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**MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY**

JESSICA FELCHLE; BEAU WRIGHT;
the MONTANA QUALITY
EDUCATION COALITION; the
LEAGUE OF WOMEN VOTERS OF
MONTANA; SHARON CARROLL;
SUZANNE MCKIERNAN; LINDA
ROST; PENELOPE COPPS; LANCE
EDWARD; and CORINNE DAY,

Plaintiffs,

v.

STATE OF MONTANA; GREG
GIANFORTE, in his official capacity as
GOVERNOR OF THE STATE OF
MONTANA; and ELSIE ARNTZEN, in
her official capacity as
SUPERINTENDENT OF PUBLIC
INSTRUCTION,

Defendants.

Cause No.:

**VERIFIED
COMPLAINT**

INTRODUCTION

1. In May 2023, the Legislature passed a bill to privatize education in Montana.

2. House Bill 562 (“HB 562”) creates what it euphemistically refers to as a “community choice” school system. Far from reflecting the needs of Montana communities or giving choices to stakeholders, HB 562 designs a separate and unequal system of state-subsidized private schools in direct conflict with the system of equal, free, and quality public education that the Montana Constitution guarantees.
3. HB 562 violates the Montana Constitution in myriad ways. It authorizes the creation of unaccountable institutions—privatized schools, governing boards, and a statewide commission—that operate without regard for state standards for accreditation, teacher qualifications, curriculum, and student protections. HB 562 exempts these institutions from the supervision and control of Montana’s Board of Public Education, even purporting to create a commission parallel to the Board of Public Education—precisely the type of agency that the framers intended to prohibit. It creates and funds a school system that necessarily deprives students of equal educational opportunity.
4. HB 562 creates new parallel local “governing boards” to compete with existing local public school boards. Only privatized school parents and employees may vote in governing board elections. That is, in a straightforward violation of the right to vote, governing boards carve out a new unconstitutional definition of a qualified voter that excludes all other community members from their electorate—community members without children, parents with children who are not yet or are no longer in school, and even parents who send their children

to the existing public school system.

5. HB 562 appropriates tax dollars to privatized schools that are exempt from the laws that govern public schools without regard to the impact on the existing public school system up to and including supporting the creation of virtual schools that can pull students even from the most rural school districts.
6. Despite professing to embrace Montana’s commitment to include curriculum that recognizes the “distinct and unique cultural heritage of the American Indians,” Mont. Const. art. X, § 1(2), HB 562 exempts privatized schools from Indian Education for All, the statutory framework of curriculum that currently implements the constitutional commitment in public schools.
7. This list of constitutional violations is by no means exhaustive. HB 562 is an outgrowth of a national privatization movement—and it shows exactly why one size does not fit all. Montana is not the venue for school privatization activists to experiment with ideas that endanger access to the high-quality community-centered education that the Montana Constitution guarantees.
8. Plaintiffs Jessica Felchle, Beau Wright, the Montana Quality Education Coalition, the League of Women Voters of Montana, Sharon Carroll, Suzanne McKiernan, Linda Rost, Penelope Copps, Lance Edward, and Corinne Day (“Public School Plaintiffs”) bring this action to prevent the degradation of Montana’s public education guarantee. Public School Plaintiffs ask the Court to declare HB 562 unconstitutional in full and to enjoin its enforcement before it irreparably damages Montana’s public schools and injures students, parents,

and communities.

PARTIES

A. Plaintiffs

9. Jessica Felchle is a resident of Laurel, Montana. She began her teaching career more than fifteen years ago as a second grade teacher in Pryor, MT, on the Crow Indian Reservation. She has also taught special education at the middle school level. Since 2016, Felchle has taught eighth grade science at Medicine Crow Middle School in the Billings Public School District. In the fall, Felchle will teach eight grade science at Ben Steele Middle School in the Billings Public School District.
10. Felchle and her husband are both teachers and strong proponents of public education. She has seen firsthand the importance of a free quality public education system. Felchle is also a registered voter in Yellowstone County and a qualified elector for the Board of Trustees of Laurel School District No. 7 & 7-70. She has regularly voted in school board elections since becoming eligible to vote at age 18. She and her husband are property owners within the Laurel School District and pay property taxes that, in part, support the public schools and public school students located within her local school district. Felchle has two children who are enrolled in Laurel Public Schools.
11. Beau Wright is a resident of Whitefish, Montana. Wright started his teaching career at a private school in northern Virginia, but after realizing the inadequacies of private education, he moved to Montana in 2004 and became a

public high school government teacher. Wright taught at Fergus High School in Lewistown for eight years and has taught at Glacier High School in Kalispell since 2012.

12. Wright's two children attend public schools, one in the Whitefish School District and the other in the Kalispell School District. As the parent of a student receiving services through an Individualized Education Program, he is particularly concerned about special education funding and discrimination against students with learning differences and disabilities.
13. Wright has been a registered voter in Flathead County since 2012. He resides within the boundaries of Whitefish School District and is a qualified elector for the Board of Trustees of the Whitefish Elementary and High School Districts No. 44 and 58. Wright has consistently voted in his local school district elections and he anticipates continuing to be an active voter in his local school district.
14. Wright also owns property within the boundaries of the Whitefish School District and pays property taxes that, in part, support the public schools and public school students located within his local school district.
15. Montana Quality Education Coalition ("MQEC") is a nonprofit organization headquartered in Helena, Montana. Formed in 2001, MQEC is the largest education advocacy organization in the state. Its mission is to advocate for adequate and equitable public school funding and to defend the Montana Constitution's guarantee of free quality public education.
16. MQEC represents the interests of more than 100 school districts, six educational

organizations, and innumerable teachers, trustees, and administrators. The public school districts MQEC represents range from large to small, rural to urban, and east to west.

17. MQEC faces harm under HB 562 because it will be forced to expend significant resources on increased legislative efforts to ensure adequate funding for public schools because privatized school funding will draw from the same pool of statewide school funds. MQEC will also need to expend resources to equip constituent organizations to help teachers, trustees, and administrators navigate the threat that privatized schools pose to each profession. HB 562 directly compromises MQEC's mission of protecting and strengthening Montana's commitment to public education by threatening the funding, stability, and public regard of the public educational system.
18. The League of Women Voters of Montana (the "League") is a chapter of the national nonprofit League of Women Voters, a nonpartisan organization based in Helena, Montana. The League's mission is to encourage informed and active participation in government while defending and improving our democracy. The League was highly involved in the adoption and passage of the 1972 Montana Constitution, and has been an adamant defender of the protections enshrined within it. Much of the League's current work focuses on voting rights, including expanding access and fighting voter suppression. The League believes that a high quality education, provided by free public schools funded by public resources and run by publicly elected school boards, is a fundamental

component of democracy in ensuring well-educated citizens.

19. The League is comprised of 329 members across the four local leagues. Membership is open to all Montanans 16 years old or older.
20. Part of the League's mission is to protect voting rights and to fight against disenfranchisement. HB 562 directly compromises those efforts by narrowing the category of voters eligible to vote in governing board elections.
21. The League's membership represents a broad swath of Montanans who are civically engaged, qualified electors who will be divested of their right to suffrage by HB 562's impermissible voter qualifications. Many of the League's members are also property owners who will be harmed by the diversion of local tax dollars towards privatized schools that may not even be in their district.
22. Sharon Carroll is a resident of Carter County, Montana. She taught middle and high school math at Carter County High School in Ekalaka for more than 25 years before retiring in May 2021. Carroll was appointed to the Montana Board of Public Education in 2007, reappointed in 2012, and later appointed to complete a vacant term in 2019. She served as Chair of the Board five times during her tenure. Carroll resigned from the Board of Public Education in January 2021, shortly before her retirement from public school teaching.
23. Carroll has been a registered voter in Carter County since 1993. She resides within the boundaries of the Carter County High School and Ekalaka #15 school districts and is a qualified elector for the Unified Board of Trustees of Ekalaka Public Schools. Over several decades, Carroll has consistently voted in her local

school district elections and anticipates continuing to be an active voter in her local school district.

24. Carroll also owns property within the boundaries of the Carter County High School and Ekalaka #15 school districts and pays property taxes that, in part, support the public schools and public school students located within her local school districts. Carroll's two children attended Ekalaka Public Schools; her son graduated from Carter County High School in 2007 and her daughter in 2008. Both of her children went on to graduate from Montana public universities.
25. Suzanne McKiernan is a resident of Billings, Montana. McKiernan's two children attended public schools in Colorado Springs, where she was an active classroom volunteer and parent advisory board member, and served on the local school board. After moving to Montana in 1999, McKiernan continued her commitment to supporting public education, volunteering at her local elementary school, Blue Creek School, and serving two terms on the Board of Trustees of Blue Creek School District No. 3.
26. McKiernan has been a registered voter in Yellowstone County since 1999. She resides within the boundaries of Blue Creek School District No. 3 and is a qualified elector for the Board of Trustees of Blue Creek School District and Billings High School District No. 2. Over the decades, Carroll has consistently voted in her local school district elections and anticipates continuing to be an active voter in her local school district.
27. McKiernan also owns property within the boundaries of the Blue Creek School

District and pays property taxes that, in part, support the public schools and public school students located within her local school districts.

28. Linda Rost is a resident of Fallon County, Montana. She began her teaching career in 2007 as a science teacher at Carter County High School in Ekalaka, Montana. Since 2014, Rost has taught science at Baker High School in Baker, Montana. Rost was the 2020 Montana Teacher of the Year and a finalist for 2020 National Teacher of the Year. Rost recently earned a doctor of philosophy degree in curriculum and instruction, STEM, from Texas Tech University.
29. Rost knows firsthand the importance of rural public schools and special education services. Her three children—including two daughters who have Individualized Education Programs for specialized education services related to hearing disabilities—are Baker Public Schools students.
30. Rost has been a registered voter in Fallon County since 2007. She resides within the boundaries of Baker K-12 Schools, School District No. 18, and is a qualified elector for the Board of Trustees for Baker Public Schools. Rost consistently votes in her local school district elections, has helped organize local candidate forums, and anticipates continuing to be an active voter in her local school district. Rost also owns property within the boundaries of the Baker School District and pays property taxes that, in part, support the public schools and public school students located within her local school district.
31. Penelope Copps is a resident of Helena, Montana. Copps has been an active supporter of public education for all her adult life. She earned a teaching degree

from Colorado State College and taught kindergarten before serving on the Board of Trustees for Helena Public Schools from 1972 to 1980. Copps also served on the National School Board Association Board of Directors, the Montana High School Association Board of Directors, and was part of a group of Montanans who successfully advocated for state funding of public kindergarten in the early 1970s. All of Copps' children, stepchildren, and grandchildren have attended Montana public schools.

32. Copps has been a registered voter in Lewis & Clark County since returning to Helena in 2016. She resides within the boundaries of the Helena Public School District and is a qualified elector for the Board of Trustees for Helena Public Schools. Copps has consistently voted in her local school district elections, having never missed a school district election since becoming eligible to vote, and she anticipates continuing to be an active voter in her local school district.
33. Lance Edward is a resident of Billings, Montana. He began his teaching career more than 22 years ago at Billings West High School and he continues to coach football and teach Advanced Placement English and Spanish there today. Edward knows firsthand the importance of a free quality public education system. His four sons have all attended Billings Public Schools: two of them graduated from Billings West High School and the other two are about to begin their sophomore and senior years at Billings West High School.
34. Edward is also a registered voter in Yellowstone County and a qualified elector for the Board of Trustees of Billings Elementary School District 2 and Billings

High School District 2. With the exception of his time attending Brigham Young University and briefly living abroad, he has regularly voted in Billings school board elections since becoming eligible to vote at age 18. He and his wife are also property owners within the Billings School District and pay property taxes that, in part, support the public schools and public school students located within her local school district.

35. Corinne Day is a resident of Billings, Montana. Day began her teaching career at Chief Dull Knife College on the Northern Cheyenne Indian Reservation in 2008. From 2012 to 2013, Day worked for the Billings Public Schools Office of Indian Education. In 2016, she joined the faculty of Montana State University, Billings, as Assistant Professor of Math Education. She currently teaches for Pryor Public Schools. Day's work includes a focus on Indian Education for All. Her two children are enrolled in Billings Public Schools.
36. Day has been a registered voter in Yellowstone County since 2012. She resides within the boundaries of Billings Elementary School District No. 2 and Billings High School District No. 2, and is a qualified elector for the Board of Trustees for Billings Public Schools. Day consistently votes in her local school district elections and anticipates continuing to be an active voter in her local school district. Day also owns property within the boundaries of the Billings Public Schools District and pays property taxes that, in part, support the public schools and public school students located within her local school district.
37. Individual Public School Plaintiffs will each suffer direct harm as a result of

HB 562's passage.

38. The public school teachers among them will suffer, *inter alia*, in the form of reduced public school funding, lost diversity within public schools, including socioeconomic and political diversity, and the lack of protections for teachers under HB 562.
39. The parents in their number them will suffer from unequal educational opportunity across their districts, the loss of funding associated with privatized virtual schools that may pull students and associated funding from their children's schools, discrimination against their children with disabilities, lost diversity within public schools, and the straightforward inequality of having to pay tuition to send their children to other out-of-district public schools but not to send their children to privatized schools, among other things.
40. All individual Public School Plaintiffs will suffer the deprivation of their right to vote in governing board elections or to otherwise engage in the privatized schools' mechanisms for asserting state and local supervision and control.

B. Defendants

41. Defendant State of Montana is a duly admitted state of the United States.
42. Defendant Greg Gianforte is the Governor of the State of Montana and is ultimately responsible for the execution of state laws and public spending. HB 562 specifically requires the Governor to appoint two members, including an initial presiding officer, to serve four-year terms on the newly created statewide commission. He is named in his official capacity.

43. Defendant Elsie Arntzen is the Montana Superintendent of Public Instruction, responsible for the general supervision of Montana public schools and districts, including public school accreditation. HB 562 requires the Superintendent to reduce existing public schools BASE aid funding by up to 80 percent and to redirect that funding to privatized schools. She must also appoint one member to serve a three-year term on the newly created statewide commission. She is named in her official capacity.

JURISDICTION & VENUE

44. Plaintiff brings this action under the Montana Constitution. Article VII, § 4 of the Montana Constitution provides this Court with original jurisdiction, as does § 3-5-302, MCA.

45. This Court has jurisdiction to grant declaratory relief pursuant to § 27-8-201, *et seq.*, MCA, and injunctive relief pursuant to § 27-19-101 *et seq.*, MCA.

46. Venue is proper in Lewis & Clark County under § 25-2-126(1), MCA.

COMMON ALLEGATIONS

Public Education in Montana’s Constitutional & Statutory Framework

47. The Montana Constitution is a modern document drafted to “stand on its own footing and . . . to provide individuals with fundamental rights and protections far broader than those available through the federal system” and meant “to meet the changing circumstances of contemporary life.” *Dorwart v. Caraway*, 2002 MT 240, ¶ 94, 312 Mont. 1, 58 P.3d 128 (Nelson, J., concurring) (quoting Dahood, Amicus Br.; Mont. Const. Conv., II Verbatim Tr., *Bill of Rights Comm.*

Proposal, at 619 (Feb. 22, 1972)).

48. The Constitution contains only 13 Articles. One of these articles, Article X, is entitled “Education and Public Lands.” Of the eleven sections enumerated in Article X, ten relate to and govern public education.
49. Upon turning to education, the Montana Constitution sets forth an unambiguous guarantee: “It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.” Mont. Const. art. X, § 1(1).
50. This guarantee is neither abstract nor aspirational. *Helena Elem. Sch. Dist. No. 1 v. State*, 236 Mont. 44, 52–53, 769 P.2d 684, 689 (1989). As the Montana Supreme Court has pointed out, in the first sentence of Title X, §1(1), the framers set an ambitious objective: that is, “to establish a system of education which will develop the full educational potential of each person.” *Id.* at 53. In the second sentence, however, the “plain meaning . . . is clear and unambiguous”: each Montanan “is guaranteed equality of educational opportunity.” *Id.* In fact, the Court observed that it could find no “other instance in which the Constitution ‘guarantees’ a particular right.” *Id.* As written, “[t]he guarantee provision of subsection (1) is not limited to any one branch of government,” and is instead “binding upon all three branches of government, the legislative as well as the executive and the judicial branches . . . whether at the state, local, or school district level.” *Id.*

51. To this end, the Constitution obligates the Legislature to “provide a basic system of free quality public elementary and secondary schools.” Mont. Const. art. X, § 1(3). While the Legislature may “provide such other educational institutions, public libraries, and educational programs as it deems desirable,” it “shall fund and distribute in an equitable manner to the school districts the state’s share of the cost of the . . . school system.” *Id.* (emphasis added); *cf.* Mont. Const. art. V, § 11(5) (prohibiting any “appropriation . . . for religious, charitable, industrial, educational, or benevolent purposes to any . . . private association, or private corporation not under control of the state”). The Court has affirmed this obligation. *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 22, 326 Mont. 304, 109 P.3d 257 (concluding “that the educational product of the current school system is constitutionally deficient and that the Legislature currently fails to adequately fund Montana’s public school system”); *Helena Elem. Sch.*, 236 Mont. at 55, 769 P.2d at 690 (“We specifically affirm that . . . spending disparities among the State’s school districts translate into a denial of equality of educational opportunity.”).

52. The framers gave force to the guarantee by establishing a dual system of public school oversight, forming a statewide Board of Public Education “to exercise general supervision over the public school system,” Mont. Const. art. X, § 9(3)(a), and reserving for local elected school boards “[t]he supervision and control of schools in each school district,” Mont. Const. art. X, § 8. This two-board system rectified at least two problems identified in the previous structure. First, under

the 1889 Montana Constitution, a statewide Board of Education held a supervisory role over public education, but the Legislature retained too much authority over the board’s powers and duties. Mont. Const. Conv., VI Verbatim Tr., at 2049–51 (Mar. 11, 1972) (Del. Champoux). Second, the two-board structure also responded to concerns about unresponsive state-level bureaucracy that lacked any genuinely local control. *Id.* at 2051 (“the greatest fear is the bureaucracy”; the “large majority of witnesses who testified on the subject . . . spoke in favor of the two-board concept”).

53. By constitutional design, the Board of Public Education is singular. It is the only agency at its level and of its kind for primary and secondary education. *See generally id.* at 2049–53; Mont. Const. art. X, § 9. The Board of Public Education is authorized to “exercise general supervision over the public school system and such other public educational institutions as may be assigned by law.” Mont. Const. art. X, § 9(3)(a). Like the Board of Regents’ powers under the Montana Constitution, the Board of Public Education is delegated authority that is self-executing, independent, and co-equal with the legislative and executive branches of government. *See Bd. of Regents of Higher Ed. v. State*, 2022 MT 128, ¶¶ 107–08, 409 Mont. 96, 512 P.3d 748 (“No reasonable rule of construction permits either body [the Legislature or the Board of Regents] to encroach upon or exercise the powers constitutionally conferred upon the other Exercise of the legislative power to undermine the constitutional powers of the Board [of Regents] cannot stand.”); *Bd. of Pub. Ed. v. Judge*, 167 Mont. 261, 263, 266–69,

538 P.2d 11 (1975) (rejecting a legislative attempt to transfer authority over vocational education from the Board of Public Education to the State Board of Education because the Constitution expressly distributes power among three state-level boards and the Legislature may not alter that distribution).

54. Local school boards play a similarly essential and deliberately crafted constitutional role. The framers carefully delegated local “supervision and control” to “a board of trustees to be elected as provided by law.” Mont. Const. art. X, § 8 (emphasis added). They directly compared the power delegated to local school boards to the power delegated to the Board of Regents, explaining that given the Board of Regents’ autonomy, “we should give constitutional recognition and status to the local boards to[o]—first of all, to allay the fears which have been expressed . . . concerning the preservation of local autonomy; and secondly, to give parallel treatment to the governing boards of the public schools, as well as the public universities and colleges.” Mont. Const. Conv., VI Verbatim Tr., at 2046 (Mar. 11, 1972) (Del. Heliker) (emphasis added); *see id.* at 2047 (“[O]ur local school boards certainly should have constitutional status.”) (Del. Johnson); *id.* at 2051 (Article X, § 8 “guarantees the control by the local board at the local level”; the decision to omit “control” from the powers granted to the Board of Public Education was intentional and meant to prevent any argument that this grants “additional powers to the state board at the expense of the local school boards”) (Del. Champoux).
55. Accordingly, the framers used the word “control” to “emphasize that [they]

want[ed] the local public school boards to have as much power as possible,” and distinguished their role from that of the Board of Public Education. Mont. Const. Conv., VI Verbatim Tr., at 2050 (Mar. 11, 1972) (Del. Champoux). Local institutions are as much the product of intentional constitutional design as the Board of Public Education and the Board of Regents and the decision to reserve their control is unmistakably purposeful. *Id.* at 2046 (Mar. 11, 1972) (Del. Heliker) (“[W]e should give constitutional recognition and status to the local boards.”); *see also id.* at 2047 (Del. Champoux) (using only the word “supervise” in reference to the Board of Public Education was intended to show that the delegates “want local control to remain with the local school districts”).

56. Local school boards exercise supervision and control in a number of ways, including, *inter alia*, hiring and firing district personnel, administering student attendance, managing the district’s budget, conducting the district’s financial business, and setting the school schedule. *See* § 20-3-324, MCA.
57. In 2005, the Court pointed out that the “Constitution mandates that the Legislature provide a quality education,” and that to do so, the Legislature should “first define[] what is a ‘quality’ system of education.” *Columbia Falls Elem.*, ¶ 22. Shortly thereafter, the Legislature did just that, defining a quality education system under Title 20, MCA, to include an “educational program specified by the accreditations standards . . . which represent the minimum standards upon which a basic system of free quality public elementary and secondary schools is built,” as well as “qualified and effective teachers” and the

“preservation of local control of schools in each district vested in a board of trustees pursuant to Article X, section 8, of the Montana [C]onstitution.”
Section 20-9-309, MCA.

58. In addition to providing accreditation standards, Title 20 ensures that public schools protect students’ health and safety. These critical protections include, *inter alia*, concussion protocols for student athletes, §§ 20-7-1303 & 1304, MCA; asthma and diabetes medication policies, §§ 20-5-412, 420, 421, and 426, MCA; and prohibitions against tobacco use, bullying, and relationships between staff and students, §§ 20-1-220, 20-5-209, and 20-7-1321, MCA.
59. The Montana Constitution also expressly recognizes “the distinct and unique cultural heritage of the American Indians” and commits the state “in its educational goals to the preservation of their cultural integrity.” Mont. Const. art. X, § 1(2). Title 20 articulates the state’s current framework for complying with this commitment.

Other Relevant Constitutional Provisions

60. Among the principles that stand at the center of Montana’s system of governance are popular sovereignty—the concept that government may not exercise any power not granted to it by the people—and its corollary, the right of self-government. Mont. Const. art. II §§ 1, 2. These principles form the foundation of our limited government and underpin the entirety of the Constitution, including its education provisions. Voting is a manifestation and effectuation of these bedrock principles. Naturally, the Montana Constitution includes the

right of suffrage among citizens' fundamental rights, requiring that "[a]ll elections . . . be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Mont. Const. art. II, § 13; see *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 52, 310 Mont. 123, 54 P.3d 1 ("The rights included within this 'Declaration of Rights' are 'fundamental rights.'"). It also sets forth that "any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector," Mont. Const. art. IV, § 2, and "any qualified elector is eligible to any public office," Mont. Const. art. IV, § 4.

61. Article II, § 4 of the Montana Constitution provides that "[n]o person shall be denied the equal protection of the law. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." The Court has been clear about the strength of this provision: "the Montana Constitution provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 104 P.3d 445. Even a law containing apparently neutral classifications may nonetheless "violate equal protection 'if in reality it constitutes a devise designed to impose different burdens on different classes of persons.'" *Id.* ¶ 16 (quoting *State v. Spina*, 1999 MT 113, ¶ 85, 294 Mont. 327, 982 P.2d 421).

House Bill 562

62. Representative Sue Vinton sponsored HB 562. According to legislative services, HB 562 was the second most opposed bill proposed during the 2023 legislative session. The Legislature received 2,030 messages in opposition to HB 562 compared to 574 in support.
63. On May 18, 2023, the Governor signed HB 562, authorizing a system of school privatization. In fact, HB 562 subverts Montana's public school system by authorizing and funding schools entirely outside the public education system prescribed by the Montana Constitution. The result is a competing system of individual educational nonprofits made public only by their unchecked receipt of public funds. HB 562 becomes effective on July 1, 2023. Its enforcement presents an immediate threat to school districts, public school parents, students, voters, and communities.
64. A true and correct copy of the enrolled bill is attached hereto as Exhibit A.
65. HB 562 defines a "community choice school" as a so-called "public school" that:
- (a) has autonomy over decisions, including but not limited to matters concerning finance, board governance, personnel, scheduling, curriculum and instruction;
 - (b) is governed by a governing board;
 - (c) is established and operated under the terms of a charter contract between the school's governing board and its authorizer;
 - (d) is a school in which parents choose to enroll their children;
 - (e) is a school that admits students based on capacity and then on the basis of a lottery if more students apply for admission than can be accommodated;
 - (f) provides a program of education that may include any or all grades from kindergarten through grade 12 and vocational education programs;
 - (g) operates in pursuit of a specific set of educational objectives as defined

- in its charter contract;
(h) operates under the oversight of its authorizer in accordance with its charter contract; and
(i) establishes graduation requirements and has authority to award degrees and issue diplomas.

Ex. A, HB 562, § 3(5) (emphasis added).

66. The “authorizer” is defined as “the commission or a local school board approved as an authorizer by the commission.” Ex. A, HB 562, § 3(3).
67. The “commission,” in turn, is “an autonomous state community choice school commission with statewide authorizing jurisdiction and authority.” Ex. A, HB 562, § 4(1). The bill gives lip service to the idea that the commission is to be “under the general supervision of the board of public education,” *id.*, but supervision extends only so far as the bill itself requires—in full, a single annual report about “the academic performance and financial reports of each choice school authorized within the state.” *Id.* § 4(12). The Board of Public Education is otherwise uninvolved, except that it may provide the commission with support staff “for centralized services, including payroll, human resources, accounting, information, technology, or other services, if those services are determined by the commission and the board to be more efficiently provided by the board.” *Id.* § 4(9) (emphasis added).
68. The Legislature cannot redistribute the Board of Public Education’s duties to another entity that falls outside the Board’s direct supervisory control. *Bd. of Pub. Educ.*, 167 Mont. at 268–269, 538 P.2d at 15 (declaring unconstitutional and enjoining the Legislature’s attempt to transfer responsibility for vocational

- education from the Board of Public Education to the State Board of Education).
69. Commission membership is specifically limited to individuals with “a demonstrated understanding of and commitment to choice schools as a strategy for strengthening public education.” Ex. A, HB 562, § 4(4).
 70. The privatized schools are subject only to state laws specifically referenced in the bill. Ex. A, HB 562, § 14(1)(c) (“Except as provided in [sections 1 through 17], a choice school is not subject to the provisions of Title 20 or any state or local rule, regulation, policy, or procedure relating to traditional public schools within an applicable traditional local school district.”). Very few state laws are expressly mentioned. HB 562 incorporates Title 20 merely to refer to existing definitions related to school district size, *id.* § 14(2), and to calculate the money that privatized schools will extract from public sources, *id.* §§ 15(10)(b)(i)–(iv). HB 562 expressly exempts privatized school employees from retirement benefits and employee protections under Title 19. *Id.* § 14(1)(d).
 71. Meanwhile, governing boards usurp the authority to supervise and control local public schools that is constitutionally delegated to local school boards, Mont. Const. art. X, § 8. A governing board is defined as “an independent volunteer board of trustees of a community choice school that is a party to the charter contract with the authorizer.” Ex. A, HB 562, § 3(7).
 72. HB 562 also limits qualified electors who may participate in electing governing boards—the extra-constitutional equivalent of local public school boards of trustees—to “parents and guardians of students enrolled in the school and the

choice school’s employees.” Ex. A, HB 562, § 14(1)(f)(i). Governing boards “shall establish graduation requirements,” *id.* § 14(7)(b), and teachers in privatized schools are exempt from state teacher certification requirements found in Title 20, Chapter 4, *id.* § 14(8)(a).

73. Both virtual and non-virtual privatized schools may pull students from districts of any size. Ex. A, HB 562, § 11(1)(a). Funding follows those students. *Id.* § 15(1) (“a choice school receive[s] operational funding on a per-pupil basis that is equitable with the per-pupil funding within the general fund of a choice school student’s resident school district.”). HB 562 does impose some limits on non-virtual privatized schools within the geographic boundaries of third-class public school districts—that is, less populous school districts—but because “out-of-district attendance and tuition laws . . . do not apply,” *id.* § 15(6)(b), non-virtual privatized schools may also pull students and funding from third-class school districts.
74. There are no limits on funding sources for privatized schools, and funding received from non-public sources has no impact on the amount of money the privatized school may pull from public sources. Ex. A, HB 562, § 15(8). “Money received by a choice school from any source and remaining in the choice school’s accounts at the end of a budget year must remain in the choice school’s accounts for use by the choice school in subsequent years.” *Id.* § 15(9).
75. Although HB 562 purports to incorporate the Montana Constitution’s commitment to American Indian cultural preservation, Mont. Const. art. X,

§ 1(2), it exempts privatized schools from compliance with the Indian Education for All program, codified in Title 20. HB 562 only acknowledges the Indian Education for All framework in its funding section, wherein privatized schools draw funds from public schools based on a rate that includes Indian Education for All funding. Ex. A, HB 562, § 15(10)(b)(ii). Thus, privatized schools draw funding designated for Indian Education for All programs with no corollary plan to meet the constitutional obligation.

76. As passed and signed into law, HB 562 violates the federal and Montana Constitutions at least six times over in separate but interrelated ways. It creates institutions that usurp constitutionally delegated authority; it undermines the right to equal educational opportunity; it violates the prohibition on funding to private entities; and it infringes Montanans' rights to quality education, suffrage, and equal protection. Further, HB 562 infringes federal rights under the Fourteenth Amendment's one-person, one-vote clause.

CLAIMS FOR RELIEF

Count One

(Violation of Supervision & Control Vested in Local Boards of Trustees, Mont. Const. art. X § 8)

77. Public School Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.
78. The Montana Constitution provides: "The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law." Mont. Const. art. X, § 8.

79. HB 562 impermissibly allows privatized schools and their governing boards to usurp supervision and control that the Montana Constitution delegates to local school boards.
80. Because HB 562 violates the Montana Constitution Article X, § 8, Public School Plaintiffs request that the Court declare it unconstitutional and unenforceable.

Count Two

(Violation of General Supervision Vested in the Board of Public Education, Mont. Const. art. X § 9(3)(a))

81. Public School Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.
82. The Montana Constitution provides: “There is a board of public education to exercise general supervision over the public school system and such other public educational institutions as may be assigned by law. Other duties of the board shall be provided by law.” Mont. Const. art. X, § 9(3)(a).
83. The plain language of the provision exclusively delegates general supervisory power to the Board of Public Education. The Legislature cannot wrest that general supervision power. *Cf. Bd. of Regents*, ¶ 108 (“Exercise of the legislative power to undermine the constitutional powers of the Board cannot stand.”).
84. HB 562 gives away the Board’s authority to set and oversee standards and qualifications identified in Title 20—accreditation, curriculum standards, and teacher qualification standards, among other things—to a commission never contemplated in the Montana Constitution. *See Helena Elem.*, 236 Mont. at 15, 769 P.2d at 691 (describing the Board of Public Education’s adoption of statewide

accreditation standards as part of its general supervisory power).

85. Because HB 562 violates the Montana Constitution Article X, § 9(3)(a), Public School Plaintiffs request that the Court declare it unconstitutional and unenforceable.

Count Three

(Violation of the Right Suffrage, Mont. Const. art. II § 13)

86. Public School Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.
87. The Montana Constitution provides: “All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Mont. Const. art. II, § 13.
88. Moreover, “[a]ny citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector unless he is serving a sentence for a felony in a penal institution or is of unsound mind, as determined by a court.” Mont. Const. art. IV, § 2.
89. Public School Plaintiffs meet all registration and residence requirements to vote in local school board elections and regularly do vote in those elections.
90. HB 562 unconstitutionally limits eligibility for voting in governing board elections to “parents and guardians of students enrolled in the school and the choice school’s employees.” Ex. A, HB 562, § 14(1)(i). This limitations deprives community members, many of whom own property and pay taxes that subsidize public schools—including HB 562’s privatized schools—from exercising the right

of suffrage.

91. Strict scrutiny applies to any law that “impermissibly interferes with the exercise of a fundamental right.” *Driscoll v. Stapleton*, 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386 (citing *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165 (1996)). The right of suffrage is a fundamental right. To survive, a statute must be “narrowly tailored to further a compelling government interest.” *Id.* ¶ 40. It is the “most stringent level of scrutiny,” to be “used when a statute implicates a fundamental right found in the Montana Constitution’s declaration of rights.” *Id.* ¶ 18 (citing *Mont. Cannabis Indus., Ass’n v. State*, 2012 MT 201, ¶ 16, 366 Mont. 224, 286 P.3d 1161).
92. This Court should apply strict scrutiny to HB 562 because it actually restricts access to the franchise by excluding individuals who live in communities affected by HB 562 and the privatized schools it authorizes from voting in elections that relate to property taxes that they pay and to the education that is available in their communities.
93. Because HB 562 violates the Montana Constitution Article II, § 13, Public School Plaintiffs request that the Court declare it unconstitutional and unenforceable.

Count Four

(Violation of Equal Protection, U.S. Const. amend. XIV, § 2, and Mont. Const. art. II, § 4)

94. Public School Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.
95. The Fourteenth Amendment bars states from “deny[ing] to any person within

its jurisdiction the equal protection of the laws.”

96. The Montana Constitution provides: “No person shall be denied the equal protection of the law. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.” Mont. Const. art. II, § 4.
97. Like unconstitutional freeholder requirements that tie voter eligibility to property ownership, HB 562 makes eligibility to vote in governance board elections contingent on having a child who attends a privatized school or working for a privatized school. *Cf. Sadler v. Connolly*, 175 Mont. 484, 487–88, 575 P.2d 51, 53–54 (1978) (“[I]t seems impossible to discern any interest the [freeholder] qualification can serve. It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor as part of his rent, or a state and federal taxpayer contributing to the approximately 85% of the . . . annual school budget derived from sources other than the board of education’s own taxes on real property.”) (emphasis added) (quoting *Turner v. Fouche* 396 U.S. 346 (1970)).
98. Unlike voting for “a special, limited-purpose governmental entity serving none of the functions reserved for general governmental entities,” *Johnson v. Killingsworth*, 271 Mont. 1, 10, 894 P.2d 272, 277 (1995), the ability to

participate in local school board elections—and the elections of purportedly parallel governing boards—is a fundamental right to equal protection under the law, *see, e.g., Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632–33 (1969) (rejecting eligibility classifications that exclude non-parents from school board elections); *see also Ball v. James*, 451 U.S. 355, 366 & n.11 (1981) (reasoning that laws “tying voter eligibility to land ownership” are often invalid in elections for bodies that “administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services” and collecting cases) (emphasis added).

99. Strict scrutiny applies to any law that “impermissibly interferes with the exercise of a fundamental right.” *Driscoll*, ¶ 18 (citing *Wadsworth*, 275 Mont. at 302). The right to equal protection is a fundamental right. To survive, a statute must be “narrowly tailored to further a compelling government interest.” *Id.* ¶ 40. It is the “most stringent level of scrutiny,” to be “used when a statute implicates a fundamental right found in the Montana Constitution’s declaration of rights.” *Id.* ¶ 18 (citing *Mont. Cannabis Indus., Ass’n v. State*, 2012 MT 201, ¶ 16, 366 Mont. 224, 286 P.3d 1161).
100. This Court should apply strict scrutiny to HB 562 because it narrowly restricts voter eligibility to parenthood and participation in privatized schools in violation of the right to equal protection under the law, guaranteed under both the federal and Montana Constitutions.
101. Because HB 562 violates the Fourteenth Amendment of the U.S. Constitution,

and the Montana Constitution, Article II, § 4, Public School Plaintiffs request that the Court declare it unconstitutional and unenforceable.

Count Five

(Violation of the Right to Quality Education, Mont. Const. art. X § 1(1))

102. Public School Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.
103. The Montana Constitution provides: “It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.” Mont. Const. art. X, § 1(1).
104. Equality of education is a constitutional guarantee. *Helena Elem.*, 236 Mont. at 52–53.
105. Parts of that guarantee are enacted through establishing accreditation standards, ensuring teacher qualifications, setting out consistent and quality programs and curricula, designing programming to implement the distinct and unique cultural heritage of American Indians, and preserving local control in local school boards. *See generally* § 20-9-309, MCA; Mont. Const. art. X, § 8.
106. HB 562 exempts privatized schools from all of the aforementioned provisions of Title 20, with no system in place to guarantee equal quality. It likewise implements a separate system of governance through governing boards and the commission, which are unaccountable to the local voters or the Board of Public Education.

107. Because HB 562 violates the Montana Constitution Article X, § 1(1), Plaintiffs request that the Court declare it unconstitutional and unenforceable.

Count Six

**(Violation of Prohibition on Appropriations to Private Entities,
Mont. Const. art. V, § 11, and the Inviolable Nature of the Public School
Fund, Mont. Const. art. X, § 3)**

108. Plaintiffs incorporate herein all the foregoing allegations as if set forth in full.

109. The Montana Constitution provides: “The public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion.” Mont. Const. art. X, § 3.

110. Moreover: “No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.” Mont. Const. art. V, § 11(5).

111. HB 562 exempts the privatized school system and governing boards from any meaningful state control. The “administrative tie” to the Board of Public Education is in name only. *See* Ex. A, HB 562, §§ 4(1), (12).

112. Privatized schools are established as a “nonprofit education organization.” Ex. A, HB 562, § 14(1)(a).

113. All that renders privatized schools public is their receipt of, and entanglement with, public funding. Otherwise, they are private entities with neither state nor local oversight. HB 562’s distribution of funds to privatized schools is unconstitutional.

114. Because HB 562 violates the Montana Constitution Article X, § 3, and Article V, § 11(5), Plaintiffs request that the Court declare it unconstitutional and unenforceable.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court enter:

1. A declaratory judgment that HB 562 is unconstitutional.
2. An order enjoining Defendants and all agencies, agents, and employees from enforcing any aspect of HB 562.
3. An order granting any other appropriate relief that may be necessary to enjoin implementation of HB 562.
4. An award of attorneys' fees and costs incurred in bringing this action pursuant to the Declaratory Judgment Act and the Private Attorney General Doctrine.
5. Any further relief this Court deems just and appropriate.

Respectfully submitted this 14th day of June, 2023.




Rylee Sommers-Flanagan
Niki Zupanic
Constance Van Kley
Upper Seven Law

Attorneys for Plaintiffs

VERIFICATION

I, Douglas Reisig, being first duly sworn, upon oath depose and say:

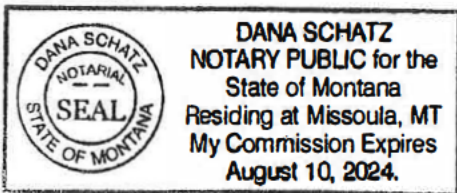
1. I am the Executive Director of the Montana Quality Education Coalition, an organizational Plaintiff in the action set forth above.
2. I verify the foregoing Verified Complaint for and on behalf of Plaintiffs.
3. I have personal knowledge that the facts and information set out in the foregoing Verified Complaint are true and authentic facts and information; that the facts therein have been assembled by counsel and Plaintiffs; and that the allegations therein are true and correct to the best of my knowledge.
4. I declare under penalty of perjury that the foregoing is true and correct.

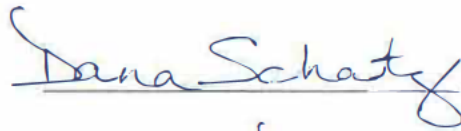


Dr. Douglas Reisig

Subscribed and sworn to before me this 14th day of June, 2023.

(NOTARIAL SEAL)





Printed Name: Dana Schatz

Exhibit A



AN ACT AUTHORIZING THE ESTABLISHMENT OF COMMUNITY CHOICE SCHOOLS AS A MEANS OF PROVIDING ADDITIONAL EDUCATIONAL OPPORTUNITIES; PROVIDING LEGISLATIVE FINDINGS AND INTENT; PROVIDING DEFINITIONS; ESTABLISHING A COMMUNITY CHOICE SCHOOL COMMISSION; ESTABLISHING CHOICE SCHOOL AUTHORIZERS FOR OVERSEEING CHOICE SCHOOLS; PROVIDING AN OVERSIGHT FEE FOR CHOICE SCHOOL AUTHORIZERS; PROVIDING FOR THE CREATION, RENEWAL, REVOCATION, AND CLOSURE OF CHOICE SCHOOLS; PROVIDING FOR PERFORMANCE MEASURES FOR CHOICE SCHOOLS; EXEMPTING CHOICE SCHOOL TEACHERS FROM STATE CERTIFICATION REQUIREMENTS; PROVIDING FOR FUNDING OF CHOICE SCHOOLS; ESTABLISHING CONDITIONS FOR CHOICE SCHOOL ACCESS TO SCHOOL DISTRICT FACILITIES AND LAND; ESTABLISHING THE COMMUNITY CHOICE SCHOOL ACCOUNT; AND PROVIDING AN EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short title. [Sections 1 through 17] may be cited as the "Community Choice Schools Act".

Section 2. Community choice schools -- legislative findings and intent. (1) The legislature finds, pursuant to the authority and duties provided in Article X, section 1(3), of the Montana constitution, that:

- (a) parents desire education options for their children;
- (b) expanding educational opportunities for K-12 education within the state is a valid public purpose; and
- (c) creating options that empower parents, encourage students to develop their full educational potential, provide a variety of professional opportunities for teachers, and encourage educational entrepreneurship is vital to the economic competitiveness of the state.

(2) It is the legislature's intent, pursuant to the authority and duties provided in Article X, section

1(3), of the Montana constitution, to create other public educational programs and institutions through choice schools. The purposes are to:

- (a) enable parents to make decisions on how best to educate their children;
- (b) provide other public educational opportunities for all students, especially those at risk of academic failure or academic disengagement;
- (c) encourage the use of different models of teaching, governing, scheduling, and providing instruction to meet a wide variety of student and community needs; and
- (d) advance Montana's commitment to the preservation of American Indian cultural identity, pursuant to Article X, section 1(2), of the Montana constitution, and to eliminate the American Indian achievement gap by encouraging participation in the choice school program by students, parents, and school districts in Indian country.

Section 3. Definitions. As used in [sections 1 through 17], the following definitions apply:

- (1) "Applicant" means a person or group that submits a proposal for a community choice school to an authorizer.
- (2) "Authorizer" means the commission or a local school board approved as an authorizer by the commission.
- (3) "Charter contract" means a fixed-term, renewable contract between a community choice school and an authorizer that outlines the roles, powers, responsibilities, and performance expectations for each party to the contract.
- (4) "Commission" means the community choice school commission provided for in [section 4].
- (5) "Community choice school" or "choice school" means a public school that:
 - (a) has autonomy over decisions, including but not limited to matters concerning finance, board governance, personnel, scheduling, curriculum, and instruction;
 - (b) is governed by a governing board;
 - (c) is established and operated under the terms of a charter contract between the school's governing board and its authorizer;
 - (d) is a school in which parents choose to enroll their children;

- (e) is a school that admits students based on capacity and then on the basis of a lottery if more students apply for admission than can be accommodated;
 - (f) provides a program of education that may include any or all grades from kindergarten through grade 12 and vocational education programs;
 - (g) operates in pursuit of a specific set of educational objectives as defined in its charter contract;
 - (h) operates under the oversight of its authorizer in accordance with its charter contract; and
 - (i) establishes graduation requirements and has authority to award degrees and issue diplomas.
- (6) "Education service provider" means a for-profit education management organization, nonprofit education management organization, school design provider, or other partner entity with which a community choice school intends to contract for educational design, implementation, or comprehensive management.
- (7) "Governing board" means an independent volunteer board of trustees of a community choice school that is a party to the charter contract with the authorizer.
- (8) "Local school board" means a traditional school district board of trustees exercising management and control over a traditional local school district pursuant to the laws of the state.
- (9) "Parent" means a parent, guardian, or other person or entity having legal custody of a child.
- (10) "Resident school district" means the public school district in which a student resides.
- (11) "Student" means a child who is eligible for attendance in a public school in the state.
- (12) "Traditional public school" means a traditional public school that is under the direct management, governance, and control of a local school board or the state.
- (13) "Virtual community choice school" means a community choice school headquartered in Montana that offers educational services predominantly through an online program.

Section 4. Community choice school commission -- appointments. (1) There is an autonomous state community choice school commission with statewide authorizing jurisdiction and authority. The commission is attached to the board of public education for administrative purposes, as prescribed in 2-15-121(2), except as provided in this section, and is under the general supervision of the board of public education as set forth in this section.

- (2) The commission is responsible for approving authorizers for choice schools throughout the

state.

(3) The commission consists of seven members who are appointed as follows:

- (a) two members appointed by the governor;
- (b) one member appointed by the superintendent of public instruction
- (c) one member appointed by the president of the senate;
- (d) one member appointed by the speaker of the house;
- (e) one member appointed by the minority leader of the senate; and
- (f) one member appointed by the minority leader of the house of representatives.

(4) Members appointed to the commission must collectively possess substantial experience and expertise in board governance, business, finance, education, management, and philanthropy. All members of the commission must have a demonstrated understanding of and commitment to choice schools as a strategy for strengthening public education.

(5) (a) Initial appointments to the commission must be for staggered terms as follows:

- (i) 4-year terms for the appointees of the governor, one of whom must be designated by the governor as the initial presiding officer of the commission for 2 years;
- (ii) 3-year terms for the appointees of the superintendent of public instruction and the minority leaders of the senate and house of representatives; and
- (iii) 2-year terms for the appointees of the president of the senate and speaker of the house.

(b) All terms after the initial term must be for 3 years. Appointment to the initial terms must be made no later than 60 days following [the effective date of this act]. If any of the appointing authorities fails to make the appointments, the remaining appointing authorities may make the remaining appointments.

(6) Each member of the commission is entitled to reimbursement for expenses upon approval of the treasurer of the commission as provided in the commission's bylaws.

(7) A member of the commission may be removed by a majority vote of the commission for any cause that renders the member unable or unfit to discharge the duties of the office, including but not limited to failure to approve an authorizer or a choice school without just cause and interference with the functions of the commission as set forth in [sections 1 through 17]. Whenever a vacancy on the commission exists, the original appointing authority shall appoint a member for the remaining portion of the term consistent with the

requirements of subsections (4) and (5).

(8) The commission is authorized to receive and expend gifts and donations of any kind from any private entity. The gifts and donations may not require conditions that do not comport with the purposes of [sections 1 through 17]. Gifts and donations under this subsection must be deposited in the community choice school account pursuant to [section 17] and may be used by the commission for commission operations or distributed to choice schools at the discretion of the commission.

(9) The commission may hire staff for the commission. Support staff may be provided by the board of public education for centralized services, including payroll, human resources, accounting, information technology, or other services, if those services are determined by the commission and the board to be more efficiently provided by the board.

(10) The commission shall convene and approve bylaws and officers within 180 days of [the effective date of this act].

(11) All commission meetings are open to the public pursuant to Article II, section 9, of the Montana constitution and 2-3-203.

(12) By August 1 of each year, the commission shall annually report to the state board of public education the academic performance and financial reports of each choice school authorized within the state.

Section 5. Authorizers. (1) The state community choice school commission created under [section 4] may authorize choice schools in the state. The commission shall perform the functions of choice school authorizers under [sections 1 through 17].

(2) (a) A local school board may apply to the commission for authorizing authority within the boundaries of the traditional school district overseen by the local school board.

(b) If the commission determines that the local school board fulfills the requirements of an authorizer, the commission shall, within 60 days of receipt of a local school board's application, approve the local school board as an authorizer.

(c) On approval, the commission shall register the local school board and shall provide the local school board with a letter confirming its approval as an authorizer.

(3) (a) The commission shall establish the annual application and approval process, including

cycles and deadlines during the fiscal year, for local school boards to apply for authorizing authority as set forth in this section.

(b) By March 1 of each year, the commission shall make available information and guidelines for local school boards concerning the opportunity to apply for authorizing authority under [sections 1 through 17].

(c) Each interested local school board shall submit an application that clearly explains or presents the following elements in a format to be established by the commission:

(i) written notification of intent to serve as a choice school authorizer in accordance with [sections 1 through 17];

(ii) an explanation of the local school board's strategic vision for authorizing;

(iii) a plan supporting the local school board's strategic vision and an explanation of the local school board's budget and personnel capacity and commitment to execute the duties of choice school authorizing in accordance with [sections 1 through 17];

(iv) a draft or preliminary outline of a request for proposal that will solicit choice school applicants in accordance with [section 9];

(v) a description or outline of the performance framework the local school board will use to guide the establishment of a charter contract and for ongoing oversight and evaluation of choice schools consistent with the requirements of [sections 1 through 17];

(vi) a draft of the local school board's renewal, revocation, nonrenewal, and school closure processes consistent with [sections 12 and 13];

(vii) a statement of assurance that the local school board commits to serving as a choice school authorizer in fulfillment of the expectations, spirit, and intent of [sections 1 through 17] and will fully participate in any authorizer training provided or required by the commission; and

(viii) a statement of assurance that the local school board will be accountable and transparent in all matters concerning authorizing practices, decisions, and expenditures.

(4) (a) Within 60 days of receipt of the application, the commission shall determine whether to approve an application based on a review of the documentation provided in subsection (5) and the quality of the application. The commission shall provide a letter to the local school board either confirming or denying acceptance as an authorizer.

(b) Within 30 days of approval of an application for choice school authorizing, the commission and the approved authorizer shall execute a renewable authorizing contract. The initial authorizing contract term is 6 years.

(5) A local school board may not engage in authorizing functions without a fully executed authorizing contract.

(6) When approved by the commission, the local school board continues as an authorizer from year to year during the term of the contract as long as the local school board fulfills all authorizing duties and expectations set forth in [sections 1 through 17] and remains an authorizer in good standing with the commission.

Section 6. Authorizer responsibilities. (1) In accordance with [sections 1 through 17], an authorizer is responsible for executing the following essential powers and duties:

- (a) soliciting and evaluating choice school proposals;
- (b) approving choice school proposals that meet identified educational needs and promote a diversity of educational choices, including but not limited to:
 - (i) creating more schools with high standards for pupil performance;
 - (ii) closing achievement gaps between high-performing and low-performing groups of public school students;
 - (iii) increasing educational opportunities within the public education system;
 - (iv) providing alternative learning environments for students who are not thriving in traditional school settings;
 - (v) addressing the dropout rate;
 - (vi) creating new professional opportunities for teachers, leaders, and other school personnel;
 - (vii) encouraging the use of innovative models of teaching, delivering content, and providing other aspects of K-12 education; and
 - (viii) providing students, parents, community members, and other local and philanthropic entities with expanded opportunities for involvement in the public education system;
- (c) declining to approve inadequate choice school proposals;

- (d) negotiating and executing sound charter contracts with each approved choice school;
 - (e) monitoring, in accordance with charter contract terms, the performance and legal compliance of choice schools; and
 - (f) determining whether each charter contract merits renewal, nonrenewal, or revocation.
- (2) An authorizer may delegate its duties to its officers, employees, and contractors.
 - (3) Regulation of choice schools by authorizers is limited to the powers and duties described in [sections 1 through 17], consistent with the intent of [sections 1 through 17].
 - (4) An authorizer shall develop, carry out, and maintain authorizing policies and practices consistent with nationally recognized principles and standards for authorizing in all major areas of authorizing responsibility, including:
 - (a) organizational capacity and infrastructure;
 - (b) soliciting and evaluating choice school proposals;
 - (c) performance contracting;
 - (d) ongoing community choice school oversight and evaluation; and
 - (e) charter contract renewal decisionmaking.
 - (5) Evidence of material or persistent failure to carry out the duties enumerated in this section constitutes grounds for rescission of authorizing powers by the commission.
 - (6) Each authorizer shall submit to the commission an annual report summarizing:
 - (a) the authorizer's strategic vision for authorizing and progress toward achieving that vision;
 - (b) the academic and financial performance of all operating choice schools overseen by the authorizer, according to the performance expectations for choice schools set forth in [sections 1 through 17];
 - (c) the status of the authorizer's choice school portfolio, identifying all choice schools approved but not yet open, operating, renewed, transferred, revoked, not renewed, voluntarily closed, or never opened;
 - (d) the authorizing functions provided by the authorizer to the choice schools under its direction, including the authorizer's operating costs and expenses detailed in annual audited financial statements that conform with generally accepted accounting principles; and
 - (e) the services purchased from the authorizer by a choice school under the authorizer's direction, including an itemized accounting of the actual costs of these services, as required in [section 7].

(7) An employee, trustee, agent, or representative of an authorizer may not simultaneously serve as an employee, trustee, agent, representative, vendor, or contractor of a community choice school authorized by that entity.

(8) A government unit or other entity, other than those expressly granted authority under [section 5], may not assume any authorizing function or duty in any form unless expressly allowed by law.

Section 7. Duties of commission -- oversight of authorizers. (1) (a) The commission shall establish a statewide formula for authorizer funding to be applied uniformly to every authorizer in the state. Authorizer funding is financed through an oversight fee.

(b) The oversight fee must be calculated as a uniform percentage of the state funding allocated to each choice school and is to be paid from the choice school's budget share of the per-pupil funding, not to exceed 3% of each community choice school's state funding in a single school year.

(c) The commission may establish a sliding scale for authorizer funding, with the funding percentage decreasing after the authorizer has achieved a certain threshold after a certain number of years of authorizing, after a certain number of schools have been authorized, or for other reasons determined at the discretion of the commission.

(d) An authorizer's oversight fee may not include any costs incurred in delivering services that a choice school may purchase at its discretion from the authorizer. The authorizer shall use the funding provided under this section exclusively for the purpose of fulfilling authorizing obligations in accordance with [sections 1 through 17].

(2) The commission is responsible for overseeing the performance and effectiveness of all authorizers established under [sections 1 through 17].

(3) The commission shall annually review the effectiveness of the formula it established for authorizer funding and shall adjust the formula if necessary to maximize public benefit and strengthen the implementation of [sections 1 through 17].

(4) By October 15 of each year, the commission shall communicate to every authorizer the requirements for the format, content, and submission of the annual report.

(5) Persistently unsatisfactory performance of an authorizer's portfolio of community choice

schools, a pattern of well-founded complaints about the authorizer or its choice schools, or other objective circumstances may trigger a special review by the commission.

(6) In reviewing or evaluating the performance of authorizers, the commission shall apply nationally recognized principles and standards for authorizing.

(7) If at any time the commission finds that an authorizer is not in compliance with an existing charter contract, its authorizing contract with the commission, or the requirements of authorizers under [sections 1 through 17], the commission shall notify the authorizer in writing of the identified problems and shall provide the authorizer reasonable opportunity to respond and remedy the problems.

(8) If an authorizer fails to respond and remedy the problems identified by the commission, the commission shall notify the authorizer, within a reasonable amount of time under the circumstances, that it intends to revoke the authorizer's authority unless the authorizer demonstrates a timely and satisfactory remedy for the violation or deficiencies.

(9) In the event of revocation of an authorizer's authority, the commission shall manage the timely and orderly transfer of each charter contract held by that authorizer to another authorizer in the state, with the mutual agreement of each affected choice school and proposed new authorizer. The new authorizer shall assume the existing charter contract for the remainder of the charter contract term.

(10) On or before December 1 of each year, beginning in the first year that choice schools have been in operation for a full school year, the commission shall issue to the board of public education, the education interim committee, and the public an annual report on the state's community choice schools that includes data from the annual reports submitted by every authorizer, as well as any additional relevant data compiled by the commission, for the school year ending in the preceding calendar year. The annual report must include:

(a) a comparison of the performance of choice school students with the performance of the comparable grade ranges of the choice school's students' resident district schools; and

(b) the commission's assessment of the successes, challenges, and areas for improvement in meeting the purposes of [sections 1 through 17], including the commission's assessment of the sufficiency of funding for choice schools, the efficacy of the commission's formula for authorizer funding, and any suggested changes in state law or policy necessary to strengthen the state's community choice schools.

Section 8. Purchase of services by choice school. (1) With the exception of oversight services as required by [section 7], a community choice school may not be required to purchase services from the choice school's authorizer as an express or implied condition of choice school approval or of executing a charter contract.

(2) A choice school may choose to purchase services from its authorizer. In that event, the choice school and authorizer shall execute an annual service contract, separate from the charter contract, stating the parties' mutual agreement concerning any services to be provided by the authorizer and any service fees to be charged to the choice school. An authorizer may not charge more than market rates for services provided to a choice school.

(3) A choice school may purchase goods and services from for-profit providers for operational and ancillary purposes.

Section 9. Community choice school proposal process -- request for proposal. (1) To solicit, encourage, and guide the development of choice schools, every authorizer operating under [sections 1 through 17] shall issue and broadly publicize a request for proposal by June 1 of each year. The content and dissemination of the request for proposal must be consistent with the purposes and requirements of [sections 1 through 17].

(2) Each authorizer's request for proposal must present the authorizer's strategic vision for authorizing, including a clear statement of any preferences the authorizer wishes to grant to proposals that help at-risk students.

(3) A request for proposal must include or otherwise direct applicants to the performance framework that the authorizer has developed for choice school oversight and evaluation in accordance with [section 7].

(4) A request for proposal must include the criteria that will guide the authorizer's decision to approve or deny a choice school proposal.

(5) A request for proposal must include clear and detailed questions designed to gauge an applicant's capacity to establish and operate a successful choice school, as well as guidelines concerning the

format and content of an applicant's response to the request for proposal.

- (6) A request for proposal must require applicants to describe thoroughly the following essential elements of their proposed choice school proposal:
- (a) an executive summary;
 - (b) the mission and vision of the proposed choice school, including identification of the targeted student population and the community the school hopes to serve;
 - (c) the location or geographic area proposed for the choice school;
 - (d) the grades to be served each year for the full term of the charter contract;
 - (e) minimum, planned, and maximum enrollment each year for the term of the charter contract;
 - (f) evidence of need and community support for the proposed choice school;
 - (g) background information on the founding governing board members and, if identified, the proposed school leadership and management team;
 - (h) the proposed choice school's proposed calendar and sample daily schedule;
 - (i) a description of the academic program, including identification of the planned standardized assessment to formally measure student achievement on an annual basis;
 - (j) a description of the proposed choice school's instructional design, including the type of learning environment, class size and structure, curriculum overview, and teaching methods;
 - (k) the proposed choice school's plans for identifying and successfully serving students with disabilities, students who are English language learners, students who are academically challenged, and gifted students, including but not limited to compliance with applicable laws and regulations;
 - (l) a description of cocurricular or extracurricular programs, if any, and how the programs will be funded and delivered;
 - (m) plans and timelines for student recruitment and enrollment, including lottery procedures;
 - (n) the proposed choice school's student discipline policies, including those for special education students;
 - (o) an organizational chart that clearly presents the proposed choice school's organizational structure, including lines of authority and reporting between the governing board, staff, related bodies such as advisory bodies or parent and teacher councils, and any external organizations that may play a role in

managing the school;

(p) a clear description of the roles and responsibilities for the governing board, the proposed choice school's leadership and management team, and other entities shown in the organizational chart;

(q) a staffing chart for the proposed choice school's first year and a staffing plan for the term of the charter contract;

(r) plans for recruiting and developing school leadership and staff;

(s) the proposed choice school's leadership and teacher employment policies, including performance evaluation plans;

(t) proposed governing bylaws;

(u) explanations of any partnerships or contractual relationships central to the proposed choice school's operations or mission;

(v) the proposed choice school's plans for providing transportation, food service, and all other significant operational or ancillary services, if any;

(w) opportunities and expectations for parent involvement;

(x) a detailed school startup plan identifying tasks, timelines, and responsible individuals;

(y) a description of the proposed choice school's financial plan and policies, including financial controls and audit requirements;

(z) a description of the insurance coverage the proposed choice school will obtain;

(aa) startup and 5-year budgets with clearly stated assumptions;

(bb) startup and first-year cash flow projections with clearly stated assumptions;

(cc) evidence of anticipated fundraising contributions, if claimed in the proposal; and

(dd) a sound facilities plan, including backup or contingency plans, if appropriate.

(7) In the case of a proposal to establish a choice school by converting an existing traditional public school to choice school status, a request for proposal must also require the applicants to demonstrate support for the proposed choice school conversion by a petition signed by a majority of teachers or a majority of the local school board and a petition signed by a majority of parents of students in the existing traditional public school.

(8) In the case of a proposal to establish a virtual choice school, a request for proposal must

additionally require the applicants to describe the proposed school's system of course credits and how the school will:

- (a) monitor and verify full-time student enrollment, student participation in a full course load, credit accrual, and course completion;
- (b) monitor and verify student progress and performance in each course through regular, proctored assessments and submissions of coursework; and
- (c) conduct parent-teacher conferences.

(9) In the case of a proposed choice school that intends to contract with an education service provider for substantial educational services, management services, or both, a request for proposal must additionally require the applicants to:

- (a) provide evidence of the education service provider's success in serving student populations similar to the targeted population, including demonstrated academic achievement as well as successful management of nonacademic school functions, if applicable;
- (b) provide documentation setting forth:
 - (i) the proposed duration of the service contract;
 - (ii) the roles and responsibilities of the governing board, the school staff, and the education service provider;
 - (iii) the scope of services and resources to be provided by the education service provider;
 - (iv) performance evaluation measures and timelines;
 - (v) a compensation structure, including clear identification of all fees to be paid to the education service provider;
 - (vi) methods of contract oversight and enforcement;
 - (vii) investment disclosure; and
 - (viii) conditions for renewal and termination of the contract; and
- (c) disclose and explain any existing or potential conflicts of interest between the governing board and the proposed education service provider or any affiliated business entities.

(10) In the case of a choice school proposal from an applicant that currently operates one or more schools in any state or nation, a request for proposal must additionally require the applicant to provide evidence

of past performance and current capacity for growth.

(11) If a choice school proposal does not contain the elements required in this section, the authorizer may consider the proposal incomplete and return the proposal to the applicant without following the process described in subsection (12).

(12) In reviewing and evaluating choice school proposals, authorizers shall employ procedures, practices, and criteria consistent with nationally recognized principles and standards for authorizing. The proposal review process must include thorough evaluation of each written choice school proposal, an in-person interview with the applicant group, and an opportunity in a public forum for local residents to learn about and provide input on each proposal.

(13) In deciding whether to approve choice school proposals, authorizers shall:

- (a) grant approval only to applicants that have demonstrated competence in each element of the authorizer's published approval criteria and are likely to open and operate a successful choice school;
- (b) base decisions on documented evidence collected through the proposal review process; and
- (c) follow proposal review and approval policies and practices that are transparent and are based on merit and avoid conflicts of interest or any appearance of conflict.

(14) (a) The authorizer shall approve or deny a choice school proposal within 60 days after the filing of the proposal, except that the commission has up to 120 days if more than three proposals have been submitted to the commission within 30 days. The commission shall notify the applicant of the expected timeline for approval or denial.

(b) The authorizer shall adopt by resolution all choice school proposal approval or denial decisions in an open meeting of the authorizer's governing body.

(c) An approval decision may include, if appropriate, reasonable conditions that the applicant must meet before a charter contract may be executed pursuant to [section 10].

(d) For any choice school proposal denial, the authorizer shall clearly state for the public record the reasons for denial. A denied applicant may subsequently reapply to that authorizer or apply to any other authorizer in the state.

(e) Within 10 days of taking action to approve or deny a choice school proposal, the authorizer shall report its decision to the commission. The authorizer shall provide a copy of the report to the applicant at

the same time that the report is submitted to the commission. The report must include a copy of the resolution of the authorizer's governing body setting forth the action taken and reasons for the decision and providing assurances of compliance with all of the procedural requirements and proposal elements set forth in this section.

(15) An applicant may submit a proposal for a particular choice school to only one authorizer at a time.

Section 10. Charter contract -- terms. (1) An initial charter contract must be granted for a term of 5 operating years, commencing on the community choice school's first day of operation. An approved choice school may delay its opening for 1 school year to plan and prepare for the school's opening. If the school requires an opening delay of more than 1 school year, the school shall request an extension from its authorizer. The authorizer may grant or deny the extension depending on the school's circumstances.

(2) Within 45 days of approval of a choice school proposal, the authorizer and the governing board of the approved choice school shall execute a charter contract that clearly sets forth the academic and operational performance expectations and measures by which the choice school will be judged and the administrative relationship between the authorizer and the choice school, including each party's rights and duties.

(3) The performance provisions of the charter contract may be refined or amended by mutual agreement after the choice school is operating and has collected baseline achievement data for its enrolled students.

(4) The charter contract for a full-time virtual community choice school must include a description and agreement regarding the methods by which the school will:

(a) monitor and verify full-time student enrollment, student participation in a full course load, credit accrual, and course completion;

(b) monitor and verify student progress and performance in each course through regular, proctored assessments and submissions of coursework; and

(c) conduct parent-teacher conferences.

(5) The charter contract must be signed by the president of the authorizer's governing body and

the president of the choice school's governing board. Within 10 days of executing a charter contract, the authorizer shall submit to the commission written notification of the charter contract execution, including a copy of the executed charter contract and any attachments.

(6) A community choice school may not commence operations without a charter contract executed in accordance with this section and approved in an open meeting of the authorizer's governing body.

(7) Authorizers may establish reasonable pre-opening requirements or conditions to monitor the startup progress of a newly approved choice school to ensure that the school is prepared to open smoothly on the date agreed and to ensure that each school meets all building, health, safety, insurance, and other legal requirements for school opening.

Section 11. Enrollment. (1) (a) A community choice school must be open to any student residing in the state.

(b) A school district may not require a student enrolled in the school district to attend a choice school.

(c) A choice school may limit admission to students within a given age group or grade level.

(d) A choice school may be organized for a special emphasis, theme, or concept as stated in the school's proposal.

(e) A choice school shall enroll all students who wish to attend the school unless the number of students exceeds the capacity of a program, class, grade level, or building.

(f) If capacity is insufficient to enroll all students who wish to attend the school, the choice school shall select students through a lottery.

(2) A traditional public school converting to a choice school shall adopt and maintain a policy giving enrollment preference to students who reside within the former attendance area of that public school.

(3) (a) A choice school shall give enrollment preference to students who were enrolled in the choice school the previous school year and to siblings of students already enrolled in the choice school. An enrollment preference for returning students and siblings excludes those students from entering a lottery.

(b) A choice school may give enrollment preference to children of a choice school's employees and governing board, limited to no more than 10% of the school's total student population.

(4) This section does not preclude the formation of a community choice school for the purpose of serving students with disabilities, students of the same gender, students who pose a sufficiently severe disciplinary problem to warrant a specific educational program, or students who are at risk of academic failure. If capacity is insufficient to enroll all students who wish to attend a school, the choice school shall select students through a lottery.

(5) If a student who was previously enrolled in a choice school enrolls in any other public school in this state, the student's new school shall accept credits earned by the student in courses or instructional programs at the choice school.

(6) A traditional school district shall provide or publicize to parents and the general public information about choice schools as an enrollment option within the district's physical, geographical boundaries to the same extent and through the same means that the district provides and publicizes information about traditional public schools in the district.

(7) An authorizer may not restrict the number of students a choice school may enroll. The capacity of the choice school must be determined annually by its governing board in conjunction with the authorizer and in consideration of the choice school's ability to facilitate the academic success of its students, to achieve the objectives specified in the charter contract, and to ensure that its student enrollment does not exceed the capacity of its facility or site.

(8) If the choice school is the only public school in a town, the choice school must give preference to enrolling pupils residing in the town or within 5 miles of the school if the next closest public school is more than 10 miles away from the student's residence.

Section 12. Community choice school performance and renewal. (1) The performance provisions within the charter contract must be based on a performance framework that clearly sets forth the academic and operational performance indicators, measures, and metrics that will guide the authorizer's evaluations of each choice school. The performance framework must include indicators, measures, and metrics for, at a minimum:

- (a) student academic proficiency;
- (b) student academic growth;
- (c) achievement gaps in both proficiency and growth between major student subgroups;

(d) attendance;

(e) recurrent enrollment from year to year;

(f) postsecondary readiness;

(g) financial performance and sustainability; and

(h) governing board performance and stewardship, including compliance with all applicable laws, regulations, and terms of the charter contract.

(2) Each choice school, in conjunction with its authorizer, shall set annual performance targets designed to help each school meet applicable federal, state, and authorizer expectations.

(3) (a) The contract performance framework must include rigorous, valid, and reliable indicators proposed by a choice school to evaluate its performance that are consistent with the purposes of [sections 1 through 17].

(b) The authorizer shall collect and analyze data from each choice school it oversees in accordance with the performance framework.

(c) Multiple schools operating under a single charter contract or overseen by a single governing board shall report their performance as separate, individual schools. Each school must be held independently accountable for its performance.

(4) (a) An authorizer shall monitor the performance and legal compliance of the choice schools it oversees, including collecting and analyzing data to support ongoing evaluation according to the charter contract. Every authorizer has the authority to conduct or require oversight activities that do not unduly inhibit the autonomy granted to choice schools but that enable the authorizer to fulfill its responsibilities under [sections 1 through 17], including conducting appropriate inquiries and investigations consistent with the intent of [sections 1 through 17], and to adhere to the terms of the charter contract. Required oversight activities may not encumber the choice school financially and may be appealed by the choice school through the commission.

(b) Each authorizer shall annually publish and provide as part of its annual report to the commission a performance report for each choice school it oversees, within the performance framework set forth in the charter contract and [section 10]. The authorizer may require each choice school it oversees to submit an annual report to assist the authorizer in gathering complete information about each school, consistent with the performance framework.

(c) In the event that a choice school's performance or legal compliance appears unsatisfactory, the authorizer shall promptly notify the choice school of the perceived problem and provide a reasonable opportunity for the school to remedy the problem.

(d) An authorizer may take appropriate corrective action or exercise sanctions short of revocation in response to apparent deficiencies in choice school performance or legal compliance. The action or sanctions may include, if warranted, requiring a choice school to develop and execute a corrective action plan within a specified timeframe.

(5) (a) A charter contract may be renewed for successive 5-year terms, although the authorizer may vary the term based on the performance, demonstrated capacities, and particular circumstances of each choice school. An authorizer may grant renewal with specific conditions for necessary improvement to a choice school.

(b) No later than June 30 of each year, the authorizer shall issue a choice school performance report and charter renewal application guide to any choice school whose charter contract will expire the following year. The performance report must summarize the choice school's performance record to date, based on the data required by [sections 1 through 17] and the charter contract, and must provide notice of any weaknesses or concerns perceived by the authorizer concerning the choice school that may jeopardize renewal if not promptly rectified. The choice school shall respond to the performance report and submit any corrections or clarifications within 90 days.

(6) The renewal application guide must, at a minimum, provide an opportunity for the choice school to:

(a) present additional evidence, beyond the data contained in the performance report, supporting its case for charter contract renewal;

(b) describe improvements undertaken or planned for the choice school; and

(c) detail the choice school's plans for the next charter contract term.

(7) The renewal application guide must include or refer explicitly to the criteria that will guide the authorizer's renewal decisions, based on the performance framework set forth in the charter contract and consistent with [sections 1 through 17].

(8) (a) No later than February 1 of each year, the governing board of a community choice school

seeking renewal shall submit a renewal application to the authorizer pursuant to the renewal application guide issued by the authorizer. The authorizer shall rule by resolution on the renewal application no later than 30 days after the filing of the renewal application.

(b) Every authorizer shall, when considering charter contract renewal:

(i) base its decision on evidence of the school's performance over the term of the charter contract in accordance with the performance framework set forth in the charter contract;

(ii) ensure that the data used in making renewal decisions is available to the choice school and to the public; and

(iii) provide a public report summarizing the basis for each decision.

Section 13. Charter contract revocation and school closure or charter contract nonrenewal. (1)

A charter contract may be subject to nonrenewal or revocation if the authorizer determines that the community choice school:

(a) committed a material and substantial violation of any of the terms, conditions, standards, or procedures required under [sections 1 through 17] or the charter contract and from which the choice school was not exempted;

(b) failed to meet or make sufficient progress toward the performance expectations set forth in the charter contract;

(c) failed to meet public safety standards; or

(d) failed to meet generally accepted standards of fiscal management.

(2) An authorizer shall develop revocation and nonrenewal processes that:

(a) provide the charter contract holders with timely notification of the prospect of revocation or nonrenewal and of the reasons for the possible closure;

(b) allow the charter contract holders a reasonable amount of time in which to prepare a response;

(c) provide the charter contract holders an opportunity to submit documents and testimony at a hearing to challenge the rationale for the closure recommendation and in support of the continuation of the school;

(d) allow the charter contract holders to be represented by counsel and call witnesses on their

behalf;

(e) permit the recording of the proceedings; and

(f) provide for a final determination conveyed in writing to the charter contract holders.

(3) If an authorizer revokes or denies renewal of a charter contract, the authorizer shall clearly state, by resolution of its governing body, the reasons for the revocation or nonrenewal.

(4) Within 10 days of taking action to renew, not renew, or revoke a charter contract, the authorizer shall report to the commission the action taken and at the same time shall provide a copy of the report to the choice school. The report must include a copy of the resolution of the authorizer's governing body setting forth the action taken and reasons for the decision and providing assurances of compliance with all the requirements set forth in [sections 1 through 17]. The authorizer's decision is appealable to the commission in writing within 30 days of the commission's receipt of the authorizer's report.

(5) (a) Prior to a choice school closure, an authorizer shall develop a choice school closure protocol to ensure timely notification to parents, orderly transition of students and student records to new schools, and proper disposition of school funds, property, and assets in accordance with the requirements of [sections 1 through 17]. The protocol must specify responsible parties, transition and closure timelines, and a delineation of the respective duties of the choice school and the authorizer.

(b) The authorizer shall oversee the closure and work with the closing choice school to ensure a smooth and orderly closure and transition for students and parents.

(c) In the event of a choice school closure for any reason, the nonrestricted distributable assets of the choice school must be distributed first to satisfy outstanding payroll obligations for employees of the choice school, then to creditors of the choice school, then to resident school districts of students previously attending the closed choice school on a prorated per-pupil basis, and then to the state general fund. If the assets of the choice school are insufficient to pay all obligations, the prioritization of the distribution of assets may be determined by a court of law.

(d) If a closing choice school was converted from an existing traditional public school, the closing choice school is not responsible for any financial obligation or debt of the previously existing traditional public school unless the choice school assumed the debt or obligation at the time of conversion.

(6) Transfer of a charter contract, and of oversight of that choice school from one authorizer to

another before the expiration of the charter contract term, may occur only if the authorizer violates the provisions of [section 6] or by special petition to the commission by a choice school or its authorizer. The commission shall consider a petition for transfer on a case-by-case basis and may grant transfer requests in response to special circumstances and to evidence that the transfer would serve the best interests of the community choice school's students.

Section 14. Community choice school operation and autonomy. (1) (a) A community choice school must be a nonprofit education organization.

(b) A choice school is subject to all federal laws and authorities as provided in [sections 1 through 17] or arranged by charter contract with the choice school's authorizer consistent with applicable laws, rules, and regulations.

(c) Except as provided in [sections 1 through 17], a choice school is not subject to the provisions of Title 20 or any state or local rule, regulation, policy, or procedure relating to traditional public schools within an applicable traditional local school district.

(d) For the purposes of the public employee retirement system and the teacher retirement system under Title 19, choice schools are not "employers" and choice school employees are not "employees" as those terms are defined in 19-2-303 and 19-20-101.

(e) A single governing board may hold one or more charter contracts. A charter contract may consist of one or more schools, to the extent approved by the authorizer and consistent with applicable law. Each choice school that is part of a charter contract is separate and distinct from any other choice school.

(f) The founding governing board of a choice school may apply for and operate with a charter contract for a period up to 3 years before holding an election. The founding board shall ensure an elected governing board is in place within 3 years of the school commencing operations. The governing board must be elected by a process outlined in the choice school bylaws. The election process must include the following requirements:

(i) the qualified electors consist of parents and guardians of students enrolled in the school and the choice school's employees. The qualified electors shall nominate and vote for candidates for the governing board on a cycle outlined in the choice school's bylaws.

- (ii) if the number of nominees is equal to the number of vacancies, no election is required;
 - (iii) if the number of nominees is greater than the number of vacancies, the election must be decided by the qualified electors as part of the next regular school election; and
 - (iv) the terms of board members must be staggered to ensure continuity on the governing board.
- (2) A choice school may only be created within the geographical boundaries of a third-class elementary district, as described in 20-6-201, or a third-class high school district, as described in 20-6-301, if:
- (a) the choice school is being converted from an existing public school;
 - (b) the traditional third-class school district elects to establish a community choice school;
 - (c) the traditional third-class district elects to convert a grade or grades to a choice school from an existing school;
 - (d) the choice school is a tribal choice school;
 - (e) the choice school is a virtual community choice school; or
 - (f) the governing board of the choice school has received approval, by majority vote, of a memorandum of understanding from the third-class school district's board of trustees.
- (3) Each community choice school shall function as a local educational agency. A choice school is responsible for meeting the requirements of a local educational agency under applicable federal, state, and local laws, including those relating to special education.
- (4) For purposes of special education, a community choice school shall serve as its own local education agency. A choice school is responsible for special education services at the school, including identification and service provisions, and is responsible for meeting the needs of enrolled students with disabilities.
- (5) A choice school has all the powers necessary for carrying out the terms of its charter contract, including the following powers:
- (a) to receive and disburse funds for school purposes;
 - (b) to secure appropriate insurance and to enter into contracts and leases, free from prevailing wage laws;
 - (c) to contract with an education service provider for the management and operation of the choice school only if the school's governing board retains oversight authority over the school;

- (d) to incur debt in reasonable anticipation of the receipt of public or private funds;
 - (e) to pledge, assign, or encumber its assets to be used as collateral for loans or extensions of credit;
 - (f) to solicit and accept gifts or grants for school purposes subject to applicable laws and the terms of its charter contract;
 - (g) to acquire real property, for use as its facility or facilities, from public or private sources; and
 - (h) to sue and be sued in its own name.
- (6) (a) A choice school may not engage in any sectarian practices in its educational program, admissions policies, employment policies or practices, or operations.
- (b) The powers, obligations, and responsibilities set forth in the charter contract may not be delegated or assigned by either party except as otherwise specifically provided in [sections 1 through 17].
- (7) (a) A choice school is subject to the same federal civil rights, health, and safety requirements applicable to other public schools in the state except as otherwise specifically provided in [sections 1 through 17].
- (b) The governing board shall establish graduation requirements and may award degrees and issue diplomas.
- (c) A governing board is subject to and shall comply with state open meeting and public records laws pursuant to Title 2, chapters 3 and 6.
- (d) A choice school shall establish purchasing procedures that include a competitive bidding process for purchases or contracts exceeding \$80,000.
- (8) (a) A community choice school's teachers are exempt from state teacher certification requirements provided in Title 20, chapter 4.
- (b) Employees in choice schools have the same rights and privileges as other public school employees except as otherwise provided in [sections 1 through 17].
- (c) Teachers and other school personnel, as well as governing board members, are subject to criminal history record checks and fingerprinting requirements.
- (d) Community choice school employees may not be required to be members of any existing collective bargaining agreement between a school district and its employees. However, a choice school may

not interfere with laws and other applicable rules protecting the rights of employees to organize and to be free from discrimination.

(9) A choice school's location is determined exclusively by its governing board and only encompasses the property lines of where the school exists as a tenant, guest, or owner of the property. The community choice school is a separate public education entity authorized by and under control of the state of Montana. A choice school is separate from the traditional local school district in which it is physically located and is exempt from Title 20 except as provided in [sections 1 through 17].

Section 15. Funding of choice schools. (1) It is the intent of the legislature that a choice school receive operational funding on a per-pupil basis that is equitable with the per-pupil funding within the general fund of a choice school student's resident school district.

(2) (a) A choice school student's enrollment must be included in the student's resident district enrollment counts for ANB purposes only. By March 1, prior to a choice school's first year of operation, the authorizer shall provide an estimate of a choice school's enrollment broken down by resident school districts to the superintendent of public instruction for review and possible adjustment. The ANB determined by the superintendent must be used for budgeting and BASE funding program purposes for the upcoming school year.

(b) A choice school must have a separate basic entitlement included in the general fund budget of the school district in which the choice school is physically located. The authorizer of the choice school shall determine the choice school's need for a basic entitlement and, not later than February 1, communicate to the superintendent of public instruction the percentage, not to exceed 80%, of the basic entitlement amount under 20-9-306 to be included in the located school district's general fund budget for the ensuing school fiscal year for the choice school.

(3) The county treasurer of the county in which a choice school is physically located shall establish a general fund and other necessary funds for the choice school separate from the funds of school districts of the county.

(4) (a) The superintendent of public instruction shall:

(i) reduce a resident school district's BASE aid payment in August through May by an amount equal to 10% of the student amount for the resident school district multiplied by the number of full-time

equivalent resident students enrolled in a choice school that were included in the resident school district's general fund budget calculations; and

(ii) by the fifth day of each month from September through June of the school fiscal year, distribute to the county treasurer in which the choice school is located the amount determined under subsection (4)(a)(i) for deposit in the choice school's general fund.

(b) The superintendent of public instruction shall reduce the BASE aid payment of a school district in which a choice school is physically located by an amount equal to 10% of the choice school's basic entitlement amount pursuant to subsection (2)(b) in August through May and by the fifth day of each month from September through June of the school fiscal year and distribute the money to the county treasurer for deposit in the choice school's general fund.

(5) A choice school experiencing significant enrollment increases must receive additional funding in an equitable manner with that received by school districts under Title 20, chapter 9.

(6) (a) A choice school may not charge tuition and may charge only fees that may be imposed by traditional public schools in the state.

(b) The out-of-district attendance and tuition laws under Title 20, chapter 5, part 3, do not apply to a student enrolled in a choice school located outside the student's district of residence.

(7) A choice school may obligate the choice school to indebtedness and is solely responsible for those debts. A choice school is not responsible for any debt service obligations that exist in the school district in which the choice school is physically located.

(8) Nothing in [sections 1 through 17] may be construed to prohibit any person, organization, business, or foundation from providing funding or other assistance for the establishment or operation of a choice school. The governing board of a choice school is authorized to accept gifts or donations of any kind made to the choice school and to expend or use the gifts or donations in accordance with the conditions prescribed by the donor. A gift or donation may not be accepted if the gift or donation is subject to a condition that is contrary to any provision of law or term of the charter contract.

(9) Money received by a choice school from any source and remaining in the choice school's accounts at the end of a budget year must remain in the choice school's accounts for use by the choice school in subsequent years.

- (10) For the purposes of this section, the following definitions apply:
- (a) "Resident school district" means the school district in which a choice school student resides.
 - (b) "Student amount" means the sum of:
 - (i) the per-ANB rate for the total data-for-achievement payment rate under 20-9-306;
 - (ii) the per-ANB rate for the total Indian education for all payment rate under 20-9-306;
 - (iii) 140% of the per-ANB amounts of the instructional block grant and related services block grant under 20-9-321; and
 - (iv) the applicable per-ANB maximum rate established in 20-9-306 for the choice school student multiplied by the ratio, rounded to the nearest 1/100 and not to exceed 1.00, of the resident school district's adopted general fund budget to its maximum general fund budget in the prior year.

Section 16. Community choice school access to district facilities and land. (1) A choice school has a right of first refusal to purchase or lease at or below fair market value a closed public school facility or property or an unused portion of a public school facility or property located in a school district from which the choice school draws its students.

(2) A choice school may negotiate and contract at or below fair market value with a school district, the governing body of a college or university or community college, or any other public entity or for-profit or nonprofit private entity for the use of a facility for a school building.

Section 17. Community choice school account. (1) There is a community choice school account in the state special revenue fund provided for in 17-2-102 and administered by the commission. The purpose of the account is for the receipt and expenditure of gifts, grants, legacies, devises, and donations given specifically to support the creation and operation of the Montana community choice schools and commission.

(2) All donations must be from a private source and may not be expended for any purpose other than for the benefit of qualifying choice schools as determined by the commission. Money in the account is derived from a private nonstate source and is payable by the commission without an appropriation pursuant to 17-8-101.

(3) A gift or donation made directly to a specific choice school or schools is not prohibited by this

section.

Section 18. Transition. The legislature intends that the community choice school commission established in [section 4] organize its operations, adopt bylaws, approve authorizers, and solicit choice school proposals during the fiscal year beginning July 1, 2023, with the goal of having operating choice schools for the school year beginning July 1, 2024.

Section 19. Codification instruction. [Sections 1 through 17] are intended to be codified as a new chapter in Title 20.

Section 20. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 21. Effective date. [This act] is effective July 1, 2023.

- END -

I hereby certify that the within bill,
HB 562, originated in the House.

Chief Clerk of the House

Speaker of the House

Signed this _____ day
of _____, 2023.

President of the Senate

Signed this _____ day
of _____, 2023.

HOUSE BILL NO. 562

INTRODUCED BY S. VINTON, S. FITZPATRICK, M. REGIER, J. ELLSWORTH, R. KNUDSEN, K. BOGNER

AN ACT AUTHORIZING THE ESTABLISHMENT OF COMMUNITY CHOICE SCHOOLS AS A MEANS OF PROVIDING ADDITIONAL EDUCATIONAL OPPORTUNITIES; PROVIDING LEGISLATIVE FINDINGS AND INTENT; PROVIDING DEFINITIONS; ESTABLISHING A COMMUNITY CHOICE SCHOOL COMMISSION; ESTABLISHING CHOICE SCHOOL AUTHORIZERS FOR OVERSEEING CHOICE SCHOOLS; PROVIDING AN OVERSIGHT FEE FOR CHOICE SCHOOL AUTHORIZERS; PROVIDING FOR THE CREATION, RENEWAL, REVOCATION, AND CLOSURE OF CHOICE SCHOOLS; PROVIDING FOR PERFORMANCE MEASURES FOR CHOICE SCHOOLS; EXEMPTING CHOICE SCHOOL TEACHERS FROM STATE CERTIFICATION REQUIREMENTS; PROVIDING FOR FUNDING OF CHOICE SCHOOLS; ESTABLISHING CONDITIONS FOR CHOICE SCHOOL ACCESS TO SCHOOL DISTRICT FACILITIES AND LAND; ESTABLISHING THE COMMUNITY CHOICE SCHOOL ACCOUNT; AND PROVIDING AN EFFECTIVE DATE.

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**MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY**

JESSICA FELCHLE; BEAU WRIGHT;
the MONTANA QUALITY
EDUCATION COALITION; the
LEAGUE OF WOMEN VOTERS OF
MONTANA; SHARON CARROLL;
SUZANNE MCKIERNAN; LINDA
ROST; PENELOPE COPPS; LANCE
EDWARD; and CORINNE DAY,

Plaintiffs,

v.

STATE OF MONTANA; GREG
GIANFORTE, in his official capacity as
GOVERNOR OF THE STATE OF
MONTANA; and ELSIE ARNTZEN, in
her official capacity as
SUPERINTENDENT OF PUBLIC
INSTRUCTION,

Defendants.

Cause No.:

**BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
OR, IN THE ALTERNATIVE,
TEMPORARY RESTRAINING
ORDER**

INTRODUCTION

Plaintiffs Jessica Felchle, Beau Wright, the Montana Quality Education Coalition, the League of Women Voters of Montana, Sharon Carroll, Suzanne

McKiernan, Linda Rost, Penelope Copps, Lance Edward, and Corinne Day (“Public School Plaintiffs”) submit this Brief in Support of their Motion for Preliminary Injunction or, in the Alternative, Temporary Restraining Order. Public School Plaintiffs seek to preliminarily enjoin or temporarily restrain Defendants State of Montana, Governor Greg Gianforte, and Superintendent of Public Instruction Elsie Arntzen (“the State”) from enforcing and implementing House Bill 562 (“HB 562”) during the pendency of this litigation.

HB 562 creates what it euphemistically refers to as a “community choice” school system. Far from reflecting the needs of Montana communities or giving choices to stakeholders, HB 562 designs a separate and unequal system of state-subsidized private schools (“privatized schools”) in direct conflict with the system of equal, free, and quality public education that the Montana Constitution guarantees.

The bill violates the Montana Constitution in myriad ways. It authorizes the creation of unaccountable, state-funded educational institutions—privatized schools, governing boards, and a statewide commission—that operate without regard for state standards on, *inter alia*, accreditation, teacher qualifications, curriculum, and student protections. In direct contravention of Article X, each of these entities is created in parallel to existing, constitutionally designed public education institutions. Each is exempt from supervision by Montana’s Board of Public Education—the statewide commission is essentially parallel to the Board of Public Education, a constitutional body. At the local level, HB 562 creates “governing boards,” which usurp the powers delegated by the Constitution to local school boards. Further, voter

eligibility in governing board elections is limited to privatized school parents and employees, violating Montanans' rights of suffrage and to equal protection. Meanwhile, privatized schools are exempt from nearly all state laws that govern public schools, including the laws that implement the constitutional commitment to Indian Education for All.

In addition to outsourcing public education, HB 562 diverts public school tax dollars to privatized schools, with disregard for how these funding losses will impact the existing public school system. And it allows the creation of virtual schools that students from any Montana school district can attend. Because dollars follow students, rural schools will be devastated.

These are merely a sampling of HB 562's constitutional problems. The bill is an outgrowth of a national privatization movement—and it shows exactly why one size does not fit all. Montana is not the venue for school privatization activists to experiment with ideas that endanger Montanans' access to equal, free, and quality public education.

HB 562 goes into effect July 1, 2023. Absent preliminary injunctive relief, Public School Plaintiffs will suffer irreparable harm because HB 562 will begin appropriating their public school tax dollars to set up its *ultra vires* entities. Accordingly, Public School Plaintiffs ask the Court to grant their Motion.

BACKGROUND – HB 562

According to legislative services, HB 562 was the second most opposed bill proposed during the 2023 legislative session. Verified Compl. ¶ 58 (“Compl.”). The

Legislature received 2,030 messages in opposition to HB 562 compared to 574 in support. *Id.* Governor Gianforte signed HB 562 into law on May 18, 2023. *Id.* ¶ 59. It will go into effect on July 1, 2023. *Id.*

HB 562 defines a “community choice school” as a “public school” that:

- (a) has autonomy over decisions, including but not limited to matters concerning finance, board governance, personnel, scheduling, curriculum and instruction;
- (b) is governed by a governing board;
- (c) is established and operated under the terms of a charter contract between the school’s governing board and its authorizer;
- (d) is a school in which parents choose to enroll their children;
- (e) is a school that admits students based on capacity and then on the basis of a lottery if more students apply for admission than can be accommodated;
- (f) provides a program of education that may include any or all grades from kindergarten through grade 12 and vocational education programs;
- (g) operates in pursuit of a specific set of educational objectives as defined in its charter contract;
- (h) operates under the oversight of its authorizer in accordance with its charter contract; and
- (i) establishes graduation requirements and has authority to award degrees and issue diplomas.

Ex. A to Compl., HB 562, § 3(5) (emphasis added) (“HB 562”).

The “authorizer” is defined as “the commission or a local school board approved as an authorizer by the commission.” HB 562, § 3(3). The “commission,” in turn, is “an autonomous state community choice school commission with statewide authorizing jurisdiction and authority.” *Id.* § 4(1). While HB 562 gives lip service to the idea that the commission is to be “under the general supervision of the board of public education,” *id.*, supervision extends only so far as the bill itself requires. And that is not very far; in full, the bill requires the commission to make only a single

annual report to the Board of Public Education about “the academic performance and financial reports of each choice school authorized within the state.” *Id.* § 4(12). The Board is otherwise uninvolved, except that it may provide the commission with publicly funded resources—support staff “for centralized services, including payroll, human resources, accounting, information, technology, or other services, if those services are determined by the commission and the board to be more efficiently provided by the board.” *Id.* § 4(9) (emphasis added).

Privatized schools are subject only to the very few state laws expressly referenced in the bill. HB 562, § 14(1)(c) (“Except as provided in [sections 1 through 17], a choice school is not subject to the provisions of Title 20 or any state or local rule, regulation, policy, or procedure relating to traditional public schools within an applicable traditional local school district.”). HB 562 incorporates Title 20 only to refer to existing definitions related to school district size, *id.* § 14(2), and to calculate the money that privatized schools will extract from public sources, *id.* §§ 15(10)(b)(i)–(iv). Further, HB 562 expressly exempts privatized school employees from retirement benefits and employee protections under Title 19. *Id.* § 14(1)(d).

Each privatized school is to be overseen by a “governing board”—the extra-constitutional equivalent of a local school board of trustees, defined as “an independent volunteer board of trustees of a community choice school that is a party to the charter contract with the authorizer.” HB 562, § 3(7). HB 562 limits who may participate in governing board elections to “parents and guardians of students enrolled in the school and the choice school’s employees.” *Id.* § 14(1)(f)(i). Governing

boards “shall establish graduation requirements,” *id.* § 14(7)(b), and teachers in privatized schools are exempt from state teacher certification requirements found in Title 20, Chapter 4, *id.* § 14(8)(a).

Both virtual and non-virtual privatized schools may pull students from districts of any size. HB 562, § 11(1)(a). Funding follows those students. *Id.* § 15(1) (“[A] choice school receive[s] operational funding on a per-pupil basis that is equitable with the per-pupil funding within the general fund of a choice school student’s resident school district.”). HB 562 imposes some limits on non-virtual privatized schools within the geographic boundaries of third-class public school districts—that is, less populous school districts—but because “out-of-district attendance and tuition laws . . . do not apply,” *id.* § 15(6)(b), non-virtual privatized schools are also allowed to pull students and funding from even the least populous districts.

The bill imposes no limits on funding sources for privatized schools, and funding received from non-public sources has no impact on the amount of money the privatized school may pull from taxpayer-funded sources. HB 562, § 15(8); *see also id.* § 15(9) (“Money received by a choice school from any source and remaining in the choice school’s accounts at the end of a budget year must remain in the choice school’s accounts for use by the choice school in subsequent years.”).

HB 562 claims to incorporate the Montana Constitution’s commitment to American Indian cultural preservation, Mont. Const. art. X, § 1(2). But it exempts privatized schools from Title 20, including the Indian Education for All program. HB 562 only acknowledges the Indian Education for All framework in its funding

section, wherein privatized schools draw funds from public schools based on a rate that includes Indian Education for All funding. HB 562, § 15(10)(b)(ii). Thus, privatized schools draw funding designated for Indian Education for All programming with no corollary plan to meet the constitutional obligation.

HB 562's provisions will be implemented imminently: members of the statewide commission may be appointed at any time after the effective date and must be appointed by August 30, 2023, HB 562, § 4(5)(b), and the commission must convene and approve bylaws and officers by December 28, 2023, at the latest, *id.* § 4(10). As soon as they are appointed, commission members are entitled to expense reimbursement, *id.* § 4(6), may hire staff, *id.* § 4(9), and may receive services from the Board of Public Education. *Id.* "The legislature intends that the community choice school commission established in [section 4] organize its operations, adopt bylaws, approve authorizers, and solicit choice school proposals during the fiscal year beginning July 1, 2023, with the goal of having operating choice schools for the school year beginning July 1, 2024." *Id.* § 18.

LEGAL STANDARD

"A preliminary injunction order or temporary restraining order may be granted when the applicant establishes that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." Section 27-19-201(1), MCA (as amended by Senate Bill 191, effective March 2, 2023). The Montana Legislature intended this standard

to “mirror the federal preliminary injunction standard” and for its “interpretation and application” to “closely follow United States supreme court case law.” Section 27-19-201(4), MCA (as amended); *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (applying the four-part federal preliminary injunction test). This revised standard applies to preliminary injunctions and temporary restraining orders. *See* §§ 27-19-201(4), 27-19-315(1), MCA (as amended).

ARGUMENT

I. HB 562 is plainly unconstitutional—Public School Plaintiffs are likely to succeed on the merits.

In passing HB 562, the State violated the Montana Constitution at least six times over. Public School Plaintiffs are likely to succeed on the merits of their claims but need only prevail on a single claim to invalidate HB 562 because its constitutional problems are not severable. In one category, the bill violates nearly all aspects of the Montana’s constitutional public education system (Counts 1, 2, 5, and 6). In another, it violates Montanans’ rights of suffrage and to equal protection under the law under both the federal and state constitutions (Counts 3 and 4). Public School Plaintiffs are likely to prevail on the merits, and the Court should grant the requested relief.

A. HB 562 violates the right to quality education and interferes with the inviolate nature of the public school fund (Counts 5 and 6).

The Montana Constitution sets forth an unambiguous guarantee: “It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.” Mont. Const. art. X, § 1(1). The guarantee is neither abstract

nor aspirational. *Helena Elem. Sch. Dist. No. 1 v. State*, 236 Mont. 44, 52–53, 769 P.2d 684, 689 (1989). As the Montana Supreme Court has explained, in the first sentence, the framers set an ambitious objective: that is, “to establish a system of education which will develop the full educational potential of each person.” *Id.* at 53. In the second sentence, the “plain meaning . . . is clear and unambiguous”: each Montanan “is guaranteed equality of educational opportunity.” *Id.* Indeed, the Court could find no “other instance in which the Constitution ‘guarantees’ a particular right.” *Id.* As written, “[t]he guarantee provision of subsection (1) is not limited to any one branch of government,” and is instead “binding upon all three branches of government, the legislative as well as the executive and the judicial branches . . . whether at the state, local, or school district level.” *Id.*

To this end, the Constitution obligates the Legislature to “provide a basic system of free quality public elementary and secondary schools.” Mont. Const. art. X, § 1(3). While the Legislature may “provide such other educational institutions, public libraries, and educational programs as it deems desirable,” it “shall fund and distribute in an equitable manner to the school districts the state’s share of the cost of the . . . school system.” *Id.* (emphasis added); *cf.* Mont. Const. art. V, § 11(5) (prohibiting any “appropriation . . . for religious, charitable, industrial, educational, or benevolent purposes to any . . . private association, or private corporation not under control of the state”). The Montana Supreme Court has affirmed this obligation. *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 22, 326 Mont. 304, 109 P.3d 257 (concluding “that the educational product of the current school system

is constitutionally deficient”); *Helena Elem. Sch.*, 236 Mont. at 55, 769 P.2d at 690 (“We specifically affirm that . . . spending disparities among the State’s school districts translate into a denial of equality of educational opportunity.”). The Constitution also expressly prohibits diverting funds from public education: “The public school fund shall forever remain inviolate, guaranteed by the state against loss or diversion.” Mont. Const. art. X, § 3.

By disrupting the public school system and forming an entirely separate oversight structure, HB 562 directly contravenes the constitutional guarantee of equal opportunity to quality education, the related constitutional requirement of equal funding, and the constitutional prohibition against diverting public education funds. Privatized schools are exempt from Title 20 and other rules that govern public schools, ensuring inconsistency in accreditation, teacher quality, student safety standards, and curriculum offerings, and more. HB 562, § 14(1)(b); *see Columbia Falls Elem.*, ¶¶ 28–29 (considering “educational product” in addition to manner of funding and describing evidence of constitutional deficiency as including “growing accreditation problems; many qualified educators leaving the state to take advantage of higher salaries and benefits overed elsewhere; the cutting of programs,” and so on); *Helena Elem.*, 236 Mont. at 57, 769 P.2d at 692 (“[T]he Montana School Accreditation Standards are minimum standards upon which quality education must be built.”) (emphasis added). Among other things, Title 20 sets out protections for students’ health and safety, including concussion protocols for student athletes, §§ 20-7-1303 & 1304, MCA; asthma and diabetes medication policies, §§ 20-5-412, 420, 421, and

426, MCA; and prohibitions against tobacco use, bullying, and relationships between staff and students, §§ 20-1-220, 20-5-209, and 20-7-1321, MCA. HB 562 contains no assurance that these protections will be available to privatized school students. Nor does HB 562 provide a plan for compliance with the Montana Constitution's commitment to preserve Indian cultural integrity. Mont. Const. art. X, § 1(2).

HB 562 authorizes governing boards that are only internally accountable, § 3(7), preventing existing, constitutional public school authorities, discussed *infra*, from correcting inconsistencies. *Id.* § 4(12). And privatized schools can raise money from private funding sources while continuing to extract money from public sources—and without any obligation to ensure equality in funding. *Id.* §§ 8–9; 15(1); 15(6)(b); *see Helena Elem. Sch.*, 236 Mont. at 55, 769 P.2d at 690 (spending disparities translate to denial of equal educational opportunity). Public School Plaintiffs are thus likely to succeed on Counts 5 and 6 of the Verified Complaint.

B. HB 562 subverts the constitutional roles of local boards of trustees and the Board of Public Education (Counts 1 and 2).

As part of the Constitution's public education framework, the framers established a dual system of public school oversight, forming a statewide Board of Public Education “to exercise general supervision over the public school system,” Mont. Const. art. X, § 9(3)(a), and reserving for local elected school boards “[t]he supervision and control of schools in each school district,” Mont. Const. art. X, § 8. By constitutional design, the Board of Public Education is the only agency at its level and of its kind for primary and secondary education. *See* Mont. Const. Conv., VI Verbatim Tr. at 2049–53 (Mar. 11, 1972); Mont. Const. art. X, § 9. It is authorized to

“exercise general supervision over the public school system and such other public educational institutions as may be assigned by law.” Mont. Const. art. X, § 9(3)(a). Like the Board of Regents, the Board of Public Education is delegated self-executing and independent authority, co-equal with the legislative and executive branches of government. *See Bd. of Regents of Higher Ed. v. State*, 2022 MT 128, ¶ 107–08, 409 Mont. 96, 512 P.3d 748 (“No reasonable rule of construction permits either body [the Legislature or the Board of Regents] to encroach upon or exercise the powers constitutionally conferred upon the other. . . . Exercise of the legislative power to undermine the constitutional powers of the Board [of Regents] cannot stand.”); *Bd. of Pub. Ed. v. Judge*, 167 Mont. 261, 263, 266–69, 538 P.2d 11 (1975) (rejecting a legislative attempt to transfer authority over vocational education from the Board of Public Education to the State Board of Education because the Legislature may not alter the Constitution’s delegation of power to the Board of Public Education).

Local school boards play a similarly deliberate, essential constitutional role. The framers carefully delegated local “supervision and control” to “a board of trustees to be elected as provided by law.” Mont. Const. art. X, § 8 (emphasis added). They explained that, given the Board of Regents’ autonomy, “we should give constitutional recognition and status to the local boards[,] to[o]—first of all, to allay the fears which have been expressed . . . concerning the preservation of local autonomy; and secondly, to give parallel treatment to the governing boards of the public schools, as well as the public universities and colleges.” Mont. Const. Conv., VI Verbatim Tr., at 2046 (Mar. 11, 1972) (Del. Heliker) (emphasis added); *see id.* at 2047 (“[O]ur local school boards

certainly should have constitutional status.”) (Del. Johnson); *id.* at 2051 (Article X, § 8 guarantees “control by the local board at the local level”; the decision to omit “control” from the Board of Public Education’s powers was intentional and meant to prevent any argument that the Constitution grants “additional powers to the state board at the expense of the local school boards”) (Del. Champoux).

Accordingly, the framers used the word “control” to “emphasize that [they] want[ed] the local public school boards to have as much power as possible.” Mont. Const. Conv., VI Verbatim Tr., at 2050 (Mar. 11, 1972) (Del. Champoux). Local institutions are as much the product of intentional constitutional design as the Board of Public Education and the Board of Regents, and the decision to reserve their control is unmistakably purposeful. *See, e.g., id.* at 2047 (Del. Champoux) (by using only the word “supervise” in reference to the Board of Public Education, the framers intended to show that they “want local control to remain with the local school districts”).

First, HB 562’s commission fully seizes the Board of Public Education’s powers and duties. It is flatly unconstitutional for the Legislature to redistribute the Board’s powers to another entity—particularly one unsupervised by the Board and unanticipated by the Constitution. *Bd. of Pub. Educ. v. Judge*, 167 Mont. 261, 268–269 (1975) (legislature barred from transferring responsibility for vocational education from the Board of Public Education to the State Board of Education).

Second, privatized school governing boards usurp the authority to supervise and control local public schools that is constitutionally delegated to local school boards. *See* HB 562, § 3(7). Just like the Board of Public Education and the Board

of Regents, local public school boards are creatures of the Constitution, and the Legislature cannot disrupt, redistribute, or otherwise alter their authority. Mont. Const. Conv., VI Verbatim Tr., at 2046 (Mar. 11, 1972) (Del. Heliker) (“[W]e should give constitutional recognition and status to the local boards.”).

Public School Plaintiffs are likely to succeed on the merits of Counts 1 and 2.

C. HB 562 violates the rights to public office eligibility and of suffrage.

The Montana Constitution includes the right of suffrage among citizens’ fundamental rights, requiring that “[a]ll elections . . . be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Mont. Const. art. II, § 13; see *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 52, 310 Mont. 123, 54 P.3d 1 (“The rights included within this ‘Declaration of Rights’ are ‘fundamental rights.’”). It also provides that “any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector,” Mont. Const. art. IV, § 2, and “any qualified elector is eligible to any public office,” Mont. Const. art. IV, § 4.

Both the Montana and United States Constitution protect against discrimination. U.S. Const. amend. XIV; Mont. Const. art. II, § 4. Because of the primacy of the right to vote, the state and federal equal protection clauses generally translate to strict scrutiny of any law denying enfranchisement to otherwise qualified voters. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); see also *Sadler v. Connolly*, 175 Mont. 484, 575 P.2d 51 (1978).

HB 562 limits the qualified electors who may participate in electing governing boards—the *ultra vires* equivalent of local public school boards of trustees under Mont. Const. art. X, § 8—to “parents and guardians of students enrolled in the school and the choice school’s employees.” HB 562, § 14(1)(f)(i). Like unconstitutional freeholder requirements that tie voter eligibility to property ownership, this limitation is unconstitutional under both the federal and Montana Constitutions. *Cf. Sadler*, 175 Mont at 487–88, 575 P.2d at 53–54 (1978) (“[I]t seems impossible to discern any interest the [freeholder] qualification can serve. It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools . . . or a state and federal taxpayer contributing to the approximately 85% of the . . . annual school budget derived from sources other than the board of education’s own [property] taxes.”) (emphasis added) (quoting *Turner v. Fouche*, 396 U.S. 346 (1970)).

Local school board elections—and purportedly parallel governing boards—must be equally open to all interested, qualified voters. *See, e.g., Kramer*, 395 U.S. at 632–33 (rejecting eligibility classifications excluding non-parents from school board elections); *see also Ball v. James*, 451 U.S. 355, 366 & n.11 (1981) (collecting cases and reasoning that laws “tying voter eligibility to land ownership” are often invalid in elections for bodies that “administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or

welfare services”) (emphasis added). Public School Plaintiffs are likely to succeed on the merits of Counts 3 and 4.

II. Public School Plaintiffs face imminent, irreparable injury.

“It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Mont. Democratic Party v. Jacobsen*, 2022 MT 184, 410 Mont. 114, 518 P.3d 58 (interference with the right of suffrage sufficient to constitute irreparable injury for purposes of preliminary injunction); *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 60, 409 Mont. 378, 515 P.3d 301 (recognizing irreparable injury from interference with a constitutional right). Ongoing constitutional violations produce injuries that “cannot effectively be remedied by a legal judgment.” *City of Billings v. Cty. Water Dist. of Billings Heights*, 281 Mont. 219, 231, 935 P.2d 246, 253 (1997). HB 562 violates Public School Plaintiffs’ constitutional rights in several distinct but interrelated ways, each of which creates a likelihood of immediate, irreparable harm.

First, HB 562 undermines Public School Plaintiffs’ right to equal educational opportunity by exempting private charter schools from all accreditation and qualification standards, consistent curriculum, and basic health and safety laws contained in Title 20. *See supra* Part I, A. As parents, teachers, and community stakeholders, Public School Plaintiffs suffer directly from the loss of equality and quality in their local schools. Jessica Felchle, for example, teaches in the Billings Public School District and has two children attending public school in Laurel. Compl.

¶¶ 9–10. Proponents of HB 562 have identified Billings as a target for early privatization efforts. Decl. of Suzanne McKiernan, ¶¶ 7–8 (June 14, 2023). Felchle will personally suffer lost resources in her classroom if plans to found privatized schools in the Billings area go forward. Compl. ¶ 9. Moreover, her children will suffer similar losses in their more rural school district, which could lose students to virtual schools or to schools physically located in Billings. *Id.* ¶¶ 10, 71; HB 562, §§ 14–15. HB 562 also injures Public School Plaintiffs by allowing privatized schools to continue receiving public funding on a per-pupil basis regardless of how much private money the privatized schools raises. HB 562, § 15. These concrete, constitutional injuries also present imminent financial and substantive educational harm.

Second, HB 562 violates Public School Plaintiffs’ rights of suffrage and to equal protection, as guaranteed under both the Fourteenth Amendment and Montana’s Article II, § 4 by limiting eligibility to vote in governance board elections. *See supra* Part I, C; HB 562, § 14(1)(i). No plaintiff will be allowed to participate in HB 562’s governing board elections because Public School Plaintiffs do not plan to participate in privatized schools. *See generally* Compl. ¶¶ 9–38. This is a separate constitutional violation that is enough on its own to show irreparable harm. *See, e.g., Driscoll v. Stapleton*, 2020 MT 247, ¶ 23–24, 401 Mont. 405, 473 P.3d 386 (affirming district court’s ruling that interference in the right to vote was sufficient to support issuance of a preliminary injunction).

Public School Plaintiffs’ injuries are also imminent because at least one privatization activist group already has a meeting planned for June 22, 2023.

McKiernan Decl. ¶ 9, Ex. 1. Moreover, the law contemplates building state infrastructure beginning in approximately two weeks, on July 1, 2023. HB 562, § 18.

III. The balance of equities and public interest weigh in favor of Public School Plaintiffs.

The balance of the equities and the public interest “merge into one inquiry when the government opposes a preliminary injunction.” *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021). The balance of equities “concerns the burdens or hardships to [Plaintiffs] compared with the burden on Defendants if an injunction is ordered,” while the public interest “mostly concerns the injunction’s impact on nonparties.” *Id.* (citing *Bernhardt v. L.A. Cty.*, 339 F.3d 920, 931 (9th Cir. 2003)) (cleaned up).

These factors weigh decidedly in Public School Plaintiffs’ favor. First, the balance of equities tips sharply toward Public School Plaintiffs because the State can suffer no harm from maintaining the existing, constitutional system of public education oversight and funding. Defendants, on the other hand, will not be harmed by an injunction that maintains the status quo, as the government “cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns.” *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Second, injunctive relief would serve the public interest by vindicating Montanans’ constitutional rights to quality public education, suffrage, and equal protection. *Am. Beverage Co. v. City & Cty. of S.F.*, 916 F.3d 749 (9th Cir. 2019) (“It is always in the public interest to prevent the violation of a party’s constitutional rights.”).

Accordingly, Public School Plaintiffs are entitled to a preliminary injunction to prevent HB 562 from taking effect during the pendency of this litigation. They are likely to succeed on the merits; irreparable harm will occur if the Court does not grant the requested relief; and the balance of equities and public interest weigh in their favor. *See* § 27-19-201(4), MCA (as amended).

IV. *Ex Parte* Relief Is Justified

Public School Plaintiffs seek an *ex parte* temporary restraining order as permitted under § 27-19-315, MCA. Public School Plaintiffs provided notice to all State Defendants on June 14, 2023. The law's imminent effective date does not allow meaningful time for the State to respond before Public School Plaintiffs will begin to suffer irreparable injury on July 1, 2023—the date chosen by the State as HB 562's effective date. A hearing likely cannot proceed in time to prevent the irreparable harm that HB 562 will cause when implemented. Irreparable injury will result unless the Court grants a temporary restraining order to maintain the status quo until the Court can conduct a hearing on Public School Plaintiffs' request for a preliminary injunction.

CONCLUSION

For the reasons set forth above, Public School Plaintiffs respectfully request this Court issue a temporary restraining order enjoining enforcement of HB 562, set a hearing on Public School Plaintiffs' motion, and, following a hearing, enter a preliminary injunction.

Respectfully submitted this 14th day of June, 2023.



Rylee Sommers-Flanagan
Niki Zupanic
Constance Van Kley
Upper Seven Law

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above was duly served upon the following on the 14th day of June, 2023, by email and by process server.

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Attorneys for Plaintiffs

**MONTANA FIRST JUDICIAL DISTRICT COURT,
 LEWIS & CLARK COUNTY**

JESSICA FELCHLE; BEAU WRIGHT; the
 MONTANA QUALITY EDUCATION
 COALITION; THE LEAGUE OF WOMEN
 VOTERS OF MONTANA; SHARON
 CARROLL; SUZANNE MCKIERNAN;
 LINDA ROST; PENELOPE COPPS; LANCE
 EDWARD; and CORINNE DAY,

Plaintiffs,

v.

STATE OF MONTANA; GREG GIANFORTE,
 in his official capacity as GOVERNOR OF THE
 STATE OF MONTANA; and ELSIE
 ARNTZEN, in her official capacity as
 SUPERINTENDENT OF PUBLIC
 INSTRUCTION,

Defendants.

Cause No.:

**Declaration of
 Suzanne McKiernan**

I, Suzanne McKiernan, submit the following declaration in this matter, as allowed
 by Mont. Code Ann. § 1-6-105:

1. I am over the age of eighteen years, am competent to testify as to the matters
 set forth herein, and I make this declaration based upon my personal
 knowledge and belief.

2. I am a resident of Billings, Montana. I own a home within Blue Creek School District and pay property taxes that, in part, fund public schools and public school students in my area.
3. I have been a strong supporter of public schools for all of my adult life. I was an active classroom volunteer, parent advisory board member, and school board member when my two children attended public schools in Colorado.
4. Even after my children graduated from school, and I moved to Montana, I continued my commitment to supporting public education by regularly volunteering at my local elementary school, Blue Creek School, and serving two terms on the Board of Trustees of Blue Creek School District.
5. I have been a registered voter in Yellowstone County since 1999 and am a qualified elector for the Board of Trustees for each of my local school districts: the Blue Creek School District and Billings High School District. I have consistently voted in local school district elections and plan to continue being an active and engaged voter in my districts.
6. Since House Bill 562 (“HB 562”) was passed, I have learned of existing efforts to establish privatized schools in Billings and other parts of the state.
7. On May 30, local news station KTVQ ran a news segment and posted an accompanying article on its website. In an interview, Trish Schreiber, a privatized school advocate, spoke about setting-up new schools under HB 562 and identified Billings as one of the areas that has been “the most proactive with parents and people interested in doing this.” Jackie Coffin, *Charter*

school groups eye Billings surrounding school districts as new law passes, KTVH (May 30, 2023) available at <https://www.ktvq.com/news/local-news/charter-school-groups-eye-billings-surrounding-school-districts-as-new-law-passes>.

8. I also visited the website for Community Choice Charter Schools for Montana and found a list of events happening this summer, including a meeting on “how to create a Choice School from the community up” on June 22, 2023—more than a week before HB 562 even goes into effect. A true and correct copy of the website identifying this information is attached as Exhibit 1.
9. HB 562 will be implemented quickly: the community choice school commission members must be appointed by August 30, 2023, and the commission must convene and approve bylaws and officers by December 28.
10. HB 562’s fiscal impacts begin immediately, as commission members are entitled to expense reimbursement, may hire staff, and may receive services from the Board of Public Education.
11. Once the commission is convened, it may begin authorizing schools and providing for their funding, and privatized schools may officially start operation as early as July 1, 2024.
12. Because I will not be an employee or parent of a student at a privatized school, HB 562 will preclude me from voting in governing board elections for any privatized school authorized in my community.

13. If HB 562 takes effect on July 1, 2023, it will cause me irreparable harm by denying me my constitutionally protected rights to community-centered quality public education, popular sovereignty, self-governance, suffrage, and equal protection.

I declare under penalty of perjury that the statements above are true and correct.

DATED this 14 day of June, 2023, in Billings, Montana.

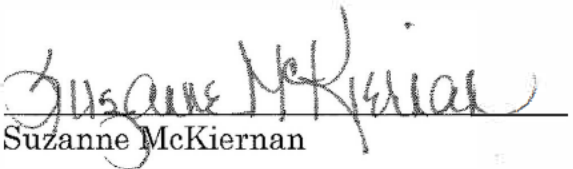

Suzanne McKiernan

Exhibit 1

Community Choice Charter Schools for Montana



[Home Page](#) [In the News](#) [Events](#)

Contact Us

[Reasons Why Charters Are Right for MT](#)

[Read the Bill](#) [Sign the Petition](#)

[MT School Performance Statistics](#)

[More on School Choice](#)



**Community Choice
Charter Schools**

A Local Discussion

Ask questions, share ideas, connect with
neighbors about how to create a Choice
School from the community up

Thursday, June 22nd
6:30 p.m. at the
Community Room
2510 U.S. Hwy 2 East
Kalispell

Light Catering and Refreshments
Family Friendly
CommunityChoiceSchools.org



June 23, 2023

***Community Choice Schools, HB562: the best charter school
legislation to empower students, parents, teachers and communities,
A Discussion***

Hosted by Kalispell Pachyderm Club

Red Lion Hotel 30 N Main Street @ noon

\$12 Lunch, everyone is welcomed to join

August 9, 2023

***Community Choice Schools, HB562: the best charter school
legislation to empower students, parents, teachers and communities,***

A Discussion

Hosted by Rotary Club of Missoula

Missoula Country Club @ noon

***\$20 for lunch, everyone is welcome to join, but head count is
necessary***

Contact us to RSVP

Community Choice Charter Schools for Montana

“...schools exist for ***the education of children***. Schools do not exist to provide iron-clad jobs for teachers, billions of dollars in union dues for teachers unions, monopolies for educational bureaucracies, a guaranteed market for teachers college degrees or a captive audience for indoctrinators.”

-Thomas Sowell, Charter Schools and Their Enemies (pg. 130)

Contact

PublicCharters4MT@gmail.com

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