EXHIBIT A - PROPOSED BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CHARTER SCHOOL AUTHORIZERS

Honorable John H. Chun
Amicus Curiae filing re Noted MSJ
Friday, January 27, 2017, 1:30 p.m.

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

EL CENTRO DE LA RAZA, a Washington non-profit corporation, *et al.*, Plaintiffs, v. STATE OF WASHINGTON, Defendant, and ROLAND D. BRADLEY, on his own behalf and on behalf of his minor child, et al., Intervenors.	No. 16-2-18527-4 SEA BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CHARTER SCHOOL AUTHORISERS IN SUPPORT OF DEFENDANT'S AND INTERVENORS' OPPOSITIONS TO PLAINTIFFS' SUMMARY JUDGMENT MOTION

I. IDENTITY AND INTEREST OF AMICUS

The National Association of Charter School Authorizers ("NACSA") is a nonprofit association of bodies empowered to "authorize" charter schools by law in 43 states or territories.[1] NACSA members oversee over half of the nation's charter schools. The vast majority of NACSA's 105 members (roughly 80%) are school districts, townships, cities, departments of education, and public universities — public bodies that existed before charter laws passed — or single-purpose public agencies that authorize charter schools, similar to

[1] *See, e.g.*, http://www.ecs.org/clearinghouse/01/13/13/11313.pdf (accessed 9/1/2014).

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Washington's Charter School Commission ("the Charter Commission" or "Commission").[2] In 41 of the 43 states and territories with charter laws only public bodies authorize schools.[3]

As the organization linking and supporting charter authorizers nationwide, NACSA is in a unique position to gather research and experience with "charter authorizing" as an aspect of public school administration and share that with the Court. NACSA has taken a leading role in advocating a focus on public school quality — the development and maintenance of high expectations for charter schools in multiple domains, including academics, financial management, and governance.[4] NACSA has also consistently advocated that public charter schools operate on a "level playing field," particularly in relation to open enrollment, students at risk of academic failure, and "due process" for any student exit.

NACSA's argument focuses on the issue of delegation of public authority. This issue goes to NACSA's core expertise: how charters are and should be held to applicable public standards. NACSA's argument also touches briefly on an implication that the non-delegation discussion holds for the separate uniformity challenge to the 2016 Washington Charter Schools Act (the "Charter Schools Act" or "Act").[5]

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[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] http://www.ncsl.org/documents/educ/AuthorizingCharterSchools.pdf p.4 (accessed 9/2/2014) (only two states permit non-governmental authorizers).

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

[5] Chapter 28A.710 RCW.

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II. ARGUMENT

A. Summary of Argument.

Plaintiffs' non-delegation argument indulges in three levels of irony. First, Plaintiffs argue that "the Legislature has 'uniquely constituted fact-finding and opinion gathering'" capacities "'for addressing the difficult policy questions inherent in forming the details of an education system.'"[6] Yet it is *Plaintiffs*, not Defendants, who are proposing that the court disregard Legislative findings and enactments "addressing . . . difficult policy questions" in public education.

Plaintiffs' also claim there is "no opportunity for the taxpaying public to assert itself."[7] Again, the taxpaying public *did* assert itself — by passing the Charter Schools Act, which *Plaintiffs*, not Defendants, seek to invalidate.

Finally, the Plaintiffs find it especially troubling that what they (artfully and misleadingly) term "private" charter school "organizations" are delegated certain powers (not accurately described) raising "concerns not present in the ordinary delegation of authority to a governmental administrative agency."[8] And yet Plaintiffs include in their number an indisputably private organization — the Washington Education Association ("WEA") — that exercises substantial authority through negotiating and administering collective bargaining agreements. This very substantial private power over public education is permitted by Washington law. Indeed, Washington goes beyond most states in allowing not just collective bargaining with private organizations (unions), but grievance arbitration by private arbitrators,

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[6] Plaintiffs' Motion for Summary Judgment, at 32 (quoting *McCleary v. State*, 173 Wn.2d 477, 516, 269 P.3d 227, 247 (2012) ("*McCleary*")).

[7] *Id.*

[8] *Id.* (quoting *United Chiropractors v. State*, 90 Wn.2d 1, 5, 578 P.2d 38 (1978) (internal quotation marks omitted)).

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and even interest arbitration[9] defining the terms of public collective bargains — a form of indisputably "private" delegation disapproved in many jurisdictions.

Notably, cases in those states that have disapproved of public sector collective bargaining, or of public sector binding grievance arbitration, or of public sector binding interest arbitration often use language that could be substituted wholesale for the arguments of Plaintiffs here: "[P]ublic policy . . . prohibits a delegation or surrender of discretion by a public agency . . . Public [bodies] cannot abdicate or bargain away their continuing legislative discretion."[10] Or: 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.[11] Or:

> [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.[12]

That said, "[h]ypocrisy is the homage that vice pays to virtue."[13] If Plaintiffs' argument has potential merit that should be addressed regardless of concerns for consistency. What must be kept in mind, however, is that Washington public sector collective bargaining law creates a powerful precedent for tolerating very substantial influence on or delegations of public authority, up to and including binding imposition of the terms of a public collective bargaining agreement — setting essential grounds rules for the entire operation of a public

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

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

[11] *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).

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

[13] Francois, Duc de la Rochefoucauld, REFLECTIONS; OR, SENTENCES AND MORAL MAXIMS (1678) at 218.

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entity — by truly "private" individuals: private labor arbitrators. Thus, Washington taxpayers and the Legislature could reasonably have believed they had judicial sanction to structure delegations of certain authority while addressing some of public education's "difficult policy questions." And this argues strongly for upholding the presumed constitutionality of the Charter Schools Act.

But this analogy dramatically *understates* the case for upholding the Charter Schools Act. Plaintiffs' non-delegation argument depends on four faulty premises: that a significant delegation of public authority has been made to charter schools; that the standards governing "delegation" to such schools are thin or otherwise insufficient; that charter schools are "private," amplifying non-delegation concerns; and that politically responsive bodies have no recourse over charters. If any of these is false, the argument collapses. All four are false.

B. The Charter Schools Act Does Not Delegate Authority to Charter Schools

The first essential element of Plaintiffs' argument is to show that significant public authority has been "delegated" to charter schools. Examination of the structure of charter school authorizing — and the analogy suggested above to collective bargaining — each reveal that this misconceives the Act.

The common public and media focus on the reported triumphs and failures of charter schools themselves tends to distract attention from the critical role of charter school authorizers. Authorizers — in Washington, the Charter Commission along with any public school districts that have qualified as authorizers through the State Board — undertake the central function of deciding which charter school applicants should be permitted to establish, or continue, a new public school. This is a genuine exercise of substantial and meaningful public authority: a power of institutional life-and-death over a body of public charter schools.

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This power is exercised not by the schools, but by the authorizers. And each Washington authorizer is subject to political accountability at the ballot box.[14]

What about the schools themselves? The schools are subject to a host of regulations that cabin their operations and that we will discuss further below. But for purposes of any "delegation" argument the first fatal flaw in Plaintiffs' argument lies in the authorizer's power to approve or deny a charter application — opening or closing the gate to the entire process — followed by the act that leads to school doors opening or closing: an *authorizer* signing a charter school contract. While termed a contract, this is no free-form commercial transaction. It is, rather a highly structured agreement setting out the organic terms for operation of a new public institution: the charter school.[15] And the contract, of course, is a mutual act of both the authorizer and the school. Thus, the school is brought into being not by willing itself into some form of spontaneous legal generation. The school is brought into being, and the terms of its existence definitively stated, through the act of the *authorizer* signing off on the charter contract. This is not a delegation *from* the authorizer. It is an act *of* the authorizer.

This same reasoning can be found in cases that have approved of public sector collective bargaining as not being a form of inappropriate delegation of public power to a private body (the union). In Colorado, for example, the state supreme court upheld public sector collective bargaining against a non-delegation assault by observing that collective bargaining was not just an act of the union, but was an official act of a public body and, as such, not a delegation of power, but an exercise of public power by that public body: "the *ultimate* decisions regarding employment terms and conditions remain exclusively with the

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[14] *See* C.3., below, "Public Recourse Exists".

[15] Again, this is akin to, but arguably less concerning as a matter of "delegation" than, collective bargaining. *See* discussion at D., below, "Charter Schools Do Not Break The Uniformity Of The Public School System". Note that many terms of the charter contract are defined by law or regulation and thus standard across either all charter schools within a state or all schools of a single authorizer.

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board. While the employees' influence is permitted and felt, the control of decision-making has not been abrogated or delegated."[16]

Simply, the substantial public authority exercised under the Charter Schools Act is the authority of the authorizer to create or refuse to create, keep open or close, a public charter school, prescribing the terms of school operation through the *authorizer's* act of approving a charter contract. No term of an *approved* charter application or an *agreed* charter contract is a "delegation" of any kind.

C. The Charter Schools Act Does Not Delegate Authority to Charter Schools Improperly

If the court perceives some significant residual delegation to the school level, Plaintiffs' argument is deficient in at least three other respects.

1. Ample Standards Exist

Plaintiffs assert a general proposition and emphasize a singular issue in order to argue standard-less delegation of authority. The general proposition is that charters are not subject to adequate standards. The leading specific example is a claim that charter schools are given statutory authority "to *define* a basic education program." We examine the Plaintiffs' leading exemplar first.

(a) Charter Schools Are Required to "*Provide*" the Basic Education Called for in RCW 28A.150.210 and 28A.150.220

Before turning to Plaintiffs' argument that RCW 28A.150.220 ("Section 220") does not apply, we should note that this appears, at first glance, to be an argument of statutory

[16] *Littleton Education Association v. Arapahoe Cty Sch. Dist*., 553 P.2d 793, 796 (Colo. 1976) (emphasis in original). In *Littleton*, the court approved of public collective bargaining without reliance on an express authorizing statute. This analogy does not reach, of course, grievance arbitration. There the issue becomes whether adequate standards exist to uphold a clear delegation of judicial or quasi-judicial authority to resolve disputes. *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 unquestionably a dramatic delegation of extensive authority to a private party, subject to vague (and arguably illusory) standards.

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construction, not constitutional moment. Indeed, the argument ignores a core insight of *McCleary*.[17] There, the Court said:

> While the legislature has long recognized these offerings as central to the basic education program, they are not etched in constitutional stone. . . . The legislature has an obligation to review the basic education program as the needs of students and demands of society evolve.[18]

Thus, changes to a "basic education program" (were there any) would be permitted, and at times required, provided they had "an educational policy rationale."[19] In short, *if* charters were exempt from Section 220, a conclusion that this is unconstitutional would not follow as night follows day, but would require a close examination of whether any "educational policy rationale" supported such a change. But there is no exemption to be justified or attacked.

Plaintiffs assert that charters are not held to Section 220 based on RCW 28A.710.040 ("Section 40"). Plaintiffs add this parenthetical description of Section 40: "charter schools *define* their own basic education program." Section 40 actually says:

> (2) A charter school must:
>
> (b) *Provide* a program of basic education, that meets the goals in RCW 28A.150.210 ["Section 210"], including instruction in the essential academic learning requirements, and participate in the statewide student assessment system as developed under RCW 28A.655.070.[20]

Thus, the statue says charters must "*provide*" a program of basic education under Section 210. Plaintiffs first artfully change "provide" to "define." These words have contrasting, not complementary meanings. *Provide* means "[t]o supply for furnish for use."[21] *Define* means "[t]o set forth or explain what (a word or expression) means; to declare the signification of a

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[17] *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012).

[18] *Id.*, 173 Wn.2d at 526.

[19] *Id.*, 173 Wn.2d at 527.

[20] RCW 28A.710.040.

[21] Oxford English Dictionary ("OED") (Comp. Ed.) at 2340/1521, def. 5.

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word."[22] Thus, *taxpayers and the Legislature*, while grappling with difficult public education policy issues, said charters schools must "supply" or "furnish" students with a basic education, *including* "essential academic learning requirements." But *Plaintiffs* want the court to believe this statute says charter schools will "set forth or explain" what basic education is. This is obviously a radical distortion of the statutory language.

Plaintiffs do not just make a misleading change in the critical verb to suggest virtually the opposite of what the Act says. They also recognize that the express cross-reference to Section 210 is problematic. Thus, they switch the focus to Section 220. This section dives into more detail on what is required as a part of a "basic education." As a simple matter of statutory construction, the question becomes: is the "minimal instruction program" detailed in Section 220 included within the "instruction in … essential academic learning requirements" that charter schools must *provide* under Section 40? The short answer to that question is "of course it is." The principle of *in pari materia* requires that statutes on the same subject to be read together.[23] The principle of constitutional avoidance requires that statute be construed, if reasonable, to avoid needless constitutional questions.[24] On each of these grounds, there is every reason to read Section 40 as directly requiring compliance with Section 220. Without torturing the language at all (without, for example, changing "provide" into "define"), we can say that "essential academic learning requirements" include at least (but may not be limited to) the State's "minimal instruction program." Indeed, if the program is the compulsory "minimum" it necessarily follows that it must be included within what is "essential."

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[22] OED at 672/137, def. 4(b).

[23] *Arnold v. City of Seattle*, 185 Wash. 2d 510, 523, 374 P.3d 111, 117 (2016) ("We interpret statutes relating to the same subject matter together through the principle of *in pari materia*").

[24] *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, of course, no need to strain to harmonize the statutes here.

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And there is more. Section 220 gives the State Board authority to enact regulations enforcing its provisions. In doing so the State Board has expressly required that *school districts* that are approving charters compel charters to comply with Section 220. This is, of course, the proper level at which to impose the requirement. Just as districts are themselves required to follow Section 220, they are likewise compelled to impose on any charter they authorize the same compliance obligation on such public charter schools. The rule says 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.[25]

As to district charter schools the Plaintiffs' non-delegation argument flatly contradicts this State Board of Education regulation.

What about Commission charter schools? The Commission requires, by regulation, that each charter school applicant "must demonstrate … [its] competence in each of the components listed in RCW 28A.710.130 *as well as any other requirements in chapter 28A.710 RCW* and those outlined below in this section."[26] "[A]ny other requirements" includes Section 40 (which is applicable by its own terms) and which, as shown above, embraces Section 220. Furthermore, the Commission has in fact compelled compliance with Section 220 in every single charter contract it has issued. The statute, on its face *and as applied*, compels every existing charter school to "provide" the education required by Section 220. The error in Plaintiffs' distorted reading of the law — substituting "define" for "provide" — is contradicted in detail by review of the Act, the regulations, and the experience implementing the Act.

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[25] WAC 180-19-030(3)(f).

[26] WAC 108-20-070 (emphasis added).

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(b) Charter Schools Are Held to Proper Standards

The notion that charter schools are standard-less institutions is an old canard. The Washington statute, in particular, imposes substantial public expectations 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. RCW 28A.710.040(2)(a);
- Provide a program of basic education including instruction in essential academic learning requirements. *Id.* at (2)(b);
- Participate in the statewide student assessment system. *Id.*;
- Employ certificated instructional staff (though they may hire noncertificated instructional staff of unusual competence and in exceptional cases as otherwise provided by law. *Id.* at (2)(c);
- Comply with the employee record check requirements. *Id.* at (2)(d);
- Adhere to generally accepted accounting principles. *Id*. at (2)(e);
- Be subject to financial examinations and audits as determined by the state auditor. *Id.*;
- Undergo annual audits for legal and fiscal compliance. *Id.*;
- Comply with the annual performance report requirement. *Id.* at (2)(f);
- Be subject to the performance improvement goals adopted by the state board of education. *Id.* at (2)(g);
- Comply with the open public meetings act. *Id.* at (2)(h);
- Comply with public records requirements. *Id.*;
- Comply with all state statutes and rules made applicable to the charter school in the school's charter contract. *Id.* at (3);

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- Not engage in any sectarian practices in its educational program, admissions or employment policies, or operations. *Id.* at (4);
- 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. *Id.* at (5).

This list reflects only one section (albeit an important one) in the Act. Several of these points involve cross reference to other detailed statutory schemes. And many other details of the publicly-defined standards structuring the charter school sector are set out in other statutes, in regulations, and in the standardized elements of charter contracts. Charter schools are held, in short, to significant (indeed heightened) academic performance expectations; a host of student-and-parent rights and civil rights laws; standards for public teacher qualifications; general public sector financial, public meetings, and public records rules; and standards for sound school governance. Every domain of charter school operation is subject to public standards, often in elaborate detail.

In addition, charters are measured against outcomes; and that set of standards changes outcomes for students. A wide-ranging study by Stanford University focuses on student subgroups that often struggle with achievement. The study found that: "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]."[27]

[27] 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 Massachusetts Institute of Technology study focused on English language learners and students with disabilities in Boston found both these groups of students in charter schools 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).

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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—articulated to good effect for all students. The many standards charter schools must, in fact, follow, and especially the outcome expectations, give rise to this overall positive impact on public education and student performance.

In short, as measured by the many elaborate public education, civil rights, teacher qualification, public meetings and records, public audit, and other standards applied to charter schools, or as measured by the discipline imposed by outcome-based standards, and certainly under both, charters are subject to ample public standards that dispel any concern for standard-less delegation.

2. Charter Schools Are Public

Delegation of public authority can run from one public body to another, or (as in arbitration under collective bargaining agreements) from one public body to a private body. The second is generally subject to closer judicial scrutiny. The Plaintiffs err in locating charter school policy as falling in the second, rather than the first, category.

In ordinary American 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 that charter school cannot be — no matter how often Plaintiffs say it — private. First, a robust line of United States Supreme Court decisions has sharply limited the ability of public authorities to regulate true "private" schools. These decisions upheld a private school's "right to teach" state-disapproved content and "the right of parents to engage" the school for that purpose;[28] found efforts to impose a specific course of public instruction

[28] *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). In *Meyer* the Court largely adopted what had been the dissenting position of the first Justice Harlan in *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

(Footnote continued next page)

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violated the Fourteenth Amendment liberty rights of parents who elected private schools;[29] and condemned close regulation of the pedagogy, organization and performance of private schools.[30] These cases are at the root of the constitutional right of privacy and individual autonomy, and remain good law.[31] The body of regulations reviewed in Section (II)(A)(2), above, would simply be impossible to apply, constitutionally, to "private" schools.

Plaintiffs may try to drive a wedge between the "school" that is a charter and the "organization" that is a charter. This is nonsense. Washington could not require a "private" school organization to comply with public meetings and public records laws. Washington does not purport to require every nonprofit corporation to follow these purely public expectations. Charter school *organizations* have these *organizational* obligations because they are public. The "organization" that *is* a charter school follows these obligations because its entire right of existence, all its powers, all its obligations, are part of it *being* a public school. No doubt Plaintiffs would respond that charters cannot be *organizationally* public because their governance is not the product of a public election. But Anglo-American law has recognized unelected public bodies back into the very beginnings of the common law: juries are not elected. Beyond that many arms of the modern administrative state have significant independence. The members of the Federal Reserve serve a *15-year* term. They are, in effect, wholly insulated from responsiveness to the electorate (directly or indirectly) for seven full two-year electoral cycles. And federal judges have lifetime appointments.

Charter schools have a distinctive form of responsiveness to electoral pressure (discussed further below), but the lack of direct election or direct appointment is not the

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learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government . . . can legally forbid their coming together . . . for such an innocent purpose.").

[29] *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.").

[30] *Farrington v. Tokushigue*, 273 U.S. 284, 298, 47 S.Ct. 406, 71 L.Ed. 646 (1927).

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

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measure of what is truly "public." That the organization that is a charter school is held to extensive public standards — educational, financial, and organizational — and judged against them; can be closed by public authority (with wind-up requiring return of any publicly-funded assets to the public treasury);[32] and, indeed, that the entire sector exists at legislative grace, demonstrates beyond peradventure that charter schools are "public" *organizations* as that term is commonly understood.

3. Public Recourse Exists

Plaintiffs devote a significant portion of their non-delegation argument to describing the travails of First Place Scholars charter school. First Place Scholars was a private school serving a very high risk student population. It converted to being a Charter Commission charter and immediately began to struggle to meet the public obligations of a charter school. It was at risk of being closed by the Commission, which itself encountered two of the deep dilemmas in performance-based chartering: how to properly measure performance of schools with highly disproportionate at-risk populations of students; and how to engrain public sector expectations in a "conversion" of a pre-existing private school.[33] Given these complexities, the Commission declined to close First Place Scholars in knee-jerk fashion. But the Commission issued an extensive 16-page corrective action letter outlining in detail the steps First Place would need to take to perform appropriately as a public school.[34] The Washington Supreme Court decision striking down the Charter Schools Act then intervened. First Place continued operations pending developments in this litigation, but then elected not to continue charter status under the revised Act. At that point, First Place Scholars becomes the *only*

[32] RCW 28A.710.210(2).

[33] On the second, a number of states have simply prohibited converting private schools into charters. *See, e.g.*, Colo. Rev. Stat. § 22-30.5-106(2). While this solves one problem, it creates an irrationality: ruling out individuals who have highly relevant educational experience as the only class of persons that cannot seek to create a charter school.

[34] *See* Exhibit 1, attached hereto.

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existing Washington public charter school to end operations as a public school. In the fall of 2016, again a private school, First Place Scholars returned to operating a private early childhood learning program, but ended all operations in grades 2 through 5.[35]

In short, the Plaintiffs' leading example is a school that was headed toward a challenging course of improvement or closure under the Act itself. And First Place, knowing exactly what the Commission expected of it, elected to cease operations as a public charter school when every other charter school remained open. With First Place, as with charters around the county, failure to live up to proper expectations brings consequences, not as an exercise in satisfying a taste for schadenfreude, but to bring schools up to appropriate public standards and, if they are unable to respond constructively, close them.

NACSA's annual survey of charter school authorizers confirms that authorizers can and do close charter schools. During the 2012-13 school year, 11.6% of charter schools that were facing a renewal decision were closed.[36] Many authorizers use closure as a tool to police school quality. As an example, District of Columbia authorizers have closed 40 charter schools.[37] The District's independent chartering board closed 15 schools from 2010 to 2013. No fewer than eight of these 15 closures were based on academic performance.

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 charters schools, individually or as a whole, does not satisfy the public, it has 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

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[35] See http://www.seattletimes.com/seattle-news/education/states-first-charter-to-go-back-to-being-a-private-school/ and http://www.seattletimes.com/seattle-news/education/first-place-scholars-cuts-back-shedding-grades-2-5/ (both accessed 12/13/2016).

[36] http://www.pageturnpro.com/National-Association-of-Charter-School-Authorizers/58053-The-State-of-Charter-School-Authorizing-2013/index.html #14, p. 12, Table 1.6 (accessed 9/2/2014).

[37] http://www.dcpcsb.org/data/files/charter%20school%20closure%203%2011%202013.pdf (accessed 9/2/2014).

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public to shape charter school policy in that district at the ballot box. With the Charter Commission, each Commissioner is subject to political accountability through a democratically elected appointing official or body. 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 entirely. As the New Hampshire Supreme Court expressed it:

> 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.[38]

In short, charter schools are "creatures of the state" from which (subject only to observing the laws constituting a particular body), the state may "withhold, grant or withdraw powers and privileges, as it sees fit."[39] The public has recourse.

4. Conclusion

There are thus at least six major flaws, most by themselves fatal, in Plaintiffs' argument: (1) it cannot be squared with Washington collective bargaining law and practice; (2) it ignores the crucial role of the authorizer and that the core "delegation" here effectively stops at the level of fully-politically-accountable authorizers; (3) it assumes Section 220 is a constitutional enactment when *McCleary* teaches that this Section is "not etched in constitutional stone"; (4) it rests on the false assertion that charters are not subject to adequate standards, and in particular the squarely false claim they are not subject to Section 220; (5) it rests on the false assertion that charter schools are "private"; and (6) it ignores that the public

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

[39] *Trenton v. New Jersey,* 262 U.S. 182, 187, 43 S.Ct. 534, 67 L.Ed. 937 (1923) (citing 1 Dillon MUNICIPAL CORPORATIONS, 5th ed., § 98, p. 154, *et seq.*). 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, 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).

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has more than ample recourse for controlling charters: up to and including closing them entirely.

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

As this brief is primarily devoted to the non-delegation issue, we will not argue this issue at length, but only mention one implication of the non-delegation argument for the issue of constitutional "uniformity." As with non-delegation, this argument is supremely ironic coming from the WEA, which participates in the highly non-uniform practice of collective bargaining. Again, collective bargaining influences a host of issues bearing on governance and management of public schools. And:

> 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. The collective bargainers cannot foresee all of the problems that are sure to arise and cannot provide for the innumerable details of the future administration of the bargain.[40]

Yet by its nature collective bargaining is applicable in some districts and some times, and not in others; and each collective bargain has the potential, frequently 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 non-delegation doctrine, that collective bargaining has been found lawful and proper in Washington in a robust form and for many years confirms that the same is true of charter schools.

[40] 6A Arthur Corbin, CONTRACTS, § 1420, at 343 (1962).

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III. CONCLUSION

The Charter Schools Act involves:

1. highly structured delegation to authorizers —
2. under public standards (including Section 220) in turn binding —
3. a public body (the charter school) that —
4. shares almost no features with private schools and is —
5. itself subject to closure and dissolution by politically responsible officials.

No aspect of the Plaintiffs' non-delegation argument is sound. Indeed, a significant portion of that argument rests on mis-stating and distorting the very words of the Charter Schools Act. And consistent with the fully constitutional practices of public sector collective bargaining, neither the non-delegation argument nor the uniformity argument can be maintained.

The Act should be found constitutional.

RESPECTFULLY SUBMITTED this 20th day of December, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By: _____
Gregory M. Miller, WSBA 14459

KUTZ & BETHKE, LLC

By: _____
William P. Bethke, *pro haec vice* pending

Counsel for Amicus Curiae National Association of Charter School Authorizers

I certify that this memorandum contains 5688 words, in compliance with the Local Civil Rules.

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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 now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date stated below, I caused to be delivered in the manner indicated a true and correct copy of the document this Certificate is attached to on the following counsel and parties:

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DATED this 20th day of December, 2016.

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WASHINGTON STATE
Charter School Commission
STUDENTS • INNOVATION • TRANSPARENCY

March 31, 2015

Board of Directors
First Place
172 20th Street
Seattle, WA 98112

RE: Letter of Concern

Dear Board Members:

This letter places First Place, a Washington State based public benefit nonprofit (First Place), on notice that the Washington State Charter School Commission (Commission) has reason to believe that First Place has committed material and substantial violations of material provisions of governing law and First Place's contractual obligations.

If these concerns are founded, First Place has deprived students of: (1) their constitutional right to a basic education, (2) their rights under federal law, and (3) the quality program that was authorized by the Commission and that First Place promised to provide to the educationally vulnerable children in its care. These newly identified concerns have occurred throughout the school year, including while First Place has been on probation and subject to corrective action for, among other things, failing to provide special education services to its students. Because these possible deficiencies directly impact the students at First Place and, if founded, indicate that they are not receiving the education to which they are legally entitled, the Commission has reached out to a number of entities that are poised to provide First Place with resources that will help it provide its students with the education to which they are entitled. The Commission strongly encourages First Place to immediately take advantage of the support and resources that are available to you.

In an effort to ensure that the Commission's ultimate decision regarding these perceived problems is based on accurate information, First Place has an opportunity to supplement the information previously provided to the Commission. Below, the Commission provides First Place with a detailed discussion of the perceived problem and identifies explicit information that it requires to render its decision. This is done in service of First Place and will help to ensure that any decision is based on an accurate understanding of the facts.

First Place has 10 working days within which to respond, in writing, to the perceived problems identified in this letter. *See* WAC 108-40-030(4)(b).

Failure to provide this information, or any other information requested related to this investigation, will force the Commission to render a decision about the continued operation of First Place on the limited record presented and the information/documentation made available within the established timeline.

Background

On November 15, 2013, First Place submitted an application to operate a charter school. The application included a Statement of Assurances signed by Sheri Day, acting as a duly authorized representative of First Place. After the application was approved, First Place and the Commission negotiated a contract that was executed on April 24, 2014, and became effective on September 3, 2014, after First Place informed the Commission that it had satisfied all of the conditions precedent to opening.

On December 16, 2014, First Place was placed on probation, resulting in increased monitoring and the requirement that First Place successfully satisfy its obligations under the Corrective Action Plan. There were several deficiencies that First Place was required to address in the Corrective Action Plan, including First Place's lack of a qualified special education employee or contractor and its failure to provide its students with special education services required by law. The Commission hired a consultant to assist First Place identify students who had not received legally required special education services and develop a plan to provide compensatory services.

First Place submitted a draft compensatory education plan to the Commission on January 30, 2015. The Commission continues to work with First Place to finalize the terms and conditions of the Corrective Action Plan. Furthermore, the Commission continues to monitor First Place to ensure its compliance with its ongoing obligation to enroll and serve all special education students and provide a "free and appropriate education" as required under the charter contract, state and federal law. *See* Charter Contract, Provision 4.4.9 (establishing school must comply with the Individuals with Disabilities Act and Section 504 of the Rehabilitation Act of 1973); s*ee also* Charter Contract, Provision 4.9.1 (establishing school's enrollment policy cannot discriminate based on special education needs).

The Commission acknowledges the efforts taken by First Place to rectify its prior special education noncompliance; nevertheless, the Commission continues to evaluate First Place's capacity to appropriately serve students with disabilities during the rest of this school year and going forward.

Unfortunately, the Commission became aware of additional concerns beyond those

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related to special education enrollment and services. As a result the Commission sent a Letter of Inquiry to First Place on February 2, 2015, requesting information and/or documentation regarding ***new*** allegations concerning:

- Deficiencies in services being provided to English Language Learners (ELL).
- Failure to adhere to the essential design elements of First Place's education program, or, more clearly, failure to satisfy material terms of its education model as First Place detailed and committed to in its charter contract.
- The unlikely financial viability of the school, threatening the school's ability to continue its operation during this school year and future school years.
- Organizational and governance deficits underscoring First Place's board's failure to support/oversee the school in an effective, contractually- and legally-compliant manner.

Making matters worse, the Commission understands First Place knew of these new deficiencies and failures on December 10, 2014, when it received a report issued by SchoolWorks alerting First Place to multiple examples of its contractual and legal noncompliance. Not only did First Place fail to share this third-party report with the Commission, but First Place also disregarded its duty to notify the Commission of the failures documented in the SchoolWorks report—a violation, in and of itself, of explicit provisions of First Place's charter contract. *See* Charter Contract, Provision 4.7.12 (requiring immediate notification of any known condition that causes First Place's operations to vary from the terms of the contract, federal and state law).

First Place's failure to inform the Commission of these documented deficiencies has begun to erode the Commission's confidence in First Place's capacity to identify, acknowledge, and remedy its noncompliance. Furthermore, in most instances First Place's response to the Commission's February 2, 2015 Letter of Inquiry validated and amplified the Commission's concerns about the school's performance and legal compliance.

This Letter of Concern provides First Place one final opportunity to respond to the concerns that have been identified. In an effort to help First Place provide the Commission with the necessary information, the Commission has set forth specific information First Place must provide in response, without limiting First Place's ability to provide any additional information it believes relevant.

Academic and Educational Program Deficits

The possible academic and educational program deficits identified below give rise to significant concern for the educational welfare of the students attending First Place. This school serves at-risk youth; many of whom require and are legally entitled to specific

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interventions and services in order to ensure their growth and academic success.

The deficits, if confirmed, place these at-risk students at even further disadvantage, deprive them of the education to which they are lawfully entitled, and illustrate First Place's failure to offer key components of the educational program it was authorized to operate. These perceived deficits are particularly troubling given that First Place currently is on probation (and has been since December 2014) and is subject to corrective action for failing to satisfy its contractual, legal, and educational obligations to serve students with disabilities.

Perceived Problems:

- **Failure to comply with federal and state law concerning ELL.**
- **Failure to satisfy contractual obligations concerning ELL.**
- **Failure to implement ELL program components established in its charter school application.**

Washington State charter schools: (1) cannot discriminate based on national origin, (2) are required to provide students with a basic education, (3) comply with state and federal laws governing English Language Learners (ELL) education, and (4) "provide resources and support to English language learners to enable them to acquire sufficient English language proficiency to participate in the mainstream English language instructional program." *See* Charter Contract, Provision 4.9.1, Provision 4.4.2(a) and Provision 4.4.8. Charter schools also are required to "employ and train teachers to provide appropriate services to English language learners." Charter Contract, Provision 4.4.8.

ELL students have the right to meaningfully participate in their educational programs and services under both federal and state law. *See* Title VI of the Civil Rights Act of 1964; Equal Educational Opportunities Act of 1974; RCW 28A.150.220(3)(e). ELL students who require transitional bilingual instruction also possess rights as part of Washington's constitutionally mandated right to basic education. *See* Const. art. IX, § 1, 2; and RCW 28A.150.220(3)(e).

Accordingly, charter schools must identify ELL students in need of assistance in a timely manner, provide language assistance services that give ELL students an equal opportunity to meaningfully and equally participate in their education, and have sufficient staff and resources to effectively implement ELL programs.

First Place was aware of its legal obligations when it submitted its application to open a charter school, it expressed an understanding of what ELL students need to achieve academic success, and identified with specificity its methods for identifying and meeting the needs of ELL students who enrolled in First Place.

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The Home Language Survey is the first step in identifying ELL. In its application First Place identified the following components of its program for ELL identification, instruction, monitoring, and evaluation:

- A home language survey conducted during "intake, before the child starts school."
- Obtain records from the child's previous schools.
- Parent interviews when the home language survey indicates that a child may be an ELL student.
- Administration of the Washington English Language Proficiency Assessment (WELPA).
- Creation of an individualized Student Learning Plan for each student that includes an English Language Acquisition Plan (ELAP).
- Employment of an ELL-endorsed teacher and staff who work directly with the student.
- Review of the ELAP by the Collective Care Team at least yearly.

First Place also represented the following with regard to staffing and training:

- It had one teacher with an ELL endorsement.
- Classroom teachers will be required to include ELL training in their professional development.
- The school's lead teacher has received training in Guided Language Acquisition and Development (GLAD).
- Classroom teachers will regularly use authentic assessments to monitor and evaluate the progress and success of ELL students.
- The results of these assessments will be addressed each trimester as the Student Learning Plans are updated.

The Commission requested ELL student assessment results in its February 2, 2015 Letter of Inquiry. Until the Commission made this request, First Place had not informed the Commission of its failure to satisfy its contractual and legal obligations to serve and support ELL.

First Place provided no assessment results in response and stated "[t]o date there has been no evidence of any calculation completed to illustrate the capacity of our ELL students in our school." The response was dated February 2015; school has been in session since September 3, 2014. Therefore, it appears First Place did not implement the components of the ELL program pledged in its application, and has failed entirely to satisfy its obligations under its charter school contract as well as state and federal law.

Moreover, during the six months of operation which ELL students were not identified or served, First Place chose not to notify the Commission of its known failure to comply with

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its contract and with state and federal law, once again violating its contractual notification obligations. *See* Charter Contract, Provision 4.7.12(b) (requiring immediate notification of any known condition that cause First Place's operations to vary from the terms of the contract, federal and state law).

Equally troubling, during its planning phase First Place projected 14.7% of its students would be ELL and 4.9% would qualify as transitional bilingual. Accordingly, First Place has been receiving funding based on these assumptions. However, by First Place's own admission, these funds have not been allocated to serving ELL students.

The financial documentation supplied by First Place itself underscores the gravity of this perceived problem. As revealed by the financial documents First Place submitted in response to the Commission's February 2, 2015 Letter of Inquiry (facts which were subsequently confirmed by the Office of Superintendent of Public Instruction), First Place has been receiving and spending its transitional bilingual apportionment dollars since September 2014; but admits it has not provided services to those students to date and only just began identifying students who should have been identified at the start of the school year. It is unclear how these transitional bilingual funds have been spent, and it is of grave concern to the Commission that such funds have been received and potentially misallocated.

First Place's failure to serve another group of highly vulnerable students (and failure to notify the Commission of such), after being placed on probation for, among other things, the school's failure to serve special education students, significantly increases the Commission's growing concern and vastly diminishes the Commission's confidence that First Place can comply with its contractual and legal obligations to provide all students with the basic education components to which they are entitled. It greatly troubles the Commission that a pattern of noncompliance with respect to serving all students, especially educationally vulnerable populations, may be emerging at First Place.

First Place is required to respond in writing to this perceived problem within 10 days. First Place's response should provide complete information, documentation, and explanations regarding the services it has, or has not, provided to ELL students since September 3, 2014, and the monies spent to provide such services.

Specifically, First Place must answer each of the following questions and provide documentation and information that supports the answer. The following questions link directly to program components described by First Place in its charter application:

- Did First Place give any students a home language survey as part of its pre-opening intake?

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- Did First Place ever request or obtain records concerning ELL from the students' previous schools, and if yes, when were they requested/obtained and how were they used by First Place?
- Has First Place conducted parent interviews when the home language survey indicated a child may be an ELL, and if yes, when?
- Has First Place administered the Washington English Language Proficiency Assessment (WELPA), and if yes, when?
- Has First Place created of an individualized Student Learning Plan for each student that includes an English Language Acquisition Plan (ELAP), and if yes, when and was it implemented with fidelity?
- Does First Place contract with or employ an ELL-endorsed teacher and/or staff who work directly with students? (List each individual and dates of employment or contract.)
- Did First Place have a teacher with an ELL endorsement from the time of it began operations as a public school (September 3, 2014) to present? (List each individual and dates of employment or contract.)
- Have classroom teachers been required to include ELL training in their professional development and/or received such training, and if yes, when?
- Did/does the school's lead teacher receive training in Guided Language Acquisition and Development (GLAD), and if yes, when?
- Why didn't First Place communicate its failure to identify and serve ELL students to the Commission?
- How did First Place spend the funds it received to serve ELL students?

Perceived Problems:

- **Failure to implement assessments designed to monitor and improve student performance.**
- **Failure to discharge essential design elements of the approved educational program.**

Monitoring and assessment is an essential design component of the educational program detailed in First Place's charter school application and the resulting contract. First Place pledged to conduct ongoing progress monitoring and assessment to measure both academic and social-emotional growth. Moreover, the monitoring and assessment was of particular importance to First Place's educational program because it would have enabled First Place to adjust scope and sequence to better meet the needs of its targeted students—those who have experienced multiple traumas. The education program designed and committed to by First Place requires enrollment, weekly, monthly, periodic, and quarterly assessments in order to meet students' needs and deliver the educational program

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outlined in its application and incorporated into the charter contract.

In its February 2, 2015 Letter of Inquiry, the Commission requested confirmation and evidence proving First Place was meeting the following monitoring and assessment obligations, which were created in its application and agreed to in its contract:

- Enrollment assessments.
- Weekly monitoring of academic growth to demonstrate acceleration of each student's academic performance.
- Interim reading and math assessments.
- Quarterly assessment of social-emotional growth.
- Meeting minutes indicating intervention strategies were developed and implemented using information obtained from the assessments.

In response to the Commission's request, First Place did not provide adequate, meaningful documentation or information to allow the Commission to confirm each student's academic performance and social-emotional well-being has been monitored as required by the charter contract. Instead, First Place provided documentation that was inconsistent, incomplete and, in many instances, void of information that would support a finding that First Place has been meeting its obligations. In the documentation that was provided, First Place often provided summary information that was insufficient to enable the Commission to ascertain whether its specific legal obligations have been/will be satisfied. More specifically:

- With regard to math assessments, First Place only provided "placement tests" results with the date range for the assessment being February 6-12; no evidence of interim assessments was provided.
- With regard to reading assessments, First Place provided no copies of student interim reading assessment results. First Place provided copies of myLexia Auto Placement reports for students in grades K-5. The reports contain student results for reading as a content area; specifically word recognition and comprehension.
- No documentation was provided regarding student enrollment assessment results in any other content areas.
- The number of students for whom the reports were provided does not align with the school's September enrollment; therefore, it is unclear if enrollment assessments were administered for all students.
- No documentation was provided regarding quarterly student assessment results. Instead, First Place provided trimester report cards. Report cards and student assessment data have a different purpose and there is no data regarding student assessments.

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- The trimester report cards reveal inconsistent reporting from teacher to teacher and there were fewer report cards provided than there are students who are purportedly attending First Place.
- Finally, there is a lack of consistency regarding the Social-Emotional Reports teachers are providing students and families.

Absent this monitoring and assessment, First Place cannot create interventions designed to meet the needs of the educationally vulnerable students who it sought, and was approved, to serve. It cannot adjust the scope and sequence of instruction nor can it use data to drive differentiated teaching and learning to ensure its students are progressing academically. Not only does the information provided to date suggest First Place is in clear violation of its commitments and obligations under its charter contract, but by failing to perform the monitoring and assessments set forth in its charter application and contract, the school is also failing the very students it recognizes may be at-risk for academic failure, students who First Place knows (because of its extensive and longstanding work in the Seattle community) need additional support and tailored, individualized educational services.

As a result, the school is being notified that a perceived problem exists at First Place regarding satisfaction of its obligations under the specific provisions of its charter contract that require monitoring and assessment as critical facets of its educational program. *See* Charter Contract, Provision 4.4.1b and Provision 4.4.1c (setting out the school's goals and objectives, which were drawn directly from First Place's application.) Moreover, as discussed previously, First Place also carries the affirmative duty to notify the Commission of any failure to perform a material term of its contact. *See* Charter Contract, Provision 4.7.12(b) (requiring immediate notification of any known condition that causes First Place's operations to vary from the terms of the contract, federal and state law). Therefore, once again, not only has First Place failed to satisfy its contractual and legal obligations, but it has also failed to notify the Commission about its failure, ultimately further eroding the Commission's confidence in First Place's capacity to remedy its growing pattern of noncompliance.

First Place is required to respond in writing to this perceived problem within 10 days. First Place's response should provide complete information, documentation, and explanations regarding the monitoring and assessment that has, or has not, occurred beginning with enrollment to the present.

The following questions and requests link directly to the goals and objectives First Place described in its charter application and committed to in its contract. First Place must respond to each item and provide documentation and information that supports the answer:

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- Whether enrollment assessments occurred for every student, the dates on which they occurred, and copies of the assessment results.
- Whether weekly monitoring of student academic growth is occurring, when it began, whether it has occurred every week, how it is documented, and how it is used.
- What systems and processes have been implemented since the beginning of school to facilitate teachers' efforts to monitor student academic growth? Information provided should include an explanation of how teachers are assessing the impact of their instruction on student learning and how their instruction is changing as a result of weekly student monitoring.
- Whether First Place has been monitoring progress of students' social-emotional growth through a Social-Emotional Report, how often it has occurred, and how it is used and documented.
- Identify the dates and times that academic progress was reviewed and the school developed or implemented intervention strategies using information obtained from the assessments.
- Copies of all student exit forms.

Financial Deficits Implicating the School's Financial Viability

The possible financial deficits identified below give rise to significant concern about the financial viability of First Place. The importance of financial viability cannot be overstated. If the school lacks financial viability, the school risks abruptly closing, leaving its educationally vulnerable, at-risk students, who already have experienced multiple traumas, in the even more vulnerable position of scrambling to find another school where they can complete their school year. Moreover, as a steward of public funds the school must be fiscally responsible and comply with generally accepted accounting principles, as well as its own internal accounting procedures. *See* RCW 28A.710.040(2)(e); Charter Contract, Provision 4.12 (School Finance); Provision 4.2.8 (Non-comingling and accounting for public funds and assets); and Provision 4.13 (Annual Budget requirements including a prohibition on expenditures and inter-fund transfers in excess of available revenues and beginning fund balances). Therefore, the school must concretely demonstrate financial viability, in part, by demonstrating adherence to appropriate and applicable accounting practices.

In its February 2, 2015 Letter of Inquiry, the Commission requested information to ascertain whether First Place is financially viable. Specifically, the Commission requested information about the significant decrease in enrollment, current financial status reports, and First Place's most recent bank account statements. The Commission also requested assurances that First Place is financially viable.

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The information provided reveals that the school's current budget does not align with the budget that was submitted as a preopening condition on July 31, 2014. In addition, the current financial status report projects a year-end deficit of $280,230 and includes a $750,000 fundraising goal of which only $6,477 has been realized. First Place also has experienced significant loss of student enrollment. As a result, in addition to the contemplated year end deficit identified above, First Place will be obligated to reconcile with the Office of Superintendent of Public Instruction for approximately $266,964 in allocation overpayment. Additionally, the Commission has information that First Place has not paid, or is more than 60 days past due on payments, to a number of vendors.

Although the Commission recognizes the first year of operation may present cash-flow challenges to any school, the Commission also expects every school to demonstrate financial responsibility and creativity to find and secure additional funds as needed. With respect to First Place, the Commission was told (in the school's charter application) the school would have access to two substantial pools of resources to ease any financial strain encountered through the school's early years of operation: (1) a $3.2 million endowment with approximately $100,000 in annual earned interest, and (2) $9 million in building assets owned free and clear by First Place. *See* Charter Contract, Section 3, Budget Narrative, p. 371-72.

These assets were pledged to support the school's operation. The Commission considered and approved First Place's charter application based on this representation; in fact, it was the commitment of these extra resources by the charter-holder that provided the Commission additional assurance that First Place would be able to accommodate any financial struggles experienced in the school's early years. Now, given that such financial struggles have arrived, the Commission is concerned that these abundant, previously-pledged assets seem to no longer be available to the school or are now characterized as an expense (e.g., lease between First Place and the newly created First Place Scholars Charter School).

Additionally, in response to the Commission's February 2, 2015 Letter of Inquiry, First Place provided only a recent bank account statement for a Wells Fargo bank account in the name of First Place Scholars Charter School. However, two other bank accounts are referenced in board meeting minutes provided to the Commission in response to the February 2, 2015 Letter of Inquiry. The August 12, 2014 board meeting minutes reference an interest bearing savings account, but no information was provided by First Place regarding this account in its recent response to the February 2, 2015 Letter of Inquiry. In addition, the October 28, 2014 board meeting minutes reference a Bank of America bank account and "other financial accounts owned by First Place, First Place Scholars and First

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Place Family Services," but no information was provided by First Place regarding these accounts in response to the February 2, 2015 Letter of Inquiry. First Place must provide current bank statements for all of its accounts.

Finally, in response to the Commission's request for assurances that First Place has the financial capacity to operate the school as required under the charter contract, and meet its financial and legal obligations for the remainder of the school year, or, alternatively, a statement confirming that First Place lacks such capacity, First Place provided a document containing a conclusory statement asserting the school has the financial capacity to meet its financial and legal obligations for the remainder of the school year.

First Place identified the following funding streams without linking them to concrete numbers to demonstrate its financial health or viability:

- State apportionment dollars
- Special education reimbursement
- Title I reimbursement
- USDOE grant
- Transportation
- Donations - First Place Scholars receives donations from First Place Incorporated which has a substantial endowment

This information is insufficient. Conclusory statements and vague descriptions of potential revenue streams do not provide adequate evidence of First Place's financial viability. Rather, it is quite the opposite. The lack of information and documentation heighten the Commission's concern about First Place's financial health and viability, and raise substantial doubt about First Place's ability to satisfy its financial and legal obligations under state statute and its charter contract.

With such limited information, the Commission is not able to verify the representation that First Place has adequate funds to keep the school open for the remainder of the school year. Additionally, based upon the updated budget First Place submitted per the February 2, 2015 Letter of Inquiry and the unabated possibility that First Place may run out of money before the end of the school year, there is grave concern that First Place will not be able to meet its legal obligations for the remainder of the school year. To illustrate the potential risk and harm ahead, a sampling of the legal obligations that may be unsatisfied by First Place due to its dwindling budget include:

- Inability to pay its teachers and staff.
- Inability to maintain all required insurance.

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- Inability to pay student transportation costs.
- Inability to meet its legal obligations under McKinney Vento and IDEA.

And notably, this list is by no means an exhaustive one.

Furthermore, with First Place developing and implementing a Special Education Compensatory Service Plan as required by its Corrective Action Plan, it has obligations to provide substantial special education services that could be costly; calling into further question the school's ability to meet its financial and legal obligations for the remainder of the school year.

Moreover, it has come to the Commission's attention that First Place never purchased the performance bond required by its charter contract. *See* Charter Contract, Provision 4.5.1(e)(2). The purpose of this performance bond was to safeguard the public funds received by First Place in the event that First Place failed to meet its material obligations under the charter contract. This failure is particularly troubling given that First Place has already been found to have breached the material obligation of providing special education services to its students, which must be remedied at significant cost, and now First Place is subject to scrutiny for several other material violations.

Based on the foregoing, the Commission doubts the ability of First Place to successfully reach and maintain compliance with its financial and legal obligations. Moreover, the Commission has no evidence to demonstrate that First Place will have the financial ability to remain open until the end of the school year or beyond. Accordingly, the Commission issues this notice of perceived problem.

First Place is required to respond in writing to this perceived problem within 10 days. First Place's response should provide complete information, documentation, and explanations specific to its current financial status.

First Place also must provide the following:

- A full staffing plan of the school both at the time the original budget was created and currently.
- Current balance sheet.
- Current accounts receivable and accounts payable reports for each vendor.
- The most recent bank account statements for all accounts associated with the Washington nonprofit corporation First Place.
- Confirmation that First Place obtained and is maintaining the insurance and bonds as required by its contract; any performance bond must be retroactive and cover

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First Place's pending and previous breaches.

- Projected expenses associated with First Place's special education compensatory service plan and planned Summer Scholars Program.
- A detailed response with supporting documentation regarding how First Place plans to balance its budget, remain open for the remainder of the school year, and reconcile with OSPI the overpayment it received during its first year of operation based on its original projected enrollment, without negatively impacting students who currently attend First Place.
- Identify individuals with knowledge or documentation regarding the bank accounts associated with the Washington nonprofit corporation First Place with whom the Commission may follow up.
- Details for each funding stream listed with projected revenues, current funds received, and projected revenues for the remaining months of the school year.
- Information and documentation showing that projected revenues are not merely speculative.
- For the endowment that is referenced, First Place must provide a detailed report regarding the endowment's current balance and the amount that is accessible and available to be used for the school.
- Identify individuals with knowledge or documentation regarding the history and current status of First Place's endowment with whom the Commission may follow up.
- Identify individuals with knowledge or documentation regarding First Place's financial capacity.
- List all outstanding bills or debts, when they were incurred, when payment is due, and to whom payment is owed.

Organizational Deficits

The importance of Board governance already has been demonstrated during this school year. The Board has final authority for the academic, financial, and organizational performance of First Place. The Board ultimately, and in the eyes of the law, carries full responsibility for ensuring compliance with the charter contract. *See* RCW 28A.710.030; Charter Contract, Section 4.2, Governance.

The items detailed in this notice raise concerns about First Place's organizational capacity to satisfy its legal obligations. Additionally, it appears that First Place may be changing its structure or affiliations in a way that materially impacts its financial status and reflects a departure for the structure that existed at the time of application. First Place is the nonprofit corporation that submitted an application to the Commission and qualified as a public benefit nonprofit entity under the Charter Schools Act. *See* RCW 28A.710.010(1); Charter Contract, Appendix 2. First Place is the charter holder and First Place's assets and

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funding sources were identified in the application as available to the school, including a specific statement that there would be no lease payments because the school already owned its building. Charter Contract, Appendix 9, Application, pp. 66-71 and Application Attachments 21 and 24. Yet, First Place now submits a backdated lease between itself and a newly created nonprofit corporation known as First Place Scholars Charter School. Additionally, First Place has demonstrated a pattern of noncompliance with its legal obligations and, possibly, a lack of financial oversight consistent with its own policies as well as its contractual obligations. This directly implicates the organizational capacity of First Place.

First Place is required to respond in writing to these perceived problems within 10 days. First Place's response should provide complete information, documentation, and explanations as follows:

- Explanation of the purpose and role of the newly created nonprofit "First Place Scholars Charter School," a list of that nonprofit's board members and that nonprofit board's governance policies.
- Minutes from the meetings in which it was decided to lease a facility not owned by the Washington public benefit corporation/nonprofit First Place.

Looking Forward

The Commission appreciates your immediate attention to the perceived problems detailed herein and will consider your response, and any other available information and evidence, to determine what steps are necessary to remedy these issues. Given the grave nature of these identified deficiencies, if they are confirmed, the Commission will have no choice but to take action, which could include revocation of First Place's charter contract. *See* RCW 28A.710.200.

As these concerns are vetted, the Commission cannot ignore the risk to the educationally vulnerable students at First Place, some of whom have already been deprived of special education services, and more whom may have been deprived of the services and educational program in the manner outlined above. We are confident you will agree that these students' needs are paramount.

Please contact me directly if you have any questions or concerns.

Sincerely,

Joshua Halsey, Executive Director, Washington State Charter School Commission

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