

September 13, 2000

**No. 8273**

This opinion is issued in response to questions from Greg McMurdo, Executive Legal Officer, Oregon Department of Education, about public charter schools.

**FIRST QUESTION PRESENTED**

Under ORS chapter 338, may a public charter school contract out its operations to a private, for-profit entity?

**ANSWER GIVEN**

Yes. Assuming that the contract is consistent with the terms of the charter and all applicable laws, a public charter school may contract with a private, for-profit entity to operate the school. Unless the contract ensures that the public charter school remains accountable as described in the discussion of question 2 below, however, the contract will be unlawful.

**SECOND QUESTION PRESENTED**

What constitutional restrictions apply to a public charter school contracting out its operation to a private for-profit entity?

**ANSWER GIVEN**

Because a public charter school is a government entity, when contracting out its operations to a private, for-profit entity, a public charter school must retain a right of control over the for-profit entity and provide procedural safeguards to affected members of the public in relation to those aspects of the school's operations that constitute the governmental function of providing a public education.

### THIRD QUESTION PRESENTED

Must a public charter school be a tax exempt organization under section 501(c)(3) of the Internal Revenue Code (a) at the time of application, or (b) at the time of sponsor approval?

### ANSWER GIVEN

No.

#### I. Statutory Contracting Authority

ORS 338.115(8) provides a broad grant of contract authority to a public charter school. It states:

(8) A public charter school may enter into contracts and may lease facilities and services from a school district, education service district, state institution of higher education, other governmental unit or any person or legal entity.

On its face, this statute permits a public charter school to contract with “any person or legal entity.” Thus, ORS 338.115(8) would necessarily authorize a public charter school to contract with a for-profit entity that is legally authorized to engage in business in Oregon. The practice of public educational entities’ contracting with for-profit entities for services, including direct services to children, is well established. For example, many school districts contract with for-profit entities for food, transportation and special and alternative education services. *See* ORS 336.631(1)(f), (4) (referencing contracts between school district and private alternative program).<sup>1/</sup> Had the legislature wanted to restrict public charter schools’ contracting authority to certain types of contractors or to certain kinds of services, it could have done so.

Consequently, we conclude that, unless other statutes restrict the contracting authority of public charter schools, ORS 338.115(8) authorizes a public charter school to contract with any legal entity for any purpose consistent with the public charter school law. We now review other statutes that apply to public charter schools to determine if the broad contracting authority granted by ORS 338.115(8) is limited by other statutes.

ORS 338.035(6)(a) prohibits the State Board of Education (State Board) and school district boards from approving the conversion of a tuition-based private school to a public charter school. The question then is whether this prohibition means that a public charter school may not contract with a private for-profit entity for some or all educational and administrative functions. We do not read the prohibition in ORS 338.035(6)(a) to mean any more than it says. By its terms, this statute does not prohibit a public charter school from contracting with a for-profit entity. Moreover, ORS 338.035(6)(b) expressly permits alternative education programs, public or private, to be converted to public charter schools. Therefore, we do not find any basis in ORS

338.035(6) to conclude that a public charter school may not contract with a for-profit entity for any or all educational or administrative services.<sup>2/</sup>

ORS 338.045 requires a public charter school applicant's proposal to contain numerous items. None of the listed items compels the applicant to identify contracts for services. Although a description of staff members and teacher qualifications must be reported, ORS 338.045(2)(p), there is no requirement in this section that teachers and staff be public employees. Nothing in this statute suggests that contracting with a for-profit entity for any or all educational or administrative services is prohibited.

ORS 338.055 specifies the criteria that a school district must use to evaluate a charter proposal. ORS 338.055(2)(c) and (d) require the district to determine the capability of the "applicant" to provide comprehensive instructional programs to regular and academically low achieving students. The phrasing of these requirements does not expressly or implicitly require the applicant itself to perform the instructional services. We conclude an applicant can demonstrate capability to render the necessary educational programs without being required to perform those services with its own employees. For example, a public charter school might choose to contract with an education service district for certain services, instead of providing these services in-house. Consequently, we do not interpret ORS 338.055 as restricting the authority of a public charter school in contracting with a private for-profit entity for educational programs.

ORS 338.115 lists the laws applicable to public charter schools. This statute does not materially affect the analysis of public charter school contracting authority. The requirements in this statute cannot be waived and apply to the public charter school regardless of whether services are contracted. Failure to comply with those statutes, directly or through its contractor, would be grounds for terminating the charter.<sup>3/</sup> ORS 338.105(1)(a), (c).

ORS 338.135 relates to public charter school employment (including teachers and administrators), leaves of absence granted to school district employees who choose to work in a public charter school, the public charter school's participation in the Public Employee Retirement System, and collective bargaining rights of a public charter school's employees. Although ORS 338.135 anticipates that a public charter school will have employees (either school district employees on leave or independently employed individuals), nothing in this statute requires a public charter school to provide any particular services by employees rather than by contractors. ORS 338.135(3) and (4) protect the rights of public employees who are selected for employment by the public charter school and who leave sponsoring district employment to work in public charter schools. However, the law does not require a public charter school to hire sponsoring district employees, does not extend statutory transfer rights (ORS 236.605 to 236.640) to sponsoring district employees and does not affirmatively require the public charter school to employ any person.

ORS 338.135(5) provides that a public charter school shall be considered a public employer and must participate in the Public Employee Retirement System. This provision does not require a public charter school to employ any person, but instead to properly account for individuals who are employed.

ORS 338.135(7)(b) requires “[a]ny person employed as a teacher *in* a public charter school to be licensed or registered to teach by the Teacher Standards and Practices Commission.” (Emphasis added.) This provision does not require teachers to be employed *by* a public charter school. It ensures that anyone employed to teach *in* a public charter school, whether by the school or by a contractor, will be held to the same qualifications.

Finally, ORS 338.135(8) provides that employees at a public charter school may be represented by a labor organization, but this does not require teachers to be public employees nor does it necessarily preclude the contracting out of services previously performed by public employees.<sup>4/</sup>

Thus, we do not find in ORS 338.135 any curtailment of the contracting authority granted to public charter schools in ORS 338.115(8). Accordingly, we conclude that ORS 338.135 does not prohibit the contracting for any or all education or administrative services by a public charter school.<sup>5/</sup>

The intent of ORS chapter 338 is to allow the creation of public charter schools “as a legitimate avenue for \* \* \* new, innovative and more flexible ways of educating children within the public school system.” ORS 338.015. The legislature directed that the provisions of ORS chapter 338 “should be interpreted liberally to support the goals of this section.” *Id.* We have found no statutes that limit the broad contracting authority granted to public charter schools in ORS 338.115(8). Accordingly, we conclude that under ORS chapter 338, a public charter school may contract with a for-profit entity to operate the school if the terms of the contract are consistent with the terms of the charter and all applicable laws. Unless the contract ensures that the public charter school remains accountable as described in the discussion in Part II, below, however, the contract will be unlawful.

## **II. Constitutional Limitations**

We have been asked to identify the extent to which a for-profit entity may operate a public charter school. In response to question 1, we concluded that ORS chapter 338 permits a public charter school to contract out operational responsibilities. Having resolved the statutory interpretation question, we next consider whether contracting out a public charter school’s operational responsibilities to a for-profit entity would violate the Oregon Constitution because it would result in the loss of governmental accountability for the performance of governmental functions. To answer this question, we must first determine if public charter schools perform governmental functions. If they do, we must then determine the elements that must exist in the relationship between the public charter school and its for-profit contractor to ensure that the public charter school remains accountable for the governmental functions delegated to the contractor.

### **A. Governmental Nature of Public Charter schools**

To determine whether public charter schools perform governmental functions, we first consider whether public charter schools are public or private schools. The legislature is

cognizant of the distinction between private and public means of education, and refers to private means of education when it so intends. *See, e.g.*, ORS 336.615 to 336.665 (providing for private as well as public alternative programs) and ORS 345.505 to 345.565 (providing for registration of private elementary and secondary schools). In ORS chapter 338, the legislature deliberately used the term “public charter schools” and provided for their creation as part of the public school system. ORS 338.015 specifies that the intent of ORS chapter 338 is for public charter schools to be a means of creating more flexible ways of educating children “within the public school system” and to “serve as models and catalysts for the improvement of *other* public schools.” (Emphasis added.) ORS 338.095(3) authorizes the State Board to require public charter schools to provide information for inclusion in the Oregon Report Card, which relates only to public schools. *See* ORS 329.115. A review of ORS chapter 338 shows no intent by the legislature for public charter schools to be considered anything other than public schools within the public school system.

Concluding that public charter schools are public schools, we look to case law for an understanding of the significance of this conclusion. Early in the last century, the Oregon Supreme Court, in holding that a school district has the capacity to receive property by will, stated that “under our form of government the conduct of the public schools is a governmental function.” *Vestal v. Pickering*, 125 Or 553, 557, 267 P 821 (1928). A few years later, the court said:

It is unquestionably the function of government to establish and maintain public schools. Indeed, the Constitution of Oregon, Art. VIII, Sec. 3, specifically commits to the legislative assembly the “establishment of a uniform and general system of the public schools.”

*Campbell v. Aldrich*, 159 Or 208, 218, 79 P2d 257 (1938) (holding that legislature had authority to mandate retirement of public school teachers age 65 or older). The court again addressed whether public schools perform governmental functions in deciding whether a public school teacher who served in the state legislature violated the separation of powers restriction in the Oregon Constitution, Article III, section 1.<sup>61</sup> *Monaghan v. School Dist. No. 1, Clackamas County*, 211 Or 360, 315 P2d 797 (1957), *superseded by* Or Const Art XV, § 8. After concluding that the appellant, Thomas Monaghan, was charged with official duties as a legislator, the court decided that he violated Article III, section 1 because, as a public school teacher, he exercised the functions of the executive branch of government.

Looking at the legislature’s duty under Article VIII, section 3, to “provide by law for the establishment of a uniform, and general system of Common schools,” the court stated that education is “a governmental obligation of the state” and characterized education as “an administrative function of the executive department.” *Monaghan*, 211 Or at 373, 375. The court reaffirmed its conclusions regarding the governmental nature of public education in 1979, when it held that a judge who taught college classes violated Article III, section 1, because “a part-time teacher regularly employed for compensation by a state-funded college to perform the duties of a teacher \* \* \* performs ‘functions’ of the executive department of government.” *In the Matter of Sawyer*, 286 Or 369, 378, 594 P2d 805 (1979).

While the issue in *Monaghan* was the nature of the functions performed by a public school teacher, the setting within which that teacher performs is the public school. In *Monaghan*, the court analyzed public education within the framework of school districts, the unit of the system of common schools established by the legislature, rather than individual public schools, concluding that a school district “acts wholly as a governmental agency when performing duties imposed by statute.” *Monaghan*, 211 Or 374. Because individual schools within a school district are the resource through which a school district provides education to the state’s children, we believe that the court’s conclusions regarding the governmental nature of education and the functions performed by school districts and public school teachers are equally applicable to individual public schools.

In light of the fact that ORS chapter 338 provides for public charter schools to be public schools operating as a part of the public school system, we conclude that public charter schools perform the executive department’s administrative function of educating the state’s children.

Not all aspects of operating a public school fall within the governmental function of providing a public education. Janitorial services are one example of an operational responsibility that does not involve a governmental function. Without determining the governmental nature of all school operations, it is clear that some responsibilities in operating a public school are governmental functions in that they go to the essence of providing a public education to students. In *Monaghan*, the court said that “[i]t is through the teacher, not the school district, that the state’s standards of educational excellence are disseminated. When so engaged, they are exercising one of the functions of the executive department of our state government.” 211 Or at 376.

We conclude, in relation to the operation of public charter schools, that, at a minimum, the following are governmental functions: developing and modifying the curriculum, ensuring appropriate instruction consistent with the approved curriculum, and making decisions affecting a student’s access to education, such as disciplinary decisions contemplating suspension or expulsion.<sup>71</sup>

## **B. Public Charter School’s Accountability for Governmental Functions Contracted Out to a Non-profit Entity**

As a public school performing the governmental function of providing a public education, a public charter school’s ability to delegate that function in part or in whole to private, for-profit entities is restricted. Relying on Oregon Supreme Court cases addressing delegation, the Oregon Court of Appeals held that a rule promulgated by the Oregon Liquor Control Commission (OLCC) giving Class A licensees partial control over OLCC decisions regarding the permit applications submitted by Class B licensees was an invalid delegation of government authority to private entities.<sup>81</sup> *Corvallis Lodge No. 1411 Loyal Order of Moose v. OLCC*, 67 Or App 15, 22, 677 P2d 76 (1984). The court held the rule invalid because it did not provide “procedural safeguards to protect against the unaccountable exercise of governmental power delegated to the Class A licensees.” *Id.* (citations omitted).

In reaching its decision in *Corvallis Lodge*, the court concluded that the Supreme Court had developed “a general ‘nondelegation’ doctrine that emphasizes the need for legislative standards as a precondition for the delegation of any governmental function.” *Id.* at 19 (citing *General Electric Co. v. Wahle*, 207 Or 302, 330, 296 P2d 635 (1956); *Foeller v. Housing Authority of Portland*, 198 Or 205, 265, 256 P2d 752 (1953); and *Van Winkle v. Fred Meyer, Inc.*, 151 Or 455, 463, 49 P2d 1140 (1935)). In 1960, the Supreme Court modified the doctrine to require that adequate “procedural safeguards to protect against arbitrariness,” rather than standards, accompany the delegation of governmental functions. *Id.* at 20 (citing *Warren v. Marion County, et. al.*, 222 Or 307, 314, 353 P2d 257 (1960)). While the cited Supreme Court precedents address the delegation of legislative authority, i.e., authority to promulgate general standards of future effect, the court in *Corvallis Lodge* appears to consider the principles governing delegation in those cases to be equally applicable to a government entity’s delegation of administrative authority to a private entity.<sup>9/</sup>

The *Corvallis Lodge* court concludes that “[a]ccountability of government is the central principle running through the [Supreme Court’s] delegation cases.” *Id.* at 20. We believe that “accountability” as used in *Corvallis Lodge* means that the government entity must retain the authority necessary to exert control over the private entity’s execution of delegated governmental functions. Based on the *Corvallis Lodge* court’s application of Supreme Court precedents to the delegation of governmental functions by an executive agency to private entities, we also believe that to remain accountable requires the government entity to provide safeguards that may be invoked by persons affected by the contractor’s actions.

To summarize, in order for a public charter school’s contracting out of the school’s operations to a private, for-profit entity to be constitutional, the public charter school must maintain a right of control over delegated governmental functions and provide safeguards for those affected by the contractor’s actions.<sup>10/</sup> We discuss both of these necessary elements for delegation below.

## 1. Right of Control

To maintain government accountability for a contractor’s exercise of governmental functions requires that the public charter school maintain a right of control over the contractor’s decisions. Maintaining a right of control means that the public charter school cannot treat its contractor as an independent contractor with respect to the contractor’s exercise of governmental functions. The public charter school, instead of the contractor, must retain the ultimate authority to make decisions about governmental functions. Because Oregon case law does not discuss in any detail the right to control that a government entity must maintain when delegating responsibility to private, for-profit entities, we have reviewed federal cases to gain insight into the issue.

In considering the adequacy of an environmental impact statement (EIS) that federal law required be prepared by the Army Corps of Engineers in relation to possible construction in Galveston Bay and the Port of Galveston, the Fifth Circuit Court of Appeals considered whether the Corps had improperly delegated preparation of the EIS to a private entity. *Sierra Club v.*

*Sigler*, 695 F2d 957, 962 n 3 (5<sup>th</sup> Cir 1983). While the Sierra Club did not allege an improper delegation, the facts of the case caused the court to raise the following concern:

This record leaves us with the distinct impression that most, if not all, of the preparation of the [EIS] was done by the private consulting firm hired by the applicants [for a permit to do the construction]. While the Corps ostensibly was supervising, we are concerned by the relatively brief time the Corps was given to review and comment on the documents, and the degree of thoroughness of the Corps' review and supervision.

*Id.* Without deciding the issue, the court went on to say that it would be impermissible for the Corps to simply “rubberstamp” a private consultant’s work. *Id.* (citing *Sierra Club v. Lynn*, 502 F2d 43, 58-59 (5<sup>th</sup> Cir 1974), *cert den*, 412 US 994, 95 S Ct 2001, 44 L Ed2d 484; 422 US 1049, 95 S Ct 2668, 45 L Ed2d 701 (1975) (“permitting a ‘financially interested private contractor’ to participate in EIS preparation, but barring agency abdication of its duties by ‘reflexively rubberstamping a statement prepared by others’”).

In an antidumping case, the U.S. Court of International Trade had to decide whether the International Trade Administration (ITA) could completely delegate to the Federal Reserve Bank of New York (NY Fed) the ITA’s authority to select an appropriate exchange rate for use in a fair value investigation. *Pistachio Group of the Ass’n of Food Industries, Inc. v. U.S.*, 671 FSupp 31, 11 C.I.T. 668 (1987). The court found that, although subject to supervision by the Board of Governors of the Federal Reserve System, the NY Fed “is also a private corporation whose stock is owned by the member commercial banks within its district.” *Id.* at 35. While the court concluded that the ITA was authorized to delegate the calculation of exchange rates, it held that the ITA could not “abandon” the decision to the NY Fed, leaving the NY Fed’s calculation “isolated from all types of review, administrative or judicial, merely for reasons of convenience.” *Id.* at 36. Distinguishing delegation of authority within a government entity from delegation to a private entity, the court stated:

Presumably there is accountability if the decision is made within the same agency.  
\* \* \* The courts have consistently required subdelegation of significant functions to be checked by some form of review, either within the agency itself, or ultimately by the courts. Lower level procedural decisions generally require less oversight than decisions which affect the substantive rights of regulated parties, or which embody the agency’s most potent use of its discretionary authority.

*Id.*

Issues raised by the federal courts in the *Sierra Club* and *Pistachio* cases suggest two concerns that an Oregon court is likely to have in assessing a public charter school’s retention of a right to control a private, for-profit contractor to which it has delegated governmental functions. First, a public charter school must be able to demonstrate that it retains final decision-making authority, at least by retaining a right to review its contractor’s decisions. For example, we do not believe that a public charter school could leave to the contractor’s discretion, subject only to conformance with applicable law and the charter, whether, or how, to respond to parental

complaints regarding the teaching methodologies used by a particular teacher. If it did so, the public charter school would not be accountable for the performance of teachers in educating the school's children. This does not mean that the public charter school must direct its contractor's actions in such a situation. Rather, the public charter school must retain the right to step in if the school's governing body questions the appropriateness of the contractor's response.

Second, while the public charter school may concur in the contractor's decisions, the public charter school must be able to show that it independently considered those decisions rather than "rubberstamping" them. As in *Sierra Club*, a court may look at the amount of time the public charter school had to consider the contractor's proposed actions as well as "the degree of thoroughness" of the public charter school's review and supervision of its contractor. *Sierra Club*, 695 F2d at 962 n 3.

## 2. Procedural Safeguards

The Oregon Supreme Court in *Warren* judged the constitutionality of a delegation of legislative authority from the legislature to a county according to whether "the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by the administrative action." 222 Or at 314. In *Warren*, the legislature authorized the governing body of a county to establish a building code for that county. A county building inspector would then be responsible for enforcing the adopted code by comparing the construction of a building to the specifications of the code. The court found the statute to be constitutional because it required the county to establish an appeals procedure "so that persons dissatisfied with the building inspector's action \* \* \* may have that action reviewed by a separate administrative body." *Id.* at 315. The court found that the required appeals procedure was a "sufficient safeguard" for anyone wanting to dispute the county's enforcement of the building code. *Id.*

In *Corvallis Lodge*, the OLCC claimed that its rule provided adequate safeguards to Class B licensees because the ultimate decision as to whether to grant a permit remained with the OLCC. The court, however, found the procedural safeguards provided by the rule insufficient because Class A licensees could thwart a Class B licensee's attempt to get a permit. For example, there was no remedy in the OLCC rule for a Class B licensee to pursue if a Class A licensee delayed in providing the factual information necessary for the Class B licensee's permit application, thereby impairing or preventing the Class B licensee's ability to comply with the requirements of the OLCC rule. 67 Or App at 22.

Based on the Supreme Court's decision in *Warren*, and its application to the delegation of factfinding functions by an administrative agency to an interested private entity in *Corvallis Lodge*, we conclude that a public charter school must provide procedural safeguards to those persons affected by its contractor's execution of governmental functions. By supplying such safeguards the public charter school allows persons aggrieved by the contractor's actions to seek redress from the public charter school. Aggrieved persons could include teachers and other employees who carry out governmental functions on behalf of the contractor, students and the students' parents and guardians. For example, if a teacher employed by a contractor decided to assign her students a potentially controversial novel, such as THE ADVENTURES OF

HUCKLEBERRY FINN or CATCHER IN THE RYE, that was not among the texts included in the approved curriculum, the public charter school would need to have in place a procedure, ultimately independent of the contractor, by which a student or the student's parent could challenge the teacher's decision.

In sum, we conclude that a public charter school is a government entity. We further conclude that, when contracting out its operations to a private, for-profit entity, a public charter school must (1) retain a right of control over the for-profit entity, and (2) provide procedural safeguards to affected members of the public in relation to those aspects of the school's operations that constitute the governmental function of providing a public education. Failure to do so would result in the loss of governmental accountability for the performance of governmental functions, making the contract unlawful.

### **III. Tax Exempt Status**

We are also asked whether a public charter school must be a tax exempt organization under section 501(c)(3) of the Internal Revenue Code (a) at the time of application, or (b) at the time of sponsor approval. ORS 338.035(2) states:

(2) Before a public charter school may operate as a public charter school it must:

(a) Be approved by a sponsor;

(b) Be established as a nonprofit organization under the laws of Oregon;  
and

(c) Have applied to qualify as an exempt organization under section 501(c)(3) of the Internal Revenue Code.

This statute requires a public charter school to have "applied" to qualify as a tax exempt organization under section 501(c)(3) before it may operate as a public charter school. Based on the law's plain text a public charter school need not actually have been determined to be a tax exempt organization when applying or when approved by a sponsor.

Our interpretation is confirmed by the legislative history. When introduced as SB 100 in the 1999 legislature, there was no requirement that a public charter school either apply for, qualify for, or be approved as a federal tax exempt organization.

An amendment adopted by the Senate Committee on Education on January 25, 1999, and passed by the Senate on February 3, 1999, provided:

(2) Before a public charter school may operate as a public charter school it must:

(a) Be approved by a sponsor;

(b) Be established as a nonprofit organization under the laws of Oregon;  
and

(c) *Qualify* as an exempt organization under section 501(c)(3) of the Internal Revenue Code.

SB 100 (A-Eng) (emphasis added). Uncertainty about the delay in becoming “qualified” left the House Education Committee to consider and pass the SB 100-A67 amendments, which included the language that ultimately became ORS 338.035(2), requiring only that the public charter school “[h]ave applied to qualify” as an exempt organization. *See* Testimony, House Education Committee (SB 100), March 29, 1999, tape 79, side A at 190-255.

Thus, both the express language and the legislative history of ORS 338.035(2) lead to the conclusion that a public charter school may apply for and be approved by a sponsor without actually having qualified as a tax exempt organization under section 501(c)(3). An application may not be denied solely because the public charter school has not yet been determined to qualify for tax exempt status under section 501(c)(3) or because of a belief that the applicant may, at some point in the future, be found not to qualify for tax exempt status under section 501(c)(3).

#### IV. Status of Advice

This advice is provided for the benefit of the Oregon Department of Education and the State Board of Education. It is not intended as, and should not be considered, advice to anyone other than state officers acting in their official capacity.

HARDY MYERS  
Attorney General

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<sup>1/</sup> ORS 336.635(2) permits school districts that contract with private alternative programs for educational services to pay tuition for students at either the program’s actual costs or an amount at least equivalent to 80 percent of the district’s estimated current year’s average per student net operating expenditure, whichever is less.

<sup>2/</sup> If the for-profit entity were an existing tuition-based private school and the public charter school were contracting with the private school to conduct *all* of its operations, there might be a question as to whether that would be equivalent to a “conversion” of the tuition-based school to a public charter school, but we do not understand those to be the facts underlying the question presented to us.

<sup>3/</sup> Depending upon the scope of its contract, a contractor retained by a public charter school may be directly subject to certain of the statutes listed in ORS 338.115. *See Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994) (Public Records Law applies to an entity that is the “functional equivalent” of a public body).

<sup>4/</sup> A public employer may legally contract out services of current public employees as long as the requirements of the Public Employee Collective Bargaining Act, ORS 243.650 to 243.782, are met.

<sup>5/</sup> Interpreting ORS 338.135(5) to require that all services be performed by public employees would run contrary to the multitude of services currently being contracted by school districts under existing law. Today, many school districts contract for transportation and food services and special and alternative education services. If ORS 338.135 were read to require that services at public charter schools be performed by public employees, then public charter schools will be more curtailed in their contracting than existing school districts. This would violate the overall flexibility mandated in the statement of legislative intent of ORS 338.015.

<sup>6/</sup> Article III, section 1, provides: “The powers of Government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”

<sup>7/</sup> Plaintiffs challenging the constitutionality of California public charter school legislation posited as essential educational functions such items as “curriculum, textbooks, education focus, [and] teaching methods.” *Wilson v. State Board of Education*, 89 Cal Rptr 2d 745, 751 (1999) (holding state public charter school legislation constitutional).

<sup>8/</sup> The OLCC rule gave Class A licensees the authority “to ascertain facts that ultimately may determine the success or failure of the [Class B licensee’s permit] application.” *Corvallis Lodge*, 67 Or App at 20.

<sup>9/</sup> The plaintiffs in *Corvallis Lodge* based their constitutional challenge on Article I, section 21 (no law shall be passed “the taking effect of which shall be made to depend upon any authority, except as provided in the Constitution”), Article III, section 1 (requiring the separation of powers into three branches of government), and Article IV, section 1 (“The legislative power of the state \* \* \* is vested in a Legislative Assembly”). 67 Or App at 19 n 2. But the court held the rule invalid without citing to a particular constitutional provision. Because most of Oregon’s case law addressing delegation, beside *Corvallis Lodge*, examines delegation of legislative authority, it is difficult to predict which constitutional provision(s) a court would look to in scrutinizing a public charter school’s delegation of administrative functions to a private entity.

<sup>10/</sup> The conclusion that the public charter school must maintain a right of control over delegated governmental functions is consistent with federal legislation controlling the issuance of grants for charter schools. See 20 USC §§ 8061 to 8067. Federal grants are available for a “charter school” which has been defined by Congress, in part, as “a public school that \* \* \* is created by a developer as a public school, or is adapted by a developer from an existing public school, and is operated under public supervision and direction.” 20 USC § 8066(1)(B).