

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Jun 20, 2014, 3:50 pm  
BY RONALD R. CARPENTER  
CLERK

No. 89714-0

E CRF  
RECEIVED BY E-MAIL

---

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

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,

v.

STATE OF WASHINGTON,

Respondent.

---

REPLY BRIEF OF APPELLANTS

---

PACIFICA LAW GROUP LLP  
Paul J. Lawrence, WSBA # 13557  
Jessica A. Skelton, WSBA # 36748  
Jamie L. Lisagor, WSBA # 39946  
1191 Second Avenue, Suite 2100  
Seattle, WA 98101  
(206) 245-1700  
Attorneys for Appellants

**Table of Contents**

I. INTRODUCTION .....1

II. STATEMENT OF ISSUES ON CHARTER SUPPORTERS' CROSS APPEAL .....2

III. RESPONSE TO CHARTER SUPPORTERS' STATEMENTS OF THE CASE .....3

IV. ARGUMENT.....7

    A. The Act Creates Publicly Funded, Privately Run, Unaccountable, Non-Uniform Schools Significantly Different than Public Common Schools. ....7

    B. Charter Schools Are Not Public Common Schools Entitled to Receive Restricted State Funds.....9

        1. The constitutional requirement of voter accountability cannot be eliminated through legislation.....10

        2. The Act diverts restricted common school funds. ....21

        3. The Act's unconstitutional provisions are not severable. ....26

    C. The Act Exempts Charter Schools from General and Uniform Public School Laws in Violation of Article IX, Section 2. ....28

    D. The Act Hinders the State's Ability to Amply Fund Basic Education as Mandated by Article IX, Section 1 and this Court.....35

    E. The Act Unconstitutionally Delegates the State's Paramount Duty to Private Organizations (Article IX).....37

F.	The Act Creates an Independent Charter Commission, Outside the Supervisory Authority of the Superintendent. ....	40
G.	The Act Improperly Redirects Local Levies to a Purpose Not Approved by the Voters. ....	44
H.	I-1240 Amends Existing Law Through Subterfuge and in Violation of Article II, Section 37. ....	47
V.	CONCLUSION.....	50

## Table of Authorities<sup>1</sup>

### Cases

<i>Bird v. Best Plumbing Grp., LLC</i> , 161 Wn. App. 510, 260 P.3d 209 (2011) <i>aff'd</i> , 175 Wn.2d 756, 287 P.3d 551 (2012).....	45
<i>Citizens for Responsible Wildlife Mgmt. v. State</i> , 149 Wn.2d 622, 71 P.3d 644 (2003) .....	47, 48
<i>Fed. Way Sch. Dist. No. 210 v. State</i> , 167 Wn.2d 514, 219 P.3d 941 (2009) .....	28, 33
<i>First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd.</i> , 129 Wn.2d 238, 916 P.2d 374 (1996) .....	45
<i>Holmes &amp; Bull Furniture Co. v. Hedges</i> , 13 Wash. 696, 43 P. 944 (1896).....	14
<i>In re Parentage of C.A.M.A.</i> , 154 Wn.2d 52, 109 P.3d 405 (2005) .....	28
<i>In re Powell</i> , 92 Wn.2d 882, 602 P.2d 711 (1979) .....	38
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 937 P.2d 154 (1997) .....	12
<i>Leonard v. City of Spokane</i> , 127 Wn.2d 194, 897 P.2d 358 (1995) .....	27
<i>McCleary v. State</i> , 173 Wn.2d 477, 269 P.3d 227 (2012) .....	passim
<i>Mitchell v. Consol. Sch. Dist. No. 201</i> , 17 Wn.2d 61, 135 P.2d 79 (1943) .....	21
<i>Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll.</i> , 81 Wn.2d 551, 503 P.2d 86 (1972) .....	16
Order, <i>McCleary v. State</i> , No. 84362-7 (Wash. July 18, 2012) .....	27
Order, <i>McCleary v. State</i> , No. 84362-7 (Wash. June 12, 2014) .....	36

---

<sup>1</sup> Appellants have submitted an Appendix to Brief of Appellants and an Appendix to Reply Brief of Appellants containing excerpts from certain authorities cited herein.

<i>Sch. Dist. No. 20, Spokane Cnty. v. Bryan,</i> 51 Wash. 498, 99 P. 28 (1909).....	passim
<i>Sch. Dist. No. 20, Spokane Cnty. v. Bryan,</i> No. 7685, Appellants' Opening Br. (Wash. 1908).....	11
<i>Seattle Sch. Dist. No. 1 of King Cnty. v. State,</i> 90 Wn.2d 476, 585 P.2d 71 (1978).....	5, 13, 22, 38
<i>Sheldon v. Purdy,</i> 17 Wash. 135, 49 P. 228 (1897).....	45, 46
<i>State ex rel. Gallwey v. Grimm,</i> 146 Wn.2d 445, 48 P.3d 274 (2002).....	4, 28
<i>State ex rel. State Bd. for Vocational Educ. v. Yelle,</i> 199 Wash. 312, 91 P.2d 573 (1939).....	22, 23, 24
<i>State v. Preston,</i> 79 Wash. 286, 140 P. 350 (1914).....	16, 18
<i>State v. Vasquez,</i> 80 Wn. App. 5, 906 P.2d 351 (1995).....	13
<i>Tunstall ex rel. Tunstall v. Bergeson,</i> 141 Wn.2d 201, 5 P.3d 691 (2000).....	7, 13, 15, 34
<i>United Chiropractors of Wash., Inc. v. State,</i> 90 Wn.2d 1, 578 P.2d 38 (1978).....	38, 40
<i>Wash. Statewide Org. of Stepparents v. Smith,</i> 85 Wn.2d 564, 536 P.2d 1202 (1975).....	6
<i>Wash. Water Jet Workers Ass'n v. Yarbrough,</i> 151 Wn.2d 470, 90 P.3d 42 (2004).....	4
<i>Yelle v. Bishop,</i> 55 Wn.2d 286, 347 P.2d 1081 (1959).....	49

### Constitutional Provisions

Const. art. II, § 37 .....	50
Const. art. III, § 22.....	1, 8, 41, 44
Const. art. IX.....	11, 13, 15, 18
Const. art. IX, § 1.....	passim
Const. art. IX, § 2.....	passim
Const. art. IX, § 3.....	passim

Const. art. VI, § 2 (original text) .....	14
Const. art. VII, § 2a .....	45
Const. art. VII, § 5 .....	45
Const. art. VIII, § 6 (original text).....	14

**Statutes and Regulations**

Ch. 28A.193 RCW.....	18
Ch. 28A.194 RCW.....	18
Ch. 28A.230 RCW.....	29
Ch. 28A.600 RCW.....	7, 18, 29
Ch. 72.40 RCW.....	43
Laws of 1871, ch. 1, § 1.....	29
Laws of 1877, An Act to Provide a System of Common Schools.....	29
Laws of 1889, ch. XII.....	4
Laws of 1889, ch. XII, tit. IX, § 44 .....	10, 12
Laws of 1891, ch. CXXVII.....	4
Laws of 1895, ch. CL .....	4
Laws of 1895, ch. CL, § 1 .....	15
Laws of 2013, 2d Spec. Sess., ch. 4, § 510.....	18, 24
Laws of 2013, 2d Spec. Sess., ch. 4, § 616.....	18, 24
Laws of 2013, 2d Spec. Sess., ch. 4, § 617.....	18, 24
RCW 28A.150.210 .....	49
RCW 28A.150.220 .....	passim
RCW 28A.150.300 .....	7, 29
RCW 28A.150.380 .....	21, 24
RCW 28A.180.030 .....	31
RCW 28A.185.010 .....	19
RCW 28A.185.040 .....	18, 19
RCW 28A.300.030 .....	42, 44
RCW 28A.300.165 .....	18

RCW 28A.305.011 .....	43
RCW 28A.305.021 .....	43
RCW 28A.305.035 .....	43
RCW 28A.305.130 .....	43
RCW 28A.310.010 .....	44
RCW 28A.315.005 .....	41
RCW 28A.315.015 .....	42
RCW 28A.315.095 .....	42
RCW 28A.315.105 .....	42
RCW 28A.315.175 .....	42
RCW 28A.315.185 .....	42
RCW 28A.410.010 .....	43
RCW 28A.410.200 .....	43
RCW 28A.410.210 .....	43
RCW 28A.410.220 .....	43
RCW 28A.600.010 .....	33
RCW 28A.600.020 .....	33
RCW 28A.600.360 .....	19, 35
RCW 28A.710.005 .....	8, 26, 32, 34
RCW 28A.710.010 .....	17
RCW 28A.710.020 .....	8, 10, 26, 34
RCW 28A.710.030 .....	7, 17
RCW 28A.710.040 .....	passim
RCW 28A.710.070 .....	26, 40
RCW 28A.710.080 .....	17
RCW 28A.710.130 .....	30, 38
RCW 28A.710.200 .....	39
RCW 28A.710.220 .....	8, 26, 46
RCW 28A.710.230 .....	21, 26
RCW 28A.715.010 .....	19

RCW 41.56.0251 .....	48
RCW 41.56.060 .....	48
RCW 41.59.031 .....	48
RCW 72.40.040 .....	18
RCW 72.40.070 .....	44
Tit. 28A RCW.....	7, 44
WAC 108-20-070 .....	31
WAC 180-19-030 .....	31
WAC 392-121-188 .....	20
WAC 392-169-075 .....	19

**Other Authorities**

Angie Burt Bowden, <i>Early Schools of Washington Territory</i> (Lowman & Hanford Co. 1935).....	29
Dennis C. Troth, <i>History and Development of Common School Legislation in Washington</i> (Univ. of Wash. Pubs. in Social Sciences 1929) .....	3, 14, 22
Op. Wash. Att’y Gen. 1961-62, No. 59 .....	46
Quentin Shipley Smith, <i>Analytical Index to The Journal of the Washington State Constitutional Convention 1889</i> (Beverly Paulik Rosenow ed., 1999).....	11
Theodore J. Stiles, <i>The Constitution of the State and Its Effects Upon Public Interests</i> , 4 Wash. Hist. Q. 281 (1913) .....	22
Thomas William Bibb, <i>History of Early Common School Education in Washington</i> (Univ. of Wash. Pubs. in Social Sciences 1929) .....	3, 15, 29
Wash. Official Voters Pamphlet, S.J.R. 22, Part 1 (1966) .....	25
Wash. State Historical Soc’y, <i>Building a State, Washington, 1889-1939</i> (Charles Miles & O. B. Sperlin eds., 1940).....	3

## I. INTRODUCTION

The Washington Constitution's education provisions uniquely direct and constrain the Legislature's traditional broad authority. The Constitution makes education the Legislature's paramount duty. The Legislature is tasked with establishing a "general and uniform" system of public schools, Const. art. IX, § 2, subject to the supervision of an elected Superintendent of Public Instruction ("Superintendent"), Const. art. III, § 22. The Legislature must dedicate certain public funds to support "common schools." Const. art. IX, §§ 2, 3. And the Legislature must define the basic education program offered by the "common schools." Const. art. IX, §§ 1, 2. These constitutional mandates reflect the undisputed intent of the State's founders to ensure a vital public school system, offering a uniform basic education through "common schools" and accountable to the taxpayers who fund it.

The State and the Intervenors (together, "Charter Supporters") erroneously characterize charter schools as an unremarkable addition to Washington's public schools to downplay the Charter School Act's significance. They assert a degree of legislative discretion which does not exist in the area of education. The Act on its face, however, violates fundamental constitutional limitations on legislative authority. The Act diverts constitutionally restricted state and local funds to support a number of experimental charter schools, which are operated by private

organizations not subject to voter control. Charter schools are not required to follow most of the uniform state laws and rules applicable to public common schools, including components of a constitutionally required basic education and discipline policies and, in many instances, are outside the supervision of the Superintendent.

The Court's role in the State's public education system is to interpret and enforce the education provisions in the Constitution, even when the Court's interpretation serves as a check on the policy preferences of the political branches. When called upon, this Court has rejected all efforts by the State—well intentioned or not—to depart from the specific mandates imposed by the Constitution. The Court should do so again here and declare the Charter School Act unconstitutional in its entirety.

## **II. STATEMENT OF ISSUES ON CHARTER SUPPORTERS' CROSS APPEAL**

A. Whether the trial court correctly held charter schools are not “common schools” under Article IX, sections 2 and 3, because charter schools are not accountable to the voters.

B. Whether the trial court correctly held that diversion of restricted common school moneys, including from the common school construction fund, to charter schools violates Article IX, sections 2 and 3.

### III. RESPONSE TO CHARTER SUPPORTERS' STATEMENTS OF THE CASE

The Charter Supporters do not challenge Appellants' account of the adoption of the education provisions in the Constitution and the intent of the delegates who crafted those provisions. They agree that the founders believed that basic education for all children is an economic necessity. See Dennis C. Troth, *History and Development of Common School Legislation in Washington* 94 (Univ. of Wash. Pubs. in Social Sciences 1929) ("Troth"); Wash. State Historical Soc'y, *Building a State, Washington, 1889-1939*, at 155 (Charles Miles & O. B. Sperlin eds., 1940). They do not dispute that the constitutional delegates, recalling the gross inconsistencies in the quality of education that plagued the earliest common schools in the Territory, believed a uniform course of basic education and centralized supervision are necessary to ensure that all children receive a basic education. See Thomas William Bibb, *History of Early Common School Education in Washington* 73-75 (Univ. of Wash. Pubs. in Social Sciences 1929) ("Bibb"). Nor do they deny that the drafters sought to balance these statewide standards and supervision with local autonomy by elected school boards. *Id.* at 145 ("Matters of local importance are in the hands of local boards; matters pertaining to law, certification, and teachers' training are in the hands of the State

Superintendent, State Board of Education and other boards. Thus we have local autonomy combined with centralized control.”).

The Charter Supporters also do not dispute that the delegates’ vision was reflected in the legislation enacted shortly after the adoption of the Constitution. Washington’s first school law adopted at the first legislative session established a common school system centrally controlled by an elected Superintendent, locally managed by elected school board officials, and offering a uniform course of education, including standardized curriculum, discipline policies, and minimum school days. Laws of 1889, ch. XII, tit. II, VI, VIII, IX; *see also* Laws of 1891, ch. CXXVII; Laws of 1895, ch. CL. This undisputed background provides the only facts relevant to this Court’s interpretation of the constitutional provisions at issue. *See Wash. Water Jet Workers Ass’n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004) (Court interprets Constitution based upon the common and ordinary meaning of the words in the text at the time they were drafted, as well as the intent of the framers and the history of events and proceedings contemporaneous with its adoption); *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 460, 48 P.3d 274 (2002) (“*Grimm*”) (“This court’s objective is to define the constitutional principle in accordance with the original understanding of

the ratifying public so as to faithfully apply the principle to each situation which might thereafter arise.” (internal quotation omitted)).

Ignoring this history, the Charter Supporters ask this Court to look at more recent legislative activity as evidence of the broad flexibility exercised by the Legislature in designing the State’s education system. *See* State’s Br. at 4-7. But flexibility to act within constitutional constraints is not the same as flexibility to alter constitutional constraints. The Constitution’s education provisions have certain meanings that cannot be altered by the Legislature. *Sch. Dist. No. 20, Spokane Cnty. v. Bryan*, 51 Wash. 498, 502-03, 99 P. 28 (1909) (“*Bryan*”); *see also Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 504, 585 P.2d 71 (1978) (“duty to construe or interpret words or phrases in the constitution and to give them meaning and effect by construction [is] a judicial issue rather than a matter to be left to legislative discretion”). This Court has rightly stepped in when the Legislature has departed from basic constitutional precepts. *McCleary v. State*, 173 Wn.2d 477, 544, 269 P.3d 227 (2012) (“we cannot ignore our constitutional responsibility to ensure compliance with article IX, section 1”). The Court should do so again here.

The Intervenors also attempt to inject irrelevant policy arguments into the case. *See* Intervenors’ Br. at 5-8. Their statements and “authorities” regarding the alleged success of charter schools, however,

are not relevant to the constitutional issues before the Court. *See Bryan*, 51 Wash. at 505 (“[Courts] have turned a deaf ear to every enticement, and frowned upon every attempt, however subtle, to evade the Constitution. Promised benefit and greater gain have been alike urged as reasons, but without avail.”); *see also Wash. Statewide Org. of Stepparents v. Smith*, 85 Wn.2d 564, 571, 536 P.2d 1202 (1975) (policy argument not relevant to statute’s constitutionality). Further, the Intervenor’s conclusions about the effectiveness of charter schools are subject to considerable debate and fail to address the many ways in which charter schools fail students, particularly students of color, students from lower socio-economic backgrounds, and other vulnerable student populations. CP 656-58, ¶¶ 5-9 (Declaration of Dr. Wayne Au, a University of Washington professor whose research, writing, and scholarly work has focused on issues of educational equity, educational policy, and social justice); CP 664-90, 827-35. Many studies have confirmed that charter schools fail to produce significantly better results than public schools. CP 658-60, ¶¶ 10-12; CP 691-810. As a result, several prominent organizations advocating on behalf of communities, such as NAACP, do not support charter schools. CP 660-61, ¶ 13; CP 811-13. But, again, this case is not about the policy debate of whether charter schools are good or bad. The issue is whether the Act is constitutional. It is not.

#### IV. ARGUMENT

##### A. **The Act Creates Publicly Funded, Privately Run, Unaccountable, Non-Uniform Schools Significantly Different than Public Common Schools.**

Charter schools are distinctly different from public common schools. Charter schools (unlike public common schools) are controlled by private organizations, rather than elected officials. RCW 28A.710.030. Charter schools also are not subject to the vast majority of the uniform public school laws, *see* Title 28A RCW (“Common School Provisions”), RCW 28A.710.040(3), which have been approved by the Court as satisfying the Legislature’s obligation under Article IX, section 2 to establish a “general and uniform” public school system, *see Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221-22, 5 P.3d 691 (2000). For example, charter schools are not required to offer uniform basic education programs, including instruction and services for English language learners, highly capable students, and underachieving students, *see* RCW 28A.150.220(2), or to comply with standardized discipline policies, *see* RCW 28A.150.300 (corporal punishment), RCW 28A.600.410-.490 (suspension, expulsion, exclusion from classroom). Instead, the private organizations that operate charter schools are empowered to design and implement experimental education programs and policies as an *alternative* to public school education. Indeed, the stated purpose of the Act is to create schools that are not like other public common schools: “[C]harter

schools free teachers and principals from burdensome regulations that limit other public schools, giving them the flexibility to innovate and make decisions about staffing, curriculum, and learning opportunities[.]” RCW 28A.710.005(1)(g).

These differences are constitutionally significant. By design, the Constitution directs the Legislature to create a system of schools offering all children a uniform basic education, subject to Superintendent supervision, and accountable to voters. Const. art. IX, §§ 1-2; art. III, § 22. By contrast, the Act creates schools offering a private vision of a basic education, supervised and accountable to private organizations and an unelected state commission (stacked with members with a pro-charter bent, RCW 28A.710.070(3)), and with no accountability to the voters who fund public education. The Act intentionally opts for experimentation over uniformity and the private marketplace over voter control.

The Charter Supporters try to minimize these fundamental differences by arguing that charter schools are just like regular public common schools run by school districts across Washington. But the similarities are limited to entitlement to receive restricted and general state and local funds, not charging tuition, and being open to all children. RCW 28A.710.020(1), .220. The differences—waiving uniform school laws and statewide supervision and taking control of common schools away from

voters—undermine key features of the public education system that the State’s founders sought to promote and protect in drafting the Constitution.

**B. Charter Schools Are Not Public Common Schools Entitled to Receive Restricted State Funds.**

Relying on this Court’s decision in *Bryan*, the trial court correctly held that charter schools do not fall within the constitutional definition of “common schools.” CP 1043. The Charter Supporters do not dispute that charter schools lack a key characteristic of “common schools” identified in *Bryan*—being subject to voter control. Rather, the Charter Supporters erroneously argue that the Legislature (rather than the Court) has the ultimate authority to define “common schools” as used in the Constitution.

The trial court also correctly found that because charter schools do not meet the constitutional definition of “common schools,” they are prohibited from receiving state funds restricted for exclusive use by common schools under Article IX, sections 2 and 3. CP 1045. In response, the Charter Supporters argue that accounting tricks can be used to free nearly all state funding for operation and construction of common schools from those constitutional restrictions. But reliance on such devices would undermine the purpose of the Constitution’s protection of common school funding: to ensure the State provides adequate support for common schools.

1. The constitutional requirement of voter accountability cannot be eliminated through legislation.

The Act purports to define charter schools as “common schools.” See RCW 28A.710.020(1). The Charter Supporters incorrectly contend that in so doing the Legislature has properly exercised its authority to change the meaning of “common school” in the Constitution. State’s Br. at 20; Intervenor’s Br. at 46. They also misread and mischaracterize *Bryan*, in which the Court, not the Legislature, adopted a constitutional definition for common schools that is similar to the definition in the first school law enacted by the Legislature in 1889, see Laws of 1889, ch. XII, tit. IX, § 44. And they ignore the temporal significance of that first legislative definition to the Court’s interpretation of the Constitution.

In *Bryan*, the Legislature attempted to divert common school funds (including common school taxes) restricted under Article IX, sections 2 and 3, to support model schools run by the State’s teacher training colleges. 51 Wash. at 500. The question before the Court was whether these model schools qualified as “common schools” under the Constitution. There, the State took the opposite position as the Charter Supporters take in this case:

It is self evident that no legislative definition of the expression ‘common schools’ can be considered of any force in our attempt to arrive at the meaning which the framers of the constitution intended to convey by the said expression. It is for the courts to interpret the constitution and not the legislature.

*Sch. Dist. No. 20, Spokane Cnty. v. Bryan*, No. 7685, Appellants' Opening Br. at 9 (Wash. 1908). This Court agreed.

The Court found that “[t]he words ‘common school’ cannot be arbitrarily defined, but must be considered in connection with the general scheme of education outlined in the Constitution of the state. When so considered, they have no uncertain meaning.” *Bryan*, 51 Wash. at 502. Reviewing the history of Article IX (which history the Charter Supporters do not dispute), the Court explained that the drafters were careful to emphasize the “distinct character” of common schools and to ensure that Article IX protected their key features. *Id.* In fact, the delegates rejected a proposal to allow the Legislature to use common school funds to support any “public schools,” and instead restricted those moneys to support exclusively “common schools.” Quentin Shipley Smith, *Analytical Index to The Journal of the Washington State Constitutional Convention 1889*, at 686 (Beverly Paulik Rosenow ed., 1999).

The Court thus defined “common school, *within the meaning of our Constitution*, [as] one that is common to all children of proper age and capacity, free, and subject to, and under the control of, the qualified voters of the school district.” *Bryan*, 51 Wash. at 504 (emphasis added). The Court emphasized the importance of voter control:

The complete control of the schools [by voters] is a most important feature, for it carries with it the right of the voters, through their chosen agents, to select qualified teachers, with power to discharge them if they are incompetent. Under the system proposed, instead of the voter employing a teacher which proper vouchers of worthiness, they are made recruiting officers to meet a draft for material that the apprentice may be employed.

*Id.* Applying this definition, the Court struck down the model school law because, among other things, the model schools were managed by a principal, who was not accountable to the voters. *Id.*

This Court looks to early Washington laws from the time of statehood in interpreting the Constitution, *see Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 120, 937 P.2d 154 (1997), and, thus, it is no surprise that the *Bryan* Court adopted a constitutional definition of “common school” consistent with the first common school law enacted during the State’s first legislative session, Laws of 1889, ch. XII, tit. IX, § 44. But contrary to the Charter Supporters’ suggestion, the Legislature’s role in giving substance to the term “common school” is not so broad as to overcome the holding in *Bryan*. *See Ino Ino, Inc.*, 132 Wn.2d at 120 (“State cases and statutes from the time of the constitution’s ratification, rather than recent case law, are more persuasive in determining” the protections of a constitutional provision). The *Bryan* Court held that the Legislature cannot “by any contrivance, designation, or definition” establish a common school that does not meet the minimum constitutional

criteria. *Bryan*, 51 Wash. at 504. The meaning and effect of these constitutional duties and restrictions is a judicial issue, *not* “a matter to be left to legislative discretion.” *Seattle Sch. Dist.*, 90 Wn.2d at 504; *see also Tunstall*, 141 Wn.2d at 218 (legislative definitions of terms in Article IX are not controlling; the “ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary” (quotation omitted)). The judiciary has been vigilant in meeting its duty under Article IX to “ensure that the legislature exercises its authority within constitutionally prescribed bounds” when “deciding which programs are necessary to deliver the constitutional required ‘education.’” *McCleary*, 173 Wn.2d at 526-27. The Charter Supporters have not identified a single case where a Washington court approved of the Legislature’s diversion of restricted common school funds to a school outside the control of the voters.<sup>2</sup>

Likewise, it is of no significance that the Constitution does not explicitly require school districts. *See State’s Br.* at 24-25 (school districts are creatures of statute). The constitutional drafters ensured voter control

---

<sup>2</sup> The Intervenor’s reliance on *State v. Vasquez*, 80 Wn. App. 5, 906 P.2d 351 (1995), as an example of a court’s reliance on a legislative definition of “common schools” is misplaced. *See Intervenor’s Br.* at 46. There, the court held that a general education equivalency program fell within the ambit of a school zone sentencing enhancement because the program met “the statutory definition of a common school.” *Vasquez*, 80 Wn. App. at 10. *Vasquez* does not speak to the issue here, namely, whether the Legislature may alter the constitutional definition of “common school” to legitimize the diversion of constitutionally restricted funds to privately controlled schools. It may not. *Bryan*, 51 Wash. at 504-05 (“To say that the Legislature can determine what institutions shall receive the proceeds of the school fund, and that whatever they determine to be entitled there to becomes ipso facto a common school, is begging the whole question, and annulling the constitutional restriction.”) (citation omitted).

of common schools, whether through school districts or some other mechanism, by deliberate use of the term “common school.” *See Bryan*, 51 Wash. at 504. As this Court has explained, “while it is true that there must be a district lawfully created and organized upon which the provision of the constitution can operate...it was not to be supposed by the framers of the constitution that the legislature would fail to make provision for the organization of school districts.” *Holmes & Bull Furniture Co. v. Hedges*, 13 Wash. 696, 700, 43 P. 944 (1896); *see also* Const. art. VI, § 2 (original text), art. VIII, § 6 (original text) (referencing “school districts”).

The State also mischaracterizes the Legislature’s addition of high schools to the common school system in 1895 as a legislative fix made in response to a legal challenge to the use of common school funds to support high schools. *See State’s Br.* at 21 (citing *Troth* at 159-60). The State is presumably referring to an incident *prior* to statehood, when a publicly funded high school in Seattle temporarily closed after taxpayers threatened legal action but reopened two weeks later as a “senior grammar school,” which was eligible to receive public funding under territorial school laws. *Troth* at 160. Indeed, during the territorial period through the adoption of the Constitution, high schools (like normal schools) were considered specialized education designed to serve the needs of discreet student populations. *See id.* at 159 (“high schools had no legal status in

Washington during its territorial days, nor during its statehood”); Bibb at 105 (only six high schools out of more than 1,000 schoolhouses in the State in 1889).

In 1895, however, the Legislature determined that the basic education offered to all children in the State should include this upper level coursework. Laws of 1895, ch. CL, § 1 (authorizing preparation of a course of study for the “high school departments of the common schools”). Unlike specialized “high schools” servicing discreet student populations referenced in the Constitution, the “high school departments of common schools”—as the term “high schools” has been used by the Legislature since 1895—meets all of the constitutionally required features of common schools as articulated in *Bryan* because such schools (unlike charter schools) are free, open to all students, within the general and uniform school system, are required to provide a uniform basic education, and are subject to voter control through an elected school board. Moreover, publicly funded high schools are necessary to meet the State’s duty under Article IX to educate children through their eighteenth birthday. *See Tunstall*, 141 Wn.2d at 219.

Similarly, the State cites to the Legislature’s determination in 1945 to allow public school districts to offer and manage 13th and 14th grade programs as an example of the Legislature’s ability to change the

definition of “common schools.” State’s Br. at 24. But this only highlights an example where the Legislature adhered to the constitutional limitations on legislative authority in the use of restricted common school funds. When the Legislature transferred those programs out of the public school districts to a new community college system—which was not accountable to voters—the programs were no longer eligible to receive these restricted funds. *See Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll.*, 81 Wn.2d 551, 559, 503 P.2d 86 (1972). This transfer was constitutional only because the community college assets were not acquired with restricted common school funds. *See id.* Here, the Act would make charter schools eligible to receive restricted common school funds even though a charter school, like the new community college system, is not subject to voter control.

Further, the charter schools’ employment of certified teachers does not satisfy the constitutionally required features of common schools articulated in *Bryan*, and reaffirmed in *State v. Preston*, 79 Wash. 286, 288-89, 140 P. 350 (1914). The *Bryan* Court was indeed concerned with the quality of instruction but, as noted, specifically highlighted the importance of voter control as a mechanism for ensuring the employment of worthy teachers. *Bryan*, 51 Wash. at 504. Here, as in *Bryan*, the voters have no control over the quality of teachers or other aspects of the

management of a charter school. A private charter board selects and discharges charter school teachers. *See* RCW 28A.710.030(1)(a). Voters do not have the authority to remove members of the charter board, as they do with elected public school district directors. RCW 28A.710.010(6). And the electorate cannot prevent the pro-charter Washington Charter School Commission (“Charter Commission” or “Commission”) from diverting money from the voter- controlled common schools to a private organization to establish a charter school. RCW 28A.710.080(1) (Commission has complete discretion to authorize charter schools anywhere in the State). In fact, the Commission has authorized several charter schools to open in King County, which rejected I-1240. CP 202.

The Charter Supporters also wrongly assert that an authorizer’s limited supervision over a charter school satisfies the constitutional requirement of voter control. *See* State’s Br. at 26. Again, hiring and firing, as well as allocation of resources, student enrollment, discipline, and other day-to-day management activities, are controlled by the appointed private charter school board. RCW 28A.710.030(1). The private organization also determines the charter school’s education program and the number of instructional hours offered by the charter school. *See id.* Moreover, this Court has held that supervision by appointees of the Governor does not meet the voter control requirement of

Article IX. *See Preston*, 79 Wash. at 288-89. Accordingly, the appointed Charter Commission, which is comprised solely of pro-charter members and in no way represents the voters of Washington, does not satisfy the voter control feature of a constitutional “common school.”

The Charter Supporters identify an array of specialty programs and services they contend will be at risk if the Court determines that the Act is unconstitutional. Although the constitutionality of these programs is not before the Court, none of the identified programs or services are defined as commons schools by the Legislature in the attempt to divert restricted common school funds to private purposes. Rather, these programs and services were established for the purpose of meeting the needs of a specialized segment of the student population<sup>3</sup> or supplementing the basic education provided by common schools.<sup>4</sup> Nothing prevents the Legislature or school districts from using unrestricted funds to support these supplemental programs and services. Thus, certain specialized statewide schools highlighted by the Charter Supporters, including programs for incarcerated youth and schools for the deaf and blind, are funded through separate appropriations. *See, e.g.*, Laws of 2013, 2d Spec. Sess., ch. 4, §§ 510, 616-17.

---

<sup>3</sup> *See, e.g.*, RCW 72.40.040 (blind/visually impaired or deaf/hearing impaired); Ch. 28A.193 RCW (juvenile inmates); Ch. 28A.194 RCW (juveniles in adult jails); RCW 28A.185.040 (UW highly capable program).

<sup>4</sup> *See, e.g.*, RCW 28A.600.300-400 (Running Start); RCW 28A.300.165 (National Guard program).

Moreover, most of the identified programs and services are subject to the oversight of either school districts or the Superintendent or both. For example, under the Running Start program, “[e]ach school district and institution of higher education shall independently have and exercise exclusive jurisdiction over academic and discipline matters involving a student’s enrollment and participation in courses of, and the receipt of services and benefits from, the school district or the institution of higher education.” WAC 392-169-075; *see also* RCW 28A.600.360 (school district and Superintendent control granting of high school credit through Running Start). Likewise, the Superintendent also oversees the selective University of Washington program for highly capable students. RCW 28A.185.010; RCW 28A.185.040 (“The superintendent of public instruction shall contract with the University of Washington for the education of highly capable students[.]”). Tribal schools also are authorized by state-tribal education compacts agreed to by the Superintendent. *See* RCW 28A.715.010.

Appellants do not contend, as the Charter Supporters suggest, that school districts may not contract with private entities to provide educational services. *See* State’s Br. at 6, 25-26; Intervenor’s Br. at 11-12. But where the contract is “to provide basic education instruction claimed by the school district for state basic education funding,” the contract must

comply with the 19 requirements set forth in WAC 392-121-188. These requirements include that “[t]he school district retains full responsibility for compliance with all state and federal laws,” “[t]he contractor complies with all relevant state and federal laws that are applicable to the school district,” “[t]he curriculum is approved by the district,” and “[t]he school district and contractor execute a written contract which is consistent with this section, and which sets forth the duties of the contractor in detail sufficient to hold the contractor accountable to the school district.” WAC 392-121-188(2), (3), (10), and (14). Elected officials retain control of these service contracts.

In contrast to the other programs and services identified by the Charter Supporters, the Act allows private organizations to provide basic education instruction to Washington students using constitutionally restricted funds, without the safeguards necessary to ensure the education is constitutionally adequate and without the oversight of the electorate. The unconstitutional Act thus differs substantially from the existing specialty programs identified by the Charter Supporters.

Charter schools lack the distinct features of common schools the constitutional delegates sought to protect. *See Bryan*, 51 Wash. at 502. Charter schools are controlled by private organizations, not the electorate. They are not subject to Superintendent or local voter control and

supervision. The State's proposal that "families can vote with their feet" by transferring out of a charter school is no substitute for the right to vote at the ballot box. *See* State's Br. at 26. Thus, the Act is unconstitutional.

2. The Act diverts restricted common school funds.

The Charter Supporters incorrectly contend that the Act does not implicate any constitutionally restricted moneys. It is undisputed that the Act would divert tens of millions of dollars appropriated by the Legislature for the support of common schools to the private organizations operating charter schools. *See* Joint Stip., ¶¶ 8-10; RCW 28A.150.380(1). These private organizations also would be eligible to receive restricted moneys from the common school construction fund and to use or purchase facilities built with restricted construction funds. RCW 28A.710.230. Taking these restricted funds and assets away from common schools to support charter schools, which do not meet the constitutional criteria of common schools, is unconstitutional. *See Mitchell v. Consol. Sch. Dist. No. 201*, 17 Wn.2d 61, 66, 135 P.2d 79 (1943).

This Court should reject the Charter Supporters' attempt to narrow the scope of funds guaranteed to the common schools under the Constitution. With regard to operations funding, their argument that "the state tax for common schools" in Article IX, section 2 refers narrowly to the amount of revenues from the common school property levy (RCW 84.52.067) is inconsistent with the delegates' undisputed intent to protect

the common school system above all. *See Bryan*, 51 Wash. at 502 (framers were “careful to emphasize the importance, as well as the distinct character, of the common school”); Theodore J. Stiles, *The Constitution of the State and Its Effects Upon Public Interests*, 4 Wash. Hist. Q. 281, 284 (1913) (“No other state has placed the common school on so high a pedestal. One who carefully reads Article IX might also wonder whether...anything would be left for other purposes.”). Under this Court’s precedent, the Constitution both requires the Legislature to fund a constitutionally adequate common school system, *McCleary*, 173 Wn.2d at 527, and protects money appropriated to the common schools from diversion, *State ex rel. State Bd. for Vocational Educ. v. Yelle*, 199 Wash. 312, 316, 91 P.2d 573 (1939) (“*Vocational Educ.*”). Constitutional protection does not depend on whether the moneys were earmarked for common schools when collected or the name of the fund in which the moneys were held. *Id.*

There was no tax for common schools when the Constitution was drafted and ratified. Troth at 94. Yet, the delegates extended constitutional protection to taxes dedicated by the Legislature to support the common schools, anticipating that revenues from the permanent common school fund would not suffice. Const. art. IX, § 2; *see also Seattle Sch. Dist.*, 90 Wn.2d at 521 (“framers must have been mindful that

Future demands for financing common schools might be greater than those encountered in 1889”). As a result, this Court has held that once funds have been appropriated by the Legislature to support common schools, those funds are protected as “the state tax for common schools” under section 2 and cannot be repurposed. *Vocational Educ.*, 199 Wash. at 316. To do so would be unconstitutional (not merely a statutory violation, as the State contends, *see* State’s Br. at 33). *Vocational Educ.*, 199 Wash. at 316 (citing Const. art. IX, § 2).

Repeating an argument previously rejected by this Court, the Charter Supporters contend that *Vocational Education*’s holding is no longer applicable because the sources, accounts, and calculation methods involved in the Legislature’s common school appropriations have changed since that case was decided. *See* State’s Br. at 33-34. But constitutional protection is triggered by appropriation, not the source of the moneys. *Vocational Educ.*, 199 Wash. at 316. The Court was clear on this point: “the question to be determined is whether the excise tax receipts so allocated have been *appropriated* by the legislature for the support of the common schools.” *Id.* at 315 (emphasis in original). There, the Court found that the Legislature’s \$34.5 million appropriation for common schools “constitute[d] a ‘state tax for the common schools’ in contemplation of Art. IX, § 2,” and thus allocation of those moneys to an

education program operated by a state board was unconstitutional. *Id.* at 316. This result makes sense within the constitutional scheme: by restricting the state funds appropriated to the common schools, the Constitution promotes the ability of the State to meet its paramount duty to provide funding for an adequate education to the State’s children.

Today, the Legislature endeavors to carry out the constitutional mandate to establish a common school system by “*appropriat[ing]* for the current use of the common schools such amounts as needed for state support to school districts during the ensuing biennium for the program of basic education[.]” RCW 28A.150.380(1) (emphasis added); *see also* State’s Br. at 35 (RCW 28A.150.380 “requires appropriations from whatever revenues are available to fund one aspect of Washington’s education system—the common schools”). The Act would require the Superintendent to allocate those moneys to support charter schools, which are not common schools, in violation of Article IX, section 2. By contrast, other statewide schools outside the common school system (*e.g.*, incarcerated youth, blind/deaf students) are funded by separate allocations. *See, e.g.*, Laws of 2013, 2d Spec. Sess., ch. 4, §§ 510, 616-17.

*Vocational Education* also cannot be distinguished based on the 1966 amendment to Article IX, section 3. *See* Intervenors’ Br. at 42. *Vocational Education* addressed the scope of *section 2* of Article IX,

which has never been amended. The purpose of the 1966 amendment to *section 3* of Article IX was to create a separate common school construction fund *without* reducing the reserves in the permanent common school fund or diverting tax revenues dedicated to the support of common schools. Wash. Official Voters Pamphlet, S.J.R. 22, Part 1 at 20 (1966)<sup>5</sup> (promising “No New Taxes!” and no “reduc[tion to] the reserves of the Permanent School Fund—which will continue to grow”). Accordingly, the Act’s diversion of moneys that have been allocated by the Legislature to support the common schools is unconstitutional. Const. art. IX, § 2.

With regard to construction funding, the trial court correctly held that the Act also unconstitutionally diverts money from the common school construction fund. The Intervenors do not challenge this holding, instead proposing that charter schools could avoid building and repairing schoolhouses altogether by leasing or using existing common school buildings for no or below market rent. Intervenors’ Br. at 44-45 (citing RCW 28A.710.230). The use of facilities built with restricted common school funds, however, also runs afoul of Article IX, section 3. Brief of Appellants at 29 (citing *Moses Lake*, 81 Wn.2d at 559 (facility was not acquired with restricted common school funds)). Yet, several approved charter schools plan to do just that. *See, e.g.*, Excel Academy Application

---

<sup>5</sup> Available at [http://wsldocs.sos.wa.gov/library/docs/osos/voterspamphlet66\\_77/voterspamphlet\\_1966\\_2007\\_000223.pdf](http://wsldocs.sos.wa.gov/library/docs/osos/voterspamphlet66_77/voterspamphlet_1966_2007_000223.pdf).

at 82 (“It is Excel’s first preference...to locate a District facility”).<sup>6</sup> And while the State points out that the Legislature also uses unrestricted funds for school construction, *see* State Br. at 37, the Act makes charter schools eligible for state funds “for *common school* construction.” RCW 28A.710.230(1) (emphasis added).

For these reasons, the Act’s funding mechanisms for charter school operations and construction violate the protection for common schools ensured by Article IX, sections 2 and 3.

3. The Act’s unconstitutional provisions are not severable.

The Act’s unconstitutional provisions purporting to define and fund charter schools like all other common schools across the State are not severable. *See, e.g.*, RCW 28A.710.005(1)(m) (defining charter schools as common schools), .020(1) (same), .020(2) (same), .070(1) (defining charter schools as part of “common school system”), .220(2) (operations funding), .230 (common school construction funds and facilities).

Notwithstanding the Charter Supporters’ after-the-fact attempt to minimize this deliberate misleading portrayal of charter schools, it is not plausible that Washington voters, well-aware of the vast shortfall in state funding for basic education and the Legislature’s failure to make measurable progress or identify any viable solution, would have approved

---

<sup>6</sup> Charter applications approved by the Commission are available at <http://www.governor.wa.gov/issues/education/commission/applicantArchive.aspx>.

the measure if they understood the Act would establish a parallel system of privately operated schools requiring separate appropriations of state funds. *See Order, McCleary v. State*, No. 84362-7 (Wash. July 18, 2012).

The Act's violation of the Constitution's common school provisions is not a technicality, as suggested by the State. *See State's Br.* at 36. Funding is at the forefront of debate about any newly proposed public programs, particularly in the field of basic education. *See Leonard v. City of Spokane*, 127 Wn.2d 194, 201-02, 897 P.2d 358 (1995) (unconstitutional funding mechanism is not severable because it "represents the heart and soul of the Act"). There can be little doubt that voters would have insisted on protection of already deficient common school funds from these private educational experiments had the true nature of charter schools been revealed. This would have required the Act to provide separate, unrestricted funding for charter school operations and construction. Otherwise voters would have been faced with an unfunded proposal, a change that likely would have shifted the outcome of this very close election. *See CP 200*.

The Charter Supporters have proposed any number of revisions to the Act and school funding laws to avoid running afoul of the constitutional protection afforded to common schools. But it is not for the Court to rewrite legislation. *See In re Parentage of C.A.M.A.*, 154 Wn.2d

52, 69, 109 P.3d 405 (2005). If the Court holds (as it must) that charter schools do not have the constitutionally required features of common schools, the Act is unconstitutional in its entirety.

**C. The Act Exempts Charter Schools from General and Uniform Public School Laws in Violation of Article IX, Section 2.**

The waiver of significant offerings otherwise required of the State's public schools violates the constitutional requirement for a "general and uniform" public school system offering a basic education program. For this separate reason, the Act is unconstitutional.

The State incorrectly contends that the Act satisfies the "general and uniform" requirement, even though the Act waives requirements for basic education services and programs, curriculum, discipline, and facilities, because charter schools are subject to the basic educational goals, teacher certification, instructional hour requirements, and assessment provisions of the Basic Education Act. *See* State at 16. But the Court has declined to interpret the "general and uniform" requirement so narrowly, emphasizing the importance of uniformity in *each* of these key aspects of a basic education. *See, e.g., Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 524, 219 P.3d 941 (2009). The Court's approach is consistent with the undisputed history leading up to the constitutional delegates' decision to reject a proposal to require merely a "thorough and efficient" public school system. *See Grimm*, 146 Wn.2d at 461.

The territorial legislature adopted uniform school laws on a range of issues, including coursework, instructional days and hours, and discipline, and established a superintendent to supervise all of the territorial public schools to address the disparities rampant in the early territorial public schools. Bibb at 75, 131-35; Angie Burt Bowden, *Early Schools of Washington Territory* 21 (Lowman & Hanford Co. 1935); *see also* Laws of 1877, An Act to Provide a System of Common Schools, tit. IX; Laws of 1871, ch. 1, § 1. The combination of uniformity of school laws and centralized supervision led to greater consistency in the public schools across the Territory. Bibb at 144-45. Consequently, the founders insisted on a general and uniform public school system subject to the supervision of the Superintendent to ensure that all children, no matter where they lived, have access to a basic education program. *Id.* Charter schools are not subject to any of these requirements. *See, e.g.,* RCW 28A.150.220 (minimum instructional components of basic education); Ch. 28A.230 RCW (mandatory coursework and activities); RCW 28A.150.300 (corporal punishment), RCW 28A.600.410-.490 (discipline).

Charter schools do not offer the same basic education as other public schools. Appellants do not dispute that charter schools are required to offer instruction in the Essential Academic Learning Requirements (“EALRs”). RCW 28A.710.040(2)(b). The EALRs, however, simply

identify educational goals. They do not prescribe “how” the goals will be met, *e.g.*, through instructional requirements and curriculum. State’s Br. at 9. Charter schools are exempt from such requirements, including the instructional components of a basic education set forth in RCW 28A.150.220.

The Charter Supporters challenge the trial court’s finding that charter schools are not required to comply with the instructional components identified in RCW 28A.150.220, CP 1043, relying on language in the Act’s provision regarding the charter application process. *See* State’s Br. at 18 (citing RCW 28A.710.130(2)(m)); Intervenors’ Br. at 18 (same). Although charter applications should include plans to serve certain student populations, those plans only need to comply with “*applicable* laws.” RCW 28A.710.130(2)(m) (emphasis added).<sup>7</sup> RCW 28A.150.220 is not among the limited subset of laws applicable to charter schools. The Act provides that except for the particular laws identified in RCW 28A.710.040(2) or a charter contract, “[c]harter schools are not subject to and are exempt from *all* other state statutes and rules applicable to school districts and school district boards of directors, for the purpose

---

<sup>7</sup> RCW 28A.710.130(2)(m) provides that a charter application should include “plans for identifying, successfully serving, and complying with *applicable* laws and regulations regarding students with disabilities, students who are limited English proficient, students who are struggling academically, and highly capable students.” (Emphasis added).

of allowing flexibility to innovate in areas such as...educational programs.” RCW 28A.710.040(3) (emphasis added).

This is not a wait-and-see proposition, as the Charter Supporters imply. *See* State’s Br. at 3 The uniformity requirement is constitutional and not subject to experimentation. And partial compliance with the uniformity requirement is not enough.

Indeed, the Commission has approved charter schools that will not offer the basic education program.<sup>8</sup> For example, the Excel Charter School will identify “English language learners” in the same manner as other public schools, but “[a]ll instruction at Excel is in English[.]” Excel Charter School Application at 39 (emphasis added).<sup>9</sup> These students will not be offered the transitional *bilingual* instruction and services that are required components of the basic education program. *See* RCW 28A.150.220(3)(e); RCW 28A.180.030(4)(a)(“concepts and information are introduced in the primary language and reinforced in” English). Worse, although approved by the Commission, First Place Scholars Charter School had yet to determine the instructional programs that will be

---

<sup>8</sup> Recognizing that the Act waives the basic education program requirements, the Board of Education has attempted, through regulations, to ensure that charter schools authorized by school districts “meet the basic education standards set forth in RCW 28A.150.220.” WAC 180-19-030(4)(f). Not surprisingly, the pro-charter Commission does not have an analogous rule for Commission-authorized charter schools. *See* WAC 108-20-070.

<sup>9</sup> *See supra* at note 6.

offered to English language learners. *See* First Place Scholars Charter School Application at 26 (First Place is “considering” different models).<sup>10</sup>

The Charter Supporters’ contention that the Act’s sweeping waiver is an exercise of legislative authority to redefine basic education is factually inaccurate and, in any event, cannot cure the constitutional violation. *See* Intervenor’s Br. at 7. The Act eliminates components of the basic education program approved by this Court in *McCleary* and leaves private organizations to fill the gaps. That is one of the Act’s stated purposes. RCW 28A.710.005(1)(n)(viii) (to “[a]llow public charter schools to be free from many regulations so that they have more flexibility to set curriculum”). While the Legislature has discretion to replace components of the basic education program that no longer serve “the same educational purpose or should be replaced with a superior program or offering,” *McCleary*, 173 Wn.2d at 227, nothing suggests that the program defined in the Basic Education Act no longer serves the same educational purpose or should be replaced with a superior offering. To the contrary, common schools must continue to adhere to the Basic Education Act.

Importantly, the Charter Supporters do not dispute the trial court’s finding that charter schools are exempt from the discipline laws applicable to public schools, an area that this Court has identified time and again as

---

<sup>10</sup> *See supra* at n.6.

an essential component of the “general and uniform” requirement. CP 1043; *Fed. Way Sch. Dist.*, 167 Wn.2d at 524 (uniform includes being “subject to the same discipline as every other child”) (quoting *Bryan*, 51 Wash. at 502). The significance of this waiver is apparent from the discipline policies at several of the recently approved charter schools. For instance, while public schools utilize a range of disciplinary tools, including short-term suspension (one to ten days), long-term suspension (generally up to one year), and expulsion, RCW 28A.600.010-.020, Rainier Prep and SOAR Academy will only suspend a student for up to five days unless expulsion is recommended, *see* Rainier Prep Application at 149 (Attachment 7, ¶ D.3); SOAR Academy at 158 (same).<sup>11</sup> This is particularly troubling in view of evidence that charter schools expel students at significantly higher rates than their regular public school counterparts, particularly students of color and students from lower socioeconomic backgrounds. CP 659-60, ¶ 11-12; CP 717-810.

Charter schools cannot be equated with other specialized schools and supplemental education programs identified by the Charter Supporters. *See* State’s Br. at 17; Intervenors’ Br. at 19. Specialized schools, which serve the special needs of students who would otherwise not be served by the general and uniform public school system, are not

---

<sup>11</sup> *See supra* at n.6.

subject to the “general and uniform” requirement. *See Tunstall*, 141 Wn.2d at 221-22. By contrast, charter schools purport to be “part of the ‘general and uniform system of public schools’ . . . required by Article IX, section 2[.]” RCW 28A.710.005(1)(m). The Court in *Tunstall* highlighted this distinction between the general public school system and an education program offered to meet the unique needs of a small subset of children. 141 Wn.2d at 221-22. There, the Court explained that the “general and uniform” requirement in Article IX, section 2 does not prevent the State—in fulfilling its paramount duty under Article IX, section 1 to provide an education to each child—from offering specialized programs for students whose needs would not be met by the State’s public schools (there, juveniles in adult correctional facilities). *Id.* (noting that “the State’s constitutional duty to provide educational services does not end with the creation of a ‘general and uniform’ school system” and that “a different education program . . . might be necessary to reasonably address special needs” of discreet student populations) (internal quotation omitted).

Although charter schools may offer programs aimed at discreet student populations, they, unlike the identified specialized schools, must be open to all students on an equal basis. RCW 28A.710.020(1). The Court has never said that the Legislature could meet its constitutional responsibility under Article IX, section 2 by establishing public schools

lacking in uniformity, *e.g.*, by funding a hodge-podge of experimental schools controlled by private organizations.

As for the multitude of programs offered through the public schools, those offerings are available to public school students to supplement the basic education program. *See, e.g.*, RCW 28A.600.360 (Running Start); RCW 28B.50.533 (vocational training). Rather than supplementing to meet the educational needs of a discrete student population, charter schools are intended as a complete alternative to the local uniform public school. And unlike the limited waiver of laws and rules that may be granted to public school districts under narrow legislatively defined circumstances, *see* State's Br. at 17 (citing RCW 28A.630.083), the Act broadly waives "all" uniform school laws and rules except for those specifically identified in the Act, RCW 28A.710.040(3).

The uniform system requirement is an important constraint on legislative authority that cannot be ignored because the Charter Supporters disagree with the State's founders about the need for a uniform school system.

**D. The Act Hinders the State's Ability to Amply Fund Basic Education as Mandated by Article IX, Section 1 and this Court.**

The Charter Supporters cannot dispute that the State is currently failing to make ample provision for basic education. This Court recently issued an order requesting the State show cause why it should not be held

in contempt for its continuing failure to fund the constitutionally required education program put forth by the Legislature and approved by this Court. Order, *McCleary v. State*, No. 84362-7 (Wash. June 12, 2014). Nor can the Charter Supporters reasonably dispute that establishing an entirely new system of publicly funded, privately operated charter schools will impede the State's ability to fulfill its paramount duty under Article IX, Section 1 to amply fund basic education. Instead, the Charter Supporters fall back on the argument that courts typically defer to the Legislature regarding policy questions in "*forming* the details of an education system." See State's Br. at 39-40 (emphasis added). But deference is particularly inappropriate when the State has been found to be in violation of its constitutional duties and is on the verge of being held in contempt for continuing failings. The State having identified and committed to fund a specific constitutional education program cannot go off in a new direction until it has met its constitutional duties.

Again, the Act does not fund the education program in the Basic Education Act that the Court has determined to be constitutionally sufficient. See *supra* at 30-31. Rather, the Act redirects public funding to a privately operated charter school system that incorporates only certain components of that Basic Education Act program. Similarly, although the majority of state funds are allocated to school districts on a per pupil basis,

the State's claim that Article IX, section 1 will be unaffected because "the funding follows the students" is an overly simplistic view of what it takes to run a public school system. *See* State's Br. at 40.

To view the Act in a vacuum, without consideration for the funding shortfalls currently facing Washington's public schools, would be equivalent to turning a blind eye to the State's paramount constitutional duty. *See* Joint Stip., ¶¶ 8-10. A facial challenge is proper because no set of facts exist under which the Act will do anything other than interfere with and impede the State's ability to fully fund basic education.

**E. The Act Unconstitutionally Delegates the State's Paramount Duty to Private Organizations (Article IX).**

The Act waives compliance with components of the Basic Education Act's program and delegates the design and management of educational programs to private entities. This constitutes an unconstitutional delegation of the legislative duty to define a basic education program that meets the requirements of Article IX, section 1.

The Constitution's assignment of legislative responsibility to provide substantive content to the basic education program under Article IX, section 1, cannot be modified through legislation. *See McCleary*, 173 Wn.2d at 515. As the Court has explained, the Legislature has "uniquely constituted fact-finding and opinion gathering processes [that] provide the best forum for addressing the difficult policy questions inherent in forming

the details of an education system.” *Id.* (quotation omitted). In fact, the basic education program set forth in the Basic Education Act is the culmination of more than two decades of study and reform. *Id.* at 490-510.

The Act on its face, however, grants a private organization operating a charter school authority to *replace* this carefully developed program with something of its own design. *See* RCW 28A.710.040(3); *see also* RCW 28A.710.130(2)(j) (charters define their own instructional program). Although the Constitution does not prohibit the use of private organizations to provide certain services (subject to appropriate guidelines and safeguards, of course), *see* State’s Br. at 44, the Court has spoken to the fundamental concerns raised by delegation to a private entity, including the lack of voter control, *see United Chiropractors of Wash., Inc. v. State*, 90 Wn.2d 1, 5, 578 P.2d 38 (1978). This concern is acutely problematic under the Act because it implicates the State’s most important duty. *See In re Powell*, 92 Wn.2d 882, 892, 602 P.2d 711 (1979) (“[I]t is imperative to consider the magnitude of the interests which are affected by the legislative grant of authority.”); *Seattle Sch. Dist.*, 90 Wn.2d at 511 (State’s duty to provide for basic education is “superior in rank, above all others, chief, preeminent, and in fact dominant”). The abdication of the Legislature’s prime duty to private organizations, which lack the unique

qualities of the legislative branch, interferes with the “delicate balancing of constitutional responsibilities.” *See McCleary*, 173 Wn.2d at 517.

The Charter Supporters incorrectly assert that adequate safeguards exist because the State could shut a charter school “at any time.” *See* Intervenor’s Br. at 23. But the Act limits the bases for withdrawing a charter contract and requires an extensive and time-consuming process prior to closure. RCW 28A.710.200. And while the Charter Supporters suggest that any charter school that falls in the bottom quartile on the statewide assessment will be shut, *see* State’s Br. at 45, the Act allows these failing charter schools to continue to operate for the full five-year contract term and, even then, the authorizer has discretion to renew the contract. *Id.* Further, *post hoc* oversight of charter school performance does not address the absence of meaningful standards to ensure the private organizations offer an adequate basic education program in the first place.

With regard to conversion charter schools, the Charter Supporters fail to address adequately what will happen with the public school’s former students and employees. The State cites no authority for its theory that staff not hired by the charter school would be entitled to continue employment with the school district. *See* State’s Br. at 45. Likewise, while the State contends that students will have the choice to attend a different public school in the school district, *id.* (citing RCW

28A.150.220(5)), school districts are not required to adopt a process for reassignment, *see United Chiropractors of Wash., Inc.*, 90 Wn.2d at 4 (Legislature must provide standards to indicate what is to be done and designate the entity to accomplish it), or even to offer an alternative to the charter school, *see RCW 28A.150.220(4)*. And, as a practical matter, in districts with limited schools, there may not be any feasible alternative.

**F. The Act Creates an Independent Charter Commission, Outside the Supervisory Authority of the Superintendent.**

Contrary to the Charter Supporters' arguments, the Act divests the Superintendent of supervisory authority over charter schools. *See State's Br. at 46; Intervenors' Br. at 24.* The Act establishes the Charter Commission "*as an independent state agency*" and provides that the Commission:

shall, through its management, supervision, and enforcement of the charter contracts, *administer the portion of the public common school system* consisting of the charter schools it authorizes as provided in this chapter, in the same manner as a school district board of directors, through its management, supervision, and enforcement of the charter contracts, and pursuant to applicable law, administers the charter schools it authorizes.

RCW 28A.710.070(1) (emphases added). The Commission thus acts in lieu of the Superintendent as administrator of charter schools. Based on this language, the trial court correctly found that "[t]he Commission is not supervised by the Superintendent." CP 1044. Thus, the Act violates

Article III, section 22, which requires the Superintendent have supervision over “*all matters* pertaining to public schools.” (Emphasis added).

The State argues that the Act does not strip the Superintendent’s supervisory powers because it provides that the Commission must administer charter schools “in the same manner as a school district board of director[s].” See RCW 28A.710.070(1). Other than this conclusory language, the Act does not endow the Commission with any characteristics similar to school district boards of directors. In fact, the Act provides that the Commission is a separate component of the governance structure for the state’s common public school system:

Under the constitutional framework and the laws of the state of Washington, the governance structure for the state’s public common school system is comprised of the following bodies: The legislature, the governor, the superintendent of public instruction, the state board of education, the Washington charter school commission, the educational service district boards of directors, and local school district boards of directors.

RCW 28A.315.005(1).

In contrast to the Act’s establishment of the Commission as an independent state agency, local school boards are part of a complex system of checks and balances subject to the supervisory authority of the Superintendent. For example, changes in the organization and extent of school districts are overseen by regional committees appointed by educational service districts, which educational service districts are

authorized by the Superintendent. *See, e.g.*, RCW 28A.315.095, .105; RCW 28A.300.030. Moreover, there are numerous statutory provisions confirming the Superintendent's supervisory authority over school districts. *See e.g.*, RCW 28A.315.175(2) (providing that "[t]he superintendent of public instruction shall . . . [c]arry out powers and duties of the superintendent of public instruction relating to the organization and reorganization of school districts."); RCW 28A.315.015(2)(e) (allowing for "[o]ther criteria or considerations as may be established in rule by the superintendent of public instruction" in the formation of school districts); RCW 28A.315.185 (providing that the Superintendent, "in cooperation with the educational service districts and the Washington state school directors' association, shall conduct an annual training meeting for the regional committees, educational service district superintendents, and local school district superintendents and boards of directors"). The Commission, in contrast, is appointed and administered with no involvement by the Superintendent. *See, e.g.*, RCW 28A.710.070.

The Charter Supporters also contend that the Commission is similar to other "complimentary agencies" that oversee Washington's public schools, and specifically point to the State Board of Education and the Professional Educator Standards Board as examples. *See* Intervenors' Br. at 26-27; State's Br. at 48. But the Superintendent is a member of the

State Board of Education, establishes the rules for electing the Board's other members, receives regular reports from the Board, and consults with the Board on determining student performance standards and levels. *See, e.g.*, RCW 28A.305.011(1)(a)(iii) (Superintendent is member of Board); RCW 28A.305.021(1) (rules for election); RCW 28A.305.035 (reporting requirement); RCW 28A.305.130(4)(b)(i), (c) (consultation with Superintendent). The Superintendent also is a member of the Professional Educator Standards Board, receives regular reports from the Board, and has express supervisory authority over the Board. RCW 28A.410.200(1)(a) (Superintendent is member of Board); RCW 28A.410.210(11) (reporting requirement); RCW 28A.410.220(9) ("The superintendent of public instruction is responsible for supervision and providing support services to administer this section."); RCW 28A.410.010(2) (while the Board establishes rules determining eligibility for and certification of common schools personnel, "[t]he superintendent of public instruction shall act as the administrator of any such rules and have the power to issue any certificates or permits and revoke the same in accordance with board rules").<sup>12</sup>

---

<sup>12</sup> The Intervenors also identify the Director of the Washington School for the Deaf and the Superintendent of the Washington School for the Blind as examples of programs "within the public education system independent of the Superintendent of Public Instruction." Intervenors' Br. at 27. Again, these specialized schools are not common schools. *See generally* Ch. 72.40 RCW (chapter governing Washington Schools for the Blind and for the Deaf, under Title 72 RCW, "State Institutions," rather than Title 28A

As to charter schools themselves, the Act engages in a clumsy sleight of hand. The Act seems to place charter schools under “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,” but then takes away much of that supervisory authority with the proviso, “*except as otherwise provided in*” the Act. RCW 28A.710.040(5) (emphasis added). That the Superintendent retains limited enumerated supervisory powers over charter schools does not rescue the Act from this constitutional violation. *See, e.g., State’s Br.* at 46-47 (noting, for example, that the Act allows the Superintendent to retain authority over teacher certification and the EALRs). Here, the exception swallows the rule.

The Commission and charter schools are not subject to the Superintendent’s supervision in violation of Article III, section 22.

**G. The Act Improperly Redirects Local Levies to a Purpose Not Approved by the Voters.**

The Act unconstitutionally requires public school districts to use local levies for a purpose not approved by the voters. Contrary to the Intervenors’ contention, the repurposing of local levies without voter

---

RCW, “Common School Provisions”); *see also supra* at 18. Regardless, even these separate institutions are not “independent” of the Superintendent, and it is the duty of educational service districts authorized by the Superintendent, *see* RCW 28A.300.030, to report on visually and hearing impaired students to the Superintendent, as well as to the Director and Superintendent of the Schools for the Deaf and for the Blind, RCW 72.40.070; *see also* RCW 28A.310.010(3).

approval raises a constitutional issue. *See* Intervenors' Br. at 30. In *Sheldon v. Purdy*, 17 Wash. 135, 141, 49 P. 228 (1897), the Supreme Court struck down a state law that diverted local levy funds raised for the support of the common schools to another purpose as unconstitutional. *Id.* ("that section, in so far as it purports to command the treasurer to pay interest coupons from moneys raised by taxation for another purpose, is *unconstitutional*, and therefore void" (emphasis added)). This constitutional principal is grounded in both Article VII, section 2(a)'s voter approval requirement and Article VII, section 5, which requires that "every law imposing a tax shall state distinctly the object of the same to which only it shall be applied."<sup>13</sup>

The Intervenors also apply the wrong legal standard in arguing that judicial review must wait until levy funds have been unconstitutionally diverted to a charter school. *See* Intervenors' Br. at 29. The claim is justiciable because the "mature seeds" of a dispute already exist. *See First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 245, 916 P.2d 374 (1996)

---

<sup>13</sup> The Intervenors' novel theory that Appellants waived their right to rely on Article VII, section 5 in support of their levy claim cannot be squared with the record below. Appellants gave notice of the facts and law underlying their constitutional levy claim in the Complaint, *see* 15, 26-27, and elaborated on that claim in the briefing on summary judgment, including by citing to Article VII, section 5, *see* CP 188-89, 641-43. Nothing more was required. *See Bird v. Best Plumbing Grp., LLC*, 161 Wn. App. 510, 529-30, 260 P.3d 209 (2011) ("if a party argued a claim to the trial court that was not included in the original pleadings, the court may treat that claim as if it had been pleaded"), *aff'd*, 175 Wn.2d 756, 287 P.3d 551 (2012); *see also* CP 1045 (addressing levy claim).

(justiciability requires “an actual, present and existing dispute, or the mature seeds of one”). An approved charter school already has claimed entitlement to funds from a local levy approved before the Act was adopted. *See* CP 253-60; Pride Prep Application at 656.<sup>14</sup>

The Court does not need to review the terms of a specific levy to determine that the Act unconstitutionally shifts control over expenditure of local levies from elected school officials to a private organization. *See* RCW 28A.710.220(6), (7). This fundamental change of purpose was not contemplated and, thus, could not have been approved by voters prior to the adoption of the Act.<sup>15</sup> And a school district’s subsequent authorization of a charter school is not an adequate substitute for voter approval. *See Sheldon*, 17 Wash. at 140-42; Op. Wash. Att’y Gen. 1961-62, No. 59 (“If the school district desires to use the money in the building fund” derived from a special levy “for general fund purposes the matter must be resubmitted to the voters[.]”).

The Spokane School District (“District”) levy is illustrative. Prior to the passage of I-1240, Spokane voters approved a levy “for support of the District’s General Fund education programs and operation

---

<sup>14</sup> Available at [http://www.spokaneschools.org/cms/lib/WA01000970/Centricity/Domain/4163/PRIDEPrep\\_Complete%20Application.pdf](http://www.spokaneschools.org/cms/lib/WA01000970/Centricity/Domain/4163/PRIDEPrep_Complete%20Application.pdf).

<sup>15</sup> For this reason, the Intervenor’s suggestion that a levy would have been drafted to explicitly include use of funds to support charter schools *before* approval of I-1240 is absurd. *See* Intervenor’s Br. at 34.

expenses[.]” CP 256. In other words, the levy granted elected District officials discretion to allocate the moneys to operate its basic programs. What voters did not approve is the District’s delegation of discretionary spending of these funds to a private organization, as would be required under the Act. *See* RCW 28A.710.220(7).

In sum, if the Act is permitted to stand, local levy funds will be used for private charter schools that are substantively different than the public schools the voters intended to support. The Constitution prohibits such a reappropriation without resubmission to the school district voters.

**H. I-1240 Amends Existing Law Through Subterfuge and in Violation of Article II, Section 37.**

The Charter Supporters do not dispute that I-1240 fails to set forth changes both to collective bargaining laws and basic education provisions. Instead, the Charter Supporters incorrectly contend that I-1240 does not violate Article II, section 37 because it constitutes a “complete act” and, thus, does not “amend” existing law. *See, e.g.,* State’s Br. at 49; Intervenors’ Br. at 38. This Court has held that “[a]n act is amendatory in character, rather than complete, if it changes the scope or effect of a prior statute, and therefore must comply with section 37.” *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 641, 71 P.3d 644 (2003) (citation omitted). The Court has further clarified that “[c]omplete acts which (1) repeal prior acts or sections thereof on the same subject, (2)

adopt by reference provisions of prior acts, (3) supplement prior acts or sections thereof without repealing them, or (4) incidentally or impliedly amend prior acts, are excepted from section 37.” *Id.* at 642.

I-1240 is not a complete act and does not, as the Charter Supporters suggest, merely adopt, repeal, or supplement existing law. Rather, I-1240 significantly reduces existing collective bargaining protections for public employees who work at charter schools, and alters existing basic education requirements for charter schools. Worse, I-1240 misleadingly suggested that the measure applied existing collective bargaining and basic education provisions to charter schools.

Prior to I-1240, existing collective bargaining laws provided that public school employees could organize into bargaining units, including district-wide bargaining units, based on factors such as “the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the public employees; and the desire of the public employees.” *See* RCW 41.56.060. Although I-1240 states that it applies collective bargaining laws to charter schools, in reality the Act severely restricts the ability of those public employees to organize. *See* RCW 41.56.0251, 41.59.031 (“[a]ny bargaining unit or units established at the charter school must be limited to employees working in the charter

school and must be separate from other bargaining units in school districts, educational service districts, or institutions of higher education”). I-1240 fails to set forth this significant change to the scope of existing bargaining rights for public employees, and voters would have no way of knowing of this change without a detailed comparison of existing law and the Act. *Yelle v. Bishop*, 55 Wn.2d 286, 299, 347 P.2d 1081 (1959) (Article II, section 37 was designed to avoid the “mischief” caused by new enactments that require examination and comparison to be understood).<sup>16</sup>

I-1240 employs similar tactics regarding amendments to the Basic Education Act. I-1240 states that charter schools are required to “[p]rovide basic education, as provided in RCW 28A.150.210, including instruction in the essential academic learning requirements and participate in the statewide student assessment system as developed under RCW 28A.655.070[.]” RCW 28A.710.040(2)(b). I-1240 does not disclose, however, that existing provisions for a basic education include not just RCW 28A.150.210 and the EALRs, but numerous other requirements including the minimum instructional requirements set forth in RCW 28A.150.220, from which the Act exempts charter schools. RCW 28A.710.040(3). Thus, I-1240 lulled voters into believing that charter

---

<sup>16</sup> The State disingenuously argues that I-1240 “created, for the first time, collective bargaining statutes that would address charter school employees,” and thus, does not “alter” collectively bargaining laws. *See* State’s Br. at 49. But this argument ignores both I-1240’s misleading language suggesting existing collective bargaining laws apply to charter employees and that, under the Act, charter employees are public employees.

schools will be required to provide a constitutionally adequate basic education as defined by the Legislature, when in fact the Act exempts charter schools from many of those requirements.

I-1240 used subterfuge to disguise its impact on the bargaining rights of public employees and the Basic Education Act, in direct violation of Article II, section 37.

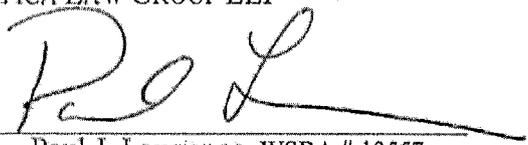
## V. CONCLUSION

The Washington Constitution imposes specific responsibilities and constraints on the Legislature in establishing and funding the State's public common schools. The Charter School Act violates these fundamental constitutional directives. Accordingly, this Court should hold, as a matter of law, that the Charter School Act is unconstitutional and prevent further implementation of the Act.

RESPECTFULLY SUBMITTED this 20th day of June, 2014.

PACIFICA LAW GROUP LLP

By



Paul J. Lawrence, WSBA # 13557  
Jessica A. Skelton, WSBA # 36748  
Jamie L. Lisagor, WSBA # 39946

Attorneys for Appellants