

1
2
3
4
5
6
7
8
9
10
11
12
13
14
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**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

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

Plaintiffs,

v.

STATE OF WASHINGTON,

Defendant.

NO. 16-2-18527-4 SEA

DEFENDANT STATE OF WASHINGTON'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. INTRODUCTION..... 3

II. STATEMENT OF FACTS..... 4

 A. Washington’s Public School System Provides a Wide Variety of Options for Students..... 4

 B. Washington’s Public Charter Schools Act Created Another Innovative Public School Option, Focused on Serving At-Risk Students and Subject to Rigorous Accountability..... 8

 C. The Legislature Changed the Funding Source for Charter Schools 14

 D. Procedural History 15

III. STATEMENT OF ISSUES..... 16

 1. Whether Plaintiffs’ uniformity claim must be dismissed because charter schools fit within Washington’s general and uniform system of public schools 16

 2. Whether Plaintiffs’ diversion claim must be dismissed because it is undisputed that charter schools are funded through Lottery revenue deposited in the Opportunity Pathways Account, and Plaintiffs’ speculation that this might change in the future does not state a justiciable claim 16

 3. Whether Plaintiffs’ delegation claim should be dismissed because the Legislature did not delegate its responsibility for defining the program of basic education and there are significant safeguards in place 16

 4. Whether Plaintiffs’ supervisory authority claim should be dismissed because the Superintendent of Public Instruction oversees charter schools in the same manner as other public schools 16

 5. Whether Plaintiffs’ article II, section 37, claim should be dismissed because the Legislature fully complied with that provision when it enacted the Charter Schools Act 16

IV. EVIDENCE RELIED UPON..... 16

V. ARGUMENT AND AUTHORITY 17

 A. To Prevail, Plaintiffs Must Show the Charter Schools Act is Unconstitutional Beyond a Reasonable Doubt, but the Legislature Has Broad Authority to Establish Educational Options Available to Washington Students 18

1	B. Public Charter Schools Do Not Destroy the General and Uniform Character of the Public School System	19
2		
3	1. The Washington Supreme Court has recognized that Washington’s system of public education must evolve over time to meet contemporary needs.....	19
4		
5	2. Like other innovative and specialized educational programs, public charter schools fit within Washington’s general and uniform system of public schools.....	20
6		
7	a. Article IX, section 2 does not mandate school board governance of all public school programs, and even if it did, some charter schools are governed by a school board, and all are ultimately accountable to at least one elected official.....	21
8		
9	b. Charter schools also offer constitutionally-uniform educational opportunities	25
10		
11	C. Charter Schools Are Constitutionally Funded From the Opportunity Pathways Account, Which Receives Revenue Only From Lottery Sales, and Thus They Do Not Divert Money Appropriated for Common Schools	29
12		
13	1. Charter schools are now funded solely from lottery revenue and not from any constitutionally restricted fund	29
14		
15	2. There is no constitutional prohibition against increasing general fund expenditures for higher education scholarships or early childhood education, but in any event Plaintiffs only speculate about what will happen in a future biennium, and their speculation cannot be a basis to hold the Act unconstitutional	32
16		
17	3. No unconstitutional diversion occurs when school districts serve as authorizers	36
18		
19	D. The Charter Schools Act Does Not Improperly Delegate the State’s Paramount Duty to Define Basic Education; It Requires Charter Schools to Provide the Legislatively Defined and Supreme Court Endorsed Program of Basic Education	37
20		
21	E. The Superintendent Supervises Public Charter Schools in Compliance with Article III, Section 22	40
22		
23	F. The Legislature Complied with Article II, Section 37 When It Adopted the Charter Schools Act in the 2016 Legislative Session.....	43
24	VI. CONCLUSION	45
25		
26		

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *Barry & Barry, Inc. v. State Dep’t of Motor Vehicles,*
81 Wn.2d 155, 500 P.2d 540 (1972)..... 37, 38

4 *Braam v. State,*
150 Wn.2d 689, 81 P.3d 851 (2003)..... 35

6 *Citizens for Responsible Wildlife Mgmt. v. State,*
149 Wn.2d 622, 71 P.3d 644 (2003)..... 44

7 *DiNino v. State ex rel. Gorton,*
102 Wn.2d 327, 684 P.2d 1297 (1984)..... 36

9 *Duval Cty. Sch. Bd. v. State Bd. of Educ.,*
998 So.2d 641, 241 Ed. Law Rep. 493 (Fla. 2008) 21

10 *Federal Way Sch. Dist. No. 210 v. State,*
167 Wn.2d 514, 219 P.3d 941 (2009)..... 20, 24, 25, 27

12 *In re Detention of Turay,*
139 Wn.2d 379, 986 P.2d 790 (1999)..... 18

13 *In re F.D. Processing, Inc.,*
119 Wn.2d 452, 832 P.2d 1303 (1992)..... 34

15 *Kucera v. Dep’t of Transp.,*
140 Wn.2d 200, 995 P.2d 63 (2000) 17

16 *League of Women Voters of Washington (LWV) v. State,*
184 Wn. 2d 393, 355 P.3d 1131 (2015)..... 14, 21, 29, 32, 36

18 *McCleary v. State,*
173 Wn.2d 477, 269 P.3d 227 (2012)..... 18, 19, 26, 38

19 *Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll.,*
81 Wn.2d 551, 503 P.2d 86 (1972)..... 18, 20, 21, 23

21 *NLRB v. Fruit & Vegetable Packers, Local 760,*
377 U.S. 58, 84 S. Ct. 1063 (1964)..... 34

22 *Northshore Sch. Dist. No. 417 v. Kinnear,*
84 Wn.2d 685, 530 P.2d 178 (1974)..... 20, 24

24 *Piepkorn v. Adams,*
102 Wn. App. 673, 10 P.3d 428 (2000) 17

25 *Pierce Cty. v. Bruno,*
62 Wn.2d 790, 384 P.2d 608 (1963)..... 22

26

1	<i>School Dist. No. 20, Spokane Cty. V. Bryan,</i> 51 Wash. 498, 99 P. 28 (1909)	22, 31
2		
3	<i>Seattle Sch. Dist. No. 1 v. State,</i> 90 Wn.2d 476, 585 P.2d 71 (1978).....	18, 19, 20, 23, 32
4	<i>State ex. rel. State Bd. for Vocational Educ. v. Yelle,</i> 199 Wash. 312, 91 P.2d 573 (1939)	31, 41
5		
6	<i>State v. Manussier,</i> 129 Wn.2d 652, 921 P.2d 473 (1996).....	44
7	<i>State v. Preston,</i> 84 Wash. 79, 146 P. 175 (1915)	39, 42
8		
9	<i>State v. Sanchez,</i> 177 Wn.2d 835, 306 P.3d 935 (2013).....	42
10	<i>Tommy P. v. Bd. of Cty. Comm’rs of Spokane Cty.,</i> 97 Wn.2d 385, 645 P.2d 697 (1982).....	19
11		
12	<i>To-Ro Trade Show v. Collins,</i> 144 Wn.2d 403, 27 P.3d 1149 (2001)	17, 35
13	<i>Tunstall ex rel. Tunstall v. Bergeson,</i> 141 Wn.2d 201, 5 P.3d 691 (2000).....	18, 19, 25, 27
14		
15	<i>United Chiropractors of Wash., Inc. v. State,</i> 90 Wn.2d 1, 6, 578 P.2d 38 (1978).....	37, 38
16	<i>Walker v. Munro,</i> 124 Wn.2d 402, 879 P.2d 920 (1994).....	35
17		
18	<i>Wynn v. Earin,</i> 163 Wn.2d 361, 181 P.3d 806 (2008).....	44
19		
	<u>Statutes</u>	
20	Laws of 1889-90, ch. XII, § 64.....	4
21	Laws of 1897, ch. 118, § 70.....	4
22	Laws of 1909, ch. 243.....	31
23	Laws of 1937, ch. 230.....	31
24	Laws of 1941, ch. 234.....	31
25	Laws of 2016, ch. 241.....	14
26	Laws of 2016, ch. 241, §123.....	15

1	Laws of 2016, ch. 36, § 501.....	35
2	Laws of 2016, ch. 36, § 501(3).....	15
3	Laws of 2016, ch. 36, § 516.....	35
4	Laws of 2016, ch. 36, § 517.....	15, 35
5	Laws of 2016, ch. 36, §§ 501-05	34
6	Laws of 2016, Sp. Sess., Ch. 36 (Supplemental Budget), § 501	30
7	Laws of 2016, Sp. Sess., Ch. 36 (Supplemental Budget), § 516	30
8	Laws of 2016, Sp. Sess., Ch. 36 (Supplemental Budget), § 517	30
9	RCW 28A.150.200	25
10	RCW 28A.150.200(2)(a)	9
11	RCW 28A.150.203	25
12	RCW 28A.150.203(8).....	10
13	RCW 28A.150.210	5
14	RCW 28A.150.220	10, 25, 26, 38
15	RCW 28A.150.230	43
16	RCW 28A.150.290(2).....	39
17	RCW 28A.150.300	25, 28
18	RCW 28A.150.305	7, 38
19	RCW 28A.150.380	30
20	RCW 28A.185.040	6, 24
21	RCW 28A.193 (incarcerated juveniles).....	38
22	RCW 28A.193.010	6
23	RCW 28A.195.010	13
24	RCW 28A.230	26
25	RCW 28A.250	7
26	RCW 28A.250.060(1)(a)	7

1	RCW 28A.300.040	42
2	RCW 28A.300.041(7).....	42
3	RCW 28A.300.165 (National Guard)	38
4	RCW 28A.305	43
5	RCW 28A.305.011(1)(a)(iii)	15
6	RCW 28A.305.130(7).....	15
7	RCW 28A.305.140	26
8	RCW 28A.310.010	6
9	RCW 28A.310.180	6
10	RCW 28A.310.200	6
11	RCW 28A.320.015(1)(a)	36
12	RCW 28A.320.035(1).....	36
13	RCW 28A.320.230	10, 26
14	RCW 28A.410.010	42, 43
15	RCW 28A.410.200(1)(a)	15
16	RCW 28A.410.200(7).....	15
17	RCW 28A.600.015	28
18	RCW 28A.600.022	28
19	RCW 28A.600.310	6, 24
20	RCW 28A.600.350	6, 24
21	RCW 28A.600.385	6, 24
22	RCW 28A.600.410-.490	25
23	RCW 28A.630.083	26
24	RCW 28A.655	28
25	RCW 28A.657	13, 40
26	RCW 28A.657.030	13

1	RCW 28A.657.050(2)(a)	13
2	RCW 28A.710	18
3	RCW 28A.710.010(1).....	8
4	RCW 28A.710.010(2).....	27
5	RCW 28A.710.020(1).....	8
6	RCW 28A.710.020(1)(a)	20
7	RCW 28A.710.020(1)(b).....	3
8	RCW 28A.710.020(4).....	12
9	RCW 28A.710.030(2).....	12, 39
10	RCW 28A.710.040(2).....	12
11	RCW 28A.710.040(2)(a)	9, 12, 28
12	RCW 28A.710.040(2)(b).....	10, 20, 25, 26, 28, 38, 44
13	RCW 28A.710.040(2)(c)	9, 20
14	RCW 28A.710.040(2)(f).....	28
15	RCW 28A.710.040(2)(h).....	13
16	RCW 28A.710.040(3).....	10, 12, 20, 27, 28, 38
17	RCW 28A.710.040(5).....	12, 25, 39, 41, 42
18	RCW 28A.710.040(b).....	27
19	RCW 28A.710.040(c).....	27
20	RCW 28A.710.050(3).....	27
21	RCW 28A.710.050(4).....	9
22	RCW 28A.710.060	37
23	RCW 28A.710.070	11, 42
24	RCW 28A.710.070(1).....	43
25	RCW 28A.710.070(3).....	25
26	RCW 28A.710.080	11, 25

1	RCW 28A.710.090	11
2	RCW 28A.710.100	11
3	RCW 28A.710.110	37
4	RCW 28A.710.130	38
5	RCW 28A.710.130(2).....	11, 26
6	RCW 28A.710.130(2)(p).....	28
7	RCW 28A.710.140	8
8	RCW 28A.710.140	11
9	RCW 28A.710.140(2).....	27
10	RCW 28A.710.140-.210	8
11	RCW 28A.710.160	11
12	RCW 28A.710.170	12
13	RCW 28A.710.180	11
14	RCW 28A.710.180(1).....	38
15	RCW 28A.710.180(2).....	38
16	RCW 28A.710.180(4).....	13, 38
17	RCW 28A.710.200	13, 38, 39
18	RCW 28A.710.200(3).....	39
19	RCW 28A.710.220	38, 39, 42
20	RCW 28A.710.250	13
21	RCW 28A.710.270	30
22	RCW 28A.710.290	13
23	RCW 28A.715	6, 24
24	RCW 28B.50.140.....	6, 24
25	RCW 28B.76.526.....	30
26	RCW 29A.150.203	38

1	RCW 41.56.0251	44
2	RCW 41.59.031	44
3	RCW 67.70.240(1)(c)	30
4	<u>Other Authorities</u>	
5	1998 Op. Att’y Gen. No. 6.....	41
6	Don Burrows, <i>The Economics and Politics of Washington’s Taxes</i> 91 (2013).....	4
7	Frederick E. Bolton & Thomas W. Bibb, <i>History of Education in Washington</i> 125 (1934).....	5
8	<i>Learning by Choice, Student Enrollment Options in Washington State</i> (rev. Aug. 2014)	5
9	<u>Rules</u>	
10	CR 56(c).....	17
11	WAC 108-20-070	26
12	WAC 108-20-090	11
13	WAC 108-30-020	12, 26
14	WAC 108-30-040	13
15	WAC 180-19-060	37
16	WAC 392-123-065	13
17	WAC 392-172-04080	6
18	WAC 392-172-04110	6
19	WAC 392-172A-04080 to -04110 (special education).....	38
20	WAC 392-502-020(1).....	7
21	<u>Constitutional Provisions</u>	
22	Const. art. II, § 37	4, 43, 44
23	Const. art. III, § 22.....	40, 43
24	Const. art. IX, § 2.....	20, 21, 29
25	Const. art. IX, § 5.....	31
26		

1 Const. art. VIII, § 1 29

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1 **I. INTRODUCTION**

2 Washington law has never required a cookie cutter approach to public education.
3 Instead, over Washington’s history, the Legislature has developed a wide variety of public
4 school programs to meet the needs of a diverse student population. Some public school
5 programs are operated directly by school districts, and some by other entities, from
6 community colleges to nonprofit schools for students with disabilities. Washington courts
7 have long interpreted the state constitution to require centralized statewide learning standards
8 that define what every child should know, while permitting instructional innovation and
9 ground-breaking programs.

10 In 2016, the Legislature adopted charter schools as “public schools that are an
11 alternative to traditional common schools.” RCW 28A.710.020(1)(b). Adding charter schools
12 to the already-diverse mix of innovative public school options does not alter the constitutional
13 uniformity of our broad public school system. It is simply a continuation of Legislative efforts
14 to ensure that the educational needs of *all* Washington students are met.

15 Plaintiffs conflate the broad category of “public schools” with the narrower category of
16 “common schools.” Plaintiffs then criticize *public* charter schools for failing to meet *common*
17 school restrictions. But under the current charter school law, charter schools are not common
18 schools and they need not meet the definition of “common school” that is established in case
19 law. In their efforts to engraft the common school requirement of local voter control onto
20 public schools, Plaintiffs jeopardize the robust menu of options offered through Washington’s
21 public education system.

22 The Legislature cured the constitutional defects in Initiative 1240 (I-1240) by financing
23 charter schools from the lottery-funded Opportunity Pathways Account. It is undisputed that
24 charter schools no longer receive constitutionally restricted common school dollars or general
25 fund dollars, and speculation that this might occur in the future does not state a justiciable
26 claim.

1 While charter schools, like other public schools and programs, are able to use
2 innovative instructional methods, there is no unconstitutional delegation of legislative
3 authority to charter schools because they are subject to extensive oversight and regulation.
4 Charter schools must operate under the same supervisory authority of the Superintendent of
5 Public Instruction as other public schools, and the Superintendent and school districts hold the
6 purse strings, controlling payments to charter schools. Finally, the adoption of the Act was
7 consistent with article II, section 37 because it is a complete act and did not mislead or
8 deceive members of the Legislature as to its effect.

9 It is Plaintiffs' burden to prove the Charter Schools Act unconstitutional beyond a
10 reasonable doubt. They have not. This Court should allow charter schools to develop
11 consistent with the will of the voters, and now the Legislature, with the understanding that
12 Plaintiffs can bring an as-applied challenge if a charter school violates the constitution in
13 practice.

14 II. STATEMENT OF FACTS

15 A. Washington's Public School System Provides a Wide Variety of Options for 16 Students

17 Washington's public school system is constantly evolving to meet the needs of a
18 changing society. We have advanced from one-room schoolhouses that served grade-school
19 students for only three months per year, to schools that operate nine months per year or more
20 serving students from kindergarten through high school. *See* Laws of 1889-90, ch. XII, § 64, p.
21 379 (requiring graded schools when population exceeded 300 students); Laws of 1897, ch. 118,
22 § 70, p. 385 (three-month requirement; longer for graded schools). At statehood in 1889, there
23 were three high schools in Washington, with 320 students.¹ In 1892, there were approximately
24 50,700 public school students in daily attendance, and 45 graduated from high school that

25 ¹ Don Burrows, *The Economics and Politics of Washington's Taxes* 91 (2013).
26

1 year.² Washington now serves more than one million students, in more than 2,000 public
2 schools statewide. Meierbachtol Decl., ¶ 3. Our modern economy necessitates a workforce
3 with a different set of skills than were needed in 1889, and modern students are educated in
4 ways that people living near the turn of the 20th Century could never have imagined. For good
5 reason, Washington’s current public education system is far more sophisticated than the one
6 that existed at statehood.

7 The Legislature has committed “to provide for a public school system that is able to
8 evolve and adapt in order to better focus on strengthening the educational achievement of all
9 students.” RCW 28A.150.210. While many public school students attend the traditional public
10 school closest to their home, Washington offers several flexible and innovative programs
11 targeted at satisfying modern needs and a diverse student population.³ See Meierbachtol Decl.,
12 ¶¶ 29-39; Anderson Decl., ¶¶ 8-15. The Spokane School District, for example, provides a
13 portfolio of options to families in recognition that “children learn in different ways and the best
14 fit for a child may be their neighborhood school, but could also include an option with a
15 different focus or different method of delivering curriculum.” Anderson Decl. at 4, ¶ 9. The
16 Spokane School District offers two public charter schools, some alternative schools that are
17 child- and parent-directed, a customized home-schooling program, online learning with
18 individualized student learning plans, schools within mental health facilities and treatment
19 centers, and a Montessori school, to name a few available options. Anderson Decl., ¶¶ 4, 5 and
20 14. Some of these schools, including the District’s two public charter schools, are operated by
21 nonprofit or other private entities under contract with the school district. Anderson Decl., ¶¶ 7
22 and 13.

23 Similarly, Washington’s broader public education system also offers a wide range of
24

25 ² See Frederick E. Bolton & Thomas W. Bibb, *History of Education in Washington* 125 (1934).

26 ³ See *Learning by Choice, Student Enrollment Options in Washington State* (rev. Aug. 2014), available
at <http://www.k12.wa.us/GeneralInfo/pubdocs/LearningByChoice2014.pdf> (last visited on Dec. 20. 2016).

1 public school programs that are not run by school districts or school boards:

- 2 • Tribal compact schools run by tribes. RCW 28A.715.
- 3 • Running Start and the high schools operated at the Lake Washington Institute of
4 Technology, Bates Technical College, and Clover Park Technical College, where
5 professors and instruction are governed by the college boards of trustees. RCW
6 28A.600.310, .350; RCW 28B.50.140. These programs are not limited to a distinct
7 population of students.
- 8 • Some Running Start students attend border community colleges in Idaho and Oregon,
9 not controlled by Washington school boards. RCW 28A.600.385.
- 10 • The University of Washington (UW) program for highly capable students, operated
11 solely by the UW. RCW 28A.185.040.
- 12 • Education Service District operated programs including juvenile detention programs⁴
13 and Re-Life: A Regional Center of Excellence.⁵ RCW 28A.193.010; RCW
14 28A.310.010, .180 and .200; Meierbachtol Decl., ¶¶ 33-35.
- 15 • The Youth Offender Program, operated by the Department of Corrections, contracting
16 with Centralia College as an educational provider. RCW 28A.193.020; Meierbachtol
17 Decl., ¶30.
- 18 • OSPI approved non-public agency⁶ education service providers for special education
19 students, such as Excelsior Youth Center. WAC 392-172-04080 to 04110;
20 Meierbachtol Decl., ¶¶ 30-31; Anderson Decl., ¶ 7
- 21 • Alternative Learning Experience and online learning programs⁷ operated by non-profit
22 or private entities. RCW 28A.250; Meierbachtol Decl., ¶ 30.

23 ⁴ <http://www.k12.wa.us/institutionaled/default.aspx> (last visited on Dec. 20, 2016);
24 <http://www.k12.wa.us/InstitutionalEd/contacts.aspx> (last visited on Dec. 20, 2016).

25 ⁵ <http://relifeschool.org/about/> (last visited on Dec. 20, 2016).

26 ⁶ <http://www.k12.wa.us/SpecialEd/NonPublicAgency.aspx> (last visited on Dec. 20, 2016).

⁷ An OPSI-approved list of online programs can be found at
<http://digitallearning.k12.wa.us/approval/providers/> (last visited on Dec. 20, 2016).

- 1 • Alternative education services operated under contracts by numerous entities in
2 addition to school districts, including private organizations. RCW 28A.150.305;
3 Meierbachtol Decl., ¶ 30.

4 It is not unusual for OSPI to allocate basic education funds directly to public education
5 programs like these without going through a school district: 1) UW’s highly capable student
6 program; 2) Lake Washington Institute of Technology’s High School Program; 3) Bates
7 Technical College’s high school program; 4) Clover Park Technical College’s high school
8 program; 5) the Washington Youth Academy; 6) tribal compact schools operated by the
9 Lummi Tribe, Muckleshoot Tribe, and Suquamish Tribe; 7) the Youth Offender Program
10 Operated by Centralia College; and 8) the juvenile detention center programs operated by a
11 number of Education Service Districts (ESD). Meierbachtol Decl., ¶ 30-34. These programs
12 serve 2,530 full time equivalent (FTE) students and receive \$20,561,966. Meierbachtol Decl., ¶
13 33-34.

14 OSPI also allocates basic education funding through districts for operation of a variety
15 of programs controlled by non-district entities: 1) work based learning; 2) Running Start,
16 which serves more than 18,000 students; 3) online courses and other Alternative Learning
17 Experiences (ALE), serving more than 26,000 students; 4) skills centers governed by
18 administrative councils; 5) OSPI-approved special education placements (e.g. Northwest
19 School of Innovative Learning); 6) ESD non-direct fund programs; and 7) Open Door drop-out
20 reengagement programs. Meierbachtol Decl., ¶ 35.

21 Finally, like the Spokane School District, many districts also contract with non-profit or
22 other private entities to operate a variety of public education programs, including many online
23 learning programs for public school students. *See* RCW 28A.250. OSPI approves online
24 providers known as “multidistrict online providers,” defined, in part, as “private or nonprofit
25 organization[s] that enter into a contract” with one or more school districts “to provide online
26 courses or programs to k-12 students.” RCW 28A.250.060(1)(a); WAC 392-502-020(1).

1 Examples of publicly-funded programs operated by private or nonprofit organizations include:
2 Columbia Virtual Academy;⁸ Washington Connections Academy;⁹ and Northwest Allprep.¹⁰
3 In addition, under federal law, when a school district is not meeting a student’s special
4 education needs, the district can contract with an approved private or non-profit education
5 service provider to meet that student’s needs. Meierbachtol Decl., ¶¶ 30-31. OSPI has
6 approved 20 publicly-funded, private education service providers located in Washington State
7 and 13 located outside of Washington. Meierbachtol Decl., ¶ 31. One such program is
8 Excelsior Youth Center, which serves students in the Spokane District. Anderson Decl., ¶¶ 7 &
9 15(o); Meierbachtol Decl., ¶ 31.¹¹

10 In sum, it is not unusual for government, non-profit, for profit private entities to
11 provide publicly-funded education to Washington’s public school students, either entirely
12 unconnected to a school district or under a contract with one.

13 **B. Washington’s Public Charter Schools Act Created Another Innovative Public**
14 **School Option, Focused on Serving At-Risk Students and Subject to Rigorous**
15 **Accountability**

16 Washington was the forty-second state to adopt a charter school law. Charter schools
17 are “public school[s],” “open to all children free of charge and by choice,” and are “operated
18 separately from the common school system as an alternative to traditional common schools.”
19 RCW 28A.710.020(1). The Act allows up to 40 public charter schools statewide, with a focus
20 on serving at-risk students, and it imposes strict accountability measures to monitor outcomes.
21 RCW 28A.710.140-.210. Public charter schools must be operated by non-profit, non-sectarian
22 organizations, selected on a competitive basis. RCW 28A.710.010(1), .140. Where student

23 ⁸ <http://www.cva.org/> (last visited on Dec. 20, 2016).

24 ⁹ <http://digitalllearning.k12.wa.us/approval/providers/providers/158-WAS> (last visited on Dec. 20, 2016).

25 ¹⁰ A list of OSPI-approved multidistrict online school programs is found on OSPI’s website:
<http://digitalllearning.k12.wa.us/approval/providers/> (last visited on Dec. 20, 2016).

26 ¹¹ OSPI approved non-public agency education service providers are identified on OSPI’s website:
<http://www.k12.wa.us/SpecialEd/NonPublicAgency.aspx> (last visited on Dec. 20, 2016).

1 interest exceeds capacity, spaces must be allotted by lottery. RCW 28A.710.050(4). Teachers
2 must be state certificated. RCW 28A.710.040(2)(c).

3 There are eight charter schools currently operating, with two scheduled to open next
4 fall. Halsey Decl., ¶¶ 5-6; Anderson Decl., ¶3-5. Those schools currently serve 1,654 students.
5 Halsey Decl., Att. A; Anderson Decl, ¶¶ 4-5. Commission-authorized charter schools serve a
6 diverse student population that, depending on the school, ranges from 64 to 94 percent students
7 of color, 31 to 79 percent low income students, and eight to 20 percent special education
8 students. Halsey Decl., Att. 1. Spokane District’s charter schools serve between 25 and 30
9 percent students of color; 40 to 54 percent low income; and 8.7 to 19 percent special education
10 students. Anderson Decl., ¶¶ 4-5. Spokane District explicitly solicited its schools to address
11 needs of at-risk students. Anderson Decl., ¶ 17.

12 Two of these charter school operators have successfully served at-risk students in
13 public charter schools in California. Halsey Decl., ¶4(b), (e), (f). For example, 96 percent of
14 Summit Public School’s California students are accepted to at least one four-year college or
15 university, with the number of graduates on track to complete college at double the national
16 average. Halsey Decl., ¶ 4(e).

17 Public charter schools are subject to rigorous accountability requirements at least as
18 stringent as those for traditional common schools. Under RCW 28A.710.040(2)(a), they must
19 meet the same academic standards by providing “a program of basic education,” defined in
20 RCW 28A.150.200(2)(a) to include “[t]he instructional program of basic education the
21 minimum components of which are described in RCW 28A.150.220,” including: a minimum
22 number of instructional hours and credits; a curriculum of instruction that ensures students will
23 meet the Essential Academic Learning Requirements (EALRs),¹² the detailed statement of
24

25 _____
26 ¹² <http://www.k12.wa.us/CurriculumInstruct/LearningStandards.aspx> (last visited on Dec. 20. 2016).

1 | what every child should know in each subject at each grade level;¹³ supplemental instruction
2 | for English language learners and for students needing learning assistance; special education
3 | programs; and programs for highly capable children. RCW 28A.150.220.¹⁴ Charter schools
4 | must also meet the goals set forth in RCW 28A.150.210. *See* RCW 28A.710.040(2)(b).

5 | Within these standards, public charter schools are allowed to innovate as to
6 | “scheduling, personnel, funding, and educational programs” to improve student outcomes.
7 | RCW 28A.710.040(3). While the EALRs identify *what* a student should know in great detail,
8 | charter schools have flexibility in determining *how* to effectively deliver that information to
9 | students. *See* RCW 28A.710.040(3); *see also* Meierbachtol Decl., Att. 1, Mathematics EARLS,
10 | at 5 (“Standards define what students should understand and be able to do;” they “do not
11 | dictate curriculum or teaching methods.”). This flexibility is not limited to charter schools.
12 | Traditional common schools and nontraditional schools other than charter schools also develop
13 | their curricula and choose the texts and materials they will use to teach the knowledge and
14 | skills covered in the EALRs. RCW 28A.710.040(3); RCW 28A.320.230; *see also*
15 | Meierbachtol Decl., Att. 1 at 5.

16 | The Charter Schools Act, along with extensive regulations and approval criteria,
17 | requires each charter school applicant to submit a detailed explanation of, among many other
18 | things: (1) a planned curriculum based on proven methods; (2) teaching methods and
19 | instructional strategies; (3) student performance expectations and standards for promoting
20 | students to the next grade; (4) the number of instructional days and hours; (5) a plan for
21 | serving many categories of students, including those who have special needs, who do not meet
22 | minimum academic standards, who are at risk of dropping out, who have higher than average

23 | _____
24 | ¹³ For example, the mathematics EALRs span 93 pages, and they provide generous detail. Meierbachtol
25 | Decl., Att. 1.

26 | ¹⁴ “Instructional program of basic education” is also defined in RCW 28A.150.203(8) to mean: “the
minimum program required to be provided by school districts and includes instructional hour requirements and
other components under RCW 28A.150.220.”

1 disciplinary sanctions, who have limited English proficiency, who are economically
2 disadvantaged, and who are highly capable; (6) a discipline plan that complies with state and
3 federal laws, protects the rights of students, including those with disabilities, and is based in
4 sound research, experience, and best practice; (7) a student assessment plan; (8) information
5 about school governance, management, and staffing; (9) a financial plan; (10) school-specific
6 performance measures; and (11) a teacher performance evaluation plan. RCW 28A.710.130(2);
7 WAC 108-20-070. Applications are hundreds of pages long.

8 Applications are submitted to, and evaluated by, an authorizer.¹⁵ The Washington
9 Charter School Commission has authority to authorize charter schools throughout the state.
10 RCW 28A.710.080. School districts may apply to become authorizers of charter schools within
11 their boundaries. RCW 28A.710.080, .090. The Spokane School District is an authorizer.
12 Anderson Decl., ¶ 3. Applications are vetted by individuals with expertise in education,
13 finance, and chartering practices. Halsey Decl., ¶ 10-12; Anderson Decl., ¶ 18. To evaluate
14 applications, the Commission and school district authorizers must hold a public forum and
15 evaluate every aspect of the application according to nationally-recognized principles,
16 including whether the school is designed to serve at-risk students. RCW 28A.710.140. Charter
17 authorizers have conducted three solicitations for applications to operate charter schools. Since
18 the first solicitation, the Commission and Spokane District have received 31 applications but
19 only approved 12. Halsey Decl., ¶¶ 8-9; Anderson Decl., ¶ 16.

20 Approved charter schools must enter into a contract with the authorizer.
21 RCW 28A.710.160; WAC 108-20-090. The contracts must ensure academic performance is
22 monitored and compliance measures are in place for student achievement, comparative
23 performance, student progress, post-secondary readiness, state and federal accountability,
24

25 ¹⁵ An authorizer is an entity that solicits and vets charter school applications and, upon approval,
26 oversees authorized schools. RCW 28A.710.070, .080, .090, .100, .180.

1 mission-specific accountability, financial compliance, and organizational performance.
2 RCW 28A.710.170; WAC 108-30-020. The contracts can impose additional requirements and
3 require compliance with laws not incorporated directly in the Act. RCW 28A.710.040(3).

4 Public charter schools are expressly “subject to the supervision of the superintendent of
5 public instruction and the state board of education, including accountability measures, to the
6 same extent as other public schools, except as otherwise provided in [RCW 28A.710].” RCW
7 28A.710.040(5). Accountability measures evaluate public schools’, including charter schools’
8 1) annual progress toward increasing the percentage of students who meet standards in reading
9 and mathematics, and 2) performance according to the Washington Achievement Index which
10 provides a “snapshot of each school’s performance by comparing how student perform in
11 reading, writing, math, science, reading and math growth, and graduation rates.” Meierbachtol
12 Decl., ¶ 44. Additionally, persistently low achieving schools are required to “adopt action
13 plans for how they will improve student achievement.” Meierbachtol Decl. ¶ 44. Public
14 charter schools are required to participate in statewide student assessment tests and annual
15 school performance reviews. RCW 28A.710.040(2). They are accountable to the State Board
16 of Education for performance improvement, and authorizers must continually monitor
17 compliance with the law. RCW 28A.710.040(2), (3). Unlike traditional common schools,
18 public charter schools must obtain independent performance audits. RCW 28A.710.030(2).

19 Charter schools must comply with all federal laws applying to local education agencies,
20 including but not limited to federal laws regarding students with disabilities, privacy, and
21 student homelessness. RCW 28A.710.020(4). Charter schools must also comply with local,
22 state, and federal laws related to health, safety, parents’ rights, civil rights (including
23 restrictions on discipline), and nondiscrimination. RCW 28A.710.040(2)(a). Charter school
24 contracts require that charter schools comply with minimum instructional hour requirements
25 and federal and state discipline laws. *See* Halsey Decl., ¶¶ 13-14 (school’s discipline policy
26 must satisfy due process and comply with all applicable law relating to student discipline,

1 “including, but not limited to, RCW 28A.150.300, 28A.600.015 and 28A.600.022.”); Anderson
2 Decl., ¶¶ 3-5.

3 Complaints to a charter school authorizer about a particular charter school can result in
4 sanctions. WAC 108-30-040. Funds can be withheld for non-compliance. WAC 392-123-065.
5 Charter schools are subject to the special education citizen complaint process and associated
6 remedies. Meierbachtol Decl., ¶ 28; Halsey Decl., ¶ 26. Charter school authorizers can require
7 a corrective action plan at any time. RCW 28A.710.180(4). Charter schools can be closed for
8 noncompliance with state or federal laws, as well as failure to meet performance expectations.
9 RCW 28A.710.200. They must remain above the bottom quartile of public schools to be
10 eligible to renew their contract, absent extraordinary circumstances. *Id.* In contrast, traditional
11 public schools are given at least three years to implement a corrective plan if they fall into the
12 bottom five percent of public schools. RCW 28A.657; RCW 28A.657.030.
13 RCW 28A.657.050(2)(a).

14 Finally, the Act emphasizes transparency. Charter school authorizers and public charter
15 schools are subject to the Public Records Act and the Open Public Meetings Act.
16 RCW 28A.710.040(2)(h). The State Board of Education must issue an annual report comparing
17 performance of public charter schools to similarly-situated traditional public schools. RCW
18 28A.710.250. And members of the charter school commission and charter school boards must
19 file personal financial affairs statements with the public disclosure commission. RCW
20 28A.710.290.

21 Although Plaintiffs try to characterize charter schools as private schools, the laws
22 governing private schools do not subject them to this extensive regulation. *See* RCW
23 28A.195.010 *et seq.* (Private schools “should be subject only to those minimum state controls
24 necessary to insure the health and safety of all of the students in the state and to insure a
25 sufficient basic education to meet usual graduation requirements.”)
26

1 In sum, public charter school applicants must undergo a rigorous application process
2 and, once selected, they are supervised by multiple government entities, and they must provide
3 all of the components of the program of basic education, at the risk of being closed if they fail.

4 **C. The Legislature Changed the Funding Source for Charter Schools**

5 Three years after the voters approved the creation of a limited number of public charter
6 schools in I-1240, the Washington Supreme Court declared the funding source adopted by the
7 voters unconstitutional and invalidated I-1240 in its entirety, on that basis. *League of Women*
8 *Voters of Washington (LWV) v. State*, 184 Wn. 2d 393, 398, 355 P.3d 1131 (2015). The
9 Supreme Court found I-1240 unconstitutional because it designated charter schools as common
10 schools and funded them with common school restricted funds. *Id.* The Court explained that
11 the Act unconstitutionally allowed the Superintendent to allocate to charter schools restricted
12 funds that had been “designated for the exclusive use of the common schools” because they
13 had been appropriated, or “made available by the legislature for the current use of common
14 schools.” *Id.* at 408-09. The voters intended “to use common school funding allocations as
15 [the] source” for charter school funding, and that was not severable from the remainder of the
16 act. *Id.* at 412. Given the Court’s determination that these provisions were not severable, this
17 was all the Court needed to hold to decide the case. *Id.* at 411-12.

18 While unnecessary given this holding, the Court further noted in dicta that “the State
19 does not segregate constitutionally restricted [common school] moneys from other state funds,”
20 rejecting the State’s argument that charter schools could be constitutionally funded out of
21 unrestricted dollars in the General Fund. *Id.* at 409. The Court also held that I-1240
22 unconstitutionally allowed charter schools to access funds from the constitutionally restricted
23 common school construction fund. *Id.* at 409-10.

24 In the 2016 legislative session, the Legislature responded, adopting RCW 28A.710, the
25 Charter Schools Act and, in addition to other amendments, remedying the constitutional
26 deficiencies the Washington Supreme Court identified. Laws of 2016, ch. 241 (codified at

1 RCW 28A.710). Pertinent changes included: (1) removal of charter schools from the common
2 school system and defining them only as public schools (*Id.*, §§ 102(1), 131, 132(1)); (2)
3 funding charter schools out of the Opportunity Pathways Account, which is funded solely from
4 lottery revenue (*Id.*, § 201); and (3) eliminating charter schools’ access to local levy funds and
5 the common school construction fund (*Id.*, §§ 122, 123, 201; *see also* Supplemental Operating
6 Budget, Laws of 2016, ch. 36, §§ 501(3), 517). Plaintiffs do not dispute that charter schools are
7 now funded out of lottery revenue in the Opportunity Pathways Account and do not receive
8 general funds, revenue from the state property tax for common schools, or any money that the
9 Legislature has appropriated to common schools in this biennium. Plaintiffs’ MSJ at 12:19-21;
10 Salvi Decl., ¶¶ 7:6-7; 11:17-19; 13; Pedersen Decl., ¶ 9; Crawford Decl., ¶¶ 15-20. Plaintiffs
11 do not dispute that the Legislature explicitly precluded appropriations for charter school
12 construction from the common school construction fund. Laws of 2016, ch. 241, §123.
13 Plaintiffs present no evidence that the Act is being implemented in any other manner.

14 The Legislature also aligned the Charter School Commission’s structure with that of
15 the State Board of Education and the Professional Educator Standards Board by placing the
16 Commission under the Superintendent of Public Instruction for administrative purposes and
17 adding the Superintendent of Public Instruction, as well as a member of the State Board of
18 Education, to the Commission. *Cf. Id.*, § 107; RCW 28A.410.200(1)(a), (7); RCW
19 28A.305.011(1)(a)(iii), .130(7).

20 **D. Procedural History**

21 Plaintiffs filed a Complaint raising seven challenges to the constitutionality of the new
22 Charter Schools Act. Parents, students, and public charter schools, among others, intervened as
23 defendants. Order on Intervention. Intervenor’s filed a Motion to Dismiss the organizational
24 Plaintiffs for lack of standing. *See* Intervenor’s Motion to Dismiss. The State filed a Motion to
25 Dismiss two of Plaintiffs’ claims for lack of justiciability: (1) Plaintiffs’ *McCleary*-based
26 “ample funding” claim and (2) Plaintiffs’ Alternative Learning Experience (ALE) claim. After

1 a hearing on the motions, the Court dismissed several of the organizational Plaintiffs for lack
2 of standing and granted Plaintiffs leave to file an Amended Complaint in an effort to plead
3 taxpayer status for the organizational Plaintiffs. November 18, 2016 Order on Motions to
4 Dismiss (Dismissal Order) at 14. The Court also dismissed Plaintiffs' Ample Funding and ALE
5 claims, with prejudice. Dismissal Order at 14. This Court then denied a motion for
6 reconsideration on the dismissal of the ample funding claim. *See* Order Denying
7 Reconsideration.

8 Plaintiffs have filed an Amended Complaint and are seeking summary judgment. The
9 State opposes the Plaintiffs' Motion for Summary Judgment and moves for summary judgment
10 in the State's favor, dismissing Plaintiffs' five remaining claims.

11 III. STATEMENT OF ISSUES

- 12 1. **Whether Plaintiffs' uniformity claim must be dismissed because charter**
13 **schools fit within Washington's general and uniform system of public**
14 **schools**
- 15 2. **Whether Plaintiffs' diversion claim must be dismissed because it is**
16 **undisputed that charter schools are funded through Lottery revenue**
17 **deposited in the Opportunity Pathways Account, and Plaintiffs' speculation**
18 **that this might change in the future does not state a justiciable claim**
- 19 3. **Whether Plaintiffs' delegation claim should be dismissed because the**
20 **Legislature did not delegate its responsibility for defining the program of**
21 **basic education and there are significant safeguards in place**
- 22 4. **Whether Plaintiffs' supervisory authority claim should be dismissed**
23 **because the Superintendent of Public Instruction oversees charter schools**
24 **in the same manner as other public schools**
- 25 5. **Whether Plaintiffs' article II, section 37, claim should be dismissed because**
26 **the Legislature fully complied with that provision when it enacted the**
Charter Schools Act

IV. EVIDENCE RELIED UPON

24 The State relies on the Declarations of Jim Crawford, Assistant Director of the Budget
25 Division, Office of Financial Management; Dierk Meierbachtol, Chief Legal Officer, Office
26 of Superintendent of Public Instruction; Mark Anderson, Associate Superintendent for School

1 Support Services, Spokane School District; Joshua Halsey, Executive Director, Charter
2 School Commission; their attachments, and the papers and pleadings previously filed with
3 this Court.

4 V. ARGUMENT AND AUTHORITY

5 The State is entitled to summary judgment if there are no material facts at issue and the
6 State is entitled to judgment as a matter of law. CR 56(c). All of Plaintiffs' remaining claims
7 should be dismissed because the truly material facts about the current funding, operation, and
8 regulation of charter schools are undisputed, and as a matter of law, Plaintiffs' constitutional
9 challenges all fail. Furthermore, Plaintiffs are not entitled to injunctive relief unless they can
10 show that they have a clear legal or equitable right and a well-grounded fear of immediate
11 invasion of that right. *E.g., Piepkorn v. Adams*, 102 Wn. App. 673, 684, 10 P.3d 428 (2000).
12 The purpose of an injunction is not to protect a plaintiff from speculative injury. *Kucera v.*
13 *Dep't of Transp.*, 140 Wn.2d 200, 221, 995 P.2d 63 (2000). In order to be justiciable,
14 Plaintiffs' claim must be ripe and not speculative. *To-Ro Trade Show v. Collins*, 144 Wn.2d
15 403, 410-11, 27 P.3d 1149 (2001).

16 As discussed below, the State disputes many of Plaintiffs' predictions about how
17 charter school funding will work, but the central material facts are undisputed, including the
18 fact that charter schools are currently funded entirely with revenue from Lottery sales, and, as
19 shown below, increases in Lottery revenue cover the cost of charter schools for the 2015-17
20 biennium. Based on undisputed facts, the Court should grant summary judgment to the State
21 and dismiss Plaintiffs' remaining claims. Even if this Court disagrees, at the very least, there is
22 a material factual dispute about charter school funding that prevents summary judgment in
23 Plaintiffs' favor.

1 **A. To Prevail, Plaintiffs Must Show the Charter Schools Act is Unconstitutional**
2 **Beyond a Reasonable Doubt, but the Legislature Has Broad Authority to**
3 **Establish Educational Options Available to Washington Students**

4 The Charter Schools Act, RCW 28A.710, is presumed constitutional, and Plaintiffs
5 must prove the Act unconstitutional beyond a reasonable doubt. *See, e.g., id.* at 205, *see also*
6 *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 235, 5 P.3d 691 (2000). Given that
7 Plaintiffs’ challenge is facial—they seek an order declaring the entire Act unconstitutional in
8 all circumstances—it must be rejected unless this Court is convinced that there is no set of
9 facts or circumstances under which the statute can constitutionally be applied. *Tunstall*, 141
10 Wn.2d at 221. To the extent that Plaintiffs bring an as-applied challenge, they must prove
11 specific facts establishing that the statute, as actually applied, is unconstitutional. *In re*
12 *Detention of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999); *Tunstall*, 141 Wn.2d at
13 223.

14 Washington courts have long recognized that the legislative power is unrestrained
15 unless specifically limited by the constitution, and the Legislature’s discretion is particularly
16 broad in the area of education. *Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll.*, 81
17 Wn.2d 551, 555, 503 P.2d 86 (1972). The Washington Supreme Court has also held that
18 courts should not micromanage education in Washington. *Tunstall*, 141 Wn.2d at 223. So
19 long as an educational program fits within article IX’s broad constitutional guidelines, it is up
20 to the Legislature to determine what options should be available to Washington students. *See*
21 *Tunstall*, 141 Wn.2d at 223 (citing *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 520,
22 585 P.2d 71 (1978)). Even where the Supreme Court has discussed the meaning of words in
23 article IX, it has left the Legislature the “greatest possible latitude to participate in the full
24 implementation of the constitutional mandate.” *Seattle Sch. Dist.*, 90 Wn.2d at 515; *see also*
25 *McCleary v. State*, 173 Wn.2d 477, 516-17, 269 P.3d 227 (2012). The Court has firmly left it
26 to the legislative branch to “address[] the difficult policy questions inherent in forming the
details of an education system.” *McCleary*, 173 Wn.2d at 517.

1 Here, Plaintiffs’ facial challenge must fail because it is based primarily on speculation
2 about what *may* happen with regard to charter school funding and operations—for example,
3 they claim that eventually there may not be enough lottery revenue, or students may be
4 disciplined inconsistently with other public school students. As in *Tunstall*, Plaintiffs “fail to
5 provide any specific facts demonstrating” that the actual application of the Charter Schools
6 Act violates the constitution. *Id.* at 223. Instead, Plaintiffs “merely speculate about
7 constitutional problems that *could result* from” the statute’s application. *Id.* (emphasis
8 added). Plaintiffs do not show that there is no set of circumstances under which charter
9 schools can be operated constitutionally.

10 **B. Public Charter Schools Do Not Destroy the General and Uniform Character of the**
11 **Public School System**

12 **1. The Washington Supreme Court has recognized that Washington’s system**
13 **of public education must evolve over time to meet contemporary needs**

14 The Washington Supreme Court has said that the Legislature has flexibility to
15 customize education programs to meet the current needs of Washington’s children. *See*
16 *Tunstall*, 141 Wn.2d at 223 (citing *Tommy P. v. Bd. of Cty. Comm’rs of Spokane Cty.*, 97
17 Wn.2d 385, 398, 645 P.2d 697 (1982)). “The program of basic education is not etched in
18 constitutional stone.” *McCleary*, 173 Wn.2d at 484. The Legislature must periodically
19 modernize the public education system and the basic education program “as the needs of
20 students and the demands of society evolve.” *Id.*; *Seattle Sch. Dist.*, 90 Wn.2d at 517. Article
21 IX must be flexible enough to support a system that prepares all of Washington’s children ““for
22 their role as citizens and as potential competitors in today’s market as well as in the
23 marketplace of ideas.”” *McCleary*, 173 Wn.2d at 516 (quoting *Seattle Sch. Dist.*, 90 Wn.2d at
24 517-18). Over time, Washington courts have shifted responsibility for ensuring the adequacy of
25 Washington’s public education system from school districts to the State. *McCleary*, 173 Wn.2d
26 at 526; *see also Seattle Sch. Dist.*, 90 Wn.2d at 515.

1 **2. Like other innovative and specialized educational programs, public charter**
2 **schools fit within Washington’s general and uniform system of public**
3 **schools**

4 Article IX, section 2 requires the Legislature to provide for a “general and uniform
5 system of *public schools*.” (Emphasis added.). Despite Plaintiffs’ attempts to conflate
6 “common schools” with “public schools,” the plain language of article IX establishes that
7 “‘[c]ommon schools’ are but one part of the entire public school system.” *Moses Lake Sch.*
8 *Dist.*, 81 Wn.2d at 559; Wash. Const., art. IX, § 2 (listing several types of public schools in
9 addition to “common schools”). “The general and uniform system contemplated by the
10 constitution is neither limited to common schools nor is it synonymous therewith.” *Seattle Sch.*
11 *Dist.*, 90 Wn.2d at 522. Thus, even where a school is not a “common school,” it can still be
12 part of the “general and uniform system of public schools” under article IX.

13 The Washington Supreme Court has defined a “general and uniform system” as:

14 [O]ne in which every child in the state has free access to certain minimum and
15 reasonably standardized educational and instructional facilities and
16 opportunities to at least the 12th grade—a system administered with that degree
17 of uniformity which enables a child to transfer from one district to another
18 within the same grade without substantial loss of credit or standing and with
19 access by each student of whatever grade to acquire those skills and training
20 that are reasonably understood to be fundamental and basic to a sound
21 education.

22 *Federal Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 524, 219 P.3d 941 (2009) (quoting
23 *Northshore Sch. Dist. No. 417 v. Kinnear*, 84 Wn.2d 685, 729, 530 P.2d 178 (1974)).

24 Public charter schools created by the Act fit easily within this definition. Charter
25 schools are free and open to all children. RCW 28A.710.020(1)(a). They provide a program of
26 basic education that, among other things, complies with the EALRs. RCW 28A.710.040(2)(b).
27 Student performance is assessed using the statewide student assessment system. *Id.* They are
28 part of statewide public school accountability measures. Meierbachtol Decl., ¶¶ 40 & 44.
29 Teachers must be certificated, and public charter schools must comply with state and federal
30 laws governing student discipline. RCW 28A.710.040(2)(c), (3); Halsey Decl. Att. 1 at 19

1 (discipline provisions). Plaintiffs acknowledge that charter schools must also comply with the
2 laws and regulations identified in the Charter Schools Act *and* any laws identified in the
3 charter school’s contract. RCW 28A.710.040(3); Plaintiffs’ MSJ at 11. Charter public school
4 students who transfer to another public school must receive credits “in the same manner and
5 according to the same criteria that credits are accepted from other public schools.” RCW
6 28A.710.060(2).

7 In arguing to the contrary, Plaintiffs advance two theories as to why charter schools
8 supposedly destroy the uniformity of the public school system, claiming that: (1) charter
9 schools have “non-uniform governance,” and (2) charter schools offer “non-uniform
10 educational opportunities.” Plaintiffs’ MSJ at 17, 18. Neither theory holds water.

11 **a. Article IX, section 2 does not mandate school board governance of**
12 **all public school programs, and even if it did, some charter schools**
13 **are governed by a school board, and all are ultimately accountable**
14 **to at least one elected official**

15 Plaintiffs first assert that charter schools violate article IX, section 2 because, they say,
16 the uniformity clause mandates that all public schools must be subject to school board
17 governance. Plaintiffs’ MSJ at 15-16. Unlike other states, including Florida, Washington’s
18 article IX does not mention school boards at all, much less mandate that they govern every
19 public school program,¹⁶ and “[i]nsofar as legislative power is not limited by the constitution it
20 is unrestrained.” *Moses Lake*, 81 Wn.2d at 555.

21 School boards and school districts are certainly long-established, legislatively-created
22 entities, but the Legislature can validly expand and limit their responsibilities. *Id.* at 556 (“[I]t
23 must be remembered that a school district is a creature of the legislature.”). In *LWV*, the
24 Supreme Court held only that school board governance was necessary for a school to be a
25 *common* school. 184 Wn.2d at 405. Plaintiffs simply misrepresent the Court’s holding when

26 ¹⁶ See *Duval Cty. Sch. Bd. v. State Bd. of Educ.*, 998 So.2d 641, 643, 241 Ed. Law Rep. 493 (Fla. 2008)
(citing Fla. Const., Art. IX, §4 (requiring school districts and school boards, which “shall operate, control and
supervise all free public schools within the school district . . .”).

1 they claim that *LWV* says that “[a] uniform system is one that is ‘common to all children of
2 proper age and capacity, free, and subject, and under the control of, the qualified voters in the
3 school district;” in truth, that portion of the opinion was explicitly describing what constitutes a
4 “common school,” not what constitutes a uniform public school system. *Compare* Plaintiffs’
5 MSJ at 15 with *LWV*, 184 Wn.2d at 405. The Supreme Court did not hold, nor has it ever held,
6 that school district or school board governance is constitutionally required for all *public*
7 schools. *Id.*¹⁷

8 Similarly, in *School Dist. No. 20, Spokane Cty. v. Bryan*, 51 Wash. 498, 99 P. 28 (1909)
9 the 1909 Washington Supreme Court addressed whether a normal school (a training school for
10 teachers that enrolled public school students) was a *common* school that could be funded from
11 the common school fund. *Bryan*, 51 Wash. at 500. The *Bryan* Court mentioned uniformity
12 twice, both in dicta. First, the Court explained that the Legislature must provide “a general and
13 uniform system of public schools” that “differentiates between the common school and the
14 normal school.” *Id.* at 502. “The system must be uniform in that every child shall have the
15 same advantages and be subject to the same discipline as every other child.” *Id.* at 502. While
16 the Court then mentioned “a system of control through school boards and county
17 superintendents,” the Court did not say that this type of governance is required by the
18 uniformity clause. The next sentences show that the Court was addressing instead what
19 constitutes a “common school” that could receive funding from the common school fund, a
20 question that is irrelevant in this case because public charter schools do not receive common
21 school funding. *Id.* at 503 (“The words ‘common school’ must measure up to every
22 requirement of the Constitution and code of public instruction . . .”). Second, the Court later
23 discussed that normal school teachers-in-training were not yet certificated or guaranteed to

24 ¹⁷ Plaintiffs also refer to *Pierce Cty. v. Bruno*, 62 Wn.2d 790, 797, 384 P.2d 608 (1963), but that case
25 actually refers to the role of both State and local entities and emphasizes the need for local autonomy to yield in
26 certain areas to the statewide educational system as a whole. Nothing in that case holds that local school board
control is required for every public school program.

1 have “a certain standard of proficiency” (unlike charter school teachers). *Id.* at 504. In that
2 context, the Court said: “the argument of counsel emphasizes the fact that in its operation the
3 act of 1907 would break the uniformity of the *common* school system.” *Id.* (emphasis added).
4 The Court then turned again to applying the definition of “common school.” *Id.*

5 Ultimately, the *Bryan* Court could not have intended to say that public schools must be
6 directly governed by school boards to operate within the constitution. The normal school at
7 issue there was not governed by a school board. *Id.* at 500, 502. Yet the Court ultimately
8 concluded that non-traditional schools like it could be *public* schools, funded with public
9 dollars; they just could not be “common schools” funded out of the common school fund. *Id.* at
10 505-07 (“[A]ll experiments in education must be indulged, if at all, at the expense of the
11 general fund [instead of the common school fund.] . . . It is not that the legislature cannot make
12 provision for the support of a model training school, but in its attempt to do so, it has made
13 provision for it out of the wrong fund.”). If the normal school’s governance violated the
14 uniformity of the *public* school system, then it could not have continued to be a public and
15 publicly-funded school at all, but that is not what the *Bryan* Court held.

16 In the more modern *Moses Lake* and *Seattle School District* cases, the Washington
17 Supreme Court confirmed that the “general and uniform system of public schools” is broader
18 than “common schools.” *Seattle Sch. Dist.*, 90 Wn.2d at 522 (“The general and uniform system
19 contemplated by the constitution is neither limited to common schools nor is it synonymous
20 therewith.” *Moses Lake Sch. Dist.*, 81 Wn.2d at 559 (“[c]ommon schools are but one part of
21 the entire public school system.”). Thus, a public school can be a valid part of the public school
22 system, even if it is not a common school because it is not governed by a school board.

23 Plaintiffs seem to suggest that *Federal Way* and *Northshore* require “unity of
24 governance” and “uniform administration,” in the form of school board governance, Plaintiffs’
25 MSJ at 15-16, but those cases say no such thing. Both simply state that the general and uniform
26 system must be “a system administered with that degree of uniformity which enables a child to

1 transfer from one district to another within the same grade without substantial loss of credit or
2 standing. . . .” *Federal Way*, 167 Wn.2d at 524; *Northshore*, 84 Wn.2d at 729. This is a far cry
3 from requiring school board governance of every public school.

4 In modern times, there are a wide range of public school programs that are not
5 controlled by elected school boards, from tribal compact schools to high school programs run
6 by community and technical colleges, to the University of Washington’s public school
7 program for highly capable students. RCW 28A.715; RCW 28A.600.310, .350, .385;
8 RCW 28B.50.140; RCW 28A.185.040. The courts have never before held that the existence of
9 such public schools violates the uniformity requirement in article IX. Public charter schools
10 that are authorized and governed by the Charter School Commission and subject to supervision
11 and accountability under the Superintendent of Public Instruction are simply another public
12 school program like these.

13 Plaintiffs also ignore that two public charter schools *are* under the control of an elected
14 school board. The Spokane School District is a charter school authorizer and it governs two of
15 the existing eight charter schools. Anderson Decl., ¶ 3. These schools were authorized as part
16 of Spokane District’s commitment to cultivate “Excellence for Everyone,” with an explicit
17 focus on schools that serve “at-risk students” in identified areas in the district. Anderson, Decl.,
18 ¶¶ 9-17. Spokane District’s charter schools are subject to district oversight and Superintendent
19 supervision and accountability, including the ability to withhold and recover payments.
20 Meierbachtol Decl., ¶¶ 19-20. To the extent that Plaintiffs assert contractual and monetary
21 control is not enough, they call into question all public education programs operated by third
22 parties on behalf of school districts, including Running Start, OSPI-approved non-public
23 entities such as Excelsior Youth Center, and on-line and ALE programs, to name a few.
24 Meierbachtol Decl., ¶¶30-39; Anderson Decl., ¶¶ 13, 14(n)-(o); 15.

25 Finally, to the extent that Plaintiffs are asserting that public schools must be held
26 accountable to some elected public official, Commission-authorized charter schools are

1 accountable to the elected Superintendent of Public Instruction who holds the purse strings,
2 RCW 28A.710.040(5), and to the Commission, whose members are appointed by the
3 Governor, and leadership of the House of Representatives and the Senate. RCW
4 28A.710.070(3). There is accountability to voters through the elected Superintendent, through
5 school board authorizers, and through elected officials required to appoint members of the
6 Charter School Commission. RCW 28A.710.040(5), .080. Charter schools are also accountable
7 to the Legislature, which could abolish them at any time, unlike common schools.

8 **b. Charter schools also offer constitutionally-uniform educational**
9 **opportunities**

10 The Supreme Court has repeatedly recognized that it falls within the Legislature’s
11 authority to define the “‘general and uniform’ system of education.” The *Federal Way* Court
12 held that the Basic Education Act’s (1) uniform educational content, (2) statewide teacher
13 certification, (3) instructional hour requirements, and (4) statewide assessment system satisfy
14 the constitutional “general and uniform” requirement. *Id* at 524-25. The educational instruction
15 provided to each student need not be identical. *Tunstall*, 141 Wn.2d at 220, 222.

16 Public charter schools do not destroy the uniformity of any of these aspects of the
17 public school system. Plaintiffs claim that the Act exempts charter schools from many statutes,
18 such as RCW 28A.150.220, student discipline laws (e.g., RCW 28A.150.300; RCW
19 28A.600.410-490), and laws concerning required programs for bilingual learners, learning
20 assistance, and highly capable students. Plaintiffs’ MSJ at 12. Plaintiffs are wrong.

21 As explained above, charter schools are expressly required to provide the “*program of*
22 *basic education*” like every other public school. RCW 28A.710.040(2)(b) (emphasis added).
23 The term “program of basic education” is defined in RCW 28A.150.203 to mean “the overall
24 program under RCW 28A.150.200” RCW 28A.150.200, in turn, “defines the program of
25 basic education under this chapter as that which is necessary” to meet statewide graduation
26 requirements; “[b]asic education . . . includes...(a) The instructional program of basic education

1 the minimum components of which are described in RCW 28A.150.220.” RCW 28A.150.200.
2 These components must include meeting or exceeding the minimum instructional hour
3 requirement, as well as providing highly capable programs, learning assistance programs,
4 transitional bilingual education, and special education. RCW 28A.150.220. They must do so, in
5 part, through instruction in the EALRs, which establish what every child should know in each
6 subject and at each grade level. RCW 28A.710.040(2)(b); *see also, McCleary*, 173 Wn.2d at
7 523. While Plaintiffs complain that charter schools are not expressly required to comply with
8 RCW 28A.230 (compulsory coursework), they have not identified any aspect of that statute
9 that is not required either by the EALRs’ specific instructional requirements or by the charter
10 contracts. Finally, Plaintiffs ignore the rigorous application process and the extensive plans and
11 curricula that charter schools must submit to be approved in the first instance. *See* RCW
12 28A.710.130(2); WAC 108-20-070 (listing more than 20 requirements); *see also* WAC 108-
13 30-020 (holding charter schools accountable if they fail to meet legal or contract requirements).

14 Public charter schools enjoy flexibility in instructional methods, but they must ensure
15 that their students are learning the same material being taught in other public schools. *See id.*
16 This type of flexibility is also available to traditional common schools, which develop their
17 own curricula and choose textbooks at the local level. RCW 28A.320.230. The Legislature has
18 also authorized waivers of some requirements for traditional common schools to develop
19 innovation schools and zones or otherwise provide “all students in the district an effective
20 education system that is designed to enhance the educational program for each student.” RCW
21 28A.305.140; RCW 28A.630.083. Thus, the concept of waiving some requirements to nurture
22 innovation was a part of the general and uniform system long before public charter schools.
23 Plaintiffs acknowledge, as they must, that the Washington Supreme Court has declined to
24 declare public school programs unconstitutional even when they significantly depart from
25 traditional instruction in order to meet the needs of particular students. Plaintiffs’ MSJ at 20
26 (acknowledging *Tunstall*).

1 Objecting to any public school option that “competes with” a traditional common
2 school, Plaintiffs’ MSJ 20, Plaintiffs argue that public school programs that serve specific
3 student populations are validly outside the general and uniform system of public schools, but
4 charter schools cannot be. Plaintiffs’ MSJ at 19-20. No Washington court has held that
5 alternative public school options are unconstitutional just because they are available to all and
6 some students may choose them above a traditional model.

7 Moreover, the *Tunstall* Court did not say that specialized programs created to meet the
8 needs of a particular population are outside of the general and uniform system of public
9 schools. *Tunstall*, 141 Wn.2d at 222 n.16 (emphasizing Title 28A.’s flexibility in meeting the
10 needs of a highly varied population). Nor did the *Tunstall* Court, (or any other Washington
11 court), suggest that a specialized educational program’s constitutionality depends on it being
12 restricted only to certain students. *See Tunstall*, 141 Wn.2d at 221-22. It would be absurd to
13 say that it would destroy uniformity to create a specialized program open to all students, but it
14 does not destroy uniformity to create specialized programs open only to some students. Finally,
15 even if the Legislature were limited to creating special programs only to meet unique needs,
16 charter schools are focused on low-income and at-risk youth who, by definition have “an
17 academic or economic disadvantage that requires assistance or special services to succeed in
18 educational programs.” RCW 28A.710.010(2); RCW 28A.710.050(3); RCW 28A.710.140(2);
19 Halsey Decl., Att. 1 (31 to 79 percent of students are low income); Anderson Decl., ¶¶ 4-5 (40
20 to 54 percent are low income).

21 Plaintiffs also offer no concrete evidence that any charter school discipline practices
22 deviate so far from those imposed in traditional schools that they destroy uniformity. Charter
23 school applicants must detail their discipline plan, they must comply with state and federal
24
25
26

1 laws (including laws regarding parents’ rights, privacy, civil rights,¹⁸ student homelessness,
2 nondiscrimination, and due process), charter school contracts explicitly require compliance
3 with federal, state, and local school discipline laws. RCW 28A.710.130(2)(p); RCW
4 28A.710.040(2)(a), (3). Halsey Decl., Att. 3 at 19. (“The School shall comply with the
5 School’s discipline policy and all Applicable Law relating to student discipline *including, but*
6 *not limited to*, RCW 28A.150.300,¹⁹ 28A.600.015²⁰ and 28A.600.022.”²¹). Plaintiffs cannot
7 show charter schools will be exempt from any existing discipline laws or regulations or that
8 they will impose discipline that so far departs from that provided in other schools that it
9 destroys uniformity.

10 Additional requirements further ensure that charter schools will not depart from the
11 general and uniform system. Contrary to Plaintiffs’ assertion that RCW 28A.655 does not
12 apply to charter schools, Plaintiffs’ MSJ at 12, public charter schools must participate in the
13 statewide student assessment system developed under that chapter and comply with annual
14 performance reports under that chapter. RCW 28A.710.040(2)(b), (f); RCW 28A.655
15 (detailing student assessments and the annual school performance report requirements). While
16 Plaintiffs assert charter schools could somehow refuse to accept credits presented by students
17 transferring into public charter schools, they have not presented any evidence that has ever
18 happened. Plaintiffs’ MSJ at 19.²² Plaintiffs simply cannot show beyond a reasonable doubt
19 that charter school students will not be able to successfully transfer within the system or that
20 public charter schools will somehow destroy the uniformity of Washington’s education system.

21
22 ¹⁸ See also U.S. Dep’t of Educ., Office for Civil Rights, *May 14, 2014 Guidance Letter*, available at
23 <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf> (requiring charter school
24 compliance with civil rights laws) (last visited on Dec. 20, 2016).

25 ¹⁹ RCW 28A.150.300 prohibits corporal punishment.

26 ²⁰ RCW 28A.600.015 requires adherence to substantive and procedural due process in the context of
discipline.

²¹ RCW 28A.600.022 requires a reengagement plan .

²² If that were the case, the affected student could challenge such a decision and could rely in part on the
constitutional principle that as public schools, charter schools must be part of a general and uniform system.

1 **C. Charter Schools Are Constitutionally Funded From the Opportunity Pathways**
2 **Account, Which Receives Revenue Only From Lottery Sales, and Thus They Do**
3 **Not Divert Money Appropriated for Common Schools**

4 Article IX, section 2 provides, in part, that “the entire revenue derived from the
5 common school fund and the state tax for common schools shall be exclusively applied to the
6 support of the common schools.” In *LWV*, the Washington Supreme Court found I-1240
7 unconstitutional because it incorrectly designated charter schools as “common schools” and
8 then funded them with money that the Legislature had appropriated for “common schools.”
9 After *LWV*, constitutionally protected common school funds are revenue from the current state
10 property tax, the common school construction fund, and general fund dollars that the
11 Legislature has appropriated in a biennium for the common schools. *LWV*, 184 Wn.2d at 408-
12 10.

13 In part to avoid a significant reduction in the State’s debt limit, the Legislature has not
14 segregated any common school funds by removing them from the general fund. *See Wash.*
15 *Const.*, Art. VIII, § 1 (limiting the debt that the State is allowed to incur to a certain percentage
16 of “general state revenues,” which are defined generally as revenues deposited into the general
17 fund, with exceptions); Crawford Decl., ¶ 31. Instead, the Legislature chose to amend the
18 Charter Schools Act to ensure that charter schools do not receive any constitutionally restricted
19 funds by ensuring they no longer receive any dollars at all from the general fund.

20 **1. Charter schools are now funded solely from lottery revenue and not from**
21 **any constitutionally restricted fund**

22 In response to the *LWV* ruling, the Legislature cured the constitutional defects of the
23 Charter Schools Act. As this Court has already recognized, charter school appropriations are
24 now expressly authorized under separate legal authority from appropriations for common
25 schools. Dismissal Order at 12-13; *Cf.* RCW 28A.710.270 and RCW 28A.150.380. Charter
26 schools are now funded entirely from the Opportunity Pathways Account. RCW 28A.710.270;
RCW 67.70.240(1)(c); Dismissal Order at 12-13. It is undisputed that the Opportunity

1 Pathways Account, in turn, is funded solely with lottery revenue. RCW 28A.710.270; RCW
2 28B.76.526; RCW 67.70.240(1)(c); Crawford Decl., ¶ 28; Plaintiffs’ MSJ at 12:19-20; Salvi
3 Decl., ¶5:17-18; Pedersen Decl., ¶ 9. This Court was correct to note that the “Fiscal Impacts”
4 chart that Plaintiffs rely on is also consistent with this conclusion because it shows that the
5 charter schools “will be funded through the opportunity pathways account instead of the
6 general fund.” Dismissal Order at 13, fn.5.²³

7 The Supplemental Budget for the remainder of the 2015-2017 biennium implements
8 this change to charter school funding. Laws of 2016, Sp. Sess., Ch. 36 (Supplemental Budget),
9 § 501 (adding some funding for OSPI and the State Board for non-common schools from
10 Opportunity Pathways); §516 (adding a section funding charter school operations from
11 Opportunity Pathways); § 517 (adjusting funding for the Charter School Commission for fiscal
12 year 2017 to come from Opportunity Pathways). Any remaining general fund references in the
13 supplemental budget relating to charter schools reflect payments made in fiscal year 2016,
14 which ended June 30, 2016, not current charter schools funding. Charter schools currently
15 receive no revenue from the general fund, from the current state property tax for common
16 schools, from money the Legislature has appropriated for common schools, or from the
17 common school construction account. *Id.*; Crawford Decl, ¶¶ 15-17, 19-20.

18 Plaintiffs assert that the Act directs OSPI to pay funds to charter schools “on the same
19 basis” as common schools. Plaintiffs’ MSJ at 23. But Plaintiffs also admit, as they must, that
20 this simply means that the Superintendent must “use the same distribution formulas” that they
21 use for other schools “to dis[bu]rse funds.” Plaintiffs’ MSJ at 21. Plaintiffs present no authority
22 for the notion that calculating funding amounts according to the same formula somehow
23 diverts money from common schools.

24
25 ²³ Even so, the chart Plaintiffs rely on also shows one option considered during the legislative process,
26 but the expenditures shown are not consistent with the supplemental budget actually adopted. Crawford Decl., ¶
24.

1 The Legislature’s cure is instead like that implemented after the ruling in *Bryan*, which
2 held that appropriation of common school funds to teacher training schools (normal schools)
3 violated the constitution because the teacher training schools did not satisfy the definition of
4 common school. After the ruling in *Bryan*, the Legislature responded by funding the normal
5 schools from non-common-school money in the general fund. Laws of 1909, ch. 243 at 870
6 and 879. Like *Bryan*, the Supreme Court found I-1240 improperly defined charter schools as
7 common schools and granted them access to restricted funds. The Legislature responded by
8 funding charter schools from a different, unrestricted revenue source—lottery revenue.²⁴

9 None of the cases relied on by Plaintiffs held that common schools are the only schools
10 that can be publicly funded in Washington, or that, contrary to the language of the constitution,
11 the public education system is a system of “common schools” rather than “public schools.” *See*
12 Plaintiffs MSJ at 21 and 24. To the contrary, as recognized in *Bryan*, the Constitution allows
13 for other types of public schools, and those schools can be funded as long as it is not from
14 funds restricted to the common schools. *Bryan*, 51 Wash. at 505. Furthermore, since *Yelle*, the
15 Supreme Court has recognized the State must appropriate funding for public education beyond
16 the constitutionally protected funds for the common schools, noting that article IX, section 5 of
17 the constitution expressly refers to a broader category of “other state educational funds.”
18 *Seattle Sch. Dist.*, 90 Wn.2d at 521 (“[T]he constitutional draftsmen must have contemplated
19 that funds, *other than* common school funds, were to be available for *and used* to educate our
20 resident children.” (emphasis in original)).

21 Charter schools receive no revenue from general fund money that was appropriated for
22 common schools, or even from the general fund at all. Nor do they receive funding from the

24 ²⁴ Similarly, in *Yelle* current school funds appropriated for common school use could not be used to fund
25 state matching funds for the State Board for Vocational Education. *State ex. rel. State Bd. for Vocational Educ. v.*
26 *Yelle*, 199 Wash. 312, 91 P.2d 573 (1939). The Legislature responded funding the State Board for Vocational
Rehabilitation out of the general fund. *cf.* Laws of 1937, ch. 230 at 1184 (appropriation from current school fund);
Laws of 1941, ch. 234 at 748 (appropriating general funds).

1 common school construction fund, or the current state property tax for common schools.
2 Crawford Decl., ¶ 16-17; Laws of 2016, ch. 36. Plaintiffs cannot show that a single dollar from
3 any common-school-restricted fund has been or will be spent on charter schools under the
4 amended Charter Schools Act. This is all that is required by the constitution, and the Court can
5 dismiss Plaintiffs’ diversion claim on this basis alone.

6 **2. There is no constitutional prohibition against increasing general fund**
7 **expenditures for higher education scholarships or early childhood**
8 **education, but in any event Plaintiffs only speculate about what will**
9 **happen in a future biennium, and their speculation cannot be a basis to**
10 **hold the Act unconstitutional**

11 Plaintiffs complain that funding charter schools out of the Opportunity Pathways
12 Account will mean that the Legislature has to shift some other expenditures to the general
13 fund. While Plaintiffs claim this will improperly encroach on common school funding, this
14 ignores the Washington Supreme Court’s reasoning in *LWV*.

15 *LWV* did not hold that the general fund can fund nothing but common schools. That
16 would be absurd. Instead, the *LWV* Court held that the constitutionally protected common
17 school funds are revenue from the current state property tax, the common school construction
18 fund, and general fund dollars that the Legislature has appropriated in that biennium for the
19 common schools. *LWV*, 184 Wn.2d at 408-10. Unless a state officer must take money
20 appropriated for common schools and spend it on something that is a not a common school
21 program—like the Superintendent was required to do under the prior charter school law—a
22 general fund expenditure is not an unconstitutional diversion of common school funding. *See*
23 *id.* An expenditure does not take money from the common school system, even indirectly, if it
24 does not spend money that was previously appropriated to common schools. Thus Plaintiffs are
25 wrong when they assume that increasing expenditures from the general fund necessarily diverts
26 common school funding.

27 In the 2015-17 biennium, the Legislature appropriated funds for higher education
28 financial aid and early childhood education from the Opportunity Pathways Account, in

1 addition to funds for charter schools. As Plaintiffs recognize, these scholarships and early
2 childhood education programs have always been funded from multiple revenue sources,
3 including, in part, the general fund. Decl. of Salvi, ¶ 7:10-21. Plaintiffs cite no authority that
4 precludes the Legislature from funding those programs more robustly, or even entirely, from
5 the general fund. A finding to the contrary would call into question the Legislature’s ability to
6 fund any non-common school program from the general fund. Moreover, even if the Court
7 were to conclude that early learning and financial aid appropriations from the general fund
8 could not be increased, Plaintiffs admit that this has not actually occurred as a result of the
9 Charter Schools Act because the cost of charter schools has been absorbed in revenue from
10 increased lottery sales.

11 Plaintiffs admit that “[a]s of September 2015, the official revenue forecast indicated
12 that the Opportunity Pathways Account would be higher than originally forecast for the
13 biennium – in an amount that was sufficient to absorb ESSB 6194’s, [the Charter Schools
14 Act’s], costs for the remainder of the 2015-17 biennium.” Salvi Decl. at ¶ 13; Plaintiffs’ MSJ
15 at 28:13-14. This is correct. As of the more recent November 2015 revenue forecast, the
16 Opportunity Pathways Account, (including the beginning balance plus 2015-17 revenue), will
17 total \$281.6 million for 2015-17 biennium. Crawford Decl., ¶ 35. From that amount, the
18 Legislature had appropriated \$80 million for early childhood education, and about
19 \$173.5 million for the student achievement council for financial aid. Crawford Decl., Att. 4,
20 Sec. 610, Supplemental Operating Budget; Att. 5, Sec. 612, Supplemental Operating Budget.
21 Thus, adding about \$11 million in appropriations for the 2015-17 biennium for charter schools
22 in the supplemental budget did not require any of the other Opportunity Pathways expenditures
23 to be shifted to the general fund. Crawford Decl., ¶¶ 35, 38, 39. \$80 million + \$173.5 million +
24 \$11 million = \$264.5 million < \$281 million. In addition, general fund expenditures for the
25 elements of basic education increased, rather than decreased, with the supplemental budget,
26 also undercutting Plaintiffs’ diversion argument. Crawford Decl., ¶ 44; Laws of 2016, ch. 36,

1 §§ 501-05.

2 Plaintiffs predict that as charter schools grow and attract more students in Washington
3 their funding will displace other expenditures that were typically made from Opportunity
4 Pathways, shifting those expenditures to the general fund. Plaintiffs also seem to speculate that,
5 at some point in the future, the Opportunity Pathways Account will not have sufficient funds
6 even if the account is used only for charter schools. Plaintiffs point to Legislative testimony
7 and documents from early in the Legislative session to support these arguments. Plaintiffs’
8 MSJ at 24-26; Pedersen Decl., Ex B.

9 For example, Plaintiffs claim, based on a statement from a single legislator in a hearing,
10 that general fund money would flow into the Opportunity Pathways Account, but the
11 Legislature did not authorize this in the supplemental budget, and Plaintiffs show no evidence
12 that Opportunity Pathways will begin to receive general fund dollars in the future. *Cf.*
13 Plaintiffs’ MSJ at 27 and Crawford Decl., ¶ 39. Moreover, this Court has rejected the notion of
14 relying on a single legislator’s statement to discern the meaning of a bill, a rule that makes
15 particular sense when the legislator opposed the measure. *See, e.g., In re F.D. Processing, Inc.*,
16 119 Wn.2d 452, 461, 832 P.2d 1303 (1992) (“[T]he comments of a single legislator are
17 generally considered inadequate to establish legislative intent.”); *NLRB v. Fruit & Vegetable*
18 *Packers, Local 760*, 377 U.S. 58, 66, 84 S. Ct. 1063, 12 L. Ed. 2d 129 (1964) (“[W]e have
19 often cautioned against the danger, when interpreting a statute, of reliance upon the views of its
20 legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its
21 reach.”).

22 In addition, the document Plaintiffs rely on reflects a proposal that was never adopted.
23 It would have funded a number of additional schools out of the Opportunity Pathways
24 Account, not just charter schools. Skelton Decl, Ex A, Plaintiffs’ MSJ at 26. This document
25 also assumed that charter school funding would cost \$18 million, not the \$11 million that was
26 actually appropriated. *Cf.* Pedersen Decl., Ex. B; Crawford Decl., ¶ 24; Laws of 2016, ch. 36

1 §§ 501, 516, 517.²⁵ Neither of these things occurred when the Act and the Supplemental
2 Operating Budget were adopted.

3 Ultimately, Plaintiffs’ fears have not materialized. Salvi Decl. at ¶13. The Legislature
4 has not yet budgeted for the 2017-19 biennium. When it does, it will very likely increase its
5 common school appropriations, which will then be constitutionally protected under the *LWV*
6 reasoning, but the remainder of the general fund will be available for other expenditures,
7 including financial aid and early learning. It is also doubtful that the total cost of charter
8 schools will exceed the typical lottery revenue funding Opportunity Pathways in the next
9 biennium. To do so, charter school costs would have to increase from about \$11 million per
10 year to more than \$270 million for the 2017-19 biennium. A claim founded on nothing more
11 than speculation is not ripe or justiciable. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411,
12 27 P.3d 1149 (2001); *see also Walker v. Munro*, 124 Wn.2d 402, 412, 879 P.2d 920 (1994)
13 (declaratory judgment is not appropriate when a dispute is hypothetical and speculative).
14 Similarly, injunctive relief requires evidence of current or existing violations. *Braam v.*
15 *State*, 150 Wn.2d 689, 708, 81 P.3d 851 (2003). Were this Court to accept Plaintiffs’ invitation
16 to speculate, it would enter into the realm of advisory opinions. *DiNino v. State ex rel. Gorton*,
17 102 Wn.2d 327, 331, 684 P.2d 1297 (1984). Plaintiffs’ “diversion” theory is based on nothing
18 more than speculation and is not justiciable.

19 In sum, Plaintiffs have failed to show, beyond a reasonable doubt, that there is no
20 circumstance under which charter schools can be funded constitutionally. Nor have they
21 established that charter schools are currently being funded from constitutionally restricted
22 funds.

23
24 _____
25 ²⁵ In addition to Legislative history, Plaintiffs interject hearsay into the record in the declaration of
26 Pedersen, discussing what someone else said in an executive session of a legislative committee., ¶16. Rulings on
summary judgment must be based on competent evidence, which does not include hearsay. CR 56(e);
Charbonneau v. Wilbur Ellis Co., 9 Wn. App. 474, 477, 512 P.2d 1126 (1973).

1 **3. No unconstitutional diversion occurs when school districts serve as**
2 **authorizers**

3 An elected school board’s decision to become an authorizer and add charter schools to
4 the options available to its the students is directly subject to local voter control and the
5 district’s discretion to make decisions about how to best meet the needs of its students.
6 Nevertheless, Plaintiffs argue that serving as a school district authorizer of charter schools
7 diverts common school funds. Plaintiffs’ Brief at 29. Plaintiffs’ narrow construction of school
8 district authority would eviscerate the very concept of local voter control Plaintiffs support.
9 *LWV*, 184 Wn.2d at 405. School districts possess broad discretion to “provide for the
10 development and implementation of programs, activities, services, or practices that the board
11 determines will: (i) Promote the education and daily physical activity of kindergarten through
12 twelfth grade students in the public schools” RCW 28A.320.015(1)(a). This includes the
13 ability to “contract with other school districts, educational service districts, public or private
14 organizations, agencies, schools, or individuals to implement the board's powers and duties.”
15 RCW 28A.320.035(1).

16 Many districts, including Spokane School District, have contracted with private entities
17 for services to meet the needs of families and students in the district. Plaintiffs’ narrow
18 interpretation of school districts’ authority to spend the money they receive from the common
19 school or general fund could effectively hamstring school boards in their efforts to provide
20 options in response to the desires and needs of their communities, whether through an online
21 provider, skills center, Running Start, or charter school.

22 Additionally, while not necessary for constitutional compliance, school districts that
23 become charter school authorizers receive a percentage of the Opportunity Pathway funds that
24 covers the costs associated with charter school oversight. RCW 28A.710.110; WAC 180-19-
25 060. School districts also receive money from unrestricted sources, such as philanthropic and
26 local operations levy funds. Anderson Decl., ¶20; Meierbachtol Decl., ¶ 10. Plaintiffs introduce

1 no evidence to show that a school district authorizer would be forced to use common school
2 money to pay for charter school operations. Plaintiffs’ MSJ at 28-29. The same is true for the
3 minimal school district costs associated with giving families notice that a charter school option
4 is available in the district. RCW 28A.710.060. If this Court concludes that this provision
5 results in diversion, it is severable and can be stricken without implicating the constitutionality
6 of the Act. E2SSB 6194, § 301.

7 **D. The Charter Schools Act Does Not Improperly Delegate the State’s Paramount**
8 **Duty to Define Basic Education; It Requires Charter Schools to Provide the**
9 **Legislatively Defined and Supreme Court Endorsed Program of Basic Education**

10 The Charter Schools Act does not delegate the State’s paramount duty to define “basic
11 education,” and any lesser delegation that does exist is subject to appropriate safeguards. The
12 Court has held that sufficient standards are in place when the Legislature “define[s] in general
13 terms what is to be done and the instrumentality or administrative body which is to accomplish
14 it;” and where “[p]rocedural safeguards exist to control arbitrary administrative action and any
15 administrative abuse of discretionary power.” *Barry & Barry, Inc. v. State Dep’t of Motor*
16 *Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). Yet requiring the legislative branch to “lay
17 down exact and precise standards for the exercise of administrative authority destroys needed
18 flexibility.” *Id.* at 160; *see also United Chiropractors of Wash., Inc. v. State*, 90 Wn.2d 1, 6,
19 578 P.2d 38 (1978) (same test for delegation to a private entity).

20 As described above, the Act requires charter schools to provide the already-defined
21 “program of basic education,” which includes all components in RCW 28A.150.220, through
22 instruction in the detailed EALRs. RCW 28A.710.040(2)(b); RCW 29A.150.203, .200, .220.
23 The provisions of the Act also track the Supreme Court’s definition of basic education as stated
24 in *McCleary*. Learning goals under RCW 28A.150.210 and the EALRs “define a ‘basic
25 education’—the substance of the constitutionally required ‘education’ under article IX, section
26 1.” *McCleary*, 173 Wn.2d at 523.

Plaintiffs contend that delegating to public charter schools the ability to establish how

1 the materials required in the EALRs will be taught is improper because charter schools will be
2 operated by non-profit, non-sectarian entities. However, nothing in the state constitution
3 prohibits the Legislature from delegating operation of charter schools to non-profit entities, so
4 long as sufficient safeguards are in place. *See United Chiropractors*, 90 Wn.2d at 6. Indeed,
5 other statutes have long allowed school districts to contract with non-sectarian, private entities
6 to provide instruction to public school students. *E.g.*, RCW 28A.150.305; RCW 28A.300.165
7 (National Guard); RCW 28A.193 (incarcerated juveniles); WAC 392-172A-04080 to -04110
8 (special education).

9 The Act imposes procedural safeguards sufficient to ensure that public charter schools
10 do not abuse their power or otherwise act arbitrarily. *See Barry*, 81 Wn.2d at 159. Charter
11 schools must comply with the terms of their contracts, which incorporate statutory or
12 regulatory requirements not specifically addressed in the Act. RCW 28A.710.040(3). Public
13 charter school authorizers must approve a charter school's education plan, discipline plan,
14 instructional hours, and all other elements of the charter school's extensive application. RCW
15 28A.710.130. Authorizers must continuously monitor charter schools and conduct ongoing
16 performance evaluation. RCW 28A.710.180(1). Authorizers may conduct investigations as
17 long as they do not unduly inhibit the school's autonomy. RCW 28A.710.180(2). If needed, the
18 authorizer can impose sanctions or require a corrective action plan. RCW 28A.710.180(4).
19 Charter schools are also subject to regular performance audits. RCW 28A.710.030(2).

20 Authorizers can revoke or refuse to renew a charter contract "at any time" for any of
21 several reasons, including: failure to comply with state or federal law or contract requirements,
22 failure to make sufficient progress toward performance expectations, or fiscal mismanagement.
23 RCW 28A.710.200. While operators must be given notice and an opportunity to be heard
24 (RCW 28A.710.200(3)), there is no indication that the process will be unduly lengthy, and
25 compliance with due process should not otherwise undermine a finding that appropriate
26 safeguards are in place under *Barry*. Indeed, charter schools can be subject to sanctions that

1 traditional public schools do not face, including nonrenewal if they fall in the bottom quartile
2 of public schools. RCW 28A.710.200(2).

3 Finally, both the Superintendent and school district authorizers hold the power of the
4 purse. The Superintendent allocates charter school funds from Opportunity Pathways to charter
5 schools, and he can withhold funds. Meierbachtol Decl., ¶¶ 14-15, 19, RCW 28A.710.040(5);
6 RCW 28A.710.220; RCW 28A.150.290(2) (authority to establish conditions for funding); *see*
7 *also State v. Preston*, 84 Wash. 79, 86-87, 146 P. 175 (1915). As with traditional public
8 schools, the Superintendent can also recoup overpayments from charter schools when they
9 have failed to perform. Halsey Decl., ¶25 (describing recovery of funds from First Place).;
10 Meierbachtol Decl., ¶ 19, 20 &22 (describing generally withholding and recapture of funds;
11 describing recovery of funds from First Place).

12 Plaintiffs' First Place Scholars example demonstrates that these safeguards are
13 implemented promptly and effectively. First Place was a non-profit private school that had
14 long served students whose families experienced homelessness. Halsey Decl., ¶ 25. Within the
15 school's second month of operation as a charter school, the Commission became aware of
16 some concerns and began its oversight and corrective action process. Halsey Decl., ¶ 25. The
17 Commission promptly intervened and engaged in a series of corrective actions, including
18 probationary status. As new information was received, the Commission not only continued to
19 administer its own corrective action process, but made the referral that resulted in the State
20 Auditors' overpayment finding and the ultimate recoupment of the overpayment funds. Halsey
21 Decl. at 25. The Commission and OSPI also worked together to ensure compliance. First Place
22 Scholars is no longer operating a charter school. *Id.*; Meierbachtol Decl., ¶ 22.

23 Notably, Plaintiffs ignore the State Auditor's reports on all other charter schools that
24 operated for the first few months of the 2015-16 school year. In each of those instances, the
25 State Auditor found compliance with laws, regulations, policies and procedures as well as
26 adequate safeguarding of public resources. Halsey Decl., ¶ 25.

1 Plaintiffs’ contention that revocation and non-renewal of charter school contracts would
2 take too long ignores the reality that some traditional public schools identified as “persistently
3 lowest achieving, with the lowest levels of achievements and rates of improvement,” are
4 afforded *increased* funding for three years as they work to increase student performance. *See*
5 chapter 28A.657 RCW.²⁶ Thus, the oversight system for charter schools provides at least as
6 rapid and stringent of consequences for underperformance as in traditional common schools.

7 In sum, the Legislature—not charter schools—defines basic education, which charter
8 schools are expressly required to provide. There are ample safeguards in place to avoid
9 arbitrary action. Thus, Plaintiffs cannot prove beyond a reasonable doubt that unconstitutional
10 delegation will occur.

11 **E. The Superintendent Supervises Public Charter Schools in Compliance with**
12 **Article III, Section 22**

13 The Superintendent has the same level of supervisory authority over charter schools
14 that he has over traditional public schools. Article III, section 22 provides: “The superintendent
15 of public instruction shall have supervision over all matters pertaining to public schools, and
16 shall perform such specific duties as may be prescribed by law.” It is a well-established
17 principle of state constitutional law that “the Washington constitution is a limitation upon the
18 powers of the Legislature, instead of a grant of powers, and so far as the power of the
19 Legislature is not limited by the constitution it is restrained.” *Yelle*, 55 Wn.2d at 297. The plain
20 language of Article III recognizes legislative authority to define the Superintendent’s specific
21 duties, so long as the legislative branch does not interfere with the general supervisory
22 authority. 1998 Op. Att’y Gen. No. 6, at 2.

23 The Office of the Superintendent of Public Instruction works with the State’s 295
24 school districts to administer basic education programs and implement education reform on

25 ²⁶ *See also* <http://www.k12.wa.us/StudentAndSchoolSuccess/RequiredActionDistricts.aspx> (last visited
26 on Dec. 20, 2016).

1 | behalf of more than one million public school students. Meierbachtol Decl., ¶ 3. The
2 | Superintendent allocates school funding and regulates financing. *Id.* With the State Auditor,
3 | the Superintendent ensures sound financial management and accountability. *Id.* at ¶ 3, 19 and
4 | 20. The Superintendent manages statewide student assessments and collects data about schools
5 | and operations. *Id.* at ¶ 3. The Superintendent ensures participation in and compliance with
6 | school accountability requirements. *Id.* The Superintendent also sets statewide learning goals
7 | that are aligned with research-based performance indicators. *Id.* While the Superintendent
8 | provides technical assistance to schools and school districts, he or she does not engage in day-
9 | to-day operation of school districts or schools. *Id.*

10 | “Charter schools are subject to the supervision of the superintendent of public
11 | instruction and the state board of education, including accountability measures, to the same
12 | extent as other public schools, except as otherwise provided in [the Charter Schools Act].”
13 | RCW 28A.710.040(5). Thus, unless the Act specifically indicates otherwise, the
14 | Superintendent’s supervisory authority remains the same. Accountability measures include
15 | participating in the Washington Achievement Index, which allows comparison with other
16 | public schools, as well as all other school accountability measures. *See* Meierbachtol Decl. ¶
17 | 44; *see also* Halsey Decl., ¶ 20. While Plaintiffs assert that where the Commission has
18 | oversight it displaces the Superintendent, nothing in the statutory section governing the
19 | Commission divests the Superintendent of any of his constitutional powers, nor could a statute
20 | do so. RCW 28A.710.070. This Court should not find an implied divestiture of the
21 | Superintendent’s constitutional power in the Act; instead it must interpret legislation in a way
22 | that is consistent with the constitution whenever possible. *E.g., State v. Sanchez*, 177 Wn.2d
23 | 835, 843, 306 P.3d 935 (2013) (“[I]f possible, we will construe a statute’s language so as to
24 | find it constitutional.”).

25 | Plaintiffs point to no provision that specifically divests the Superintendent of any
26 | particular aspect of his supervisory authority. The Superintendent or his designee is a voting

1 member of the Charter School Commission and the Commission must reside within the Office
2 of the Superintendent of Public Instruction for administrative purposes. RCW 28A.710.070.
3 Thus the Superintendent will be aware if the Commission were to encroach on his
4 constitutional supervisory powers in practice. The Superintendent has supervisory authority
5 over teacher certification in traditional and public charter schools, with the Professional
6 Education Standards Board. RCW 28A.410.010. The Superintendent establishes and revises
7 the EALRs, with which charter schools must comply. Meierbachtol Decl., ¶ 41-42. He also
8 supervises statewide assessments, in which charter schools must participate. RCW
9 28A.300.041(7). The Superintendent must make reports and recommendations to the
10 Legislature regarding the overall public education system, including charter schools. RCW
11 28A.300.040. Again, the Superintendent holds the power of the purse; he allocates charter
12 school funds from Opportunity Pathways, and he can withhold funds. RCW 28A.710.040(5);
13 RCW 28A.710.220; *see also Preston*, 84 Wash. at 86-87; Meierbachtol Decl., ¶¶ 3 & 22
14 (general control over allocation; funds recouped from First Place).

15 Plaintiffs argue that the Charter Schools Act transfers some of the Superintendent’s
16 authority to the Commission, but it does not. The Charter School Commission is charged with
17 “authoriz[ing] high quality public charter schools throughout the state, particularly schools
18 designed to expand opportunities for at-risk students, and to ensure the highest standards of
19 accountability and oversight for these schools.” RCW 28A.710.070(1). The Commission must,
20 “through its management, supervision, and enforcement of the charter *contracts*, administer the
21 portion of the public common school system consisting of the charter schools it authorizes as
22 provided in this chapter, *in the same manner as a school district board of directors.*” *Id.*
23 (Emphasis added). Thus, the Commission’s role is parallel to that of school district authorizers,
24 and it does not supplant the Superintendent’s general supervision over the public schools.
25 While the Superintendent will not participate in the day-to-day operation of charter schools, it
26 would be wholly impractical to suggest that the Superintendent could personally supervise the

1 day-to-day operations of each public school, or even each of the 295 public school districts.
2 Meierbachtol Decl., ¶ 3. Such a system would contradict the local control that Plaintiffs assert
3 is central to Washington’s public school system.

4 The Commission is no different than the State Board of Education or the Professional
5 Educator Standards Board, which are independent boards charged to address certain aspects of
6 the education system, and neither of which defeats the Superintendent’s supervisory authority.
7 See RCW 28A.305; RCW 28A.410.010. Like the Commission, local school boards are
8 responsible for developing performance evaluation criteria for staff, developing curricula that
9 meet state standards, and evaluating instructional materials. RCW 28A.150.230. Such local
10 oversight has never been held to encroach on the Superintendent’s authority. The legislative
11 branch can assign specific tasks to the Commission, just as it has done for these other entities
12 within the education system. Plaintiffs cannot show a violation of article III, section 22.

13 **F. The Legislature Complied with Article II, Section 37 When It Adopted the**
14 **Charter Schools Act in the 2016 Legislative Session**

15 The Charter Schools Act is a complete act that does not violate article II, section 37 of
16 the Washington Constitution. Article II, section 37 provides that no act shall be “revised or
17 amended by mere reference to its title, but the act revised or the section amended shall be set
18 forth at full length.” In applying this provision, the Court has analyzed whether the new
19 enactment is a complete act such that the scope of the rights or duties affected can be
20 determined without referring to any other law, and whether a straightforward determination of
21 the scope of rights or duties under existing statutes would be rendered erroneous by the new
22 law. See *State v. Manussier*, 129 Wn.2d 652, 663, 921 P.2d 473 (1996). A complete act is not
23 unconstitutional, “even though it may by implication operate to change or modify prior acts.”
24 *Id.* at 664-65. The Legislature is presumed to know the law in the area in which it is legislating.
25 *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008).

26 Just like the prior Charter Schools Act, the amended Charter Schools Act includes

1 collective bargaining statutes that address charter school employees. RCW 41.56.0251; RCW
2 41.59.031. The statutes create separate collective bargaining units for charter school employees
3 within these new schools. RCW 41.56.0251; RCW 41.59.031. Neither the prior or current
4 Charter Schools Act altered collective bargaining in any pre-existing statutes for other
5 employees.

6 Similarly, the Act did not surreptitiously amend any portion of the Basic Education
7 Act. In fact, the current Charter Schools Act specifically requires charter schools to provide “a
8 program of basic education.” RCW 28A.710.040(2)(b). As explained above, the Charter
9 Schools Act plainly requires that students be instructed in the Supreme Court endorsed, and
10 Legislatively defined, program of basic education. *See* RCW 28A.710.040(2)(b). While some
11 flexibility is afforded charter schools in order to improve student outcomes, that flexibility
12 exists for all schools and, in any event, when the effect of a new statute is to decline to apply
13 existing law in a new circumstance, that does not make a complete act violate article II, section
14 37. *See Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 640-42, 71 P.3d 644
15 (2003). “Nearly every legislative act of a general nature changes or modifies some existing
16 statute, either directly or by implication but this, alone, does not inexorably violate the
17 purposes of [article II,] section 37.” *Id.* at 640 (internal quotation marks omitted). Legislators
18 were not misled and, therefore, the Act does not violate article II, section 37.

19 VI. CONCLUSION

20 For the reasons stated above, the Court should grant summary judgment to the State
21 and dismiss all of Plaintiffs’ remaining claims.

22 I certify that this memorandum contains 13,794 words, in compliance with this Court’s
23 Order dated October 4, 2016.

24 DATED this 20 day of December 2016.

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26 Respectfully submitted,

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