Cameras in Classrooms and Other State Legislative Trends

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State Legislative Trends 2014

Despite increasing federal involvement in public education, governance of public schools remains primarily a state function. Each year, state legislatures consider, debate and pass myriad laws affecting public schools. The 2014-2015 state legislative session produced several state laws related to technology and governance that appear to be part of larger trends in public education:

- Texas SB 507, which requires video cameras in certain special education classrooms at the request of a parent, trustee or staff member;
- A trio of new laws in California increasing protections for student data privacy;
- New York's Education Transformation Act of 2015, part of which provides for the takeover and restructuring of schools deemed "struggling" and "persistently struggling," through a new receivership process[1]; and
- Washington's recent tug-of-war between the state's legislative and judicial branches, in which the state supreme court found that the state had failed to fulfill its constitutional duty to fund education adequately under article IX, section 1 of the state constitution and ruled that the state's charter school law is unconstitutional.

We introduce each issue below with a brief explanation and analysis, followed by a summary of the relevant law. As these trends may surface in your state, we encourage you to remain actively connected to your state school boards association, state school attorneys group, and NSBA/COSA for updates on trends, recently enacted legislation, and key court decisions. If you are up-to-date, you are better able to advise your clients to take preventative approaches on trending issues.

Texas: Cameras in Classrooms and Body Cameras on Officers

Two Texas statutes passed in the 2015 session exemplify seemingly competing trends sweeping the country: the desire and increased capacity to collect data for purposes of improving student achievement, surveillance and monitoring, versus concerns for individual privacy. Texas has come down on the increased surveillance side of the equation with its new statutes requiring cameras in certain classrooms and supporting body cameras for police officers.

[1] A summary and analysis of the Tennessee Achievement School District program, which was passed by the Tennessee General Assembly in 2011 as part of a revamped school accountability model, is included immediately following the section on New York's statute.

Senate Bill 507, summarized below, requires a district to place video cameras in self-contained classrooms and certain other special education settings upon request by a parent, school board trustee, or staff member. The cameras must record audio and video footage in all areas of the classroom or setting, except that they may not visually record the inside of a bathroom or changing area. Districts must maintain the footage for at least 6 months and must make the recordings available to a parent or employee, upon request, when a complaint is reported to the district involving the parent's child or the employee. In some cases the district may also be required to release a recording to law enforcement, child abuse investigators, or the state teacher certification agency. The law takes effect for the 2016-2017 school year.

In an informal email response to TASB's inquiry, the U.S. Department of Education's Family Policy Compliance Office (FPCO) reiterated its informal guidance regarding surveillance video recordings. Such recordings created or maintained by a school's law enforcement unit for a law enforcement purpose (such as general school security purposes) are "law enforcement records," not "education records," and may be disclosed to anyone by the law enforcement unit, and, conversely, withheld from parents and others, pursuant to school policy or state law. Video recordings that are not law enforcement records will be subject to the Family Educational Rights and Privacy Act (FERPA) if they are (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution.[2]

FPCO has informally advised that video images in which a student is the focus (such as an altercation) might be "directly related" to students who are involved in the event at issue; whereas, those images would not be education records of student who are incidental or captured only as part of the background. Schools also should determine whether the videotape with that image is being "maintained" by the school or a party acting for the school, other than the school's law enforcement unit.

FPCO also reiterated its informal advice regarding copies of video recordings. If the video is determined to be an education record of a student, before providing a copy of the video images to a parent or eligible student, the other parent/eligible student should provide consent for the disclosure. FERPA does not require a school to provide a copy of education records to a parent. If circumstances effectively prevented a parent from exercising the right to inspect and review the records (such as the parent no longer living in commuting distance, for example), then the school would be required to either provide a parent with a copy or make other arrangements for the parent to inspect and review the records.

Texas' new law supporting body cameras for police officers may have little obvious application to schools at present, but its provisions highlight the privacy concerns at play in the body camera debate, and may be applicable to school resource officers in some cases.

Texas Senate Bill 507 – Video Cameras in Special Education Settings[3]

Sections affected: Amends Tex. Educ. Code § 26.009(b). Adds Tex. Educ. Code §§ 29.022, 42.2528.

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[2] See 34 CFR § 99.3, defining "education records." See also, 34 CFR § 99.30 and § 99.31, prohibiting an educational agency or institution from disclosing personally identifiable information (PII) from students' education records, without consent, unless the disclosure meets an exception to FERPA's general consent requirement.

[3] Summary adapted from the Texas Association of School Boards' 2015 Post-Legislative Guide, and used with permission. Text of the bill is available at http://www.capitol.state.tx.us/Search/DocViewer.aspx?ID=84RSB005075B&QueryText=%22sb+507%22&DocType=B.

Effective date: June 21, 2015. However, the requirement that districts put video cameras in special education settings upon request applies beginning with the 2016-17 school year.

Request for Video Cameras in Special Education Setting: Upon request by a parent, trustee, or staff member for the purpose of promoting student safety, this bill requires a district to provide equipment, including a video camera, to each school in the district in which a student who receives special education services in a self-contained classroom or other special education setting is enrolled. Each school that receives equipment shall place, operate, and maintain one or more video cameras in each self-contained classroom or other special education setting in which a majority of the students in regular attendance are: (1) provided special education and related services; and (2) assigned to a self-contained classroom or other special education setting for at least 50 percent of the instructional day. This bill requires the school to continue to operate and maintain the camera for as long as the special education classroom or setting continues to meet these requirements.

Applicability to Charter Schools: This bill applies to Open-Enrollment Charters, which are authorized by the Texas Commission of Education (as opposed to District or Campus Charters, which are authorized and governed by independent school districts). Most charters in Texas fall into this category.

Video Camera Requirements: This bill requires video cameras to be capable of covering all areas of the classroom or setting, except that they may not visually record the inside of a bathroom or any area in which a student's clothes are changed. The cameras must also record audio from all areas of the classroom or setting.

Notice of Video Camera: This bill requires districts to provide written notice to all school staff and to the parents of students receiving special education in the classroom or setting.

Retention and Use of Video Camera Recordings: This bill requires districts to retain the video recorded from a camera in a special education setting for at least six months after the date of recording. A district may not allow regular or continual monitoring of the video recording or use the recording for teacher evaluations or any other purpose other than the promotion of safety for special education students. A recording believed to document a possible violation of district policy may be used as part of a disciplinary action against an employee and shall be released in a legal proceeding at the request of the student's parent.

Release of Video Camera Recordings: This bill makes the recordings of a student confidential, except that a district is required to release a recording for viewing by:

(1) a district employee or parent who is involved in an incident documented by the recording for which a complaint has been reported to the district, upon request;

(2) appropriate DFPS (Texas Department of Family and Protective Services) personnel as part of a child abuse investigation;

(3) a peace officer, school nurse, administrator trained in de-escalation and restraint techniques as provided by commissioner rule, or a human resources staff member designated by the board of trustees in response to a complaint or an investigation of personnel or a complaint of abuse committed by a student; or

(4) appropriate TEA (Texas Education Agency) or SBEC (State Board for Educator Certification) personnel as part of an investigation.

If a person described by (3) or (4) above believes that the recording documents a reportable incident of child abuse or neglect, this bill requires the person to make a report to DFPS for investigation. If any person described by (2), (3) or (4) believes that the recording documents a violation of district policy, the person may allow access to the recording to appropriate legal and human resources personnel.

Funding: If the commissioner determines that the amount appropriated for the FSP (Foundation School Program, the Texas source of state education funding) exceeds the amount to which districts are entitled, then this bill requires establishment of a grant program to pay or reimburse districts for the cost of video cameras in special education settings. If a grant program is established, funds shall be distributed to districts in 2015-16. This bill also permits a district to accept gifts, grants, and donations from any person for use in placing video cameras in special education settings.

Liability: This bill does not waive any immunity or create any liability for, or cause of action against, a district or its employees or officers.

Texas Senate Bill 158 – Body Worn Camera Program for Certain Law Enforcement Agencies[4]

Sections affected: Adds Tex. Occ. Code § 1701.651-.663.

Effective date: September 1, 2015.

Scope of Program: This bill provides that a police department of a municipality in this state, a sheriff of a county in this state who has received the approval of the commissioners court, or DPS (Texas Department of Public Safety) may apply to the office of the governor for a grant to defray the cost of implementing a body worn camera program and to equip peace officers with body worn cameras *if the law enforcement agency employs officers who are engaged in traffic or highway patrol or otherwise regularly detain or stop motor vehicles or are primary responders who respond directly to calls for assistance from the public* (emphasis added). A body worn camera is defined as a recording device that is capable of recording, or transmitting to be recorded remotely, video or audio and worn on the person of a peace officer, which includes being attached to the officer's clothing or worn as glasses.

Funding: The office of the governor is to set deadlines for applications for grants. The office of the governor must create and implement a matching grant program under which matching funds from federal, state, local, and other funding sources may be required as a condition of the grant. A law enforcement agency that receives a grant is required to match 25 percent of the grant money. DPS is eligible for grants but may not be made subject to any requirement for matching funds. The governor's office may conditionally award a grant to a law enforcement agency that has not adopted and implemented the required policy or training, but money may not be disbursed to a law enforcement agency until the agency fully complies with those requirements.

Reporting Requirements: As a condition of receiving a grant, a law enforcement agency annually must report to TCOLE (Texas Commission on Law Enforcement) regarding the costs of implementing a body worn camera program, including all known equipment costs and costs for data storage. TCOLE must

[4] Summary adapted from the Texas Association of School Boards' 2015 Post-Legislative Guide, and used with permission.

compile the information into a report and submit the report to the office of the governor and the legislature no later than December 1st of each year.

Interagency or Interlocal Contract: A law enforcement agency in this state may enter into an interagency or interlocal contract to receive body worn camera services and have the identified operations performed through a program established by the Department of Information Resources.

Policy Required: A law enforcement agency that receives a grant to provide body worn cameras to its peace officers or that otherwise operates a body worn camera program must adopt a policy for the use of body worn cameras. The policy must ensure that a body worn camera is activated only for a law enforcement purpose and must include:

- guidelines for when a peace officer should activate a camera or discontinue a recording currently in progress, considering the need for privacy in certain situations and at certain locations;
- provisions relating to data retention, including a provision requiring the retention of video for a minimum period of 90 days;
- provisions relating to the storage of video and audio, creation of backup copies of the video and audio, and maintenance of data security;
- guidelines for public access, through open records requests, to recordings that are public information;
- provisions entitling an officer to access any recording of an incident involving the officer before the officer is required to make a statement about the incident;
- procedures for supervisory or internal review; and
- the handling and documenting of equipment and malfunctions of equipment.

The policy may not require a peace officer to keep a body worn camera activated for the entire period of the officer's shift. The policy must also be consistent with the Federal Rules of Evidence and the Texas Rules of Evidence. A law enforcement agency operating a body worn camera program on the effective date of this bill may submit any existing policy of the agency regarding the use of body worn cameras to TCOLE to determine whether the policy is in compliance. A law enforcement agency operating a body worn camera program on the effective date of this bill is not required to adopt or implement a policy that complies with this bill before September 1, 2016.

Training Required: Before a law enforcement agency may operate a body worn camera program, the agency must provide training to peace officers who will wear the body worn cameras and any other personnel who will come into contact with video and audio data obtained from the use of body worn cameras. TCOLE, in consultation with DPS, the Bill Blackwood Law Enforcement Management Institute of Texas, the W. W. Caruth Jr. Police Institute at Dallas, and the Texas Police Chiefs Association, must develop or approve a curriculum for a training program no later than January 1, 2016. A law enforcement agency operating a body worn camera program on the effective date of this bill is not required to implement the training program before September 1, 2016.

Decision to Record with Body Worn Camera: This bill requires that a peace officer equipped with a body worn camera act in a manner consistent with the policy of the law enforcement agency that employs

the officer with respect to when and under what circumstances a body worn camera must be activated. This bill also states that a peace officer equipped with a body worn camera may choose not to activate a camera or may choose to discontinue a recording currently in progress for any non-confrontational encounter with a person, including an interview of a witness or victim. A peace officer who does not activate a body worn camera in response to a call for assistance must include in the officer's incident report or otherwise note in the case file or record the reason for not activating the camera. Any justification for failing to activate the body worn camera because it is unsafe, unrealistic, or impracticable is based on whether a reasonable officer under the same or similar circumstances would have made the same decision.

Use of Personal Body Worn Cameras: If a law enforcement agency receives a grant, a peace officer who is employed by the agency and who is on duty may only use a body worn camera that is issued and maintained by that agency. Regardless of any previous policies, an agency may not allow its peace officers to use privately owned body worn cameras after receiving a grant. A peace officer who is employed by a law enforcement agency that has not received a grant or who has not otherwise been provided with a body worn camera by the agency that employs the officer may operate a body worn camera that is privately owned only if permitted by the employing agency. An agency that authorizes the use of privately owned body worn cameras must make provisions for the security and compatibility of the recordings made by those cameras.

Offense: A peace officer or other employee of a law enforcement agency commits an offense if the officer or employee releases a recording created with a body worn camera without permission of the applicable law enforcement agency. This offense is a Class A misdemeanor.

Recordings of Incidents with Body Worn Camera; Release of Recording: A recording created with a body worn camera and documenting an incident that involves the use of deadly force by a peace officer or that is otherwise related to an administrative or criminal investigation of an officer may not be deleted, destroyed, or released to the public until all criminal matters have been finally adjudicated and all related administrative investigations have concluded. A law enforcement agency may release to the public such a recording, however, if the law enforcement agency determines that the release furthers a law enforcement purpose. This does not affect the authority of a law enforcement agency to withhold information related to a closed criminal investigation that did not result in a conviction or a grant of deferred adjudication community supervision.

Public Information Request Requirements: When submitting a written request to a law enforcement agency for information recorded by a body worn camera, a member of the public is required to provide the following information: the date and approximate time of the recording; the specific location where the recording occurred; and the name of one or more persons known to be a subject of the recording. A failure to provide all of the required information with a request for recorded information does not preclude the requestor from making a future request for the same recorded information.

Records Subject to Release Under the PIA (Public Information Act): Most information recorded by a body worn camera and held by a law enforcement agency is not subject to the requirements of the PIA; information that is or could be used as evidence in a criminal prosecution, however, is subject to the requirements of the PIA. A law enforcement agency may seek to withhold information that is or could be used as evidence in a criminal prosecution in accordance with procedures provided by Texas Government Code section 552.301; assert any exceptions to disclosure in the PIA or other law; or release requested

information after the agency redacts any information made confidential under the PIA or other law. A law enforcement agency may not release any portion of a recording made in a private space or of a recording involving the investigation of conduct that constitutes a misdemeanor punishable by fine only and does not result in arrest without written authorization from the person who is the subject of that portion of the recording or, if the person is deceased, from the person's authorized representative. Private space means a location in which a person has a reasonable expectation of privacy, including a person's home.

Fee for Copy of Recording: The attorney general must set a proposed fee to be charged to members of the public who seek to obtain a copy of a recording. The fee amount must be sufficient to cover the cost of reviewing and making the recording. A law enforcement agency may provide a copy without charge or at a reduced charge if the agency determines that waiver or reduction of the charge is in the public interest. A recording is confidential and excepted from the requirements of the PIA if the recording was not required to be made by this or another law or under a policy adopted by the appropriate law enforcement agency and does not relate to a law enforcement purpose.

Requests for Decision from Attorney General Regarding PIA Requests: A governmental body's request for a decision from the attorney general about whether a requested body worn camera recording falls within an exception to public disclosure is considered timely if made not later than the 20th business day after the date of receipt of the written request. A governmental body's response to a requestor regarding a requested body worn camera recording is considered timely if made not later than the 20th business day after the date of receipt of the written request. A governmental body's submission of a request for an open records decision to the attorney general regarding a requested body worn camera recording is considered timely if made not later than the 25th business day after the date of receipt of the written request. A governmental body's submission to a requestor of the comments sent to the attorney general in relation to an open records decision request regarding a requested body worn camera recording is considered timely if made not later than the 25th business day after the date of receipt of the written request.

Voluminous PIA Requests: An officer for public information who is employed by a governmental body and who receives a voluminous request is considered to have promptly produced the information if the officer certifies that the request is voluminous in writing to the requestor before the 21st business day after the date of receipt of the written request and sets a date and hour within a reasonable time when the information will be available for inspection or duplication. A voluminous request includes a request for body worn camera recordings from more than five separate incidents; more than five separate requests for body worn camera recordings from the same person in a 24-hour period, regardless of the number of incidents included in each request; or a request or multiple requests from the same person in a 24-hour period for body worn camera recordings that, taken together, constitute more than five total hours of video footage.

California: Trio of Student Data Privacy Laws

In California, three new laws were adopted relating to the storage of student records and data. These new laws exemplify the fast-moving trend toward increased student data privacy protections at the state and federal levels, as they address key issues such as use of student data in the hands of online educational service providers, steps schools must take to safeguard student data when they contract with such

providers, and the privacy interest students may have in information contained in their social media accounts.

Of the three, the Student Online Personal Information Protection Act (SOPIPA) has received the most national attention. SOPIPA was crafted with the assistance and urging of the nonprofit Common Sense Media. It is one of the most aggressive and restrictive state statutes governing provider of online educational services. As reported in *EdWeek*, SOPIPA "prohibits operators of online educational services from selling student data and using such information to target advertising to students or to 'amass a profile' on students for a non-educational purpose. The law also requires online service providers to maintain adequate security procedures and to delete student information at the request of a school or district."[5] Similar bills are moving through the legislatures of several other states, including New Hampshire, and federal bills have been introduced that look remarkably similar to SOPIPA.[6]

A companion bill to SOPIPA, Assembly Bill 1584, clarified and supplemented existing laws relating to cloud-based storage and student record privacy. AB 1584 requires contracts between a school district and a third party to provide services for electronic storage, management and retrieval of students' records or to provide digital educational software to contain certain enumerated provisions.

Finally, Assembly Bill 1442 limits an educational agency's ability to institute a program in which it monitors student social media activity. When a school district is c*onsidering* such a program, it must provide public notice, and after implementation, parent and student access to the information obtained.

CA Senate Bill 1177 – Student Online Personal Information Protection Act, Business & Professions Code § 22584 *et seq* [7]

Before SOPIPA, online sites and services could not use, disclose, compile the personal information of a minor to market or advertise K-12 products or services. SOPIPA further restricts the usage of students' educational data by online service providers. It prohibits online service providers ("operators") from:

- Knowingly engaging in targeted advertising to students or their parents;
- Using "covered information" to amass a profile about a K–12 student for non-K-12 purposes; or
- Selling covered information or disclosing it for non-K-12 purposes.

One example of a permissible K-12 purpose: disclosing a student's information to allow or improve operability and functionality within that student's classroom or school.

The bill also requires site operators to maintain reasonable security measures to protect students' information from unauthorized access or use, and to delete a student's information if the school or district requests it.

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[5] Herold, Benjamin, "Landmark Student Data Law Enacted in California," *EdWeek*, September 30, 2014, available at http://blogs.edweek.org/edweek/DigitalEducation/2014/09/_landmark_student-data-privacy.html.

[6] See Singer, Natasha, "Franchising a Student Digital Privacy Law," *New York Times*, April 28, 2015, available at http://bits.blogs.nytimes.com/2015/04/28/franchising-a-student-digital-privacy-law/?_r=0; Herold, Benjamin, "(Yet Another") Student-Data-Privacy Bill Introduced," *EdWeek*, July 16, 2015, available at http://blogs.edweek.org/edweek/DigitalEducation/2015/07/federal_student-data-privacy_bill.html?qs=blumenthal+daines.

[7] Available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1151-1200/sb_1177_bill_20140929_chaptered.pdf.

Under SOPIPA, "covered information" means personally identifiable information or materials, in any media or format that meets any of the following:

- Is created or provided by a student, or the student's parent or legal guardian, to an operator in the course of the student's, parent's, or legal guardian's use of the operator's site, service, or application for K–12 school purposes.
- Is created or provided by an employee or agent of the K–12 school, school district, local education agency, or county office of education, to an operator.
- Is gathered by an operator through the operation of a site, service, or application described in subdivision (a) of the Act and is descriptive of a student or otherwise identifies a student, including, but not limited to, information in the student's educational record or email, first and last name, home address, telephone number, email address, or other information that allows physical or online contact, discipline records, test results, special education data, juvenile dependency records, grades, evaluations, criminal records, medical records, health records, social security number, biometric information, disabilities, socioeconomic information, food purchases, political affiliations, religious information, text messages, documents, student identifiers, search activity, photos, voice recordings, or geolocation information.

The new law does not apply to general audiences sites or services, and is effective January 1, 2016.

Because it applies to vendors that collect data from K-12 students in California and/or market services to K-12 California students, it may impact popular services and student-focused apps, like Google's Apps for Education suite.[8]

California Assembly Bill 1584 – Requirements for School District Contracts with Service Providers, California Education Code § 49073.1

This companion bill to SOPIPA amends Section 49073.1 of the California Education Code, authorizing schools and other local educational offices to contract with vendors for the provision of cloud-based digital storage of student records, but requiring such agreements to contain certain provisions. AB 1584 provides that student records must remain private regardless of whether they are stored in a file cabinet or the cloud and that parents will retain the right to view and correct any inaccuracies.

All contracts between schools and data storage vendors must now include a statement that any student records stored continue to remain the property of the district and other specified provisions, including:

- A statement that the pupil records continue to be the property of and under the control of the local educational agency; and
- A description of the actions the 3rd party will take to ensure the security and confidentiality of pupil records; and
- A description of how the local educational agency and the 3rd party will jointly ensure compliance with the federal Family Educational Rights and Privacy Act.

[8] Media reports suggest that SOPIPA was enacted in part to combat Google's scanning of student e-mails for non-educational and advertising purposes. http://www.govtech.com/education/California-Enacts-Student-Data-Protection-Law.html.

The law requires that a contract that fails to comply with its requirement be rendered void if certain conditions are satisfied. It imposes other requirements on cloud-based storage providers to ensure the security of student data.

A.B. 1584[9] requires that contracts between a school district and third parties specify, among other things, that the student data remains the property of the educational agency; how students and parents may access their data; how the third party will ensure the confidentiality and security of student data; and how to notify students and parents in the event of a security breach. A.B. 1584 goes into effect on January 1, 2015.

California Assembly Bill 1442 – Information From Social Media, California Education Code § 49073.6

Completing the trio of student data bills passed in California is AB 1442, which amends Section 49073.6 of the Education Code to limit the types of information an educational agency may collect from social media sources regarding students. It provides that where a school district (or a county office of education or charter school) considers implementing a program to gather and maintain information obtained from social media sites, it must first notify students and parents before adopting the program. The district must also provide an opportunity for public comment on the program at a regularly scheduled meeting of the educational agency's governing board. The notice and comment period is a prerequisite to the educational agency's ability to collect and use student information gathered from any social media source.

Once the program is established, the educational agency may only collect information that is directly related to school or pupil safety. Like traditional student records, students and parents are entitled to access the information educational agencies gather from social media, and have the right to challenge the veracity of the information. However, unlike other student records, the information gathered from social media sources must be destroyed within one year of the student turning 18, or from the student's departure from the educational agency, whichever occurs first. The statute also provides protections against third party use of the information gathered where the district contracts with a third party to gather such information.

New York: Receivers With Broad Authority Over "Struggling" Schools[10]

A new state receivership law was enacted in New York as part of the Education Transformation Act of 2015; and the New York Board of Regents adopted implementing regulations in June. Together, the statute and regulations provide for schools identified as "struggling" or "persistently struggling" to be taken over and their operations to be managed by a receiver. Schools are subject to receivership if they are identified under the state's accountability system as being among the lowest achieving five percent of public schools in the state. As of July 1, 2015, these schools are being operated under the management of a school district superintendent receiver—persistently struggling schools for one school year and struggling schools for two school years. If they fail to make "demonstrable improvement" during the prescribed time period, they become eligible for placement under an external independent receiver for

[9] Available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1551-1600/ab_1584_bill_20140929_chaptered.pdf.

[10] Adapted from "Questions and answers on receivership," published in the New York State School Boards Association's *On Board* magazine, July 20, 2015.

three years. After the 2016-2017 school year, schools newly designated as struggling are immediately eligible to be placed under an independent receiver. The school district appoints the independent receiver, subject to approval by the commissioner of education.

All receivers have the authority to manage and operate all aspects of the school and implement a school improvement plan, and to:

- supersede any decision, policy or regulation of the superintendent or chief school officer, school board, another school officer, or principal that, in the receiver's sole judgment, conflicts with the school plan being implemented by the receiver;
- expand, alter or replace the school's curriculum and program offerings, as necessary;
- extend the school day/year;
- review and modify the proposed school district budgets prior to the budget hearing without unduly impacting other district schools;
- superseded any employment decision by the school board, except that a school superintendent receiver and an EPO receiver may not override a school board decision regarding their own employment;
- increase salaries and establish steps to improve hiring, induction, teacher evaluation, professional development, teacher advancement, and school culture and organizational structure;
- abolish the positions of all members of the teacher and administrative and supervisory staff, and terminate the principal, requiring that all reapply; and
- Convert the school into a charter school in accordance with the state's charter school law.

A detailed summary of the statute and implementing regulations appears below.

Chapter 56 of the Laws of 2015 (New York) – Part EE Subpart H -- Receivership – The Taking Over and Restructuring of Struggling Schools

Type of Schools Eligible for Receivership

1. Struggling schools – Those identified under the State's accountability system as a priority school for at least three consecutive school years, except as otherwise specified in the statute. They include those who fall among the lowest achieving five percent of public schools in the state (§ 211-f [1][a]; 8 NYCRR § 100.19 [a][1],[3]).

2. Persistently struggling schools – Those identified under the State's accountability system as a priority school for ten consecutive school years, as specified in the statute (§ 211-f [1][b]; 8 NYCRR § 100.19[a][2]).

3. Schools newly designated as struggling – Those designated as a struggling school after the 2016-2017 school year (§ 211-f [1][c][ii]).

4. The definitions of struggling and persistently struggling schools do not include schools within a special act school district or a charter school (§ 211-f [1][a],[b]; 8 NYCRR § 100.19[a][1],[2]).

5. A school under receivership continues to operate in accordance with laws applicable to other public schools, unless such other laws conflict with the provisions of the receivership statute (§ 211-f [2][c]).

Types of Receivership – School District Receivership

1. The term school district superintendent receiver refers to:

   a. A school superintendent, or other chief school officer of a district with one or more schools designated as struggling or persistently dangerous, and in New York City, the chancellor or his/her designee, or

   b. An educational partnership organization (EPO) that has assumed the powers and duties of the school superintendent for purposes of implementing the educational program of the school (8 NYCRR § 100.19 [a][5],[9]).

2. A school district superintendent receivership is applicable to struggling and persistently struggling schools (§ 211-f [1][c][i],[ii]; 8 NYCRR §100.19[a][5]).

   a. Persistently struggling schools:

      - School districts continue to operate persistently struggling schools during the 2015-2016 school year, under a department-approved intervention model of comprehensive education plan.

      - Throughout that year, the superintendent is vested with all powers granted to an independent receiver, except that the superintendent may not override any decision of the school board regarding his/her employment status.

      - At the end of that school year, the State Education Department (SED) determines whether the school should:

         • Be removed from its designation,

         • Remain under school district operation, with the superintendent vested with the powers of a receiver, or

         • Placed into external receivership.

      - A persistently struggling school will remain under district operation for an additional year if it makes demonstrable improvement, subject to annual review by SED (§ 211-f [1][c][i]; 8 NYCRR § 100.19[d])

   b. Struggling schools - Continue under operation by the school district subject to the same terms and conditions applicable to persistently struggling schools. The one exception is that, in the case of struggling schools, the initial duration of the school district superintendent receivership is two school years, instead of one (the 2015-2016 and 2016-2017 school years) (§ 211-f [1][c][ii]; 8 NYCRR § 100.19[d][1]).

3. By September 1 of each year in which a school is in a school district superintendent receivership, the commissioner will provide the school district and the superintendent with annual goals that must be met for the school to make demonstrable improvement.

To determine whether a school has made demonstrable improvement, the commissioner will consider:

a. The number of years the school has been identified as struggling or persistently struggling,

b. The degree to which the superintendent has successfully used the powers of a school receiver to implement the school's department approved intervention plan or comprehensive education plan, and

c. Other metrics that include:

- student attendance, discipline, and safety
- student promotion and graduation and drop-out rates
- student achievement and growth on state measures
- progress in areas of academic underperformance and among student accountability subgroups
- reduction of achievement gaps among specific student groups
- development of college and career readiness, including at the elementary and middle school levels
- parent and family engagement
- culture of academic success among students and student support and success among faculty and staff
- use of developmentally appropriate child assessments from pre-k through 3rd grade, if applicable, that are tailored to the needs of the school, and
- measures of student learning (8 NYCRR § 100.19[d][2],[f][6]).

4. School board decisions regarding the superintendent's employment status must be consistent with applicable laws and regulations and his/her employment contract, and may not be taken in retaliation for acts taken by the superintendent as a school receiver (8 NYCRR § 100.19[d][3]).

Types of Receivership – Independent Receivership

Independent receiverships are applicable to schools newly designated as struggling after the 2016-2017 school year, and to struggling and persistently struggling schools that fail to make demonstrable improvement under a school district superintendent receivership (§ 211-f [1][c][i],[ii]).

1. The term independent receiver refers to:

a. a non-profit entity,

b. an individual with a proven track record of improving school performance, or

c. another school district in good standing appointed by a school district and approved by the commissioner.

If the independent receiver is an individual, such individual may not be an existing officer or employee of the school district at the time of such appointment (§ 211-f [2][a]; 8 NYCRR § 100.19[a][6]).

2. Schools newly designated as struggling are immediately eligible for the appointment of an independent receiver, except that the commissioner may determine that the school district will continue to operate the school under a school district superintendent receiver (§ 211-f[1][c][ii]; 8 NYCRR § 100.19[d][8]).

Independent Receivers – Appointment, Compensation, and Termination

1. School districts must appoint an independent receiver:

a. For schools newly designated as struggling after the 2016-2017 school year, immediately upon such designation, unless the commissioner the school continue to operate under a school district receiver for two additional school years (§ 211-f [1][c][ii]; 8 NYCRR § 100.19[f][8]), and

b. For struggling and persistently struggling schools, within 60 days of a determination by the commissioner that the school should be placed into receivership.

2. A school district's appointment of an independent receiver is subject to approval by the commissioner of education.

a. A school district may appoint an independent receiver from among SED's list of approved independent receivers, or one not on that list.

b. When a district appoints a receiver not on SED's list, it must submit evidence that the prospective independent receiver meets the minimum qualifications set out in regulation and in SED's request for proposals.

The district must submit such evidence to the commissioner, for approval, within 40 days of the commissioner's determination to place a school in receivership.

3. The commissioner will appoint the independent receiver if a school district fails to appoint one that meets the commissioner's approval within 60 days of the commissioner's determination that the school should be placed into receivership (§ 211-f [2][a]; 8 NYCRR § 100.19[e][1]-[3]).

4. The commissioner contracts with the receiver. The contract may be terminated by the commissioner for a violation of law or commissioner's regulations, or for neglect of duty (§ 211-f [2][c]; 8 NYCRR § 100.19[e][4][i]).

If the independent receiver's appointment is vacated or otherwise terminated, the commissioner will appoint a new or interim independent receiver no later than 15 business days thereafter, until a new independent receiver is appointed (8 NYCRR § 100.19[e][3]).

5. The receiver's compensation and costs are paid from:

a. A state appropriation for such purpose, or

b. By the school district as determined by the commissioner, except that costs are payable by a district only if the district has an open administrative staffing line available for the receiver and the receiver takes on the responsibilities of that open line (§ 211-f [2][c]; 8 NYCRR § 100.19[e][4][i]).

Independent Receiver Qualifications

1. In addition to the qualifications set out in SED's request for proposal, all independent receivers must have a demonstrated record of successful experience:

a. In education within the past three years, including at least five years of successful experience:

- Improving student academic performance in low performing schools and/or districts, or

- Dramatically raising the achievement of high needs students in moderate to high performing schools and/or districts.

b. With at risk student populations in closing achievement gaps.

c. Forming collaborative relationships or partnerships with school community stakeholders, including parents, teachers, administrators, school staff, collective bargaining unit, school boards and community members.

d. Converting a school to a community school.

2. School districts appointed as independent receivers must be in good standing under the accountability system.

3. Individuals appointed as independent receivers, and individuals designated by a non-profit entity appointed as an independent receiver must hold:

a. New York State certification as a school district administrator or school district leader, or school administrator and supervisor, or school building leader, or

b. A substantially equivalent certification, as determined by the commissioner, from another state (8 NYCRR § 100.19[e][5]).

Independent Receivers - Employment Benefits and Status

1. Independent receivers and any of their employees providing services in the receivership are entitled to defense and indemnification by the school district to the same extent as a district employee (§ 211-f [2][c]; 8 NYCRR § 100.19[e][4][ii]).

2. The independent receiver or designee is an ex officio non-voting member of the school board entitled to attend all school board meetings, except properly convened executive sessions of the school board that pertain to personnel and/or litigation matters involving the receiver (§ 211-f [2][c]; 8 NYCRR § 100.19[e][4][iv]).

3. School boards and superintendents must fully cooperate with the receiver.

Willful failure to cooperate, or interference with the functions of the receiver, constitute willful neglect of duty for purposes of removal from office by the commissioner (§ 211-f [2][c]; 8 NYCRR § 100.19[e][4][iii]).

Receiver's General Authority

1. Manage and operate all aspects of the school (§ 211-f [2][a],[c]; 8 NYCRR § 100.19[a][6],[d][3],[g][1]).

2. Develop and implement a school intervention plan for the designated school that considers the recommendations of a statutorily established community engagement team (§ 211-f [2][a]; 8 NYCRR § 100.19[a][6], [e][4][v]).

3. Supersede any decision, policy or regulation of the superintendent or chief school officer, school board, another school officer, or the building principal that, in the receiver's sole judgment, conflicts with the school intervention plan.

a. Such authority does not apply to decisions that are not directly linked to the school intervention plan such as building usage plans, co-location, and student transportation to the extent that such decisions impact other schools in the district (§ 211-f [2][b]; 8 NYCRR § 100.19[g][6]).

b. Before exercising this supersession authority, a receiver must follow the process set out in regulation, including:

- Giving notice to the school board, superintendent or chief school officer, and the principal at least 10 business day notice prior to the effective date of the supersession including the reasons therefor, what will replace what is being superseded, and the duration of the supersession.

  - The notified parties would have at least five business days to respond to the notice in writing and the receiver must consider their response their response before implementing the supersession.

  - At any time subsequent to a supersession, the superintendent or the school board may ask the receiver in writing to terminate the supersession, and the receiver must respond to such a request in writing within 15 business day, with his/her decision and rationale.

The receiver may dispense with the pre-supersession notice requirements if he/she deems the supersession necessary on an emergency basis to protect the health and welfare of the school's students and staff, or to ensure the school's compliance with law or commissioner's regulations. In such an instance, the receiver must inform the school board, the superintendent or chief school officer, and the principal of the supersession within 24 hours or as soon as practicable thereafter, and give them an opportunity to respond.

- Providing the commissioner with an electronic copy of all correspondence related to the supersession (8 NYCRR § 100.19[g][7]).

4. A school district superintendent receiver and an EPO receiver have all the powers granted to an independent receiver, except as otherwise provided in regulation (8 NYCRR § 100.19[a]5];[d][3]).

Receiver's Authority – Instructional Programs

1. If necessary, expand, alter or replace the school's curriculum and program offerings. This includes, for example, the implementation of research-based early literacy programs, early interventions for struggling readers and the teaching of advanced placement courses, if such programs or courses are not already in place (§ 211-f [7][a][i]; 8 NYCRR § 100.19[g][3][i]).

2. Expand the school's school day or school year or both, which may include establishing partnerships with community based organizations and youth development programs that offer appropriate programs and services in expanded learning time settings (§ 211-f[7][a][vi]; 8 NYCRR § 100.19[g][3][vi]).

3. Add pre-kindergarten and full-day kindergarten classes if the school does not offer such classes but does offer first grade (§ 211-f[7][a][vii]; 8 NYCRR § 100.19[g][3][vii]).

Receiver's Authority – The School Budget

1. Review proposed school district budgets no later than 30 business days prior to presentation to district voters at the budget hearing.

2. Review school budget of a large city school district (population of 125,000 or more) prior to school board approval.

The school board must provide the receiver a copy of the proposed district budget including any school-based budget, at least 5 business days prior to the date that the superintendent submits the budget to the school board.

3. Modify the proposed budget to conform to the school intervention plan.

a. Any such modification must be limited in scope and effect to the struggling or persistently struggling school and may not unduly impact other schools in the district.

b. The receiver must inform the school board and superintendent or chief school officer of any modification he/she deems necessary no later than 5 business days after receiving the proposed budget.

c. The requested modifications may not require that the school board seek voter approval of a budget that exceeds the tax levy cap.

d. Upon receipt of the receiver's modifications, the school board must either:

- Incorporate them into the proposed budget and present it to the public, or

- Return the modifications to the receiver within 5 business days for reconsideration with the reasons for reconsideration in writing.

- Within 5 business days of the request for reconsideration, the receiver must notify the school board in writing of his/her determination to either withdraw or revise the proposed modifications or resubmit the original. The receiver's determination must be incorporated into the budget.

e. The receiver and the school board must provide the commissioner with an electronic copy of all correspondence related to modification of the school budget.

f. Upon approval of the school district budget, any changes to the budget that would adversely affect the implementation of the school intervention plan/department-approved intervention model/comprehensive education plan must be approved by the receiver (§ 211-f [2][b]; 8 NYCRR § 100.19[g][8]).

4. Reallocate the uses of the existing budget of the school (§ 211-f [2][a][v]; 8 NYCRR § 100.19[g][3][v]).

Receiver's General Authority Over Employment Decisions

1. Supersede any employment decisions of the school board, except that the school board remains the employer of record for the school (§ 211-f [2][c]).

a. A school district superintendent receiver may not override any decision of the school board regarding his/her employment status (8 NYCRR § 100.19[d][3],[g][6]).

b. An EPO may not override any decision of the school board with respect to the contract with the EPO (8 NYCRR § 100.19[a][5]).

2. The school board must give the receiver written notice no later than 10 business days after it has acted upon an employment decision pertaining to staff assigned to the school, and such decision shall not go into effect until the receiver has reviewed it.

a. Within 10 business days of the notification, the receiver must provide in writing any modifications he/she deems necessary and the rationale, along with an explanation as to how the modifications are limited in scope and effect to the school in receivership and do not unduly impact other schools in the district.

b. The school board would have 10 days to either adopt the modifications at is next regularly scheduled meeting, or return the modifications to the receiver for reconsideration and the reasons therefor.

c. The receiver would then have 10 business days to make his/her determination. The school board would need to adopt any modifications required by the receiver at its next regularly scheduled meeting.

d. The receiver and the school board must provide the commissioner with an electronic copy of all correspondence related to such employment decisions (8 NYCRR § 100.19[g][9]).

3. Replace teachers and administrators who are not properly certified or licensed.

4. Increase salaries of current or prospective teachers and administrators to attract and retain high-performing teachers and administrators.

5. Establish steps to improve hiring, induction, teacher evaluation, professional development, teacher advancement, school culture and organizational structure (§ 211-f [7][b][ii],[iii],[iv]; 8 NYCRR § 100.19[g][3][ii]-[iv]).

Receiver's Authority – Abolition of Positions

1. Abolish the positions of all members of the teaching and administrative and supervisory staff assigned to the school, and terminate any building principal assigned to the school, and require that they reapply for the positions in the school if they so choose (§ 211-f [7][a][viii]; 8 NYCRR § 100.19[g][4]).

   a. When a position is abolished, it is the services of the teacher or administrator or supervisor within the tenure area of the position with the lowest rating on the most recent annual professional performance review that is discontinued. Seniority within the tenure area is used solely to determine which position to discontinue in the event of a tie.

   b. Those whose position is abolished are eligible to be placed in a preferred eligibility list (PEL), except that a classroom teacher or building principal who has received two or more composite ratings of ineffective will not be deemed eligible for such placement (§ 211-f [7][b],[c]).

2. In determining whether to implement an abolition, a receiver must follow the process set out in regulation including:

   a. Conducting a comprehensive school needs assessment including an analysis of the professional development provided for staff in the abolished positions during the preceding two school years, and how the planned abolition will in improved student performance.

   b. Giving, at least 90 day written notice of any planned abolition to the school staff and their collective bargaining representative, the superintendent of chief school officer, and the school board.

      - The notified parties would have 14 days to submit to the receiver a written request for reconsideration.

      - The receiver would have 30 days from the issuance of the notice of planned abolition to notify the school board of his/her decision, in writing.

   c. Providing the commissioner with an electronic copy of all correspondence related to the abolition (8 NYCRR § 100.19[g][4][i]-[v]).

3. Following an abolition of positions, define new positions for the school aligned with the school intervention plan, including criteria and expected duties and responsibilities for each position.

a. The receiver has full discretion over all rehiring decisions involving administrators and pupil personnel service providers.

b. For teachers and pedagogical support staff, the receiver must convene a staffing committee (consisting of five members set out in statute) that will determine whether those reapplying for a position are qualified for the new position.

Otherwise, the receiver has full discretion regarding hiring decisions, except that the receiver must fill:

- at least 50% of the newly defined positions with the most senior former school staff determined by the staff committee to be qualified.

- Any remaining vacancies in consultation with the staffing committee.

4. Teachers re-hired maintain their prior status as tenured or probationary. The probation period of a re-hired probationary teacher does not change.

5. Members of the teaching and pedagogical support, administrative, or pupil personnel service staff who are not re-hired have no right to bump or displace any other person employed by the district (§ 211-f [7][c]).

6. Upon completion of the abolition and rehiring process, no further abolition of the positions of all members of the teacher and administrative and supervisory staff assigned to the school may occur without the prior approval of the commissioner (8 NYCRR § 100.19[g][4][vi]).

Receiver's Authority – School Conversions

1. An independent receiver must, consistent with any applicable collective bargaining agreement(s) and Taylor Law provisions, and after consultation with stakeholders and the community engagement team, convert schools to community schools to provide expanded health, mental health and other services to students and their families (§ 211-f [7][a]; 8 NYCRR § 100.19[a][6],[8],[g][2]).

a. When converting a school in receivership to a community school, the independent receiver must follow the process and meet the minimum requirements set out in regulation including, for example,

- partnering with families and relevant community agencies,

- conducting a comprehensive school and community needs assessment, and

- designating a full-time staff person to manage the development of the community school strategy for the school and subsequently ensure the maintenance and sustainability of the community school (8 NYCRR § 100.19[f][8],[g][2]).

b. A community school refers to:

- a school that partners with one or more agencies with an integrated focus on rigorous academics and the fostering of a positive and supportive learning environment, and

- a range of school-based and school-linked programs and services that lead to improved student learning, stronger families and healthier communities, and that, at a minimum, provide the programs set out in regulation (8 NYCRR § 100.19 [a][8]).

c. A school district superintendent receiver is not required to convert a struggling or persistently struggling school to a community school (8 NYCRR § 100.19[a][5],[d][3],[g][1]).

2. Receivers may order the conversion of the school into a charter school in accordance with the charter school law, and subject to other specified conditions including that such school will operate consistent with a community schools model (§ 211-f [7][a][xi]; 8 NYCRR § 100.19[g][3][x]).

Receiver's Authority - Professional Development

In creating and implementing the school intervention plan, the receiver also has the authority to include a provision for job-embedded professional development for teachers and establish a plan for professional development for administrators at the school.

1. In the case of teachers, it must emphasize strategies that involve teacher input and feedback and, in the case of principals, strategies that develop leadership skills and use the principles of distributive leadership (§ 211-f [7][a][ix],[x]; 8 NYCRR § 100.19[g][3][vii],[ix]).

2. The professional development and planning time for teachers and administrators in a school with English language learners must include specific strategies and content designed to maximize the rapid academic achievement of such students (§ 211-f [7][d]).

Parental Notice, Hearing and Community Engagement

1. School districts must give written notice to the parents of students attending a school that may be placed into receivership (§ 211-f[1][c][iv]) and a description of the reasons therefor.

The notice must be:

a. In English and translated to the extent practicable in the parent's native language or mode of communication, and

b. Given no later than 30 calendar days following the school's designation as struggling or persistently struggling.

School district also must provide such notice to parents at the time they enroll or seek to enroll the children in the school (8 NYCRR § 100.19[c][1][i]).

By June 30 of each year, school district must give parents similar notice when the school remains identified as struggling or persistently struggling (8 NYCRR § 100.19[c]1][ii]).

2. The school district must hold at least one public meeting or hearing annually to discuss the performance of the school and the construct of receivership (§ 211-f [2][c][iv]; 8 NYCRR § 100.19[c][iii]).

a. The initial meeting or hearing must be held no later than 30 calendar days following the school's designation. Subsequent annual hearings within 30 calendar days of the first day of student attendance in September of each school year the school remains in such status (8 NYCRR § 100.19[c][iii]).

b. School districts must provide written notice of such meetings or hearings to both parents and the public in the manner set out in regulation, and translators at the meeting (8 NYCRR § 100.19[c][iii][a],[b]).

3. School districts must provide parents notice of the school intervention plan approved by the commissioner, and its availability (§ 211-f [9]).

4. No later than 20 business days after a school's designation as struggling or persistently struggling, the school district must establish a community engagement team that consists of community stakeholders such as the school principal, parents of students attending the school, teachers and other school staff assigned to the school and students attending the school (§ 211-f [1-a]; 8 NYCRR § 100.19[c][2],[2][i]).

a. The community engagement team develops recommendations for improvement of the school and solicits input through public engagement, which may include surveys, and public hearings or meetings arranged for by the school district in the manner set out in regulation (§ 211-f [1-a]; 8 NYCRR § 100.19[c][2][ii]).

b. Presents its recommendations, and its assessment of the implementation of the school's comprehensive education plan or department-approved intervention plan, periodically, but at least twice annually, to the school leadership, to the receiver, as applicable, and to the commissioner (§ 211-f [1-a]; 8 NYCRR § 100.19[c][2],[2][iii],[iv]).

The school's department-approved intervention model or comprehensive education plan must include all such recommendations and the efforts made to incorporate them, including a description of which recommendations were incorporated and how, and which were not and why not (8 NYCRR § 100.19[c][2][iii]).

5. The superintendent must develop a community engagement plan in the manner set out in regulation, and submit it to the commissioner for approval. Once approved, it will be incorporated into the school's department-approved intervention model or comprehensive education plan (8 NYCRR § 100.19[c][3]).

Intervention Models and Comprehensive Education Plans For School District Superintendent Receiverships

Persistently struggling and struggling schools under a school district superintendent receivership must operate under an SED approved intervention model or comprehensive education plan that includes rigorous performance metrics and goals, such as measures of student academic achievement and outcomes that include those set out in the receivership statute (§ 211-f [2][c][i],[ii],[6]).

1. A department-approved intervention model or comprehensive education plan refers to a:

a. Comprehensive education plan under section 100.18(h)(2)(iii) of commissioner's regulations,

b. Plan for a School Under Registration Review (SURR) under section 100.18[l)(3) of commissioner's regulations, or

c. School phase out or closure plan under section 100.18(m)(5) of commissioner's regulations (8 NYCRR § 100.19[a][12]).

2. School districts may modify a previously approved intervention model or comprehensive education plan, subject to further SED approval.

3. The commissioner may require a school district to modify a previously approved intervention model or comprehensive education plan, with any such modifications subject to his/her approval (§ 211-f [2][c][iii]; 8 NYCRR § 100.19[d][9]).

4. Any proposed modifications to a previously approved intervention model or comprehensive education plan are subject to consultation with the community engagement team in accordance with the community engagement plan approved by the commissioner (8 NYCRR § 100.19[d][9]).

5. If SED revokes a prior approval of an intervention model or comprehensive education plan, the commissioner will require that the school district appoint an independent receiver and submit the appointment for his/her approval no later than 45 calendar days from the revocation of approval (8 NYCRR § 100.19[d][7]).

Intervention Plans for Independent Receiverships – In General

1. Independent receivers operating persistently struggling and struggling schools must develop and implement a school intervention plan within six months of appointment (§ 211-f [3]-[6]; 8 NYCRR § 100.19[a][13],[f],[g][2]). A school district superintendent receiver is not required to create and implement a school intervention plan (8 NYCRR § 100.19[a][5],[d][3],[g][1]).

a. An independent receiver must submit a final school intervention to the commissioner for approval no later than five months after his/her appointment, and upon approval and within six months of the appointment, issue the plan (§ 211-f[9]; 8 NYCRR § 100.19[f][9].

b. The commissioner will approve a school intervention plan for a period of not more than three years. The independent receiver may make changes to a previously approved school intervention plan, subject to further approval by the commissioner (§ 211-f [10]; 8 NYCRR § 100.19[f][10]).

2. The independent receiver must ensure that within five business days after the commissioner approves the school intervention plan,

a. The plan is made publicly available in the school district's offices and posted on the district's website, if one exists.

b. A copy is provided to the school board, the superintendent and the collective bargaining representatives of teachers and administrators, the community engagement team, and the elected officers of the school's parent-teacher and/or parent association

c. The school district provides parents written notice of the plan and its availability (§ 211-f [9],[17]; 8 NYCRR § 100.19[f][12]).

3. The independent receiver is responsible for meeting the goals of the school intervention plan (§ 211-f [10]; 8 NYCRR § 100.19[f][11]).

4. If an independent receiver is unable to create an approvable school intervention plan, the commissioner may:

a. Appoint a new or interim independent receiver, or

b. Direct the school district to develop a plan to phase out or close the school, and implement the plan once approved by the commissioner (8 NYCRR § 100.19[f]9]).

Intervention Plans – Consultation Requirements

1. Before developing the school intervention plan, the independent receiver must consult with:

a. Local stakeholders including the school board, the superintendent, the school building principal, teachers and administrators assigned to the school and their respective collective bargaining representative, parents, and others specified in statute and regulations, and

b. The school community engagement team the school district is required to establish when a school is designated as persistently struggling or struggling (§ 211-f [3]; 8 NYCRR § 100.19[f][2]), except that with respect to consultation with students attending the school, the community engagement team need not include students attending grades seven and lower (8 NYCRR § 100.19[f][2][xii]).

No later than 20 business days after the effective date of his/her contract, the independent receiver must submit to the commissioner for approval a local stakeholder consultation plan developed in the manner set out in regulation (8 NYCRR § 100.19[f][1][i],[ii]).

2. In creating the school intervention plan, the independent receiver must consult with and consider all recommendations of the community engagement team (§ 211-f [4][i]; 8 NYCRR § 100.19[f][3][i]).

3. In this context, consultation refers to a process by which the school receiver, whether a school district superintendent receiver or an independent receiver, seeks input and feedback through written correspondence and meetings (e.g. in-person meetings, site visits, telephone conferences, video conferences) (8 NYCRR § 100.19[a][14],[17]).

Intervention Plans – Content Requirements

An intervention plan must:

1. Include provisions intended to maximize the rapid academic achievement of the school's students,

2. Address school leadership and capacity, school leader practices and decisions, curriculum development and support, teacher practices and decisions, student social and emotional developmental health, and family and community engagement (§ 211-f [4][ii],[iii]; 8 NYCRR § 100.19[f][3]-[7]).

3. Include research-based components that include strategies to:

   a. Address social service, health and mental health needs of the school's students and their families to help students arrive and remain at school ready to learn (including mental health and substance abuse screening,

   b. Improve or expand access to child welfare services, and school community services to promote a safe and secure learning environment,

   c. As applicable, provide greater access to career and technical education and workforce development services by both students and their families,

   d. Address achievement gaps for English language learners, students with disabilities and economically disadvantage students, as applicable,

   e. Address school climate and positive behavior support, including mentoring and other youth development programs,

   f. Provide professional development and other supports to the staff of the school to ensure that they have the capacity to successfully implement the school intervention plan and to sustain the components of the plan after the period of the school receivership has ended,

   g. Improve student achievement through development of collaborative partnerships with the local school community that are designed to develop and sustain the capacity of the local school community to implement such strategies to ensure continued improvement in student achievement after the period of the school receivership has ended, and

   h. Strategies by which the independent receiver will apply for allocational and competitive grants and other resources for the school to the extent practicable.

4. Include a budget for the plan (§ 211-f [5][a]; 8 NYCRR § 100.19[f][5]).

As necessary, the commissioner of education and the commissioners of the department of health, the office of children and family services, the department of labor and other specified local and state agencies officials must coordinate regarding the implementation of such measures, and subject to appropriation, reasonably support such implementation as set out in statute (§ 211-f [5][b]).

5. To the extent practicable, be based on the findings of any recent diagnostic review or assessment of the school and, as applied to the school, student outcome data including that specified in the receivership statute (§ 211-f [4][ii],[iii]; 8 NYCRR § 100.19[f][3][iii],[4]).

6. Include measurable annual goals to assess the school across multiple measures of school performance and student success including student attendance, discipline safety, promotion and graduation and drop-out rates, and achievement and growth on state assessment; progress in areas of academic underperformance and among school accountability student subgroups; and parent and family engagement, among other specified measures (§ 211-f [6]; 8 NYCRR § 100.19[f][6]).

In addition, the school intervention plan may include, as well, measurable annual goals on locally-selected measures, submitted to and approved by the commissioner (8 NYCRR § 100.19[f][7]).

Collective Bargaining

1. The receiver may request the negotiation of a receivership agreement that modifies the applicable collective bargaining agreement(s) with respect to the school(s) in receivership during the period of receivership.

2. The scope of those negotiations can include:

   a. The length of the school day and/or school year

   b. Professional development for teachers and administrators

   c. Class size

   d. Changes to the programs, assignments, and teaching conditions in the school.

3. Receivership agreements may not:

   a. Reduce compensation unless there is also a proportionate reduction in hours. However, they must provide for a proportionate increase in compensation if the length of the school day or school year is extended.

   b. Alter the remaining terms of the existing/underlying collective bargaining agreement which must remain in effect (§ 211-f [8][a]; 8 NYCRR § 100.19[g][5][i]-[ii]).

4. Bargaining over a receivership agreement must be conducted in accordance with the process established in statute and regulation. Unresolved issues will ultimately be resolved by the commissioner of education in accordance with standard collective bargaining principals (§ 211-f [8][b],[c]; 8 NYCRR § 100.19[g][5][iii]).

Evaluation of Receiverships – In General

1. Receivers must provide quarterly written reports on the progress being made on the implementation of the school intervention plan to the school board, the commissioner, and the Board of Regents no later than October 30, January 31, April 30 and July 31 of each year of the receivership (§ 211-f [11]; 8 NYCRR § 100.19[d][4],[f][13]).

   a. The July 31 report shall serve as the basis for the commissioner's annual evaluation of the school intervention plan.

   b. The independent receiver is not required to provide a quarterly report if the date for submitting the report is less than 45 days from the date the commissioner approved the receiver's appointment and entered into a contract with the receiver (8 NYCRR § 100.19[f][13]).

2. Quarterly reports and a plain-language summary of the report must be made publicly available in the school district's offices and posted on the district's website, if one exists (8 NYCRR § 100.19[d][4],[f][13]).

3. Nothing prevents the commissioner, or the school district with approval from the commissioner, from closing the school in receivership, or the Board of Regents from revoking the school's registration (§ 211-f [14]).

4. In this context, consultation and cooperation refers to a process by which the commissioner or his/her designee seeks input and feedback through written correspondence and/or meetings (e.g. in-person meetings, site visits, telephone conferences, video conferences) (8 NYCRR § 100.19[a][16]).

Evaluation of Independent Receiverships

1. The commissioner will evaluate each school with an independent receiver at least annually, in consultation and cooperation with the district and school staff to determine whether the school has met the intervention plan's goals, and assess the plan's implementation.

    a. The commissioner will submit a copy of the evaluation to the school board and the superintendent by September 1st for the preceding school year (§ 211-f [12][a]; 8 NYCRR § 100.19[h][1]).

    b. Based upon the evaluation findings, the commissioner may allow implementation of the school intervention plan to continue, or require that the plan be modified (§ 211-f [12][b]; 8 NYCRR § 100.19[h][2]).

2. Upon the expiration of a school improvement plan, the commissioner will evaluate the school, in consultation and cooperation with the district, to determine whether the school has either improved sufficiently, requires further improvement, or failed to improve.

Based on the findings, the commissioner may:

    a. Renew implementation of the intervention plan with the independent receiver for an additional period of not more than three years,

    b. Terminate the receiver and appoint a new one if the school remains struggling and the terms of the intervention plan were not substantially met, or

    c. Remove the school from its struggling or persistently struggling status if it has improved sufficiently for such purposes (§ 211-f [13]; 8 NYCRR § 100.19[h][2],[i]).

If the independent receiver is terminated, the commissioner may appoint an interim independent receiver. A newly appointed independent receiver must continue to implement the existing school intervention plan until a new one is developed and approved by the commissioner (8 NYCRR § 100.19[e][3],[i][1][ii],[3]).

Evaluation of School District Superintendent Receiverships

1. The commissioner will conduct a performance review of a school operating under a school district superintendent receiver in consultation with the school district, the school's staff and the community engagement team:

    a. At the end of one school year for persistently struggling schools,

    b. At the end of two school years for struggling schools, and

    c. Annually for any persistently struggling or struggling school that the commissioner determined made demonstrable progress and should continue under a school district superintendent receiver.

2. The purpose of the performance review is to determine whether the school will:

   a. Be removed from its persistently struggling or struggling designation,

   b. Remain under a school district superintendent receiver in which case the school remains subject to annual review, or

   c. Placed under an independent receiver, subject to the annual evaluation provisions applicable to independent receiverships (8 NYCRR § 100.19[d][5],[6]).

Tennessee Achievement School District

In 2011, the Tennessee General Assembly revamped its school accountability model, focusing turnaround efforts on schools in the bottom 5%. Two interventions that may be mandated by the State are driven by local school districts (using one of the four turnaround models supported by federal School Improvement Grants or placing the school in a district operated "innovation zone"). The third involves removing a school from the jurisdiction of the local board of education and placing it into the Achievement School District (ASD). The ASD may directly operate schools, authorize nonpublic charter schools or contract with other nonprofit operators to run the schools. After a minimum of five years, provided the school makes sufficient academic progress, the school may return to oversight of the local board of education pursuant to a plan approved by the commissioner.

From a legislative standpoint, the ASD worked to change the law in 2012 to address two challenges:

- Getting a school district run by the State up and running requires LEA-like (Local Education Agency) flexibility in hiring and purchasing.

- Explicitly allowing the ASD to authorizer charter schools to serve students zoned to priority schools brought the existing charter school statutes into governance of ASD schools.

From a strategic perspective, the ASD made the decision after a year or so of operations that they wanted to be just an authorizer, not an operator of schools. So, even though they have five schools “directly run” by employees of the State, they treat those schools like their own network. They have their own leadership team, and face the same risks of replacement as the nonprofit public charter schools authorized by the ASD. If they average not meeting performance expectations (academic, financial, and in student and family rights) for two out of three years, they will be replaced.

From an operations perspective, there have been other lessons learned, such as:

- Making parents the most involved adults in these difficult conversations and plans about failing schools and enabling success of children;

- Making every effort to partner with the other school operators (LEAs) in a community to improve as many schools as possible as soon as possible (the floor of the bottom 5% went from 16% proficient in a school to 22% in two years and in that same period, 4,500 fewer students were in priority schools); and

- Keeping the bar for turnaround school operation entrance high.

From a long term legislative perspective, one of the significant portions of the Tennessee law is the fact that not only can the ASD as a school authorizer replace schools they have authorized, but the commissioner can see whether the district turnaround efforts (school improvement grant or innovation zones) are doing better than ASD turnaround efforts, and make decisions accordingly (e.g., slow or halt ASD growth, and approve more LEA turnaround efforts in a given community).

(See T.C.A. 49-1-602(b)(2), 49-1-614 and 49-13-106(a)(2)).

Relevant Laws

49-1-602. Placement in improvement status for schools and LEAs.

(b)(1) By September 1, 2012, and at a minimum every three (3) years thereafter, based on an evaluation of all schools' achievement data, the commissioner of education shall recommend for approval to the state board a listing of all schools to be placed in priority, focus or reward status pursuant to the rules, regulations and performance standards of the state board. Once approved by the state board, priority, focus and reward schools shall be publicly identified by the commissioner.

(2) Schools identified as priority schools shall represent the bottom five percent (5%) of schools in overall achievement as determined by the performance standards and other criteria set by the state board and shall be subject to one (1) of the following interventions as determined by the commissioner….

(C) Placement in the achievement school district as defined in § 49-1-614.

49-1-614. Achievement school districts.

(a) The "achievement school district" or "ASD" is an organizational unit of the department of education, established and administered by the commissioner for the purpose of providing oversight for the operation of schools assigned to or authorized by the ASD.

(b) The commissioner shall have the authority to directly operate or contract with one (1) or more individuals, governmental entities or nonprofit entities to manage the day-to-day operations of any or all schools placed in the ASD, including, but not limited to, providing direct services to students.

(c) The commissioner shall have the authority to assign any school or grade configuration within a school to the ASD at any time such school is designated to be in priority status pursuant to § 49-1-602.

(d)(1) The ASD may receive, control, and expend local and state funding for schools placed under its jurisdiction, and shall have the authority to seek, receive, expend, manage, and retain federal funding and grant funding and to otherwise seek, obtain, expend, manage, and retain funding with the same authority as an LEA. The ASD shall receive from the department or LEA, as appropriate, an amount equal to the per student state and local funds received by the department or LEA for the students enrolled in the ASD school. ASD schools shall also receive all appropriate allocations of federal funds as other LEAs under federal law or regulation, including, but not limited to, Title I and ESEA funds. All funding allocations and disbursements shall be in accordance with procedures developed by the department.

(2) The ASD shall have the authority to receive donations of money, property or securities from any source for the benefit of the ASD and schools within the ASD. All such funds shall, in good faith, be disbursed in accordance with the conditions of the gifts.

(3) To the extent that any state and local funds allocated to the ASD are not used to support a school or LEA in the ASD, they shall be allocated to a state reserve fund to be distributed to the appropriate LEA upon approval of the commissioner and upon the removal of the school from the ASD.

(e) The ASD may require any LEA to provide school support or student support services for a school transferred from the LEA's jurisdiction including, but not limited to, student transportation, school food service, alternative schools or student assessment for special education eligibility that are compliant with all laws and regulations governing such services. In such cases, the ASD shall reimburse the actual cost to the LEA providing such services.

(f) The ASD shall have the right to use any school building and all facilities and property otherwise part of the school and recognized as part of the facilities or assets of the school prior to its placement in the ASD and shall have access to such additional facilities as were typically available to the school, its students, faculty and staff prior to its placement in the ASD. Such use shall be unrestricted and free of charge, except that the ASD shall be responsible for and obligated to provide for routine maintenance and repair such that the facilities and property are maintained in as good order as when the right of use was acquired by the ASD. The ASD shall also be responsible for paying all utilities in use at ASD-utilized facilities. Extensive repairs to buildings or facilities considered capital expenses shall be the responsibility of the LEA and not the ASD. Any fixtures, improvements or tangible assets added to a school building or facility by the ASD shall remain at the school building or facility upon its return to the LEA.

(g)(1) If it is determined that the ASD shall directly operate a school within the ASD, the employees hired to work in schools directly operated by the ASD may be deemed employees of the ASD and such employees shall be under the exclusive control of the ASD. The ASD shall develop written procedures, subject to the approval of the commissioner, for employment and management of personnel as well as the development of compensation and benefit plans. Within the limits of the budget, staffing needs of any school within the ASD shall be exclusively determined by the ASD with approval of the commissioner.

(2) The ASD, or the entity under contract to operate schools within the ASD, shall have the authority to determine whether any teacher who was assigned to such school prior to the school's transfer into the ASD shall have the option of continuing to teach at that school as an employee of either the ASD or the operating entity. Any tenured teacher not given that option shall remain an employee of the LEA, subject to § 49-5-511. The LEA, if it so chooses, may continue the employment of a nontenured teacher not given that option. Moreover, any teacher who accepts that option may, at the discretion of the LEA, return as an employee of the LEA, should the ASD or operating entity later determine not to continue to employ such teacher.

(3) With the exception of the provisions protecting teachers' rights to accumulated sick leave, retirement benefits, pension and tenure status within an LEA, § 49-5-203, and the Education Professional Negotiations Act, compiled in chapter 5, part 6 of this title, prior to June 1, 2011, shall not apply to teachers who accept the option of continuing to teach at a school placed in the ASD.

(h) Notwithstanding any law to the contrary, the ASD shall, at a minimum, have the same authority and autonomy afforded to LEAs under state law regarding the procurement of property, goods and services, including, but not limited to, personal, professional, consulting, and social services. The ASD shall develop written procedures for the procurement of all goods and services in compliance with the expenditure thresholds for competitive bidding outlined or permitted in § 49-2-203. Such procedures shall be submitted to and approved by the commissioner.

(i) Notwithstanding title 12, chapter 7, part 1, or any other law to the contrary, the ASD shall have the authority to authorize the preparation and use of publications and other media for the marketing and public education needs of the ASD in order to effectively carry out its mission.

(j) The ASD or any entity the ASD contracts with to operate or manage schools that have been placed in the ASD may apply to the commissioner for a waiver of any state board rule that inhibits or hinders the ability of the school to increase student achievement. Notwithstanding this subsection (j), the commissioner shall not waive rules related to the following:

(1) Federal and state civil rights;

(2) Federal, state and local health and safety;

(3) Federal and state public records;

(4) Immunizations;

(5) Possession of weapons on school grounds;

(6) Background checks and fingerprinting of personnel;

(7) Federal and state special education services;

(8) Student due process;

(9) Parental rights;

(10) Federal and state student assessment and accountability;

(11) Open meetings; and

(12) At least the same equivalent time of instruction as required in regular public schools.

(k)(1) A school that has been removed from the LEA and placed in the ASD shall remain in the ASD for a minimum of five (5) years. After the school improves student performance for two (2) consecutive years such that the school would no longer be identified as a priority school pursuant to § 49-1-602, the commissioner shall develop a transition plan for the purpose of planning the school's return to the LEA. Implementation of this plan shall begin after the school achieves the required improvements for three (3) consecutive years. The plan shall be fully implemented and the transition shall be completed after the school achieves the required improvements for five (5) consecutive years, unless the LEA is identified as an LEA in need of improvement pursuant to § 49-1-602(a) and the parents of sixty percent (60%) of the children enrolled at the school demonstrate support for remaining in the ASD by signing a petition. Such school shall return to the LEA after the LEA is no longer identified as in need of improvement; provided, that the school is not identified as a priority school pursuant to § 49-1-602.

(2) Notwithstanding subdivision (k)(1) or any other provision to the contrary, if a school enters the ASD and is operated as a charter school through authorization by the ASD pursuant to § 49-13-106, the ASD shall remain the chartering authority through the duration of the charter agreement and the school shall remain under the authority of the ASD. Upon expiration of the charter agreement, and provided the conditions set forth in subdivision (k)(1) are met, the school shall return to the LEA and the terms of the charter agreement may be renewed upon submission of a renewal application by the governing body of the charter school to the LEA under the provisions outlined in § 49-13-121.

(3) Notwithstanding subdivision (k)(1) or any other provision to the contrary, the commissioner shall have the authority to remove any school from the jurisdiction of the ASD at any time.

(l) Any individuals, governmental entities or nonprofit entities contracting with the commissioner to operate any school under this section shall provide timely information to the LEA and director of schools regarding the operation of such schools, including, but not limited to, matters relating to employment of personnel at the school as provided for in this section. The LEA may continue to support the educational improvement of the school under the direction and guidance of the commissioner and in accordance with any contracts entered into in accordance with this section. In addition, any individuals, governmental entities or nonprofit entities contracting with the commissioner may voluntarily work with the LEA in providing to the schools professional development or technical assistance, instructional and administrative support and facilitating any other support that may be beneficial to academic progress of the school.

(m) Any contracts to operate schools that have been placed in the ASD shall require expenditure reports for funds received and expended pursuant to such contracts. Such reports shall be provided to the department of education and comptroller of the treasury for review.

(n) The department of education shall establish within the school system with the most schools operated by the ASD a four-year pilot program of assessment of kindergarten students. The pilot program shall begin with the 2012-2013 school year. Students entering kindergarten in such system in schools operated by the ASD shall be assessed by an appropriate standardized test or tests. The test shall measure the present educational levels of the students to determine how instruction should be targeted to best meet the learning needs of the students and to eliminate disparities in learning backgrounds, if any.

(o) The ASD shall adopt an appropriate dress code for its professional employees.

49-13-106. Creation or conversion of charter schools.

(a)(1) Public charter schools may be formed to provide quality educational options for all students residing within the jurisdiction of the chartering authority; provided, however, that a chartering authority may authorize charters to enroll students residing outside the LEA in which the public charter school is located pursuant to the LEA out-of-district enrollment policy and in compliance with §§ 49-6-3003 and 49-6-403(f).

(2) The achievement school district may authorize charter schools within the jurisdiction of the LEA for the purpose of providing opportunities for students within the LEA who are zoned to attend or enrolled in a school that is eligible to be placed in the achievement school district. For the purposes of this subdivision (a)(2), students shall not be considered “zoned” for a school that is open to all students within the LEA unless they are assigned to the school based on the LEA’s geographic zoning policies.

Washington: State Supreme Court Reigns in Legislative Action

The Washington Supreme Court has invoked the state constitution to invalidate actions by the state legislature two key education decisions. In the landmark *McLeary v. State of Washington* ruling of 2012, the Court found the state had not adequately funded public education. The case is unique in that the state supreme court held the state in contempt for failing to come up with a plan to fully fund basic education by 2018. When the legislature did not develop a "plan" in the 2014 legislative session, the state supreme court ordered it to pay a fine of $100,000 per day for each day it did not have a plan, the proceeds of which would go into an account designated for education. A large hurdle, however, is that the state treasurer cannot create such an account without a legislative appropriation. Enforcement of the court's order, therefore, remains to be seen and the political showdown continues, with overtones of separation of powers overreach between the judiciary and legislature.

Most recently, in September 2015, the court found the state law establishing charter schools unconstitutional. The 2015 ruling contains strong language validating the state constitutional requirement for local governance of "common schools" in order for entities to tap into funding intended exclusively for common schools.

***McCleary v. State of Washington*, 269 P.3d 227 (Wash. 2012).**[11]

Holding: The Washington Supreme Court ruled that the state had failed to meet its constitutional duty under article IX, section 1 of the state constitution to adequately fund the "education" of K-12 students. The evidence showed "the State's now-abandoned basic education funding formulas did not correlate to the real cost of amply providing students with the constitutionally required 'education.' As a result, the State has consistently failed to provide adequate funding for the program of basic education, including funding for essential operational costs such as utilities and transportation. To fill this gap in funding, local districts have been forced to turn increasingly to excess levies…." 173 Wash.2d at 529.

Facts and Issues: The McClearys and the Venemas are Washington State citizens, voters, and taxpayers, who brought suit individually and on behalf of their children enrolled in the State's public school system. The Network for Excellence in Washington Schools (NEWS) is a statewide coalition of community groups, school districts, and education organizations. Together, the McClearys, Venemas, and NEWS (plaintiffs) filed a petition for declaratory judgment alleging that the state was violating article IX, section 1 of the Washington State Constitution by failing to adequately fund the K-12 school system.

The trial court found for the plaintiffs, determining the state to be out of compliance with its constitutional duty. "State funding is not ample, it is not stable, and it is not dependable," the court found. The trial court issued an order requiring the legislature to: "(1) establish the actual cost of amply providing all Washington children with the education mandated by this court's interpretation of Article IX, § 1, and (2) establish how the Respondent State will fully fund that actual cost with stable and dependable State sources. The court has ordered that the State 'must comply with the Constitutional mandate to provide stable and dependable funding for such costs,' and that such funding 'must be based as closely as

[11] The opinion is also available at http://www.courts.wa.gov/opinions/pdf/897140.pdf.

reasonably practicable on the actual costs' of providing the education mandated by this court's interpretation of Article IX, § 1."

Ruling and Rationale: The Washington Supreme Court upheld the trial court's ruling. Although the state legislature had devised a basic education program to provide the constitutionally-required "education" under article IX, section 1, defining the resources and offerings the legislature believed were necessary to give all students an opportunity to meet state standards, substantial evidence showed that state allocations had consistently fallen short of the actual cost of implementing the basic education program. "By the legislature's own terms," concluded the court, "it has not met its duty to make ample provision for 'basic education.'" Said the court:

> After extensive review over many years, state task forces and committees have concluded that the K-12 funding system is broken. The legislature itself abandoned its longtime funding model effective September 1, 2011. Following an eight-week bench trial, the trial court concluded that the State has failed to meet its constitutional obligations. Substantial evidence confirms that the State's funding system neither achieved nor was reasonably likely to achieve the constitutionally prescribed ends under article IX, section 1. We affirm the trial court's declaratory ruling and hold that the State has not complied with its article IX, section 1 duty to make ample provision for the education of all children in Washington.

By way of remedy, the Washington Supreme Court decided "to retain jurisdiction over this case to monitor implementation of the reforms …, and more generally, the State's compliance with its paramount duty." It said, "This option strikes the appropriate balance between deferring to the legislature to determine the precise means for discharging its article IX, section 1 duty, while also recognizing this court's constitutional obligation."

***League of Women Voters of Washington v. State of Washington*, No. 89714-0, 2015 WL 5209244 (Wash. Sept. 4, 2015)**

Abstract: The Supreme Court of the State of Washington, in a 6-3 split, ruled that a voter referendum codified in state law that provides for the creation and public funding of charter schools operating independent of local school districts violates the Washington State Constitution's provision restricting use of state funds for education to "common schools." Although the nine justices all agreed that the charter schools are not "common schools," as defined by the *Washington Supreme Court in School District No. 20 v. Bryan*, 51 Wash. 498, 99 P. 28 (1909), three of the justices dissented from the majority view that only the state's "common schools" could be funded through public moneys.

Remarking that, "[u]nder the Act, charter schools are devoid of local control from their inception to their daily operation," the majority decided that without local accountability and control, such schools were not "common schools" under the state Constitution, so funds intended for common schools could not be diverted to them. The majority also held that the Charter School Act's funding mechanisms, which fail under the Constitution, were not severable from the remainder of the Act.

Facts/Issues: In November 2012, Washington voters approved I-1240, codified in the Charter School Act, (CSA) providing for the establishment of up to 40 charter schools within five years. Under the CSA's provisions, charter schools "free teachers and principals from burdensome regulations that limit other public schools" thereby giving charter schools "the flexibility to innovate" regarding staffing and curriculum. Charter schools are exempt from many state rules.

Charter schools can be approved in two ways. The Washington Charter School Commission, an "independent state agency" established by the Act and made up of nine appointed members, has the power to establish charter schools anywhere in the state. School districts also may apply to the Washington State Board of Education for permission to authorize charter schools.

Charter schools are not governed by elected local school boards, but are operated by a "charter school board," which is "appointed or selected under the terms of a charter application to manage and operate the charter school." The CSA requires the superintendent to apportion funds to charter schools on the same basis as public school districts. Such disbursements include basic education moneys appropriated by the legislature in the biennial operating budget for the use of common schools and moneys from the common school construction fund.

The plaintiffs filed suit against the State of Washington in King County Superior Court, seeking a declaratory judgment that the CSA is unconstitutional. Several supporters of charter schools intervened. All three parties moved for summary judgment, and the trial court granted summary judgment to the State and intervenors on all issues but one. The trial court held that charter schools are not "common schools" under article IX of Washington's Constitution and, therefore, the common school construction fund could not be appropriated to charter schools. However, it determined that the provisions permitting such appropriations were severable. The trial court concluded that the CSA was otherwise constitutional.

The Washington Supreme Court granted direct appeal upon petition of all the parties.

Ruling/Rationale: A six justice majority of the Washington Supreme Court held the CSA ran afoul of article IX, section 2 of the Washington State Constitution, which requires 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.”

To determine whether charter schools are indeed “common schools,” as designated by the Act, the court looked to its century-old ruling in *School District No. 20 v. Bryan*, 51 Wash. 498, 99 P. 28 (1909). *Bryan* established the criteria for evaluating a "common school" within the meaning of article IX, it explained, and noted the *Bryan* court’s warning, "The words 'common school' must measure up to every requirement of the constitution... and whenever by any subterfuge it is sought to qualify or enlarge their meaning beyond the intent and spirit of the constitution, the attempt must fail." Under *Bryan*, the majority noted, a common school under the Washington state constitution, is “common to all 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. The complete control of the schools is a most important feature, for it carries with it the right of the voters, through their chosen agents, to select qualified teachers, with powers to discharge them if they are incompetent.”

The majority rejected the intervenors’ invitation to overrule *Bryan*, as well as the state’s contention that the court should "recognize an evolving common school system" and not read *Bryan* as "a static statement of constitutional imperatives." It applied *Bryan*’s framework, particular its emphasis on local school district control, to find, “because charter schools under 1-1240 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.”

Having determined that charter schools are not "common schools" even though designated by the Act, the majority found that the Act's funding provisions failed to pass constitutional muster under two sections of article IX of the state constitution. The Act, explained the majority, diverts funds explicitly designated for common schools – both general funds and construction funds -- to charter schools.

Because the state does "not segregate constitutionally restricted moneys from other state funds," this absence of segregation and accountability led the majority to the conclusion that the state's view that charter schools may be constitutionally funded through the general fund is without merit.

Emphasizing the "school construction fund, unlike other restricted common school funds, continues to be held in a segregated account," the majority pointed out that the state constitution "restricts the legislature's power to divert funds committed to common schools for other purposes even if related to education."

The majority rejected the state's argument that the Act's "remaining provisions are saved because funding 'follows the student' and in any event charter schools could be funded out of the state general fund." It responded: "Where a child is not attending a common school, there can be no entitlement to 'an apportionment of the current state school fund, to a credit predicated on attendance of children at such ... school.'"

With regard to severability, the majority concluded:

> Without a valid funding source the charter schools envisioned in I-1240 are not viable. Moreover, I- 1240's voters' pamphlet stressed that the funding for charter schools will come from existing funding sources in the form of a "shift [in] revenues" from "local public school districts to charter schools." In sum, without funding, charter schools are not viable. Nor can it be believed that voters would have approved the Charter School Act without its funding mechanism.

Concurrence in part/Dissent in part: Three justices concurred in part and dissented in part. They agreed with the majority that charter schools are not "common schools." However, they did not see that as an impediment to the state funding charter schools. They found the Act to be facially valid because it does not expressly require the use of restricted funds, adding that "charter schools may be constitutionally funded with unrestricted monies from the general fund."

The justices insisted that there is a distinction between public school funds and common school funds, noting that in *Moses Lake School District No. 161 v. Big Bend Community College*, [503 P.2d 86 (1972)], the court had concluded that while the diverted resources at issue might have been "public school funds," but none were "common school funds."

The justices also contended that the court had improperly place the burden of proof as to the SCA's constitutionality on the state.

Finally, the justices believed that the Act's provisions declaring charter schools to be common schools are severable, as the its purpose to establish 40 charter schools over five years could be accomplished without designating public charter schools as common schools.