

No. 94269-2
SUPREME COURT OF THE STATE OF WASHINGTON

EL CENTRO DE LA RAZA, a Washington non-profit corporation; LEAGUE OF WOMEN VOTERS OF WASHINGTON, a Washington non-profit corporation; WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS, a Washington non-profit corporation; WASHINGTON EDUCATION ASSOCIATION, a Washington non-profit corporation; INTERNATIONAL UNION OF OPERATING ENGINEERS 609; AEROSPACE MACHINISTS UNION, IAM&AW DL 751; WASHINGTON STATE LABOR COUNCIL, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS UNION 21; WASHINGTON FEDERATION OF STATE EMPLOYEES; AMERICAN FEDERATION OF TEACHERS WASHINGTON; TEAMSTERS JOINT COUNCIL NO. 28; WAYNE AU, PH.D., on his own behalf and on behalf of his minor child; PAT BRAMAN, on her own behalf; and DONNA BOYER, on her own behalf and on behalf of her minor children,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. John H. Chun)

**NATIONAL ASSOCIATION OF CHARTER SCHOOL
AUTHORIZERS' *AMICUS CURIAE* BRIEF**

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The members of the nonprofit National Association of Charter School Authorizers (“NACSA”) include 128 charter authorizers from across the nation.¹ These authorizers oversee over half of the nation’s charter schools. Virtually all of NACSA’s authorizer members are public entities. *Id.* These include school districts, townships, cities, departments of education, public universities, and single-purpose public authorizing agencies, like Washington’s Charter School Commission (“Commission”).² In the overwhelming majority of states only public bodies authorize schools.³ That is the case in Washington.

NACSA advocates a focus on public school quality — the development and upkeep of high expectations for charter schools in academics, finance, and governance⁴ —and strongly supports public charter schools following public standards for open enrollment, serving at-risk students, and providing “due process” for any student exit.

¹ See, e.g., <http://www.ecs.org/clearinghouse/01/13/13/11313.pdf> (accessed 9/1/2014) (2014 data).

² See also <http://www.ncsl.org/documents/educ/AuthorizingCharterSchools.pdf> p. 2 (accessed 9/2/2014) (“States allow various entities to authorize charter schools. The most common are local school districts.”).

³ See <http://www.ncsl.org/documents/educ/AuthorizingCharterSchools.pdf> p.4 (accessed 9/2/2014). Washington and Kentucky, states not addressed in the 2014 report, only permit governmental authorizing. See <http://www.lrc.ky.gov/record/17RS/HB520.htm> (accessed 9/25/2017).

⁴ See, e.g., W. Bross & D. N. Harris, *The Ultimate Choice: How Charter Authorizers Approve and Renew Schools In Post-Katrina New Orleans* (September 12, 2016) at 5 <http://educationresearchalliancencola.org/files/publications/The-Ultimate-Choice-How-Charter-Authorizers-Approve-and-Renew-Schools-in-Post-Katrina-New-Orleans.pdf> (accessed 12/16/2016) (NACSA ratings strongly related to success of schools and correlate to student value added scores).

II. ISSUES OF CONCERN TO *AMICUS CURIAE*

First, NACSA addresses an issue within its core expertise: delegation of public authority and the role of charter school authorizers. NACSA supports charter school statutory schemes that genuinely provide an increase in public school choices available to all students in a given state through publicly-accountable charter schools which are established by publicly-accountable “authorizers.” NACSA supports *public* schools available to all students in a given jurisdiction. It does *not* work with publicly-funded private school systems.

Second, NACSA addresses whether the establishment of publicly-accountable charter schools open to all students is consistent with the constitutionally-required uniformity of public schools – it is.

III. LEGAL DISCUSSION

A. The 2016 Charter Schools Act is a Proper Delegation of Legislative Authority under Supreme Court Case Law.

Appellants assert the Washington Charter Schools Act (“2016 Act” or “Act”)⁵ facially violates the Washington Constitution by improperly delegating legislative authority to “private” charter schools.⁶ Appellants’ argument is incorrect on three counts: *First*, the Act delegates authority to *public* charter authorizers to regulate *public* charter schools; *Second*, the Act provides adequate standards and guidance; *Third*, adequate procedural safeguards exist.⁷ We discuss these issues in turn.

⁵ Chapter 28A.710 RCW.

⁶ Brief of Appellants at 37.

⁷ Compare *Barry & Barry v. State Dept. of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972).

Appellants’ non-delegation argument contends that “the Legislature must determine ‘the organization, administration, and operational details of the ‘general and uniform system’ required by’ the Constitution.”⁸

Appellants then propose the Court disregard the Legislature’s determinations regarding the organization, administration and details of the “general and uniform system” of public education as they object to its policy decisions.

Second, the Appellants assert that what they incorrectly characterize as “private” charter school “organizations” are delegated powers (not accurately described) raising “concerns not present” in delegation to public bodies.⁹ Yet Appellants include the Washington Education Association, a private organization that exercises substantial power over public bodies. Approved collective bargaining practice in Washington extends to grievance arbitration by private arbitrators and even interest arbitration¹⁰ defining public employment policy.

Cases in other states have disapproved public collective bargaining or grievance or interest arbitration using language that could be substituted word-for-word for Appellants’ arguments. Three examples are from Alabama, Virginia, and Utah:

⁸ Appellants’ Brief at 37 (quoting *Seattle School Dist. v. State*, 90 Wn.2d 476, 512-13, 585 P.2d 71, 95 (1978).)

⁹ Brief of Appellants at 38.

¹⁰ *Metro Seattle v. Div. 587, Amalgamated Transit Union*, 118 Wn.2d 639, 826 P.2d 167 (1992).

Public [bodies] cannot abdicate or bargain away their continuing legislative discretion.¹¹

[One may not] remove from a local school board and transfer to others a function essential and indispensable to the exercise of the power of supervision [of education].¹²

[T]he act authorizes the appointment of [individuals], who are private citizens with no responsibility to the public, to make binding determinations affecting the quantity, quality, and cost of an essential public service. The legislature may not surrender its legislative authority to a body wherein the public interest is subjected to the interests of a group which may be antagonistic to the public interest.¹³

Conversely, Washington public sector collective bargaining law creates a sound precedent for delegations of or substantial influence on public authority, up to and including private labor arbitrators stating essential ground rules for the entire operation of a public entity. We address in turn the several flaws in Appellants' argument.

1. Charter Schools are Public Schools.

Relying on *United Chiropractors of Wash., Inc. v. State*,¹⁴

Appellants suggest the Act should be subject to heightened scrutiny because the delegation of authority runs to private organizations.¹⁵ *First, United Chiropractors* held that delegation of authority to private organizations is authorized in Washington and is subject to the *same* legal standard as

¹¹ *Nichols v. Bolding*, 291 Ala. 50, 54, 277 So.2d 868, 869 (1973) (collective bargaining an unlawful delegation of public authority in Alabama).

¹² *Sch. Bd. v. Parham*, 218 Va. 950, 957, 243 S.E.2d 468, 472 (1978) (binding grievance arbitration an unlawful delegation of public authority in Virginia).

¹³ *Salt Lake City v. Firefighters*, 563 P.2d 786, 789 (Utah 1977) (binding interest arbitration an unlawful delegation of public authority in Utah).

¹⁴ 90 Wn.2d 1, 578 P.2d 38 (1978).

¹⁵ Brief of Appellant at 38.

delegations of authority to public bodies.¹⁶ *Second*, the delegation here is to *public* bodies. The issue in *United Chiropractors* was not the delegation itself, but whether discipline by a body appointed by a private organization violated the due process rights of chiropractors who did not belong to that organization.¹⁷ Such due process rights are not implicated here. Thus, delegation of authority in Washington can run *both* from one public body to another or, as in *United Chiropractors* or the use of binding interest arbitration, from one public body to a private body. Here, the delegation runs to two *public* bodies: *public* authorizers and *public* charter schools.

The Act defines charters as public: “charter school . . . means a public school.”¹⁸ The Act provides that charter schools are “open to all children free of charge,” though “operated separately from the common school system as an alternative to traditional common schools”; function as “local educational agencies” under federal laws; are subject to the supervision of the Superintendent of Public Instruction and the Washington State Board of Education; provide students public credits that transfer routinely to other public schools; can only be created by public entities; are under the oversight of public authorizers; can be closed for multiple reasons; upon closure must return any publicly-funded assets to the public

¹⁶ *United Chiropractors*, 90 Wn.2d at 10 (citing *Barry & Barry*).

¹⁷ *Id.* at 10 – 11.

¹⁸ RCW 28A.710.010(5).

treasury; and are subject to Washington’s open public meetings and public records acts.¹⁹ These are conclusive indicia of public, not private, entities.

In ordinary usage, there are two kinds of schools: public and private. Having just reviewed some of the scores of public obligations given charter schools, it is obvious a Washington charter school cannot be private. A robust line of United States Supreme Court decisions sharply limits the ability of public authorities to regulate true “private” schools. These decisions uphold a private school’s “right to teach” state-disapproved content;²⁰ reject imposing public instruction on all parents and students;²¹ and condemn close regulation of private schools.²² These cases helped develop the constitutional right of privacy, and remain good law.²³ The regulations just reviewed could not apply to “private” schools.

Appellants try to drive a wedge between the charter “school” and the “organization.” But charter school *organizations* have *organizational*

¹⁹ See RCW 28A.710.020(2); 28A.710.020(4); 28A.710.040(5); 28A.710.060(2); 28A.710.070; 28A.710.080; 28A.710.120; 28A.710.210(2); and 28A.710.040(2)(h), respectively.

²⁰ *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). In *Meyer* the Court adopted the dissenting position of the first Justice Harlan attempting to shield an integrated college from *de jure* segregation. *Berea College v. Kentucky*, 211 U.S. 45, 85, 29 S.Ct. 33, 53 L.Ed. 81 (1908) (“If pupils ... choose ... to sit together in a private institution of learning while receiving instruction which is not ... harmful or dangerous ... no government ... can legally forbid their coming together ... for such an innocent purpose.”).

²¹ *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (“The child is not the mere creature of the state, those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

²² *Farrington v. Tokushigue*, 273 U.S. 284, 298, 47 S.Ct. 406, 71 L.Ed. 646 (1927) (Fifth Amendment due process holding; parents’ choice of after-school Japanese language instruction protected).

²³ *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

obligations (*e.g.*, public records and meetings requirements) *because* they are public. A charter school’s entire existence—all its powers and obligations—are part of it *being* a school. It is a creature of the State and the State retains power to disestablish it based on policy considerations.

Appellants may respond that charter schools cannot be *organizationally* public because their governance is not the product of a public election. But Anglo-American law has long recognized unelected public bodies. Juries are not elected. Modern administrative agencies have significant independence. The members of the Federal Reserve serve a *15-year* term. Federal judges have lifetime appointments. And being elected has no relevance to Washington’s law of delegation. Entities governed by nonelected board members or officials may be delegated authority if standards are provided and procedural safeguards exist.²⁴

Further, charter schools are responsive to electoral pressure (*see pp.* 16-17, *infra*), but the lack of election is not the measure of what is “public.” On top of extensive public requirements, charter schools exist by legislative grace and are thus “public” organizations.

2. The Act Provides Standards and Guidance That Define What is to be Done by Authorizers and Charter Schools.

The first element of a constitutionally permissible delegation of legislative authority is whether the legislature has provided standards or guidelines stating what is to be done and who is to do it.²⁵ Appellants

²⁴ *Larson v. Monorail Auth.*, 156 Wn.2d 752, 761-62, 131 P.3d 892 (2006).

²⁵ *Brown v. Vail*, 169 Wn.2d 318, 329, 237 P.3d 263 (2010) (quoting *Barry & Barry, supra*).

incorrectly contend the Act delegates to individual charter schools the duty to define a “basic education program” in violation of this element.

(a) Appellants’ Argument Ignores the Critical Role of Charter School Authorizers.

Authorizers undertake the central function of deciding which charter school applicants should be permitted to establish, or continue, a charter public school.²⁶ This is a power of institutional life-and-death, exercised not by schools, but by the authorizers. And each Washington authorizer ultimately is subject to political accountability at the ballot box.²⁷

The act of authorizing is followed by the *authorizer* signing a charter contract with the charter school.²⁸ This is no free-form transaction. It is a highly-structured agreement setting out organic terms for a new public school.²⁹ And the contract, of course, is a mutual act of both the authorizer and the school. The school does not spontaneously generate. It is brought into being by the *authorizer* signing the charter contract. This is not a *delegation from*, but an *act of* the authorizer. Again, public sector collective bargaining is analogous. Such bargaining should not be classified as an improper delegation because it is not a delegation: “the *ultimate* decisions regarding employment terms and conditions remain exclusively

²⁶ RCW 28A.710.070, .080, .090.

²⁷ See pp. 16-17, *infra*.

²⁸ See RCW 28A.710.010(4), .020(3)

²⁹ Unlike collective bargaining, many terms of a charter contract are standard by law, rule or practice across all schools or all schools of one authorizer.

with the board. While the employees' influence is permitted and felt, the control of decision-making has not been abrogated or delegated."³⁰

Simply, the substantial public authority exercised under the 2016 Act is the power of the *authorizer* to create or refuse to create, keep open or close, a public charter school. No term of an *approved* charter application or an *agreed* charter contract is a "delegation" to the school of any kind.

(b) The 2016 Charter Schools Act Provides Adequate Standards and Guidance to both Authorizers and to Public Charter Schools.

Appellants assert the Act's standards are constitutionally deficient because charter schools are empowered "to define a basic education program."³¹ This is incorrect. The 2016 Act incorporates and mandates that charter schools meet the basic education requirement for all public schools specified in RCW 28A.150.210 ("Section 210"). The Act states:

(2) A charter school must:

(b) **Provide** a program of basic education, that **meets the goals 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.

...

(3) Charter public schools must comply with all state statutes and rules made applicable to the charter school in the school's charter

³⁰ *Littleton Education Association v. Arapahoe Cty Sch. Dist.*, 553 P.2d 793, 796 (Colo. 1976) (emphasis in original). This analogy does not reach, of course, grievance arbitration. There the issue is whether adequate standards exist to uphold a clear delegation of quasi-judicial authority. *See, e.g.*, Kenneth May, ed., ELKOURI & ELKOURI, HOW ARBITRATION WORKS (8th ed. 2016) at 21-5 (citing *City & Cty. Of Denver v. Firefighters (IAFF) Local 858*, 663 P.2d 1032, 1037-38 (Colo. 1983)). And it cannot reach interest arbitration, which is a dramatic delegation subject to vague (and arguably illusory) standards.

³¹ Brief of Appellants at 38.

contract, and are subject to the specific state statutes and rules identified in subsection (2) of this section.³²

Thus, per Subsection .040, charters must “**provide**” a program of basic education under RCW 28A.150.210, “**including instruction in the essential academic learning requirements.**” They are expressly “subject to” Section 210. Appellants incorrectly try to equate “provide” as stated in Subsection .040 of the Act with “define,” which is not in that subsection at all. These words are not synonyms. *Provide* means “[t]o supply or furnish for use.”³³ *Define* means “[t]o set forth or explain what (a word or expression) means; to declare the signification of a word.”³⁴ The terms are not the same. “Provide” cannot properly be interpreted as if they were.

Because Subsection .040’s invocation of RCW 28A.150.210 presents analytical problems to their argument, Appellants incorrectly try to switch the focus to RCW 28A.150.220 (“Section 220”), which details requirements for a “basic education.” As a matter of statutory construction, the question becomes: is a “minimal instruction program” under Section 220 contained within Subsection .040, whether in “instruction in . . . essential academic learning requirements” or otherwise? The short answer is yes. *In pari materia* requires that statutes on the same subject to be read together.³⁵ Constitutional avoidance requires that statutes be construed, if

³² RCW 28A.710.040 (emphasis added) (hereafter “Subsection .040”).

³³ Oxford English Dictionary (“OED”) (Comp. Ed.) at 2340/1521, def. 5.

³⁴ OED at 672/137, def. 4(b).

³⁵ *Arnold v. City of Seattle*, 185 Wn. 2d 510, 523, 374 P.3d 111 (2016) (“We interpret statutes relating to the same subject matter together through the principle of *in pari materia*”).

reasonable, to avoid needless constitutional questions.³⁶ Finally, since the Act is remedial in nature, RCW 28A.710.900(1), it is to be liberally interpreted to achieve its purpose,³⁷ one of which is to provide a constitutionally-adequate public education for its intended beneficiaries – Washington students – and require of charter schools an instructional program that will achieve that. On each of these grounds, the Court should read Subsection .040 to require compliance with RCW 28A.150.220 and hold that “essential academic learning requirements” include at least the State’s “minimal instruction program.”

Moreover, RCW 28A.150.220 gives the State Board authority to enact regulations. Those regulations expressly require that *school districts* compel charter schools to comply with Section 220. A school district must:

(f) Include in any charter contract it may execute with the governing board of an approved charter school, in accordance with RCW 28A.710.160(2), educational services that at a minimum meet the basic education standards set forth in RCW 28A.150.220.³⁸

What about Commission charter schools? Commission regulations require each applicant to “demonstrate ... [its] competence in each of the components listed in RCW 28A.710.130 *as well as any other requirements*

³⁶ *Davis v. Cox*, 183 Wn.2d 269, 280, 351 P.3d 862, 867 (2015) (“the doctrine of constitutional avoidance requires us to choose a constitutional interpretation of a statute over an unconstitutional interpretation when the statute is genuinely susceptible to two constructions”) (internal quotation marks and citation omitted). There is no need to strain to harmonize the statutes here.

³⁷ *E.g., Bostain v. Food Exp. Corp.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007) (“remedial statutes . . . should be liberally construed to carry out the legislature’s goal,” there in minimum wage act case).

³⁸ WAC 180-19-030(3)(f).

*in chapter 28A.710 RCW ...*³⁹ “[A]ny other requirements” includes Subsection .040 and, thus, RCW 28A.150.220. The Commission has in fact compelled compliance with Section 220 in every single charter contract it has issued. The 2016 Act, on its face, *and as applied*, is properly construed to compel every charter school to “provide” the education required by Section 220.⁴⁰

Additionally, the notion that charter schools are standard-less institutions is not supported by a reading of the Act. The 2016 Act imposes substantial standards, guidelines and benchmarks for charter performance. We will not exhaust the issue here, but simply list some of the most important requirements. A charter school must:

- Comply with local, state, and federal health, safety, parents' rights, civil rights, and nondiscrimination laws applicable to school districts and to the same extent as school districts.
- Provide a program of basic education including instruction in essential academic learning requirements;
- Participate in the statewide student assessment system;
- Employ certificated instructional staff (though they may hire noncertificated instructional staff of unusual competence and in exceptional cases as otherwise provided by law);
- Comply with the employee record check requirements;
- Adhere to generally accepted accounting principles;
- Be subject to financial examinations and audits as determined by the state auditor;

³⁹ WAC 108-20-070 (emphasis added).

⁴⁰ Appellants filed and argued a “facial” challenge. Their reply brief now seeks to change to an “as applied” challenge. We do not address this premature argument, but point out that the facial challenge must fail if it is possible that the law will be applied constitutionally, and add it is so applied now.

- Undergo annual audits for legal and fiscal compliance;
- Comply with the annual performance report requirement;
- Be subject to the performance improvement goals adopted by the state board of education;
- Comply with the open public meetings act;
- Comply with public records requirements;
- Comply with all state statutes and rules made applicable to the charter school in the school's charter contract;
- Not engage in any sectarian practices in its educational program, admissions or employment policies, or operations;
- Be subject to the supervision of the superintendent of public instruction and the state board of education, including accountability measures, roughly along the lines of all public schools.⁴¹

This list reflects one section (albeit an important one) in the Act.

Many items cross reference detailed statutory schemes. And other details of the publicly-defined standards structuring the charter school sector are set out in other statutes, in regulations, and in charter contracts.

And charters are measured against outcomes, which changes outcomes for students. A wide-ranging study by Stanford University focusing on student subgroups found: “Black and Hispanic students, students in poverty, English language learners, and students receiving special education services all see stronger growth in urban charters than their matched peers in urban TPS [traditional public schools].”⁴²

⁴¹ See RCW 28A.710.040(2) through (5).

⁴² Center for Research on Educational Outcomes – Stanford University, URBAN CHARTER SCHOOL STUDY – REPORT ON 41 REGIONS (2015), at 17, <https://urbancharters.stanford.edu/download/Urban%20Charter%20School%20Study%20Report%20on%2041%20Regions.pdf> (accessed 10/31/2016) (emphasis ours). Similarly, a MIT study focused on English language learners and students

We hasten to add that new and small charter schools often struggle with certain demands of public education—and will likely continue to do so under any standard. Charter schools are not a panacea; they are an opportunity to adopt policies that can be—and in a significant number of instances have been—implemented to good effect for all students.

Charters schools are most certainly subject to ample public standards that dispel any concern about a “standard-less” delegation.

3. The 2016 Charter Schools Act Provides Constitutionally Adequate Safeguards.

The final element in a constitutional delegation of legislative authority is providing adequate procedural safeguards to control arbitrary or abusive administrative action.⁴³ Appellants argue the Commission’s oversight does not provide sufficient procedural safeguards, and charter school authorizers lack sufficient authority to oversee and monitor the operations of those charter schools under their authority.⁴⁴ Appellants’ arguments overlook both Washington case law defining adequate procedural safeguards and the oversight authority granted in the Act.

It is well settled that procedural safeguards sufficient to support constitutional delegation can be met in the statute or by the agency

with disabilities in Boston found both groups of charter school students to be outperforming comparable students in traditional public schools: Elizabeth Setren, SPECIAL EDUCATION AND ENGLISH LANGUAGE LEARNER STUDENTS IN BOSTON CHARTER SCHOOLS: IMPACT AND CLASSIFICATION (2015) (abstract) <https://seii.mit.edu/research/study/special-education-and-english-language-learner-students-in-boston-charter-schools-impact-and-classification/> (accessed 10/23/2016).

⁴³ *Barry & Barry*, 81 Wn.2d at 159.

⁴⁴ Brief of Appellant at 40-41.

administering of the statute.⁴⁵ Specifically, adequate procedural safeguards exist when rules implementing the Act are promulgated pursuant to the Administrative Procedures Act.⁴⁶ In this case, both the Washington State Board of Education and the Commission have promulgated such rules. That rule-making process provides adequate procedural safeguards to avoid arbitrary administrative action and abuse of discretion.⁴⁷

Adequate procedural safeguards are also established by the Act because the performance of charter school authorizers is subject to the oversight and regulation of the State Board of Education, which has the power to evaluate the performance of such authorizers and to revoke their chartering authority.⁴⁸ Additionally, the authorizers are granted oversight authority to monitor the performance and legal compliance of the charter schools they authorize,⁴⁹ and may take appropriate corrective actions including sanctions in response to deficiencies in charter school performance or legal compliance.⁵⁰ Finally, adequate procedural safeguards exist by virtue of authorizer power to revoke or nonrenew a charter school contract for: commission of a material and substantial

⁴⁵ *Earle M. Jorgensen Co. v. Seattle*, 99 Wn.2d 861, 870, 665 P.2d 1328 (1983); *Yakima Cy. Clean Air Auth. v. Glascam Builders, Inc.*, 85 Wn.2d 255, 534 P.2d 33 (1975).

⁴⁶ *Brown v. Vail*, 169 Wn.2d 318, 331, 237 P.3d 263 (2010).

⁴⁷ See WAC 108-20-010 through 090 (APA regulations promulgated by the Commission); WAC 180-19-010 through 260 (APA regulations promulgated by the State Board of Education).

⁴⁸ RCW 28A.710.120.

⁴⁹ RCW 28A.710.180(1).

⁵⁰ RCW 28A.710.180(4).

violation of the Act or the charter contract; failure to make sufficient progress towards performance expectations; fiscal mismanagement; or violation of any material applicable provision of the law.⁵¹

The sanction of potential revocation or nonrenewal is not an empty one. NACSA's annual survey of charter school authorizers confirms authorizers can and do close non-performing charter schools. During the 2015-16 school year, 7.3% of charter schools nationally facing a renewal decision were closed.⁵² Many authorizers use closure as a tool to police school quality. As an example, the District of Columbia independent chartering board closed 21 schools from 2012 to 2017. Fifteen of these closures were based on academic performance.⁵³

Beyond individual school closure—an institutional death penalty—charter schools, as a matter of law, are subject to political recourse. If behavior or performance of charter schools, individually or as a whole, does not satisfy the public, citizens have the means for expressing disapproval at the ballot box and securing appropriate changes. As to district-chartered schools, every election to a school district board of education will be an opportunity for the public to shape charter school policy in that district. With the Commission, each Commissioner is subject to political accountability through a democratically elected appointing official or body.

⁵¹ RCW 28A.710.200(1)(a)-(d).

⁵² <http://www.qualitycharters.org/policy-research/soca-2016/closures/> Data In Depth Charter School Closures (accessed 9/29/2017).

⁵³ <http://www.dcpsb.org/report/charter-school-growth-closures> Charter School Growth and Closures (accessed 9/29/2017).

Thus, charter school policy statewide will be subject to voter direction as well. And the Legislature, of course, is empowered to amend or even repeal the Act in its entirety:

From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation—the Legislature has plotted all aspects of their existence. Having created the charter school approach, the Legislature can refine it and expand, reduce or abolish charter schools altogether.⁵⁴

In short, charter schools are “creatures of the state” from which the state may “withhold, grant or withdraw powers and privileges, as it sees fit.”⁵⁵ The 2016 Act provides adequate procedural safeguards to control arbitrary administrative action and any administrative abuse of discretionary power. The public has recourse.

4. Conclusion.

Appellants’ argument is incorrect on three counts: *first*, the 2016 Act in fact delegates authority to public charter authorizers to regulate public charter schools; *second*, the Washington legislature provided adequate standards and guidance which define in general terms what is to be done by these public bodies; and *third*, adequate procedural safeguards exist to prevent the public bodies’ arbitrary exercise of their discretionary

⁵⁴ *Appeal of Pinkerton Academy*, 155 N.H. 1, 920 A.2d 1168, 1175 (2006).

⁵⁵ *Trenton v. New Jersey*, 262 U.S. 182, 187 & fn. 1, 43 S.Ct. 534, 67 L.Ed. 937 (1923) (citing 1 Dillon, MUNICIPAL CORPORATIONS, § 98, p. 154, *et seq* (5th ed. 1911)). This is an aspect of “Dillon’s Rule.” That is, the powers of public bodies are prescribed by law and those powers, or the body itself, may be altered or abolished. Washington follows “Dillon’s Rule,” including in this regard. *See, e.g., Hillside Comm. Church, Inc., v. City of Tacoma*, 76 Wn.2d 63, 65-66, 455 P.2d 350 (1969) (quoting *Trenton*); *Moses Lake School Dist. No. 161 v. Big Bend Comm. College*, 81 Wn.2d 51, 556-558, 503 P.2d 86 (1972).

authority. For these reasons, the 2016 Act does not constitute an improper delegation of legislative authority and is constitutional.

B. Charter Schools Do Not Break the Uniformity of the Public School System.

As with non-delegation, the argument that charter schools break the uniformity of the public schools is surprising coming from the Washington Education Association, which participates in the “highly non-uniform” practice of collective bargaining. Collective bargaining influences a host of public school governance and management issues.

Collective bargaining has many features of a fundamental organizing statute, whose broad provisions control, in some degree, the activities of many individuals who may have had little or no part in its drafting and who may even have been bitterly opposed to the draftsmen.⁵⁶

By its nature collective bargaining is applicable in some districts and times, and not in others; and each bargain has the potential, often realized, to impose different strictures in District A than in District B. Thus, if charter schools “break” the uniformity of governance in public education, so does collective bargaining. Conversely, if collective bargaining does *not* break the uniformity of governance in public education, neither do charter schools. With constitutional uniformity, as with the non-delegation doctrine, the fact that that collective bargaining has long been held to be lawful and proper in Washington in a robust form confirms the same is true of charter schools.

⁵⁶ 6A Arthur Corbin, CONTRACTS, § 1420, at 343 (1962).

Second, educational uniformity should not become oppressive sameness. “Education,” after all, “is not a ‘one size fits all’ business.”⁵⁷ Justice Ginsberg’s observation in *United States v. Virginia* is especially salient in special education, where attempting to force children to fit programs instead of crafting programs for children is a direct violation of the core federal law intended to assure those children appropriate education.⁵⁸ Beyond special education, some students may thrive in a Montessori-based setting, while others find their potential in Core Knowledge, or respond to No Excuses or some other pedagogy. Pedagogical diversity creates opportunities for students who learn differently, who think differently, who develop differently, to access curricula effectively and enjoy educational success. Children are not cut from one cloth and “[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike”⁵⁹

⁵⁷ *United States v. Virginia*, 518 U.S. 515, 542, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996).

⁵⁸ See, e.g., *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 859 (6th Cir. 2004), *cert den. sub nom. Hamilton Cty. Dep’t of Educ. v. Deal*, 546 U.S. 936 (2005) (Individuals with Disabilities Education Act violated by insisting that a child attend a district-designed program as is, “regardless of any evidence to the contrary of the individualized needs of a particular child”).

⁵⁹ *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971) (upholding different requirements for small political parties and major political parties). See also *Dennis v. United States*, 339 U.S. 162, 184, 70 S.Ct. 519, 94 L.Ed. 734 (1949) (“There is no greater inequality than the equal treatment of unequals”) (Frankfurter, J., dissenting) (allowing jurors who are employees of the federal government to try Communists for subversion violates right to a fair trial); and *Univ. of California v. Bakke*, 438 U.S. 265, 407, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (“In order to treat some persons equally, we must treat them differently”) (Blackmun, J., concurring) (upholding race as a factor in university admissions).

The degree of diversity in educational opportunity fostered by the Act does not detract from its effort to provide the “uniform” education otherwise required by Washington law. Rather, the legitimate differences fostered by charter schools are a means to the end of assuring that students who come from different backgrounds, with different educational needs, have an improved chance to find the educational home where they can meet the “uniform” expectations—achieve the educational results—that are the underlying goal of public education.

IV. CONCLUSION

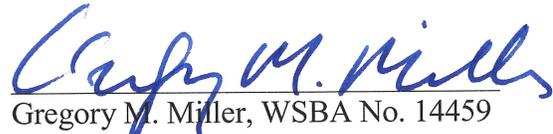
Amicus curiae National Association of Charter School Authorizers respectfully suggests that the 2016 Charter Schools Act is well-designed and wholly consistent with settled Washington municipal law principles such that the trial court’s decision upholding the Act should be affirmed. The Act is consistent with sound educational principles and with properly structured charter school legislation throughout the country. Washington students should continue to have the same range of choices as students in the rest of the country, and as the legislature has provided.

Respectfully submitted this 2nd day of October, 2017.

KUTZ & BETHKE L.L.C.

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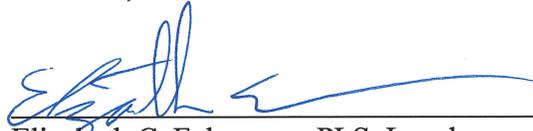
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorneys of record by the method(s) noted:

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