The Honorable John H. Chun

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

EL CENTRO DE LA RAZA, a Washington non-profit corporation, *et al.*, Plaintiffs, v. STATE OF WASHINGTON, Defendant.	NO. 16-2-18527-4 SEA MEMORANDUM OPINION & ORDER RE: SUMMARY JUDGMENT

I.

INTRODUCTION

In 2012, Washington voters passed I-1240, which provided for the establishment of public charter schools. In 2015, in *League of Women Voters of Washington v. State*, the Supreme Court of Washington held I-1240 unconstitutional. In response, the Washington State Legislature sought to cure the defects noted by the Supreme Court and, in 2016, passed the Charter School Act, E2SSB 6194, LAWS OF 2016, ch. 241. Plaintiffs challenge the constitutionality of this Act.

Washington law presumes the constitutionality of statutes. Because Plaintiffs bring a facial challenge, they bear a heavy burden. To overcome the presumption, they must demonstrate that the Act is unconstitutional beyond a reasonable doubt. This means they must show that there exists no set of facts or circumstances under which the statute can be

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constitutionally applied. As discussed below, they have not satisfied this burden. On its face, the Act operates within the bounds of constitutionality. Accordingly, Plaintiffs' motion is denied and the State's and Intervenor-Defendants' motions are granted.

This Order addresses Plaintiffs' legal theories in the Discussion section below. At the outset, however, several points bear highlighting.

First, this case does not concern the merits or demerits of charter schools. That policy debate remains the province of the voters and the legislature. Nor does this case relate to the ongoing funding issues in the *McCleary* case. Separate litigation addresses those questions. This case concerns only whether, on its face, the Charter School Act violates the state constitution.

Second, Plaintiffs contend that the Act violates article IX, section 2's uniformity requirement for the public school system. Their argument, however, conflates common schools with public schools. Common schools are but one component of the public school system, yet Plaintiffs' argument attempts to measure charter schools against common schools rather than the broader public school system. As the Washington Supreme Court has observed regarding public schools, "[T]he general and uniform system contemplated by the constitution is neither limited to common schools nor is it synonymous therewith." Thus, the uniformity analysis requires measurement against the public school system and not solely common schools.

Third, on its face, the Charter School Act does not disrupt the existing common school system. Facially, it does not divert restricted common school funds to charter schools, nor does it otherwise deprive any Washington child of access to a common school. Fourth, and finally, Plaintiffs argue in significant part regarding the ways in which the Act's implementation has led, and may lead, to unconstitutional results. Such arguments, however, are more properly brought as as-applied challenges. And this Order does not foreclose such a claim.

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II.

THE PARTIES' MOTIONS

This matter comes before the court on Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Motion"), the State of Washington's Cross Motion for Summary Judgment (the "State's Motion"), and Intervenor-Defendants' Cross-Motion for Summary Judgment ("Intervenor-Defendants' Motion").

The court has reviewed the materials submitted in connection with the motions, including the following:[1]

1. Plaintiffs' Motion (Dkt. #54A);
2. Declaration of Washington State Senator Jamie Pedersen in Support of Plaintiffs' Motion (Dkt. #54B);
3. Declaration of Julie K. Salvi in Support of Plaintiffs' Motion (Dkt. #54C);
4. Declaration of Paul J. Lawrence in Support of Plaintiffs' Motion (Dkt. #54D);
5. Intervenor-Defendants' Motion & Opposition to Plaintiffs' Motion (Dkt. #77);
6. Declaration of William W. Holder in Support of Intervenor-Defendants' Motion & Opposition (Dkt. # 78);
7. The State's Motion and Opposition to Plaintiffs' Motion (Dkt. #79F);
8. Declaration of Dierk Meierbachtol (Dkt. #83E);
9. Declaration of Mark Anderson (Dkt. #83C);
10. Declaration of Joshua Halsey (Dkt. #83B);
11. Declaration of Jim Crawford (Dkt. #83D);
12. Plaintiffs' Reply in Support of Plaintiffs' Motion and Opposition to the State's and Intervenor-Defendants' Motions (Dkt. #101);

[1] Pursuant to CR 56(h), materials called to the attention of the court in connection with the motions are listed in this section.

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13. Declaration of Jessica A. Skelton in Support of Plaintiff's Reply in Support of Motion and Opposition to the State's and Intervenor-Defendants' Motions (Dkt. #99);

14. Declaration of Julie K. Salvi in Support of Plaintiffs' Reply to Motion for Summary Judgment (Dkt. #100);

15. The State's Reply (Dkt. #108);

16. Second Declaration of Jim Crawford (Dkt. #103);

17. Second Declaration of Joshua Halsey (Dkt. #104);

18. Second Declaration of Mark Anderson (Dkt. #105);

19. Declaration of Aileen Miller (Dkt. #106);

20. Intervenor-Defendants' Reply (Dkt. #110);

21. Declaration of Joseph Calise in Support of Intervenor-Defendants' Reply (Dkt. #111); and

22. Declaration of Robert M. McKenna in Support of Intervenor-Defendants' Reply (Dkt. #112).

The court also received and reviewed the following materials relating to *amici curiae* submissions:

1. Memorandum of Amici Curiae Legislators (Dkt. #72);

2. Brief of National Association of Charter School Authorisers in Supports of Defendant's and Intervenors' Oppositions to Plaintiffs' Summary Judgment Motion (contained in Dkt. #79L);

3. *Amici Curiae* Brief of John S. Archer, Kristina L. Mayer, Ed.D., and Jeffrey Vincent (contained in Dkt. #79M);

4. *Amicus Curiae* Brief of National Alliance of Public Charter Schools, National Center for Special Education in Charter Schools, and Black Alliance for Educational Options (Dkt. #90);

5. Plaintiffs' Response to Amici Briefs (Dkt. 114);

6. Declaration of Wayne Au, Ph.D, in Support of Plaintiffs' Response to Amici Briefs (Dkt. 115); and

7. Declaration of Jamie L. Lisagor, in Support of Plaintiffs' Response to Amici Briefs (Dkt. 116).

A hearing took place the afternoon of Friday, January 27, 2017. Plaintiffs were represented by Paul J. Lawrence and Jamie L. Lisagor. The State of Washington was

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represented by Aileen B. Miller and Rebecca Glasgow. And Intervenor-Defendants were represented by Robert M. McKenna, Melanie Phillips, and Adam Tabor. The court has considered the thoughtful arguments of counsel.

III.

BACKGROUND

In November 2012, Washington voters passed I-1240, which provided for the establishment of up to 40 public charter schools within five years. LAWS OF 2013, ch. 2, § 215(1), invalidated by *League of Women Voters of Washington v. State* ("*LWV*"), 184 Wn.2d 393, 398, 355 P.3d 1131 (2015), *as amended on denial of reconsideration* (Nov. 19, 2015). The Initiative established a system for authorizing and monitoring charter schools. Authorized charter schools were given flexibility to innovate in areas such as staffing, curriculum, and learning opportunities. *Id.* at § 101(1)(g). Problematically, the Initiative designated charter schools as common schools, yet did not place the schools under the governance of locally elected school boards. *Id.* at § 202(1). The Supreme Court of Washington held that designating and funding charter schools as common schools violated article IX, section 2 of Washington's Constitution. *LWV*, 184 Wn.2d at 398. The court invalidated the Initiative in its entirety.[2] *Id.*

The Legislature sought to cure the defects that rendered I-1240 unconstitutional and, in 2016, passed the Charter School Act (the "Act" or "CSA"). Just as I-1240 did, the Act provides for the establishment of up to 40 charter schools within five years. RCW 28A.710.150(1). But in contrast to I-1240, charter schools are now designated public schools serving as an "alternative to traditional common schools." RCW 28A.710.020(1)(b). The Legislature

[2] Notably, while the trial court in that case similarly found the designation of charter schools as common schools to violate article IX, section 2, it rejected arguments similar to those made here: indeed, it ruled that I-1240 met the definition of a general and uniform system, did not constitute an unlawful delegation of the Legislature's authority, did not remove the Superintendent's supervisory authority, and did not conceal changes to the law. Order Granting in Part Plaintiffs' Motion for Summary Judgment and Granting in Part the State and Intervenors' Cross Motion for Summary Judgment, *League of Women Voters of Washington v. State*, King County Superior Court Cause No. 13-2-24977-4 SEA, Docket No. 73.

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appropriates funding for charter schools exclusively from the Opportunity Pathways account, which is funded solely from lottery revenue. RCW 28A.710.270.

Charter schools are run by nonprofit, non-sectarian entities. RCW 28A.710.010(1). Certified teachers provide a program of basic education that meets the minimum instructional requirements of RCW 28A.150.220, conforms to the goals codified in RCW 28A.150.210, and includes the essential academic learning requirements ("EALRs"). RCW 28A.710.040(2)(b), (c). Charter schools also participate in the statewide student assessment system. RCW 28A.710.040(2)(b). Charter schools must comply with local, state, and federal health, safety, parents' rights, civil rights, and nondiscrimination laws to the same extent as school districts. RCW 28A.710.040(2)(a). However, in order to allow innovation in areas such as scheduling, personnel, funding, and educational programs, charter schools do not have to comply with other state statutes and rules applicable to school districts and school boards. RCW 28A.710.040(3).

A charter school can be authorized by either the statewide Commission on Charter Schools or a local school district, if it has applied for authorizer status. RCW 28A.710.080, .090. Charter schools' contracts with their authorizers establish the terms by which the charter school will meet the basic education standards, including academic and operational performance expectations. RCW 28A.710.160. The schools are subject to ongoing performance-based supervision by their authorizer, the Superintendent of Public Instruction, and the State Board of Education. RCW 28A.710.170; RCW 28A.710.040(5). They must also provide annual reports to the community, and comply with performance improvement goals adopted by the State Board of Education. RCW 28A.710.040(f)–(g).

Here, Plaintiffs contend the CSA violates certain provisions of Washington's Constitution. First, Plaintiffs raise article IX challenges based on an alleged violation of the general and uniform public school system, impermissible funding scheme, and improper delegation of the Legislature's duties. Next, Plaintiffs assert that the CSA impermissibly

removes the Superintendent of Public Instruction's supervisory power in violation of article III, section 22. Finally, Plaintiffs say the Legislature violated article II, section 37 because it failed to set out in full the CSA's revisions to other state laws. This Order analyzes these claims in the next section.

IV.

DISCUSSION

As Plaintiffs appropriately acknowledged earlier in this matter, "This case is not about whether charter schools are a good or bad idea. The only issue in this case is whether the Charter School Act violates Washington's Constitution."[3] Indeed, the Supreme Court noted in *LWV*, "Whether charter schools would enhance our state's public school system or appropriately address perceived shortcomings of that system are issues for the legislature and the voters. The issue for this court is what are the requirements of the constitution." 184 Wn.2d at 401 (citing *Gerberding v. Munro*, 134 Wn.2d 188, 211, 949 P.2d 1366 (1998) ("we are not swayed in our analysis of [the term limits initiative] by the policy merits or demerits of term limits for officeholders")). Accordingly, the court limits its analysis to the constitutional questions raised by Plaintiffs.

A. Legal Standards.

Plaintiffs bring a facial constitutional challenge to the Charter School Act. Summary judgment is appropriate if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

In Washington, the law presumes the constitutionality of state statutes. *Island Cty. v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). Where possible, courts will construe them as constitutional. *State v. Sanchez*, 177 Wn.2d 835, 842–43, 306 P.3d 935 (2013). Plaintiffs bear a heavy burden to overcome that presumption: they must prove that the CSA is unconstitutional beyond a reasonable doubt. *Tunstall ex rel. Tunstall v. Bergeson* (*"Tunstall"*), 141 Wn.2d 201,

[3] Pls.' Opp'n to Mot. to Intervene (Dkt. #17), 2:16–17.

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220, 5 P.3d 691 (2000). Such a challenge must be rejected unless the court is convinced there exists no set of facts or circumstances under which the statute can be constitutionally applied. *Id.* at 221. This high standard reflects the judiciary's "respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution." *Island Cty.*, 135 Wn.2d at 147. Courts "assume the Legislature considered the constitutionality of its enactments and afford great deference to its judgment." *Id.* Further, "the Legislature speaks for the people and [the judiciary is] hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution." *Id*.

B. Article IX, Section 2.

With respect to the proper roles of the legislature and the judiciary regarding article IX and public education, the Supreme Court has observed as follows:

> Although the mandatory duties of Const. art. 9, s 1 are imposed upon the State, the organization, administration, and operational details of the 'general and uniform system' required by Const. art. 9, s 2 are the province of the Legislature. In the latter area, the judiciary is primarily concerned with whether the Legislature acts pursuant to the mandate and, having acted, whether it has done so constitutionally. Within these parameters, then, the system devised is within the domain of the Legislature.

Seattle Sch. Dist. No. 1 of King Cty. v. State (*"Seattle Sch. Dist,*), 90 Wn.2d 476, 585, 518 P.2d 71 (1978). Here, the court's only duty is to decide whether the Legislature has acted constitutionally pursuant to the duties and constraints imposed by article IX, section 2.

1. Whether Section 2 Provides an Exclusive List of Public Schools.

Article IX, section 2 of Washington's Constitution provides in pertinent part as follows: "The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established." The court must determine initially whether

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the list of schools in the second sentence is exhaustive and thus excludes charter schools. For the reasons discussed below, the court concludes it does not.

First, it is well established that "[t]he state constitution is not a grant, but a restriction on the lawmaking power; and the power of the legislature to enact all reasonable laws is unrestrained except where, either expressly or by fair inference, it is prohibited by the state or federal constitutions." *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 557, 452 P.2d 943 (1969) (citing *Pacific American Realty Trust v. Lonctot*, 62 Wn.2d 91, 381 P.2d 123 (1963)). Section 2 does not state that the public school system includes only the listed schools; indeed, the plain language of section 2 does not curb the Legislature's power to create additional public schools of any type.

Second, numerous types of public schools, which are not listed in section 2, currently provide education within the K-12 level in our state. These include, for example, the following: tribal compact schools (RCW 28A.715); Running Start (RCW 28A.600.300–.400); high schools operated at community colleges (RCW 28B.50.533); University of Washington program for highly capable students (RCW 28A.185.040); Youth Offender Program operated by the Department of Corrections under contract with Centralia College (RCW 28A.193.020); Education Service District-operated programs, including juvenile detention programs (RCW 28A.310.200(7), RCW 28A.190.010); OSPI approved non-public agency education services providers for special education students (RCW 28A.155.060); Alternative Learning Experience (ALE) and online learning programs operated by non-profit or private entities (RCW 28A.232.010); and alternative education service providers operated under contract by numerous entities in addition to school districts, including private organizations. Meierbachtol Decl. (Dkt. #83E), 7:12–25.[4] While some of these schools serve a specialized population, such as incarcerated youth, others are open to all students as an alternative to traditional common

[4] Dierk Meierbachtol is the Chief Legal Officer for the Office of the Superintendent of Public Instruction.

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schools.[5] For example, high school students can attend Lake Washington Institute of Technology, Bates Technical College, and Clover Park Technical College and receive their high school diploma. RCW 28B.50.535; Meiererbachtol Decl. (Dkt. #83E), 7:16–17. Surely, these schools fall within section 2's "public school system" even though they are not specifically listed.

Third, as noted above, the law presumes the Legislature has acted in a manner consistent with its constitutional duties. *Island Cty*, 135 Wn.2d at 147. The Legislature's evolving definition of "public school" supports finding that section 2 grants it discretion to create schools outside the enumerated list. For example, legislation enacted in 1897 defined the public school system as consisting of "common schools (in which all high schools shall be included), normal schools, technical schools, the University of Washington, school for defective[6] youth, and *other educational institutions as may be established and maintained by public expense*." LAWS OF 1897, ch. 118, § 1 (emphasis added). Today, public schools are defined by statute as "the common schools as referred to in Article IX of the state Constitution, charter schools established under chapter 28A.710 RCW, and those schools and institutions of learning having a curriculum below the college or university level as now or may be established by law and maintained at public expense." RCW 28A.150.010. The Legislature's evolving definition reflects a degree of flexibility in section 2, which is consistent with the Supreme Court's recognition that the constitution must be adaptive: "We must Interpret the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning… In short, the constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness." *Seattle Sch. Dist.*, 90 Wn.2d at 516–17.

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[5] Plaintiffs contend that the Legislature's power to create non-common schools is limited to schools serving specialized students. Neither the plain language of article IX, section 2 nor case law supports that assertion.

[6] Undoubtedly, today, the legislature would choose other terminology to describe this population of youth.

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Fourth, historical context shows that the framers' primary concern was ensuring that all students had access to common schools. The framers made the creation of common schools a constitutional mandate, and they provided two sources of protected revenue. WASH. CONST. art. IX, § 2. As constitutional convention delegate Theodore Stiles explained:

> No other state has placed the common school on so high a pedestal. One who carefully reads Article IX. might also wonder whether, after giving to the school fund all that is here required to be given, anything would be left for other purposes. But the convention was familiar with the history of school funds in the older states, and the attempt was made to avoid the possibility of repeating the tale of dissipation and utter loss.

Seattle Sch. Dist., 90 Wn.2d at 510–11 (quoting T. Stiles, *The Constitution of the State and its Effects Upon Public Interests*, 4 WASH. HISTORICAL Q. 281, 284 (1913)). But, the framers allowed for "high schools, normal schools, and technical schools" so long as common schools were also provided. Here, on the face of the CSA, it appears the Legislature has endeavored to offer an additional alternative public school that, consistent with the framers' intent, does not deprive any student of access to a common school.

Section 2 mandates that the Legislature provide common schools for all students, but it has not been shown beyond a reasonable doubt that the Legislature cannot provide for other public schools beyond those enumerated. Therefore, Section 2's list of schools is not exhaustive and does not necessarily preclude public charter schools.

2. Whether the CSA Meets the Uniformity Requirement.

Plaintiffs assert that the CSA does not satisfy the uniformity requirement prescribed by section 2, which requires that the Legislature "provide for a general and uniform system of public schools." The Supreme Court first defined uniformity more than a century ago when it explained that "[t]he system must be uniform in that every child shall have the same advantages and be subject to the same discipline as every other child*." Sch. Dist. No. 20, Spokane Cty. v. Bryan* (*"Bryan"*), 51 Wash. 498, 502, 99 P. 28 (1909). More recently, the Supreme Court updated the definition as follows:

> A general and uniform system, we think, is, at the present time, one in which every child in the state has free access to certain minimum and reasonably standardized educational and instructional facilities and opportunities to at least the 12th grade—a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education.[7]

Northshore Sch. Dist. No. 417 v. Kinnear, 4 Wn.2d 685, 729, 530 P.2d 178, 202 (1974), *overruled on other grounds by Seattle Sch. Dist.*, 90 Wn.2d at 585. It follows then that public schools in a general and uniform system must meet three requirements. First, schools must provide minimum and reasonably standardized educational opportunities and facilities; these must allow students access to acquire those skills and training reasonably understood to be fundamental and basic to sound education. Second, schools must be free and open to all students. Third, students must have the ability to transfer schools without substantial loss of credit.

a. Minimum and Reasonably Standardized.

Basic Education. By providing a program of basic education consistent with the Supreme Court's definition of "education," public charter schools provide minimum and reasonably standardized educational opportunities that are fundamental and basic to a sound education.

Charter schools must provide a program of basic education that aligns with goals identified by the Legislature and applicable to common and charter schools alike. RCW 28A.710.040(2)(b). These goals provide opportunities for students to "develop the knowledge and skills" to:

[7] Notably, this definition has met with approval by out-of-state courts. *See, e.g.*, *Thompson v. Engelking*, 96 Idaho 793, 810, 537 P.2d 635 (1975) (Idaho's Constitution charges the legislature to establish a "general, uniform and thorough system of public, free common schools"); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 248, 877 P.2d 806 (1994) (Arizona's Constitution requires the legislature provide for a "general and uniform public school system").

> (1) Read with comprehension, write effectively, and communicate successfully in a variety of ways and settings and with a variety of audiences;
>
> (2) Know and apply the core concepts and principles of mathematics; social, physical, and life sciences; civics and history, including different cultures and participation in representative government; geography; arts; and health and fitness;
>
> (3) Think analytically, logically, and creatively, and to integrate technology literacy and fluency as well as different experiences and knowledge to form reasoned judgments and solve problems; and
>
> (4) Understand the importance of work and finance and how performance, effort, and decisions directly affect future career and educational opportunities.

RCW 28A.150.210. Charter schools are also required to teach to the same essential academic learning requirements ("EALRs") and participate in the same statewide student assessment as common schools. RCW 28A.710.040(2)(b). The statewide assessment tests students' mastery of the EALRs in the areas of reading, writing, mathematics, and science. RCW 28A.655.070(3).

These requirements alone satisfy the Supreme Court's definition of constitutionally sufficient "education." *McCleary v. State*, 173 Wn.2d 477, 525–526, 269 P.3d 227 (2012).[8] In *McCleary*, the Supreme Court defined the State's obligation to provide "education" and charged the Legislature with implementing a program of basic education consistent with the new definition. *Id.* at 526. While uniformity requires that a program of basic education align with the Supreme Court's definition, the Legislature deserves deference regarding "which programs are necessary to deliver the constitutionally required 'education.'" *Id.* at 526. Here, the Legislature has satisfactorily discharged its duty. Charter schools not only provide "education" consistent with the definition in *McCleary*, but the Legislature has properly exercised its discretion to give further substance to charter schools' program of basic education.

[8] The Supreme Court defined "education" under article IX, section 1 as the opportunity to obtain the knowledge and skills described in *Seattle School District,* the four goals now codified in RCW 28A.150.210, the statewide student assessment, and the EALRs. *McCleary*, 173 Wn.2d at 525–26.

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Nothing in article IX, section 2 requires charter schools to deliver the same program of basic education as common schools. Nevertheless, charter schools provide the same "minimum instruction program of basic education" as common schools. The Act requires charter schools to "[p]rovide a program of basic education." RCW 28A.710.040(b). The Basic Education Act ("BEA") defines a "[p]rogram of basic education" as the "overall program under RCW 28A.150.200," which applies to common schools. RCW 28A.150.203(9).

That a "program of basic education" is defined in the BEA and not the CSA causes no concern. Title 28A requires the statutes therein to be construed *in pari materia*. RCW 28A.900.040. The Supreme Court has explained this canon of construction as follows:

> The principle of reading statutes in pari materia applies where statutes relate to the same subject matter. Such statutes "must be construed together." In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes. . . Courts also consider the sequence of all statutes relating to the same subject matter.

Hallauer v. Spectrum Properties, Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (citations omitted) (quoting *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974)). Applying *in pari materia*, definitions found in 28A can apply across chapters in order to provide a unified reading of the laws applicable to the public school system. And with respect to statutory sequence, the CSA's enactment postdates the definition of a program of education and, likewise, the CSA falls after the BEA in Title 28.

Turning then to RCW 28A.150.200, the program of basic education "deemed by the legislature to comply with the requirements of article IX, section 1 of the state constitution" is defined as including the minimum components provided in RCW 28A.150.220. The components for the "minimum instruction program of basic education" include minimum instructional hours, instruction in the EALRs, provision of highly capable programs, learning assistance programs, transitional bilingual education, and special education. RCW 28A.150.220.

Exemptions. Charter schools must comply with local, state, and federal laws related to health, safety, parents' rights, civil rights, and nondiscrimination laws, as well as any state statute or rule made applicable in their charter school contracts. RCW 28A.710.040(2)(a), (3). However, charter schools are not subject to all other state statutes and rules applicable to school districts and school boards "for the purpose of allowing flexibility to innovate in areas such as scheduling, personnel, funding and educational programs." RCW 28A.710.040(3). Nothing in the CSA prohibits charter schools from following statutes, rules, and policies from which they would otherwise be exempt.

To find any deviation from common schools a violation of article IX, section 2 conflates the common school system with the public school system. "The general and uniform system contemplated by the constitution is neither limited to common schools nor is it synonymous therewith." *Seattle Sch. Dist.*, 90 Wn.2d at 522. In *Tunstall*, plaintiffs challenged the constitutionality of RCW 28A.193, an educational program for juvenile inmates housed at the Department of Corrections. 141 Wn.2d at 220. The Supreme Court held that the inmates were not entitled to the program of basic education provided in common schools and codified as the BEA. *Id.* at 216. However, the Legislature's alternative program, codified in RCW 28A.193, survived an article IX facial challenge. As the court noted, the constitution does not require "that the education must be identical." *Id.*

There are numerous examples in which the Legislature has allowed public schools flexibility without violating the uniformity requirement. The State Board of Education can waive provisions of RCW 28A.150.200 through RCW 28A.150.220, including the "minimum instruction program of basic education," where a school district has a local plan that "may include alternative ways to provide effective educational programs for students who experience difficulty with the regular education program." RCW 28A.305.140(1)(a). Education providers for juvenile inmates housed at the Department of Corrections "develop the curricula, instructional methods, and educational objectives of the education programs, subject to

applicable requirements of state and federal law." RCW 28A.193.030(3). Programs such as Running Start and the education programs provided at juvenile detention and the Department of Corrections are not explicitly bound to the same school discipline statutes as common schools. These examples show what the Supreme Court noted in *Tunstall*: education need not be identical in order to satisfy the requirements of article IX. 141 Wn.2d at 222.

In the instant case, the exemptions provided to charter schools do not violate the uniformity of the public school system. Nothing in the CSA prohibits authorizers from requiring that charter schools comply with the same requirements as common schools through their charter school contracts.[9] Further, nothing on the face of the Act creates an obligation for charter schools that is inconsistent with the minimum constitutional requirements of "education" as defined by the Supreme Court. The apparent primary function of the exemptions is to relieve charter schools of requirements that otherwise apply to school districts. This makes sense because, unless it is authorized by one, a charter school is wholly independent from a school district.

Plaintiffs have not shown beyond a reasonable doubt that charter public schools do not provide minimum and reasonably standardized opportunities and facilities that are fundamental and basic to a sound education.

b. Open to All Students.

Public schools in the general and uniform system must be open to every child and free. *Northshore Sch. Dist. No. 417*, 84 Wn.2d at 729. Charter schools are open to all children and free. RCW 28A.710.020(1)(a).

[9] For example, in practice, existing charter school contracts require compliance with all federal, state, and local school discipline laws. Halsey Decl. (Dkt. #104), ¶ 14, Att.3 at 19; Anderson Decl. (Dkt. #105), ¶ 3.

c. Ability to Transfer Without Substantial Loss of Credit.

A student attending a charter school who then transfers to another public school receives credits "in the same manner that credits are accepted from other public schools." RCW 28A.710.060(2). The statute does not explicitly require that charter schools honor credits from another public school. But four factors support finding that the Act does not violate the uniformity requirement in connection with credit transfers.

First, the plain language of the statute is silent on how charter schools will calculate credits earned at another public school. Nothing in the statute indicates that the credits will not be honored.

Second, apparently no statute codifies the existing transfer-of-credits policy from which Plaintiffs allege charter schools deviate. Other non-common public schools that provide a program of basic education are not subject to a statutory provision that controls the transfer of credits. For example, RCW 28A.193, the constitutionality of which the Supreme Court affirmed in *Tunstall*, does not mention credit transfers.

Third, students transferring to a charter school from a common school will receive substantially the same program of basic education pursuant to RCW 28A.150.220. Because students will receive substantially the same education, it follows that charter schools would honor the credits just as any other public school would.

Fourth, and finally, the statute requires school districts to inform parents and the general public in their district of available charter schools. RCW 28A.710.060. It would be inconsistent to require school districts to inform families of the option to transfer their student to a charter school if that charter school would not honor credits earned at a different public school.

Plaintiffs have failed to show beyond a reasonable doubt that charter schools will not honor credits in a manner consistent with the uniformity requirements of article IX. This conclusion does not prohibit a subsequent "as applied" challenge if evidence later shows that charter schools are not honoring credits from other public schools.

d. Voter Control.

Plaintiffs allege that the CSA violates the uniformity requirement because charter schools are governed by charter school boards rather than locally elected school district boards. *See* RCW 28A.710.030. Local control of schools is a requirement of common schools and a condition precedent of accessing protected common school funds. However, the same requirement does not apply to all public schools in article IX, section 2's general and uniform system. *See Bryan*, 51 Wash. at 504 ("a common school, within the meaning of our Constitution, is…under the control of, the qualified voters of the school district"). As early as 1909, in *Bryan*, the Supreme Court recognized that the common schools' requirement of voter control did not apply to normal schools, and, consequently, normal schools could not access common school funds. 51 Wash. at 504, 506.

Today, charter schools are by no means the only public schools not under the control of an elected school board. For example, OSPI directly contracts with alternative education services providers, some of which are private organizations not under the control of a school district board. Meierbachtol Decl. (Dkt. #83E), 7:23–25. Community and technical colleges award high school diplomas for dually enrolled students, and these colleges are under the control of governor-appointed Boards of Regents. RCW 28B.50.535, .100. Similar to charter schools, tribal compact schools are not under the control of elected school district boards and are "exempt from all state statutes and rules applicable to school districts and school district boards of directors, except those statutes and rules made applicable under" the statute and their state-tribal education compacts. RCW 28A.715.020.

Furthermore, charter schools are ultimately accountable to elected officials. School districts can apply to be charter school authorizers, in which case the charter school is under the control of a locally elected school board. Alternatively, a charter school can be authorized by the statewide Commission on Charter Schools. The eleven-member Commission is comprised of the elected-Superintendent of Public Instruction, and other members who are appointed by elected

officials, including the Governor and leadership of the House of Representatives and the Senate. RCW 28A.710.070(3).

Plaintiffs have not shown beyond a reasonable doubt that the CSA fails to meet the criteria for a general and uniform school system.

C. Whether the CSA Diverts Restricted Common School Funds.

Plaintiffs contend that funding charter schools with the Opportunity Pathways account amounts to an accounting legerdemain, which disguises the diversion of restricted common school funds to charter schools. Article IX, section 2 provides that certain revenue sources are solely for the use of common schools. The provision requires that "the entire revenue derived from the common school fund and the state tax for common school shall be exclusively applied to the support of common schools." Article IX, section 2 is not intended to prevent the Legislature from innovating in the arena of education; it simply prohibits the use of common school funds to do so. In *Bryan*, the Supreme Court noted "that all experiments in education must be indulged, if at all, at the expense of the general fund." 51 Wash. at 505.

Use of State General Fund. It is undisputed that charter schools are not common schools. RCW 28A.710.020(1)(b) (defining charter schools, in part, as "[o]perated separately from the common school system as an alternative to traditional common schools"). It is further undisputed that charter schools cannot access funds restricted for common schools. *LWV*, 184 Wn.2d at 406. Finally, it is undisputed that charter schools are funded solely by the Opportunity Pathways account, which, in turn, is funded by lottery revenue. RCW 28B.76.526; RCW 67.70.240(1)(c).

Plaintiffs' diversion claim lacks ripeness. Courts "steadfastly adhere to the virtually universal rule that, before the jurisdiction of a court may be invoked under the act, there must be a justiciable controversy." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814–15, 514 P.2d 137 (1973)). Plaintiffs' argument rests on speculation that the Opportunity Pathways account

revenue will not be able to cover the cost of the CSA by the 2021-2022 school year, and that restricted funds will thereafter be used. However, it is undisputed that, at this time, lottery revenue from the Opportunity Pathways account is the only funding source for charter schools. It is similarly undisputed that such funding is not a restricted revenue source for common schools. If, in the future, the State attempts to use funds allocated for common schools in violation of article IX, section 2, then the issue will be ripe for consideration. On the face of the CSA, however, such use is not inevitable.

Common Schools' Use of Restricted Funds. Plaintiffs identify two provisions of the Act that could result in common schools using restricted funds to support charter schools. First, a school district applying to be an authorizer could expend common school funds in preparing its application. RCW 28A.710.090(2). Second, the statute requires that "school districts must provide information to parents and the general public about charter schools located within the district as an enrollment option for students." RCW 28A.710.060. This requirement is consistent with school districts' obligation to notify parents of inter and intra-school district enrollment opportunities. RCW 28A.225.300.

Neither provision requires common schools to expend restricted funds. In *Mitchell v. Consol. Sch. Dist. No. 201*, the Supreme Court considered the constitutionality of a law that allowed students attending private or parochial schools use of public school transportation. 17 Wn.2d 61, 66, 135 P.2d 79 (1943). While there was no specific appropriation to cover costs associated with transporting non-public school students, the plurality opinion noted that "to carry out its purpose, the directors of school districts must, of necessity, resort to the common school fund. As such, they have no other resource." *Id.* Here, in contrast, it is undisputed that common schools receive both restricted and unrestricted funds. Regardless of whether school districts currently track their expenditures according to funding source, school districts are not forced to expend restricted school funds in order to apply to be an authorizer, or to comply with the requirement of informing families of local charter schools.

Because common schools are not required to expend restricted dollars, Plaintiffs have failed to carry their burden that the Act is unconstitutional beyond a reasonable doubt. This does not foreclose an as-applied challenge if Plaintiffs find evidence that common schools are using restricted funds.

D. Whether the Legislature Impermissibly Delegated its Duty to Define a Program of Basic Education.

Plaintiffs allege that the Legislature has impermissibly delegated its duty to define a program of basic education to charter schools. As discussed above, however, the Legislature met its duty to define a reasonably standardized program of basic education, *supra* section IV(B)(2)(a), and thus it has properly discharged its duty.

Regardless, that the Legislature has provided discretion for authorizers and charter schools to define specific aspects of a program of basic education is not unconstitutional beyond a reasonable doubt. The constitution permits delegation where "the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretion." *Barry & Barry, Inc. v. State Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). Furthermore, there is no prohibition on legislative delegations to private organizations, such as the non-sectarian nonprofit organizations here. *See United Chiropractors of Washington, Inc. v. State*, 90 Wn.2d 1, 4, 578 P.2d 38 (1978).

The CSA provides standards and guidelines for authorizing and operating a charter school. RCW 28A.710.130. Authorizers are tasked with overseeing the solicitation of charter school applications, *id.*, and also serve as gate-keepers for approval of charter schools, RCW 28A.710.110(1). Finally, authorizers continue to provide oversight once a charter school contract has been signed. RCW 28A.710.160, .180. It has not been demonstrated that the CSA's guidelines, instrumentality, and procedural safeguards are insufficient beyond a reasonable doubt.

E. Whether the CSA Displaces the Superintendent's Supervisory Authority.

Plaintiffs contend that the CSA unconstitutionally displaces the Superintendent's supervisory power by delegating it to the Charter School Commission. *See* WASH. CONST. art. III, § 22 ("The Superintendent shall have supervision over all matters pertaining to public schools, and shall perform such specific duties as may be prescribed by law . . .."). As an initial point, it is undisputed that, with respect to charter schools for which a school district is an authorizer, there is no alleged displacement.

While scant legal authority describes the Superintendent's supervisory powers, the Supreme Court has noted "that general supervision means something more than the power merely to confer with and advise, or to receive reports, or file papers; in other words, that the power of supervision is not granted to an officer as a mere formality." *State v. Preston*, 84 Wash. 79, 86–87, 146 P. 175 (1915), *aff'd sub nom. State ex rel. Seattle Sch. Dist. No. 1 v. Preston*, 84 Wash. 79, 149 P. 352 (1915).

Attorney General advisory opinions suggest that the Legislature can create state and local institutions to administer the general and uniform system of public education, but cannot delegate to any such agency the supervisory power held by the Superintendent. 1998 Op. Att'y Gen. No. 6. Specifically, legislation could not make the Superintendent subordinate to another agency. *Id*.

The CSA acknowledges the supervisory authority of the Superintendent where it provides that "[c]harter schools are subject to the supervision of the superintendent of public instruction and the state board of education, including accountability measures, to the same extent as other public schools, *except as otherwise provided in this chapter*." RCW 28A.710.040(5) (emphasis added). Hence, any displacement of the Superintendent's supervisory authority would have to be provided in the Act, but there is apparently no such provision.

The CSA provides for the Commission, an eleven-member independent state agency that is charged with authorizing and overseeing charter schools. The Commission manages and

supervises charter school contracts "in the same manner as a school district board of directors administers other schools." RCW 28A.710.070(2). Nowhere in the CSA is the Superintendent made subordinate to the Commission.

Not only does the Commission not displace the Superintendent's supervisory power, the Act assigns the Superintendent additional supervisory duties. The Superintendent or a designee is a member of the Commission (RCW 28A.710.070(3)(a)(ii)), and continues to supervise many aspects of basic education delivered in charter schools. For example, the Superintendent develops the EALRs and the statewide assessment system. RCW 28A.655.070(1).

Furthermore, the Superintendent maintains the "power of the purse" with respect to charter schools. The CSA provides that "the superintendent of public instruction shall transmit to each charter school an amount calculated as provided in this section . . .." RCW 28A.710.280(2). The same statute requires the Superintendent to "adopt rules necessary for the distribution of funding required by this section and to comply with federal reporting requirements." RCW 28A.710.280(3). Numerous WACs give the Superintendent the power to withhold, delay, or otherwise recoup payments. WAC 392-115-015; 090 (allowing the Superintendent to recover or withhold funds for failure to comply with audit resolution process); WAC 392-140-068 (failing to provide timely reports can delay or reduce apportionments); WAC 392-121-122 (funding apportionment considers compliance with instructional hours requirement); WAC 392-123-065 (allowing withholding of funds pending investigation of non-compliance with any binding restriction); Meierbachtol Decl. (Dkt. #83E), 5:8–14 (explaining OSPI adopted rules for charter schools that "for the most part" are "the same rules followed by school districts" and require charter schools "comply with all the legal requirements associated with the receipt of state and federal funds").

On its face, the CSA does not displace the Superintendent's supervisory power in violation of article III, section 22 beyond a reasonable doubt.

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F. Article II, Section 37.

Plaintiffs assert that the Legislature adopted the CSA without disclosing "significant changes to existing state collective bargaining laws and to the education program in the Basic Education Act." Pls.' Mot. (Dkt. #54A), 38:3–5. Article II, section 37 requires that legislation set forth in full changes to existing law. While the Legislature is presumed to know the law in the area in which it legislates, *Wynn v. Earin*, 168 Wn.2d 361, 371, 181 P.3d 806 (2008), the purpose of this constitutional provision is to ensure that lawmakers and the public understand the proposed legislation without "examination and comparison," *Bishop*, 55 Wn.2d at 299 (quoting *Spokane Grain & Fuel Co. v. Lyttaker*, 59 Wash. 76, 78, 109 P. 316 (1910), disapproved of by *Washington Fed'n of State Employees, AFL-CIO, Council 28 AFSCME v. State*, 101 Wn.2d 536, 682 P.2d 869 (1984)). However, the provision's purpose is not to render unconstitutional laws that, simply by effect, enlarge or restrict the operation of other statutes. *Washington Educ. Ass'n v. State*, 97 Wn.2d 899, 906, 652 P.2d 1347 (1982).

In keeping with the purpose of article II, section 37, the Supreme Court developed a two-part test:

> Is the new enactment such a complete act that the scope of the rights or duties created or affected by the legislative action can be determined without referring to any other statute or enactment? . . . [and]
>
> Would a straightforward determination of the scope of rights or duties under the existing statutes be rendered erroneous by the new enactment?

Washington Educ. Ass'n v. State, 93 Wn.2d 37, 40–41, 604 P.2d 950 (1980).

The first part of the test helps "avoid uncertainty created by the need to refer to existing law to understand the effect of the new enactment." *Id.* at 40. A new statute thus "must either be complete in itself or it must show explicitly how it relates to statutes that it amends." *Id.* at 39. The second part of the test ensures that those affected by the law are aware of changes to existing law. *Id*. at 41. The CSA satisfies the first part of the test because it is a complete act. Any statute that it amends was included in its entirety in the bill. Plaintiffs' challenges regarding the

collective bargaining statutes and the BEA must be analyzed separately under the second part of the test.

The CSA creates collective bargaining units for charter school employees with each charter school forming its own bargaining unit. RCW 41.56.0251; RCW 41.59.031. While the CSA extends collective bargaining rights to charter school employees and provides standards for forming bargaining units, it does not otherwise amend the Public Employees' Collective Bargaining Act or the Educational Employment Relations Act. Because the existing statutes are otherwise unchanged, the CSA does not alter the statutory rights that existed before the law passed. This suffices to satisfy the second part of the test.

While the CSA cross-references the BEA (for example, the basic education goals codified at RCW 28A.150.210), it does not modify the statute. A cross-reference or an exemption to another statute's provisions is not forbidden by article II, section 37. The CSA's references to the BEA therefore satisfies the second part of the test. The Legislature complied with article II, section 37 when it enacted the CSA.

VI.

CONCLUSION

Plaintiffs have not demonstrated that the Charter School Act is unconstitutional beyond a reasonable doubt. They have not shown that there is no set of facts of circumstances under which the Act can be constitutionally applied. Accordingly, Plaintiffs' motion is DENIED and the State's and Intervenor-Defendants' motions are GRANTED.[10] Plaintiffs' remaining claims in this matter are DISMISSED WITH PREJUDICE.

DATED this 17th day of February, 2017.

/s/ John H. Chun

Judge John H. Chun

[10] In light of the analysis above, the court need not reach the evidentiary issues and objections raised by Intervenor-Defendants. Even if admitted, the evidence at issue would not affect the outcome here.

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