

2011

Tom Gregory v. Mark Shurtleff : Brief of Plaintiff/ Appellant

Utah Supreme Court

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Jerrold S. Jensen; Brent A. Burnett; Assistant Attorney General; Counsel for Defendants/ Appellees.
David R. Irvine; Janet I. Jenson; Jenson & Guelker; Alan L. Smith; Counsel for Plaintiffs/
Appellants.

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IN THE UTAH SUPREME COURT

Tom Gregory, <i>et al.</i> ,)	
)	
Plaintiffs/Appellants,)	
)	
vs.)	Sup. Ct. Dkt. No. 20110473-SC
)	
Mark Shurtleff, <i>et al.</i> ,)	
)	
Defendants/Appellees.)	

PLAINTIFFS'/APPELLANTS' OPENING BRIEF

**APPEAL FROM SUMMARY JUDGMENT ORDERS
ENTERED BY THIRD JUDICIAL DISTRICT COURT,
THE HONORABLE L. A. DEVER PRESIDING**

Counsel for defendants/appellees:

Jerrold S. Jensen
Brent A. Burnett
Assistant Attorneys General
160 East 300 South, Fifth Floor
P. O. Box 140858
Salt Lake City, Utah 84114

Counsel for plaintiffs/appellants:

David R. Irvine
747 East South Temple Street
Suite 130
Salt Lake City, Utah 84102

Janet I. Jenson
Jenson & Guelker, P.C.
747 East South Temple Street
Suite 130
Salt Lake City, Utah 84102

Alan L. Smith
1169 East 4020 South
Salt Lake City, Utah 84124

**FILED
UTAH APPELLATE COURTS**

AUG 26 2011

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747 East South Temple Street
Suite 130
Salt Lake City, Utah 84102

Alan L. Smith
1169 East 4020 South
Salt Lake City, Utah 84124

I. LIST OF PARTIES

The plaintiffs/appellants are: Tom Gregory, Glen E. Brown, A. Lamont Tyler, Marjorie Tuckett, Teresa Theurer, Jordan Tanner, Debbie Swenson, Carmen Snow, Marilyn Shields, Pat Rusk, Ronda Rose, Jack Redd, Georgia Peterson, Carole Peterson, Bonnie Palmer, Denis Morrill, Bill Moore, Sarah Meier, Rosalind McGee, Scott McCoy, Sheryl Allen, Dee Burningham, Kim Burningham, Carolyn White, Michael Jensen, Steven O. Laing, Judy Larson, Lisa Watts Baskin, David Hogue, Rebecca Chavez-Houck, Janice Fisher, Christine Johnson, Beth Beck, Mike Marsh, Karen Hale, Becky Edwards, Janet Cannon, and Steven C. Baugh.

The defendants/appellees are: Mark Shurtleff, in his official capacity as Attorney General for the state of Utah, Edward Alter, in his official capacity as Treasurer for the state of Utah, and Jeff Herring, in his official capacity as Executive Director of the Utah Department of Human Resource Management.

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IV. JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear and resolve this appeal pursuant to Utah Code, Section 78A-3-102(3)(j). The final order from which this appeal is taken was entered May 2, 2011. This was an order pursuant to Rule 56, Utah Rules of Civil Procedure, which denied the motion of plaintiffs'/appellants' (hereinafter simply "plaintiffs") for summary judgment and granted the motion of defendants'/appellees' (hereinafter simply "defendants") for summary judgment. The summary judgment dismissed counts three and four of plaintiffs' complaint, leaving no further claims pending for decision in the civil action. The notice of appeal from this final order was filed May 25, 2011.

V. STATEMENT OF ISSUES

The issue presented on this appeal is whether the lower court appropriately denied summary judgment to plaintiffs and granted summary judgment to defendants in relation to counts three and four of plaintiffs' complaint. Those counts of the complaint charged that an omnibus education bill enacted in the 2008 general session of the Utah State Legislature, SB 2 2d Substitute (hereinafter simply "SB 2" or "Omnibus Bill") unconstitutionally delegated powers to an administrative agency and to private parties which, under Article 10 of the Utah State Constitution, are vested in the Utah State Board of Education (hereinafter simply "USB E").

This is a question of law which is reviewed for correctness; no deference is given to the lower court's decision in this regard. *See, e.g., Wood v. University of Utah Medical Center*, 67 P.3d 436, 439 (Utah 2002).

The constitutionality of SB 2 was put at issue by plaintiffs' complaint which is in the record at R. 1-36. The question respecting unconstitutional delegation was raised by cross-motions for summary judgment which were briefed and re-briefed to the lower court. R. 309-410, 673-699, 752-754, 784-791, 795-822, 828-916 and 927-936. The lower court denied plaintiffs' motion and granted defendants' motion. R. 945-952. Plaintiffs thereafter filed their notice of appeal from this ruling. R. 955-957.

VI. IMPORTANT CONSTITUTIONAL PROVISION

The outcome of this appeal turns upon the application of Utah Constitution, Article 10, Section 3, when properly construed, to the provisions of SB 2. Article 10, Section 3, in pertinent part, provides as follows: "The general control and supervision of the public education system shall be vested in a State Board of Education. The membership of the board shall be established and elected as provided by statute." In view of its length, SB 2 is reproduced as Appendix A to this brief.

VII. STATEMENT OF THE CASE

An omnibus education bill known as SB 2 was enacted in the 2008 General Session of the Utah State Legislature. Lines 774 to 864 of SB 2 establish a so-called "Teacher Salary Supplement Program." The Program, as established in SB

2, is to be administered by the Utah Department of Human Resource Management ("UDHRM"). Lines 469 to 491 of SB 2 provide that the "mapping" and "alignment" of the "core curriculum" and "primary instructional matters" for school districts must be accomplished by an "independent party" and may not be performed by the "USBE". These portions of SB 2 offend Utah Constitution, Article 10, Section 3; they contravene the constitutional requirement that education programs remain subject to the "general supervision and control" of the USBE by transferring the administration of these matters to the UDHRM and unnamed private parties.

Plaintiffs stress on this appeal what the lower court overlooked or elided in its ruling below: (1) When the provisions of SB 2 are read together with the statutory provisions which establish and govern UDHRM, the unmistakable legal effect is both to assign administrative functions respecting the Teacher Salary Supplement Program to UDHRM and to exclude USBE from performing those functions or even supervising UDHRM in that role. (2) The provisions of SB 2 give the USBE rulemaking power to establish selection criteria for private parties to administer the Textbook Approval Program, but once those parties are selected, the legislation positively prohibits the USBE from either supervising or controlling the actual process which those parties undertake in mapping or alignment of textbooks. Please see Section 11 starting at page 17 of SB 2 which is reproduced as Appendix A to this brief. In case the lower court might miss the clear message which the legislature sent in these specific provisions, and in an abundance of

caution, plaintiffs submitted the Declaration of Denis R. Morrill, a member of the USBE, who testified that control and supervision of teacher salaries and textbook approvals were central to the powers and responsibilities of the USBE. The Morrill Declaration was submitted with plaintiffs' motion papers in the lower court and is reproduced as Appendix C to this brief for the convenience of the Court. This was the only evidence (aside from constitutional and statutory texts) which any party submitted in connection with the cross-motions for summary judgment below.

As noted above, in 2008, the Utah State Legislature passed SB 2 and Governor Huntsman signed that bill into law. Sections 19 and 20 of SB 2, found at lines 774 to 864 of the bill, establish and provide for the funding of a so-called Teacher Salary Supplement Program. This Program, touted by sponsors of the legislation as a major educational reform, provides for salary supplements for qualifying teachers. Administration of the Program is given to the UDHRM, not the USBE. That administration consists of providing for an internet-based application system, determining the eligibility of applicants, ascertaining whether applicants teach in the prescribed areas and verifying that information, where necessary, with school districts and school administrators, making determinations respecting the timing, amounts, and pro-ration of salary supplements, depending upon the applicant in question, and certifying this information to the Utah Division of Finance so that payments can be distributed consistent with these findings. In addition, if the cost of salary supplements exceeds appropriations to pay those

supplements, the UDHRM is granted discretion to "limit or reduce the salary supplements." The statute, however, does not impose any conditions on the exercise of this discretion. And although a variety of means to effect such limitations or reductions in salary is imaginable, no statutory guidance is given in this regard. The statute enjoins the USBE to "cooperate" with the UDHRM by providing or verifying teacher data and by making information technology resources available, but does not allow the USBE any other role in administering the Program, and, in particular, contemplates that the UDHRM, rather than the USBE, will make all discretionary judgments which may be required in the marshalling, allocation, and application of funds. This exclusion of the USBE from any controlling or supervisory role in connection with the Teacher Salary Supplement Program is underscored by the statutory provisions, outlined below, which establish and regulate the UDHRM.

The UDHRM is established pursuant to Utah Code, Section 67-19-5(1). The department is administered by an executive director who is appointed by the governor with consent of the Senate. Utah Code, Section 67-19-5(2)(a). The executive director is accountable to the governor for performance in office. Utah Code, Section 67-19-5(2)(b). The executive director "shall have full responsibility and accountability for the administration of the statewide human resource management system." Utah Code, Section 67-19-5(4)(a). With exceptions not pertinent here, no agency may perform human resource functions without the consent of the executive director. Utah Code, Section 67-19-5(4)(b). In this

respect, the term "agency" is defined to mean "any department or unit of Utah state government with authority to employ personnel." Utah Code, Section 67-19-3(1). "Human resource function" is defined to mean "those duties and responsibilities" which are specified under any other "state . . . statute." Utah Code, Section 67-19-3(13)(c).

In short, the text of SB 2 delegates to the UDHRM the power and responsibility to administer all aspects of the Teacher Salary Supplement Program. And SB 2's delegation of these functions, especially when read in tandem with the provisions of title 67, chapter 19, in legal effect, makes that administrative control exclusive to the UDHRM, displacing any supervisory role for the USBE.

Section 11 of SB 2, found at lines 468 to 491 of the legislation, regulates the terms and conditions for the purchase of so-called "primary instructional materials" by local school districts. For convenience of reference, we will call this the "Textbook Approval Program." All such purchases are forbidden unless the school district making the purchase first has contracted with an "independent party to evaluate and map the alignment of the primary instructional materials with core curriculum . . ." and "provides a detailed summary of the evaluation . . . on a public website at no charge, for use by teachers and the general public . . ." While the USBE is given rulemaking authority to fix the qualifications of the "independent parties" and "detailed summary" requirements noted above, *the statute, in section 11 on page 17, expressly forbids the USBE from performing or*

supervising any of the tasks respecting contracting, mapping, and evaluation associated with this program.

In short, SB 2 deliberately and expressly ousts the USBE from its traditional role of vetting textbooks, conferring those functions on private vendors.

Believing that SB 2's delegations of powers and duties to politically non-accountable agencies and parties was contrary to the provisions of Article 10 of the Utah State Constitution, plaintiffs brought this civil action, seeking declaratory and injunctive relief to that effect. Plaintiffs and defendants filed cross-motions for summary judgment on these portions of plaintiffs' complaint. The lower court granted defendants' motion and denied plaintiffs' motion. This appeal from that ruling followed.

VIII. SUMMARY OF ARGUMENT

Utah's non-delegation doctrine under state constitutional law has four branches, each of which is rooted, to some extent, in fundamental principles respecting the separation of powers.¹ (1) Certain powers -- at the core of a constitutional department -- simply may not be delegated. *See, e.g., State v. Gallion*, 572 P.2d 683 (Utah 1977) (legislative branch has exclusive power to define crimes and this core power may not be delegated to attorney general

¹ Unlike the federal constitution, Utah's constitution, in Article 5, Section 1, expressly provides for the separation of powers in state government: "The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted."

pursuant to statute which authorized him to add or delete controlled substances from proscribed list); *State v. Green*, 793 P.2d 912 (Utah Ct. App. 1990) (same); *Salt Lake City v. Ohms*, 881 P.2d 844 (Utah 1994) (judicial branch has exclusive power to enter judgments and impose fines in misdemeanor cases and this core power may not be delegated by legislative enactment to certain commissioners); *State v. Thomas*, 961 P.2d 299 (Utah 1998) (judicial branch has exclusive power to issue search warrants and this core power may not be exercised by commissioners). (2) In this regard, the legislature may not defeat or impair the constitutionally prescribed administrative role of an executive department by transferring powers of administration and execution from that department to another agency. *See, e.g., Allen v. Rampton*, 463 P.2d 7 (Utah 1969) (legislature may not transfer powers and duties constitutionally vested in state treasurer's office to another agency); *State v. Southern Pac. Co.*, 79 P.2d 25, 38 (Utah 1938) (legislature may not transfer powers and duties constitutionally vested in state tax commission to public service commission). (3) Moreover, most if not all delegations of governmental power to private parties is constitutionally proscribed. At bottom, this is because our form of representative democracy will not countenance the exercise of public power, power which allocates public resources and makes decisions affecting the public at large, in the absence of political accountability. *See, e.g., Stewart v. Utah Public Service Comm'n*, 885 P.2d 759, 776 (Utah 1994) (unconstitutional delegation of public authority to private utility); *Salt Lake City v. I. A. of Firefighters, Etc.*, 563 P.2d 786 (Utah 1977)

(unconstitutional delegation of municipal power to private arbitrators). (4)

Finally, “non-delegation,” as a branch of constitutional law, most often is believed to mean that doctrine which limits the ability of a legislative body to confer its power to make laws upon administrative agencies in the absence of guidelines. *Compare, e.g., Lloyd A. Fry Co. v. Utah Air Conservation Committee*, 545 P.2d 495, 500-501 (Utah 1975) (standards adequate to sustain constitutionality of delegation), *with, e.g., Rowell v. State Board of Agriculture*, 99 P.2d 1, 4-5 (Utah 1940) (standards inadequate to sustain constitutionality of delegation).

Versions (1), (2), and (3) of the non-delegation doctrine, outlined above, have varying degrees of application to this appeal, while version (4) does not. Most state agencies, like the Public Service Commission, the Department of Transportation, and the Department of Environmental Quality, are *creatures of the legislature*. Their personnel, powers, and duties, by a repeat act of legislative creation, may be vested, removed, or transferred to other agencies. The USBE, however, is a *constitutionally established* department in state government. Its constitutionally vested powers, absent constitutional amendment, may not be transferred by a simple bill to another agency or to private parties. Moreover, as shown below, even were the USBE an ordinary agency, created by statutory enactment rather than constitutional mandate, a legislative delegation of agency powers to private parties still would offend non-delegation doctrines under Utah law.

IX. ARGUMENT

1. The Legislature May Not Transfer the Power Which Has Been Constitutionally Vested in a Constitutional Office to Other Agencies or to Private Parties. This Court consistently has ruled that, where power is constitutionally vested in a particular office of state government, the legislature, by statute, may not remove that power or transfer it to others. Let's examine our case law in five instances respecting the Utah State Treasurer's Office, the Utah State Board of Examiners, the Utah State Board of Pardons, the Utah State Tax Commission, and the Utah Attorney General's Office. These precedents show that the legislature, by statute, may not encroach upon constitutionally vested executive prerogatives by means of transfers, re-locations, legislative micromanagement, funding reductions, and the like.

a. The Utah State Treasurer's Office. In *Allen v. Rampton*, 463 P.2d 7 (Utah 1969), this Court considered a challenge to the constitutionality of a so-called State Money Management Act. The Act created a division of investments for the purpose of supervising the investment of public funds and selection of depository institutions. This division, in turn, was supervised by an investment council, the members of which were appointed by various means. The division was to be staffed with a chief administrative officer and deputy administrative officer, both of whom were to be appointed by the treasurer and at least four

members of the investment council. The treasurer sought a declaratory judgment that the Act violated Article 7, Sections 1 and 17, of the Utah Constitution, since the provisions of the Act, by transferring management of state funds to a new division run by unelected officials, unconstitutionally interfered with the prerogatives and duties of his office.

The Court sustained the treasurer's position and declared the Act unconstitutional. According to the Court, the treasurer's duties were constitutionally vested in his office. Removal of these duties from the treasurer and assignment of them to a new division, therefore, was constitutionally offensive. This "undue interference with [the treasurer's] constitutional rights and duties" was compounded because his office is elective, and transferring powers to non-elected appointees unhitched the principle of constitutional control from the moorings of public accountability. *Id.* at 12-13.²

² The *Allen* opinion relied upon several cases which it discussed in the following order: *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84 (Wis. 1870) (unconstitutional delegation of sheriff's duties to county jailor); *State ex rel. Josephs v. Douglas*, 110 P. 177 (Nev. 1910) (same; secretary of state); *Thompson v. Legislative Audit Commission*, 448 P.2d 799 (N. M. 1968) (same; state auditor); *Hudson v. Kelly*, 263 P.2d 362 (Ariz. 1953) (same; state auditor); *Wright v. Callahan*, 99 P.2d 961 (Idaho 1940) (same; state auditor); *Tucker v. State*, 35 N.E.2d 270 (Ind. 1941) (same; state treasurer); *In re House Resolution Relating to House Bill No. 349*, 21 P. 486 (Colo. 1889) (same; state treasurer).

The rationale for these decisions, in part, is illustrated by the following quotation from the decision in *Hudson v. Kelly*, 263 P.2d 362, 369 (Ariz. 1953): "To make a free and independent constitutional officer subservient to the dictates of some appointive officer is equivalent to abolishing the office and creating another in lieu thereof to exercise the duties and functions belonging to the first office. I[t] was long ago determined that the legislature has no power to take from a constitutional

b. The Utah State Board of Examiners. *Uintah State Bank v. Ajax*, 297

P. 434 (Utah 1931) treated an analogous situation involving the Utah State Board of Examiners. In 1992, the Board of Examiners was abolished by constitutional amendment, after decades of reform agitation, including a trenchant critique by Professor John J. Flynn published as "Constitutional Difficulties of Utah's Executive Branch and the Need for Reform," 1966 UTAH L. REV. 351, 358-363 and 368. In its day, however, the Board of Examiners was a creature of Utah Constitution, Article 7, Section 13, and was comprised of the governor, secretary of state, and attorney general. No claim against the state of Utah, with the exception of salaries and compensation of officers fixed by law, could be paid by the state treasurer unless first audited and approved by this board. The powers of the board were described as "general and sweeping," and the fact of the single exception, noted above, was said, by negative inference, to "strengthen . . . the

officer the substance of the office itself, and transfer it to another who is to be appointed in a different manner and will hold the office by a different tenure from that which is provided for by the constitution." Additional reasoning is given by the court in *State ex rel. Hovey v. Noble*, 21 N.E. 244, 247 (Ind. 1889), which was relied upon by the court in *Tucker v. State*, 35 N.E.2d 270 (Ind. 1941): "A department without the power to select those to whom it must instruct part of its essential duties cannot be independent. If it must accept as 'ministers and assistants,' as Lord Bacon calls them, persons selected for them by another department, then, it is dependent on the department which makes the selection."

See also, State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777 (Minn. 1986) (transfer of functions from office of state treasurer to commissioner of finance disapproved as unconstitutional); *Williams v. State Legislature of Idaho*, 722 P.2d 465 (Idaho 1985) (striking down state statute which impermissibly interfered with administrative prerogatives of state auditor; state legislature may not prohibit, directly or indirectly, a constitutional officer from doing his duty).

force of the general provisions of the law." *Id.* at 437. Another case emphasized that Article 7, Section 13, gave the Board of Examiners "general supervisory power over expenditures by the state government." *Toronto v. Clyde*, 393 P.2d 795, 796 (Utah 1964) (emphasis supplied).³

In *Ajax*, a bank had purchased from a customer the right to collect on certain bounties, claims which the state paid to hunters who killed coyotes inflicting harm on ranching interests. Under the statute establishing this program, a hunter presented his trophies to the county clerk and, after meeting other requirements, then obtained a certificate which he presented to the state auditor who then, after finding the certification papers to be in proper form, issued a warrant to the state treasurer for payment of the bounty. There was no requirement in this statutory scheme for submission of these certification papers to the Board of Examiners, the entity which constitutionally was empowered to audit and approve claims.

The bank in *Ajax* submitted the certification papers which it had acquired by assignment from the customer noted above to the state auditor, but the auditor refused to pay. The bank petitioned for a writ of mandamus which would force compensation from the auditor's office. The auditor demurred to the petition on

³ Plaintiffs will show below that the USBE, pursuant to the text of Article 10, Section 3, likewise has *general supervisory power* over state educational matters. What is more, as in *Ajax*, this Court has underscored the nature and extent of this power by means of a negative inference from the constitutional text. *See, University of Utah v. Shurtleff*, 144 P.3d 1109, 1120 (Utah 2006), discussed below in footnote 16 of this brief.

the ground that the papers had not been approved by the Board of Examiners and, therefore, speaking constitutionally, payment was impossible.

The bank argued that this power to approve had been delegated to the county clerks in the first instance, and that any approvals after that, by the terms of the statute, involved a review of the *form* of the paperwork which had been submitted. These approvals, in the event, whether made by the state auditor or some other functionary, were ministerial and non-essential in character. They certainly were not, in the bank's view, of constitutional significance.

This Court disagreed, however. It responded that, since the power to approve this type of claim had been vested generally in the Board of Examiners, that authority could not be delegated and that power could not be exercised by any other agency of state government: "If we should adopt [the bank's] view, it would follow that the Legislature might designate any officer other than the board of examiners as authorized in behalf of the state to settle, fix, or liquidate claims and agree upon the amount to be paid thereon, and thereby exclude the board of examiners from its duty and responsibility with respect to claims thus liquidated pursuant to legislative authority. We cannot agree to any such construction of the constitutional language, nor may we by construction interpolate the word 'unliquidated' into the Constitution so that it would provide that the board of examiners have power to 'examine all unliquidated claims against the State,' etc. *The Constitution has vested in the Board of Examiners the power to examine and pass on all claims except those exempted, and the Legislature is without authority*

to delegate such power to any other board or officer." *Uintah State Bank v. Ajax*, 297 P. at 438 (emphasis supplied). The demurrer accordingly was sustained and the petition for a special writ was denied.

Toronto v. Clyde, 393 P.2d 795 (Utah 1964) is to the same effect. In *Toronto*, this Court declared unconstitutional portions of a newly enacted State Finance Act. That Act was "purposed to vest in the Governor, and the newly created office of Director of Finance, powers theretofore regarded as vested in the Board of Examiners by the Constitution." *Id.* at 795. Indeed, this re-location of power under the State Finance Act, not only delegated control and supervision of budgetary concerns to the Department of Finance, but also provided positively that the Board of Examiners could not exercise that control or undertake that supervision in stipulated circumstances. *Id.* at 797.⁴ This delegation, in the Court's view, unconstitutionally divested the Board of Examiners of its general supervisory control over state financial matters.⁵

Although the Board of Examiners long since has been eliminated, the principle established in *Ajax*, *Toronto*, and the other cases discussed in this section

⁴ This re-location, displacement, and exclusion is similar to the approach in Section 11 of SB 2 which, in positive terms, forbids the USBE from performing or supervising any of the tasks respecting contracting, mapping, and evaluation associated with primary instructional materials in connection with the Textbook Approval Program.

⁵ *Cf. Dean v. Rampton*, 556 P.2d 205 (Utah 1976) (legislature's statutory end-run around the board of examiner's control of legislators' travel expenses declared unconstitutional).

of our brief remains, namely, that legislative enactments may not trump the administrative prerogatives of other entities with constitutional stature in state government.

c. The Utah State Board of Pardons. When Utah's Constitution was ratified in 1896, the Board of Pardons was established in Article 7, Section 12. Moreover, the board constitutionally was vested with the "exclusive right" to commute punishments and grant pardons. *State ex rel. Bishop v. State Board of Corrections*, 52 P. 1090, 1092 (Utah 1898). In *Bishop*, the state legislature enacted a law which authorized the state department of corrections (as opposed to the board of pardons) to parole prisoners on certain terms and conditions. The state attorney general sought a writ of prohibition against the release of prisoners under this statute, arguing that it took power constitutionally vested in the board of pardons and gave that power unconstitutionally to the department of corrections. This Court agreed and struck down the statute as unconstitutional and therefore void. *Id.*⁶ *Bishop's* reasoning and result were followed in subsequent cases as well. *See, e.g., Cardisco v. Davis*, 64 P.2d 216 (Utah 1937) (writ of habeas corpus is recalled because it was based upon a statute which commutes sentence in derogation of constitutional power of board of pardons) (plurality opinion); *McCoy v. Harris*, 160 P.2d 721, 724 (Utah 1945) (prisoner seeks good time

⁶ This holding seems clear enough from the language in *Bishop*. In the event there is any doubt on this point, however, this is the manner in which the holding of *Bishop* has been characterized in subsequent decisions of this Court. *See, e.g., Cardisco v. Davis*, 64 P.2d 216, 221 (Utah 1937).

allowance as required by statute; request denied because power to terminate or reduce sentences is “exclusive with the board of pardons” and legislative mandate cannot alter this executive prerogative).⁷

d. The Utah State Tax Commission. In 1930, the Utah Constitution was amended to add Article 13, Section 11, which established the Utah State Tax Commission and required that body to perform certain duties of assessment for tax purposes. In 1937, the legislature enacted a law which empowered the Utah Public Service Commission to render valuations of public utilities for tax purposes. This Court declared that law unconstitutional in *State v. Southern Pac. Co.*, 79 P.2d 25, 36-40 (Utah 1938) on the ground that the duty of assessment included the power of valuation, and that, accordingly, the law transferred a duty of valuation constitutionally vested in the state tax commission to the public

⁷ *Cf. State v. Barlow*, 483 P.2d 236, 237 (Utah 1971) (issue noted but left undecided); *Graham v. Thompson*, 246 F.2d 805, 806 (10th Cir. 1957) (applying Utah law; “exclusive power” of board of pardons “which is not subject to legislative control[]”).

The results in *Bishop*, *Cardisco*, *McCoy*, and *Graham* were reversed by constitutional amendment in 1980. This change is reflected in subsequent case law. *See, e.g., State v. Bishop*, 717 P.2d 261, 264 (Utah 1986) (“[b]ecause of the breadth of this power [in Article 7, section 12], pre-1980 decisions of this Court can be read as treating the Board of Pardons as, in effect, a fourth branch of government[]”); *State v. Gentry*, 747 P.2d 1032, 1034 (Utah 1987) (following *State v. Bishop*); *State v. Shickles*, 760 P.2d 291, 301 (Utah 1988) (same).

The amendment which changed these results, however, proves the rule for which plaintiffs argue in this brief: The legislature, by a simple majority and without amending the fundamental charter of state government, may not interfere with the power and responsibilities which constitutionally have been vouchsafed to entities like the USBE.

service commission: “The provisions of section 11 specifically vest the power of assessing utilities in the State Tax Commission. Therefore, that specific provision must be considered as a limitation on the power of the legislature to place the assessing power in any other officer or commission.” *Id.* at 38. Indeed, “Functions of constitutional officers, i.e., officers provided for by the Constitution, cannot be exercised or transferred by the Legislature.” *Id.* at 39 (citation omitted). The holding and rationale of *Southern Pac. Co.* have been followed. *See, e.g., Evans & Sutherland Comp. v. State Tax*, 953 P.2d 435, 442 (Utah 1997) (power of assessment which constitutionally has been conferred on tax commission may not be exercised by district court in the course of judicial review of agency action; Article 13, Section 11, is more than grant of power to tax commission, “[i]t also limits the power of the legislature to confer the [c]ommission’s powers on other governmental entities[]”). *See also, Kennecott Corp. v. Salt Lake County*, 702 P.2d 451, 457 (Utah 1985) (legislative grant of assessment power to tax division of district court would contravene Article 13, Section 11), citing with approval *National Tunnel & Mines Co. v. Industrial Commission*, 102 P.2d 508, 514 (Utah 1940) (“[t]he provisions of Sec. 11 of the state constitution specifically vest the power of administering and supervising the tax laws of the state in the State Tax Commission . . . [t]herefore, that specific provision must be considered as a limitation on the power of the legislature to

place the administering and supervising power in any other officer or commission [including the state industrial commission] []” (citation omitted).⁸

e. The Utah State Attorney General. In *Hansen v. Legal Services Com. of Utah State Leg.*, 429 P.2d 979 (Utah 1967), this Court struck down a statute which allowed the state legislature to hire legal counsel. The Court quoted the language of then Article 7, Section 18,⁹ which stated that, “The Attorney General shall be the legal adviser of the State officers,” (emphasis in original), noted that, pursuant to Article 24, Section 12, state legislators were deemed to be state officers, and, accordingly, held that the statute in question, by invading the attorney general’s prerogative to provide counsel to state officials, was unconstitutional. To hold otherwise, in the view of the Court, would mean that the constitutional office of attorney general “could be emasculated and rendered impotent.” *Id.* at 980. A later opinion, *Hansen v. Utah State Retirement Board*, 652 P.2d 1337, 1335-1337 (Utah 1982), subjected the *Legal Services* interpretation of the term, “state officers,” to “reanalysis,” but left intact its basic holding respecting improper intrusions upon executive functions. *Id.* at 1334-

⁸ The rulings in *Southern Pac. Co.* and these subsequent precedents also have been overruled by constitutional amendment. See, *T-Mobile USA, Inc. v. Utah State Tax Comm’n*, 2011 UT 28, para, 12 and n. 5, ___ P.3d ___ (Utah 2011). Here, again, however, this amendatory exception proves the constitutional rule advanced by plaintiffs on this appeal. Cf. also, *State v. Eldredge*, 76 P. 337 (Utah 1904) (legislature may not remove constitutionally vested, tax-related powers from counties and transfer those powers to state board of equalization).

⁹ In 1980, subsequent to the decision in *Legal Services*, the Utah Constitution’s provisions respecting the attorney general were altered and renumbered.

1337.¹⁰ The current attorney general, like his predecessors, is jealous of his powers under Article 7, Section 16, and has taken pains, through the promulgation of a formal opinion,¹¹ to protect that constitutional territory from legislative incursions.¹²

2. The USBE Is a Constitutional Office With Constitutionally-Vested Power to Control and Supervise Public Education in the State of Utah. Utah Constitution, Article 10, Section 3, provides in part that, "The general control and supervision of the public education system shall be vested in a State Board of

¹⁰ The *Legal Services* result, as we all know, has been reversed by constitutional amendment. Another constitutional amendment has allowed the governor, in certain circumstances, to engage his own counsel. But these constitutional amendments, as exceptions, prove the rule that the attorney general's constitutionally vested rights and responsibilities may not be transferred legislatively to others. Both *Hansen v. Utah State Retirement Board*, 652 P.2d at 1335-1337, and *Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406, 414-415 (Utah 1986), in effect, agree that the legislature may not pass legislation which delegates to other counsel the attorney general's duty to render legal services to the executive department of state government. The scope of that duty, that is, the determination respecting which departments are executive under Article 7, is the subject upon which the disagreement turns in these cases.

¹¹ A.G. OP. No. 02-003 (October 25, 2002) (agencies subject to Article 7, Section 16, of the Utah Constitution violate the Constitution when they hire in-house legal counsel directly, bypassing the Attorney General, regardless of the official position or actual title given to the legal advisor, if the attorney provides legal advice to the agency or its officers and staff).

¹² See also, *State ex rel. McGraw v. Burton*, 569 S.E.2d 99 (W.Va. 2002) (legislature may not authorize transfer of core functions of attorney general to state lawyers in other agencies); *In re House of Representatives (Special Prosecutor)*, 575 A.2d 176 (R.I. 1990) (statute unconstitutionally transferred power from attorney general to special prosecutor); *Murphy v. Yates*, 348 A.2d 837 (Md. Ct. App. 1975) (same).

Education." The "public education system" is defined in Utah Constitution, Article 10, Section 2, to include "all public elementary and secondary schools and such other schools and programs as the Legislature may designate." Membership on the USBE, pursuant to Article 10, Section 3, is elective, and not a matter of appointment.¹³

¹³ The text of Article 10, Section 3, shows conclusively that the USBE is a constitutionally established office and that, as such, it constitutionally is empowered with "general control and supervision" of the public education system in the state of Utah. This showing is confirmed by the case law discussed below in the text of this brief. Moreover, the historical development of our constitution's treatment of educational policy -- discussed below in this footnote, with legal notations -- reinforces that view.

In 1896, then Article 10, Section 8, provided that, "The general control and supervision of the Public School System shall be vested in a State Board of Education, consisting of the Superintendent of Public Instruction, and such other persons as the Legislature may provide." At that time, pursuant to Article 7, Sections 1, 10, and 20, the Superintendent was deemed part of the executive department and, as provided therein, an elective office. At the same time, the legislature provided for appointment, rather than election, of other Board members. *See, State Board of Education v. Commission of Finance*, 247 P.2d 435, 437 (Utah 1952).

In 1950, the constitution was amended, making membership on the USBE elective and allowing the Board, in turn, to appoint the Superintendent. At that time, the reference to the Superintendent in Article 7, as part of the executive department, for the most part, was removed and reference to her role was placed in Article 10. Notwithstanding this change, Utah case law still referred to the Superintendency as a "constitutional office." *See, State Board of Education v. Commission of Finance*, 247 P.2d at 440. *See also*, Flynn, "Constitutional Difficulties of Utah's Executive Branch and the Need for Reform," 1966 UTAH L. REV. 351, 352. Of course, if the Superintendent, as appointed by the USBE, is a constitutional officer, it follows that the Board which makes that appointment likewise has constitutional stature.

Subsequent amendments reinforced this stature, and, moreover, may have served to heighten the independence of the USBE in relation to the state legislature. Even

According to this Court, "general control and supervision," as used in Article 10, Section 3, means "the direction and management of *all* aspects of [the] operation or business [of public education]." *Utah School Boards v. State Bd. of Educ.*, 17 P.3d 1125, 1129 (Utah 2001) (emphasis in original). The Court called this "plenary" power. *Id.* at 1130, quoting *In re Woodward*, 384 P.2d 110, 112 (Utah 1963). This reading of Article 10, Section 3, moreover, has practical force, since agencies vested with control are liable, on a theory of *respondeat superior*, in the event things go wrong, and, therefore, it would be unwise as well as unfair

after the changes in 1950, noted above, the constitution retained Article 7, Section 19, which provided that, "The Superintendent of Public Instruction shall perform such duties as may be provided by law." *See, State Board of Education v. Commission of Finance*, 247 P.2d at 440. This provision, however, was eliminated by later amendment, leaving the language now found in Article 10, Section 3, that the Superintendent, rather than being directed by the state legislature, "shall be the executive officer of the [USBE]."

Likewise, Article 10 institutions, such as the University of Utah, have been treated as constitutional entities. *See, Hansen v. Utah State Retirement Bd.*, 652 P.2d 1332, 1339 (Utah 1982) ("[t]he University of Utah has constitutional status . . ."). *See also*, Flynn, "Constitutional Difficulties of Utah's Executive Branch and the Need for Reform," 1966 UTAH L. REV. 351, 361 & n. 64 (discussing constitutional conflicts between board of examiners and "other constitutionally created institutions," such as the University of Utah and citing *University of Utah v. Board of Examiners*, 295 P.2d 348 [Utah 1956]).

In view of the above, it is not improbable that the USBE may be classified as a "fourth branch of government" in the state of Utah. *Cf. State v. Bishop*, 717 P.2d 261, 264 (Utah 1986) (describing Utah Board of Pardons as a "fourth branch of government"). And *cf. Estes v. Talbot*, 597 P.2d 1324, 1326 (Utah 1979) (USBE members are state officers and, therefore, not subject to removal as officers of political subdivisions under title 77, chapter 6, of Utah Code). In all events, the USBE clearly is a constitutional entity and constitutionally has been vested with control and supervision over the public education system in the state of Utah.

to sever the right to "direct and manage" from the legal consequences of doing so. *Utah School Boards v. State Bd. of Educ.*, 17 P.3d at 1130-1131.

Utah School Board's reasoning about the need to maintain this connection between control and accountability in matters of public administration echoes the rationale adopted by the court in *Allen v. Rampton*, 463 P.2d 7 (Utah 1969), elaborated above in footnote 2 of this brief. It also underscores the case rulings, cited above, that statutes which purport to transfer power from constitutional entities to ordinary agencies should not be countenanced because they, in fact, loosen or unfasten this tie. This same principle, no doubt, explains the elimination of former Article 7, Section 19, and the provision for our Superintendent's appointment by and responsibility to the USBE in Article 10, Section 3 (discussed in footnote 13 of this brief), since one woman cannot serve two masters, and divided loyalties inexorably produce poor administration and worse accountability.

It bears repeating that, pursuant to Article 10, Section 3, and the decision in *Utah School Boards*, "plenary" power over "all aspects" of the state's educational enterprise "shall be vested" in the USBE. The word "shall," according to canons of construction, both constitutional and statutory, is imperative and not merely directory. This rule of construction is found in the text of Utah's Constitution, at Article 1, Section 26, which states that, "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be

otherwise."¹⁴ But the same result follows even when we look to the "plain" meaning of "shall" or the "ordinary" or the "commonly understood" usage of that term, standards of construction that this Court expressly has instructed lower courts to follow in the context of Article 10, Section 3. *See, Utah School Boards v. State Bd. of Educ.*, 17 P.3d at 1129.¹⁵

¹⁴ *See also, National Tunnel & Mines Co. v. Industrial Commission*, 102 P.2d 508, 514 (Utah 1940) (“[t]he provisions of [Article 13], Sec[ti]on 11[,] of the state constitution specifically vest the power of administering and supervising the tax laws of the state in the State Tax Commission . . . [t]herefore, that specific provision must be considered as a limitation on the power of the legislature to place the administering and supervising power in any other officer or commission [including the state industrial commission] []”) (citation omitted), language approved in *Kennecott Corp. v. Salt Lake County*, 702 P.2d 451, 457 (Utah 1985); *Salt Lake City v. Ohms*, 881 P.2d 844, 856 (Utah 1994) (Howe, J., concurring opinion) (“[W]here the constitution expressly provides the manner of doing a thing, it impliedly forbids it being done in a substantially different manner[]”) (citation omitted). Even more forcibly, “express delegations of political power [as with the USBE] are made through constitutional provisions and are necessarily exclusive delegations of power, unless it be expressly provided otherwise[]” (citation omitted). *Id.*

¹⁵ This Court has adopted this interpretation of “shall” as mandatory rather than directory in other contexts as well. *See, State v. Wanosik*, 79 P.3d 937, 943-944 (Utah 2003) (reading Rule 22, Utah Rules of Criminal Procedure, to forbid practice of *in absentia* sentencing; the phrase, “shall afford,” in Rule 22 means that the accused and counsel must be given an opportunity to appear and speak in self-defense prior to sentencing); *Ostler v. Buhler*, 989 P.2d 1073, 1076 (Utah 1999) (the word, “shall,” as used in Rule 24, Utah Rules of Civil Procedure, is “mandatory[]”), citing *Landes v. Capital City Bank*, 795 P.2d 1127, 1131 (Utah 1990) (“shall,” as used in joinder rules, is mandatory), and also citing *Board of Educ. of Granite Sch. Dist. v. Salt Lake County*, 659 P.2d 1030, 1035 (Utah 1983) (when “shall” is used, it is presumed to require a person “to comply strictly with the terms of the statutes” at issue). *But cf. Hansen v. Utah State Retirement Bd.*, 652 P.2d 1333, 1341-1342 (Utah 1982) (Crockett, R. J., concurring with comments) (former Article 7, Section 16, providing that the Attorney General “shall” be the legal advisor to state officers should be read as directory rather than mandatory because of the overall context and purpose to be accomplished, citing

The key question, insofar as the general control and supervision of public education programs “shall be vested” in the USBE, is who exercises the administrative discretion to select personnel to implement programs, and to marshal resources for the prioritization of tasks and fulfillment of duties. Should the USBE, as a matter of constitutional requirement, make these determinations, or may the legislature, by statute, supersede the Board, and by designation of the

Bird and Jex Co. v. Funk, 85 P.2d 831 [Utah 1939] as taking same interpretive approach to statute respecting authority of state liquor control commission); *Cardisco v. Davis*, 64 P.2d 216, 226-227 (Utah 1937) (Hansen, J., concurring opinion) (the use of “may” in a statute should be interpreted as “mandatory” or “must” or “shall” only when public interest or private rights are at stake).

Other state courts take a similar approach. *See, e.g., OEC v. OG&E*, 982 P.2d 512, 514 (Okla. 1999) (Oklahoma constitution provides that there "shall" be voter approval before the grant of any municipal franchise: "Generally, the term 'shall' is mandatory and precludes alternative means of carrying out a mandate[]" [citation omitted]); *Smith, etc. v. State Bd. of Equalization*, 630 P.2d 1264, 1266 (Okla. 1981) (under Oklahoma constitution, State Board of Equalization constitutionally required to certify certain revenue accruals: "'Shall' is commonly understood to be a word of command which must be given a compulsory meaning") (emphasis supplied) (footnote omitted); *State ex rel. Billington v. Sinclair*, 183 P.2d 813, 816-819 (Wash. 1947) (when state constitution uses “shall,” meaning usually is mandatory; even when “may” is used, the meaning, in context, may be compulsory). *Cf. State v. Wanosik*, 79 P.3d at 944 (Utah courts may look to other jurisdictions for general guidance in defining terms in rules and statutes).

The federal judiciary concurs. *See, e.g., National Ass'n v. Defenders of Wildlife*, 127 S. Ct. 2518, 2531-2532 (2007), citing *Lopez v. Davis*, 531 U. S. 230, 241 (2001) (Congress uses "shall" to "impose discretionless obligations"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"); *Association of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D. C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive").

UDHRM or private contractors, displace that constitutional entity? In the event, will the Board be left with constitutional accountability to the people of Utah for an administrative performance that, being hamstrung by supervening legislation, it is powerless to control, oversee, or influence in any meaningful way?¹⁶ *Utah*

¹⁶ Article 10 of the Utah Constitution, as presently written, treats higher education and state universities differently from public education. In this respect, Section 4 provides, in part, that, “The general control and supervision of the higher education system shall be provided for by statute.” This Court recently read this language to mean that the University of Utah did not have institutional autonomy, and, therefore, could not promulgate a regulation respecting firearms that was at odds with a legislative enactment. In arriving at and reinforcing this conclusion, however, the Court cited Section 3 and noted that: “Our interpretation of the language in article X, section 4[,], confirming the legislature’s right of ‘general control and supervision’ over the University is also consistent with our interpretation of similar language found elsewhere in our constitution. In *Utah School Boards Ass’n v. Utah State Board of Education* . . . we examined language from article X, section 3, which governs Utah’s public education system. While section 4 vests ‘general control and supervision’ of the higher education system in the legislature, section 3 vests ‘general control and supervision’ of the public education system in the State Board of Education. We construed this language in the context of the Utah School Boards Association’s challenge to a statute that vested the state school board with authority to make decisions regarding individual schools. The Association argued that the phrase ‘general control and supervision’ actually restricted the authority of the state school board, preventing it from exercising ‘specific or local supervision and control.’ . . . We rejected the association’s premise that the phrase ‘general control and supervision’ limited the Board’s authority. Instead, we concluded that the ‘common and ordinary understanding’ of the phrase encompassed ‘the authority to direct and manage all aspects of the public education system in accordance with the laws made by the legislature. . . .’” *University of Utah v. Shurtleff*, 144 P.3d 1109, 1120 (Utah 2006).

The legislature nevertheless has been restricted in the extent to which it may influence the selection of management to administer the system of higher education in the state of Utah. In *Rampton v. Barlow*, 464 P.2d 378 (Utah 1970), this Court struck down a legislative enactment which allowed the Speaker of the House and the President of the Senate to appoint members to the State Board of Higher Education and to exercise a power of confirmation over gubernatorial appointments to the same.

School Boards and other cases cited above answer this question clearly. Although the legislature may establish and maintain programs affecting public education in the state of Utah, the USBE constitutionally is vested with the power and duty to implement and administer those programs. That power may not be exercised and that duty may not be discharged by any other agency or person.¹⁷

Plaintiffs infer from the *Rampton* and *Shurtleff* opinions that, even though the Utah Constitution gives the legislature extensive power over higher education, the legislature still may not interfere with the executive prerogative to select the personnel who will administer that system. And in light of *Rampton*, as well as the contrasting language in Sections 3 and 4 of Article 10 as explained in *Shurtleff*, the legislature's power to interfere with the USBE's general control and supervision of public education must be nil and none. *See also, Uintah State Bank v. Ajax*, 297 P. 434, 437 (Utah 1931), where a similar inference from the constitutional text was said to insulate the exclusive power of the Board of Examiners from legislative interference.

¹⁷ Plaintiffs submit that the plain language of Article 10, Section 3, as elaborated in the *Utah School Boards* decision, as well as analogous precedents involving other departments in our state government, the treasurer, the board of examiners, the board of pardons, the tax commission, and the attorney general, demand the conclusion that the Teacher Salary Supplement Program and the Textbook Approval Program as enacted in SB 2 must be declared unconstitutional.

Plaintiffs have found no opinions in Utah, aside from the strong language found in *Utah School Boards*, that treat the transfer of Section 3's power from the USBE to others. Other states have precedents which may be instructive in this regard, however. *See, e.g., Evans v. Andrus*, 855 P.2d 467 (Idaho 1993) (there is single board of education under Idaho constitution which board administers affairs of higher education and public schools; state statute established three boards, dividing these administrative responsibilities; statute declared unconstitutional delegation of constitutional body to statutory agencies); *King v. Board of Regents*, 200 P.2d 220, 238 (Nev. 1948) (Nevada constitution vests administrative power over higher education in board of regents; legislature passes statute creating advisory board to board of regents; statute declared void as unconstitutional interference with vested prerogatives of board of regents). *See also, Ethics Com'n v. Cullison*, 850 P.2d 1069, 1075 (Okla 1993) (state ethics commission is

3. The Teacher Salary Supplement Program and the Textbook

Approval Program of SB 2 Are Impermissible Legislative Encroachments upon the Constitutionally-Vested Power of the USBE. Plaintiffs emphasize that this case is not about the power of the legislature to establish or maintain educational programs in the state of Utah. The legislature is required to do so under Article 10, Section 1, of our constitution. This case, instead, is about which organ of state government constitutionally is required to implement and administer those programs once they are established -- and whether the legislature may abrogate that constitutional mandate through statutory means.

Salary supplements for select teachers and textbook alignment with core curricula are educational programs within the meaning of Article 10, Section 2.

As such, they must be controlled by and subject to the supervision of the USBE

constitutional entity; legislature may not enact statute which impairs or interferes with quorum requirements or prosecutorial discretion of ethics commission).

The opinion of the Utah Supreme Court in *Bateman v. Board of Examiners*, 322 P.2d 381 (Utah 1958) does not alter the analysis above. *Bateman* did not delineate the powers of the legislature against the role of the USBE so much as it negotiated the respective spheres of the Board of Examiners, another constitutional entity, and the USBE. The analysis in *Bateman* is irrelevant in our case because the UDHRM which is empowered to administer the Teacher Salary Supplement Program and the private contractor who will take charge of the Textbook Approval Program are neither the constitutional equivalents of the former Board of Examiners nor on a constitutional par with the USBE. Now that the Board of Examiners no longer exists as a fixture of state government, the *Bateman* case probably has become moot. See, Flynn, "Constitutional Difficulties of Utah's Executive Branch and the Need for Reform," 1966 UTAH L. REV. 351, 361 & n. 66 and 370 n. 126. Any residual validity in the *Bateman* opinion has been superseded entirely or overruled *sub silentio* by *Utah School Boards v. State Bd. of Educ.*, 17 P.3d 1125 (Utah 2001).

pursuant to the constitutional mandate of Article 10, Section 3. Contrary to this mandate, however, the control and supervision of these programs have been conferred upon the UDHRM (in the case of the Teacher Salary Supplement Program) and an independent, private contractor (in the case of the Textbook Approval Program).

In connection with the teacher salary program, the USBE's "general control and supervision" has been displaced entirely, since this apparently is required by statute, Utah Code, Section 67-19-5, whenever programs are managed by the UDHRM. By the terms of SB 2, moreover, all discretionary aspects of this program, the fixing and application of criteria for eligibility, the allocation of appropriations in the event of shortfalls, are to be handled by the UDHRM. Far from having "general control and supervision," the USBE is relegated to a second-chair with SB 2's injunction that the Board "shall cooperate" by lending "technical assistance" to the UDHRM. Although the sovereign people, speaking through the constitutional mandate of Article 10, Section 3, have insisted that public education programs be administered by elected officials who are politically accountable, the legislature has placed this matter in the hands of a governmental department consisting of non-elected bureaucrats. With respect, the Teacher Salary Supplement Program in SB 2 should be declared unconstitutional as violating the "general control and supervision" requirement of Article 10, Section 3, of the Utah Constitution.

The Textbook Approval Program also violates this constitutional mandate. The statute, as enacted in SB 2, permits the USBE, by rule, to establish the qualifications of contractors who are to perform textbook vetting services, but the authority of the Board to select a provider is left unstated, and the legislature, through Senator Howard Stephenson, apparently disapproves of the Board's role in this regard.¹⁸ In any event, whatever means are adopted for selection of a provider, once that selection is accomplished, the statute, in positive terms, forbids further involvement by the USBE in the actual textbook approval process. It expressly excludes the USBE from performing or supervising any of the tasks respecting contracting, mapping, and evaluation associated with this program. Please see Section 11 starting at page 17 of SB 2 which is reproduced as Appendix A to this brief.

As discussed in the next section of this brief, the delegation of government power over textbook vetting (a power so politically sensitive that it incites the intervention of an important senator in the state legislature) to private parties, standing alone, is unconstitutional. But this delegation also offends Article 10, Section 3, because it takes "general control and supervision" of the textbook approval process from the USBE and confers that power and responsibility upon others, in this case, private parties. What is more, with a provision that is

¹⁸ Please see the article and correspondence in Appendix D which was included in the record below and is reproduced as an appendix here for the convenience of the Court.

remarkably similar to the statute declared unconstitutional in *Toronto v. Clyde*, 393 P.2d 795, 797 (Utah 1964), SB 2, in section 11 on page 17, expressly ousts the USBE from any role in this process. With respect, the Textbook Approval Program in SB 2 should be declared unconstitutional as violating the “general control and supervision” requirement of Article 10, Section 3, of the Utah Constitution.

4. SB 2 Unconstitutionally Delegates Government Power to Private Parties. Even if the Court believes, on whatever basis, that the USBE’s general control and supervision of educational programs may be transferred to a public agency such as the UDHRM, that government power still may not be exercised by private parties. In this respect, the crucible for decision is not that the government power at issue is either legislative power or the USBE’s constitutionally vested power of control and supervision – it simply is that government power impermissibly is handed over to private parties.

Utah’s case law is well developed and uncompromising on this point. An illustrative case is *Salt Lake City v. I. A. of Firefighters, Etc.*, 563 P.2d 786 (Utah 1977) which reviewed the constitutionality of legislation which provided for the compulsory arbitration of labor disputes between municipal governments and fire fighter unions. The court held that this aspect of the legislation was unconstitutional because it contemplated the appointment of “arbitrators, who are private citizens with no responsibility to the public, to make binding determinations affecting the quantity, quality, and cost of an essential public

service. The legislature may not surrender its legislative authority to a body wherein the public interest is subjected to the interest of a group which may be antagonistic to the public interest.” *Id.* at 789. The decisions to be made by the arbitrators, in essence, were political in character, involving the quality of public services and the allocation of public resources. The Court largely was concerned that there could be no political accountability in this decision-making process and that this lack of accountability was “not consonant with the concept of representative democracy.” *Id.* at 780.¹⁹

Other opinions echo this concern with accountability, and give voice to the additional problem that private parties may be stakeholders, with a pecuniary interest, in the issue at hand. This lack of disinterestedness or actual conflict of interest is another reason why they are constitutionally ineligible to become the delegates of public power. *See, e.g., Stewart v. Utah Public Service Comm’n*, 885 P.2d 759, 776 (Utah 1994) (legislature delegates ratemaking power to public

¹⁹ The compulsory arbitration provisions of this particular legislation likewise had no standards to guide the arbitrators in their decision-making. But the Court said that this lack of standards, as well as the absence of any procedural safeguards, such as hearings, administrative oversight, or judicial review, to palliate or eliminate any tendency to arbitrariness was “not dispositive” of the delegation issue. The constitutional offense, at bottom, consisted of giving public power to politically unaccountable private persons – not the failure to trammel the exercise of that power with substantive standards or procedural constraints. The arbitrators were empowered to decide questions of public policy, questions respecting the “levels and standards of public services,” these decisions involved the making of political choices, and the arbitrators as decisionmakers were insulated from and not subject to control by any political process. This, in the Court’s view, was not “consonant with the constitutional exercise of political power in a representative democracy.” *Salt Lake City v. I. A. of Firefighters, Etc.*, 563 P.2d at 789 (citation omitted).

service commission; commission exercises this power to promulgate incentive regulation plan for public telephone utility, giving utility choice respecting implementation of plan; delegation of power of choice to utility is unconstitutional; “the Legislature cannot constitutionally delegate to private parties governmental power that can be used to further private interests contrary to the public interest”). The Court, in *Stewart*, underscored the gravamen of this concern, by quoting from a concurring opinion of Justice Latimer in *Revne v. Trade Commission*, 192 P.2d 563, 570 (Utah 1948): The problem with statutes which delegate this kind of power to private persons is that they “vest[] the operation and control of the law in a group of individuals who are directly interested in the economical features of the act.”

The *Stewart* court discusses two other opinions at some length for the purpose of elaborating concerns respecting the delegation of public power to private groups. These opinions are *Union Trust v. Simmons*, 211 P.2d 190, 192 (Utah 1949) and *Revne v. Trade Commission*, 192 P.2d 563, 568 (Utah 1948). In both *Simmons* and *Revne*, the statutes at issue handcuffed public administrators and left them powerless to act outside the control of the private parties involved. Thus, in *Revne*, a board appointed by the governor could not act to initiate the adoption of regulations for local barbers until a stated percentage of such barbers had made recommendations in this regard. Hence, the “public interest was given ‘second place to the interest of a 70% majority of the profession directly affected by the law.’” *Stewart v. Utah Public Service Com’n*, 885 P.2d at 776, in part

quoting from *Revne v. Trade Commission*, 192 P.2d at 567. Likewise, in *Simmons*, the state bank commissioner was prohibited from approving the establishment of branch banks in a given area unless and until the competing banks in the same area had given written consent to the commissioner in this regard. The operation of the law, in other words, was made contingent, in the first instance, upon the determination of the private parties, rather than upon any assessment of public interest. *Stewart v. Utah Public Service Com'n*, 885 P.2d at 776, discussing *Union Trust Co. v. Simmons*, 211 P.2d at 192. The fear, naturally, is that, “If the interests of the public must give way to those of a [private party], the effect is simply to permit that [party] to impose its will upon the administrative body and the public, be the results beneficial to the public or not.” *Id.* at 193.²⁰

²⁰ See also, *Bradshaw v. Wilkinson Water Co.*, 94 P.3d 242, 247-249 (Utah 2004) (public service commission may not approve settlement stipulation which, in effect, requires the commission to defer to private standards in derogation of its statutory duty to consider the public interest in fixing rates; this would have “impermissibly delegated to the parties the task of determining standards[]”); *Gumbhir v. Kansas State Bd. of Pharmacy*, 618 P.2d 837, 842 (Kan. 1980) (statute restricting approval of educational qualifications deemed necessary for examination and registration of pharmacists to individuals graduating from schools accredited by private nonprofit association ruled unconstitutional delegation of government power to private parties; “. . . a strict rule is applied when the delegation of authority to some outside, nongovernmental agency is attempted. The legislative power of this state is vested in the legislature and the legislature is prohibited from delegating legislative powers to *nongovernmental associations or groups*[]”) (emphasis in original) (citations omitted); *Hillman v. Northern Wasco County People’s Util. Dist.*, 323 P.2d 664, 670-673 (Ore. 1958) (personal injury verdict predicated upon electrical code of national association which had been approved by legislative enactment; verdict set aside on ground that statute was unconstitutional delegation of legislative power to private group; order setting aside verdict sustained on appeal; “. . . the question of when such a law was to go into effect was dependent wholly upon the initiative of persons

The Textbook Approval Program in SB 2 offends these constitutional principles in the same respects as discussed in *Salt Lake Firefighters, Stewart, Simmons, and Revne*. The statute allows the USBE to “qualify” through rulemaking a private party to vet textbooks for educational purposes. Once “qualified,” however, the USBE has no further power, control, or supervisory role in reviewing the manner in which the private party accomplishes this task. The statute disallows further involvement by the USBE in this regard. Because USBE oversight is proscribed, the private contractor has *carte blanche* in the designation of which textbooks are acceptable or unacceptable for educational purposes in the state of Utah. Any textbook not approved by the private contractor may not be used in public classrooms in any school district statewide. The private contractor, thus, becomes a gatekeeper, with absolute, unreviewable power in terms of all textbooks for the entire state. Giving a private gatekeeper unchecked power to deny access to public entitlements exactly parallels the circumstances which were constitutionally offensive in *Revne* and *Simmons* as elaborated in *Stewart*.

The private contractor likewise is making political choices, not only because they involve the sensitive subject of textbook selection, but also because they will affect the quality and the cost of a public resource. But the private contractor, unlike the USBE, is not elected, and hence, contrary to the concerns

outside the Legislature. This we think is a plain violation of the provision of the Constitution last referred to and, in itself alone, would render the act void, since it authorizes the making of laws the taking effect of which was made to depend upon the authority of persons not provided for in the Constitution[]”) (citation omitted).

expressed in the *Firefighters* opinion, will not be accountable politically for these choices in any democratic sense.

Finally, the private contractor, as gatekeeper, will have monopoly power, and economic incentives to profit from the pricing of its textbook vetting services. These incentives, moreover, may spawn corruption and other forms of illicit profiteering. *See, e.g., Owens v. Congress of Parents, Teachers*, 92 P.3d 933, 938-939 (Colo. 2004) (*en banc*) (explaining that fear of corruption in selection of textbooks for schools was motivating factor at constitutional convention for putting control of public education at local school boards).²¹ As noted in our

²¹ The subject of textbook selection, speaking historically, has been politically sensitive in Utah as well. From 1896, when our state constitution was ratified, and for a half century thereafter, the Utah Constitution contained a provision, in Article 10, Section 9, which stated that, “Neither the Legislature nor the State Board of Education shall have power to prescribe text books to be used in the common schools.” Like the people of Colorado, Utah’s sovereign people were distrustful of delegating the power of textbook approval to government officials who were not elected and, hence, accountable to the people (please remember that, during this phase of Utah’s history, members of the USBE were appointed, not elected). In Colorado, by keeping the selection process at local boards, the people believed they could retain control. In Utah, likewise, popular control was maintained by denying delegation to any state governmental body. Article 10, Section 9, was removed from Utah’s constitution when membership on the USBE, not only became an elective rather than an appointive office, but also when that election process was put on a non-partisan footing. Utah’s ultimate constitutional choice, in other words, was to place the power to administer the programs of public education, including programs respecting text-book selection, in elected, hence, politically accountable, non-partisan, hence, economically disinterested, hands. The Textbook Selection Program stands this choice on its head, turning over textbook vetting to private, unaccountable, and, under the circumstances, economically conflicted interests.

Indeed, if textbook selection were left to the USBE, the Superintendent of Public Instruction, and her staff, the public would have additional protection through

cases, it is unconstitutional to vest public power in private hands under these circumstances. Accordingly, and with respect, the Textbook Approval Program, as enacted in SB 2, should be declared unconstitutional for the additional reason that it involves an unconstitutional delegation of government power to private parties.

X. CONCLUSION


Sections 19, 20, and 11 of SB 2, the so-called Teacher Salary Supplement Program and Textbook Approval Program, are unconstitutional. Both programs, as established in SB 2, violate the non-delegation doctrine as that principle of constitutional law has been applied on numerous occasions by this Court. They provide that another agency, the UDHRM, and private parties shall administer programs, the general control and supervision of which are constitutionally committed to the USBE under Article 10, Section 3. The Textbook Approval Program suffers from the additional constitutional defect of delegating government power to a private party. Accordingly, plaintiffs respectfully request that the Court vacate the lower court's order which denied summary judgment to plaintiffs and granted summary judgment to defendants. Plaintiffs further

statutes such as the Utah Public Officers' and Employees' Ethics Act, Utah Code, Sections 67-16-1, *et seq.* There will be no protection for the public, however, so long as the statute is administered by private parties, beyond the pale of public accountability.

Once again, for those who doubt that this program is politically sensitive, with the potential for economic boondoggles, please see the news analysis and exchange of correspondence in Appendix D.

respectfully request that the Court remand the case to the lower court with instructions to enter summary judgment in favor of plaintiffs.

Dated this 25th day of August, 2011.



Alan L. Smith
1169 East 4020 South
Salt Lake City, Utah 84124
Telephone: (801) 262-0555

Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Plaintiffs'/Appellants' Opening Brief, together with a disk containing a pdf formatted electronic version of the same, was served this 25th day of August, 2011, by mailing copies of the same, first class mail, postage prepaid, addressed to counsel for defendants/appellees, Jerrold S. Jensen, Assistant Attorney General, and Brent A. Burnett, Assistant Attorney General, 160 East 300 South, 5th Floor, P. O. Box 140857, Salt Lake City, Utah 84114-0857.



Tab A

APPENDIX A

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MINIMUM SCHOOL PROGRAM BUDGET

AMENDMENTS

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Howard A. Stephenson

House Sponsor: Bradley G. Last

LONG TITLE

General Description:

This bill provides funding for the Minimum School Program and other education programs.

Highlighted Provisions:

This bill:

- ▶ establishes the value of the weighted pupil unit at \$2,577;
- ▶ establishes a ceiling for the state contribution to the maintenance and operations portion of the Minimum School Program for fiscal year 2008-09 of \$2,497,012,086;
- ▶ modifies provisions related to the funding of charter schools;
- ▶ modifies requirements regarding instructional materials;
- ▶ authorizes the use of appropriations for accelerated learning programs for International Baccalaureate programs;
- ▶ modifies the positions that qualify for educator salary adjustments and increases the salary adjustments for those positions;
- ▶ establishes and funds the following ongoing programs:
 - a pilot project using a home-based educational technology program to develop school readiness skills of preschool children;
 - a financial and economic literacy passport to track student mastery of certain concepts;
 - the Teacher Salary Supplement Program to provide a salary supplement to an eligible teacher;

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- 30 • stipends for special educators for additional days of work;
- 31 • an optional grant program to provide an extended year for math and science
- 32 teachers through the creation of Utah Science Technology and Research
- 33 Centers;
- 34 • the High-ability Student Initiative Program to provide resources for educators to
- 35 enhance the academic growth of high-ability students;
- 36 • the English Language Learner Family Literacy Centers Program; and
- 37 • career and technical education online assessment;
- 38 ▶ makes one-time appropriations for fiscal year 2008-09 for:
- 39 • pupil transportation to and from school;
- 40 • the Beverley Taylor Sorenson Elementary Arts Learning Program to provide
- 41 grants to integrate arts teaching and learning into selected schools; and
- 42 • classroom supplies;
- 43 ▶ provides a repeal date for certain pilot programs;
- 44 ▶ makes nonlapsing appropriations; and
- 45 ▶ makes technical corrections.

Monies Appropriated in this Bill:

- 47 This bill appropriates:
- 48 ▶ the following Minimum School Program Monies:
 - 49 • \$2,438,692,586 from the Uniform School Fund for fiscal year 2008-09;
 - 50 • \$26,499,500 from the Uniform School Fund Restricted - Interest and Dividends
 - 51 Account for fiscal year 2008-09;
 - 52 • \$31,820,000 from the Uniform School Fund for fiscal year 2008-09 only; and
 - 53 • \$280,000 from the Uniform School Fund for fiscal year 2007-08 only; and
 - 54 ▶ the following other education program monies:
 - 55 • \$3,000,000 from the Uniform School Fund for fiscal year 2008-09;
 - 56 • \$150,000 from the Uniform School Fund for fiscal year 2008-09 only;
 - 57 • \$1,000,000 from the Uniform School Fund for fiscal year 2007-08 only;

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- 58 • \$250,000 from the General Fund for fiscal year 2008-09; and
59 • \$50,000 from the General Fund for fiscal year 2007-08 only.

60 **Other Special Clauses:**

61 This bill provides an effective date.

62 This bill coordinates with H.B. 1 by providing superseding and substantive amendments.

63 **Utah Code Sections Affected:**

64 **AMENDS:**

- 65 **53A-1a-502.5**, as last amended by Laws of Utah 2007, Chapter 344
66 **53A-1a-513**, as last amended by Laws of Utah 2005, Chapters 9 and 291
67 **53A-14-107**, as enacted by Laws of Utah 2007, Chapter 349
68 **53A-17a-103**, as last amended by Laws of Utah 2007, Chapters 107 and 372
69 **53A-17a-104**, as last amended by Laws of Utah 2007, Chapters 2, 344, 368, and 372
70 **53A-17a-108**, as last amended by Laws of Utah 2007, Chapter 344
71 **53A-17a-120**, as last amended by Laws of Utah 2007, Chapter 368
72 **53A-17a-126**, as last amended by Laws of Utah 2003, Chapters 221 and 320
73 **53A-17a-127**, as last amended by Laws of Utah 2001, Chapter 73
74 **53A-17a-153**, as enacted by Laws of Utah 2007, Chapter 380
75 **63-55b-153**, as last amended by Laws of Utah 2007, Chapter 216

76 **ENACTS:**

- 77 **53A-1a-1001**, Utah Code Annotated 1953
78 **53A-1a-1002**, Utah Code Annotated 1953
79 **53A-1a-1003**, Utah Code Annotated 1953
80 **53A-1a-1004**, Utah Code Annotated 1953
81 **53A-1a-1005**, Utah Code Annotated 1953
82 **53A-1a-1006**, Utah Code Annotated 1953
83 **53A-1a-1007**, Utah Code Annotated 1953
84 **53A-13-110**, Utah Code Annotated 1953
85 **53A-17a-156**, Utah Code Annotated 1953

- 86 **53A-17a-157**, Utah Code Annotated 1953
 - 87 **53A-17a-158**, Utah Code Annotated 1953
 - 88 **53A-17a-159**, Utah Code Annotated 1953
 - 89 **53A-17a-160**, Utah Code Annotated 1953
 - 90 **53A-17a-161**, Utah Code Annotated 1953
 - 91 **53A-17a-162**, Utah Code Annotated 1953
-

93 *Be it enacted by the Legislature of the state of Utah:*

94 Section 1. Section **53A-1a-502.5** is amended to read:

95 **53A-1a-502.5. Charter schools -- Maximum authorized students.**

96 (1) The State Charter School Board and local school boards may only authorize a
97 combined maximum student capacity of:

98 ~~[(a) 27,921 students for the charter schools in the 2007-08 school year; and]~~

99 ~~[(b)]~~ (a) 32,921 students for the charter schools in the 2008-09 school year[-]; and

100 (b) beginning in the 2009-10 school year, an annual increase in charter school
101 enrollment capacity equal to 1.4% of total school district enrollment as of October 1 of the
102 previous school year.

103 (2) (a) The State Board of Education, in consultation with the State Charter School
104 Board, shall allocate the students under Subsection (1) between the State Charter School Board
105 and local school boards.

106 (b) One-third of the student capacity described under Subsection (1)(b) shall be
107 allocated to increase the maximum student capacity of operating charter schools.

108 (c) If the operating charter schools do not use the allocation described under Subsection
109 (2)(b), the remaining student capacity may be used by new charter schools.

110 Section 2. Section **53A-1a-513** is amended to read:

111 **53A-1a-513. Funding for charter schools.**

112 (1) As used in this section:

113 (a) "Charter school students' average local revenues" means the amount determined as

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114 follows:

115 (i) for each student enrolled in a charter school on the previous October 1, calculate the
116 district per pupil local revenues of the school district in which the student resides;

117 (ii) sum the district per pupil local revenues for each student enrolled in a charter school
118 on the previous October 1; and

119 (iii) divide the sum calculated under Subsection (1)(a)(ii) by the number of students
120 enrolled in charter schools on the previous October 1.

121 (b) "District per pupil local revenues" means the amount determined as follows, using
122 data from the most recently published school district annual financial reports and state
123 superintendent's annual report:

124 (i) calculate the sum of a school district's revenue received from:

125 (A) a voted levy imposed under Section 53A-17a-133;

126 (B) a board levy imposed under Section 53A-17a-134;

127 (C) 10% of the cost of the basic program levy imposed under Section 53A-17a-145;

128 (D) a tort liability levy imposed under Section 63-30d-704;

129 (E) a capital outlay levy imposed under Section 53A-16-107; and

130 (F) a voted capital outlay levy imposed under Section 53A-16-110; and

131 (ii) divide the sum calculated under Subsection (1)(b)(i) by the sum of:

132 (A) a school district's average daily membership; and

133 (B) the average daily membership of a school district's resident students who attend
134 charter schools.

135 (c) "Resident student" means a student who is considered a resident of the school
136 district under Title 53A, Chapter 2, District of Residency.

137 (d) "Statewide average debt service revenues" means the amount determined as follows,
138 using data from the most recently published state superintendent's annual report:

139 (i) sum the revenues of each school district from the debt service levy imposed under
140 Section 11-14-310; and

141 (ii) divide the sum calculated under Subsection (1)(d)(i) by statewide school district

142 average daily membership.

143 ~~[(1)]~~ (2) (a) Charter schools shall receive funding as described in this section, except
144 Subsections ~~[(2)]~~ (3) through ~~[(7)]~~ (8) do not apply to charter schools described in Subsection
145 ~~[(1)]~~ (2)(b).

146 (b) Charter schools authorized by local school boards that are converted from district
147 schools or operate in district facilities without paying reasonable rent shall receive funding as
148 prescribed in Section 53A-1a-515.

149 ~~[(2)]~~ (3) (a) Except as provided in Subsection ~~[(2)]~~ (3)(b), a charter school shall receive
150 state funds, as applicable, on the same basis as a school district receives funds.

151 (b) In distributing funds under Title 53A, Chapter 17a, Minimum School Program Act,
152 to charter schools, charter school pupils shall be weighted, where applicable, as follows:

153 (i) .55 for kindergarten pupils;

154 (ii) .9 for pupils in grades 1-6;

155 (iii) .99 for pupils in grades 7-8; and

156 (iv) 1.2 for pupils in grades 9-12.

157 ~~[(c) The State Board of Education shall make rules in accordance with Title 63,
158 Chapter 46a, Utah Administrative Rulemaking Act, to administer Subsection (2)(b), including
159 hold harmless provisions to maintain a charter elementary school's funding level for a period of
160 two years after the effective date of the distribution formula.]~~

161 ~~[(d) Subsection (2)(b) does not apply to funds appropriated to charter schools to
162 replace local property tax revenues.]~~

163 ~~[(3) The State Board of Education shall adopt rules to provide for the distribution of
164 monies to charter schools under this section.]~~

165 ~~[(4) (a) The Legislature shall provide an appropriation for charter schools for each of
166 their students to replace some of the local property tax revenues that are not available to charter
167 schools. The amount of money provided for each charter school student shall be determined
168 by:]~~

169 ~~[(i) calculating the sum of:]~~

170 ~~[(A) school districts' operations and maintenance revenues derived from local property~~
171 ~~taxes, except revenues from imposing a minimum basic tax rate pursuant to Section~~
172 ~~53A-17a-135;]~~

173 ~~[(B) school districts' capital projects revenues derived from local property taxes, and]~~
174 ~~[(C) school districts' expenditures for interest on debt, and]~~

175 ~~[(ii) dividing the sum by the total average daily membership of the districts' schools.]~~

176 (4) (a) (i) Except as provided in Subsection (4)(a)(ii), a school district shall allocate a
177 portion of school district revenues for each resident student of the school district who is
178 enrolled in a charter school on October 1 equal to 25% of the lesser of:

179 (A) district per pupil local revenues; or
180 (B) charter school students' average local revenues.

181 (ii) For the purpose of allocating school district revenues under Subsection (4)(a)(i), a
182 kindergarten student who is enrolled in less than a full-day kindergarten program is weighted as
183 .55 of a student.

184 (iii) Nothing in this Subsection (4)(a) affects the school bond guarantee program
185 established under Chapter 28, Utah School Bond Guaranty Act.

186 (b) The State Board of Education shall:

187 (i) deduct an amount equal to the allocation provided under Subsection (4)(a) from
188 state funds the school district is authorized to receive under Title 53A, Chapter 17a, Minimum
189 School Program Act; and

190 (ii) remit the money to the student's charter school.

191 (c) Notwithstanding the method used to transfer school district revenues to charter
192 schools as provided in Subsection (4)(b), a school district may deduct the allocations to charter
193 schools under this section from:

194 (i) unrestricted revenues available to the school district; or
195 (ii) the revenue sources listed in Subsections (1)(b)(i)(A) through (F) based on the
196 portion of the allocations to charter schools attributed to each of the revenue sources listed in
197 Subsections (1)(b)(i)(A) through (F).

198 (d) (i) Subject to future budget constraints, the Legislature shall provide an
199 appropriation for charter schools for each student enrolled on October 1 to supplement the
200 allocation of school district revenues under Subsection (4)(a).

201 (ii) Except as provided in Subsections (4)(d)(iii) and (iv), the amount of money
202 provided by the state for a charter school student shall be the sum of:

203 (A) charter school students' average local revenues minus the allocation of school
204 district revenues under Subsection (4)(a); and

205 (B) statewide average debt service revenues.

206 (iii) If the total of a school district's allocation for a charter school student under
207 Subsection (4)(a) and the amount provided by the state under Subsection (4)(d)(ii) is less than
208 \$1427, the state shall provide an additional supplement so that a charter school receives at least
209 \$1427 per student under this Subsection (4).

210 (iv) For the purpose of providing state monies for charter school students under this
211 Subsection (4)(d), a kindergarten student who is enrolled in less than a full-day kindergarten
212 program is weighted as .55 of a student.

213 ~~(b) (e) Of the monies provided to a charter school under this Subsection (4)(a), 10%~~
214 ~~shall be expended for funding school facilities only.~~

215 ~~(c) To qualify for money under Subsection (4)(a), a new charter school shall, by~~
216 ~~September 30 of the school year prior to the school year it intends to begin operations:]~~

217 ~~(i) obtain approval of its application for a charter from:]~~

218 ~~(A) the State Board of Education, pursuant to Section 53A-1a-505; or]~~

219 ~~(B) a local school board, pursuant to Section 53A-1a-515; and]~~

220 ~~(ii) submit to the chartering entity an estimate of the charter school's first year~~
221 ~~enrollment.]~~

222 ~~(d) Subsection (4)(c) does not apply to charter schools beginning operations in the~~
223 ~~2005-06 school year.]~~

224 ~~(e) By December 1, the State Charter School Board shall submit to the Governor's~~
225 ~~Office of Planning and Budget and the Office of the Legislative Fiscal Analyst an estimate of~~

226 total charter school enrollment in the state for the following school year.]

227 (5) Charter schools are eligible to receive federal funds if they meet all applicable
228 federal requirements and comply with relevant federal regulations.

229 (6) The State Board of Education shall distribute funds for charter school students
230 directly to the charter school.

231 (7) (a) Notwithstanding Subsection [~~(2)~~] (3), a charter school is not eligible to receive
232 state transportation funding.

233 (b) The board shall also adopt rules relating to the transportation of students to and
234 from charter schools, taking into account Sections 53A-2-210 and 53A-17a-127.

235 (c) The governing body of the charter school may provide transportation through an
236 agreement or contract with the local school board, a private provider, or with parents.

237 (8) (a) (i) The state superintendent of public instruction may allocate grants for both
238 start-up and ongoing costs to eligible charter school applicants from monies appropriated for
239 the implementation of this part.

240 (ii) Applications for the grants shall be filed on a form determined by the state
241 superintendent and in conjunction with the application for a charter.

242 (iii) The amount of a grant may vary based upon the size, scope, and special
243 circumstances of the charter school.

244 (iv) The governing board of the charter school shall use the grant to meet the expenses
245 of the school as established in the school's charter.

246 (b) The State Board of Education shall coordinate the distribution of federal monies
247 appropriated to help fund costs for establishing and maintaining charter schools within the state.

248 (9) (a) A charter school may receive, hold, manage and use any devise, bequest, grant,
249 endowment, gift, or donation of any property made to the school for any of the purposes of this
250 part.

251 (b) It is unlawful for any person affiliated with a charter school to demand or request
252 any gift, donation, or contribution from a parent, teacher, employee, or other person affiliated
253 with the charter school as a condition for employment or enrollment at the school or continued

254 attendance at the school.

255 ~~[(10) The State Office of Education shall use up to \$1,044,000 of funding provided for~~
256 ~~new growth to fund additional growth needs in charter schools in fiscal year 2005.]~~

257 Section 3. Section 53A-1a-1001 is enacted to read:

258 **Part 10. UPSTART**

259 **53A-1a-1001. Definitions.**

260 As used in this part:

261 (1) "Contractor" means the educational technology provider selected by the State
262 Board of Education under Section 53A-1a-1002.

263 (2) "Low income" means an income below 200% of the federal poverty guideline.

264 (3) "Preschool children" means children who are:

265 (a) age four or five; and

266 (b) have not entered kindergarten.

267 (4) "UPSTART" means the pilot project established by Section 53A-1a-1002 that uses
268 a home-based educational technology program to develop school readiness skills of preschool
269 children.

270 Section 4. Section 53A-1a-1002 is enacted to read:

271 **53A-1a-1002. Pilot project to develop school readiness skills of preschool children.**

272 (1) UPSTART, a pilot project that uses a home-based educational technology program
273 to develop school readiness skills of preschool children, is established within the public
274 education system.

275 (2) UPSTART is created to:

276 (a) evaluate the effectiveness of giving preschool children access, at home, to
277 interactive individualized instruction delivered by computers and the Internet to prepare them
278 academically for success in school; and

279 (b) test the feasibility of scaling a home-based curriculum in reading, math, and science
280 delivered by computers and the Internet to all preschool children in Utah.

281 (3) The State Board of Education shall contract with an educational technology

282 provider, selected through a request for proposals process, for the delivery of a home-based
283 educational technology program for preschool children that meets the requirements of
284 Subsection (4).

285 (4) A home-based educational technology program for preschool children shall meet the
286 following standards:

287 (a) the contractor shall provide computer-assisted instruction for preschool children on
288 a home computer connected by the Internet to a centralized file storage facility;

289 (b) the contractor shall:

290 (i) provide technical support to families for the installation and operation of the
291 instructional software; and

292 (ii) provide for the installation of computer and Internet access in homes of low income
293 families that cannot afford the equipment and service;

294 (c) the contractor shall have the capability of doing the following through the Internet:

295 (i) communicating with parents;

296 (ii) updating the instructional software;

297 (iii) validating user access;

298 (iv) collecting usage data;

299 (v) storing research data; and

300 (vi) producing reports for parents, schools, and the Legislature;

301 (d) the program shall include the following components:

302 (i) computer-assisted, individualized instruction in reading, mathematics, and science;

303 (ii) a multisensory reading tutoring program; and

304 (iii) a validated computer adaptive reading test that does not require the presence of
305 trained adults to administer and is an accurate indicator of reading readiness of children who
306 cannot read;

307 (e) the contractor shall have the capability to quickly and efficiently modify, improve,
308 and support the product;

309 (f) the contractor shall work in cooperation with school district personnel who will

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310 provide administrative and technical support of the program as provided in Section
311 53A-1a-1003;

312 (g) the contractor shall solicit families to participate in the program as provided in
313 Section 53A-1a-1004; and

314 (h) in implementing the home-based educational technology program, the contractor
315 shall seek the advise and expertise of early childhood education professionals within the Utah
316 System of Higher Education on issues such as:

317 (i) soliciting families to participate in the program;

318 (ii) providing training to families; and

319 (iii) motivating families to regularly use the instructional software.

320 (5) The contract shall provide funding for a home-based educational technology
321 program for preschool children for one year with an option to extend the contract for additional
322 years or to expand the program to a greater number of preschool children, subject to the
323 appropriation of money by the Legislature for UPSTART.

324 Section 5. Section **53A-1a-1003** is enacted to read:

325 **53A-1a-1003. School district participation in UPSTART.**

326 (1) A school district may participate in UPSTART if the local school board agrees to
327 work in cooperation with the contractor to provide administrative and technical support for the
328 pilot project.

329 (2) Family participants in UPSTART shall be solicited from school districts that
330 participate in UPSTART.

331 (3) A school district that participates in UPSTART shall:

332 (a) receive funding for:

333 (i) paraprofessional and technical support staff; and

334 (ii) travel, materials, and meeting costs of the program;

335 (b) participate in program training by the contractor; and

336 (c) agree to adopt standardized policies and procedures in implementing the pilot
337 project.

338 Section 6. Section **53A-1a-1004** is enacted to read:

339 **53A-1a-1004. Family participation in UPSTART.**

340 (1) The contractor shall solicit families to participate in UPSTART through a public
341 information campaign and referrals from participating school districts.

342 (2) (a) Preschool children who participate in UPSTART shall:

343 (i) be from families with diverse socioeconomic and ethnic backgrounds; and

344 (ii) reside in different regions of the state in both urban and rural areas.

345 (b) At least 30% of the preschool children who participate in UPSTART shall be from
346 low income families.

347 (3) A low income family that cannot afford a computer and Internet service to operate
348 the instructional software may obtain a computer and peripheral equipment on loan and receive
349 free Internet service for the duration of the family's participation in the pilot project.

350 (4) The contractor shall make the home-based educational technology program
351 available to families at an agreed upon cost if the number of families who would like to
352 participate in UPSTART exceeds the number of participants funded by the legislative
353 appropriation.

354 Section 7. Section **53A-1a-1005** is enacted to read:

355 **53A-1a-1005. Purchase of equipment and service through cooperative purchasing**
356 **contracts.**

357 The State Board of Education or a school district may purchase computers, peripheral
358 equipment, and Internet service for low income families who cannot afford them through
359 cooperative purchasing contracts administered by the state Division of Purchasing and General
360 Services.

361 Section 8. Section **53A-1a-1006** is enacted to read:

362 **53A-1a-1006. Audit and evaluation.**

363 (1) The state auditor shall:

364 (a) conduct an annual audit of the contractor's use of funds for UPSTART; or

365 (b) contract with an independent certified public accountant to conduct an annual audit.

366 (2) The State Board of Education shall:
367 (a) require by contract that the contractor will open its books and records relating to its
368 expenditure of funds pursuant to the contract to the state auditor or the state auditor's designee;
369 (b) reimburse the state auditor for the actual and necessary costs of the audit; and
370 (c) contract with an independent, qualified evaluator, selected through a request for
371 proposals process, to evaluate the home-based educational technology program for preschool
372 children.

373 (3) Of the monies appropriated by the Legislature for UPSTART, excluding funds used
374 to provide computers, peripheral equipment, and Internet service to families, no more than
375 7.5% may be used for the evaluation of the program.

376 Section 9. Section **53A-1a-1007** is enacted to read:

377 **53A-1a-1007. Annual report.**

378 (1) The State Board of Education shall make a report on UPSTART to the Education
379 Interim Committee by November 30 each year.

380 (2) The report shall:

381 (a) address the extent to which UPSTART is accomplishing the purposes for which it
382 was established as specified in Section 53A-1a-1002; and

383 (b) include the following information:

384 (i) the number of families:

385 (A) volunteering to participate in the program;

386 (B) selected to participate in the program;

387 (C) requesting computers; and

388 (D) furnished computers;

389 (ii) the frequency of use of the instructional software;

390 (iii) obstacles encountered with software usage, hardware, or providing technical
391 assistance to families;

392 (iv) student performance on pre-kindergarten and post-kindergarten assessments
393 conducted by school districts and charter schools for students who participated in the

394 home-based educational technology program and those who did not participate in the program;

395 and

396 (v) as available, the evaluation of the program conducted pursuant to Section

397 53A-1a-1006.

398 Section 10. Section **53A-13-110** is enacted to read:

399 **53A-13-110. Financial and economic literacy education.**

400 (1) As used in this section, "financial and economic literacy passport" means a

401 document that tracks mastery of financial and economic literacy concepts and completion of

402 financial and economic activities, including the following:

403 (a) basic budgeting;

404 (b) saving and financial investments;

405 (c) banking and financial services, including balancing a checkbook or a bank account;

406 (d) career management, including earning an income;

407 (e) rights and responsibilities of renting or buying a home;

408 (f) retirement planning;

409 (g) loans and borrowing money, including interest, credit card debt, predatory lending,

410 and payday loans;

411 (h) insurance;

412 (i) federal, state, and local taxes;

413 (j) charitable giving;

414 (k) online commerce;

415 (l) identity fraud and theft;

416 (m) negative financial consequences of gambling;

417 (n) bankruptcy;

418 (o) free markets and prices;

419 (p) supply and demand;

420 (q) monetary and fiscal policy;

421 (r) effective business plan creation, including using economic analysis in creating a plan;

- 422 (s) scarcity and choices;
423 (t) opportunity cost and tradeoffs;
424 (u) productivity;
425 (v) entrepreneurship; and
426 (w) economic reasoning.
427 (2) The State Board of Education shall:
428 (a) in cooperation with interested private and non-profit entities:
429 (i) develop a financial and economic literacy passport that students may elect to
430 complete;
431 (ii) develop methods of encouraging parent and educator involvement in completion of
432 the financial and economic literacy passport; and
433 (iii) develop and implement appropriate recognition and incentives for students who
434 complete the financial and economic literacy passport, including:
435 (A) a financial and economic literacy endorsement on the student's diploma of
436 graduation;
437 (B) a specific designation on the student's official transcript; and
438 (C) any incentives offered by community partners;
439 (b) more fully integrate existing and new financial and economic literacy education into
440 instruction in kindergarten through twelfth grade by:
441 (i) coordinating financial and economic literacy instruction with existing instruction in
442 other core curriculum areas such as mathematics and social studies;
443 (ii) using curriculum mapping;
444 (iii) creating training materials and staff development programs that:
445 (A) highlight areas of potential coordination between financial and economic literacy
446 education and other core curriculum concepts; and
447 (B) demonstrate specific examples of financial and economic literacy concepts as a way
448 of teaching other core curriculum concepts; and
449 (iv) using appropriate financial and economic literacy assessments to improve financial

450 and economic literacy education and, if necessary, developing assessments;

451 (c) work with interested private and non-profit entities to:

452 (i) coordinate school use of existing financial and economic literacy education
453 resources;

454 (ii) develop simple, clear, and consistent messaging to reinforce and link existing
455 financial literacy resources; and

456 (iii) coordinate the efforts of school, work, private, non-profit, and other financial
457 education providers in implementing methods of appropriately communicating to teachers,
458 students, and parents key financial and economic literacy messages; and

459 (d) in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act,
460 make rules to develop guidelines and methods for school districts and charter schools to more
461 fully integrate financial and economic literacy education into other core curriculum courses.

462 (3) The state superintendent shall annually report to the Education Interim Committee
463 by November of each year on the successes and areas of needed improvement in financial and
464 economic literacy education provided pursuant to this section.

465 Section 11. Section **53A-14-107** is amended to read:

466 **53A-14-107. Instructional materials alignment with core curriculum.**

467 (1) A school district may not purchase primary instructional materials unless the
468 primary instructional materials provider:

469 (a) contracts with an independent party to evaluate and map the alignment of the
470 primary instructional materials with the core curriculum adopted under Section 53A-1-402;

471 (b) provides a detailed summary of the evaluation under Subsection (1)(a) on a public
472 website at no charge, for use by teachers and the general public; and

473 (c) pays the costs related to the requirements of this Subsection (1).

474 (2) The requirements under Subsection (1) may not be performed by:

475 (a) the State Board of Education;

476 (b) the superintendent of public instruction or the [~~superintendent's staff~~] State Office of
477 Education;

478 (c) the State Instructional Materials Commission appointed pursuant to Section
479 53A-14-101;

480 (d) ~~[an employee or]~~ a local school board ~~[member of]~~ or a school district; or

481 (e) the instructional materials creator or publisher.

482 (3) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act,
483 the State Board of Education shall make rules that establish:

484 (a) the qualifications of the independent parties who may evaluate and map the
485 alignment of the primary instructional materials in accordance with the provisions of Subsection
486 (1)(a); and

487 (b) requirements for the detailed summary of the evaluation and its placement on a
488 public website in accordance with the provisions of Subsection (1)(b).

489 Section 12. Section **53A-17a-103** is amended to read:

490 **53A-17a-103. Definitions.**

491 As used in this chapter:

492 (1) "Basic state-supported school program" or "basic program" means public education
493 programs for kindergarten, elementary, and secondary school students that are operated and
494 maintained for the amount derived by multiplying the number of weighted pupil units for each
495 district by ~~[\$2,514]~~ \$2,577, except as otherwise provided in this chapter.

496 (2) (a) "Certified revenue levy" means a property tax levy that provides an amount of ad
497 valorem property tax revenue equal to the sum of:

498 (i) the amount of ad valorem property tax revenue to be generated statewide in the
499 previous year from imposing a minimum basic tax rate, as specified in Subsection
500 53A-17a-135(1)(a); and

501 (ii) the product of:

502 (A) new growth, as defined in Section 59-2-924 and rules of the State Tax
503 Commission; and

504 (B) the minimum basic tax rate certified by the State Tax Commission for the previous
505 year.

- 506 (b) For purposes of this Subsection (2), "ad valorem property tax revenue" does not
507 include property tax revenue received statewide from personal property that is:
- 508 (i) assessed by a county assessor in accordance with Title 59, Chapter 2, Part 3, County
509 Assessment; and
- 510 (ii) semiconductor manufacturing equipment.
- 511 (3) "Leeway program" or "leeway" means a state-supported voted leeway program or
512 board leeway program authorized under Section 53A-17a-133 or 53A-17a-134.
- 513 (4) "Pupil in average daily membership (ADM)" means a full-day equivalent pupil.
- 514 (5) (a) "State-supported minimum school program" or "minimum school program"
515 means public school programs for kindergarten, elementary, and secondary schools as described
516 in this Subsection (5).
- 517 (b) The minimum school program established in the districts shall include the equivalent
518 of a school term of nine months as determined by the State Board of Education.
- 519 (c) (i) The board shall establish the number of days or equivalent instructional hours
520 that school is held for an academic school year.
- 521 (ii) Education, enhanced by utilization of technologically enriched delivery systems,
522 when approved by local school boards, shall receive full support by the State Board of
523 Education as it pertains to fulfilling the attendance requirements, excluding time spent viewing
524 commercial advertising.
- 525 (d) The program includes the total of the following annual costs:
- 526 (i) the cost of a basic state-supported school program; and
- 527 (ii) other amounts appropriated in this chapter in addition to the basic program.
- 528 (6) "Weighted pupil unit or units or WPU or WPUs" means the unit of measure of
529 factors that is computed in accordance with this chapter for the purpose of determining the
530 costs of a program on a uniform basis for each district.
- 531 Section 13. Section **53A-17a-104** is amended to read:
- 532 **53A-17a-104. Amount of state's contribution toward minimum school program.**
- 533 (1) The total contribution of the state toward the cost of the minimum school program

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534 may not exceed the sum of [~~\$2,273,574,120~~] \$2,497,012,086 for the fiscal year beginning July
535 1, [~~2007~~] 2008, except as otherwise provided by the Legislature through supplemental
536 appropriations.

537 (2) There is appropriated from state and local funds for fiscal year [~~2007-08~~] 2008-09
538 for distribution to school districts and charter schools, in accordance with this chapter, monies
539 for the following purposes and in the following amounts:

540 (a) basic program - kindergarten, [~~\$61,819,260 (24,590)~~] \$65,182,638 (25,294 WPU)s);

541 (b) basic program - grades 1-12, [~~\$1,202,446,200 (478,300)~~] \$1,258,253,751 (488,263
542 WPU)s);

543 (c) basic program - professional staff, [~~\$112,436,136 (44,724)~~] \$116,307,741 (45,133
544 WPU)s);

545 (d) basic program - administrative costs, [~~\$4,072,680~~] \$4,174,740 (1,620 WPU)s);

546 (e) basic program - necessarily existent small schools and units for consolidated
547 schools, [~~\$19,229,586~~] \$19,711,473 (7,649 WPU)s);

548 (f) special education - regular program - add-on WPU for students with disabilities,
549 [~~\$143,034,030 (56,895)~~] \$155,789,958 (60,454 WPU)s);

550 (g) preschool special education program, [~~\$20,918,994 (8,321)~~] \$22,082,313 (8,569
551 WPU)s);

552 (h) self-contained regular WPU, [~~\$33,587,040 (13,360)~~] \$34,573,032 (13,416 WPU)s);

553 (i) extended year program for severely disabled, [~~\$922,638 (367)~~] \$968,952 (376
554 WPU)s);

555 (j) special education programs in state institutions and district impact aid, [~~\$4,090,278~~
556 ~~(1,627)~~] \$4,293,282 (1,666 WPU)s);

557 (k) career and technical education district programs, [~~\$65,147,796 (25,914)~~
558 \$67,530,285 (26,205 WPU)s), including [~~\$1,114,000~~] \$1,154,458 for summer career and
559 technical education agriculture programs;

560 (l) career and technical education district set-aside, [~~\$2,742,774 (1,091)~~] \$2,878,509
561 (1,117 WPU)s);

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- 562 (m) class size reduction, [~~\$82,330,986 (32,749)~~] \$88,373,061 (34,293 WPU)s);
- 563 (n) Social Security and retirement programs, [~~\$333,315,119~~] \$349,906,049;
- 564 (o) pupil transportation to and from school, [~~\$70,928,797~~] \$74,446,865, of which not
- 565 less than [~~\$2,462,300~~] \$2,584,435 shall be allocated to the Utah Schools for the Deaf and Blind
- 566 to pay for transportation costs of the schools' students;
- 567 (p) guarantee transportation levy, \$500,000;
- 568 (q) Local Discretionary Block Grant Program, \$21,820,748;
- 569 (r) Interventions for Student Success Block Grant Program, [~~\$17,953,612~~
- 570 \$18,844,111;
- 571 (s) Quality Teaching Block Grant Program, [~~\$73,947,829~~] \$77,615,641;
- 572 (t) highly impacted schools, \$5,123,207;
- 573 (u) at-risk programs, [~~\$29,926,867~~] \$31,411,241;
- 574 (v) adult education, [~~\$9,781,008~~] \$10,266,146;
- 575 (w) accelerated learning programs, [~~\$3,975,546~~] \$4,295,581;
- 576 (x) concurrent enrollment, [~~\$9,215,497~~] \$9,672,586;
- 577 (y) High-ability Student Initiative Program, \$500,000;
- 578 (z) English Language Learner Family Literacy Centers, \$2,000,000;
- 579 ~~(y)~~ (aa) electronic high school, \$2,000,000;
- 580 ~~(z)~~ (bb) School LAND Trust Program, [~~\$21,000,000~~] \$26,499,500;
- 581 ~~{aa} state-supported voted leeway, \$227,700,777;~~
- 582 ~~{bb} state-supported board leeway, \$62,066,336;~~
- 583 (cc) charter schools, pursuant to Section 53A-1a-513, [~~\$28,509,000~~] \$36,957,646;
- 584 (dd) charter school administrative costs, [~~\$750,000~~] \$2,898,600;
- 585 (ee) K-3 Reading Improvement Program, [~~\$12,500,000~~] \$15,000,000;
- 586 ~~{ff} state-supported board leeway for K-3 Reading Improvement Program,~~
- 587 \$15,000,000; and]
- 588 ~~{gg}~~ (ff) Public Education Job Enhancement Program, \$2,430,000[-];
- 589 (gg) educator salary adjustments, \$148,260,200;

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- 590 (hh) Teacher Salary Supplement Restricted Account, \$4,300,000;
- 591 (ii) library books and electronic resources, \$1,500,000;
- 592 (jj) school nurses, \$1,000,000;
- 593 (kk) critical languages, \$230,000;
- 594 (ll) extended year for special educators, \$2,900,000;
- 595 (mm) USTAR Centers, \$6,900,000;
- 596 (nn) state-supported voted leeway, \$273,337,346;
- 597 (oo) state-supported board leeway, \$71,575,858; and
- 598 (pp) state-supported board leeway for K-3 Reading Improvement Program,
- 599 \$15,000,000.

600 Section 14. Section 53A-17a-108 is amended to read:

601 **53A-17a-108. Weighted pupil units for school district administrative costs --**
 602 **Appropriation for charter school administrative costs.**

603 (1) Administrative costs weighted pupil units are computed and distributed to districts
604 in accordance with the following schedule:

Administrative Costs Schedule

606 School District Enrollment as of October 1	Weighted Pupil Units
607 1 - 2,000 students	53
608 2,001 - 10,000 students	48
609 10,001 - 20,000 students	25
610 20,001 and above	16

611 (2) (a) Money appropriated to the State Board of Education for charter school
612 administrative costs, including an appropriation in Section 53A-17a-104, shall be distributed to
613 charter schools in the amount of [~~\$62~~] \$100 for each charter school student in enrollment.

614 (b) Charter schools are encouraged to identify and use cost-effective methods of
615 performing administrative functions, including contracting for administrative services with the
616 State Charter School Board as provided in Section 53A-1a-501.6.

617 (3) Charter schools are not eligible for funds for administrative costs under Subsection

618 (1).

619 Section 15. Section **53A-17a-120** is amended to read:

620 **53A-17a-120. Appropriation for accelerated learning programs.**

621 (1) Money appropriated to the State Board of Education in Section 53A-17a-104 for
622 accelerated learning programs shall be allocated to local school boards and charter schools for
623 the following programs:

624 (a) programs in grades 1-12 for the gifted and talented; ~~and~~

625 (b) advanced placement~~[-]; and~~

626 (c) International Baccalaureate.

627 (2) (a) Districts shall spend monies for these programs according to rules established by
628 the State Board of Education in accordance with Title 63, Chapter 46a, Utah Administrative
629 Rulemaking Act.

630 (b) The State Board of Education shall develop uniform and consistent policies for
631 school districts to follow in utilizing advanced placement monies.

632 Section 16. Section **53A-17a-126** is amended to read:

633 **53A-17a-126. State support of pupil transportation.**

634 (1) Money appropriated to the State Board of Education in Section 53A-17a-104 for
635 state-supported transportation of public school students shall be apportioned and distributed in
636 accordance with Section 53A-17a-127, except as otherwise provided in this section.

637 (2) (a) The Utah Schools for the Deaf and the Blind shall use money appropriated in
638 Section 53A-17a-104 to pay for transportation of their students based on current valid
639 contractual arrangements and best transportation options and methods as determined by the
640 schools.

641 (b) All student transportation costs of the schools shall be paid from the allocation of
642 pupil transportation monies received under Section 53A-17a-104.

643 (3) (a) A school district may only claim eligible transportation costs as legally reported
644 on the prior year's annual financial report submitted under Section 53A-3-404. [Each district
645 shall receive its]

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646 (b) The state shall contribute 85% of approved transportation costs, [except that if
647 during the] subject to budget constraints.

648 (c) If in a fiscal year the total transportation allowance for all districts exceeds the
649 amount appropriated for that purpose, all allowances shall be reduced pro rata to equal not
650 more than [that amount] the amount appropriated.

651 (4) Local school boards shall provide salary adjustments to employee groups that work
652 with the transportation of students comparable to those of classified employees authorized
653 under Section 53A-17a-137, when dividing the weighted pupil unit for salary adjustment
654 purposes.

655 Section 17. Section 53A-17a-127 is amended to read:

656 **53A-17a-127. Eligibility for state-supported transportation -- Approved bus**
657 **routes -- Additional local tax.**

658 (1) A student eligible for state-supported transportation means:

659 (a) a student enrolled in kindergarten through grade six who lives at least 1-1/2 miles
660 from school;

661 (b) a student enrolled in grades seven through 12 who lives at least two miles from
662 school; and

663 (c) a student enrolled in a special program offered by a school district and approved by
664 the State Board of Education for trainable, motor, multiple-disabled, or other students with
665 severe disabilities who are incapable of walking to school or where it is unsafe for students to
666 walk because of their disabling condition, without reference to distance from school.

667 (2) If a school district implements double sessions as an alternative to new building
668 construction, with the approval of the State Board of Education, those affected elementary
669 school students residing less than 1-1/2 miles from school may be transported one way to or
670 from school because of safety factors relating to darkness or other hazardous conditions as
671 determined by the local school board.

672 (3) (a) The State [~~Office~~] Board of Education shall distribute transportation monies to
673 school districts based on [~~three factors~~]:

- 674 (i) an allowance per mile for approved bus routes;
- 675 (ii) an allowance per hour for approved bus routes; ~~and~~
- 676 (iii) an annual allowance for equipment and overhead costs based on approved bus
- 677 routes and the age of the equipment~~[-]; and~~
- 678 (iv) a minimum allocation for each school district eligible for transportation funding.
- 679 (b) The State Board of Education shall distribute appropriated transportation funds
- 680 based on the prior year's eligible transportation costs as legally reported under Subsection
- 681 53A-17a-126(3).
- 682 ~~(b)~~ (c) In order for a bus to be considered for the equipment allowance under
- 683 Subsection (3)(a)(iii), it must meet federal and state regulations and standards for school buses.
- 684 ~~(c)~~ (d) The State ~~Office~~ Board of Education shall annually review the allowance per
- 685 mile, the allowance per hour, and the annual equipment and overhead allowance and adjust the
- 686 allowance to reflect current economic conditions.
- 687 (4) (a) Approved bus routes for funding purposes shall be determined on fall data
- 688 collected by October 1.
- 689 (b) Approved route funding shall be determined on the basis of the most efficient and
- 690 economic routes.
- 691 (5) A Transportation Advisory Committee with representation from local school
- 692 superintendents, business officials, school district transportation supervisors, and the ~~State~~
- 693 ~~Office of Education~~ state superintendent's staff shall serve as a review committee for
- 694 addressing school transportation needs, including recommended approved bus routes.
- 695 (6) (a) A local school board may provide for the transportation of students who are not
- 696 eligible under Subsection (1), regardless of the distance from school, from:
- 697 (i) general funds of the district; and
- 698 (ii) a tax rate not to exceed .0003 per dollar of taxable value imposed on the district.
- 699 (b) A local school board may use revenue from the tax to pay for transporting
- 700 participating students to interscholastic activities, night activities, and educational field trips
- 701 approved by the board and for the replacement of school buses.

702 (c) (i) If a local school board levies a tax under Subsection (6)(a)(ii) of at least .0002,
 703 the state may contribute an amount not to exceed 85% of the state average cost per mile,
 704 contingent upon the Legislature appropriating funds for a state contribution.

705 (ii) The [~~State Office of Education~~] state superintendent's staff shall distribute the state
 706 contribution according to rules enacted by the State Board of Education.

707 (d) (i) The amount of state guarantee money [~~to~~] which a school district would
 708 otherwise be entitled to receive under Subsection (6)(c) may not be reduced for the sole reason
 709 that the district's levy is reduced as a consequence of changes in the certified tax rate under
 710 Section 59-2-924 due to changes in property valuation.

711 (ii) Subsection (6)(d)(i) applies for a period of two years following the change in the
 712 certified tax rate.

713 [~~(7) There is appropriated for the fiscal year beginning July 1, 1999, \$225,000 to the~~
 714 ~~state board as the state's contribution under Subsection (6)(c)(i).]~~

715 Section 18. Section **53A-17a-153** is amended to read:

716 **53A-17a-153. Educator salary adjustments.**

717 (1) As used in this section, "educator" means a person employed by a school district,
 718 charter school, or the Utah Schools for the Deaf and the Blind who holds:

719 (a) a license issued under Title 53A, Chapter 6, Educator Licensing and Professional
 720 Practices Act; and

721 (b) a position as a:

722 (i) classroom teacher;

723 (ii) speech pathologist;

724 (iii) librarian or media specialist;

725 (iv) preschool teacher;

726 [~~(v) school administrator;~~]

727 [~~(vi)] (v) mentor teacher;~~

728 [~~(vii)] (vi) teacher specialist or teacher leader;~~

729 [~~(viii)] (vii) guidance counselor;~~

730 [~~(ix)~~] (viii) audiologist;
731 [~~(x)~~] (ix) psychologist; or
732 [~~(xi)~~] (x) social worker.

733 (2) In recognition of the need to attract and retain highly skilled and dedicated
734 educators, the Legislature shall annually appropriate money for educator salary adjustments,
735 subject to future budget constraints.

736 (3) Money appropriated to the State Board of Education for educator salary
737 adjustments shall be distributed to school districts, charter schools, and the Utah Schools for the
738 Deaf and the Blind in proportion to the number of full-time-equivalent educator positions in a
739 school district, a charter school, or the Utah Schools for the Deaf and the Blind as compared to
740 the total number of full-time-equivalent educator positions in school districts, charter schools,
741 and the Utah Schools for the Deaf and the Blind.

742 (4) School districts, charter schools, and the Utah Schools for the Deaf and the Blind
743 shall award bonuses to educators as follows:

744 (a) the amount of the salary adjustment shall be the same for each full-time-equivalent
745 educator position in the school district, charter school, or the Utah Schools for the Deaf and the
746 Blind;

747 (b) a person who is not a full-time educator shall receive a partial salary adjustment
748 based on the number of hours the person works as an educator; and

749 (c) salary adjustments may be awarded only to educators who have received a
750 satisfactory rating or above on their most recent evaluation.

751 (5) (a) Each school district and charter school and the Utah Schools for the Deaf and
752 the Blind shall submit a report to the State Board of Education on how the money for salary
753 adjustments was spent, including the amount of the salary adjustment and the number of full and
754 partial salary adjustments awarded.

755 (b) The State Board of Education shall compile the information reported under
756 Subsection (5) and submit it to the Public Education Appropriations Subcommittee by
757 November 30 each year.

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758 (6) The State Board of Education may make rules as necessary to administer this
759 section, in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.
760 (7) (a) Subject to future budget constraints, the Legislature shall appropriate sufficient
761 monies each year to:
762 ~~(a)~~ (i) maintain educator salary adjustments provided in prior years; and
763 ~~(b)~~ (ii) provide educator salary adjustments to new employees.
764 (b) Money appropriated for educator salary adjustments shall include money for the
765 following employer-paid benefits:
766 (i) retirement;
767 (ii) worker's compensation;
768 (iii) Social Security; and
769 (iv) Medicare.
770 Section 19. Section **53A-17a-156** is enacted to read:
771 **53A-17a-156. Teacher Salary Supplement Program.**
772 (1) As used in this section:
773 (a) "Eligible teacher" means a teacher who:
774 (i) has an assignment to teach:
775 (A) a secondary school level mathematics course;
776 (B) integrated science in grade 7 or 8;
777 (C) chemistry; or
778 (D) physics;
779 (ii) holds the appropriate endorsement for the assigned course;
780 (iii) has qualifying educational background; and
781 (iv) (A) is a new employee; or
782 (B) received a satisfactory rating or above on the teacher's most recent evaluation.
783 (b) "Qualifying educational background" means:
784 (i) for a teacher who is assigned a secondary school level mathematics course, a
785 bachelor's degree major, master's degree, or doctoral degree in mathematics; and

786 (ii) for a teacher who is assigned a grade 7 or 8 integrated science course, chemistry
787 course, or physics course, a bachelor's degree major, master's degree, or doctoral degree in:
788 (I) integrated science;
789 (II) chemistry;
790 (III) physics;
791 (IV) physical science; or
792 (V) general science.
793 (2) (a) Subject to future budget constraints, the Legislature shall annually appropriate
794 money to the Teacher Salary Supplement Restricted Account established in Section
795 53A-17a-157 to fund the Teacher Salary Supplement Program.
796 (b) Money appropriated for the Teacher Salary Supplement Program shall include
797 money for the following employer-paid benefits:
798 (i) retirement;
799 (ii) workers' compensation;
800 (iii) Social Security; and
801 (iv) Medicare.
802 (3) (a) Beginning in fiscal year 2008-09, the annual salary supplement is \$4,100 for an
803 eligible teacher who:
804 (i) is assigned full-time to teach one or more courses listed in Subsections (1)(a)(i)(A)
805 through (D); and
806 (ii) meets the requirements of Subsections (1)(a)(ii) and (iii) for each course
807 assignment.
808 (b) An eligible teacher who has a part-time assignment to teach one or more courses
809 listed in Subsections (1)(a)(i)(A) through (D) shall receive a partial salary supplement based on
810 the number of hours worked in a course assignment that meets the requirements of Subsections
811 (1)(a)(ii) and (iii).
812 (4) The Department of Human Resource Management shall:
813 (a) create an on-line application system for a teacher to apply to receive a salary

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814 supplement through the Teacher Salary Supplement Program:
815 (b) determine if a teacher:
816 (i) is an eligible teacher; and
817 (ii) has a course assignment as listed in Subsections (1)(a)(i)(A) through (D);
818 (c) verify, as needed, the determinations made under Subsection (4)(b) with school
819 district and school administrators; and
820 (d) certify a list of eligible teachers and the amount of their salary supplement, sorted by
821 school district and charter school, to the Division of Finance.
822 (5) (a) An eligible teacher shall apply with the Department of Human Resource
823 Management prior to the conclusion of a school year to receive the salary supplement
824 authorized in this section.
825 (b) An eligible teacher may apply with the Department of Human Resource
826 Management, after verification that the requirements under this section have been satisfied, to
827 receive a salary supplement after the completion of:
828 (i) the school year as an annual award; or
829 (ii) a semester or trimester as a partial award based on the portion of the school year
830 that has been completed.
831 (6) (a) The Division of Finance shall distribute monies from the Teacher Salary
832 Supplement Restricted Account to school districts and charter schools for the Teacher Salary
833 Supplement Program in accordance with the provisions of this section.
834 (b) The Department of Human Resource Management shall include the employer-paid
835 benefits described under Subsection (2)(b) in the amount of each salary supplement certified to
836 the Division of Finance.
837 (c) The employer-paid benefits described under Subsection (2)(b) are an addition to the
838 salary supplement limits described under Subsection (3).
839 (7) (a) Money received from the Teacher Salary Supplement Restricted Account shall
840 be used by a school district or charter school to provide a salary supplement equal to the
841 amount specified for each eligible teacher.

842 (b) The salary supplement is part of the teacher's base pay, subject to the teacher's
843 qualification as an eligible teacher every year, semester, or trimester.

844 (8) The State Board of Education shall cooperate with the Department of Human
845 Resource Management as it administers the Teacher Salary Supplement Program by:

846 (a) providing or verifying teacher data, as requested; and

847 (b) making information technology resources available.

848 (9) Notwithstanding the provisions of this section, if the appropriation for the program
849 is insufficient to cover the costs associated with salary supplements, the Department of Human
850 Resource Management may limit or reduce the salary supplements.

851 Section 20. Section **53A-17a-157** is enacted to read:

852 **53A-17a-157. Teacher Salary Supplement Restricted Account.**

853 (1) There is created within the Uniform School Fund a restricted account known as the
854 "Teacher Salary Supplement Restricted Account."

855 (2) The account shall be funded from appropriations made to the account by the
856 Legislature.

857 (3) The account shall be used to fund teacher salary supplements for school districts and
858 charter schools as provided in Section 53A-17a-156.

859 (4) The Division of Finance shall distribute account monies to school districts and
860 charter schools for the Teacher Salary Supplement Program as provided in Section
861 53A-17a-156.

862 Section 21. Section **53A-17a-158** is enacted to read:

863 **53A-17a-158. Stipends for special educators for additional days of work.**

864 (1) As used in this section:

865 (a) "IEP" means an individualized education program developed pursuant to the
866 Individuals with Disabilities Education Improvement Act of 2004, as amended.

867 (b) "Special education teacher" means a teacher whose primary assignment is the
868 instruction of students with disabilities who are eligible for special education services.

869 (c) "Special educator" means a person employed by a school district, charter school, or

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870 the Utah Schools for the Deaf and the Blind who holds:

871 (i) a license issued under Title 53A, Chapter 6, Educator Licensing and Professional
872 Practices Act; and

873 (ii) a position as a:

874 (A) special education teacher; or

875 (B) speech-language pathologist.

876 (2) The Legislature shall annually appropriate money for stipends to special educators
877 for additional days of work:

878 (a) in recognition of the added duties and responsibilities assumed by special educators
879 to comply with federal law regulating the education of students with disabilities and the need to
880 attract and retain qualified special educators; and

881 (b) subject to future budget constraints.

882 (3) (a) The State Board of Education shall distribute money appropriated under this
883 section to school districts, charter schools, and the Utah Schools for the Deaf and the Blind for
884 stipends for special educators in the amount of \$200 per day for up to ten additional working
885 days.

886 (b) Money distributed under this section shall include, in addition to the \$200 per day
887 stipend, money for the following employer-paid benefits:

888 (i) retirement;

889 (ii) workers' compensation;

890 (iii) Social Security; and

891 (iv) Medicare.

892 (4) A special educator receiving a stipend shall:

893 (a) work an additional day beyond the number of days contracted with the special
894 educator's school district or school for each daily stipend;

895 (b) schedule the additional days of work before or after the school year; and

896 (c) use the additional days of work to perform duties related to the IEP process,

897 including:

- 898 (i) administering student assessments;
899 (ii) conducting IEP meetings;
900 (iii) writing IEPs;
901 (iv) conferring with parents; and
902 (v) maintaining records and preparing reports.
903 (5) A special educator may:
904 (a) elect to receive a stipend for one to ten days of additional work; or
905 (b) elect to not receive a stipend.
906 (6) A person who does not hold a full-time position as a special educator is eligible for
907 a partial stipend equal to the percentage of a full-time special educator position the person
908 assumes.
- 909 Section 22. Section **53A-17a-159** is enacted to read:
910 **53A-17a-159. Utah Science Technology and Research Initiative Centers Program.**
911 (1) (a) The Utah Science Technology and Research Initiative (USTAR) Centers
912 Program is created to provide a financial incentive for charter schools and school districts to
913 adopt programs that result in a more efficient use of human resources and capital facilities.
914 (b) The potential benefits of the program include:
915 (i) increased compensation for math and science teachers by providing opportunities for
916 an expanded contract year which will enhance school districts' and charter schools' ability to
917 attract and retain talented and highly qualified math and science teachers;
918 (ii) increased capacity of school buildings by using buildings more hours of the day or
919 more days of the year, resulting in reduced capital facilities costs;
920 (iii) decreased class sizes created by expanding the number of instructional
921 opportunities in a year;
922 (iv) opportunities for earlier high school graduation;
923 (v) improved student college preparation;
924 (vi) increased opportunities to offer additional remedial and advanced courses in math
925 and science;

- 926 (vii) opportunities to coordinate high school and post-secondary math and science
927 education; and
- 928 (viii) the creation or improvement of science, technology, engineering, and math centers
929 (STEM Centers).
- 930 (2) From monies appropriated for the USTAR Centers Program, the State Board of
931 Education shall award grants to charter schools and school districts to pay for costs related to
932 the adoption and implementation of the program.
- 933 (3) The State Board of Education shall:
- 934 (a) solicit proposals from the State Charter School Board and school districts for the
935 use of grant monies to facilitate the adoption and implementation of the program; and
- 936 (b) award grants on a competitive basis.
- 937 (4) The State Charter School Board shall:
- 938 (a) solicit proposals from charter schools that may be interested in participating in the
939 USTAR Centers Program;
- 940 (b) prioritize the charter school proposals and consolidate them into the equivalent of a
941 single school district request; and
- 942 (c) submit the consolidated request to the State Board of Education.
- 943 (5) In selecting a grant recipient, the State Board of Education shall consider:
- 944 (a) the degree to which a charter school or school district's proposed adoption and
945 implementation of an extended year for math and science teachers achieves the benefits
946 described in Subsection (1);
- 947 (b) the unique circumstances of different urban, rural, large, small, growing, and
948 declining charter schools and school districts; and
- 949 (c) providing pilot programs in as many different school districts and charter schools as
950 possible.
- 951 (6) (a) Except as provided in Subsection (6)(b), a school district or charter school may
952 only use grant monies to provide full year teacher contracts, part-time teacher contract
953 extensions, or combinations of both, for math and science teachers.

954 (b) Up to 5% of the grant monies may be used to fund math and science field trips,
955 textbooks, and supplies.

956 (7) Participation in the USTAR Centers Program shall be:

957 (a) voluntary for an individual teacher; and

958 (b) voluntary for a charter school or school district.

959 (8) The State Board of Education shall make an annual report during the 2009, 2010,
960 and 2011 interims to the Public Education Appropriations Subcommittee describing the
961 program's impact on students and its effectiveness at achieving the benefits described in
962 Subsection (1).

963 Section 23. Section **53A-17a-160** is enacted to read:

964 **53A-17a-160. High-ability Student Initiative Program.**

965 (1) The High-ability Student Initiative Program is created to provide resources for
966 educators to enhance the academic growth of high-ability students.

967 (2) The program shall consist of:

968 (a) personnel under the direction of the State Board of Education and superintendent of
969 public instruction who shall direct and facilitate the program;

970 (b) a comprehensive, Internet-based resource center to provide information about
971 high-ability students to teachers, administrators, parents, and the community;

972 (c) professional development and professional learning communities for teachers,
973 including research-based tools to:

974 (i) identify high-ability students;

975 (ii) implement strategies to meet high-ability students' needs;

976 (iii) train and mentor teachers; and

977 (iv) enhance teacher collaboration and networking, including videoconferencing
978 equipment for classroom observation and coaching;

979 (d) assistance for a teacher to obtain an endorsement for gifted and talented education;

980 and

981 (e) an evaluation of the program.

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982 (3) (a) From monies appropriated for the High-ability Student Initiative Program, the
983 State Board of Education shall establish a grant program to encourage a licensed teacher to
984 obtain an endorsement for gifted and talented education.

985 (b) The State Board of Education may award up to 250 grants in amounts of up to
986 \$2,500 each.

987 (c) To receive a grant, a licensed teacher shall provide matching funds in an amount
988 equal to 1/2 the grant amount.

989 (4) From monies appropriated for the High-ability Student Initiative Program, the State
990 Board of Education shall:

991 (a) contract with an independent, qualified evaluator, selected through a request for
992 proposals process, to evaluate the High-ability Student Initiative Program; and

993 (b) provide up to 60 stipends in amounts of up to \$1,500 each for teachers who
994 participate in the evaluation.

995 (5) High-ability Student Initiative Program monies may not be used to supplant funds
996 for existing programs, but may be used to augment existing programs.

997 (6) Participation in the High-ability Student Initiative Program shall be:

998 (a) voluntary for an individual teacher; and

999 (b) voluntary for a charter school or school district.

1000 (7) The State Board of Education shall make an annual report during the 2009, 2010,
1001 and 2011 interims to the Education Interim Committee describing the program's impact on
1002 high-ability students.

1003 Section 24. Section **53A-17a-161** is enacted to read:

1004 **53A-17a-161. English Language Learner Family Literacy Centers Program --**
1005 **Report.**

1006 (1) Money appropriated for the English Language Learner Family Literacy Centers
1007 Program shall be used by school districts and charter schools to pay for costs of English
1008 Language Learner Family Literacy Centers as provided in this section.

1009 (2) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the

1010 State Board of Education, after consultation with school districts and charter schools, shall
1011 adopt a formula that allocates the money appropriated by the Legislature for the English
1012 Language Learner Family Literacy Centers Program to school districts and charter schools in a
1013 fair and equitable manner.

1014 (3) English Language Learner Family Literacy Centers shall be established to:

1015 (a) increase parent involvement;

1016 (b) communicate with parents who are not proficient in English concerning required and
1017 optional activities at the school, in the parents' preferred language to the extent practicable;

1018 (c) increase academic achievement, literacy skills, and language gains in all ethnic
1019 groups of students and their families;

1020 (d) coordinate with school administrators, educators, families, and students; and

1021 (e) support and coordinate with other language acquisition instructional services and
1022 language proficiency programs in the public schools.

1023 (4) The State Board of Education shall make a report to the Education Interim

1024 Committee on the effectiveness of the English Language Learner Family Literacy Centers
1025 Program before November 30, 2011.

1026 Section 25. Section **53A-17a-162** is enacted to read:

1027 **53A-17a-162. Beverley Taylor Sorenson Elementary Arts Learning Program.**

1028 (1) The Legislature finds that a strategic placement of arts in elementary education can
1029 impact the critical thinking of students in other core subject areas, including mathematics,
1030 reading, and science.

1031 (2) The Beverley Taylor Sorenson Elementary Arts Learning Program is created to
1032 enhance the social, emotional, academic, and arts learning of students in kindergarten through
1033 grade six by integrating arts teaching and learning into core subject areas.

1034 (3) From monies appropriated for the Beverley Taylor Sorenson Elementary Arts
1035 Learning Program, the State Board of Education shall, after consulting with the Utah Arts
1036 Council and receiving their recommendations:

1037 (a) establish a grant program to allow school districts and charter schools to hire 50

- 1038 highly qualified, full-time arts specialists to be based at 50 schools;
1039 (b) provide up to \$10,000 in one-time funds for each school arts specialist described
1040 under Subsection (3)(a) to purchase supplies and equipment;
1041 (c) establish a grant program to allow ten school districts to hire art coordinators,
1042 provided that a qualifying school district provides matching funds in an amount equal to the
1043 grant amount; and
1044 (d) annually contract with an independent, qualified evaluator, selected through a
1045 request for proposals process, to evaluate the Beverley Taylor Sorenson Elementary Arts
1046 Learning Program.
1047 (4) Beverley Taylor Sorenson Elementary Arts Learning Program monies may not be
1048 used to supplant funds for existing programs funded by the state, but shall be used to augment
1049 existing programs.
1050 (5) Schools that participate in the Beverley Taylor Sorenson Elementary Arts Learning
1051 Program shall partner with institutions of higher education that award elementary education
1052 degrees to obtain quality pre-service and in-service training, research, and leadership
1053 development for arts education.
1054 (6) The State Board of Education shall, after consultation with the Utah Arts Council,
1055 make an annual report during the 2009, 2010, and 2011 interims to the Education Interim
1056 Committee describing the program's impact on students in kindergarten through grade six.
1057 Section 26. Section **63-55b-153** is amended to read:
1058 **63-55b-153. Repeal dates -- Titles 53, 53A, and 53B.**
1059 (1) Section 53-3-210 is repealed February 1, 2007.
1060 (2) Section 53A-1-403.5 is repealed July 1, 2012.
1061 (3) Subsection 53A-1a-511(7)(c) is repealed July 1, 2007.
1062 (4) Title 53A, Chapter 1a, Part 10, UPSTART, is repealed July 1, 2014.
1063 [~~(4)~~] (5) Section 53A-3-702 is repealed July 1, 2008.
1064 [~~(5)~~] (6) Section 53A-6-112 is repealed July 1, 2009.
1065 (7) Subsection 53A-13-110(3) is repealed July 1, 2013.

- 1066 ~~(6)~~ (8) Section 53A-17a-152 is repealed July 1, 2010.
- 1067 (9) Section 53A-17a-162 is repealed July 1, 2012.
- 1068 Section 27. **Ongoing appropriations.**
- 1069 (1) As an ongoing appropriation subject to future budget constraints, there is
- 1070 appropriated from the Uniform School Fund for fiscal year 2008-09, as follows:
- 1071 (a) \$2,500,000 to the State Board of Education for UPSTART as provided in Title
- 1072 53A, Chapter 1a, Part 10, UPSTART, including costs of:
- 1073 (i) a home-based educational technology program provided by a contractor;
- 1074 (ii) computers, peripheral equipment, and Internet service for families who cannot
- 1075 afford the equipment and service;
- 1076 (iii) administrative and technical support provided by school districts;
- 1077 (iv) an audit of the contractor's use of funds appropriated for UPSTART; and
- 1078 (v) an evaluation of the home-based educational technology program;
- 1079 (b) \$100,000 to the State Board of Education for staff development and assessments in
- 1080 financial and economic literacy as provided by Subsection 53A-13-110(2)(b);
- 1081 (c) \$4,300,000 from the Uniform School Fund Teacher Salary Supplement Restricted
- 1082 Account for the Teacher Salary Supplement Program in accordance with the provisions under
- 1083 Sections 53A-17a-156 and 53A-17a-157; and
- 1084 (d) \$400,000 to the State Board of Education for career and technical education online
- 1085 assessment.
- 1086 (2) As an ongoing appropriation subject to future budget constraints, there is
- 1087 appropriated from the General Fund for fiscal year 2008-09, \$250,000 to the Department of
- 1088 Human Resource Management for administration of the Teacher Salary Supplement Program
- 1089 established in Section 53A-17a-156.
- 1090 Section 28. **One-time appropriations for fiscal year 2008-09.**
- 1091 (1) There is appropriated from the Uniform School Fund for fiscal year 2008-09 only,
- 1092 as follows:
- 1093 (a) \$3,000,000 to the State Board of Education for pupil transportation to and from

- 1094 school as provided in Sections 53A-17a-126 and 53A-17a-127;
- 1095 (b) \$3,000,000 to the State Board of Education to fund the English Language Learner
- 1096 Family Literacy Centers Program established in Section 53A-17a-161;
- 1097 (c) \$15,820,000 to the State Board of Education to fund the Beverley Taylor Sorenson
- 1098 Elementary Arts Learning Program established in Section 53A-17a-162; and
- 1099 (d) \$150,000 to the State Board of Education to fulfill its requirements under
- 1100 Subsection 53A-13-110(2), including curriculum integration and development of assessments
- 1101 and materials.
- 1102 (2) The money appropriated in Subsections (1)(a) through (d) is nonlapsing.
- 1103 **Section 29. One-time appropriations for fiscal year 2007-08.**
- 1104 (1) There is appropriated for fiscal year 2007-08 only, as follows:
- 1105 (a) \$50,000 from the General Fund to the Department of Human Resource
- 1106 Management for costs to administer the Teacher Salary Supplement Program established in
- 1107 Section 53A-17a-156;
- 1108 (b) \$1,000,000 from the Uniform School Fund to the State Board of Education for
- 1109 UPSTART as provided in Title 53A, Chapter 1a, Part 10, UPSTART; and
- 1110 (c) \$280,000 from the Uniform School Fund to the State Board of Education for library
- 1111 books and electronic resources.
- 1112 (2) The money appropriated in Subsections (1)(a) through (c) is nonlapsing.
- 1113 **Section 30. One-time appropriation for classroom supplies.**
- 1114 (1) There is appropriated from the Uniform School Fund to the State Board of
- 1115 Education for fiscal year 2008-09 only, \$10,000,000 for classroom supplies and materials.
- 1116 (2) (a) Of the amount appropriated in Subsection (1), the board shall distribute
- 1117 \$7,500,000 to classroom teachers in school districts, the Schools for the Deaf and the Blind,
- 1118 and charter schools on the basis of the number of classroom teachers in each school as
- 1119 compared to the total number of classroom teachers.
- 1120 (b) Teachers shall receive up to the following amounts:
- 1121 (i) a teacher on salary schedule steps one through three teaching in grades kindergarten

- 1122 through six or preschool handicapped - \$360;
- 1123 (ii) a teacher on salary schedule steps one through three teaching in grades seven
- 1124 through twelve - \$310;
- 1125 (iii) a teacher on salary schedule step four or higher teaching in grades kindergarten
- 1126 through six or preschool handicapped - \$285; and
- 1127 (iv) a teacher on salary schedule step four or higher teaching in grades seven through
- 1128 twelve - \$235.
- 1129 (c) If the appropriation in Subsection (1) is not sufficient to provide to each teacher the
- 1130 full amount allowed under Subsection (2)(b), teachers on salary schedule steps one through
- 1131 three shall receive the full amount allowed with the remaining monies apportioned to all other
- 1132 teachers.
- 1133 (3) (a) Of the amount appropriated in Subsection (1), the State Board of Education
- 1134 shall distribute \$2,500,000 for classroom supplies and materials in accordance with a
- 1135 distribution formula established by rule.
- 1136 (b) The State Board of Education shall make rules in accordance with Subsections
- 1137 (3)(c) and (d) and Title 63, Chapter 46a, Utah Administrative Rulemaking Act, for the
- 1138 distribution of the \$2,500,000.
- 1139 (c) The rules shall give priority to teachers in any grade in the first year of teaching in
- 1140 the awarding of the monies.
- 1141 (d) The rules may allow the monies to be distributed to teachers in any grade in the
- 1142 second through the fifth year of teaching.
- 1143 (4) Teachers shall spend the money appropriated in Subsection (1) for school supplies,
- 1144 materials, or field trips under rules adopted by the State Board of Education.
- 1145 (5) As used in this section, "classroom teacher" or "teacher" means permanent teacher
- 1146 positions filled by one teacher or two or more job-sharing teachers:
- 1147 (a) who are licensed personnel;
- 1148 (b) who are paid on the teacher's salary schedule;
- 1149 (c) who are hired for an entire contract period; and

S.B. 2

Enrolled Copy

1150 (d) whose primary function is to provide instructional or a combination of instructional
1151 and counseling services to students in public schools.

1152 **Section 31. Intent language.**

1153 It is the intent of the Legislature that:

1154 (1) at least \$100,000 of the monies appropriated for accelerated learning programs in
1155 accordance with the provisions of Sections 53A-17a-104 and 53A-17a-120 shall be annually
1156 allocated to International Baccalaureate programs; and

1157 (2) the State Board of Education shall:

1158 (a) conduct an independent audit of funds allocated to the Utah Virtual Academy
1159 charter school through the Minimum School Program, including its expenditures of WPU,
1160 categorical (below-the-line), and local replacement funding, as the school begins operations for
1161 the 2008-09 school year; and

1162 (b) prepare and present a report to the Executive Appropriations Committee by
1163 November 30, 2008, detailing the findings of the independent audit and of Utah Virtual
1164 Academy expenditures examined through the audit.

1165 **Section 32. Effective date.**

1166 This bill takes effect on July 1, 2008, except:

1167 (1) if approved by two-thirds of all the members elected to each house, Sections
1168 53A-1a-1001 through 53A-1a-1007 take effect upon approval by the governor, or the day
1169 following the constitutional time limit of Utah Constitution Article VII, Section 8, without the
1170 governor's signature, or in the case of a veto, the date of veto override; and

1171 (2) the following sections take effect on May 5, 2008:

1172 (a) Section 53A-17a-156; and

1173 (b) Uncodified Section 29, One-time appropriations for fiscal year 2007-08.

1174 **Section 33. Coordinating S.B. 2 with H.B. 1 -- Superseding amendments.**

1175 If this S.B. 2 and H.B. 1, Minimum School Program Base Budget Amendments, both
1176 pass, it is the intent of the Legislature that when the Office of Legislative Research and General
1177 Counsel prepares the Utah Code database for publication:

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S.B. 2

- 1178 (1) the amendments to Section 53A-17a-104 in S.B. 2 supersede the amendments to
1179 Section 53A-17a-104 in H.B. 1;
- 1180 (2) Subsection 53A-17a-104(2)(hh) in H.B. 1 shall be deleted and renumber the
1181 remaining subsections accordingly;
- 1182 (3) the amendments to Section 53A-17a-108 in S.B. 2 supersede the amendments to
1183 Section 53A-17a-108 in H.B. 1; and
- 1184 (4) Uncodified Section 7, Intent language for charter schools appropriation, in H.B. 1
1185 shall be deleted.

Tab B

APPENDIX B

MAY 02 2011

SALT LAKE COUNTY

By _____
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY
STATE OF UTAH

TOM GREGORY, et al.,

Plaintiffs,

vs.

MARK SHURTLEFF, et al.,

Defendants.

RULING

Case No. 080908814

Judge: L.A. DEVER

The above entitled matter is before the Court on (1) Defendants' Motion for Partial Summary Judgment, (2) Plaintiffs' Cross-Motion for Partial Summary Judgment, and (3) Plaintiffs' Motion to Strike Evidentiary Matters. Having reviewed the noted motions and having heard oral arguments on the matters on March 1, 2011, the Court makes the following Ruling.

The parties' Motions center on Plaintiffs' Counts Three and Four of their Complaint. Count Three asserts that Senate Bill Two ("SB2") violates the non-delegation doctrine of Article X, Section Three of the Utah Constitution. Specifically, Plaintiffs maintain that the Teacher Salary Supplement Program violates the non-delegation doctrine by delegating the authority of the Utah State Board of Education ("USBE") to administer education related programs to the Utah Department of Human Resources.

Count Four maintains that same violation of the non-delegation doctrine of the USBE's authority to evaluate instructional materials to an independent party.

Article Ten, Section Three of the Utah Constitution ("Article X"), provides in part, that "[t]he *general* control and supervision of the public education system shall be vested in a State Board of Education." (2011)(emphasis added).

Although the language does not define the scope of "general control and supervision," the same language was first enacted in the 1896 of Utah State Constitution. Article Ten, Section Eight¹ read, "The general control and supervision of the Public School System shall be vested in a State Board of Education consisting of the Superintendent of Public Instruction, and *such other persons* as the Legislature may provide." (emphasis added).

To appropriately address the issue put forth to this Court, the Court must discern the meaning of SB2 in light of the intent of the framers of the constitution. State Bd. of Educ. v. State Bd. of Higher Educ., 505 P.2d 1193, 1195 (Utah 1973) ("It is a cardinal rule of constitutional construction that the instrument must be construed in the light of what was intended by its framers. The intended meaning must be ascertained from the whole of the instrument and in construing a particular section the court may refer to any other section or provision to ascertain its purpose and intention."); see also Utah Sch.

¹The 1986 amendment, S.J. Res. 1, 46th Leg., 2d Spec. Sess., (Utah 1986), renumbered the provisions of the former Section Eight to the current numbered Section.

Bds. Ass'n v. Utah State Bd. of Educ., 2001 UT 2, ¶9 (“The power and duty of ascertaining the meaning of a constitutional provision resides exclusively with the judiciary. The issue of whether a statute is constitutional is a question of law[.]” (citations omitted)).

The Court notes that neither party provided to the Court any evidentiary support of legislative history, reports, journals, or other legislative documents to elucidate the intent of the framers in the scope of power granted to the USBE.

The Utah Supreme Court explained, “Since statehood the legislature, from time to time, has specified the duties and responsibilities fo the State Board of Education.” State Bd. of Educ., 505 P.2d at 1195. Plaintiffs failed to present any evidence that the Legislature does not have continuing authority to specify or alter the USBE’s duties. See Utah Sch. Bds. Ass'n, 2001 UT at ¶14 (“The legislature has plenary authority to create laws that provide for the establishment and maintenance of the Utah public education system.”)

In Utah’s first enacted constitution of 1896, in addition to the provision of “general control and supervision,” Article Ten, Section Nine specifically precluded the USBE to “prescribe text books to be used in th common schools.²” This provision

²Utah Code Annotated Section 53-13-1 et. seq., entitled State Textbook Commission, was renumbered in 1990 as Section 53A-14-101 et. seq.

remained as part of Utah's constitution until 1986 when Article Ten, Sections Eight and Nine were renumbered. There is no indication, nor any evidence presented, that the intent of the 1986 constitutional amendments was to grant the USBE sole involvement and regulation of Utah's public education system. S.J. Res. 1, 46th Leg., 2d Spec. Sess., (Utah 1986).

Before the 1986 constitutional amendments, the related statutory provisions, Utah Code Annotated Section 53-2-1³ et. seq., specifically Section 53-2-12 provided:

(1) The general control and supervision of the public system is vested in the State Board of Education. "General control and supervision" as used in Article X, Sec. 8, fo the Utah Constitution means comprehending or directed to the whole, *as distinguished* from authority or power to govern or manage a specific division, category, branch, school, on institution in the public school system, *except* as otherwise specifically directed by statute.

(1953) (Interim Supp. 1984)(emphasis added).

Following the 1986 constitutional amendments, Section 53-2-12, was repealed and reenacted to read:

(1) The State Board of Education has general control and supervision of the public school system. "General control and supervision" as used in Article X, Sec. 8⁴, of the Utah Constitution means comprehending or directed to the whole system.

Id. (1986 Cumulative Supp.)

³The current Section 53A-1-401 et. seq. was enacted by Chapter 2, Laws of Utah 1988.

⁴The amended Article 10, Section Three of the constitution became effective July 1, 1987.

"Shortly after adoption of the Utah Constitution, the legislature understood general control and supervision to mean *management* of all aspects of the public education system[.]" Utah Sch. Bds. Ass'n, 2001 UT at ¶17 (citation omitted)(emphasis added).

Plaintiffs fail to explain how lines 482-488 of SB2 strips the USBE of its authority to manage, especially in light of the following key language:

- (3) [T]he State Board of Education *shall make rules* that establish:
 - (a) the qualifications of the independent parties who may evaluate and map the alignment of the primary instructional materials. . . ; and
 - (b) requirements for the detailed summary of the evaluation[.]

Utah Code Ann. § 53A-14-107 (2011) (emphasis added). This language is not indicative of the removal of any authority of the USBE rather, it unambiguously establishes the USBE as the body to regulate the textbook commission in its assessment of instructional materials.

In order to demonstrate the need for well-established legal and evidentiary support in the submission of any motion, the Court addressed Plaintiffs' Count Four in spite of Plaintiffs' failure to provide the same in support of its argument; however, the Court will not do the same for Plaintiffs' Count Three⁵.

⁵The Court notes that Plaintiffs' only argument was based upon the doctrine of non-delegable powers. Plaintiffs failed to address pertinent issues related to matters of constitutional analysis including the standard of review, evidentiary burdens, the issue of severability, relevant procedural or legislative history, etc.

As well noted, it is not the burden of the Court to research and develop a party's argument. State v. Gamblin, 2000 UT 44, ¶¶6-8, 1 P.3d 108.

In matters of constitutional consideration, the Utah Supreme Court explained:

The Utah Constitution is not one of grant, *but one of limitation*. The state having thus committed its whole lawmaking power to the legislature, excepting such as is expressly or impliedly withheld by the state or federal constitution, it has plenary power for all purposes of civil government. Therefore, if the legislature is to be restricted in educational as well as all other matters, it is imperative that the Legislature be restricted *expressly* or by *necessary implication* by the Constitution itself. As a result, the Act at issue *must be deemed constitutional* unless an examination of the Utah Constitution reveals limitations upon the legislature with respect thereto.

Utah Sch. Bds. Ass'n, 2001 UT at ¶11 (citations and quotations omitted)(emphasis added).

Furthermore, summary judgment is proper only if there is no genuine issue as to any material fact and that the moving party is *entitled to a judgment as a matter of law*. Gudmundson v. Del Ozone, 2010 UT 33, ¶44, 232 P.3d 1059 (citation and quotations omitted)(emphasis added).


Because Plaintiffs failed to show that they are entitled to summary judgment as a matter of law, their Motion for Partial Summary Judgment is DENIED.

Additionally, because a statute is presumed constitutional and any doubts are to be resolved in favor of constitutionality, the Court GRANTS Defendants' Motion for Partial Summary Judgment.

Based upon the Court's Ruling, Plaintiffs' Motion to Strike is MOOT.

Dated this 1st day of May, 2011.

BY THE COURT:



L.A. DEVER
DISTRICT COURT JUDGE




CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling dated this 2 day of May, 2011, postage prepaid, to the following:

Jerold S. Jensen
Mark L. Shurtleff
OFFICE OF THE ATTORNEY GENERAL
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, UT 84114

David R. Irvine
Janet I. Jenson
JENSON & GUELKER, P.C.
747 East South Temple Street, Suite 130
Salt Lake City, UT 84102

Alan L. Smith
1492 East Kensington Avenue
Salt Lake City, UT 84105



CLERK OF COURT

Tab C

APPENDIX C

David R. Irvine (Utah Bar No. 1621)
Attorney and Counselor at Law
747 East South Temple Street, Suite 130
Salt Lake City, Utah 84102
Telephone: (801) 579-0802

Alan L. Smith (Utah Bar No. 2988)
Attorney and Counselor at Law
1169 East 4020 South
Salt Lake City, Utah 84124
Telephone: (801) 262-0555

Janet I. Jenson (Utah Bar No. 4226)
Jenson & Guelker, P. C.
747 East South Temple Street, Suite 130
Salt Lake City, Utah 84102
Telephone: (801) 579-0800

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Tom Gregory, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
vs.)	Civil No. 080908814
)	
Mark Shurtleff, <i>et al.</i> ,)	Judge Dever
)	
Defendants.)	

DECLARATION OF DENIS R. MORRILL

Denise R. Morrill, under penalty of perjury, declares and testifies as follows.

1. My name is Denis R. Morrill. I am a plaintiff in this civil action. I am over 21 years of age and competent to give the testimony set forth below. All of the testimony given below is based upon my personal knowledge and experience and, in the main, upon

my service as a member of the Utah State Board of Education for a combined total of approximately 10 years.

2. I have served as a member of the Utah State Board of Education ("USBE" or "state board"), with one period of hiatus, for 10 of the last 12 years. As a result of my service on the state board, I am intimately familiar with the role of the USBE in making policy and administrative determinations respecting teacher salaries and so-called textbook-curriculum alignments.

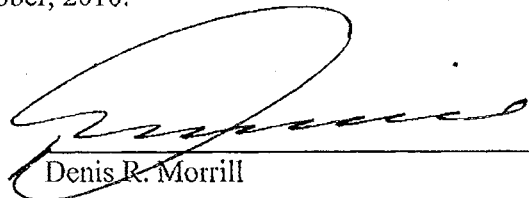
3. I have read the provisions of SB 2 (second substitute) as those provisions bear upon the so-called "Teacher Salary Supplement Program" and the so-called "Textbook Approval Program." I also have read the defendants' submission in this case styled as a "Memorandum in Response to Plaintiffs' Motion for Partial Summary Judgment, and in Support of Defendants' Cross-Motion for Partial Summary Judgment," wherein defendants claim that SB 2's measures respecting teacher salary supplements and textbook approvals do not come within the general supervision and control or the core responsibilities of the state board.

4. I respectfully disagree, on factual grounds, with defendants' claims in this regard. Based upon my personal experience, the USBE at all times has exercised general supervision and control over teacher salaries. It may be true, for example, that the state board looks to local school boards to regulate salaries in the first instance, but the state board always has exercised general supervision and control over these local decisions. Likewise, the state board sometimes may rely upon other departments of government for payroll and other ministerial or clerical type services respecting teacher salaries. But the state board always has exercised general supervision and control even in these respects.

5. In particular, the teacher salary supplement provisions of SB 2 (second substitute) are measures in the nature of performance pay incentives. These types of teacher salary considerations, in my experience, have been part of the policy making, administrative responsibility of the state board. In fact, a year or two ago, I served on a subcommittee of the state board which was tasked with the evaluation of teacher performance pay issues, and the state board presently has in effect a pilot project respecting such issues. The state board, moreover, always has treated all dimensions of teacher salaries as part of its budgetary discussions. These responsibilities respecting teacher salaries, especially in the performance pay area, never have been delegated, in my experience or to my knowledge, to any other state agency.

6. Based upon my personal experience, the state board always has exercised general supervision and control over textbook approval and especially over the so-called alignment of textbook content and core curriculum requirements in public education in the state of Utah. This general supervision and control over textbooks and alignment of textbooks with curricula is a core function of the state board.

Dated this 26th day of October, 2010.



Denis R. Morrill

Tab D

APPENDIX D

The Salt Lake Tribune

<http://www.sltrib.com>

Did Utah senator's advocacy go too far?

Textbook case: Stephenson leaned on educators on behalf of an Orem company.

By Robert Gehrke
The Salt Lake Tribune

Salt Lake Tribune

Updated:11/29/2008 10:08:40 PM MST

The Salt Lake Tribune

<http://www.sltrib.com>

It was past midnight and Sen. Howard Stephenson was livid.

Hammering out an early-morning e-mail to Utah education officials, the Draper Republican lashed out at "subversives" in the department for their shabby treatment of ProCert Labs, an Orem-based company whose services Stephenson had been advocating for years.

In a series of heated e-mails and phone calls, Stephenson, who heads the committee that sets the public education budget, threatened to withhold support from the Utah Office of Education, suggested it be downsized and have work outsourced and that the malcontents mistreating ProCert could be fired.

"This persistent, long-term and ongoing defiance on the part of [the two employees] is unacceptable and, in my opinion, is justification for termination of employment," Stephenson wrote.

The e-mail, and other angry phone calls and missives from Stephenson on ProCert's behalf, stunned state Superintendent Patti Harrington.

"When it gets to be a strained relationship around one vendor and irate e-mails around one vendor, that does get problematic, and it feels like we're being bullied," Harrington said. "I don't think that's an appropriate type of pressure to be put on a state agency."

But it was just one example of several since 2007 in which Stephenson had waded into the minutiae of contracts and vendors at the state education office, attempting to shape education programs created by the Legislature and the lucrative contracts to implement them.

"I'm just trying to get the 21st-century tools into the hands of our teachers and I don't care who gets the bid," said Stephenson, who also is president of the Utah Taxpayers Association and a registered lobbyist. "When you're as committed to saving money, precious taxpayer resources, as I am, that's why I want to make sure we get the best bang for the buck."

He said his watchdogging stopped education officials from diverting \$30 million meant for technology improvements into salaries and pushed stubborn bureaucrats into adopting new technology and upgrading Utah's lagging rate of computers in classrooms.

Records show that, on several occasions in the past two years Stephenson made detailed recommendations and suggested specific changes to criteria for picking companies to receive state funds, including revisions to a program to provide laptop computers to preschoolers.

That degree of legislative involvement is rare. Typically, lawmakers set policy, allocate funds and then let the executive branch award contracts. Occasionally legislators have called with input, but none, aside from Stephenson, has put any complaints or recommendations in writing.

Harrington said Stephenson is the "singular example" of a legislator who has weighed in with the education office and, as the senator who controls the education budget, his wishes are hard to ignore.

That type of interaction "is exactly what everyone doesn't want to have happen," said Steven Schooner, a George

Washington University law professor who specializes in government contracting.

"It could be the people doing the purchasing were incompetent," Schooner said. "But if your Legislature is getting involved in individual procurements, the system isn't going to work in the long run."

Last summer, the Legislature's general counsel gave GOP lawmakers a primer on the propriety of intervening in government-contract issues, a response to Stephenson's actions and other factors.

The Legislature's ethics rules state that members "shall not exercise any undue influence on any governmental entity," but Stephenson maintains he's crossing no such lines.

"It's my job, as chairman of the committee," he said, "that the will of the Legislature is carried out when we do pass laws and make appropriations for these things."

Stephenson said he has no financial stake in any of the companies involved in the contracting issues. They have not contributed to his campaigns nor do they belong to the Utah Taxpayers Association. His only motivation, he said, is a passion to ensure teachers get the tools they need.

Harrington said she respects Stephenson's vision and drive for using technology in classrooms, and they frequently see eye to eye.

At the same time, her department no longer provides advance copies of "requests for proposals" to legislators, rules have been adopted to insulate the contracting process, and she now makes the final determination on high-profile contracts to protect her staff from political pressure.

Stephenson said he suspects educators may be criticizing him now because in tough budget times he has resisted their effort to ax many reforms he championed, such as performance pay for teachers and laptops for preschoolers.

"Collectively, these things I've been pushing have a toll on the state office and there is a desire to neutralize me as chairman of education appropriations, and I think this reaction is an attempt to do that," he said, adding that he won't stop pushing the office for reforms.

The most striking example of Stephenson's activism involved ProCert Labs, which is seeking to review Utah's textbooks, pinpointing where concepts in the state's core curriculum are taught to help instructors teach the required lessons. The work could be worth millions.

ProCert President Paul Hoffmann, who is the son-in-law of prominent lobbyist Ruland Gill, said the company has clashed with some education officials for years for reasons he doesn't understand, but suspects the bureaucrats might feel threatened by privatization.

In 2003, a legislative committee, which included Stephenson, took the unusual step of writing specifications for innovative education programs, then awarded handpicked vendors, including ProCert, money to bid for the programs. But when the Legislature tried to fund the ProCert contract the next year, then-Gov. Olene Walker vetoed the project.

Walker said she felt having lawmakers award contracts to specific vendors was inappropriate.

"The Legislature has the right to make policy and set divisions of power, but it's the executive branch's job to implement them," Walker said last week, "and I felt quite strongly about that separation of powers."

At the time, Stephenson accused Walker in his taxpayer-association newsletter of caving to the teachers union.

"In hindsight," he now says, "after reflecting on it, she probably did the right thing."

Harrington has been no fan of private "curriculum alignment." She says the panel of educators that has screened textbooks for more than eight decades has done it well.

Stephenson dismisses those in-house screenings as "schlock reviews" that are practically useless for teachers.

In 2007, Stephenson helped pass a bill requiring private textbook reviews, leaving it to state education officials to pick qualified reviewers. But when he felt ProCert was being treated unfairly by the state office, he made his displeasure known.

"I've had it!" Stephenson wrote in an e-mail. "It is obvious that [the program directors] are subversives who will

stop at nothing to prevent the effective alignment of the texts to the core. ... Perhaps downsizing USOE or outsourcing is the answer."

In another e-mail from his Senate account, he said, "I've never seen anything more outrageous in my 15 years in the Legislature."

Harrington replied that the office had "reached out to ProCert beyond what we have to others," and if Stephenson wanted to give ProCert the contract, "then we do have a problem that will need a broader remedy."

Stephenson says his e-mails were "advocacy for fairness." After a bidding process that dragged on for months, the Legislature amended the law last March and the contract has yet to be awarded.

gehrke@sltrib.com



Harrington, Patti

From: Howard [howard@utahtaxpayers.org]
Sent: Thursday, June 07, 2007 5:25 PM
To: Harrington, Patti
Subject: Urgent. Alignment of primary texts to core

Superintendent Harrington:

I am writing to express my extreme dissatisfaction, one last time, with the refusal of USOE staff to implement the law relating to alignment of textbooks to the core curriculum.

In our telephone conversation two weeks ago when I was on Lake Powell, you stated that you would make sure your staff carried out the commitments you had made with the legislature regarding the implementation of these issues. You assured me that you were as concerned as I was about getting it right.

The alignment of textbooks to the core curriculum, to ensure that textbook evaluators and teachers have the tools they need to select and use textbooks effectively, is still the victim of subterfuge from Brett Moulding and Vali Kremer of your staff. The laundry list of "providers" I thought you said would be removed is still on the website with the explanation that publishers should pick one and in a year the USOE would tell them which ones are acceptable. The list can be seen at the following link: <http://www.schools.utah.gov/curr/IMC/indvendors.html>

Patti, we have been struggling with fulfillment of the promise for alignment of the core ever since we implemented UPASS and in great earnest for more than four years. As we have had you in our committee meetings responding to why this has not happened for the umpteenth time, you have recently agreed that you would make sure this law is implemented with an approved vendor. I'm sure I don't need to play the recording of your commitment to the committee.

Since our telephone conversation, the list of questionable vendors has NOT been removed, and in fact Moulding and Kremer have actually expanded the list! They still say they will evaluate the evaluations next year at this time and select approved vendors at that time.

I've had it!

I believed you when you assured our committee that you would designate approved vendors and that there was only one you knew of. I believed you the other day on the phone when you said you were more upset than I was about what your office has done. I believed you when you said you would take care of it. I appreciate your taking care of the Technology RFP, but the alignment issue is still left undone.

The law which Rep. Froerer and I sponsored says school districts cannot purchase primary texts unless and until they have been mapped to the core. Is the USOE going to allow districts to flout the law because, given the subversive actions of Moulding/Kremer, the texts have not been aligned?

Based on four years of experience with USOE on this issue it is obvious that Moulding and

6/7/2007

Hales, Brenda

From: Brenda Hales [bhales@gmail.com]
Sent: Friday, July 06, 2007 2:13 PM
To: Hales, Brenda
Subject: Fwd: textbook evaluation

Begin forwarded message:

Cc: <bhales@gmail.com>, "Moulding, Brett" <Brett.Moulding@schools.utah.gov>
Subject: textbook evaluation

Senator Stephenson -

I have reviewed the situation on the textbook evaluation and wanted to give you an update. We have changed our website today accordingly. The URL for the site is:
<http://www.schools.utah.gov/curr/TMC/indvendors.html>
Here is where we stand:

1. We sought textbook evaluation vendors and were surprised with the number of companies that do that work. While we are comprising the criteria by which we determine which companies should be on the "qualified list," one of those criteria must, of course, be their careful match to the core. Brenda Hales will finalize that criteria list and approve those on the qualified list. (We have not received an application from ProCert. We have sent one to them to make sure they are aware of the process.)
2. A handful of publishers followed this procedure as it relates to math textbooks for alignment to the new elementary and secondary math core curriculums. They are the first to comply with the new state law by selecting a textbook evaluation company and submitting the match to the core. Four are deemed as "qualified" and one more is working toward that end. To our knowledge, no publisher has hired ProCert to handle their alignments. To ensure all vendors have an opportunity to be on the qualified list, we are providing a short list of textbooks, that vendors can select from, to submit an alignment and meet the approval requirements.
3. When we first saw the number of vendors, we listed them all as we wished to provide fair treatment to all and could not yet delineate the "qualified list." We are altering that this morning given solid evaluations by four vendors, so far. (These will be the math textbook evaluations I spoke of earlier.) Of course, we will add to that list as other publishers select their vendors and evaluations are submitted and approved as "qualified." In the meantime, those who are not yet "qualified" will be listed elsewhere on the website so that publishers can access names of possible vendors.

I hope this clarifies the matter for you. Please call me if you have further concerns. Thank you.

7/6/2007

Harrington, Patti

From: Howard [howard@utahtaxpayers.org]
Sent: Tuesday, June 12, 2007 12:05 AM
To: Harrington, Patti, Brenda Hales
Subject: Re: Urgent. Alignment of primary texts to core

Patti:

This is past a joke.

It looks like Vali Kremer and Brett Moulding are getting more subversive with each permutation of the "resolution" of the problem of getting textbooks mapped to the core. I've never seen anything more outrageous in my 15 years in the legislature. No one should have to spend this much time and energy correcting a problem which could have been easily solved four years ago. Apparently bureaucrats know that most people give up by now. They figure they can always outlast their detractors.

Despite your statement in committee that ProCert was the standard you would use for the review vendors and that they would be listed right away as an approved vendor, they are still not approved yet! Instead of wiping the bogus list for the one year trial period which violated the statute and which you and I discussed on Friday, Moulding and Kremer have replaced it with a list of four approved and twelve other "pending" vendors who they say have not submitted correlations to the Instructional Materials Commission. ProCert is one of the twelve that have not been approved, despite their previous excellent correlation work for the USOE. The link is shown below but I am including the text below it, in case it is changed before you hit the link:

List of Vendors: <http://www.schools.utah.gov/curr/IMC/Indvendors.html>

List of Independent Alignment Vendors

Note: The following vendors are approved for the 2007-2008 school year to conduct "independent alignments" to the Utah core.

Approved Independent Alignment Vendors
Eisemann Communications, Inc.
Standard Media Services, LLC
J. Bailey
R. Foster
*Pending Independent Alignment Vendors

6/12/2007

Brown & Associates, LLC
C. Quigley
Coleman Educational Research
Dr. John C. Turpin & Associates, Inc.
E. Stadler
EdGate
Inside Edge publishing, Inc.
McHugh & Associates, Inc.
ProCert Labs
School Solutions
Seeds of Knowledge, Math Consulting, LLC
Texas Sunshine

Additional Vendor Information
Vendor Contact information
Vendor Criteria
Alignment Templates
Credential Form in Word
Credential Form in PDE

***These vendors have yet to submit an alignment for consideration by the Instructional Materials Commission.**

[For contact information on above vendors, click here.](#)

ProCert received a form email sent Friday at 6:23 pm telling them that if they wanted to work for the USOE to get approved. They went immediately online and found that four vendors had already been approved. The email is shown below:

From: Kremer, Vali [<mailto:Vali.Kremer@schools.utah.gov>]
Sent: Fri 08-Jun-07 6:23 PM
To: info@procertlabs.com; scotth@procert.com; Paul Hoffmann
Subject: Independent Alignment Vendor Information

6/12/2007

June 8, 2007

Announcement to Independent Alignment Vendors:

The Instructional Materials Commission, along with the Utah State Office of Education, has received notice your company provides independent alignments to state core curriculums. The approval of your company to conduct independent alignments for publishers of primary/basal instructional materials is pending.

For the steps necessary to become an Approved Independent Alignment Vendor, please visit the Utah Instructional Materials Website at www.schools.utah.gov/curr/imc/indvencriteria.html.

As of July 1, 2007, publishers of primary/basal materials will be required to contract only with approved Independent Alignment Vendors. For more information, please contact me.

Sincerely,

Vali A. Kremer

Instructional Materials Specialist

Utah State Office of Education

Email: vali.kremer@schools.utah.gov

Phone: (801) 538-7783

The Link in the above email makes two outrageous requirements of all potential vendors:

- **Alignment Vendor companies must submit a credential form for every individual conducting alignments to the Utah Core.**
- **Individuals conducting independent alignments must be a licensed educator.**

These requirements are arbitrary and appear to force the vendors to reveal the names of reviewers who can be hired away by competitors. I would like to know if the four approved vendors have complied with these requirements. I would also like to know who this announcement was sent to and why some had already been approved when it was sent to others. Do all of those receiving the announcement have prior experience? I would think they should have at least 3-5 years prior experience to even be considered. And why was ProCert only told about this Friday night, when there are already four "approved vendors"?

It appears that Kremer and Moulding have an ulterior motive, to keep ProCert out.

In a phone call earlier today I asked Brenda to find out what criteria was used to approve these four vendors. Now I would also like to know why ProCert was notified of the opportunity to

6/12/2007

apply AFTER the four approved vendors were already listed. It is one thing to avoid preferential treatment of a vendor. It is another to engage in discriminatory treatment of a vendor as has been the case with ProCert.

This is not the first time that ProCert has been deliberately keep out of the loop. Paul Hoffman of ProCert tells me that in Aug 2006 Brett Moulding said he would have a contract sent to ProCert by Oct. He never responded to any communications from ProCert until Myron Cottam invited him to a meeting with ProCert in Dec. This was the meeting that you told me you would have Myron set up to get to the bottom of the hostility from USOE toward ProCert. Paul told me that at that meeting Paul said that Brett let is slip that he had been working with a company from Ohio to do the reviews and when Paul asked why Brett had not contacted them to give an equal opportunity to do the work, Brett changed the subject. Paul said that at that point Myron told Brett to keep ProCert in the loop, which he has not done. I want to know why the company from Ohio was getting preferential treatment back in December and why now, that same company appears on the approved list before ProCert is even sent the announcement to apply.

I wonder as I look at this current list of vendors if Brett and Vali are creating business opportunity for competitors because they want to punish ProCert for criticizing the sloppy way so called "correlations" have been done by USOE for the past few years. The way it is presented, it appears as if anyone wanting to do a review (as long as they are a teacher and Brett Molding approves them) can represent the State as an official reviewer.

The alignment templates that are required for all vendors to use are static and appear to be paper-based. How is the USOE going to translate these forms to an electronic database so that they are useful to the teachers and districts?

Example of Review template:

<http://www.schools.utah.gov/curr/IMC/aligntemp/math/math3.mht>

It appears that Brett Molding is intent on spending more money to do a job that should require less time and money. These forms will need to be input into a database to comply with the law. It only makes sense that the reviewer put the review online and the data is only entered one time and maintained in a paperless environment.

I would strongly request that before this gets anymore out of hand and the USOE becomes even more embarrassing, that you identify the one vendor you know can do the work and then work with that vendor to ensure that the reviews are quality and useful. Others can be added ONLY as they prove they can do the job. There appears to be no other viable choice after what I have seen in the last couple of months.

This persistent, long-term and ongoing defiance on the part of Moulding and Kremer is unacceptable and in my opinion is justification for termination of employment. They've continued to stand in the way of these correlations for four years because they get away with it without any consequences. Having seen their lack of integrity I am reluctant to support legislation in the future if they have anything to do with implementing it.

Howard Stephenson

6/12/2007

Harrington, Patti

From: Harrington, Patti
Sent: Tuesday, June 12, 2007 6:37 AM
To: 'howard@utahtaxpayers.org'
Cc: 'Brenda Hales'; 'blast@utah.gov'
Subject: RE: Urgent. Alignment of primary texts to core

I would like to talk with you about this asap. Maybe tomorrow sometime? Obviously our office has a duty that goes well beyond ProCert. Indeed, we have reached out to ProCert beyond what we have others. If the intent of the legislature was only to promote ProCert and have them alone certified, then we do have a problem that will need broader remedy. I will be anxious to see you tomorrow and will bring this documentation with me for our discussion.

From: Howard [mailto:howard@utahtaxpayers.org]
Sent: Tuesday, June 12, 2007 12:05 AM
To: Harrington, Patti; Brenda Hales
Subject: Re: Urgent. Alignment of primary texts to core

Patti:

This is past a joke.

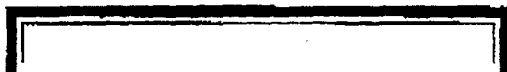
It looks like Vali Kremer and Brett Moulding are getting more subversive with each permutation of the "resolution" of the problem of getting textbooks mapped to the core. I've never seen anything more outrageous in my 15 years in the legislature. No one should have to spend this much time and energy correcting a problem which could have been easily solved four years ago. Apparently bureaucrats know that most people give up by now. They figure they can always outlast their detractors.

Despite your statement in committee that ProCert was the standard you would use for the review vendors and that they would be listed right away as an approved vendor, they are still not approved yet! Instead of wiping the bogus list for the one year trial period which violated the statute and which you and I discussed on Friday, Moulding and Kremer have replaced it with a list of four approved and twelve other "pending" vendors who they say have not submitted correlations to the Instructional Materials Commission. ProCert is one of the twelve that have not been approved, despite their previous excellent correlation work for the USOE. The link is shown below but I am including the text below it, in case it is changed before you hit the link:

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List of Independent Alignment Vendors

Note: The following vendors are approved for the 2007-2008 school year to conduct "independent alignments" to the Utah core.



6/12/2007

Harrington, Patti

From: Moulding, Brett
Sent: Wednesday, June 13, 2007 6:38 AM
To: Harrington, Patti
Cc: blhales@gmail.com
Subject: RE: criteria

Patti

The criteria for the company to be placed on the list are the following

1) The company uses licensed educators to do the alignment of the instructional materials. The company meets the criteria set forth in Board rule and state law for an independent vendor

According to Utah State Law and Policy; independent alignments must *not* be performed by:

- * the State Board of Education
- * the superintendent of public instruction or the superintendent's staff;
- * the State Instructional Materials Commission;
- * an employee or board member of a school district;
- * the instructional materials creator or publisher; or
- * anyone with a financial interest in the instructional materials, however minimal.

2) Placed on the pending list

3) The company submits an alignment study of instructional materials to USOE which meets the following criteria: a) the alignment is consistent with the textbook committee's previous alignment (within 10%) b) the company has used the Core Curriculum alignment rubric properly, c) The alignment addresses each Standard, Objective, and Indicator within the Core Curriculum (The alignment does not omit any portion of the Core Curriculum).

4) Placed on the approved list

Thank you,
Brett

From: Harrington, Patti
Sent: Tue 6/12/2007 7:38 PM
To: Moulding, Brett
Cc: blhales@gmail.com
Subject: criteria

What are the criteria you used for rating the textbook evaluation companies? Any specific rubric you used?

6/15/2007

Harrington, Patti

From: Howard [howard@utahtaxpayers.org]
Sent: Thursday, June 14, 2007 10:33 PM
To: Harrington, Patti; Brenda Hales
Subject: Preliminary results of vendor survey

Patti:

I've had good feedback from legislators and board members from various perspectives about our open discussion on powers of the State Board and Legislature. I think the respect for the other institution increased by all members.

Here's the results from the calling I've had done to learn about the textbook alignment vendors.

6 of the list were either directed by or submitted by Pearson Publishing to the USOE.
2 were directed to submit by other publishers McMillan and McGraw-Hill

Therefore 8 total of the 10 that responded so far (it could be more), are Publisher appointed - hardly the independent USOE-approved arms-length vendors called for by the legislation.

Inside Edge Publishing publishes education materials and works with Pearson. As you know, publishers are not allowed to do the reviews.

5 are individuals reached on their home phones

1 is an accounting firm.

3 including ProCert are Utah companies.

It looks to me like not much has changed from the original list and the July 1, 2008 evaluation and final approval of vendors concept which I objected to earlier. This is virtually the same thing in different packaging.

I forgot to mention another problem with the way Kremer and Moulding are requiring the data to be submitted: They require a template to be filled out. It's not clear whether the completed forms will be submitted on paper or PDF, but either way, the data will not be searchable and therefore will have to be input again. Of the estimated 7000 books that are submitted each year to the USOE, it is estimated 2500 are submitted as Primary texts. If we use the 2500 books as Primary number and use a conservative estimate of 100 objectives per core alignment, this produces 1/4 million items of data that must be entered into the State's system. If someone can enter an item in 30 seconds, it will take 1 person one year to enter all of the information doing nothing else. (assuming 40 hours a week and 52 weeks a year). If they just use a PDF of the alignment, it is of little value to the teachers or districts in finding materials that fill the gaps in the course because they can't do a relational search in a PDF. This is no different than what the USOE starting doing last year. And there still is not a viable tool for anyone else but Vali and Brett to keep their jobs.

We discussed this when Gage Froerer and I were sponsoring the legislation. When we discussed whether to amend to statute to clarify further the need for a state approved vendor, Myron Cottam assured that the state would give an approved vendor, not merely seek them from the publishers as has been done. We had also been warned that if we put a requirement in the statute that the state develop the searchable database for 2,500 books there would be a fiscal note attached, so we left it for the searchable data to be ~~way Kremer and Moulding have done this~~ that it will require the fiscal expense we were trying to avoid. Where is the money going to come from to accomplish the task the way USOE is requiring it to be submitted - the money USOE said would have to be appropriated if we were to require the state to do the searchable database?

From: Harrington, Patti
Sent: Thursday, June 14, 2007 11:30 AM
To: Moulding, Brett
Cc: Kremer, Vali; Brenda Hales
Subject: items

As my followup to conversations with Sen. Stephenson, will you please:

1. Please supply to me the request letter or invitation letter you sent to companies providing textbook evaluation, when you sent those letters and a copy of the one you sent to ProCert? (ProCert is claiming they were never invited to submit.)
2. I assume now that ALL vendors who have expressed an interest in becoming a qualified vendor have each received a textbook that we are seeking them to respond to as if they were performing an independent textbook evaluation, correct?
3. I want you to make calls and inquiries of each vendor to ensure they are truly an independent party, separate from the publisher. Sen. Stephenson claims that many are not legitimately independent. I asked him for specifics and he said check Prentice Hall and McGraw Hill. Please ask each to submit their contract with the publisher.

Thank you.

6/19/2007

Harrington, Patti

From: Moulding, Brett
Sent: Friday, June 15, 2007 1:47 PM
To: Harrington, Patti
Subject: Independent Textbook Alignments
Attachments: Independent Alignment Invitation Letter.doc

Patti

Below are the responses to the three questions from your conversation with Senator Stephenson. Nicole and Vali put these together for you and are working to add to the documentation ensuring the independence of the contractors. .

Thank you,
Brett

Brett D. Moulding
Utah Office of Education
Curriculum Director
250 East 500 South
P. O. Box 144200
Salt Lake City, UT
84114-4200
801-538-7791

From: Paulson, Nicole
Sent: Friday, June 15, 2007 1:03 PM
To: Moulding, Brett
Subject: RE: items

1. Attached is the invitation letter that was sent to companies/individuals providing textbook evaluations on June 8th. Vali e-mailed copies of the invitation letter to Paul and Scott Hoffman, Presidents of ProCert Labs AND to the general inquiry desk at info@procertlabs.com. The email server indicated all three e-mails have gone through successfully. On June 14th, after hearing ProCert had not received the invitation letter, a phone call was made directly to the company to request e-mail addresses for Paul and Scott Hoffman. The e-mail addresses for Paul and Scott were new (since Vali has worked with them); however, the general inquiry desk e-mail is still the same. New invitations were sent at 1:30 p.m. (June 14th) to both Paul and Scott Hoffmann and the inquiry desk again.
2. The invitation letter indicated the independent alignment vendors would need to contact the publisher directly to obtain a textbook to align. However, per our conversation, Vali has contacted Prentice Hall and Holt to obtain student and teacher editions of their textbooks for alignment. We will have copies (by the end of next week) of the textbooks that we can send to independent alignment vendors. This clarification is also being made on the Instructional Materials website.
3. Prentice Hall and McGraw Hill contracted with individuals to do the independent alignment. Prentice Hall is sending us their contracts. Vali is contacting every individual on the list to ensure he/she is not in any way working for a single company, but rather has a contract to do this work.

6/19/2007

Hales, Brenda

From: Brenda Hales (bhales@gmail.com)
Sent: Friday, July 06, 2007 2:28 PM
To: Hales, Brenda
Subject: Fwd: documentation

Begin forwarded message:

From: "Harrington, Patti" <Patti.Harrington@schools.utah.gov>
Date: June 23, 2007 10:37:59 PM MDT
To: "Moulding, Brett" <Brett.Moulding@schools.utah.gov>
Cc: <bhales@gmail.com>
Subject: documentation

I am growing worried about the situation with Senator Stephenson and textbook evaluation. I hope we have satisfied him. However, would you please prepare documentation of what we have done to try to make him happy, with dates and actions listed since we have been working on this? I will use that information to make sure President Valentine and, perhaps, others, are up to date on what we have done to try to help alleviate his concerns while holding to the law that was passed. Thanks Brett.

7/6/2007

Hales, Brenda

From: Brenda Hales [bhales@gmail.com]
Sent: Friday, July 06, 2007 2:27 PM
To: Hales, Brenda
Subject: Fwd: update on textbook evaluation

Begin forwarded message:

From: "Harrington, Patti" <Patti.Harrington@schools.utah.gov>
Date: June 25, 2007 8:07:58 AM MDT
To: <hstephenson@utahsenate.org>, <valentine@utahsenate.org>
Cc: "Moulding, Brett" <Brett.Moulding@schools.utah.gov>, "Brenda Hales" <bhales@gmail.com>
Subject: update on textbook evaluation

Good morning Senators Valentine and Stephenson,

As you will see if you log onto the USOE website, ProCert has been added to the approved list of textbook evaluation vendors.

I have asked for a summary of what is occurring on the searchable database and will have that to you sometime early this week.

Thank you for your service to children.

7/6/2007

Hales, Brenda

From: Brenda Hales [bhales@gmail.com]
Sent: Friday, July 06, 2007 2:32 PM
To: Hales, Brenda
Subject: Fwd: HB 364 Timeline

Begin forwarded message:

From: "Moulding, Brett" <Brett.Moulding@schools.utah.gov>
Date: June 26, 2007 2:01:11 PM MDT
To: "Harrington, Patti" <Patti.Harrington@schools.utah.gov>
Cc: "Paulson, Nicole" <Nicole.Paulson@schools.utah.gov>, "Kremer, Vali" <Vali.Kremer@schools.utah.gov>, <bhales@gmail.com>
Subject: HB 364 Timeline

Patti

Below is a timeline of the activities that were completed and/or planned for implementation of HB 364.

Thank you

Brett

House Bill 364, Substitute 1 Timeline

- April 9, 2007 - Myron Cottam met with staff to determine the steps for implementation of HB364, including development of a new website to support implementation.
- April 16, 2007 - Process began for soliciting vendors for the qualified vendors list.
- April 25, 2007 - Instructional Materials Commission met to approve '07 spring submitted materials. Due to pending math standards and HB 364, approval of math was delayed until publishers completed the independent alignment process.

* Publishers were asked to submit an independent alignment for the submitted math texts to the new Math Core.

- April 2007 - An amendment to Board Rule R277-469 was drafted to incorporate HB 364.
- May 3, 2007 - The State Board approved Board Rule R277-469 on first and second reading.
- May 31, 2007 - The Instructional Materials Commission met to review the independent alignments submitted for '07 spring math materials and to discuss the independent alignment process.

7/6/2007

- June 1, 2007 - The new Instructional Materials Commission website became active and included a list of independent alignment vendors.
- June 7, 2007 - Board Rule R277-469 passed on third reading and was forwarded to Administrative Rules
- June 8, 2007 - Criteria were finalized for approved independent alignment vendors. The vendor list included pending and approved vendors based upon:

Pending:

1. Names of vendors performing independent alignments

Approved:

1. Vendors who had submitted qualifications of the person(s) completing the independent alignment; and,
 2. Vendors who had submitted an accurate and consistent independent alignment for a textbook
- June 8, 2007 - Pending vendors received an invitation to align materials to the Utah Core.
 - June 8, 2007 - Vendor contact information was posted to the web.
 - June 9, 2007 - Independent Alignment Templates and Alignment Vendor Credentials Form were posted to the web.
 - June 14, 2007 - Staff were informed that ProCert Labs did not receive their invitation letter. Calls were made to ProCert Labs and a second email letter was sent to ProCert.
 - June 14, 2007 - Procured samples of the textbooks for independent alignment vendors to use to submit an alignment to qualify for the Approved Vendor List
 - June 14, 2007 - Vendors were notified of the availability of textbooks for completing an independent alignment to qualify for the Approved Vendor List.
 - June 21, 2007 - Status was verified of individual vendors as "independent" (not an employee of a publisher).
 - June 22, 2007 - ProCert was moved from the pending list to the Approved Vendor List.

7/6/2007

Timeline for Future Implementation:

- *July 1 - Maintain a searchable database of primary instructional materials aligned to the Utah Core.*
- *October 1, 2007 – Deadline for Independent Alignment Vendors to qualify for the Approved Vendor List through submitting an alignment study of the identified textbooks*
- *December 6, 2007 – The Textbook Commission will evaluate the submitted alignments and determine the reliability for vendors to be moved to the Approved Vendor List*
- *Ongoing - Provide textbook publishers with information on independent alignment requirements for Utah.*
- *Maintain a list of instructional materials used in each district.*

Brett D. Moulding

Utah Office of Education

250 East 500 South

PO Box 144200

Salt Lake City, Utah

84114-4200

7/6/2007

Moulding, Brett

From: Hales, Brenda
Sent: Wednesday, August 29, 2007 9:05 AM
To: Moulding, Brett

Brett-

Here are Sen. Stevenson's comments on the RFP

From: Howard [mailto:howard@utahtaxpayers.org]
Sent: Tuesday, August 21, 2007 11:21 PM
To: Hales, Brenda
Cc: Harrington, Patti; Shumway, Larry
Subject: Re: Text alignment RFP

*Brenda
see attached
July State
Purchase*

Brenda:

Thanks for sending the RFP. The one thing that is problematic for me is that the greatest weighting is given for price. I think all vendors will be willing to do each text for the price set by the state, probably in the neighborhood of \$700 per title. I would rather have the state set the price and take the most qualified vendor who provides the most searchable comprehensive database to handle well-done correlations, than to select the vendor with no searchable database and poor quality correlations just because they would do it for \$650 per title, while the best vendor was at \$700.

*That
you
Brett*

It seems to me that vendors should agree to the state's price determination and then weight the other qualifications more, especially Demonstrated Ability, Qualification, and Demonstrated technical capability.

For example, it could look like this:

- Cost - State established
- 40% Demonstrated ability to meet the scope of work (Alignment and Website)
- 25% Qualification and expertise of staff proposed for this project (Capacity)
- 25% Demonstrated technical capability (Sustainability and Timeframe)
- 10% Demonstrated evidence of communication (Communication and Reporting)

*We can go
to 30%
without
State
Purchase*

8/29/2007

performed, the offeror's ability and approach, and the resources necessary to fulfill the requirements. This should demonstrate the offeror's understanding of the desired overall performance expectations. Clearly indicate any options or alternatives proposed.

B. A specific point-by-point response, in the order listed, to each requirement in the RFP.

4. **Cost Proposal.** Cost will be evaluated independently from the technical proposal. Please enumerate all costs on the attached Cost Proposal Form. *Provide a template for the offeror to submit proposed costs that will enable evaluators to make like comparisons. See attached examples.*

PROPOSAL EVALUATION CRITERIA

A committee will evaluate proposals against the following weighted criteria. Each area of the evaluation criteria must be addressed in detail in proposal. *(The weighting of the criteria must reflect the priority of importance of the information asked for in the RFP. Carefully review the evaluation criteria and the weighting of criteria with the evaluation committee prior to submitting the RFP to State Purchasing.)*

The following list of criteria is an example only. Please adjust the criteria to reflect the requirements listed in your RFP.

WEIGHT EVALUATION CRITERIA

40% Cost (Generally cost is weighted between 30 and 50 percent. A weight less than 30% requires approval by the State Director of Purchasing)

20% Demonstrated ability to meet the scope of work

15% Demonstrated technical capability (proven track record), etc.

15% Qualification and expertise of staff proposed for this project

10% Performance references for similar projects

Nancy Orton
Doug Richins
Howard Stephenson
Nort Evans
Buck Hubs

HB 364, 2007
1/30/08
RFP - Textbooks

The current status of the 3rd party textbook review and RFP is as follows:

1. The RFP was sent to all possible interested contractors to conduct a Utah third-party independent textbook review.
2. Bids were returned from all interested contractors.
3. A request for proposal (RFP) was issued from State Purchasing to alignment vendors in October 2007. The purpose of the RFP was to enter into a contract with a qualified firm to align textbooks to Utah's Core Curriculum.
4. The RFP closed in November 2007 and the selection committee met, reviewed the proposals, and determined a Best and Final Offer was appropriate.
5. It was further determined that a spread sheet would be helpful support for all vendors in making their Best and Final Offer. This document was sent to all vendors as support in making their Best and Final Offer.
6. It is anticipated the contract will be in place prior to the Fall 2008 Bid Cycle.

Section 11. Section 53A-14-107 is amended to read:

53A-14-107. Instructional materials alignment with core curriculum.

(1) A school district may not purchase primary instructional materials unless the primary instructional materials provider:

(a) contracts with an independent party to evaluate and map the alignment of the primary instructional materials with the core curriculum adopted under Section 53A-1-402;

(b) provides a detailed summary of the evaluation under Subsection (1)(a) on a public website at no charge, for use by teachers and the general public; and

(c) pays the costs related to the requirements of this Subsection (1).

(2) The requirements under Subsection (1) may not be performed by:

(a) the State Board of Education;

(b) the superintendent of public instruction or the ~~superintendent's staff~~ State Office of Education;

(c) the State Instructional Materials Commission appointed pursuant to Section 53A-14-101 ;

(d) ~~an employee of~~ a local school board ~~member of~~ or a school district; or (e) the instructional materials creator or publisher.

(3) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the State Board of Education shall make rules that establish:

(a) the qualifications of the independent parties who may evaluate and map the alignment of the primary instructional materials in accordance with the provisions of Subsection (1)(a); and

(b) requirements for the detailed summary of the evaluation and its placement on a public website in accordance with the provisions of Subsection (1)(b).

Handwritten notes:
March 11, July 19, 2007
Joint Logistics/ISD Meeting

TEXTBOOK CORRELATION WITH UTAH CURRICULUM STANDARDS

TIMELINE

Date	Event
April 2007	Associate Superintendent Myron Cottam met with staff to determine the steps for implementation of §53A-14-107, including development of a new public website to support implementation. The staff was directed to solicit vendors for a qualified vendor list. Publishers were told to submit an independent alignment for newly submitted math tests.
April 2007	Utah State Board of Education Rule R277-469, Instructional Materials Commission Operating Procedures, was amended and criteria were written for vendors.
May 3, 2007	The Utah State Board of Education approved on 1 st and 2 nd reading an amendment to Utah State Board of Education Rule R277-469, Instructional Materials Commission Operating Procedures, to incorporate §53A-14-107.
June 2007	Vendors were sent invitations to align materials to the Utah Core. The new public website became active. It included a list of independent alignment vendors. A template for vendor use was also posted.
June 11, 2007	USOE responded to legislative and vendor concerns regarding the vendor criteria and the template. Requests were made to remove vendors. The staff was informed that the website was not being implemented according to previous understandings of the law's intent. The website was changed, and information was provided on how the changes were made.
June 12, 2007	More feedback regarding implementation of the law was received. Concern was expressed regarding the method for assigning vendors to the approved list with the absence of Pro Cert from the list. A list of criteria was provided.
June 14, 2007	Concern was expressed regarding the use of more than one vendor. Superintendent Harrington asked Brenda Hales to monitor and respond when she officially began her duties on July 2, 2007.
June 25, 2007	Pro Cert was added to the list of vendors.
July 19, 2007	Associate Superintendents Larry Shumway and Brenda Hales met with Senator Stephenson to discuss concerns related to implementation of the law. It was decided to develop and submit an RFP for a single alignment
July 31, 2007	District superintendents are notified that instructional materials must be independently aligned before purchase.
August 2007	An RFP was created. A draft of the RFP was e-mailed to Senator Stephenson for feedback.

September 2007	Feedback was compiled and a final draft was sent to State Purchasing. RFP finalized.
October 2007	RFP posted.
November 2007	Vendors requested more information. The information was sent. The RFP closed.
December 2007	RFPs reviewed.
January 2008	Best and final offer sent out.
January 30, 2008	A meeting was held with State Purchasing, Senator Stephenson, a vendor lobbyist, and USOE to discuss the progress of the RFP. Only general information was exchanged.
February - March 2008	An amendment to §53A-14-107 was filed. The amendment specified multiple vendors. It was decided to wait on the RFP until the new legislation was either passed or failed.
March 2008	Amendments to §53A-14-107, in S.B. 2, passed.
April 2008	S.B. 2, was signed by the Governor. The RFP was cancelled.
April 15, 2008	A meeting was held with Representative Froerer, Senator Stephenson, Dee Larsen, Larry Shumway, Carol Leer, and Brenda Hales to discuss the next steps with the textbook alignment matter. It was decided that an amended rule was needed with specific information on formatting and vendor criteria. Ms. Hales was assigned to find a way to ensure a common searchable database that did not cost anything.
April 21, 2008	Brenda Hales met with UEN to discuss possible database solutions.
May 9, 2008	An amendment to R277-469, was passed by the Utah State Board of Education on 1 st and 2 nd reading.
June 13, 2008	The amendment to R277-469 passed on 3 rd reading.
May - June 2008	Brenda Hales has been meeting with UEN to develop programs for the database. Publishers have been notified on changes.