DATE: September 9, 2015
TO: School Superintendents
FROM: Donna Christensen
RE: League of Women Voters v. State

In light of recent conversations on school choice, it may be helpful to look carefully at the Supreme Court decision on charter schools.

On Thursday, September 3, 2015 in a 6- 3 opinion the Washington State Supreme Court issued a long-awaited decision in the charter schools case, finding the Charter Schools Act unconstitutional.

Background: In 2012 Washington voters approved Initiative 1240, known as the Charter Schools Act. This came after several failed legislative attempts to establish charter schools. I-1240 allowed for up to 40 new public charter "common" schools open to all children free of charge. The schools are exempt from most of the statutes and rules public schools are required to follow, but must meet state learning requirements. Charter schools are authorized and regulated by either the quasi-governmental Washington Charter School Commission (established by the Act) or by local school districts. Funding is provided to the schools through the apportionment, just as public schools are funded. The Act also includes access to common school construction funds.

A lower court found that charter schools are not "common" schools and therefore the provisions relating to the construction funds were unconstitutional. The court also determined these provisions were severable so the remaining provisions were constitutional. The plaintiffs appealed.

Supreme Court Decision: The Supreme Court's analysis focused on three key areas:

1. Charter schools are not common schools
2. The Act's funding provisions fail
3. I-1240's unconstitutional provisions are not severable

1. Charter schools are not common schools

The Supreme Court ruled that charter schools are not common schools because they do not fit the definition found in Article IX of the state Constitution. The opinion notes that I-1240 directed charter schools to be funded just like other public schools and the charters are to be included in the budget process of school districts as well as levy planning. Relying on a 1909 case, School District No. 20 v. Bryan, 51 Wash. 498, 99 P. 28 (1909), the Court found that "…because charter schools under I-1240 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." The lack of local control and local accountability does not comply with the expectation of a uniform common school system.

2. The Act's funding provisions fail

The state's Constitution in article IX requires the legislature to dedicate state funds, including construction funds, to support common schools. Relying again on precedent, the

court notes that it has repeatedly struck down laws diverting common school funds to any other purpose, and that the Charter School Act diverts money dedicated to common schools. The court found that using any of those funds for purposes other than to support common schools is unconstitutional. See also *Mitchell*, a 1943 case overturning a statute that extended school bus transportation privileges to private school students along already existing and operating public school bus routes. The court ruled that the use of the bus for other than common school purposes contravened article IX, section 2's exclusivity requirement.

The opinion also states that though the funds are generally distributed on a per student apportionment, this does not mean the common school funds are available for students who do not attend common schools. Where a child is not attending a common school, there can be no entitlement to "an apportionment of the current state school fund." The decision rules the I-1240 funding mechanism unconstitutional.

3. I-1240's unconstitutional provisions are not severable

The Court also ruled that the unconstitutional provisions render the Act unconstitutional in its entirety. Though the Act has a severability clause, the test is whether the provisions are so connected that it is unreasonable to believe the legislature or the people would have passed it without the invalid portions or whether eliminating the unconstitutional provisions results in the remainder being useless. Without funding, charter schools are not viable.

Partial Dissent

Three justices, concurring in part and dissenting in part, concurred only that charter schools are not common schools. But the dissent opinion argues that I-1240 provisions relate to the amount and not the source of funding. Nor did I-1240 expressly require the use of restricted common school funds. The dissent opinion found that unrestricted monies from the state's general fund could be used for the charter schools. These justices noted that the restricted funds are not nearly enough to support the common schools, and that only 28 percent of the funding is from restricted sources. The remainder is appropriated from the general fund.

The partial dissent also argues that the funding established in I-1240 for charter schools is consistent with precedent, primarily due to the co-mingling of restricted and unrestricted funds that are presently used to support common schools. This sets aside the idea of fund diversion. They also note that there is a statute that allows appropriations for other educational programs, with no common school limitation. As an example, the opinion points to the Running Start program.

Interestingly, the dissent also points out that the concurrence in *Mitchell* "recognized that schools that were not common schools could qualify for student transportation under the legislation so long as restricted funds were not used."

Bottom line for the dissent is that the State can constitutionally support charter schools through the general fund.