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POLICY BRIEF

Analysis: Why the state supreme court ruling against public charter schools is wrong

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January 2016

Key Findings:

1. *The state supreme court ruled charter schools are not common schools, and that only common schools governed by locally-elected boards can receive state funding from the General Fund budget.*
2. *The ruling is wrong because it distorted the plain meaning of a sentence in the constitution about dedicated common school funds, whose original purpose was to protect these funds from waste and fraud, and for spending on public education.*
3. *Public schools are funded mostly from the unrestricted General Fund, not from dedicated common school accounts.*
4. *In fiscal 2015, schools received over $7 billion from the state General Fund. Of this amount, only $2 billion came from the dedicated state property tax for common schools.*
5. *The ruling illogically concluded that because some money in the state General Fund is restricted to common schools, then all money in the General Fund must be restricted to common schools.*
6. *The ruling ignored other well-established legal rules for determining whether a law is constitutional.*
7. *Key passages of the ruling appear to be copied directly from papers written by Washington Education Association (WEA) lawyers, the lead party in the lawsuit.*
8. *The constitution authorizes public education programs beyond "common schools," including high schools, innovation schools, online schools, tutoring programs and public education programs for incarcerated youth.*
9. *It is constitutional for the legislature to fund charter schools from the General Fund.*

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Introduction

The 2016 Legislative Session is currently considering legislation to restore public funding to Washington's charter schools. A recent ruling from the state supreme court has put in jeopardy public funding for charter schools.

This study analyzes the legal arguments behind the court's majority ruling, reviews whether standard rules of constitutional interpretation were properly applied, identifies internal flaws in logic and examines the role of the Washington Education Association (WEA) union in drafting the court's opinion. Finally, this study assesses whether the case was wrongly decided in light of how public programs are commonly funded through the state General Fund, and assesses whether lawmakers may constitutionally fund public charter schools out of non-dedicated General Fund accounts.

Background

On September 4, 2015, shortly after the school year started, the state supreme court ruled in a lawsuit brought by the powerful WEA teachers union that Washington's public charter schools had to close.[1] The ruling struck down as unconstitutional Washington's 2012 voter-approved charter school law, Initiative 1240.

The six justices in the majority, citing a 1909 case, said only common schools governed by locally-elected boards can receive state funding from the General Fund budget.

The six judges in the majority were Chief Justice Barbara Madsen and Justices Charles Johnson, Susan Owens, Debra Stephens, Charles Wiggins and Mary Yu. The majority opinion was written by Chief Justice Madsen.

Three justices strongly dissented, saying that even if charter schools cannot receive money from dedicated education funding accounts, it is constitutional for lawmakers to allocate other General Fund money to provide for the education of these students, just as they fund social services, health care, public safety, and all other non-education programs. The dissenting judges were Justices Mary Fairhurst,

1 League of Women Voters of Washington; El Centro De La Raza, Washington *Association of School Administrators, Washington Education Association, Wayne Au, Pat Braman, Donna Boyer, and Sarah Lucas, Appellants v. State of Washington*, En Banc Opinion, Supreme Court of the State of Washington, September 4, 2015, No. 89714-0 at www.courts.wa.gov/opinions/pdf/897140.pdf.

Sheryl Gordon McCloud and Steven Gonzalez. The dissenting opinion was written by Justice Fairhurst.

The majority's ruling has had immediate and far-reaching effects. It threatens the closure of nine public charter schools, cancelled the applications of new schools, sparked protests in local communities, upset families and disrupted the education of some 1,200 school children.

The reasoning in the majority ruling

Chief Justice Madsen's majority opinion interpreted Article IX, section 2 of Washington's constitution as barring public funding to public charter schools. This section of the constitution says:

> *"The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.*[2]*"*

Chief Justice Madsen made a three-step argument to conclude that public charter schools cannot receive public funding.

1. All of the legislature's basic education appropriations in the budget are designated for the exclusive use of the common schools;

2. A public charter school is not a "common school" because, according to a 1909 case, *School District No. 20 v. Bryan*, they are not under the control of the qualified voters of the school district.[3]

3. Therefore public charter schools are not "common schools" and may not receive state public funds.

Based on this reasoning the court ruled that charter school funding under the law passed by voters in 2012 is unconstitutional, and that, because the funding section is invalid, the entire law is struck down and the schools must close.

Why the majority ruling is wrong

The reasoning of the majority ruling is wrong primarily because it distorted the plain meaning of a sentence in the constitution by ignoring its context. In this

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2 Constitution of the State of Washington, Art. IX, Sec. 2, at leg.wa.gov/LawsAndAgencyRules/Documents/12-2010-WAStateConstitution.PDF.

3 In *School District No. 20 v. Bryan*, 51 Wash. 498, 99 P. 28 (1909), the court held that restricted common school funds could not be used to support a state normal school, a school for training teachers, because state normal schools are not common schools under the control of locally elected school boards. In the case of *Bryan*, the court said "It is not that the legislature cannot make provision for the support of a model training school, but in its attempt to do so, it has made provision for it out of the wrong fund."

case, the majority justices took one clause of the state constitution and ignored other clauses and the proper historical and current context. The clause in question is the restricted school funding clause:

"But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools."

Chief Justice Madsen interpreted this clause to mean that because the unrestricted General Fund includes restricted funds for common schools, no other kind of public school can receive unrestricted or restricted funds.

The state constitution authorizes public education programs beyond "common schools"

Viewed in context, Washington's 1889 constitution gives the legislature the authority to expand public education to include programs beyond the original system of elementary common schools. Article IX, section 2 reads in part:

> *"The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools."*

Former state supreme court justice and state senator Phil Talmadge explains that this part of the constitution gives the legislature broad authority to create new school programs not specifically listed in the constitution. This is shown by the reference to future public schools as those that "may hereafter be established." As Mr. Talmadge has shown, the drafters used the words "shall include," not the words "consists of," to indicate that other kinds of public schools could be added later.[4]

That has happened. The legislature has broadened public education to include a variety of programs that are not the "common schools" that existed in 1889. These include kindergarten, high schools, bilingual education, special education, remedial education, gifted education and Running Start.

Mr. Talmadge shows Chief Justice Madsen confused school programs with a common school system:

> *"The effect of the court's opinion is to confuse school **programs** with a common school **system**…Some, like Running Start, are not operated by local school districts. Our Constitution requires the Legislature to provide a system open to all, but nowhere restricts its ability to fund specialized programs within that system.*[5]"

4 "Justices should reconsider charter school decision," by Phil Talmadge, *The News Tribune,* September 14, 2015, at www.thenewstribune.com/opinion/op-ed/article35265840.html.

5 Ibid.

The legislature's current practice for funding public schools

Chief Justice Madsen's mistake is further demonstrated by current school funding practice. Public schools are funded mostly from the unrestricted General Fund, not from dedicated common school accounts. For example, in fiscal 2015, schools received over $7 billion from the General Fund. Of this amount only a little over $2 billion came from the dedicated state property tax for common schools.[6]

Justice Fairhurst explained that charter school funding is constitutional because the charter school law does not divert funding from the restricted school funds. In the court's dissent she wrote:

> "*Washington's Constitution identifies three funds whose use is restricted solely for the benefit of common schools. The [Charter school] Act does not require the use of monies from any of these funds. The current funding scheme for charter schools and public education is consistent with our Constitution and precedent.*[7]"

The majority ruling ignored established case law

Chief Justice Madsen cited a 1939 case, *State ex rel. State Board for Vocational Education v. Yelle*, as support for defunding charter schools. In that case the court struck down state funding for a vocational school because it received money from the restricted "current school fund."

Justice Fairhurst pointed out, however, that the court overruled this case in 2009 in *Fed. Way Sch. Dist. No. 210 v. State*, because the legislature had changed the way it funds public schools. Even though the *Yelle* case had been ignored by the courts for 76 years, the majority justices seem to have revived it in order to rule against charter schools, while neglecting countervailing decisions their court had made in the meantime.[8]

It is worth noting after the *Yelle* ruling in 1939, the legislature reacted by funding the vocational school from the unrestricted General Fund instead of from restricted education accounts. The legislature did not abolish vocational schools.

The majority ruling employed flawed logic to reach its conclusion

All four of Washington's former living state Attorneys General asked the court reconsider its decision. They note the majority ruling's logic may be summed up in this syllogism:

- The General Fund contains restricted funds dedicated to common schools;

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6 Ibid.

7 *League of Women Voters of Washington; El Centro De La Raza, Washington Association of School Administrators, Washington Education Association, Wayne Au, Pat Braman, Donna Boyer, and Sarah Lucas, Appellants v. State of Washington*, En Banc Opinion, The Supreme Court of the State of Washington, September 4, 2015, No. 89714-0, Dissent by Justice Mary E. Fairhurst, page 3, at www.courts.wa.gov/opinions/pdf/897140.pdf.

8 Ibid., page 11.

- Charter schools are not common schools;
- Therefore charter schools cannot receive public funds.[9]

The mistake in this line of reasoning is that it represents the common Fallacy of Induction – because some items in group share a quality, then all items in the group must share the same quality. Some money in the state General Fund is restricted to common schools, therefore all money in the General Fund must be restricted to the common schools.

The former Attorneys General point out that this faulty reasoning endangers public funding for all non-education programs:

> *"The Majority's opinion also puts at risk other appropriations from the general fund that pay for programs such as children and family services, mental health, developmental disabilities, and aging and adult service, to name a few.*[10]"

Justice Fairhurst severely criticizes this extreme result by the Court's majority as follows:

> *"Not only does this [finding] directly contradict established case law, see Bryan, 51 Wash. at 505, but taken to its full logical extent, it would mean any expenditure from the general fund would be unconstitutional unless it was for the support of common schools.* ***This cannot be the case.***[11]" *(Emphasis added.)*

The historical context for the restricted school funding clause

Historical context provides a clearer understanding of the restricted school funding clause in the constitution. In 1889, when Washington's constitution was written, the term "common schools" referred to the typical schools existing in the Territory of Washington at the time, that is, about one thousand small primary schools serving students in grades one through eight, many in one-room schoolhouses built by settlers.

Congress had found that other states had wasted the funds provided by federal land grants for education, so requiring a restricted fund for schools in the constitutions of new states was an effort to protect public money for schools.[12] For this reason Washington included the restricted school funding clause as a condition of becoming a state.

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9 "Former Attorneys General Amici Curiae Brief in Support of Reconsideration," by William B. Collins, in *League of Women Voters, Washington Education Association, et al. v State of Washington*, October 28, 2015.

10 Ibid.

11 *League of Women Voters of Washington; El Centro De La Raza, Washington Association of School Administrators, Washington Education Association, Wayne Au, Pat Braman, Donna Boyer, and Sarah Lucas, Appellants v. State of Washington*, En Banc Opinion, The Supreme Court of the State of Washington, September 4, 2015, No. 89714-0, Dissent by Justice Mary E. Fairhurst, page 9, at www.courts.wa.gov/opinions/pdf/897140.pdf.

12 "Charter Schools, Common Schools and the Washington State Constitution, by Laurie Beale, *University of Washington Law Review*, page 535-566, at 544, 1997.

Today many public education programs are funded through the General Fund that do not fit the 1909 definition of "common school." These include public high schools, innovation schools, online education, tutoring programs and public education courses for incarcerated youth.

Chief Justice Madsen's opinion distorts the meaning of the restricted funds clause in the constitution. This clause was not intended to block the use of the General Fund for innovative school programs, but to ensure that restricted school funds were protected from waste and fraud, and were spent on public education.

Influence of the WEA union in drafting the majority opinion

Analysis of the text of the charter school ruling reveals the extent of influence of one of the parties in the case, the Washington Education Association (WEA) union, in drafting the court's majority opinion. Several key passages in the opinion appear to have been copied directly from papers written by the WEA union and sent to the court on April 25, 2014.[13]

Here is one example. Page 12 of the court ruling says:

> *"Our constitution requires the legislature to dedicate state funds to support 'common schools.' WASH. CONST. art.IX, Sec. 2,3. As noted, section 2 provides that "the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.* Id.
>
> *Section 3 establishes a separate construction fund for the sole use of the common schools. Using any of those funds for purposes other than to support common schools is unconstitutional.* Mitchell v. Consol. Sch. Dist. No. 201*, 17 Wn.2d 61, 66, 135 P.2d 79 (1943) (plurality opinion). This court has repeatedly struck down laws diverting common school funds to any other purpose."*

Page 22 of the WEA union paper says:

> *"The Constitution requires the legislature to dedicate state funds to support "common schools." CONST. art.IX, Sec. 2,3. Section 2 provides that "the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.* Id.
>
> *Section 3 establishes a separate construction fund for the sole use of the common schools. Using even one cent of those funds for purposes other than to support common schools is unconstitutional.* Mitchell v. Consol. Sch. Dist. No. 201*, 17 Wn.2d 61, 66, 135 P.2d 79 (1943). This court has repeatedly struck down laws diverting common school funds to any other purpose."*

13 *League of Women Voters of Washington; El Centro De La Raza, Washington Association of School Administrators, Washington Education Association, Wayne Au, Pat Braman, Donna Boyer, and Sarah Lucas, Appellants v. State of Washington,* Brief of Appellants, Pacific Law Group, LLP, Paul J. Lawrence, April 25, 2014, at www.courts.wa.gov/content/Briefs/A08/89714-0%20Brief%20of%20Appellants.pdf.

In the court ruling all of page 12, all of page 13, half of page 14 (except one paragraph), all of page 15, all of page 16 and the top of page 17 are nearly identical to pages 22, 23, 24, 25, 26 and the top of page 27 of the papers written by the WEA union.

Federal courts have recognized the fairness problem judges create when they simply copy from legal papers submitted by one party in a lawsuit, noting that judges should render independent decisions, not function as an "advocate's tool.[14]"

Washington's supreme court is already laboring under a growing public perception of being partisan and unfair. The discovery that large portions of a controversial court opinion were in effect written by one side in the case makes that perception worse.

The majority ruling ignored the court's own precedents

The current state Attorney General, Bob Ferguson, argues that Chief Justice Madsen dismissed well-established rules for deciding whether a law is constitutional, particularly by ignoring the courts' own earlier rulings.[15]

In the past, the supreme court had ruled that educational programs that are not "common schools" can receive state funding. For example, in the 2000 case of *Turnbull v. Bergeson*, the state supreme court said education programs for juveniles in state prison can receive public funding, even though the prison schools are not under the control of locally-elected school boards, and thus are not "common schools" as they existed in 1889 or according to the 1909 definition.[16]

The majority ruling shifted the burden of proof

Justice Madsen and the other justices in the majority also ignored the legal rule that laws passed by the legislature or the voters are presumed to be constitutional until proven otherwise. The burden of proof should fall on the challengers of the law, in this case the WEA union. In the charter school case, however, the majority justices shifted the burden of proving the law's constitutionality to the law's defenders, making it much harder for the people, represented by the state Attorney General, to win the case.

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14 Quote from the case of DiLeo v. Ernst and Young, 901 F.2d 624 (7th Circuit, 1990) in "Unoriginal Sin: The Problem of Judicial Plagiarism," by Douglas R. Richmond, Arizona State Law Journal, January 11, 2014, page 1080.

15 *League of Women Voters of Washington; El Centro De La Raza, Washington Association of School Administrators, Washington Education Association, Wayne Au, Pat Braman, Donna Boyer, and Sarah Lucas, Appellants v. State of Washington*, Respondent, Motion for Reconsideration, State of Washington, Attorney General Robert W. Ferguson, September 24, 2015, at agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/89714-0_MotionForReconsideration.pdf.

16 "Justices should reconsider charter school decision," by Phil Talmadge, *The News Tribune*, September 14, 2015, at www.thenewstribune.com/opinion/op-ed/article35265840.html.

The majority ruling ignored the law's severability clause

The justices ignored the charter school law's severability clause. This clause is often included in state laws, so that if one part of a statute is stuck down, the rest of the law is "severed" from it and remains in effect. Instead of following the charter school law's severability section, they used the perceived flaws in one part to strike down the entire law.

Conclusion

A review of the majority opinion by dissenting justices, former state attorneys general and independent legal experts shows the case striking down Washington's charter school law was wrongly decided.

In drafting the majority opinion Chief Justice Madsen, using an outdated understanding of a modern public education program, found that only "common schools" can receive public funding. A review of the history shows the constitutional restriction was adopted to protect education funding from waste and fraud, not to block the creation of innovative education programs, like high schools, vocational programs or charter schools.

The majority ruling failed to consider the court's own past rulings that guide education funding, shifted the burden of proof on the law's constitutionality from the challengers to the people and, upon reaching a conclusion about one part of the law, failed to apply the law's severability clause to uphold the rest of the statute.

Perhaps the most disturbing finding is the role of one party in the case, the powerful education lobby operated by the WEA union, which state records show was politically active in electing supreme court justices. Textual analysis shows the drafting of the majority opinion was heavily influenced by the WEA union, in that large sections of the opinion were copied from papers the union sent to the court in April 2014.

There are convincing reasons to conclude the state supreme court's majority ruling against charter schools was wrongly decided, due largely to its contorted reasoning, its poor understanding of contemporary school funding, and strong indications the result was influenced by outside political forces.

It is clearly constitutional for legislators to fund public charter schools from non-dedicated state accounts, just as they currently fund a variety of other public education programs. Charter schools are popular with parents and have been shown to meet the educational needs of children in underserved communities. While lawmakers may choose to avoid open conflict with the court, it is within their constitutional authority to direct funding from non-dedicated state accounts to preserve charter schools in Washington state.

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