POLICY ALERT

THE Center for Education Reform

Understanding Constitutions & Charter Schools

JULY 2007

Introduction

Charter schools are public schools, held accountable for results, open by choice, and free from most rules and regulations. Charter schools have faced their share of detractors, especially among teachers unions, school board associations, and other organizations with a vested interest in the status quo. At least twelve times in eight years, these groups have challenged the constitutionality of charters, claiming charters are either not public schools, or are unconstitutional because they are not run by school boards (and therefore, they believe, not entitled to public funds). These arguments have been repeatedly rejected by state Supreme Courts around the country, which have continually affirmed that charter schools are constitutional, are public schools, and that state legislatures have the right to enact laws that create different forms of public education. Rhetorical challenges to charter school proposals are heard daily in state capitals. These tactics can scare all but the most courageous members of a legislative assembly, but have little truth in fact. With policymakers in at least ten states considering new or revised charter legislation, it's important to take a look at the reality and understand how different kinds of chartering provisions are indeed constitutional. As Ohio is the most recent in a long line of state Supreme Courts to reject anti-charter special interest arguments, this brief will highlight this case, while providing additional information on several others.

State Cases

On October 25, 2006, the Ohio Supreme Court ruled that Ohio's charter schools are legal and constitutional, continuing a national trend of state Supreme Court rulings cementing charter schools' constitutionality. What began in 2001 as an effort by a union -- the Ohio Federation of Teachers -- to eradicate Ohio's independent public schools (known as community or charter schools), ended in a resounding vindication for charters and the right of states to permit other kinds of public education programs for students. Across the country, from Colorado to Ohio, state legislatures are reclaiming their constitutional right to be involved in education by enacting legislation permitting charter schools. Lawyers argue that few constitutions give school boards the exclusive franchise on public education. Thus, lawsuits challenging the constitutionally of charter schools are nothing more than improper attempts by school boards to retain exclusive control over the education system.

The Ohio Story

Since the state enacted its charter law in 1997, special interests have sought to repeal it. Turned away repeatedly by the legislature, they took their case to court. In 2001, claiming that Ohio's charter schools were unconstitutional, the defenders of Ohio's status quo and conventional public school systems (Ohio Federation of Teachers, Ohio School Boards Association, and the Ohio Congress of Parents and Teachers) filed suit challenging Ohio's charter school law. In the original complaint, the anti-choice plaintiffs asserted ten different statutory and constitutional arguments against charter schools. First and foremost, the plaintiffs argued that Section 3, Article VI of the Ohio State Constitution had been violated.[1] They claimed that the charter school legislation had usurped the constitutional right of local educational self-determination by allowing the creation of privately owned charter schools not authorized or governed by locally elected school boards. In other words, because individual local school boards did not govern charter schools, they were unconstitutional. The court disagreed, and ruled that the General Assembly has the power to create and modify school districts as it believes necessary, and because of that power, charter schools were in fact constitutional.

Multi-State Battles

Other states before Ohio have seen similar arguments – and similar Court rulings.

In both **New Jersey** and **Colorado**, similar rulings have been handed down, breaking the local school boards' monopolistic hold over education. In both states, the respective Supreme Courts ruled in favor of charters, determining they were constitutional.

In Colorado's *Board of Education No. 1 in the City and County of Denver v. Booth*, the Denver school board challenged Colorado's Charter Schools Act, which grants local school boards the authority to approve or disapprove a charter application, but also grants the state board of education appeals oversight. The Colorado charter statute enables aspirants whose applications are denied by local school boards to appeal to the state board of education, which has ultimate power to overturn local decisions. First the state board can force the district board to reconsider. If the district board continues to deny the application, the charter applicant may again appeal to the state board. If, on the second appeal, the state board finds that granting the charter is in the public interest, it may reverse the board's local decision.

Cordia Booth, a former Denver District public school teacher, applied to open the Thurgood Marshall Charter School for her son and other students trapped in the poorly performing Denver School District. When the Denver School Board rejected the application, she appealed to the State Board of Education. The State Board of Education ruled in favor of Booth's charter plan and ordered the local board to open her school. The Denver board sued, claiming that the appeals process gave the state board of education more power than the Colorado state constitution permits, infringing upon the state constitution's provision that the local school board "shall have control of instruction in the public schools of their respective districts."

In the 1999 *Booth* decision, the Colorado Supreme Court rejected the Denver board's position, finding that the Constitution's grant of "general supervision" over public education to the state board was broad enough to encompass the power to approve local charter schools. However, the local board's authority could not be entirely displaced. In effect, the power of the Colorado state board to approve schools on appeal was affirmed, but the court also affirmed the right of local school boards to negotiate with the applicant concerning the "issues necessary to permit the applicant to open a charter school," for example, questions of the site of the school and per-pupil funding. In the end, the prolonged court battle exhausted the applicants and the Thurgood Marshall Charter never opened. But the precedent was set, making clear that the Legislature and the State Board of Education were constitutionally entitled to involvement in the system.

In **New Jersey**, four local school districts sued the state in 1999 claiming that charter schools were unconstitutional because they did not have elected school boards, and further that they were draining money from conventional public schools. Again, the state Supreme Court ruled in favor of the charter schools, and against the monopolistic control of local school boards. Subsequent school districts sued and have lost in New Jersey's high court on similar grounds.

The same is true of courts in **California** and **Michigan** where state Supreme Courts ruled in favor of charter schools. In *Wilson v. State Board of Education,* decided in 1999, California's high court recognized that the supreme authority over education in the state rests with the Legislature. The Court ruled that the public school system is a "system of schools, which the Constitution requires the Legislature to provide." Therefore, the court said, charter schools are constitutional public schools. In Michigan there was a similar argument about constitutionality and the right to spend public funds. A coalition of unions and other charter opponents brought suit against the state. The State Supreme Court, however, disagreed. In *Council of Organizations and Others for Education About Parochiaid v. Governor of Michigan* in 1997, the Michigan Supreme Court ruled that the charter schools (academies as they are called in MI) did not have to be under the direct, immediate, and exclusive control of the local board to be permissible. These charter schools, the court found, are under the "ultimate and immediate control of the state and its agents." This finding is based upon numerous facts, including that the authorizing bodies in Michigan (school districts and public universities) are public institutions over which the state exercises control; the state therefore controls their money. As a result, charter schools in Michigan were public schools and entitled to public money.

No matter what the issue, the same conclusion has been reached: charter schools are public schools and they are constitutional.

In all of these cases, local school boards (through their associations) have challenged the charter school concept and the state legislature's authority over education. Despite being veiled in a cloak of concern for "what's best for the children," these cases were little more than desperate power grabs by entities losing their total control over education. The most recent case in Ohio continues this trend of governance diversification. It highlights the important role state legislatures, not just local school boards and unions, have in ensuring the widest possible delivery of healthy educational opportunities state by state.

Such challenges in court are not atypical but standard practice for teachers unions and school boards, the two entities losing the most power with the introduction of charter schools. School board elections are routinely little more than rubber stamps for union-backed candidates. Teacher unions around the country have fought and continue to fight the introduction of charter schools. Often, the school board members they supported fall into line and take this same acrimonious position. In Ohio, the state school board and local school board association were the initiators of the lawsuit challenging charter school constitutionality, arguing only school boards had the power to create schools. The Supreme Court believed otherwise, and recognized that legislatively approved charter school authorizers are constitutional. These alternative authorizers are publicly created and publicly accountable in the same way that public school boards are accountable. Thus, the schools they authorize are public as well. Charter schools, as public schools, share public accountability for education, and thus share in the funding of public education. Challenges to this notion might be couched in constitutionality, but they are really challenges to a policy that is at odds with traditional school district/school board control. Such a concept, while once sufficient to ensure a strong public education system, has shown itself to be flawed in delivering high quality schools to the majority of children. State legislatures may create new methods to educate students and are acting constitutionally when they do so.

As long as groups have money to wage these battles, however, there will be lawsuits. And traditional education and legal analysts will provide opinions to policymakers based on case history, often hampering them from seeing how a new form of public education constitutionally can fit into the state's original system.

The founders of the fifty states saw constitutions as living documents that could provide a broad array of authorities for democratically elected state leaders. The decisions of the courts that have considered the question demonstrate that the authority with which legislatures are vested for education transcends specific school designs and can, and should, provide a vehicle to foster better educational venues for all children.

As Justice Judith Lanzinger wrote when speaking for the majority in the Ohio State Supreme Court case, "This court has held that the General Assembly has the power to create and modify school districts…by choosing to create community schools as part of the state's

program of education but independent of school districts, the General Assembly has not intruded on the powers of city school boards…" Like the Ohio opinion, court opinions in at least 12 other states have affirmed that charter schools legally may be part of a state educational system and that a General Assembly has the final say over laws governing those education systems already in existence or those yet to be created. Regardless of the particulars of a state constitution, courts consistently have ruled that wherever a state legislature is tasked with the authority to establish and fund public education, it may create systems for the establishment of other public schools without violating the constitution. State legislators or state attorneys that argue otherwise often hide their disagreement with charter schools behind a constitutional cloud, when in reality their disagreements are based on politics and policy, not the intent or direction of the law. Whether started by a school board or an independent, publicly recognized authorizer that is not a school board, the evidence is clear. With data in hand and a true concern for education, proponents can challenge the arguments against charter schools and help all states to sanction a variety of public authorizers to support and equitably fund these innovative public charter schools.

Notes

1"Provision shall be made by law for the organization, administration and control of the public school system for the state supported by public funds; provided, that each school district embraced wholly or in party within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts."

Appendix

In 2006, 12 states had authorizers other than local school boards that approved and managed charter schools. An additional 8 states had strong binding appeals processes that allow applicants an open and objective avenue to seek a charter if it is initially denied by the local school board. In 2007, there are 15 states with multiple authorizers, increasing the total number from 20 to 23 states with multiple authorizers and/or a strong binding appeals process.

States with Multiple Authorizers

Arizona
Colorado
District of Columbia
Florida
Indiana
Idaho
Michigan
Minnesota
Missouri
New Mexico
New York
Ohio
South Carolina
Utah
Wisconsin *(only in Milwaukee)*

States with Strong Binding Appeals Process

California
Florida
New Hampshire
New Jersey
North Carolina
Pennsylvania
Tennessee
Utah

Source: CER's 2006 *Raising the Bar on Charter School Laws Rankings and Scorecard*
http://www.edreform.com/_upload/charter_school_laws.pdf

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