

## POLICY NOTE

# Summary of the Lawsuit Against Charter Schools

by Liv Finne  
Director, Center for Education

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### Key Findings

1. *The constitutional question posed by the lawsuit is whether charter public schools qualify as “common schools” and are therefore eligible to receive public funding.*
2. *The definition of a “common school” under existing Washington law includes a variety of alternative, innovative, and parental choice schools; schools similar to charter schools.*
3. *As described by the new voter-approved Charter School Act, Washington’s charter schools share the same essential characteristics and attributes of other common schools in Washington, and are therefore eligible to receive public funding to educate children.*
4. *Voters passed the Charter School Act in order to offer parents and children in Washington a charter public school choice.*

### The Lawsuit

Case name: *League of Women Voters of Washington et al v. State*

Case number: 13-2-24977-4

Court: King County Superior Court

Judge: Jean Rietschel

Date filed: July 3, 2013

### Introduction

In November 2012, state voters approved Initiative 1240, making Washington the 42nd state to allow the opening of charter public schools.<sup>1</sup> The law is being implemented and the first charter schools will likely be open to students in the 2014-15 school year.

A charter school is a community-based public school that operates independently of central district management and most administrative rules. Charter schools are tuition free and open to all students. Parents must be involved and choose to send their children to the school; no family can be assigned to a charter school involuntarily. Attendance at charter schools that are over-subscribed is decided by lottery. Charter schools must comply with the same civil rights, nondiscrimination and public safety laws that apply to all schools.

After the November vote, the Washington Education Association teachers union, school administrators association and other groups that had opposed the passage of Initiative 1240 said they intended to challenge the law in court. On July 3, 2013 they carried out this action. The WEA union, the Washington Association of School Administrators and other groups and individuals filed a lawsuit in King County Superior Court asking a judge to strike down the new law and to prevent children from attending charter schools in Washington state.

This study provides a description of the lawsuit, summarizes the main arguments made by charter school opponents, and assesses whether charter schools are constitutional in Washington state.

### Who filed the lawsuit

The groups and individuals who filed the lawsuit to overturn the charter school initiative (called the Charter School Act) are:

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<sup>1</sup> “General Election Results, Initiative Measure No. 1240,” Washington Secretary of State, November 6, 2013, at [www.vote.wa.gov](http://www.vote.wa.gov).

**Washington Education Association (WEA)**, the state's teachers' union, says the Charter School Act creates costs for the State Board of Education, the Superintendent of Public Instruction and school districts across the state. The WEA says the Act harms its members by transferring public funds from traditional public schools to charter public schools. (Making financial contributions to the WEA is mandatory for teachers in traditional public schools, but not for teachers at charter schools.)

**Washington Association of School Administrators (WASA)**, says the Charter School Act creates costs for the State Board of Education, the Superintendent of Public Instruction and school districts across the state and harms its members by transferring public funds from traditional public schools to charter public schools. (District administrators would not have direct control over charter school budgets.)

**League of Women Voters of Washington**, a left-leaning political advocacy group, says the Charter School Act harms its members because "it is an unconstitutional act."

**El Centro de la Raza of Seattle**, a left-leaning political advocacy group in the Latino community, says the Charter School Act harms its members by transferring public funds from traditional public schools to charter public schools. In the past, this group has received substantial funding grants from the WEA.

**Dr. Wayne Au, Ph.D.**, education advocate and taxpayer, says the Charter School Act harms his citizen activist efforts to promote social justice and to advocate on behalf of traditional public schools.

**Pat Braman, Donna Boyer and Sarah Lucas**, public school parents and taxpayers, say they and their children are harmed by the Charter School Act.

## **The question of standing**

Standing involves the question of whether a person or group is legally qualified to file a particular lawsuit. When seeking to overturn a state law, being a taxpayer by itself is generally not enough to establish standing—usually individuals and groups must show the law they are challenging has harmed them in some direct way.

The groups and individuals that filed the lawsuit against the Charter School Act face two problems on the legal question of standing.

First, the Charter School Act has yet to take full effect. No charter schools have opened, no public schools have sought to convert to charter schools, and funding of charter schools will not reduce the funding of non-charter schools.

Second, if the Charter School Act were to take full effect, it will be difficult for these advocates and groups to show they have been harmed. A charter public school creates new educational opportunities for children and families who choose to attend. Under the Act, funding would be provided to charter schools on a per-student basis using the same funding formula that applies to traditional public schools. Students attending traditional public schools would receive the same level of funding they receive now, along with any increases enacted by federal, state or local governments.

Advocates and groups say they *might* be harmed because voters in the state enacted a law through a ballot measure, Initiative 1240, that they opposed. It could be argued they are merely turning to the courts to reverse a democratic decision made by the people. For these reasons, the lawsuit supporters' claim of standing may be problematic, and this is the first obstacle they must overcome before the judge considers the merits of the case.

## Why the lawsuit was filed in King County

According to the lawsuit, “Venue is proper in this Court because the residence or principal place of business of one or more of the Plaintiffs is in King County, WA.”<sup>2</sup> It is common for groups seeking to overturn a voter-approved initiative to look for a favorable court, at least for the initial ruling. Since Seattle was one of the few cities in the state to vote against the initiative, it is possible these groups have filed their lawsuit in King County Superior Court in hopes of finding a sympathetic judge. Forum-shopping like this is generally discouraged by the judiciary.

Regardless of how Judge Rietschel rules, however, her decision will likely be reviewed by appeals courts. It is almost certain the final ruling in the case will be made by the state Supreme Court.

## The Constitutional question

Article IX, section 1 of the Washington State Constitution establishes that it is the “paramount duty” of Washington to make “ample provision for the education of all children residing within its borders.” This section further says the state must provide for a “general and uniform” system of public schools, including “common” schools.

The precedent cited by lawsuit supporters is *School District Number 20 v. Bryan* (1909), which held that “a common school is a school that is common to all children of proper age and capacity, free, and subject to, and under the control of, the qualified voters of the school district.”<sup>3</sup>

Article IX, sections 2 and 3 of the constitution say that the revenues derived from the common school fund and from the state tax for common schools must be used “exclusively” for the support of common schools. Under the Charter School Act, charter public schools are common schools, because charter schools must provide the same basic education, subject to the same fundamental rules which govern other, traditional public schools.

The constitutional question posed by the lawsuit centers on whether a charter public school qualifies as a common school, and therefore may legally receive public funding to educate children. If so, a further question the court will examine is whether the attendance of children at a public school chosen by their parents detracts from or otherwise harms the education of children attending a different public school, even while the per-student funding provided for all children remains the same.

## The lawsuit’s legal arguments

Following are the main legal arguments made against charter schools by the lawsuit’s supporters.

1) In filings to the court, the lawsuit’s supporters argue that charter schools in Washington state are not common schools under the Constitution. Article IX, Section 2 of the Washington State Constitution states:

*“The Legislature shall provide for a general and uniform system of 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.”*

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2 “Charter School Complaint, Jurisdiction and Venue,” Washington Education Association, August 2013, page 8. at [www.ourvoicewashingtonnea.org/wp-content/uploads/2013/07/charter-school-complaint.pdf](http://www.ourvoicewashingtonnea.org/wp-content/uploads/2013/07/charter-school-complaint.pdf).

3 Ibid, page 2.

The Enabling Act of 1889 required Washington to establish a school system open to all children of the state. At the same time, the Framers of Washington’s Constitution specifically repudiated racially segregated school systems existing in other states, making unconstitutional any distinctions based on race, color, caste or sex.

The first sentence of Section 2 gives the Legislature the plenary power to organize, administer and arrange the operational details of one “general and uniform system of schools,” meaning that the schools are required to operate by the same laws, deliver the same standard of education, across an entire system of schools, for all children within its borders.

The words “general and uniform” in the Constitution modify the words “system of schools.” A “general and uniform system of schools” can still allow for variety and innovation in programs offered by individual schools. Montessori schools, Science, Technology, Math and Science schools, Schools of the Arts, are just a few examples of the constitutionally permissible diversity allowed within a general and uniform system of schools.

In 1889 the Constitution excluded high schools and vocational schools from the definition of “common schools.” (Normal schools were schools designed to train teachers.) But later, the Legislature and its voters redefined the meaning of common schools:

*Public schools means the common schools as referred to in Article IX of the state Constitution, including charter schools established under chapter 28A.710 RCW, and those schools and institutions of learning having a curriculum below the college or university level as now or may be established by law and maintained at public expense.*  
RCW 28A.150.010

The Legislature, and voters through their initiative powers, have the authority to change and expand the definition of common schools, as described in RCW 28A.150.020, and by the voters’ Charter School Act, RCW 28A.710 et seq.

Charter schools are common schools under the Constitution because they fulfill the requirements set forth by the Framers and by subsequent legislation. Charter schools do not discriminate against or exclude students. They are tuition-free and open to all students. The Charter School Act requires charter schools to provide the same basic education as other public schools, specifically, the essential academic learning requirements set forth in the Common School Manual, RCW 28A et seq. The Charter School Act requires charter schools to hire teachers certified under the laws of the state, like other public schools. It requires charter schools to participate in the state’s student assessment and public school accountability system, just like other public schools. The Act requires charter schools to comply with the public meetings act and public records requirements, prohibits religious schools, requires charter schools to follow all local, state, federal health, safety, parents rights, civil rights and nondiscrimination rules applicable to other public schools.

The Charter School Act does, however, exempt charter schools from certain scheduling requirements and other regulations which restrict educators from having the flexibility they need to deliver customized educational programs for students. A number of innovative schools in Washington enjoy some of the same exemptions from the Common School Manual given to charter schools. For example, Delta High in Pasco, Aviation High in Highline, and Creative Approaches schools in Seattle, are innovative schools which are required to deliver the same Basic Education content, employ teachers certified by state law, and administer the same tests, yet they are free to create a school model which better serves their students. Charter schools are just another example of innovative school.

2) The lawsuit’s supporters cite the last sentence of Article IX, Section 2 to argue charter schools should not receive any public money.

This argument assumes the accuracy of their contention—that charter schools are not common schools. This is simply incorrect. Charter schools are common schools. Therefore

charter schools are entitled to the same funding other schools receive, because they are common schools under the law and the state Constitution, and serve public school students.

3) Specifically, the lawsuit's supporters argue a common school is one that is accountable to voters in the local school district. They say that charter public schools are accountable only to an appointed board at the state level.

Accepting this argument requires the court to ignore the clearly stated provisions of the Charter School Act which allow local school districts to apply for authority to open charter schools. Voters can hold charter schools accountable if their local school district is approved to authorize charter schools. Spokane Public Schools, the second-largest school district in the state, will be the first district in the state to sign up to open charter schools. Many other districts will soon follow. Districts which refuse to become charter school authorizers under the Charter School Act cannot argue that the Act is unconstitutional; they have simply refused to participate. Voters can also hold school board members of non-participating districts accountable for refusing to offer a charter school opportunity to their students.

In addition, the Constitution does not strictly limit the oversight and administration of schools to local school districts. The Legislature, and voters through the initiative process, have broad plenary power to delegate certain education-related functions to various agencies at the state level. The Legislature has used this power to create numerous state-level agencies, including the State Board of Education, the Department of Early Learning, the Professional Educator Standards Board and nine regional Educational Service Districts. Accordingly, the Constitution also allows the Legislature, and voters through the initiative process, the power to create the Washington State Charter School Commission. The Charter School Act describes the processes, guidelines and standards by which the Commission grants, consistent with and similar to grants of authority to other state-level education agencies.

Contrary to the assertion of the lawsuit's supporters, the Charter School Act does not limit or restrain voters' ability to hold accountable those charter schools which may be authorized by the state-level Commission. Voters can hold accountable Commission members through their votes in statewide general elections by holding the Governor, Lieutenant Governor and Speaker of the House for these appointments. And, as noted above, voters can also replace the school board members of districts refusing to apply for authority to open charter schools, or, in the case of districts which do open charter schools, for failing to hold the district's charter schools accountable as required by the Act.

Finally, and most importantly, accountability over school performance is much stronger under the Charter School Act than under the current traditional school governance structure. The term of a charter contract is for five years only. The authorizing agency of charter schools, whether the state-level commission or a local school district, must revoke the charter of a school which fails to educate students, as provided in the Act. The ten lowest-performing schools in the state of Washington, all non-charter schools, have been in operation an average of 48 years; yet voters have been unable to hold their local school boards accountable for improving the deplorable performance of these schools.

4) The lawsuit's supporters argue that Article III, section 2 of the state Constitution says common schools must be accountable to the state Superintendent of Public Instruction, and that charter schools operate outside of his supervision. They say he does not have a role in appointing members to the nine-person Charter School Commission, who instead are appointed by the Speaker of the House, the Lieutenant Governor and the Governor.

The Charter School Act gives the state Superintendent of Public Instruction supervisory authority over charter schools, to the same extent as his existing supervisory authority over traditional public schools. The Superintendent will oversee the distribution of state and federal monies to charter schools, for overseeing the state assessments given to students in charter schools, for publishing the annual performance reports for charter schools, and other similar functions, just like he does for traditional public schools.

The Superintendent of Public Instruction does not have any authority to appoint any local school board members, under the Constitution or under the law. Similarly, the Charter School Act did not give the Superintendent the power to appoint the members of the Washington State Charter School Commission.

5) Specifically, the lawsuit’s supporters point out that the Superintendent of Public Instruction should “have supervision over all matters pertaining to public schools.”<sup>1</sup> As stated above, the Superintendent of Public Instruction has the same supervisory authority over charter schools as he has over other public schools.

6) Lawsuit supporters point out that the state Supreme Court has ruled in *McCleary v. State* (2012), that the state must make “ample provision” for public education.<sup>2</sup> They say the Charter School Act diverts funding from traditional public schools and thus makes that funding goal harder to attain.

Charter schools receive money on a per-student basis, from choices made by public school students and their parents. Non-charter school per-student funding will be unaffected by the existence of charter schools.

Students in Washington are already allowed to leave their assigned local school or local school district to attend another program. These public school students take their per-student funding with them, to their new program. Here are just a few examples:

- 13,621 students in Running Start, which allows high school students to leave their local high school to attend a local community college;
- 4,759 students in vocational Skill Centers;
- 6,903 students enrolled in a full-time online school (run by private companies) in a district other than their local district.

Because students are better served with a whole panoply of school choices, Washington’s general and uniform system of schools allows students to leave their traditional school for a choice that better meets their needs. No concerns are raised about the money that is transferred from traditional schools to Running Start, Skills Centers, or full-time online schools.

Charter schools simply offer students, particularly at-risk students attending chronically underperforming traditional schools, a better choice within a general and uniform system of schools. They do not divert money from traditional public schools because they serve public school students.

*McCleary v. State* (2012) held that the Constitution’s “paramount duty” is to make “ample provision for the education of every child within its borders.” *McCleary v State* also called for reforming the existing public school system, saying that “Fundamental reforms are needed for Washington to meet its constitutional obligation to its students. Pouring more money into an outmoded system will not succeed.” The Charter School Act is a reform passed by voters in recognition of the fact that at-risk children need a means to escape their failing traditional schools, so they can attend a high-performing charter public school.

### **What action charter school opponents are seeking**

The lawsuit’s supporters say they are seeking a decision from the court that the Charter School Act is unconstitutional. They have also requested that the court impose an

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1 Ibid, page 25.

2 Ibid, pages 23 and 24.





**Liv Finne** has been the director of WPC's Center for Education since 2008. She holds a law degree from Boston University School of Law and a Bachelor of Arts degree from Wellesley College.

**Austin Cooper** is a Research Assistant at WPC as part of the Doug and Janet True Internship Program, and contributed to the research of this Policy Note.

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immediate injunction to prohibit further implementation of the Act and to prevent children in Washington state from attending a charter school.

In addition, the lawsuit's supporters are asking the judge to grant them compensation for reasonable attorney fees, expenses and other costs to the fullest extent allowed by law. If successful, the request means the cost of the lawsuit would be borne by state taxpayers.

## Conclusion

The lawsuit against charter schools involves two basic legal questions. First, the court must rule on the question of standing, and whether the lawsuit's supporters have shown they are being harmed by the Charter School Act. Second, the court must determine whether the voter-approved charter school initiative is allowed under the state Constitution's provisions governing the system of common schools.

To education reformers it seems obvious the Charter School Act is constitutional. The public education system already provides many alternative learning environments, including Innovation Schools, Choice Schools, vocational Skills Centers, STEM Schools, Creative Choices Schools and full-time Online Learning Schools.

For example, the state Running Start program allows some public high school students, and the funding they receive, to transfer to a community college to receive their education. The Running Start program faces no legal challenges under the Constitution, even though community colleges are not under the supervision of the Superintendent of Public Instruction and they appear to "divert" money from traditional public schools.

During the campaign, Initiative 1240 opponents argued the measure was unnecessary because districts were already providing a variety of education choices and reforms. But voters felt otherwise, and passed the measure. Voters decided that charter schools do not take money away from public schools; rather they add one more way for children to receive a public education.

The courts, however, have produced unexpected policy rulings in the past, and it would not be surprising if the King County court selected by lawsuit supporters struck down the voter-enacted charter school law. In that case, it is probable the ruling will be reviewed by higher courts, including the state Supreme Court, before a final decision is reached. In the meantime, barring an injunction, the implementation of the Charter School Act will proceed as scheduled.