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**VIA U.S. MAIL AND E-MAIL**

May 27, 2016

The Honorable Bob Ferguson
Attorney General of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100

**Re: Request for the Attorney General to Investigate and Institute Legal Proceedings on the Unconstitutionality of Engrossed Second Substitute Senate Bill 6194 regarding Charter Schools**

Dear Mr. Attorney General:

We represent a group of Washington taxpayers and organizations with taxpayer members, including El Centro de la Raza, the League of Women Voters, and the Washington Education Association. We request that your office investigate and promptly institute legal proceedings to remedy the constitutional violations arising from Engrossed Second Substitute Senate Bill ("E2SSB") 6194 and from the continued diversion of public school funds to private charter schools.

E2SSB 6194 essentially reenacts Initiative 1240's ("I-1240's") private charter school system, which the Washington Supreme Court struck down in its entirety as unconstitutional under article IX of the Washington Constitution. In *League of Women Voters v. State*, 184 Wn.2d 393, 405, 355 P.3d 1131 (2015), the Court affirmed the superior court's ruling that charter schools are not common schools within the meaning of article IX because, *inter alia*, "charter schools under I-1240 are run by an appointed board or nonprofit organization and thus are not subject to local voter control[.]" The Court held that I-1240 unconstitutionally diverts restricted common school funds to charter schools, including funds from the legislature's basic education allocation. *Id.* at 408-10.

The legislature passed E2SSB 6194 in the wake of *League of Women Voters* to continue the unconstitutional diversion of public funds to those charter schools established under I-1240 and to authorize creation of 40 additional charter schools over the next five years. E2SSB 6194 does not resolve the constitutional defects identified by the Supreme Court in *League of Women Voters* and is otherwise unconstitutional on multiple grounds, including but not limited to the following:

First, E2SSB 6194 violates article IX, sections 2 and 3 of the Constitution, which require that certain state monies be used *only* in support of the state's "common schools." The *League of Women Voters* Court ruled that charter schools are not common schools as that term is used in the Constitution, namely, 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." 184 Wn.2d at 405 (quoting *Sch. Dist. No. 20 v. Bryan*, 51 Wash. 498, 504, 99 Pac. 28 (1909)). Thus, the Court held that funding for charter schools under I-1240 violated the Constitution because, *inter alia*, money was distributed to charter schools on "the same basis as common schools" and "the source of funds for the operation of charter schools [was] the basic education moneys that are otherwise dedicated to the operation of common schools." *Id.* at 406.

In E2SSB 6194, the legislature acknowledges, as it must, that charter schools are not common schools. Yet, the legislature attempts to sidestep the constitutional protection for basic education moneys by directing the Superintendent to disburse charter schools' portion of the basic education allocation from the opportunity pathways account, rather than the general fund as provided under I-1240. E2SSB 6194, § 127. Charter schools continue, however, to be funded on the same basis as common schools from the same basic education funds. *See id.* As the legislative history confirms, the legislature intended merely to swap funding sources between charter schools and an early childhood education program. This sleight of hand cannot overcome the constitutional prohibition on the diversion of common school funds to charter schools. *See State ex rel. State Bd. for Vocational Educ. v. Yelle*, 199 Wash. 312, 317, 91 P.2d 573 (1939) (allowing diversion of common school moneys to other purposes would be "calamitous"). Moreover, charter schools continue to be run by and responsible to non-profit companies and non-elected boards and, thus, continue to be non-accountable to taxpayers who provide funding for charter schools.

Second, E2SSB 6194 violates article IX, section 2 of the Constitution, which mandates that the state provide a "general and uniform system of public schools." Like I-1240, E2SSB 6194 violates the "general and uniform" requirement by eliminating the local voter control that was – and remains – a hallmark of public schools, thereby resulting in different, non-uniform governance for charter schools. Further, charter schools are non-uniform in that they are not subject to most of the laws and regulations applicable to public school districts, including many of the Common School Provisions and provisions of the basic education act. *See* E2SSB, § 104(2), (3).

Third, E2SSB 6194 violates the state's "paramount duty" to provide for the education of children within its borders under article IX, section 1. In *McCleary v. State*, 173 Wn.2d 477, 539, 269 P.3d 227 (2012), the Supreme Court held that the state has failed and continues to fail to provide the funding needed to fulfill this duty, and ordered the legislature to fully fund basic educational programs by 2018. In August 2015, the Court held the legislature in contempt after it repeatedly failed to provide a plan to comply fully by the 2018 deadline. E2SSB 6194 interferes with the state's progress toward compliance by diverting already insufficient resources away from public school districts.

Fourth, E2SSB 6194 constitutes an unconstitutional delegation of the state's paramount duty by failing to provide adequate standards, guidelines, and procedural safeguards to ensure that the state's duty is met. *See, e.g., Matter of Powell*, 92 Wn.2d 882, 892, 602 P.2d 711 (1979). Instead, E2SSB 6194 exempts charter schools from a range of state statutes and rules applicable to school districts in areas including programming, scheduling, personnel, and funding. *See* E2SSB, § 104(2), (3).

Fifth, E2SSB 6194 violates the constitutional requirement that the superintendent of public instruction "have supervision over all matters pertaining to public schools[.]" Const. art. III, § 22. In particular, the charter school commission established by E2SSB 6194 is authorized to grant charters, E2SSB 6194, § 108(1), and "administer[s] the charter schools it authorizes," *id.*, § 107(2). Although the superintendent, or his designee, has one seat on the 11-member commission, the superintendent has no actual supervisory authority over these charter schools as required by article III, section 22 of the Constitution.

Sixth, E2SSB 6194 provides that charter employees are covered by state collective bargaining laws but purports to add new sections that restrict bargaining units to employees working in each charter school. E2SSB 6194, §§ 137-38. E2SSB 6194 fails to set forth any of the pre-existing sections of the collective bargaining laws in violation of article II, section 37. The bargaining unit restrictions significantly change the rights and duties of employees and the Public Employment Relations Commission, and cannot be understood without reference to the existing laws. *See Wash. Educ. Ass'n v. State*, 93 Wn.2d 37, 40-41, 604 P.2d 950 (1980).

In summary, unlike other specialized school programs funded by the state, including the Washington Youth Academy, Tribal Compact Schools, DOC Youth Offender Program, and the UW Transition School, E2SSB 6194 creates a private, non-accountable and separate school system that is intended to be a complete substitute to the public common schools envisioned by our State Constitution. This publicly funded private alternative school system is unconstitutional.

Additionally, with respect to the charter schools that commenced operations for the 2015-16 school year, public funds have continued to be diverted to these schools in violation of the Constitution. After the Supreme Court ruled that the funding provisions in I-1240 were unconstitutional and struck down the law in its entirety, these charter schools sought to continue to receive unconstitutional disbursements of public funds. Specifically, certain charter schools entered into an agreement with the Mary Walker School District in Eastern Washington so that they could continue to receive public funds by allegedly operating as Alternative Learning Experiences, or "ALEs." These charter schools do not qualify as ALEs under the requirements of chapter 28A.232 RCW and the charter schools' arrangement with the Mary Walker School District simply allowed for the continued unconstitutional diversion of public funds to support charter schools. Worse, E2SSB 6194 allows these schools to be converted back to publicly funded charter schools. Additionally, the charter schools' arrangements with the Mary Walker

School District improperly allowed the Mary Walker School District to operate schools within the boundaries of other districts without permission to do so.

In sum, the ongoing diversion of public school funds to charter schools violates the Constitution, further impedes the state's progress toward fully funding public education, and places even greater pressure on school districts to fill this gap. The Attorney General should act now to ensure that the next generation of our children receives an adequate education. We therefore request that you pursue immediate measures to address the unconstitutional provisions of the Charter School Act. *See Farris v. Munro*, 99 Wn.2d 326, 329, 662 P.2d 821 (1983) (allowing a taxpayer to demand that the Attorney General bring suit on behalf of all taxpayers).

Please let us know at your earliest convenience whether your office will initiate legal proceedings against E2SBB 6194.

Sincerely yours,

PACIFICA LAW GROUP LLP

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cc: Noah Purcell, Solicitor General for the Washington State Attorney General's Office