

Economic Sense - Sixteenth Edition

Charter public schools help at-risk students, use constitutionally-compliant funding

Bottom line up front:


Earlier this year the state Supreme Court heard arguments on charter public schools for the second time since 2012 when Washington voters endorsed targeted school choice for students and parents.

In 2015 the Court invalidated the entire initiative as the result of a lawsuit, but thanks to the leadership of Senate Republicans who worked diligently across the aisle, we passed legislation that remedied the infirmities identified in the original opinion.

But in an attempt to shut down charter public schools, special interests from the education establishment filed yet another suit. It failed in King County Superior Court, but was appealed.

We know where a majority of Washington voters and the Legislature stand. And we know what the state's largest teachers union and governor think.

Now, in the coming days -- or months -- we'll learn the position of our state Supreme Court. It is my belief and hope that the Court will uphold the current law and preserve this additional tool that helps our most at-risk students.



When Washington voters approved Initiative 1240 in 2012,¹ our state became the 42nd -- along with Washington D.C. -- to allow publicly funded but independent charter schools to operate.

As new schools opened and others were in the planning process, opponents filed a successful lawsuit challenging the source of charter school funding. This led to the Legislature passing a law addressing the specific concerns.

With 11 charter public schools currently open and a 12th on the way this fall,² opponents are back in court after appealing an unsuccessful attempt to do away with this option for students and parents.

In this edition of Economic Sense we'll review the voter-approved initiative authorizing Washington's charter public school system, the original court ruling, the Legislature's response bringing about constitutional compliance, and why it's back in court.

Washington voters endorse charter public school option

While charter schools are not uncommon in the United States, the laws surrounding them vary significantly state-by-state including what entity authorizes them, how many can operate, and what accountability requirements are in place among other regulations.

During the 2012 general election Washington voters were asked to weigh in on Initiative 1240, which allowed up to **40 charter public schools to open over five years**. Under the law existing local school districts or a newly created state commission could authorize non-profit organizations to open charter public schools. Like traditional public schools, charter schools receive state funding and must be open to all students at no cost. While the schools operate independently once approved, they would still be held accountable on performance requirements and employ certified teachers.³

Voters approved the initiative with 50.69% in support statewide, passing in 36 of the state's 49 legislative districts.

The focus as stated in the initiative and by supporters was the incredible need to address Washington's persistent "opportunity gap," that being **the difference in educational outcomes between white and Asian students from middle- and higher-income communities and students of color from low-income communities**. While limited in scale, this change in policy was specifically aimed at providing an equal opportunity for all students to attend a school that works for them and move closer to our state's mission of providing a high-quality education for all children.

From the initiative text:

Public charter schools are designed to find solutions to problems that affect chronically underperforming schools and to better serve at-risk students who most need help;

Public charter schools have cost-effectively improved student performance and academic achievement for students throughout the country, especially for students from the lowest-performing public schools;

Public charter schools serving low-income, urban students often outperform traditional public schools in improving student outcomes and are closing the achievement gap for at-risk students.

Washington's first charter public school opened its doors for the 2014-15 school year, with nine schools in place by the following year. All of the schools except two were authorized by the Washington Charter School Commission, with the Spokane School District being the only existing district to apply as an authorizer.

Education establishment seeks complete shutdown

In July 2013, charter public school opponents including the Washington Education Association (the state's largest teachers union), filed a lawsuit in King County Superior Court to shut down charter public schools.⁴ They claimed that charter public schools diverted money away from traditional schools, with the WEA president stating that "charter schools steal money from our existing classrooms."

On September 4, 2015, the Washington Supreme Court declared the charter school law unconstitutional and declined to reconsider the ruling despite requests from Washington State Attorney General Bob Ferguson and a bipartisan group of legislators.⁵

The ruling came via a 6-3 decision, which declared Initiative 1240 to be unconstitutional in its entirety, going even further than the King County Superior Court -- which found the act had a

constitutional defect, but that the severability clause in the initiative "saved" the remainder of the act (and, as a practical matter, kept charter schools viable).

Article IX, section 2 of the state constitution provides for a system of common schools and that the state tax for common schools (state property tax) cannot be used for any other purpose.⁶

The appellants argued that I-1240 was unconstitutional on its face, as the initiative designated charter schools as common schools and that its engagement in the same funding formula as common schools siphoned off money constitutionally dedicated to common schools.

Issue #1: Are Charter Schools Common Schools?

The majority and the dissent in the 2015 decision agreed that I-1240 improperly attempted to characterize charter schools as common schools. Since charter schools are "run by an appointed board or nonprofit organization and thus are not subject to local voter control, they cannot qualify as 'common schools' within the meaning of article IX."⁷

Issue #2: Were Charter Schools Unconstitutionally Siphoning Money from the Common School Fund?

The majority held yes, despite the fact that the state property tax is only a small portion of overall funding for K-12 (as noted by the dissent).

The majority wrote:

"compounding this problem, the State does not segregate constitutionally restricted moneys from other state funds. Nor can it demonstrate that these restricted moneys are protected from being spent on charter schools. Given this absence of segregation and accountability, we find unconvincing the State's view that charter schools may be constitutionally funded through the general fund."⁸

This came despite the fact that Section 516 of the 2015-17 state operating budget (p. 175) specifically provides that general state funds provided for charter schools did not include state common school levies protected by article IX, section 2.⁹

The Court in footnote 13 stated that this legislative-adopted policy language did not affect their analysis that I-1240 was so constitutionally impaired as to be invalid on its face.

Issue #3: Did the severability clause in I-1240 "save" those parts of the initiative not found unconstitutional?

No, held the majority, which drew strong disagreement in the dissent. A severability clause states that if any part of an act is found to be unconstitutional that the remainder of the act shall still be

valid. Yet, despite the explicit presence of the clause, the majority found that since the initiative intended to rely on common school funding allocations as the source of charter schools' funding, the charter schools are not viable since such allocations are an impermissible source. "In sum, without funding, charter schools are not viable," wrote the majority.

The Dissent

Written by Justice Fairhurst (co-signed by Justices Gonzalez and McCloud-Gordon), the dissent would have upheld all but the portion of the act that designated charter schools to be common schools. In pertinent part, the dissent concludes: "[N]othing in the Act requires the diversion of resources out of the three funds identified by article IX as restricted for the benefit of common schools. Rather, the State can constitutionally support charter schools through the general fund."¹⁰

Solving the problem

Addressing the Court's constitutional issue with funding for charter public schools while also keeping them open and available to students was a priority for lawmakers on both sides of the aisle in 2016. Ahead of the session, legislators sponsored multiple bills aimed at fixing the problem identified by the Court.

The main vehicle for debate became a bill sponsored by education leaders in the Senate Republican Caucus, which re-authorized charter public schools while no longer identifying them as common schools. It also restarted the five-year authorization period and specifically dedicated funding for charter public schools from the Washington Opportunity Pathways Account, a dedicated fund, which receives proceeds from the Washington State Lottery.¹¹

The fund is restricted to use for charter schools, the Washington scholars award, and the State Need Grant in addition to a variety of other programs supporting early learning, K-12 and higher education outside of the traditional K-12 public school program.¹²

Wanting to provide assurance to students and parents that their schools would not immediately shut down and highlight the importance of supporting low-income students of color, the Senate approved this bill early in the 2016 session on a 27-20 bipartisan vote. Despite support among members in the House of Representatives, they were not allowed to vote until nearly the end of that session. The bill eventually passed easily by a 58-39 margin.

This legislative solution allowed lawmakers to maintain the existing voter-approved public school option while ensuring the funding source was constitutionally appropriate. Lawmakers also took

the opportunity to clarify and strengthen accountability and oversight of the schools to ensure charter public schools remained one of multiple tools to improve student outcomes.

Facing a decision of whether or not to sign the bill into law or veto the provisions, Gov. Jay Inslee chose a third option: choosing not to sign the bill so as to have plausible deniability before the state teachers union, without vetoing the measure, and thus letting it pass into law.¹³

Back to court

Despite re-authorization of charter public schools by the Legislature, opponents continued trying to find a legal argument that a court would buy in order to achieve their ultimate goal of ending charter public schools in Washington.

After the Legislature's 2016 action went into effect, the same coalition of education establishment interests filed another suit in August 2016, continuing to claim charter public schools diverted money from public schools without proper oversight.¹⁴

King County Superior Court Judge John H. Chun disagreed, ruling that charter public schools do not divert funding from traditional public schools throughout Washington's 295 school districts.¹⁵

Plaintiffs appealed the ruling and the state Supreme Court heard oral arguments on the case on Thursday, May 17.¹⁶

Given the Legislature's work in 2016 I believe the Court will agree that our legislation is constitutional. Having addressed the funding source since the 2015 Court ruling in the initial lawsuit, our state has demonstrated we can make significant investments in traditional public schools while also allowing the opportunity for at-risk students in struggling schools to choose the school that works best for them. This may be in a traditional classroom, by embracing online learning opportunities, by attending a charter school, or even advancing into college level courses in high school, all of which provide an opportunity to ensure we serve the needs of all children.

Bottom line:

- Charter public schools are one of many tools our state has to provide a high-quality education to all children.
- Lawmakers remedied the constitutional concerns of the state Supreme Court by ensuring funding was not dedicated for common schools.
- Despite the contention of education establishment interest groups, charter public schools must remain a choice for students, parents and teachers.

FOOTNOTES

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2. Washington State Charter School Association. <http://wacharters.org/schools/>
3. Washington State Senate Committee Services Summary of Initiative 1240. <http://leg.wa.gov/Senate/Committees/documents/Initiatives/2012/1240Summary.pdf>
4. El Centro De La Raza et. al vs. State of Washington in King County Superior Court, 2013.
5. Seattle Times, "State Supreme Court: Charter Schools are Unconstitutional," September 4, 2015. <https://www.seattletimes.com/seattle-news/education/state-supreme-court-charter-schools-are-unconstitutional/>
6. Washington State Constitution. <http://leg.wa.gov/LawsAndAgencyRules/pages/constitution.aspx>
7. Washington State Supreme Court Ruling on Initiative 1240. <http://www.courts.wa.gov/opinions/pdf/897140.pdf>
8. Id.
9. Washington State 2015-17 Operating Budget. <http://leap.leg.wa.gov/leap/Budget/Detail/2015/6052-S.PL.pdf>
10. Washington State Supreme Court Ruling on Initiative 1240. <http://www.courts.wa.gov/opinions/pdf/897140.pdf>
11. Senate Bill 6194, 2015. <http://apps2.leg.wa.gov/bills/summary?BillNumber=6194&Year=2015&BillNumber=6194&Year=2015>
12. Washington State Opportunity Pathways Account, RCW 28B.76.526. <http://app.leg.wa.gov/RCW/default.aspx?Cite=28B.76.526>
13. Seattle Times, "Gov. Inslee grudgingly allows charter schools to survive." April 1, 2016. <https://www.seattletimes.com/seattle-news/education/charter-school-bill-likely-to-become-law/>
14. El Centro De La Raza et. al vs. State of Washington in King County Superior Court, 2016. https://www.washingtonea.org/file_viewer.php?id=1882
15. Seattle Times, "King County judge rules charter school law is constitutional." February 17, 2017. <https://www.seattletimes.com/seattle-news/education/king-county-judge-rules-states-charter-school-law-is-constitutional/>
16. TVW, Washington State Supreme Oral Arguments on Second Charter School Lawsuit. <https://www.tvw.org/watch/?eventID=2018051039>