UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

D.C. ASSOCIATION OF CHARTERED PUBLIC SCHOOLS, *et al.*, **Plaintiffs,** **v.** **DISTRICT OF COLUMBIA, *et al.*,** **Defendants**.	**No. 1:14-CV-1293-RMC**

COUNCIL OF THE DISTRICT OF COLUMBIA'S
AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS'
OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Pursuant to the Court's June 22, 2016 Order, the Council of the District of Columbia ("Council") hereby submits this *amicus curia* brief in support of Defendants District of Columbia, Vincent Gray, and Jeffrey S. Dewitt's ("Defendants") Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment.

In 1996, Congress passed the District of Columbia School Reform Act of 1995 ("School Reform Act"), which, among other things, authorized the creation of public charter schools in the District.[1] Plaintiffs contend that Subtitle D of that law mandates equivalent funding, on a per-student basis, for the operating expenses of District of Columbia Public Schools ("DCPS") and public charter schools ("charter schools" or "charters"). They ask the Court to issue a permanent injunction requiring the District to fund DCPS and charter schools consistent with this interpretation. Plaintiffs further argue that the uniform per-pupil funding formula described in the School Reform Act provides the exclusive mechanism for funding the operating expenses of DCPS and charter schools. They ask the Court to declare that the Council has no authority to enact legislation that amends or is inconsistent with the School Reform Act's funding requirement and to further declare that the School Reform Act preempts Council-passed laws that allegedly authorize unequal funding for DCPS and charter schools.[2] On June 24, 2016, Plaintiffs filed a Motion for Summary Judgment on their claims.

As the District's only democratically elected legislative body, the Council submits that Plaintiffs claims are antithetical to Congress's delegation of legislative authority to the District in the District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule

[1] Pub. L. No. 104-134, 110 Stat. 1321-107 (1996).

[2] Compl. ¶¶ 93-95 (ECF No. 1).

Act").[3] The Council's legislative authority under the Home Rule Act is subject to Congress's plenary power to place limitations on that authority and to disapprove Council actions. However, neither the text, legislative history, nor context in which Congress enacted the School Reform Act demonstrates that Congress intended the law's per-pupil funding mandate to divest the Council of its power under the Home Rule Act to enact, amend, and repeal local laws. Indeed, Congress delegated the responsibility of developing a schools funding formula to the District and left the District to resolve ambiguities in Congress's law. In compliance with this mandate, the Council passed the Uniform Per Student Funding Formula for Public Schools and Public Charter Schools Act of 1998 ("UPSFF Act").[4] The District has been funding its public schools pursuant to the UPSFF Act and its amendments for nearly two decades.

Although Plaintiffs contend that the UPSFF Act is invalid to the extent it permits the District to fund DCPS in a manner inconsistent with their interpretation of the School Reform Act, Congress has never disapproved the District funding actions of which Plaintiffs complain. This is so despite playing an active legislative and oversight role in District education reform. Thus, there is no basis for the Court to find that the Council has acted in contravention of its powers under the Home Rule Act or congressional intent in the School Reform Act.

There can be no doubt that providing primary and secondary education is a quintessential and vital function local government.[5] In an attempt to build upon the structures Congress created for the District in the School Reform Act and tailor that law to meet the District's changing public education landscape, the Council repeatedly amended the Act. The Court should be

[3] Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code § 1-201.01 *et seq.*).

[4] D.C. Law 12-207 (1998) (codified as amended at D.C. Code § 38-2901 *et seq.*). Unless otherwise provided, the D.C. Laws cited herein are available at http://lims.dccouncil.us/.

[5] *See Martinez v. Bynum*, 461 U.S. 321, 329 (1983); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

mindful that granting Plaintiffs relief would strike a devastating blow to the principle of home rule and fundamentally undermine the Council's ability, as the District's democratically elected legislature, to effectively respond to the District's educational needs.[6]

ARGUMENT

I. Congress Delegated Local Legislative Authority to the Council.

In 1973, Congress passed the Home Rule Act with the stated purpose of granting to District residents the "powers of local self-government" and "to the greatest extent possible . . . relieve Congress of the burden of legislating upon essentially local District matters."[7] To that end, Congress delegated the legislative authority that it possesses over the District under the District Clause of the Constitution to the Council, subject to enumerated limitations in the Home Rule Act,[8] Congress's veto authority over Council-passed laws,[9] and Congress's retention of plenary authority over District affairs.[10] The Home Rule Act is to the District as a state constitution is to a state,[11] and the Council's legislative authority under the Home Rule Act is analogous to that of a state legislature (subject to the aforementioned limitations).[12]

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[6] *See U.S. v. Wilson*, 290 F.3d 347 (D.C. Cir. 2002) (considering policy ramifications of parties' suggested statutory interpretations).

[7] Home Rule Act §102(a) (codified at D.C. Code § 1-201.02(a)).

[8] *Id.* § 602(a) (codified as amended at D.C. Code § 1-206.02(a)).

[9] *Id.* § 602(c)(1) (codified as amended at D.C. Code § 1-206.02(c)(1)).

[10] *Id.* § 601 (codified at D.C. Code § 1-206.01).

[11] *See Shook v. District of Columbia Fin. Responsibility and Mgmt. Auth.*, 132 F.3d 775, 776 (D.C. Cir. 1998); *District of Columbia v. Wash. Home Ownership Council, Inc.*, 415 A.2d 1349, 1367 (D.C. 1980).

[12] *See Milton S. Kronheim & Co., Inc. v. District of Columbia*, 91 F.3d 193, 199 (D.C. Cir. 1996); *Wash. Home Ownership Council, Inc.*, 415 A.2d at 1373 (Mack, J., with Newman, C. J. & Pryor, J., dissenting); Home Rule for the District of Columbia, 1973-1974, Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93–198, 93d Cong., 2d Sess. at 1561, 2135 (1974) ("Home Rule Act Legis. History") (attached hereto as Exhibit 1).

A. The Council's Legislative Powers Include the Power to Amend Local Congressional Enactments.

The power to legislate necessarily entails the power to amend and repeal laws. In the case of the Council, the power to amend includes the power to amend congressionally-passed laws applicable solely to the District, because such laws are to be treated as local, rather than federal, law.[13] Despite the Court's suggestion that the Council's powers to amend congressionally-passed local laws may turn on whether Congress passed such laws pre- or post-home rule, the text of Home Rule Act permits no such distinction.[14] Moreover, the legislative history of that law indicates that Congress understood that its delegation of legislative authority to the Council included the ability to amend future congressionally-passed local laws.[15] Concerned with this prospect, opponents of District home rule warned of the following scenario:

> In such instances where the local Council would go beyond the bounds that Congress desires, Congress would be left with its "ultimate" power to set it aside (Section 102). If the District re-enacted the same legislation, there would ensue a "legislative dance" between the District and the Congress that could presumably only be terminated by the Congress specifically forbidding the Council to pass any act on such subject again.[16]

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[13] *See* Home Rule Act § 602(a)(3); *Key v. Doyle*, 434 U.S. 59, 68 n. 13 (1977) ("Unlike most congressional enactments, the [District] Code is a comprehensive set of laws equivalent to those enacted by state and local governments."); *Brown v. United States*, 742 F.2d 1498, 1502 (D.C. Cir. 1984) (en banc) ("Congress frequently enacts legislation applicable only to the District and ... [a]bsent evidence of contrary congressional intent, such enactments should be treated as local law."); *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360, 363 (D.C. Cir. 2007).

[14] The Court should reject any notion that § 717 of the Home Rule Act is a limitation on the Council's powers. Congress vested the Council with the District's legislative authority in § 404 and limited that authority in § 602, which is clear from those sections' respective headings and the law's legislative history. By contrast, § 717, is titled "Status of the District," and the legislative history of that section reveals that Congress meant for it to establish the continuing effect of the District's then-existing laws and its status as a municipal corporation. *See* Home Rule Act Legis. History at 1479 ("This section continues the District of Columbia as a body corporate, and the boundary line between the District of Columbia and the Commonwealth of Virginia remains as established under the provisions of Title 1 of the Act of October 31, 1945.").

[15] *See, e.g.*, Home Rule Act Legis. History at 620, 1035-36 (statements of John Hogan, House Minority Counsel, and Hon. Brock Adams, Chairman, Subcommittee on Government Operations, Committee on the District of Columbia).

[16] *Id.* at 1561; *see also id.* at 1773-74 (statement of John Hogan, House Minority Counsel) (". . .[Y]ou would have this back and forth between the Congress and the local government until one or the other either gave up or the Congress put a provision in the law that they passed that no longer could the city government act in a particular area.").

Rather than disavow the likelihood of a "legislative dance" between the Council and Congress, the bill's proponents countered that the Council remained "subordinate to congressional disapproval of local legislation."[17] As one member explained, if the Council acted to revamp the District's education system contrary to Congress's liking, Congress could override the Council's actions by passing a new statute and making that statute unamendable.[18] Thus, although the Council may generally amend congressionally-passed local laws, this power is subject to congressional disapproval and Congress's ability to make its local laws unamendable *i.e.* divest the Council of the legislative authority it otherwise possesses.

B. Congress Maintains Oversight of the Council through Divestment and Disapproval.

The drafters of the Home Rule Act believed Congress's divestment and disapproval powers sufficient to "correct" any errant Council actions.[19] Though sparingly exercised, these powers are neither nominal nor idle. For example, during the sessions of the 114th Congress, the House of Representatives passed legislation to repeal the District's charter amendment authorizing budget autonomy and the District's Reproductive Health Non-Discrimination Amendment Act.[20] By way of further example, in 1989, Congress amended § 241 of the District's Human Rights Act of 1977 (D.C. Law 2-38) to permit religiously affiliated universities in the District to discriminate against individuals on the basis of sexuality.[21] Congress repeatedly

[17] *Id.* at 1644.

[18] *Id.* at 620 (statement of Hon. Brock Adams).

[19] *See, e.g.*, Home Rule Legis. History 1793, 2214 (statements of Hon. Joel Broyhill and Hon. Spark Matsunaga; statement of Hon. Carl Albert, Speaker).

[20] *See* H.R. 5233, 114th Cong. (2016); H.J. Res. 43, 114th Cong. (2016). Earlier this summer, the House of Representatives passed H.R. 5485, which authorizes fiscal year 2017 appropriations for the District and includes provisions repealing the Local Budget Autonomy Act of 2012 (D.C. Law 19-321) and prohibiting enforcement of the Reproductive Health Non-Discrimination Amendment Act of 2014 (D.C. Law 20-593). *See* H.R. 5485 114th Cong. §§ 817, 1226 (2016). The bill is pending in the Senate.

[21] Pub. L. No. 101–168 § 141, 103 Stat. 1284 (1989). The Council has since repealed Congress's amendment. *See* D.C. Law 20-266 § 3(a) (2015).

attaches riders to its appropriations laws that prohibit various District laws from taking effect or being implemented.[22] Further, as this Court has recognized, Congress prospectively prohibited the Council from amending the District of Columbia Financial Responsibility and Management Assistance Act of 1995 ("FRMAA") by adding a new paragraph to Home Rule Act § 602(a)'s list of express limitations on the Council.[23]

Congress also exercised its disapproval and divestment powers in the context of the School Reform Act and funding for public charter schools. A Council-passed charter school law and the School Reform Act existed side-by-side for several years.[24] However in 2000, Congress amended the School Reform Act to effectively nullify provisions of the District's charter school law that conflicted with provisions of the School Reform Act "regarding the establishment, administration, or operation of public charter schools."[25] Further, with the District of Columbia Appropriations Act of 2001, Congress divested the Council of legislative authority over a public charter school funding program by placing the program in a federal law codified in the U.S. Code.[26]

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[22] *See, e.g.*, Pub. L. No. 106-113 § 167(b), 113 Stat. 1530 (1999) ("The Legalization of Marijuana for Medical Treatment Initiative of 1998 . . . shall not take effect."); Pub. L. No. 114-113 § 809(b), 129 Stat. 2489 (2015) ("None of the funds contained in this Act may be used to enact any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act . . . or any tetrahydrocannabinols derivative for recreational purposes.").

[23] *D.C. Ass'n of Chartered Pub. Schs. v. District of Columbia*, 134 F. Supp. 3d 525, 533 (D.D.C. 2015).

[24] As discussed in Part II.A., *infra*, the Council and Congress were simultaneously considering public charter school legislation in 1995 and 1996. The Council-passed Public Charter Schools Act of 1996 was in its layover period when Congress enacted the School Reform Act. *See* 142 Cong. Rec. H3946 (daily ed. Apr. 25, 1996). Congress never vetoed the Council's law, and it became effective shortly after the School Reform Act. *See* D.C. Law 11-135.

[25] Pub. L. 106-522 § 120(b), 114 Stat. 2462 (2000) (amending School Reform Act § 2210); *see* H.R. Rep. No. 106-786, at 68. The Committee Report misstates the procedural history of the Public Charter Schools Act of 1996. Mayor Barry did not veto the bill. Letter from M. Barry to D. Clarke (Mar. 26, 1999) (attached hereto as Exhibit 2 at 12). Rather he failed to sign it, which has the effect of approving a bill. *See* Home Rule Act § 602(c)(1).

[26] Pub. L. 106-522 § 161, 114 Stat. 2483 (2000) (amending § 603(e) of the Student Loan Marketing Association Reorganization Act of 1996, Pub. L. 104-208, 110 Stat. 3009-293 (1996) (codified as amended at 20 U.S.C. § 1155 (2012)).

To ascertain whether Congress intended to limit the Council's legislative authority in the realm of school funding through the School Reform Act, the Court must determine whether Congress has exercised its divestment or disapproval powers. The answer is "No."

II. The School Reform Act does not Divest the Council of its Legislative Authority to Fund District Public Schools.

Congress does not "hide elephants in mouseholes."[27] Although Congress may amend the Home Rule Act by express or implied acts,[28] its intent to amend fundamental details of that law must be clear and manifest.[29] Congress did not manifest an intent to divest the Council of its general legislative powers when it directed the Council to establish a per-pupil funding formula in the School Reform Act.[30]

A. The Per-Pupil Public Schools Funding Formula Originated with the Council.

Plaintiffs maintain that the use of the word "shall" in § 2401 of the School Reform Act demonstrates Congress's intent to deprive the District of any discretion in funding the operating expenses of DCPS and charter schools and to prevent it from taking legislative action allegedly in conflict with that law.[31] However, the legislative history of the funding formula and the statutory and historical context in which it was enacted prove otherwise.[32] In passing the School

[27] *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

[28] *Shook*, 132 F.3d at 780.

[29] *See Whitman*, 531 U.S. at 468; *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (explaining that repeal by implication is particularly disfavored when the alleged repeal is located in an appropriations act and that the "intention of the legislature to repeal 'must be clear and manifest'") (quoting *United States v. Borden Co.*, 308 U.S. 188, 198(1939)).

[30] The School Reform Act contains nine subtitles. The funding formula is located in Subtitle D (§§ 2401-2403).

[31] Notably, Plaintiffs complain of instances in which the District has allegedly funded DCPS outside the formula, but not of instances in which the District funded public charter schools outside the formula. *See, e.g.*, Notice of Reprogramming Request for $19,000,000 of Local Funds Budget Authority from Non-Public Tuition to Public Charter Schools, REPROG20-36 (2013), *available at* http://lims.dccouncil.us/Legislation/REPROG20-0036?FromSearchResults=true.

[32] As this Court has explained, the unique relationship between the Council and Congress makes the seemingly mandatory nature of the funding formula ambiguous. *D.C. Ass'n of Chartered Pub. Schs.*, 134 F. Supp. 3d at 536.

Reform Act, Congress did not unilaterally impose its vision of education reform on the District, as Plaintiffs would have the Court believe. Rather, Congress worked closely with the Council and District stakeholders to enact a statutory framework within which the District could accomplish comprehensive education reform.[33] In fact, the directive that the District *shall* develop a per-pupil school funding formula originated not with Congress, but with the Council.

When Congress took-up District education reform in 1995, the District's Board of Education (the "Board"), which governed District public schools,[34] was beset by scandal, mismanagement, and inflated budgets that benefitted administrators' salaries to the detriment of students.[35] The Council was abreast of the Board's dysfunction and sensitive to the District's education needs.[36] Months before any congressional legislation on District school reform materialized, councilmembers introduced the Public Charter Schools Act of 1995, which authorized the establishment of public charter schools in the District.[37] Shortly thereafter, the Council Committee on Education and Libraries ("Council Education Committee") adopted summary recommendations for District education reform, which included a recommendation for "a per-pupil formula-based or predictable funding mechanism for the D.C. Public Schools."[38]

Where the text of a statute is ambiguous, courts consider legislative history and historical context of the statute. *See Wilson*, 290 F.3d at 353.

[33] *See* 141 Cong. Rec. H11720 (daily ed. Nov. 2, 1995) (statement of Rep. Gunderson) (hereinafter "Gunderson Statement"); H.R. Rep. No. 104-455, at 142 (1996) (Conf. Rep.).

[34] The Home Rule Act established the Board as an independent District agency. The Mayor and Council's budgetary authority over the Board was limited to authorizing a bulk sum of annual funding. S*ee* Home Rule Act §§ 452, 495. With the FRMAA, Congress amended the Home Rule Act to grant the Council conditional line-item authority over the Board's budget. *See* Pub. L. No. 104-8, § 202(g)(2). Congress approved the Board's abolition, following the Council's passage of the Public Education Reform Amendment Act of 2007. *See* D.C. Law 17-9 § 902 (2007); Pub. L. No. 110-33, § 1, 121 Stat. 223 (2007).

[35] *See*, *e.g.*, B11-318 Council Comm. Rep. at 35 (1995) ("Council Comm. Rep.") (attached hereto as Exhibit 3 at 74); Sari Horwitz, *Wide Discontent with Schools Puts D.C. Board Under Siege; Council, Congress Moving to Weaken Its Hold*, WASH. POST, June 12, 1995, at B01, *available at* 1995 WLNR 5738176.

[36] *See generally* Council Comm. Rep. at 1-42 (Ex. 3 at 3-81).

[37] *See id.* at 2 (Ex. 3 at 4).

[38] Council Comm. Rep. *attach*. Letter from H. Mason to S. Gunderson at 6 (July 21, 1995) (Ex. 3 at 131).

The Committee sent its summary to Congressman Steve Gunderson (R-WI), who was leading congressional efforts to help reform the District's education system.[39]

On October 23, 1995, the Council Education Committee passed a revised version of the Public Charter Schools Act of 1995 ("Council Committee Print").[40] Section 219 of that bill was titled "Annual budgets for public schools." The text of that section contained the essential elements of § 2401 of the School Reform Act: it supplied the directive at § 2401(b)(1) that the Mayor and Council, in consultation with the Board of Education and Superintendent, "*shall*" establish a funding formula; it provided that the formula shall be based on student enrollment, as in § 2401(b)(2); and it required the formula to specifically address the costs associated with students with special needs or who were otherwise at-risk, as provided in § 2401(b)(3)(B).[41]

In a section titled "Calculation of number of students," the Council Committee Print set forth specific requirements for calculating the enrollment numbers to be used in the funding formula.[42] That section established requirements for reporting the number of students enrolled in DCPS and charter schools and required the Board to obtain an audit of the initial enrollment

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[39] *See id.*; Gunderson Statement at H11720; *D.C. Council Panel Approves School Reform but Rebuffs Privatization*, WASH. POST, July 21, 1995, D06, *available at* 1995 WLNR 5721983.

[40] Council Comm. Rep. at 3 & *attach.* Council Committee Print (Ex. 3 at 5, 83-123).

[41] The text of the section read as follows:

> (a) For Fiscal Year 1997 and for each subsequent fiscal year, *the Mayor shall recommend, and the Council shall approve*, annual appropriated funds budgets for the District of Columbia public schools and for public charter schools in accordance with the formula established by subsection (b) of this section.
>
> (b) *The Mayor and the Council, in consultation with the Board of Education and the Superintendent of Schools, shall establish a funding formula* which determines the amount of the annual appropriation for the Board of Education and the public schools under its control, and for each public charter school. The funding formula shall be based on the number of students enrolled at each school, as calculated by Section 221 of this act, and shall define and then take into consideration students with special needs, including students with disabilities, disruptive students, or students who have dropped out of school.

Council Comm. Print § 219 (emphasis added) (Ex. 3 at 115-16).

[42] Council Comm. Print § 221 (Ex. 3 at 117-19).

calculations to ensure their accuracy. Congress adopted substantially identical language in § 2402 of the School Reform Act.

Finally, the Council Committee Print addressed annual payments to public charter schools. It set a schedule for issuance of payments to charter schools, required each charter to report the total number of students who had withdrawn or dropped out by March 1st of each school year, and authorized a reduction in the charter school's final payment under the funding formula if, based on its March 1st enrollment figures, the school had experienced a net reduction in enrollment.[43] Congress adopted these requirements in § 2403 of the School Reform Act.[44]

The Council Education Committee's impetus for the funding formula was three-fold. First, members wanted to create predictability in school budgets to facilitate long-range planning. Second, they wanted to prevent excessive spending on non-school-based activities such as central office and instructional support by implementing a model in which funds would follow a student as long as she was enrolled in DCPS or a charter school. Third, they were cognizant of concerns that the creation of public charter schools might result in a "two-tiered system of education in the District" in which poverty or other socio-economic factors prevented certain students from accessing public charter schools, leaving them to attend poorly performing and inadequately funded DCPS schools. They therefore sought to incentivize public charter schools to develop programs aimed at the needs of such at-risk students by providing for such students within the funding formula.[45]

[43] *Id.* § 222 (Ex. 3 at 119-20).

[44] Congress also authorized an increase in a public charter school's annual payment if its March enrollment figures showed a net increase in enrollment. *See* School Reform Act § 2403(a)(2)(B)(ii).

[45] Council Comm. Rep. at 8, 15, 35, 42 (Ex. 3 at 47, 54, 74, 81).

Ten days after the Council Education Committee's markup, Representative Gunderson introduced the District of Columbia School Reform Act of 1995 ("Gunderson Amendment") as an amendment to the District of Columbia Appropriations Act, 1996.[46] His amendment contained a per-pupil schools funding formula that mirrored §§ 219, 221 and 222 of the Council Committee Print.[47] On April 26, 1996, Congress passed the School Reform Act without substantive change to the per-pupil funding formula offered in the Gunderson Amendment.[48]

Representative Gunderson's comments on the funding formula reflect the goals of the Council Education Committee.[49] Plaintiffs point to Congress's desire to prevent a "two-tiered system of public schools" as evidence that Congress intended public charter schools to receive funding on the same dollar-for-dollar basis as DCPS. However, the "two-tiered system" legislators desired to avoid was one in which charters siphoned the District's most socio-economically advantaged students away from DCPS, and their remedy for this concern was monetary add-ons for special needs students within the formula.[50] A discussion on the importance of ensuring equal funding for DCPS and public charter schools is entirely absent from the legislative history of the School Reform Act.[51]

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[46] Gunderson Statement at H11713-15. On September 15, 1995, the Senate Committee on Appropriations passed an appropriations bill for the District that included a plan for District education reform and for establishing public charter schools, but the bill included no school funding provisions. *See* S. 1244, 104th Cong. (1995).

[47] *See* Gunderson Statement at H11721. Indeed, §§ 2301 and 2302 of the Gunderson Amendment possessed the same section headings – "Annual Budgets for Schools" and "Calculation of Number of Students" – as §§ 219 and 221, respectively, of the Council Committee Print.

[48] *Compare* Gunderson Amendment §§ 2301-2303 at 141 Cong. Rec. H11713-15 (Nov. 2, 1995) *with* School Reform Act §§ 2401-2403.

[49] *See* Gunderson Statement at H11722 ("This uniform formula will be used to provide operating budgets on the basis of enrollment. . . . Such a formula will clarify and focus decisions regarding funding for public education around students' needs.").

[50] *See* Gunderson Statement at H11721-22; *supra* note 45.

[51] *See* 141 Cong. Rec. H11705-11732; H.R. Rep. No. 104-455, at 142-157 (1996) (Conf. Rep.); 142 Cong. Rec. S1321-1339 (daily ed. Feb. 27, 1996); 142 Cong. Rec. H3946 (daily ed. Apr. 25, 1996) (statement of Rep. Livingston); 142 Cong. Rec. H4194 (daily ed. Apr. 30 1996).

The legislative history is unequivocal that the Council supplied Congress with the directive to create a per-pupil funding formula and the language that Congress used to explain it. From these facts it is incongruous to infer from the use of the word "shall" in § 2401 of the School Reform Act that Congress intended to divest the Council of its legislative authority to amend that law sometime in the future.

B. Congress Delegated the Responsibility of Developing a Funding Formula to the District.

As the Court observed, Congress did not set about to micromanage the District's education system in passing the School Reform Act.[52] Rather, it crafted legislation that allowed for local legislative discretion out of respect for the principle of home rule.[53] With Subtitle D of the School Reform Act, Congress established a framework for public school funding, but it explicitly left the task of creating the formula to the District.[54]

Section 2401(b) of the School Reform Act specifies that the formula is to be used to determine the annual payment from the District's general fund for the "operating expenses" of DCPS and each charter school, but Congress did not define "operating expenses." The law further specifies that the annual payment for operating expenses "shall be calculated by multiplying a uniform dollar amount" by "the number of students calculated under § 2402 that are enrolled" in DCPS and each charter school.[55] However, § 2402 provides three different dates on which to calculate and report student enrollment, and it does not specify which date provides

[52] *See D.C. Ass'n of Chartered Pub. Schs.*, 134 F. Supp. 3d at 537 (quoting House and Senate committee reports); *see also* Gunderson Statement at H11723.

[53] Gunderson Statement at H11723.

[54] School Reform Act § 2401(a)-(b).

[55] *Id.* § 2401(b)(2).

the enrollment figures to be used in calculating the annual payment described in § 2401.[56] Thus, not only did Congress vest the District with discretion in developing a schools funding formula, the framework it established for that formula contains ambiguities for the District to resolve. The District resolved these ambiguities in the UPSFF Act, discussed in Part III, *infra*.

C. Congress Enacted the School Reform Act against a Back-Drop of Existing Laws Governing the District's Budgetary Obligations.

By contending that § 2401 of the School Reform Act prevents the District from providing mid-year supplemental funding to DCPS without providing proportional supplemental funds to public charter schools and that it requires the District to include payments for teacher retirement within the meaning of "operating expenses," Plaintiffs ask this Court to find that the School Reform Act changed the District's pre-existing budgetary obligations, including those under the Anti-Deficiency Act ("ADA") and the District of Columbia Retirement Reform Act. However, neither the text of § 2401 nor the School Reform Act's legislative history indicates any intention to alter the Council's obligations and authority with respect to these laws.[57]

1. The District's Budget and the Anti-Deficiency Act.

Congress annually appropriates funds to the District after receiving its annual budget request.[58] Under the Home Rule Act, Congress prohibited the District from obligating and expending money except in accordance with a congressional appropriation.[59] The District must also comply with the federal ADA, which prohibits a District agency from spending money that

[56] Section 2402 also requires the District to include both resident and non-resident students in the enrollment count for DCPS and public charter schools, even though the District only pays to educate resident students.

[57] *U.S. v. Wilson*, 290 F.3d at 356 ("Congress is presumed to preserve, not abrogate, the background understandings against which it legislates").

[58] *See* Home Rule Act §§ 442, 603.

[59] *Id.* §§ 446. The Budget Autonomy Act of 2012 amended § 446 to permit the District to expend local revenues without a congressional appropriation, but during the years relevant to Plaintiffs' claims the District continued to seek congressional appropriations for its local budget. It is therefore unnecessary to address the effect of the Budget Autonomy Act of 2012 on the Plaintiffs' claims.

Congress has not appropriated or authorized for a particular use.[60] However, Congress also granted the District the authority to supplement agency budgets outside its initial budget request.[61] Under this framework, if a District agency such as DCPS faces mid-year spending pressures that the agency's budget cannot cover, like cuts to federal grants or unanticipated food service costs,[62] it cannot spend sums to cover these obligations unless the Council approves a reprogramming or acts to supplement the agency's budget. In all instances, the District must maintain a balanced budget.[63]

Plaintiffs' position completely ignores this budgetary framework. They ask the Court to construe § 2401 of the School Reform Act to either a) prohibit the Council from acting to supplement DCPS's budget to prevent the District from violating the ADA (or defaulting on its contractual obligations), or b) require the Council to approve a proportional amount of supplemental funding to charter schools, regardless of need. Both interpretations are nonsensical. The former would require the Court to conclude that Congress intended, *sub silentio*, for § 2401 to deprive the Council of its congressionally-granted authority to prevent agency ADA violations. The latter would require the Court to interpret the term "uniform" in

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[60] *See id.* § 603(e); 31 U.S.C. 1341(a).

[61] The Home Rule Act authorized the District to seek additional mid-year funding from Congress through supplemental budget requests. *See* Home Rule Act §§ 442(c), 446. In 1995, Congress amended the Home Rule Act to spell-out the District's reprogramming authority. *See* FRMAA § 301(b) (codified at D.C. Official Code § 1 204.46(d)). Congress also authorized mid-year supplemental funding through budget adjustment acts. Beginning in the early 2000s, Congress began granting the District greater appropriations flexibility. *See, e.g.*, Pub. L. No. 107-96, 115 Stat. 933 (2001); Pub. L. No. 108-335 § 331, 118 Stat. 1345 (2004); Pub. L. No. 110-161 § 821, 121 Stat. 2042 (2007). In 2009, it permanently authorized the District to annually increase its congressional appropriation consistent with local revenue collections or the prior year's surplus and to obligate and expend such additional sums "in accordance with laws enacted by the Council of the District of Columbia in support of each such obligation and expenditure." Pub. L. No. 111-8 §§ 816-17, 123 Stat. 669 (2009) (codified at D.C. Official Code §§ 47-369.01 & .02). The Council took the supplemental funding actions of which Plaintiffs complain pursuant to the foregoing congressional authorizations. *See, e.g.*, D.C. Act 19-382 § 2 (2012).

[62] *See e.g.*, D.C. R19-451 (2012). Bill Turque, *Charters Challenge Fairness of $21 Million to DCPS*, WASH. POST (Jan. 5, 2012), https://www.washingtonpost.com/blogs/dc-schools-insider/post/charters-challenge-fairness-of-21-million-to-dcps/2012/01/04/gIQA6FWGdP_blog.html.

[63] *See* Home Rule Act § 603(c)-(d).

§ 2401 to mean that Congress intended a DCPS financial necessity to result in a potential windfall for charter schools.[64]

Congress cannot be assumed to have legislated irrationally. Nothing in the text or legislative history of the School Reform Act suggests that Congress intended the funding formula to abrogate the Council's budgetary authority to prevent DCPS from committing ADA violations; or, as Plaintiffs contend, to obligate the Council to provide a proportional amount of supplemental funding to charter schools if it acts to prevent an ADA violation for DCPS. A more reasonable interpretation of the terms "uniform" and "annual payment" in § 2401 is that Congress intended the District to use the same formula to calculate the amount of funds to be allocated to DCPS and charter schools as their initial operating budget, which all District agencies receive at the start of a fiscal year. This interpretation finds support in the Council's original desire for the funding formula,[65] § 2401's heading, "Annual Budgets for Schools",[66] and the legislative history of the School Reform Act.[67]

2. The Teachers' Retirement Fund.

Plaintiffs claim that contributions to the Teachers' Retirement Fund are "operating expenses" that must be included in the funding formula, but clearly this was never Congress's intent. Congress created the Teachers' Retirement Fund in 1979, when it transferred the

[64] Not only that, accepting Plaintiffs' argument would mean that every time the District seeks to cure a potential ADA violation for DCPS through its supplemental budget authority, it needs to come up with nearly double that sum to give to public charter schools. Doing so, however, could be impossible under the District's overriding obligation to maintain a balanced budget. Thus, Plaintiffs would have the District sacrifice necessary funds for DCPS or violate the Home Rule Act, all so that public charter schools can receive money they may not require. Congress cannot possibly have intended this Sophie's Choice.

[65] *See supra* Part II.A.

[66] In the Home Rule Act and elsewhere in the D.C. Code "budget" is defined to mean the "*request* for appropriations. . . ." Home Rule Act § 103(15) (emphasis added). Plaintiffs' interpretation of § 2401 is at odds with this definition.

[67] *See supra* Part II.A. & note 49; 142 Cong. Rec. S1326 (statement of Sen. Lieberman).

obligation to pay teacher retirement benefits to the District, and it created the District of Columbia Retirement Board ("DCRB") to manage the District's funding obligations under that law.[68] The District must make annual appropriations to the District of Columbia Teachers' Retirement Fund to cover its teacher pension liabilities.[69]

Section 2401 of the School Reform Act directs the annual payment under the funding formula to be made to the Board of Education for the operating expenses of the District's public schools. However, the District's annual appropriation to the Teachers' Retirement Fund was never part of the budget that the Board of Education administered for the operations of District public schools. Rather, DCRB managed this contribution.[70] Nothing in the School Reform Act changed that. Given the independent statutory scheme for teacher retirement contributions, it is illogical to interpret the "annual payment to the Board of Education for the operating expenses" to include the District's annual appropriation to the DCRB for teacher retirement benefits. The legislative history of the funding formula and Congressional appropriations practice following passage of the School Reform Act bolster this conclusion. The Council's Education Committee explained that it did not anticipate retirement-related benefits as being "a component of a per-pupil driven funding formula."[71] In the District's 1997 appropriations bill, following passage of the School Reform Act, Congress appropriated $479,679,000 in local funds for DCPS and

[68] Pub. L. No. 96-122, 93 Stat. 866 (1979) (codified as amended at D.C. Official Code § 1-701 *et seq.*). In 1998, pursuant to congressional mandate, the Council created a replacement plan to manage the pension benefits of DCPS teachers accrued after June 30, 1997, which continued the Teachers' Retirement Fund under the stewardship of the DCRB. *See* Pub. L. 105-33 § 11042, 111 Stat. 725 (1997); D.C. Law 12-152 (1998) (codified at D.C. Official Code § 1-901.01 *et seq.*).

[69] From its inception, the Teachers' Retirement Fund has included both employee contributions and an annual appropriation by the District to cover the Fund's liabilities. *See* D.C. Official Code §§ 1-713, 1-724, 1-903.02, 1-907.02.

[70] Pub. L. No. 96-122 § 121(a) (granting the DCRB "exclusive authority and discretion to manage and control" the Teachers' Retirement Fund).

[71] Council Comm. Rep. at 36 (Ex. 3 at 75).

$2,835,000 for charter schools to be allocated as "operating costs" on the basis of the per-pupil funding formula. It separately appropriated $88,100,000 in local funds for Teachers' Retirement and Annuity Payments.[72] Congress has maintained the practice of separately appropriating local payments for the Teachers' Retirement Fund and for DCPS and public charter schools.[73]

The foregoing demonstrates that Congress in no way manifested an intent to divest the Council of its legislative powers under the Home Rule Act through the use of "shall" in § 2401.

III. Congress has not Disapproved Council School Funding Actions.

The Council passed the UPSFF Act in accordance with the directive in § 2401 of the School Reform Act. The UPSFF Act provided clarity where the School Reform Act was silent or ambiguous. Whereas the School Reform Act failed to define "operating expenses", the UPSFF Act fleshed-out its meaning and application.[74] The UPSFF Act also clarified that the enrollment figure to be used in the funding formula was to be "the number of resident students enrolled as of October 1 in the year preceding the fiscal year in which the appropriation is made" as verified by an independent contractor.[75]

Rather than looking to the UPSFF Act, which the Council passed per the School Reform Act, Plaintiffs ask the Court to define operating expenses to include "'*the total costs of the*

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[72] *See* Pub. L. No. 104-194, 110 Stat. 2359 (1997); H.R. Rep. No. 104-689, at 49-52 (1996) (Conf. Rep.).

[73] *See, e.g.*, Pub. L. No. 105–277, 112 Stat. 2681–128 (1998); Pub. L. No. 106-113, 113 Stat. 1507 (1999); Pub. L. No. 106-522, 114 Stat. 2449 (2000); Pub. L. No. 108–335, 118 Stat. 1331 (2004); Pub. L. No. 114-113, 129 Stat. 2447 (2015) (appropriating District local funds per the Fiscal Year 2016 Budget Request Act of 2015 (D.C. Law 21-27 (2015)).

[74] The UPSFF Act established a "Foundation level" defined as "the amount of funding per weighted student needed to provide adequate regular education services to students. Regular education services do not include special education, language minority education, summer school, capital costs, state education agency functions or services funded through federal and other non-appropriated revenue sources." D.C. Law 12-207 § 102(5) (1999). The UPSFF Act further clarified the meaning of operating expenses by providing that the per student funding formula applied "only to operating budget appropriations from the District of Columbia General Fund for DCPS and Public Charter Schools. It shall not apply to funds from federal or other revenue sources, or to funds appropriated to other agencies and funds of the District government." *Id.* § 103.

[75] *Id.* § 107. It further mandated periodic review and revisions of the funding formula. *Id.* § 112.

operations of the Board of Education . . ., all facilities operating costs, including utilities, … [and] any other direct or indirect costs normally incurred by, or allocated to, schools under the control of the Board of Education and the overall public school system.'"[76] Yet, this language comes not from the legislative history of the School Reform Act, but from the House Committee Report accompanying the District of Columbia Appropriations Act, 1997, passed five months after the School Reform Act.[77] Notably, Congress amended provisions of the School Reform Act in that law, but it did not amend § 2401 to clarify the definition of "operating expenses."[78]

Plaintiffs argue that the UPSFF Act is invalid to the extent it authorizes funding to DCPS inconsistent with the definition of "operating expenses" offered in the 1997 House Committee Report. However, given the Council's legislative powers under the Home Rule Act, it cannot be that a non-legislative act of Congress – a *post hoc* statement in a committee report – has the power to divest the Council of its legislative prerogative to define a term that Congress has not.[79] The language in Congress's Committee Report can, at most, be interpreted as non-binding guidance to the District in developing its schools funding formula.[80] This is especially true where, when the same congress sought to clarify the terms of the School Reform Act, it did so unequivocally by amending the law in District of Columbia Appropriations Act, 1997.

The UPSFF Act became effective March 26, 1999, following the 30-day congressional review period in which Congress took no action to disapprove the law. The District has been funding DCPS and charter schools under the UPSFF Act for 17 years, and Congress has only

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[76] Pls. Supp. Mem. at 23 (emphasis in original) (ECF No. 43).

[77] H.R. Rep. No. 104-689, at 50 (1996); *see* Pub. L. No. 104-194, 110 Stat. 2356 (1996).

[78] *See* Pub. L. No. 104-194 §§ 145, 148, 110 Stat. 2376-77 (1996).

[79] *See* notes 17 & 18.

[80] *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011) ("Post-enactment legislative history is not a legitimate tool of statutory interpretation").

once voiced an objection to District action under the Act.[81] This is despite the fact that Congress actively exercised its oversight and legislative authority around charter school funding in the years following passage of the School Reform Act.

A. Congress is not a Potted Plant when it comes to Charter Schools Funding.

After passing the School Reform Act, Congress continued efforts to promote stable funding for charter schools by amending the School Reform Act and other laws. It established a quarterly payment schedule for public charter schools and authorized charter schools to receive their first payment before the start of the school year.[82] It created funds to supplement the operating costs of charter schools whose total audited enrollment exceeded the student enrollment count on which the annual appropriation was based, and to assist charter schools with obtaining financing for facilities acquisition and capital improvements.[83] After determining that the District was not implementing a provision of the School Reform Act that granted charter schools access to surplus DCPS properties, it amended the law to grant charter schools a disposition preference.[84] In another amendment, Congress sought to make it easier for public charter schools to contract for outside services on similar terms as DCPS.[85] In the same appropriations bills in which Congress amended the School Reform Act, it consistently

[81] H.R. Rep. No. 108-214, at 24 (2003) (rejecting District's budget proposal to increase DCPS teacher salaries "outside the per pupil allocation funding formula" and to achieve a proportional increase for charter school teachers through federal funds). The Committee raised its objection in response to the District's annual budget request, which does not undermine the Council's position that the District may authorize mid-year spending outside the formula pursuant to the powers discussed in Part II.C, *supra*.

[82] *See* Pub. L. No. 106-522, 114 Stat. 2249, 2251 (2000) (effectively amending semi-annual payment schedule in § 2403(a) of the School Reform Act).

[83] *See* Pub. L. No. 106–113 § 153, 113 Stat. 1501 (1999); Pub. L. No. 106–522 § 161; Pub. L. No. 108-7 §§ 143(b), 146(a), 117 Stat. 131-33 (2003); Pub. L. No. 108-335 § 335, 118 Stat. 1347 (2004).

[84] *See* Pub. L. No. 108–335 § 342(c), 118 Stat. 1349; Pub. L No. 108-447, Div. J, Title I, § 103(a)(3), 118 Stat. 3342-43 (2004); S. Rep. No. 108-142, at 23 (2003).

[85] *See* H.R. Rep. No. 106-786, at 69-70 (2000) (explaining amendment in Pub. L. No. 106-522 § 120(a)).

appropriated operating funds to DCPS and charter schools under the funding formula established in the UPSFF Act, without amendment to or comment on that law.[86]

B. Congress has not Disapproved the Charter School Enrollment True-Up Requirement.

In 2004, the Council amended the UPSFF Act to add § 107b.[87] Section 107b codified the quarterly payment schedule for public charter schools that Congress established through its annual appropriations acts.[88] The section authorized the first two payments to be based on each charter school's unaudited enrollment figures, but required that the latter two payments be based on the school's October 1 audited enrollment. It further permitted the Mayor to adjust the latter payments so that a school's total annual payment reflected its audited enrollment. In addition to adding § 107b to the UPSFF Act, the Council amended § 2403 of the School Reform Act to conform the payments authorized in that section to those established in § 107b.[89]

Plaintiffs claim that adjusting charter schools' annual payments to reflect actual enrollment while failing to similarly adjust the annual payment for DCPS violates the School Reform Act, as enacted. This argument ignores the fact that the School Reform Act originally required the District to adjust charter school funding to reflect mid-year enrollment figures to "ensure accurate payment," whereas Congress never imposed a similar enrollment "true-up" on DCPS.[90] Thus, § 107b and the Council's conforming amendments to § 2304 in no way violate the original intent of the School Reform Act.

These amendments became effective on April 13, 2005, following the 30-day

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[86] *See, e.g.*, Pub. L. No. 106-522, 114 Stat. 2249; Pub. L. No. 108-7, 117 Stat. 115-16; Pub. L. No. 108–335, 118 Stat. 1330-31.

[87] D.C. Law 15-348 § 101(d) (2004) (codified at D.C. Official Code § 38-2906.02).

[88] *See supra* note 82.

[89] D.C. Law 15-348 § 102(c).

[90] *See* School Reform Act §§ 2402(a)(2), § 2403(a)(2)(B)(ii).

congressional lay-over period. In the 11 years the law has been in effect, Congress has not exercised its disapproval powers to prevent the District from basing public charter school funding on actual enrollment and DCPS funding on estimated enrollment. Congress's failure to respond to the allegedly illicit funding of DCPS and charter schools under the UPSFF Act is particularly telling when one considers that Congress expressly limited the Council's authority to pass laws inconsistent with the School Reform Act's provisions regarding the "establishment, administration, or operation of public charter schools," but has taken no similar action with respect to budgets.[91]

C. The UPSFF Act Controls to the Extent it Conflicts with the School Reform Act.

Congress exercised its powers under the District Clause when it passed the School Reform Act, a fact which Plaintiffs concede.[92] The School Reform Act applies exclusively to the District and concerns purely local matters, namely the District's public schools. Thus, the School Reform Act is a local law.[93] As such, in the absence of congressional divestment or disapproval limiting its powers, the Council has the power to amend the School Reform Act.[94] The foregoing demonstrates that Congress has not exercised its divestment or disapproval powers with respect to the Council's passage of the UPSFF Act or subsequent amendments affecting allocation of funds to charter schools. Thus, to the extent the UPSFF Act conflicts with Subtitle D of the School Reform Act, the UPSFF Act, as the later-in-time, more specific statute, controls.[95]

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[91] *See supra* Part I.B. Notably, § 2204.10(d) does not apply to budgets or appropriations for public charter schools.

[92] *See* Compl. ¶ 82.

[93] *See McKinney-Byrd Academy Public Charter School v. District of Columbia*, No. CIV.A. 04-02230 RBW, 2005 WL 1902873, at *2-3 (D.D.C. July 21, 2005), *dismissed sub nom. McKinney-Byrd Acad. Pub. Charter Sch. v. Gov't of D.C.*, No. 05-7115, 2005 WL 3789050 (D.C. Cir. Oct. 31, 2005); *supra* note 13.

[94] *See* Part I.A, *supra*.

[95] *See Driscoll v. George Washington Univ.*, 938 F. Supp. 2d 19, 23 (D.D.C. 2013); *C.f. Noble v. U.S. Parole Com'n, 82 F.3d 1108 (D.C. Cir. 1996)* (acknowledging that a council-passed provision in the District Code that

That the UPSFF Act controls District public school funding decisions is all the more compelling upon a close reading of § 2401(b) of the School Reform Act, which reveals itself as an un-implementable anachronism. That provision directs the Mayor and Council to consult with the Board of Education to develop a formula to determine the amount of the "annual payment to the Board of Education for the operating expenses of the District of Columbia public schools, which . . . includes the operating expenses of the Board of Education and the Office of the Superintendent." Since 2007, when the Council abolished the Board of Education and the Office of Superintendent, this directive has been literally impossible to implement.[96] There can be no annual payment to the Board of Education inclusive of its operating expenses and those of the Superintendent. Thus, the UPSFF Act necessarily amends the School Reform Act. Any other conclusion would render § 2401(b) completely unintelligible, indeed, useless, in the context of the District's current public education environment.[97]

Finally, given the ambiguity of the statutory provisions, Plaintiffs' contention that the District has violated both the School Reform Act and the Home Rule Act flies in the face of Congress's recognition in both Acts that "it cannot realistically be expected to deal with every aspect of a local problem."[98] Thus, the Court should resolve any doubts regarding conflict between the UPSFF Act and Subtitle D in favor of the District.[99]

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conflicted with an earlier-in-time congressionally-passed provision might supplant the congressionally-passed provision and certifying the question to the D.C. Court of Appeals).

[96] *See supra* note 34.

[97] *C.f.* Norman J. Singer, Sutherland Statutory Construction § 47.38 (5th ed.1991) ("Words may be supplied in a statute in order to give it effect, to avoid repugnancy or inconsistency with legislative intent and ... where omission makes the statute absurd, meaningless, irrational or unreasonable.").

[98] *Firemen's Ins. Co. of Wash., D.C. v. Washington*, 483 F.2d 1323, 1329 (D.C. Cir. 1973)

[99] *See id.* These arguments apply with equal strength to Plaintiffs' claims that the District improperly funds DCPS facilities maintenance costs outside Subtitle D. DCPS facilities are District property managed by the Department of General Services with funds from that agency's budget, except that DCPS provides janitorial services. *See* D.C. Official Code § 10-551.02(4). This practice is consistent with the UPSFF Act, which excludes "funds appropriated to other [District] agencies" from the definition of operating expenses. *See* D.C. Law 12-207 § 103.

IV. Finding for Plaintiffs would Undermine the Purpose of the Home Rule Act.

The Court should reject Plaintiffs' argument that the School Reform Act necessarily preempts Council actions that allegedly conflict with it. As the Court has stated, such a "conclusion would run contrary to the very purpose of the Home Rule Act" and saddle the District with immutable, potentially unworkable laws until Congress took time off from its federal responsibilities to turn its attention back the District.[100] Indeed, a finding that congressionally-passed local laws silently preempt subsequently-passed Council actions would strike a death knell to District home rule and cripple the Council's ability to appropriately respond to the District's changing educational needs.

A. Council Amendments to Subtitle D of the School Reform Act.[101]

The Council has amended every section of Subtitle D of the School Reform Act to reflect changes in the District's educational landscape and to make the law responsive to the actual funding needs of its public schools. These amendments have, among other things: 1) authorized supplemental funding outside the per-pupil funding formula for special education services;[102] 2) conformed the law to federal spending requirements under the federal Individuals with Disabilities Education Act and authorized reductions in per-pupil funding as a penalty for schools that fail to comply with the federal requirements;[103] 3) removed outdated references to

[100] *See D.C. Ass'n of Chartered Pub. Schs.*, 134 F. Supp. 3d at 534. The cases Plaintiffs cite in support of their preemption argument are inapposite in so far as the decisions pre-date home rule and therefore fail to account for the District's expanded legislative authority under the Home Rule Act, *see Firemen's Ins. Co.. v. Washington*, 483 F.2d 1323 (D.C. Cir. 1973); *Md. & D.C. Rifle & Pistol Ass'n v. Washington*, 442 F.2d 123 (D.C. Cir. 1971), or involve a conflict between a federal interest or federal law and a District law analogous to situations in which states attempt to regulate a federal interest or legislate in conflict with a federal law, *see Don't Tear it Down, Inc. v. Pennsylvania Ave. Dev. Corp.*, 642 F.2d 527 (D.C. Cir. 1980); *Biotechnology Indus. Org. v. District of Columbia*, 496 F.3d 1362 (Fed. Cir. 2007). Neither scenario is present here.

[101] A chart detailing Council amendments to Subtitle D is provided in Appendix A, attached hereto.

[102] *See* D.C. Law 17-20 § 4032 (2007) (adding subparagraph (D) to § 2401(b)(3) of the School Reform Act); D.C. Law 18-370, Title IV § 403 (2010).

[103] *See* D.C. Law 19-21 § 4002 (2011) (adding subsections (c)-(i) to § 2401 of the School Reform Act).

the Board of Education and Financial Responsibility and Management Assistance Authority;[104] 4) instituted quarterly enrollment reporting requirements for DCPS and charter schools and clarified that the first enrollment report, due June 30, should be based on estimated enrollment;[105] and 5) placed limitations on the reprogramming of excess funds placed in escrow for public charter schools.[106] In many instances, the District has funded its public schools in accordance with the foregoing amendments for more than a decade.

B. Council Amendments to Subtitle B of the School Reform Act.[107]

Similarly, over the last twenty years, the Council has amended Subtitle B of the School Reform Act to address ongoing and unanticipated problems facing the District's public education system. For example in 2006, the Council amended the School Reform Act to provide a process for the dissolution of charter schools and the distribution of their assets to ensure that assets obtained with public funds are returned to the District for continued use in public education.[108]

Although Congress created a preference for charter schools to obtain access to excess DCPS facilities, the Council determined that poor implementation of that law left charter schools without access to these facilities. It therefore amended the School Reform Act to provide a detailed framework for DCPS facilities disposition.[109] The Council also amended the School Reform Act in 2014 in response to the District's ongoing struggles to provide adequate educational services to students with disabilities. The Council determined that allowing public

[104] *See* D.C. Law 13-176 § 8 (2000); D.C. Law 18-223 § 4092 (2010).

[105] D.C. Law 15-348 § 102 (2005).

[106] D.C. Law 21-36 § 4162 (2015).

[107] A chart detailing Council amendments to Subtitle B is provided in Appendix B, attached hereto.

[108] D.C. Law 16-268 § 4 (2007). *See* B16-0642 Comm. Rep., at 4-10 (2006) (describing need for legislation and problems arising with closure of public charter schools), *available at* http://lims.dccouncil.us/Download/1206/B16-0624-COMMITTEEREPORT.pdf.

[109] *See* D.C. Law 20-114 § 2 (2014); B20-0313 Comm. Rep., at 3-4 (2013) *available at* http://lims.dccouncil.us/Download/29469/B20-0313-CommitteeReport.pdf.

charter schools to elect DCPS to serve as their local education agency for purposes of special education compliance gave charters "little incentive to develop high quality special education programs" and prevented students with disabilities from having "the benefit of meaningful school choice."[110] It therefore phased-out charters' ability to elect DCPS as their local education agency for special education purposes and permitted charters to establish enrollment preferences for students with disabilities.[111]

In 2016, in response to scandals involving financial abuses by charter school founders and administrators the Council passed the Public Charter School Fiscal Transparency Amendment Act of 2016.[112] That bill, which is currently in its congressional layover period, amends the School Reform Act to limit conflicts of interest between school fiduciaries and third-party vendors and to strengthen the District's ability to monitor money flowing from public charter schools to third-party management organizations.[113] As the foregoing demonstrates, a finding that the School Reform Act, as a congressional enactment, prohibits Council amendments to that act, would jeopardize two decades of District efforts to build public schools responsive to local needs.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for summary judgment.

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[110] B20-0725 Comm. Rep., 2-3 (2014) *available at* http://lims.dccouncil.us/Download/31381/B20-0725-CommitteeReport1.pdf.

[111] *See id.*; D.C. Law 20-196, Title I (2015).

[112] B21-0115 Comm. Rep., at 1-4 (2016) *available at* http://lims.dccouncil.us/Download/33498/B21-0115-CommitteeReport1.pdf.

[113] *See id.*, at 4; D.C. Act 21-465.

Dated: September 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that today, September 9, 2016, I electronically filed the foregoing Amicus Curiae Brief in Support of Defendants and Memorandum of Points and Authorities with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. I further certify that all parties have been served through CM/ECF.

Respectfully submitted,

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