

latitude to set the standards and requirements for common schools, including different standards for [charters],” the Ohio Supreme Court held that the legislature constitutionally classified charter schools as common schools. *Id.* at ¶¶ 29, 34. The court rejected the argument that school district residents must be able to vote on every school board member in their community, explaining that the “Constitution does not prevent the General Assembly from creating additional schools that are located within city school districts but are not part of the district.” *Id.* at ¶¶ 43, 47.

Similarly, the Michigan Supreme Court rejected the argument that charters did not satisfy the “public elementary and secondary schools” requirement in the Michigan constitution. *Council of Orgs. v. Governor*, 455 Mich. 557, 572-73 (Mich. 1997). The plaintiffs there argued that because charters are not under the exclusive control of the state itself, but, instead, are run by a non-elected board, they are not public schools. *Id.* But as the court noted, charter schools are “open and public to all in the locality.” *Id.* at 576 (quotation omitted). The legislature, moreover, established a selection process for the boards, and, in addition, the state otherwise had control over the schools through state funding and other regulatory and administrative mechanisms. *Id.* at 572-76.

Washington’s constitution shares many similarities with those in California, Ohio, and Michigan. Like these states and many others, the

Washington constitution places the legislature in charge of the system of education: “The legislature shall provide for a general and uniform system of public schools,” which are to include “common schools.” Const. art. IX, § 2. The voters exercised this legislative power in approving the Charter School Act. *See McGowan v. State*, 148 Wn.2d 278, 288 (Wash. 2002). The constitution’s broad grant of authority plainly makes room for public charter schools as part of the broader public education system. Charters are subject to many of the same requirements imposed on traditional public schools, including statewide academic standards, being free and open to all students, and employing state-certified teachers. *See* RCW 28A.710.005, .020, .040, .070, .080.

Only the Georgia Supreme Court has declared a part of its charter program unconstitutional, and even then did so based on a unique constitutional provision. Unlike constitutions that vest the *legislature* with authority to establish a school system, the Georgia constitution grants authority “to county and area boards of education to establish and maintain public schools within their limits.” *Gwinnett Cnty. Sch. Dist. v. Cox*, 289 Ga. 265, 265-66 (Ga. 2011). The legislature, on the other hand, can create only “special schools.” *Id.* at 267. Applying these unique provisions, the Georgia court held that charters were not “special schools” and thus had to be approved by local districts. *Id.* at 272. Georgia voters

responded swiftly, passing a constitutional amendment providing for a commission to approve charter schools even where they were opposed by the local school district. *See* Motoko Rich, *Charter Schools Win Support in Georgia Vote*, New York Times (Nov. 7, 2012), <http://www.nytimes.com/2012/11/08/us/politics/georgia-approves-charter-school-measure-washington-state-still-counting.html>. In Washington, of course, voters have *already* voiced their support for charter schools.

Critically, unlike in Georgia, Washington’s constitution does not vest authority over the educational system in local districts. Article IX, in fact, does not even reference school districts. *See* Const. art. IX, §§ 1-6. Rather, like most states, Washington’s constitution authorizes the legislature to craft a public education system it believes will best meet the demands of today’s students. *See* Const. art. IX, § 2 (“The legislature shall provide for a . . . system of public schools.”). Enhancing that system with public school options does not offend the constitution.

2. Washington’s Charter Schools Are Part of a General and Uniform System of Schools.

Appellants’ next basis for ending parental school choice is the constitution’s command that “[t]he legislature shall provide for a *general and uniform* system of public schools.” Const. art. IX, § 2 (emphasis

added). Charter schools fail this requirement, Appellants say, because they are exempt from certain requirements imposed on traditional schools.

These arguments have been rejected in other states. Colorado's legislators must "provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state" *Boulder Valley Sch. Dist. RE-2 v. Colorado State Bd. of Edn.*, 217 P.3d 918, 925 (Colo. Ct. App. 2009). But this "thorough and uniform" clause does not require "a single uniform system of public schools consisting of school districts . . . governed by locally elected officials." *Id.* at 928 (quotation marks omitted). Nor does it prohibit "schools that are not part of" a district. *Id.* at 927. Colorado thus "may provide additional educational opportunities open to all students in the state through . . . charter schools, provided that . . . comparable opportunities for creating charter schools exist across the state." *Id.* at 927-28.

In California, charter opponents maintained that their constitution's "system of common schools" clause prohibited "a separate system of charter public schools that has administrative and operational independence from the existing school district structure, and whose courses of instruction and textbooks may vary from those of noncharter schools." *Wilson*, 75 Cal. App. 4th at 1136. But, as the California court held, "curriculum and courses of study are not constitutionally

prescribed”; thus, charter schools are “within the system uniformity requirement” because (1) teachers must meet the same requirements as traditional schools, (2) their education programs must be geared to meet the same standards, and (3) student progress will be measured by the same assessments. *Id.* at 1135, 1138. *See also Ohio Congress*, 111 Ohio St. 3d 568, at ¶ 25, 29-30 (rejecting argument that charters are “not subject to uniform statewide standards” because while charters “are exempted from certain state standards, there are others to which the schools must adhere”).

Nor does Washington’s constitution bar innovation. “Uniformity” does not require every school to operate in rigid lock step. It does not compel all classrooms to look the same. Nor does it compel Shakespeare instead of Orwell, or French instead of Chinese. Rather, a “general and uniform system” merely requires “certain minimum and reasonably standardized educational and instructional facilities and opportunities.” *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 524 (Wash. 2009) (quotation omitted). Washington’s charters enjoy certain flexibility in the educational process. Yet at the same time, they are subject to many of the same requirements as traditional schools, including (1) providing the “basic education” established by statute, (2) employing certified teachers, (3) administering statewide proficiency exams, (4) satisfying

performance goals adopted by the state board of education, and (5) complying with federal and state civil rights and discipline laws. RCW 28A.710.040.

3. Charter Schools Do Not Undermine the State’s “Paramount Duty” to Provide Adequate Funding for Public Education.

By transferring state funds to charter schools, the Charter School Act, Appellants claim, violates Washington’s “paramount duty . . . to make ample provisions for the education of all children residing within its borders” Const. art. IX, § 1. According to Appellants, with the Court having previously held that the State’s school funding system as a whole is constitutionally deficient, any use of school funds by charter schools is unconstitutional. This argument has failed elsewhere.

The Ohio Supreme Court, citing that state’s constitutional requirement of “a thorough and efficient system of common schools,” had likewise declared Ohio’s school funding system unconstitutional. *See DeRolph v. State*, 78 Ohio St. 3d 193, syllabus (Ohio 1997). Following the enactment of a charter program, opponents argued that diverting funds to charters prevented a thorough and efficient school system. *Ohio Congress*, 111 Ohio St. 3d 568, at ¶ 35. That argument was rejected because Ohio’s charter schools, like those in Washington, are *part of* the state’s thorough and efficient school system. *Id.* at ¶ 39.

In New Jersey, opponents argued that funding charters prevented local districts from offering a “thorough and efficient” system of education, as mandated by the constitution. *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 N.J. 316, 330-31 (N.J. 2000). But the New Jersey Supreme Court disagreed, citing a lack of evidence that any district would fail to provide a thorough and efficient education due to a proposed charter school. *Id.* at 331-32.

In the same fashion, funding Washington’s charter schools does not undercut the State’s “duty” to adequately fund public education. After all, considering that charter schools are part of the public education system, the creation of charter schools evidences the State’s *commitment* to public education. *See* RCW 28A.710.220. While some district schools may receive less funding should students leave to attend a charter school, that funding will simply be redirected to other public schools—in other words, the “funds follow the student.” *See Ohio Congress*, 111 Ohio St. 3d 568, at ¶ 39. Charter schools thus do not reduce overall funding for public schools. Put differently, whether funding for Washington’s education system *as a whole* is “ample” is not undermined by charters.

4. The Charter Schools Act Is Not an Unconstitutional Delegation of the State’s “Paramount Duty” Regarding Education.

Again invoking the “paramount duty” clause, Appellants contend that the Charter Schools Act delegates the legislature’s “duty” to unelected boards by failing to provide sufficient educational standards for charters. In California, opponents similarly asserted that charter laws “amount[ed] to an unconstitutional delegation of legislative powers to the Board and other chartering authorities” because “the power to issue charters has been handed over without standards or guidance. . . .” *Wilson*, 75 Cal. App. 4th at 1146. But as the California court reasoned, delegation is permissible “so long as adequate safeguards exist to protect against abuse of that power.” *Id.* at 1147. Because the legislature established standards for charters, and in view of the legislative intent of encouraging innovation, further regulation “could not be better in this situation.” *Id.*

In New Jersey, charter opponents likewise argued that the state’s charter law “improperly delegates legislative authority to a private body, namely, a board of trustees neither elected by voters nor appointed by an elected official.” *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 320 N.J. Super. 174 (Super. Ct. App. Div. 1999) (this portion of opinion adopted by *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*,

164 N.J. at 319). New Jersey courts, however, disagreed, holding that “charter schools are not private within the meaning of the no-delegation principle; they are subject to control by the Commissioner and must meet the Act’s standards in order to maintain their charters.” *Id.* at 231, 232.

Washington’s charter law aims to provide “more customized learning experiences for students.” RCW 28A.710.005. In doing so, it does not abdicate educational standards. Rather, it requires charters to provide the “basic education” established by statute. RCW 28A.710.040; *see also Barry & Barry, Inc. v. Dep’t of Motor Vehicles*, 81 Wn.2d 155, 159 (Wash. 1972) (legislature may delegate authority so long as it provides standards and establishes procedural safeguards). The charter law also specifies procedures for revoking charters, and requires that the schools employ certified teachers, administer statewide proficiency exams, and satisfy performance goals adopted by the state board of education. RCW 28A.710.040, .200. Given these parameters, the limited delegation to charter schools is well within constitutional bounds.

5. Charter Schools Do Not Interfere With the Superintendent of Public Instruction’s Supervision of Public Schools.

Appellants also contend that by placing charter schools under the authority of the Charter School Commission, the Charter Schools Act undermines the constitutional command that “[t]he superintendent of

public instruction shall have supervision over all matters pertaining to public schools” Const. art. III, § 22. Here too, other state courts have found similar arguments meritless.

California’s constitution prohibits the use of public money for “any school not under the exclusive control of the officers of the public schools” *Wilson*, 75 Cal. App. 4th at 1138. Charter schools satisfied this requirement because they are public schools and are “under the exclusive control of the officers of the public schools.” *Id.* at 1139.

The Michigan constitution provides that “[l]eadership and general supervision over all public education . . . is vested in a state board of education.” *Council of Orgs.*, 455 Mich. at 583. The Michigan Supreme Court held that this supervisory authority was maintained for charter schools because the legislature deemed them to be public schools and, thus, “they are necessarily subject to the . . . supervision of the State Board of Education” *Id.* at 584; *see also Utah Sch. Bds. Assn. v. Utah State Bd. of Edn.*, 17 P.3d 1125, 1129 (Utah 2001) (holding charter program did not violate State Board’s constitutional supervisory authority because Board has general authority over public education system, including charters).

In Washington, charters “are subject to the supervision of the superintendent of public instruction and the state board of education,

including accountability measures, to the same extent as other public schools except as otherwise provided” RCW 28A.710.040. While the statute authorizes the Charter School Commission to administer charter schools “in the same manner as a school district board,” RCW 28A.710.070, nowhere does the law remove the Superintendent’s authority. Plainly, the Superintendent is not responsible for managing the day-to-day activities of every Washington school (nor could he be). Rather, the Superintendent has only certain oversight responsibility, such as administering the funding system and developing academic requirements. *See, e.g.*, RCW 28A.150.250; RCW 28A.655.070. The Charter Schools Act maintains that authority.

6. The Charter School Program Does Not Improperly Divert Funding from Local Levies.

Lastly, Appellants contend that the Charter Schools Act mandates the use of funds from local district levies for purposes not approved by voters—namely, to support charter schools. Article VII, § 2(a) requires that “a proposition . . . to levy an additional tax for a school district shall be authorized by a majority of the voters voting on the proposition” Because levies must be so approved, Appellants argue, the funds cannot be used for any purpose other than the approved one. Appellants also cite Article VII, § 5, which states that “[n]o tax shall be levied except in

pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.”

Funding for Washington’s charter schools derived from state funds raises no constitutional dilemma. Ohio’s constitution, it bears noting, has an identical provision to the latter Washington mandate. Ohio Const. art. XII, § 5. Citing that language, Ohio opponents asserted that Ohio’s charter law impermissibly gave tax dollars approved for the local district to charters. *Ohio Congress of Parents & Teachers*, 111 Ohio St. 3d 568, at ¶ 51. The Ohio Supreme Court disagreed because, by statute, charter school funding came from state funds, not local levies. *Id.* at ¶¶ 52, 60.

While Washington charters are also eligible for local levy funds, such funds would only be used for their approved purpose. *See* RCW 28A.710.220. First, charter schools authorized by local school boards would fall within the voter-approved use of levy funds collected for the district. Second, going forward, charter schools must be included as part of any local tax levy, meaning voters will be approving funds for charters. RCW 28A.710.220(8). And third, funds could be allocated to charters from a general-purpose (rather than specific-purpose) levy.

IV. CONCLUSION

For these reasons, the Charter Schools Act is constitutional.

RESPECTFULLY SUBMITTED, this 12th day of September,

2014.

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DECLARATION OF SERVICE

I, Ellen R. Evans, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the parties listed below were served in the manner listed below:

On September 12, 2014, I caused a copy of National Alliance For Public Charter Schools, Black Alliance For Educational Options, and The National Center For Special Education In Charter Schools' (1) Motion for Leave to File Brief of *Amici Curiae*; (2) Brief of *Amici Curiae*; and (3) this Declaration of Service to be served via email and legal messenger on:

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I hereby declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 12th day of September, 2014, at Seattle, Washington.



Ellen R. Evans, Legal Secretary
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