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## Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools

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# HAVING IT BOTH WAYS: HOW CHARTER SCHOOLS TRY TO OBTAIN FUNDING OF PUBLIC SCHOOLS AND THE AUTONOMY OF PRIVATE SCHOOLS

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## INTRODUCTION

Since 1992, forty-two states and the District of Columbia have enacted legislation for charter schools.<sup>1</sup> As of December 2011, there were 5,700 charter schools educating 1.9 million students.<sup>2</sup> Charter schools are characterized as public schools that receive autonomy from a variety of rules and regulations that traditional public schools must follow.<sup>3</sup> In exchange for this increased autonomy, charter schools are accountable to the requirements that are established in the charter.<sup>4</sup> Failure to satisfy those requirements could result in the closing of the school.<sup>5</sup>

Charter schools and “traditional public schools” are similar in that they are directly subsidized by a combination of primarily state and local taxes based on their enrollments.<sup>6</sup> However, the authorization process for these two types of schools can be quite different. Local education agencies (LEAs), which are usually school districts that are governed by elected school boards, decide to

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<sup>1</sup> See *Choice & Charter Schools: Laws & Legislation*, CTR. FOR EDUC. REFORM, <http://www.edreform.com/issues/choice-charter-schools/laws-legislation/> (last visited Dec. 11, 2013) (noting that the states without charter schools are Alabama, Kentucky, Montana, Nebraska, North Dakota, South Dakota, Vermont, and West Virginia).

<sup>2</sup> *Choice & Charter Schools: Facts*, CTR. FOR EDUC. REFORM, <http://www.edreform.com/issues/choice-charter-schools/facts/> (last visited Dec. 11, 2013).

<sup>3</sup> See *What Are Public Charter Schools?*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/About-Charter-Schools/What-are-Charter-Schools003F.aspx> (last visited Dec. 11, 2013).

<sup>4</sup> *Charter Schools 101: The Most Frequently Asked Questions*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/About-Charter-Schools/Frequently-Asked-Questions.aspx> (last visited Dec. 11, 2013).

<sup>5</sup> See *id.*

<sup>6</sup> *What Are Public Charter Schools?*, *supra* note 3.

open new traditional public schools.<sup>7</sup> While LEAs may open new charter schools in many states, some state statutes grant chartering authority to nonprofit private entities that are governed by boards of directors consisting of private citizens.<sup>8</sup> Traditional public schools and charter schools may also differ in terms of how they are governed. While LEAs generally govern traditional public schools, many states permit private boards of directors to operate charter schools.<sup>9</sup> Another key difference between traditional public schools and charter schools is that charter school governing boards might choose to contract a private entity, or educational management organization (EMO), to manage and operate the school.<sup>10</sup>

This Article discusses how charter schools have used their hybrid characteristics to obtain the benefits of public funding while circumventing state and federal rights and protections for employees and students that apply to traditional public schools. The first Part explains how charter schools have emphasized their “public” characteristics to withstand state constitutional challenges that they are ineligible for public funding because they are private schools or fall outside of a system of public schools.

The second and third Parts of this Article explain how charter schools have emphasized their private characteristics to avoid having to comply with state and federal protections that protect employees and students. Specifically, the second Part discusses how privately run charter school boards and EMOs have evaded state union election laws by arguing that they are private entities that are covered by the National Labor Relations Act (NLRA), a federal statute that governs private-sector employment. The third Part discusses how charter schools have attempted to evade federal constitutional and statutory protections for employees and students by arguing that they are not state actors pursuant to 42 U.S.C. § 1983, a federal statute that establishes a cause of action for deprivations of federal constitutional and statutory rights under the color of

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<sup>7</sup> See Bruce D. Baker, *Charter Schools Are . . . [Public? Private? Neither? Both?]*, SCH. FIN. 101 (May 2, 2012), <http://schoolfinance101.wordpress.com/2012/05/02/charter-schools-are-public-private-neither-both/>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

state law.<sup>11</sup> These Parts also point out that attempts to circumvent state and federal protections for students and employees may have unintended consequences, such as inviting federal involvement in charter school labor policies, or causing state courts to revisit the question of whether charter schools are public schools eligible for funding under state constitutional law.

## I. CHARTER SCHOOLS, PUBLIC SCHOOL FUNDING, AND STATE CONSTITUTIONS

Plaintiffs have alleged that the private characteristics possessed by charter schools render them ineligible for funding under state constitutions. Charter schools have survived these challenges by convincing courts that they are sufficiently public to be eligible for funding. This section discusses how charter schools have withstood challenges under two types of constitutional provisions based on their private characteristics: (1) state constitutional provisions that prohibit funding to these types of schools and (2) state constitutional provisions requiring the state to provide a uniform or efficient system of public schools.

### A. *Category #1: Are Charter Schools Too Privately Governed to Be Eligible for Funding?*

Courts in Michigan and California have examined whether the private characteristics of charter schools make them private schools that are ineligible for public funding. These decisions are significant because sixteen charter school states have similar constitutional provisions. Seven charter school states have constitutional provisions barring the funding of private schools with public funds: Alaska,<sup>12</sup> Arizona,<sup>13</sup> Hawaii,<sup>14</sup> Michigan,<sup>15</sup> New Mexico,<sup>16</sup> South

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<sup>11</sup> 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2006).

<sup>12</sup> ALASKA CONST. art. 7, § 1 (“No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.”).

<sup>13</sup> ARIZ. CONST. art. IX, § 10 (“No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.”).

<sup>14</sup> HAW. CONST. art. X, § 1 (“[N]or shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution . . . .”).

Carolina,<sup>17</sup> and Wyoming.<sup>18</sup> Seven states with charter schools have constitutional provisions limiting educational funds to public, free, or common schools: Connecticut,<sup>19</sup> Georgia,<sup>20</sup> Missouri,<sup>21</sup> New Jersey,<sup>22</sup> Rhode Island,<sup>23</sup> Texas,<sup>24</sup> and Washington.<sup>25</sup> Two states with charter schools have constitutional provisions that prohibit the funding of any schools that are not under the exclusive control of the state: California<sup>26</sup> and Massachusetts.<sup>27</sup>

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<sup>15</sup> MICH. CONST. art. VIII, § 2 (“No public monies or property shall be appropriated or paid or any public credit utilized . . . directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school.”).

<sup>16</sup> N.M. CONST. art. XII, § 3 (“[N]o part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.”).

<sup>17</sup> S.C. CONST. art. XI, § 4 (“No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.”).

<sup>18</sup> WYO. CONST. art. VII, § 8 (“[N]or shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever.”).

<sup>19</sup> CONN. CONST. art. VIII, § 4 (“The fund, called the SCHOOL FUND, shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public schools throughout the state, and for the equal benefit of all the people thereof. The value and amount of said fund shall be ascertained in such manner as the general assembly may prescribe, published, and recorded in the comptroller’s office; and no law shall ever be made, authorizing such fund to be diverted to any other use than the encouragement and support of public schools, among the several school societies, as justice and equity shall require.”).

<sup>20</sup> GA. CONST. art. VIII, § 6, para. I(b) (“School tax funds shall be expended only for the support and maintenance of public schools, public vocational-technical schools, public education, and activities necessary or incidental thereto, including school lunch purposes.”).

<sup>21</sup> MO. CONST. art. IX, § 5 (“establishing ‘a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever’”).

<sup>22</sup> N.J. CONST. art. VIII, § 4, para. 2 (“The fund for the support of free public schools . . . shall be annually appropriated to the support of free public schools, and for the equal benefit of all the people of the State; and it shall not be competent, except as hereinafter provided, for the Legislature to borrow, appropriate or use the said fund or any part thereof for any other purpose, under any pretense whatever.”).

<sup>23</sup> R.I. CONST. art. XII, § 2 (“The money which now is or which may hereafter be appropriated by law for the establishment of a permanent fund for the support of public schools, shall be securely invested and remain a perpetual fund for that purpose.”); *id.* § 4 (“The general assembly shall make all necessary provisions by law for carrying this article into effect. It shall not divert said money or fund from the aforesaid uses, nor borrow, appropriate, or use the same, or any part thereof, for any other purpose, under any pretense whatsoever.”).

<sup>24</sup> TEX. CONST. art. 7, § 5(c) (“The available school fund shall be applied annually to the support of the public free schools. Except as provided by this section, the legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose. The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school.”).

<sup>25</sup> WASH. CONST. art. IX, § 2 (“[T]he entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.”).

<sup>26</sup> CAL. CONST. art. IX, § 8 (“No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools;

In *Council of Organizations & Others for Education About Parochialism v. Engler*,<sup>28</sup> the Supreme Court of Michigan found that the state's charter school statute did not violate article VIII, section 2 of its constitution, which provides, "No public monies or property shall be appropriated or paid or any public credit utilized . . . directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school."<sup>29</sup> The plaintiffs alleged that charter schools violated section 2 "because they were not under the immediate and exclusive control of the state."<sup>30</sup> The Michigan Supreme Court found that this constitutional provision did not require the state to exercise exclusive control.<sup>31</sup> However, the court acknowledged that other states had recognized the need to exercise some control in order for a school to qualify for funding.<sup>32</sup> Charter schools satisfied this requirement "because they are under the ultimate and immediate control of the state and its agents."<sup>33</sup> First, the authorizing body could revoke a charter when it had a reasonable ground for revocation, such as the school's failure to comply with the terms of its charter or with all applicable law.<sup>34</sup> Second, authorizing bodies, which were public institutions, exercised control over charter schools through the application approval process.<sup>35</sup> Third, the state set the qualifications for determining whether charter schools were eligible for funding.<sup>36</sup> Finally, other sections of the school code applied to charter schools.<sup>37</sup>

The Michigan Supreme Court rejected the argument that charter schools were unconstitutionally funded private schools because they were not under the control of the qualified voters of the school district. The court observed that

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nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State."

<sup>27</sup> MASS. CONST. amend. art. CIII ("No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any . . . primary or secondary school . . . which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both . . .").

<sup>28</sup> 566 N.W.2d 208 (Mich. 1997).

<sup>29</sup> MICH. CONST. art. VIII, § 2.

<sup>30</sup> *Parochialism*, 566 N.W.2d at 216.

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 216–17.

<sup>37</sup> *Id.* at 217.

the *Corpus Juris Secundum* had defined public schools as, “broadly speaking, open and public to all in the locality, which the state undertakes through various boards and officers to direct, manage, and control, and which is subject to and under the control of the qualified voters of the school district in which it is situate[d].”<sup>38</sup> The *Parochiaid* court also noted that the Washington Supreme Court, in *State ex rel. School District No. 3 v. Preston*, had defined a common school as “common to all children of proper age and capacity, free, and subject to and under the control of the qualified voters of the district.”<sup>39</sup> However, the Michigan court found that article VIII, section 2 did not require public schools to be under the control of the voters of the school district, but rather that they be under the control of the state legislature, which was under the command of the state electorate.<sup>40</sup>

The plaintiffs also alleged that charter schools were not public schools because private boards of directors ran them, and the authorizing bodies had no means for selecting board members.<sup>41</sup> The court rejected this argument because the power “granted by the Constitution to the Legislature to establish a . . . primary school system carried with it the authority to prescribe what officers should be chosen to conduct the affairs of the school districts, to define their powers and duties, . . . and how and by whom they should be chosen.”<sup>42</sup> The legislature exercised control by empowering the authorizing body to establish “the method of selection, length of term, and number of members of the board of directors of each [charter school] subject to its jurisdiction.”<sup>43</sup> The court further pointed out that the authorizing bodies were publicly elected or appointed by public bodies.<sup>44</sup> While the charter school boards of directors may not have been elected, the public maintained control over charter schools through the authorizing bodies.<sup>45</sup>

In *Wilson v. State Board of Education*, a California appellate court found that charter schools did not violate article IX, section 8 of the state constitution, which provides, “No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the

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<sup>38</sup> *Id.* at 218 (footnotes omitted) (quoting 78 C.J.S. *Schools and School Districts* § 2).

<sup>39</sup> *Id.* (quoting *State ex rel. School District No. 3 v. Preston*, 140 P. 350, 351 (Wash. 1914)) (internal quotation mark omitted).

<sup>40</sup> *Id.* at 218–19.

<sup>41</sup> *Id.* at 217.

<sup>42</sup> *Id.* (quoting *Belles v. Burr*, 43 N.W. 24, 28 (Mich. 1889)).

<sup>43</sup> *Id.* (quoting 1993 Mich. Pub. Acts 362).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 217–18.

exclusive control of the officers of the public schools . . . .”<sup>46</sup> First, the court found that the exclusive control requirement was met because the legislature had declared that charters were under the control of the legislature and directed the courts “to construe the law liberally to effectuate that finding.”<sup>47</sup> Second, charter schools were not in opposition to the public schools, but were instead a part of the system.<sup>48</sup> “Although they have operational independence,” the court explained that “an overarching purpose of the charter school approach is to infuse the public school system with competition in order to stimulate continuous improvement in *all* its schools.”<sup>49</sup>

Third, the court “wonder[ed] what level of control could be more complete than where . . . the very destiny of charter schools lies solely in the hands of public agencies and offices, from the local to the state level: school districts . . . [and] county boards of education.”<sup>50</sup> The court observed that the chartering authority exercised control from the application approval process to the revocation of the charter.<sup>51</sup> Further, the state board of education could revoke a charter or “take other action in the face of certain grave breaches of financial, fiduciary or educational responsibilities” and “exercise[d] . . . control . . . through its power to promulgate implementing regulations.”<sup>52</sup> Finally, the superintendent of education exercised the power of public funding of charter schools.<sup>53</sup>

Fourth, the court concluded that these features added up to sufficient constitutional control even when the charter school chose to operate as a nonprofit public-benefit corporation or remained under the umbrella of the charter authorizer.<sup>54</sup> Fifth, the court rejected the argument that, due to the decision-making role of the charter grantees, there would not be sufficient control over the school’s curriculum and educational functions because, ultimately, those matters were left to legislative discretion.<sup>55</sup> The court reasoned that the legislature had exercised its discretion through the charter

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<sup>46</sup> 89 Cal. Rptr. 2d 745, 753 (Ct. App. 1999) (omission in original) (quoting CAL. CONST. art. IX, § 8).

<sup>47</sup> *Id.* at 754.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 755.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*



school law to permit “innovative practices and experimentation.”<sup>56</sup> Finally, the court rejected the argument that the grantees were not officers of public schools because the legislature had the authority to designate school districts and the legislature had declared that charter schools were school districts.<sup>57</sup>

*B. Category #2: Do the Private Characteristics of Charter Schools Cause Them to Fall Outside of an Efficient or Uniform System of Public Schools?*

Courts in California, Colorado, and Ohio have examined claims that charter schools are so much like private schools that they fall outside of an “efficient” or “uniform” system of public schools. These cases are significant because thirteen charter school states have constitutional provisions that impose a duty to provide an “efficient” or “uniform” system of public schools: Colorado,<sup>58</sup> Florida,<sup>59</sup> Idaho,<sup>60</sup> Indiana,<sup>61</sup> Minnesota,<sup>62</sup> Nevada,<sup>63</sup> New Mexico,<sup>64</sup> North Carolina,<sup>65</sup> Ohio,<sup>66</sup> Oregon,<sup>67</sup> Washington,<sup>68</sup> Wisconsin,<sup>69</sup> and Wyoming.<sup>70</sup>

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 755–56.

<sup>58</sup> COLO. CONST. art. IX, § 2 (“The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.”).

<sup>59</sup> FLA. CONST. art. IX, § 1(a) (“The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.”).

<sup>60</sup> IDAHO CONST. art. IX, § 1 (“The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.”).

<sup>61</sup> IND. CONST. art. VIII, § 1 (“Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all.”).

<sup>62</sup> MINN. CONST. art. XIII, § 1 (“The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.”).

<sup>63</sup> NEV. CONST. art. 11, § 2 (“The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.”).

In *Boulder Valley School District RE-2 v. Colorado State Board of Education*, the Colorado Court of Appeals examined whether its charter school statute violated article IX, section 2 of the state constitution, which requires that the legislature provide “a thorough and uniform system” of public schools by creating a separate school system that was outside of the control of school districts.<sup>71</sup> The court rejected this argument because the legislature had an “almost unlimited power to abolish, divide or alter school districts.”<sup>72</sup> The court further analogized the instant case to *Lujan v. Colorado State Board of Education*, a school finance case in which the Colorado Supreme Court had held that the school finance system did not violate the “thorough and uniform” clause.<sup>73</sup> Specifically, in *Lujan*, the court held that the “thorough and uniform” clause was satisfied so long as “thorough and uniform educational opportunities are available through state action in each school district,”<sup>74</sup> but did not require “educational expenditures per pupil in every local school district to be identical.”<sup>75</sup> Similarly, the state court of appeals in *Boulder Valley* found that the thorough and uniform clause permitted the state to “provide additional educational opportunities open to all students in the state through . . . charter schools, provided that these opportunities are available

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<sup>64</sup> N.M. CONST. art. XII, § 1 (“A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.”).

<sup>65</sup> N.C. CONST. art. IX, § 2 (“The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”).

<sup>66</sup> OHIO CONST. art. VI, § 2 (“The General Assembly shall make such provisions, by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state . . .”).

<sup>67</sup> OR. CONST. art. VIII, § 3 (“The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.”).

<sup>68</sup> WASH. CONST. art. IX, § 2 (“The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.”).

<sup>69</sup> WIS. CONST. art. X, § 3 (“The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable . . .”).

<sup>70</sup> WYO. CONST. art. 7, § 1 (“The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.”).

<sup>71</sup> 217 P.3d 918, 925 (Colo. App. 2009) (quoting COLO. CONST. art. IX, § 2).

<sup>72</sup> *Id.* at 928 (quoting *Bd. of Educ. v. Booth*, 984 P.2d 639, 646 n.3 (Colo.1999)).

<sup>73</sup> *See id.*; *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1010–11 (Colo. 1982).

<sup>74</sup> *Boulder Valley*, 217 P.3d at 928 (quoting *Lujan*, 649 P.2d at 1025) (internal quotation marks omitted).

<sup>75</sup> *Id.*

state-wide.”<sup>76</sup> Therefore, the court saw no reason why “section 2 should be read to prohibit the State from creating a school system with different types of schools, some controlled by school districts while others are not.”<sup>77</sup>

Courts in California and Ohio pointed to the fact that their state charter schools had to comply with the same accountability standards as traditional public schools. In *Wilson*, the California appellate court found that charter schools did not violate article IX, section 5 of the state constitution,<sup>78</sup> which mandates that the legislature provide a “system of common schools.”<sup>79</sup> The court defined the “systems” requirement as a

unity of purpose as well as an entirety of operation, and the direction to the legislature to provide “a” system of common schools means *one* system which shall be applicable to all the common schools within the state. This means that the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade.<sup>80</sup>

The court found that charter schools were part of a “uniform” system because the legislature had explicitly declared that charter schools were “part of the . . . Public School System,” “under its jurisdiction,” and “entitled to full funding.”<sup>81</sup> Further, charter schools satisfied the uniformity requirement because (1) the teachers were required to

meet[] the same minimum requirements as all other public school teachers; (2) their educational programs [had to] be geared to meet the same state standards, including minimum duration of instruction, applicable to all public schools; and (3) student progress . . . [was] measured by the same assessments required of all public school students.<sup>82</sup>

In *Ohio Congress of Parents & Teachers v. State Board of Education*, the Ohio Supreme Court ruled that the state’s charter school statute did not violate article VI, section 2 of the Ohio constitution,<sup>83</sup> which provides: “The General Assembly shall make such provisions, by taxation or otherwise, as, with the

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 752–53 (Ct. App. 1999).

<sup>79</sup> *Id.* at 751.

<sup>80</sup> *Id.* at 752 (citations omitted) (quoting *Serrano v. Priest*, 487 P.2d 1241, 1248–49 (Cal. 1971)) (internal quotation marks omitted).

<sup>81</sup> *Id.* (internal quotation marks omitted).

<sup>82</sup> *Id.* at 753.

<sup>83</sup> 111 Ohio St. 3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, at ¶ 74.

income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state.”<sup>84</sup> In reaching this conclusion, the court explained that charter school students had to pass the same graduation tests that students in traditional public schools had to pass.<sup>85</sup> Also, charter schools were required to “administer proficiency and achievement tests, and diagnostic tests, maintain adequate facilities” as well as comply with numerous school code provisions, “as if they were school districts.”<sup>86</sup> Further, the state department of education monitored and supervised charter authorizers.<sup>87</sup> While charter schools received exemptions from state rules and regulations, the court characterized many of the exemptions as “picayune in nature.”<sup>88</sup>

The Ohio court further found that the “thorough and efficient” standard permitted the legislature to create alternative accountability and academic standards for charter schools.<sup>89</sup> Indeed, charter schools faced heightened accountability because sponsors could shut them down for failing to meet expected academic goals and unsatisfied parents could withdraw their children.<sup>90</sup> Also, charter schools could tailor their academic and accountability requirements because they served targeted populations.<sup>91</sup> To require charter schools to be operated like traditional public schools would contravene the legislative goal of providing educational opportunity for children who may benefit more from alternative settings.<sup>92</sup>

## II. CHARTER SCHOOLS AND THE NATIONAL LABOR RELATIONS ACT

While charter schools have emphasized their public characteristics to be eligible for funding under state constitutional law, they have also emphasized their private characteristics to be exempted from state and federal protections that are provided by traditional public schools for employees and students. Collective bargaining is an example. Approximately 12% of all charter schools

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<sup>84</sup> *Id.* ¶ 24 (quoting OHIO CONST. art. VI, § 2).

<sup>85</sup> *Id.* ¶ 30.

<sup>86</sup> *Id.* (citations omitted).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* ¶ 31.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* ¶ 32.

are unionized.<sup>93</sup> By contrast, in 2012, 35.4% of employed wage and salary workers in the education, training, and library professions were members of unions.<sup>94</sup> Twenty-one states and the District of Columbia exempt all charter schools from school district collective bargaining agreements.<sup>95</sup> Labor unions have sought to increase their involvement in charter schools.<sup>96</sup> Charter school advocates argue that charter schools have the autonomy to try innovative strategies, such as extending the school day or increasing instructional time, that are not supported by collective bargaining agreements.<sup>97</sup>

In two decisions, *Chicago Mathematics & Science Academy Charter School*<sup>98</sup> and *Pilsen Wellness Center*,<sup>99</sup> the National Labor Relations Board (NLRB) held that it had jurisdiction over two Chicago charter schools employing entities under the National Labor Relations Act, the federal statute that applies to private-sector employment relations. Illinois is one of the twenty-one states that exempt charter schools from collective bargaining agreements.<sup>100</sup> The employing entities preferred the federal act to state law because they apply different rules with respect to union organizing.<sup>101</sup> Illinois law permits public-sector employees to organize as a bargaining unit through a card check process, in which a majority of employees sign an authorization form stating that they wish to be represented by a union.<sup>102</sup> By contrast, the NLRA permits the employer to petition for a secret ballot election.<sup>103</sup> Also,

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<sup>93</sup> *Public Charter Schools and Teachers Unions*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/editor/files/NAPCS%20Documents/PublicCharterSchoolsandTeachersUnions.pdf> (last visited Dec. 11, 2013) [hereinafter *Charter Schools and Teachers Unions*].

<sup>94</sup> *Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, BUREAU LAB. STAT., <http://www.bls.gov/news.release/union2.t03.htm> (last modified Jan. 23, 2013).

<sup>95</sup> NAT'L ALLIANCE FOR PUB. CHARTER SCHS., *MEASURING UP TO THE MODEL: A RANKING OF STATE CHARTER SCHOOL LAWS* 8 tbl.3 (4th ed. 2013), available at [http://www.publiccharters.org/data/files/Publication\\_docs/NAPCS\\_2013%20Model%20Law%20Rankings\\_20130123T175438.pdf](http://www.publiccharters.org/data/files/Publication_docs/NAPCS_2013%20Model%20Law%20Rankings_20130123T175438.pdf). Those states are as follows: Arizona, California, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Michigan, Minnesota, Missouri, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Washington, and Wyoming. *Id.*

<sup>96</sup> *E.g.*, Stephanie Banchemo & Caroline Porter, *Unions' Charter-School Push: Labor Looks to Organize in an Educational Sector That Has Largely Kept It Away*, WALL ST. J. (Apr. 15, 2013, 7:43 PM), <http://online.wsj.com/article/SB10001424127887324010704578418710940566402.html>.

<sup>97</sup> See *Charter Schools and Teachers Unions*, *supra* note 93.

<sup>98</sup> 359 N.L.R.B. No. 41 (Dec. 14, 2012).

<sup>99</sup> 359 N.L.R.B. No. 72 (Mar. 8, 2013).

<sup>100</sup> NAT'L ALLIANCE FOR PUB. CHARTER SCHS., *supra* note 95, at 8.

<sup>101</sup> See *Charter School Newsletter*, MCKENNA, LONG, & ALDRIDGE LLP (Jan. 30, 2013), [https://www.mckennalong.com/media/library/1977\\_Charter%20Schools%20Newsletter%20-%20January2013%20\\_FINAL\\_.pdf](https://www.mckennalong.com/media/library/1977_Charter%20Schools%20Newsletter%20-%20January2013%20_FINAL_.pdf).

<sup>102</sup> See 115 ILL. COMP. STAT. ANN. 5/7(c-5) (West 2009).

<sup>103</sup> National Labor Relations Act § 9, 29 U.S.C. § 159(e) (2006).

Illinois law subjected employers to mediation and/or binding interest arbitration to obtain a final contract in case of an impasse.<sup>104</sup> The NLRA, on the other hand, did not impose such requirements on employers, and also permitted the parties to influence negotiations through a strike or employee lockout.<sup>105</sup>

This section summarizes the *Chicago Mathematics* and *Pilsen* decisions and explains how these decisions might have the unintended consequence of opening the door to more federal involvement in the labor practices of charter schools.

#### A. Chicago Mathematics and Pilsen Wellness Center

In *Chicago Mathematics*, the private, nonprofit corporation that ran the charter school petitioned the NLRB after a union requested an election of teachers and staff.<sup>106</sup> The pertinent question was whether the corporation was an “employer” under section 2(2) of the NLRA.<sup>107</sup> Section 2(2) provides that the term “employer” does not include political subdivisions.<sup>108</sup> The acting regional director found that the corporation was a political subdivision under the test established by the Supreme Court in *NLRB v. Natural Gas Utility District of Hawkins County*.<sup>109</sup> Under *Hawkins County*, an entity is a political subdivision if it was “either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.”<sup>110</sup>

The NLRB granted the corporation’s request to review.<sup>111</sup> It reinstated the petition, finding that it had jurisdiction.<sup>112</sup> Applying *Hawkins County*, the Board found that the corporation was not a political subdivision.<sup>113</sup> The corporation failed the first prong because private individuals, acting through private corporations, create charter schools through the framework provided by

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<sup>104</sup> 115 ILL. COMP. STAT. ANN. 5/13–14.

<sup>105</sup> See 29 U.S.C. § 158.

<sup>106</sup> Chi. Mathematics & Sci. Acad. Charter Sch., 359 N.L.R.B. No. 41, slip op. at 1 (Dec. 14, 2012).

<sup>107</sup> *Id.*

<sup>108</sup> 29 U.S.C. § 152(2).

<sup>109</sup> *Chicago Mathematics*, 359 N.L.R.B. No. 41, slip op. at 1.

<sup>110</sup> *NLRB v. Natural Gas Util. Dist. of Hawkins Cnty.*, 402 U.S. 600, 604–05 (1971).

<sup>111</sup> *Chicago Mathematics*, 359 N.L.R.B. No. 41, slip op. at 1.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

the enabling statute.<sup>114</sup> The corporation failed to satisfy the second prong of *Hawkins County* because the bylaws provided that “only sitting board members may appoint [or] remove other [charter school] board members.”<sup>115</sup> Also, only board members were authorized to elect and remove the employing entity’s corporate officers, and only board members could be selected for the corporation’s finance and audit committee.<sup>116</sup>

After the NLRB found that the corporation was not a political subdivision, it then concluded that the corporation was an employer under section 2(2) of the Act.<sup>117</sup> The corporation controlled “most, if not all, matters relating to the employment relationship,” such as hiring, firing, and paying benefits.<sup>118</sup> Further, this case was similar to other cases involving governmental contractors. Even though these contractors were “subject to exacting oversight in the form of statutes, regulations, and agreements,” the NLRB exercised jurisdiction over these private entities under section 2(2).<sup>119</sup> This provision exempted “only government entities or wholly owned government corporations from its coverage—not private entities acting as contractors for the government.”<sup>120</sup>

The *Pilsen Wellness Center* case involved an EMO that contracted with a charter school to provide teaching staff.<sup>121</sup> The pertinent question was whether the EMO was a political subdivision under the second prong of the *Hawkins County* test—whether the EMO was under the control of public officials or the electorate.<sup>122</sup> Applying its analysis in *Chicago Mathematics*, the NLRB concluded that the EMO was not a political subdivision because the EMO’s board of directors had the sole power to appoint and remove its members, and the EMO was governed by its own bylaws, instead of state statutes and regulations.<sup>123</sup>

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<sup>114</sup> *Id.*, slip op. at 6.

<sup>115</sup> *Id.*, slip op. at 9.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*, slip op. at 12.

<sup>118</sup> *Id.*, slip op. at 10.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (quoting Research Found. of the City Univ. of N.Y., 337 N.L.R.B. 965, 968 (2002)) (internal quotation marks omitted).

<sup>121</sup> 359 N.L.R.B. No. 72, slip op. at 1 (Mar. 8, 2013).

<sup>122</sup> *Id.*, slip op. at 3.

<sup>123</sup> *Id.*, slip op. at 3–4.

### B. Implications for Charter Schools

While the *Chicago Mathematics* and *Pilsen Wellness Center* cases may appear to be victories for charter school employers, they may actually be a boon to teachers unions in the long run. Antiunion commentators complained that the NLRB had ignored its precedent of not exercising jurisdiction in instances where the employing entities were entwined with the government.<sup>124</sup> They have argued that unionization under the NLRA will stifle the implementation of creative approaches that affect employment conditions.<sup>125</sup> They have also cited federalism concerns<sup>126</sup> and the possibility that the NLRB's exercise of jurisdiction will frustrate right-to-work statutes, which authorize employees to decide for themselves whether or not to join a union.<sup>127</sup>

Another possible reason for their displeasure is that the NLRB's exercise of jurisdiction may frustrate attempts by employing entities to avoid both public- and private-sector collective bargaining. Charter school employers may have hoped to emphasize the private characteristics of charter schools to argue that they were not public under state labor laws and thus outside of the jurisdiction of state labor commissions. At the same time, they were anticipating that the NLRB would not exercise jurisdiction of charter schools under federal private-sector law.

The experience of the Cesar Chavez Academy, a Detroit charter school, supports this assertion. In 2006, a union filed a petition with the Michigan Employment Relations Commission to represent the teachers, social workers, and school counselors of the Academy pursuant to Michigan's Public Employment Relations Act.<sup>128</sup> The petition named the charter school and the EMO that provided employees for the school as the employers.<sup>129</sup> The EMO that hired the employees for the Academy countered that the NLRA preempted the Commission's jurisdiction, and that the particular positions at issue did not fall under the definition of "public employee" under Michigan's employment

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<sup>124</sup> Joe Luppino-Esposito, *NLRB Reaches into State Education*, ST. BUDGET SOLUTIONS (Mar. 19, 2013), <http://www.statebudgetsolutions.org/blog/detail/nlr-reaches-into-state-education>; Ctr. for Union Facts, *In Post-Election Spree, NLRB Discards Precedent at Every Turn*, LABORPAINS (Jan. 3, 2013), <http://laborpains.org/2013/01/03/in-post-election-spree-nlr-discards-precedent-at-every-turn/>.

<sup>125</sup> Luppino-Esposito, *supra* note 124.

<sup>126</sup> *Id.*

<sup>127</sup> See Ctr. for Union Facts, *supra* note 124.

<sup>128</sup> *In re Cesar Chavez Acad.*, Case No. R05 D-070 at 1 (Mich. Emp't Relations Comm'n Aug. 30, 2006), <http://www.dleg.state.mi.us/ham/ber/pdf/2006/r05d070.pdf>.

<sup>129</sup> *Id.*



relations statute.<sup>130</sup> The union rebutted that the Commission had jurisdiction because the charter school was a “public school academy” under the state’s charter school statute and was the employer.<sup>131</sup> The Commission dismissed the petition.<sup>132</sup> It was unclear whether the NLRB would consider the EMO or the Academy to be the employer.<sup>133</sup> Because the NLRB would arguably assert jurisdiction, the Commission concluded that it had to defer to the NLRB.<sup>134</sup> On December 20, 2012, six days after the *Chicago Mathematics* decision, a union filed a petition with the NLRB to be the bargaining unit for the Academy employees.<sup>135</sup> In February 2013, the employees of the charter school voted to form a union by a 2–1 margin.<sup>136</sup>

### III. CHARTER SCHOOLS AND THE STATE ACTION DOCTRINE

Private charter school boards and the EMOs that serve them have also sought to be treated like private entities in order to evade federal and statutory provisions that provide protections to employees and students. Specifically, they have argued that they are not “state actors” pursuant to 42 U.S.C. § 1983, a federal statute that establishes a cause of action for deprivations of federal constitutional and statutory rights under the color of state law.

The first section of this Part summarizes state action case law with respect to private schools. Next, it discusses state action case law pertaining to charter schools. It points out that in the most recent decision on state action in the school context, *Caviness v. Horizon Community Learning Center, Inc.*,<sup>137</sup> the Ninth Circuit held that a private, nonprofit corporation running an Arizona charter school was not a state actor for employment purposes under § 1983. Next, this Part points out how charter school attorneys may use the holding of the *Caviness* decision to argue that charter schools should not be considered state actors with respect to student disciplinary decisions. Finally, this section discusses important implications of the *Caviness* case.

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<sup>130</sup> *Id.* at 1–2.

<sup>131</sup> *Id.* at 2.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 6.

<sup>134</sup> *Id.*

<sup>135</sup> David Sands, *Detroit Charter School Union Drive Ramps into High Gear*, HUFFPOST DETROIT (Dec. 22, 2012, 11:04 AM), [http://www.huffingtonpost.com/2012/12/23/detroit-charter-school-union-cesar-chavez\\_n\\_2348289.html](http://www.huffingtonpost.com/2012/12/23/detroit-charter-school-union-cesar-chavez_n_2348289.html).

<sup>136</sup> *Teachers at Michigan’s Biggest Charter School Vote Union*, BERGER–MARKS FOUND., <http://www.bergermarks.org/news/2013/index1.php?art=374> (last updated Feb. 14, 2013).

<sup>137</sup> 590 F.3d 806 (9th Cir. 2010).

### A. *State Action Litigation and Private Schools*

In *Rendell-Baker v. Kohn*, the United States Supreme Court, for the first time, addressed whether § 1983 applied to private schools.<sup>138</sup> A vocational counselor and teachers brought separate § 1983 challenges alleging that a Massachusetts private school that served maladjusted students had fired them in violation of the First, Fifth, and Fourteenth Amendments.<sup>139</sup> Almost all of the students had been referred to the school by city school committees or by a state agency.<sup>140</sup> Public funds had accounted for at least 90% of the school's budget.<sup>141</sup> To be eligible for tuition provided by a state statute, the school had to follow a number of regulations "concerning matters ranging from recordkeeping to student-teacher ratios."<sup>142</sup> With regard to personnel matters, the state statute required the state "to maintain written job descriptions and written statements describing personnel standards and procedures," but imposed few specific obligations.<sup>143</sup> The school had a contract with the Boston school committee, which stated that the school's employees were not city employees.<sup>144</sup> The school also had a contract with the state's drug rehabilitation division.<sup>145</sup> Except for general requirements, that contract did not cover personnel policies.<sup>146</sup>

The First Circuit consolidated the actions and affirmed the district court's dismissal of the claims.<sup>147</sup> The Supreme Court granted certiorari and found that the private school was not a state actor.<sup>148</sup> According to the Court, "[t]he ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights fairly attributable to the State?"<sup>149</sup> The Court answered this question in the negative. It found that the school's relationship with the state "is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads,

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<sup>138</sup> 457 U.S. 830 (1982).

<sup>139</sup> *Id.* at 832–35.

<sup>140</sup> *Id.* at 832.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 833.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 836–37.

<sup>148</sup> *Id.* at 837.

<sup>149</sup> *Id.* at 838 (internal quotation marks omitted).

bridges, dams, ships, or submarines for the government.”<sup>150</sup> Such agreements did not become state action “by reason of their significant or even total engagement in performing public contracts.”<sup>151</sup> The Court also reasoned that the relationship between the school and the teacher did not change because the state paid the tuition of the students.<sup>152</sup>

Further, the Court found that the state regulations did not make the private school a state actor. “[I]n contrast to the extensive regulation of the school generally,” the Court asserted that “the various regulators showed relatively little interest in the school’s personnel matters.”<sup>153</sup> The Court rejected the argument that the school was a state actor because it performed the public function of providing education.<sup>154</sup> To qualify as state action, the function would have to be the “*exclusive* prerogative of the state.”<sup>155</sup> The legislature’s decision to provide services to maladjusted students at public expense “in no way makes these services the exclusive province of the State.”<sup>156</sup> Moreover, the Court rejected the argument that the fiscal relationship between the school and the state created a “symbiotic relationship,” thus making the school a state actor.<sup>157</sup> This was the case because the school’s fiscal relationship was similar to that of many contractors performing governmental services.<sup>158</sup>

In *Milonas v. Williams*, the Tenth Circuit analyzed whether a private school for boys could be subjected to a § 1983 action brought by students.<sup>159</sup> The students claimed that school administrators “acting under color of state law, had caused the plaintiffs to suffer and to be subjected to cruel and unusual punishment, antitherapeutic and inhumane treatment, and denial of due process of law.”<sup>160</sup> Although the school was privately owned and operated, it received funds from both federal and state governments.<sup>161</sup> Many of the students were placed at the private school by their school districts, with funding for tuition coming from state and federal agencies.<sup>162</sup> A federal district court awarded the

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<sup>150</sup> *Id.* at 840–41.

<sup>151</sup> *Id.* at 841.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 842.

<sup>155</sup> *Id.* (internal quotation mark omitted).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (internal quotation marks omitted).

<sup>158</sup> *Id.* at 843.

<sup>159</sup> 691 F.2d 931, 934 (10th Cir. 1982).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 935.

<sup>162</sup> *Id.* at 936.

plaintiffs injunctive relief because the practices “were carried out under the cloak of state action.”<sup>163</sup>

The Tenth Circuit affirmed the lower court’s decision.<sup>164</sup> It found that the state had so insinuated itself with the private school “as to be considered a joint participant in the offending actions.”<sup>165</sup> In reaching this conclusion, the court observed that many students “were placed at the school involuntarily by juvenile courts and other state agencies.”<sup>166</sup> Further, “[d]etailed contracts were drawn up by the school administrators and agreed to by the many local school districts that placed boys at the school.”<sup>167</sup> The court cited the “significant state funding of tuition” and the “extensive state regulation of the educational program at the school.”<sup>168</sup> The court concluded that “[t]hese facts demonstrate that there was a sufficiently close nexus between the states sending boys to the school and the conduct of the school authorities so as to support a claim under Section 1983.”<sup>169</sup>

The Tenth Circuit distinguished the instant case from *Rendell-Baker*. It noted that the First Circuit in *Rendell-Baker* had opined that students “would have a stronger argument than do plaintiffs [vocational counselor and teachers] that the school’s action *toward them* is taken ‘under the color of’ state law, since the school derives its authority over them [students] from the state.”<sup>170</sup> The Tenth Circuit agreed with this contention, declaring:

To us, *Rendell-Baker* differs from the present case in at least one important respect. The plaintiffs in the present case are not employees, but students, some of whom have been involuntarily placed in the school by state officials who were aware of, and approved of, certain of the practices which the district court has now enjoined. *Rendell-Baker* does not control the Section 1983 issue before us.<sup>171</sup>

By contrast, in *Robert S. v. Stetson School, Inc.*, the Third Circuit found that a private school for sex offenders was not a state actor with regard to its

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<sup>163</sup> *Id.* at 939.

<sup>164</sup> *Id.* at 945.

<sup>165</sup> *Id.* at 940.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* (quoting *Rendell-Baker v. Kohn*, 641 F.2d 14, 26 (1st Cir. 1981), *aff’d*, 457 U.S. 830 (1982)) (internal quotation marks omitted).

<sup>171</sup> *Id.*

students.<sup>172</sup> In this case, a student claimed under § 1983 that the school and several staff members violated his constitutional rights “by subjecting him to physical and psychological abuse.”<sup>173</sup> “None of the members of the board of trustees or the board of corporators were appointed by a government entity, and none were federal, state, or local employees.”<sup>174</sup> The school entered into various contracts with state and local governments to provide treatment and education for juvenile sex offenders.<sup>175</sup> The school received \$200 per student from Philadelphia and covered costs not covered by tuition through “grants from private foundations, other charitable contributions and loans.”<sup>176</sup> Private school staff ran the daily operation of the school with no involvement from Philadelphia or its department of human services (DHS).<sup>177</sup>

The Third Circuit affirmed the federal district court’s holding that the charter school was not a state actor.<sup>178</sup> “In light of *Rendell-Baker*,” the court found that “many of the factors upon which [the claimant] relie[d] . . . [were] insufficient to establish state action.”<sup>179</sup> For instance, the receipt of public funds did not make the private school a state actor.<sup>180</sup> Similar to *Rendell-Baker*, the DHS’s contracts “did not ‘compel or even influence’ the conduct on the part of the . . . staff that [the claimant] challenged.”<sup>181</sup> As was the case in *Rendell-Baker*, the record failed to show that the private school performed a function that had “traditionally been the exclusive province of the state.”<sup>182</sup>

The Third Circuit refused to apply the Tenth Circuit’s reasoning in *Milonas* to the instant case.<sup>183</sup> The Tenth Circuit’s reliance on “state funding of tuition and the detailed contracts between the school and local school districts” was “squarely inconsistent with *Rendell-Baker*.”<sup>184</sup> The court was also unclear about what the Tenth Circuit “had in mind when it sought to distinguish *Rendell-Baker* on the ground that the plaintiffs in that case were school

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<sup>172</sup> 256 F.3d 159, 161 (3d Cir. 2001).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 162.

<sup>175</sup> *Id.* at 163.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 161.

<sup>179</sup> *Id.* at 165.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 167.

<sup>184</sup> *Id.* at 168 (internal quotation mark omitted).

employees, rather than students.”<sup>185</sup> The Third Circuit speculated that the Tenth Circuit made this distinction because “it believed that some state officials ‘were aware of, and approved of’ certain of [the private school’s] practices concerning the treatment of students.”<sup>186</sup> However, the Third Circuit doubted whether such awareness was sufficient to establish state action in light of the fact that the Supreme Court had ruled in *San Francisco Arts and Athletics, Inc. v. U.S. Olympic Committee* “that governmental ‘approval of or acquiescence in’ the challenged conduct was not enough to establish state action.”<sup>187</sup> The Third Circuit then determined that it did not have to decide whether it agreed with the Tenth Circuit’s analysis in *Milonas* because the cases were very different.<sup>188</sup> School officials, who knew about the school’s activities or approved of them, had not placed the plaintiff into private school.<sup>189</sup> Rather, a legal custodian had enrolled the plaintiff into the school with his mother’s consent.<sup>190</sup>

Similarly to the Third Circuit, the First Circuit in *Logiodice v. Trustees of Maine Central Institute* held that a private school, which had contracted with a school district to educate its high-school-age students at public expense, was not a state actor under § 1983 when it disciplined a student.<sup>191</sup> The student alleged that the school violated his due process rights by suspending him for seventeen days without a hearing.<sup>192</sup> The contract provided the school’s board of trustees with sole authority over school disciplinary matters.<sup>193</sup>

The First Circuit found that the private school was not a state actor under the public function doctrine, which finds state action where “the private entity is engaged in a traditionally exclusive public function.”<sup>194</sup> This finding was compelled because “[e]ducation is not and never has been a function reserved to the state.”<sup>195</sup> The First Circuit also rejected the claim that the private school was a state actor under the entwinement test, which the Supreme Court established in *Brentwood Academy v. Tennessee Secondary School Athletic*

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 168 n.10 (quoting *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 547 (1987)) (internal quotation marks omitted).

<sup>188</sup> *Id.* at 168.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> 296 F.3d 22, 22–23 (1st Cir. 2002).

<sup>192</sup> *Id.* at 25.

<sup>193</sup> *Id.* at 28.

<sup>194</sup> *Id.* at 26.

<sup>195</sup> *Id.*

*Association*.<sup>196</sup> The entwinement test requires a finding that the private entity is “entwined with governmental policies or when government is entwined in [its] management or control.”<sup>197</sup> *Brentwood* involved a nonprofit association that established and enforced standards for athletic competition for public and private schools.<sup>198</sup> The Supreme Court found that there was state action because the membership of the association was comprised overwhelmingly of public school officials, the majority of the funding came from the state, and the association set the applicable standards, instead of the state’s board of education.<sup>199</sup>

In *Logiodice*, the First Circuit observed that there were similarities between the instant case and *Brentwood*: “The state regulate[d] contract schools in various respects”; the school district sponsored 80% of the contract school students; and “in certain respects (public busing to extracurricular events, transfer of lower-school records, assistance with registration), [the contract school’s] students [we]re treated as if they were regular public school students.”<sup>200</sup> However, the First Circuit found no entwinement in the instant case because the private trustees, not public school officials, ran the school, and the school’s contract provided that the trustees had sole authority over student discipline.<sup>201</sup>

The First Circuit acknowledged that it could create an ad hoc exception based on the fact that “Maine has undertaken in its Constitution and statutes to assure secondary education to all school-aged children.”<sup>202</sup> Further, the private school was “for those in the community the only regular education available for which the state will pay.”<sup>203</sup> Another significant consideration was that while “[a] school teacher dismissed by a private school without due process is likely to have other options for employment[,] a student wrongly expelled from the only free secondary education in town is in far more trouble.”<sup>204</sup> However, to make an exception, the court had to be convinced that “the threat is serious,

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<sup>196</sup> *Id.* at 27–28 (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001)).

<sup>197</sup> *Id.* at 27 (alteration in original) (quoting *Brentwood*, 531 U.S. at 296) (internal quotation marks omitted).

<sup>198</sup> 531 U.S. at 291.

<sup>199</sup> *Id.* at 299–302.

<sup>200</sup> *Logiodice*, 296 F.3d at 28.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 29.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

reasonably wide-spread, and without alternative means of redress”; the court concluded that “[n]one of these elements is satisfied in this case.”<sup>205</sup>

One reason for this conclusion was that while the student did not receive the public-school-level due process, he was not completely denied of procedural due process.<sup>206</sup> The school informed both the child and the parents about the reasons for the suspension, and while “[m]issing 17 days is a cost,” the school’s request that the student receive a psychological evaluation before being allowed to come back to school was understandable.<sup>207</sup> Moreover, there was no indication

that contract schools in Maine are disciplining students in an outrageous fashion and leaving Maine school children without an education. There are costs (rigidities, law suits), and not just benefits in inflicting constitutional standards wholesale upon privately governed institutions. . . . Before creating a new state action category, a lower court is entitled to insist upon some showing of need—beyond the small arguable unfairnesses that are part of life.<sup>208</sup>

The court also observed that state law required the school district to provide the plaintiff with a free secondary education.<sup>209</sup> If the private school had wrongly expelled the student, the school district could still be required to educate him.<sup>210</sup> While this solution would be a problem in this case because the school district so heavily relied on the private school to provide an education, it was likely that “a Maine court would compel the school district to satisfy its statutory obligation by providing him an education.”<sup>211</sup> The court opined that “we are all dependent on private entities for crucial services and, in certain key areas, competition may not furnish protection. . . . [S]tate statutory and administrative remedies are normally available to deal with such abuses and . . . ‘constitutionalizing’ regulation of private entities is a last resort.”<sup>212</sup>

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 30.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 30–31.



## B. *State Action Litigation and Charter Schools*<sup>213</sup>

Several courts have analyzed whether charter schools, their governing boards, and the private companies that either provide services to or run these schools were state actors pursuant to § 1983. The courts in New York, Ohio, and Pennsylvania found that these bodies were state actors because the state charter school laws defined charter schools either as public schools or municipal entities. An Illinois district court held that a private entity operating a charter school was a state actor because charter school governing boards were subject to the same disclosure requirements as other state governmental bodies. By contrast, in *Caviness*, the Ninth Circuit held that a private, nonprofit corporation that operated an Arizona charter high school was not a state actor under § 1983.<sup>214</sup> This section provides an overview of those cases.

### 1. *Ohio*

In 2002, an Ohio federal district court first addressed the question of whether charter schools and the private companies that operated these schools were state actors. In that case, *Riester v. Riverside Community School*, a terminated teacher sued the charter school and the management companies that provided services for that school under § 1983.<sup>215</sup> She alleged that the charter school and the management companies violated her First Amendment rights by terminating her in retaliation for her complaints pertaining to the lack of services for a troubled student.<sup>216</sup>

The charter school and the management companies then moved to dismiss on the ground that they were not state actors under § 1983.<sup>217</sup> The court denied the motion.<sup>218</sup> It found that the state charter school law defined charter schools as public schools.<sup>219</sup> It thus followed that the charter school, and by extension the management companies, were state actors.<sup>220</sup> The court further found that management companies were state actors under the public function and

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<sup>213</sup> This summary of the state action cases regarding charter schools originally appeared in Preston C. Green et al., *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 253 (2012).

<sup>214</sup> *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F. 3d 806 (9th Cir. 2010).

<sup>215</sup> 257 F. Supp. 2d 968, 969–70 (S.D. Ohio 2002).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 970.

<sup>218</sup> *Id.* at 973.

<sup>219</sup> *Id.* at 972.

<sup>220</sup> *Id.*

entwinement tests—two tests used to determine whether private companies are state actors.<sup>221</sup> Under the public function test, a private company is a state actor when it provides a traditional state function.<sup>222</sup> The court found that the management companies were state actors because “free, public education, whether provided by public or private actors, is an historical, exclusive, and traditional state function.”<sup>223</sup> The court rejected the defendant’s assertion that *Rendell-Baker* required a different conclusion because (1) the charter school was created “only with the help of the state,” and (2) the charter school was “subject to various rules and regulations to which private schools [were] not.”<sup>224</sup> Similarly, the district court rejected the defendants’ reliance on *Logiodice* because the Ohio statutes made it clear that charter schools were public schools.<sup>225</sup>

The court also agreed that the management companies were state actors under the entwinement test, which states that “private conduct may become so ‘entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations on state actors.’”<sup>226</sup> The court concluded that the private companies were state actors under the entwinement test because they “have been granted the authority to provide free public education to all students in a nondiscriminatory manner; no other entity . . . has been so mandated by the State of Ohio besides local school districts.”<sup>227</sup>

## 2. Pennsylvania

In 2003, a federal district court in Pennsylvania found that charter schools were state actors under § 1983. In that case, *Irene B. v. Philadelphia Academy Charter School*, parents of a student attending a charter school filed a § 1983 action alleging that a charter school violated the Individuals with Disabilities Education Act (IDEA).<sup>228</sup> The child, who had been attending Philadelphia public schools prior to the events that triggered the litigation, was a “15-year old boy with Down Syndrome, mental retardation, and profound hearing loss

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 972–73.

<sup>225</sup> *Id.* at 973.

<sup>226</sup> *Id.* (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

<sup>227</sup> *Id.*

<sup>228</sup> No. Civ.A. 02-1716, 2003 WL 24052009, at \*1 (E.D. Pa. Jan. 29, 2003).

in his right ear.”<sup>229</sup> His mother contacted the founder and principal of the charter school and the president of the school’s board of directors.<sup>230</sup> The president told the mother that the school could meet his educational needs and would develop a new Individual Educational Plan (IEP) for the child that would incorporate life skills and academics.<sup>231</sup> When the child enrolled as an eighth grader in the school, his parents provided the school with his prior IEP, which was developed by the Philadelphia School District.<sup>232</sup> The parents asserted that, other than speech therapy and bus transportation, the charter school failed to provide the services promised to their child under his prior IEP.<sup>233</sup> Also, the parents claimed that the charter school failed to develop a new IEP as it had promised.<sup>234</sup>

The parents then sued in district court alleging a violation of IDEA.<sup>235</sup> The court rejected the charter school’s motion to dismiss for failure to state a claim upon which relief could be granted.<sup>236</sup> The court found that the § 1983 claim could proceed because “[i]t is now well-settled that a municipal entity is a state actor for purposes of liability under § 1983.”<sup>237</sup> Public school districts were municipal entities.<sup>238</sup> Similarly, the court noted that because charter schools were independent public schools, they were part of the school system.<sup>239</sup> Thus, it was appropriate to treat charter schools as state actors with respect to IDEA claims.<sup>240</sup>

### 3. *New York*

In 2006 and 2007, two New York federal district courts also concluded that charter schools were state actors under § 1983. In the 2006 decision, *Matwijko v. Board of Trustees of Global Concepts Charter School*, a former teacher alleged that the principal and the board of a charter school terminated her in violation of the First Amendment because of her actions as chairperson of the

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<sup>229</sup> *Id.* at \*2.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at \*1.

<sup>236</sup> *Id.* at \*13.

<sup>237</sup> *Id.* at \*11.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

school's advisory council.<sup>241</sup> The defendants moved for judgment on the pleadings on the ground that the defendants were not state actors pursuant to § 1983.<sup>242</sup>

The court denied the defendants' motion on the ground that the New York charter school statute provides that charter schools are "'independent and autonomous *public school[s]*' performing 'essential public purposes and governmental purposes of the state.'"<sup>243</sup> The court also noted that charter schools had to "meet the same health and safety, civil rights, and student assessment requirements applicable to *other public schools*."<sup>244</sup> Additionally, charter schools received 100% of the per-pupil funding provided to other public schools, and any public student was qualified for admission to a charter school.<sup>245</sup> Further, the school code permitted charter school employees to participate in the public retirement system and afforded these employees protection under New York's civil service law.<sup>246</sup> Therefore, the fact that the code did not consider charter schools otherwise as public employers did not "remove them from the realm of state actors."<sup>247</sup> The court concluded that the legislature intended charter schools to be public schools despite the fact that they were exempted "from certain regulatory burdens associated with traditional public schools."<sup>248</sup> The court found that *Rendell-Baker* was inapplicable because New York law did not consider charter schools to be private schools.<sup>249</sup>

In *Scaggs v. New York State Department of Education*, students attending a charter school brought a § 1983 action against that charter school and Edison Schools (Edison), the private entity that operated the school.<sup>250</sup> The plaintiffs alleged that the defendants violated the Americans with Disabilities Act, the Rehabilitation Act of 1973, and the Equal Protection Clause.<sup>251</sup> The defendants moved to dismiss the claim on the ground that Edison was not a state actor.<sup>252</sup>

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<sup>241</sup> No. 04-CV-663A, 2006 WL 2466868, at \*2 (W.D.N.Y. Aug. 24, 2006).

<sup>242</sup> *Id.* at \*1.

<sup>243</sup> *Id.* at \*5 (quoting N.Y. EDUC. LAW § 2853(1)(c)–(d)).

<sup>244</sup> *Id.* (quoting N.Y. EDUC. LAW § 2854(1)(b)) (internal quotation marks omitted).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> No. 06-CV-0799 (JFB)(VVP), 2007 WL 1456221, at \*1–2 (E.D.N.Y. May 16, 2007).

<sup>251</sup> *Id.* at \*2.

<sup>252</sup> *Id.* at \*1, \*12.

The district court contrasted the instant case with *Rendell-Baker*.<sup>253</sup> Because *Rendell-Baker* was an employment action regarding a single teacher, the state was “only minimally or tangentially involved.”<sup>254</sup> Conversely, the plaintiffs’ allegations in the instant case “relate[d] to the alleged total inadequacy of a school to provide free public education to its students while receiving state funding, being bound to state educational standards and purporting to offer the same educational services and facilities as any other public school.”<sup>255</sup> Because the plaintiffs’ claims challenged the quality of education provided by charter schools, the court held that their § 1983 action could proceed.<sup>256</sup>

#### 4. Illinois

In 2009, a federal district court in Illinois held that a not-for-profit organization that owned a charter school was a state actor pursuant to § 1983.<sup>257</sup> In that case, *Jordan v. Northern Kane Educational Corp.*, the not-for-profit organization (NKEC) relieved an employee of her duties as executive director of the charter school and made her a full-time teacher.<sup>258</sup> NKEC later terminated her employment as a teacher.<sup>259</sup> The former employee then filed a complaint under § 1983, alleging that NKEC violated her due process rights by failing to provide a hearing before firing her.<sup>260</sup> NKEC moved to dismiss the claim on the ground that it was not a state actor under § 1983.<sup>261</sup>

The district court denied NKEC’s motion to dismiss. The court observed that although Illinois’s charter school law did provide that charter schools were public entities, it failed to address explicitly whether the entity that owned the charter school was a public entity.<sup>262</sup> However, the charter school law did provide that governing bodies of charter schools were subject to the same disclosure requirements that applied to other state governmental entities.<sup>263</sup> Therefore, it was apparent that the legislature intended charter school bodies to

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<sup>253</sup> *Id.* at \*13.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>257</sup> *Jordan v. N. Kane Educ. Corp.*, No. 08 C 4477, 2009 WL 509744, at \*1, \*3 (N.D. Ill. Mar. 2, 2009).

<sup>258</sup> *Id.* at \*1.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at \*2.

<sup>263</sup> *Id.* at \*3.

function as public entities.<sup>264</sup> Consequently, the court concluded that NKEC was a state actor pursuant to § 1983.<sup>265</sup>

### 5. Caviness

By contrast, in *Caviness*, the Ninth Circuit held that Horizon, a private, nonprofit corporation that operated an Arizona charter high school, was not a state actor with respect to employment matters.<sup>266</sup> Caviness contended that the charter school, acting under the color of state law, deprived him of “his liberty interest in finding and obtaining work without due process by making ‘several false statements about’ him in connection with his employment” without providing him notice or a name-clearing hearing.<sup>267</sup> The district court granted Horizon’s motion to dismiss on the ground that Horizon was not a state actor.<sup>268</sup>

Caviness then appealed to the Ninth Circuit.<sup>269</sup> The court affirmed the district court’s motion to dismiss with respect to the § 1983 claim.<sup>270</sup> The Ninth Circuit would have found that Horizon was a state actor “if, though only if, there [were] such a close nexus between the State and the challenged action that seemingly private behavior [could] be fairly treated as that of the State itself.”<sup>271</sup> To determine whether there was a close nexus, the court’s inquiry began by examining the specific conduct at issue because an entity may be a state actor for some matters but not others.<sup>272</sup> The Ninth Circuit then found that Caviness failed to argue that Horizon’s specific conduct rendered it a state actor.<sup>273</sup> Instead, Caviness asserted that Horizon was a state actor as a matter of law under the state’s charter school scheme.<sup>274</sup> “Therefore,” the court reasoned, “Caviness’s appeal must fail unless being an Arizona charter school is, by that fact alone, sufficient to make Horizon the government for employment purposes.”<sup>275</sup>

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 808 (9th Cir. 2010).

<sup>267</sup> *Id.* at 811 (internal quotation mark omitted).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 818.

<sup>271</sup> *Id.* at 812 (quoting *Villegas v. Gilroy Garlic Festival Ass’n*, 541 F.3d 950, 955 (9th Cir. 2008)) (internal quotation mark omitted).

<sup>272</sup> *Id.* at 812–13.

<sup>273</sup> *Id.* at 813.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

The court rejected Caviness's first argument that charter schools were state actors for all purposes, including employment matters, under the state's statutory and regulatory scheme.<sup>276</sup> In support of this assertion, Caviness observed that Arizona statutes defined charter schools as "public schools" and that the state attorney general had concluded that charter schools were political subdivisions under the state open meeting act.<sup>277</sup> The court disagreed with this argument because a private entity may be a state actor for some purposes but not others.<sup>278</sup>

Caviness also argued that Horizon was a state actor because it provided public education, which Caviness characterized as a "function that is traditionally and exclusively [under] the prerogative of the state."<sup>279</sup> The Ninth Circuit countered that *Rendell-Baker* foreclosed this argument.<sup>280</sup> The Ninth Circuit found that the instant case was like *Rendell-Baker* in that the Arizona statute authorized the charter school sponsor to provide alternative educational choices at public expense.<sup>281</sup> As in *Rendell-Baker*, such a legislative choice did not place these services under the exclusive power of the state.<sup>282</sup>

Caviness also claimed that Horizon was a state actor because the state regulated personnel issues related to charter schools.<sup>283</sup> The Ninth Circuit rejected this assertion, noting that state action may occur if the state had exercised coercive power over the private entity.<sup>284</sup> On the other hand, subjecting a business to mere regulation did not convert the private entity into a state actor.<sup>285</sup> Even extensive regulations did not make a private entity a state actor if the regulations did not compel the private entity's challenged conduct.<sup>286</sup> The court found that the charter school statute did not control Horizon's post-termination decisions.<sup>287</sup> Indeed, the statute expressly exempted Horizon from all rules relating to school districts, including providing employees the right to a hearing after dismissal.<sup>288</sup> The Ninth Circuit found

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<sup>276</sup> *Id.* at 813–14.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 814.

<sup>279</sup> *Id.* (internal quotation marks omitted).

<sup>280</sup> *Id.* at 815.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 816.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 817.

<sup>288</sup> *Id.*

further support for its conclusion because of the absence of any reference to charter schools in the statutory provisions related to certified teachers' employment rights.<sup>289</sup>

Further, the court found the fact that charter schools could participate in the state's retirement system did not make Horizon a state actor.<sup>290</sup> It was settled case law that states could subsidize the operating costs of a private entity "without converting its acts into those of the state."<sup>291</sup> Moreover, the Ninth Circuit rejected the fact that Horizon became a state actor because its sponsor had the power to approve and review its charter, including its personnel policies.<sup>292</sup> Mere approval of the actions of private entities did not convert their personnel decisions into state action.<sup>293</sup> This was the case even when the state had the initial power to review the qualifications of the schools' employees.<sup>294</sup>

### C. *Import of Caviness*

The charter school state action cases raise the question of whether a charter school becomes a state actor merely because charter school statutes define them as public schools. The *Riester* court went so far as to declare that the Third Circuit's decision in *Logiodice* was inapplicable because the charter school statute clearly stipulated that private schools were public schools.<sup>295</sup> On the other hand, in *Caviness*, the Ninth Circuit did not rely on the declaration that charter schools were public to conclude that they were state actors.<sup>296</sup> Instead, the court looked at the language of the enabling statute and the charter contract to conclude that the charter school was not a state actor with respect to employment actions.<sup>297</sup>

Those who argue that charter schools are state actors on the basis of statutory declarations that they are public schools seem to conclude that the term "public schools" encompasses the provision of constitutional rights. However, courts have applied other definitions of public schools, such as "under the control of the Legislature";<sup>298</sup> "common to all children of proper

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 817–18.

<sup>295</sup> *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 973 (S.D. Ohio 2002).

<sup>296</sup> *Caviness*, 590 F.3d at 813–14.

<sup>297</sup> *Id.* at 816.

<sup>298</sup> *Council of Orgs. & Others for Educ. About Parochial v. Engler*, 566 N.W.2d 208, 218 (Mich. 1997).



age and capacity, free, and subject to and under the control of the qualified voters of the school district”;<sup>299</sup> and “established under the laws of the state, usually regulated in matters of detail by the local authorities in the various districts, towns, or counties, and maintained at the public expense by taxation, and open without charge to the children of all the residents of the town or other district.”<sup>300</sup> Because these definitions do not include any mention of constitutional protection, it was possible for the *Caviness* court to find that a charter school was not a state actor with respect to employment matters, even though the Arizona statute declared that charter schools were public schools.

The charter school cases also raise the question of whether students should be treated differently from employees for state action purposes. Most state statutes exempt charter schools from school district discipline policies, instead allowing charter schools to devise their own policies subject to the approval of the charter authorizer.<sup>301</sup> Thus, if a charter school devises a student discipline policy that does not impose constitutional due process standards with charter authorizer approval, then that charter school would not be a state actor for its student disciplinary policy under the compulsion test used in *Caviness*. Indeed, when Preston Green, one of the authors of this Article, made a presentation on the application of civil rights to charter schools at a workshop for the Alliance of Public Charter School Attorneys on the application of desegregation mandates and federal civil rights laws to charter schools,<sup>302</sup> several attorneys who represented charter schools asserted that the analysis applied in *Caviness* could be applied to constitutional challenges regarding students.

The § 1983 private school cases provide support for the attorneys’ position. Three circuit courts addressed the question of whether children attending private schools should be treated differently from teachers with respect to state action. While the Tenth Circuit in the *Milonas* case answered the question in the affirmative, the First and Third Circuits found no reason to treat private school children differently from employees for § 1983 purposes. In *Logiodice*, the First Circuit refused to create an ad hoc exception for students, even though the state had undertaken a state constitutional duty to educate children, and the

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<sup>299</sup> State *ex rel.* Sch. Dist. No. 3 v. Preston, 140 P. 350, 351 (Wash. 1914).

<sup>300</sup> Newman v. Schlarb, 50 P.2d 36, 39 (Wash. 1935) (internal quotation mark omitted).

<sup>301</sup> Jaclyn Zubrzycki et al., *Charter Schools’ Discipline Policies Face Scrutiny*, 32 EDUC. WK., Feb. 20, 2013, at 1, 20, available at [http://www.edweek.org/ew/articles/2013/02/20/21charters\\_ep.h32.html](http://www.edweek.org/ew/articles/2013/02/20/21charters_ep.h32.html).

<sup>302</sup> See Alliance of Pub. Charter Sch. Att’ys, *APCSA Legal Seminar*, CAL. CHARTER SCHS. ASS’N, [http://www.charterconference.org/CASchooler2011/general/APCSA\\_legal\\_seminar.php](http://www.charterconference.org/CASchooler2011/general/APCSA_legal_seminar.php) (last visited Sept. 27, 2013). Specifically, Professor Green’s workshop addressed “[d]esegregation mandates from federal courts and the US DoE’s Office of Civil Rights.” *Id.*

private school in question was the only available school for high-school-aged children.<sup>303</sup> The court refused to find such an exception because the state was still obligated to educate children who were expelled from the private school.<sup>304</sup> Similarly, children expelled from charter schools without due process could be readmitted into one of the traditional public schools in the students' attendance zone.

The possibility that charter schools may not have to provide due process for students has negative implications for certain students. According to *Education Week*, the expulsion rate for charter schools was generally similar to that of traditional public schools, which was 1 student in 500.<sup>305</sup> However, a few urban districts had much higher discipline rates for charter schools than both traditional public schools in the district and the national rate. In San Diego, the thirty-seven charter schools had a suspension rate of eight percent, which was twice the suspension rate of traditional public schools.<sup>306</sup> In Newark, the suspension rate for charter schools was ten percent, while the suspension rate of traditional schools was three percent.<sup>307</sup> In Washington, D.C., only 3 students were expelled from the city's 45,000-student system, while 227 students were expelled from the city's 35,000-student charter school system.<sup>308</sup>

Several urban school districts have responded to these disproportionately high disciplinary rates by considering changes to the policies governing discipline in charter school districts. San Diego now requires charter schools to clarify their expulsion procedures, and the city school district reviews the expulsion decisions and discipline data of charter schools when they are being considered for reauthorization.<sup>309</sup> Washington, D.C., is considering requiring charter schools to spell out students' disciplinary procedures in more detail.<sup>310</sup>

If charter school attorneys succeed in arguing that charter schools are not state actors under § 1983 with regard to discipline decisions, they might unintentionally make charter schools susceptible to state constitutional challenges that charter schools are private schools that are ineligible for public funding in the long run. Students might decide to make due process challenges

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<sup>303</sup> Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 28–29 (1st Cir. 2002).

<sup>304</sup> *Id.* at 30.

<sup>305</sup> Zubrzycki et al., *supra* note 301, at 17, 19.

<sup>306</sup> *Id.* at 17.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 19.

<sup>310</sup> *Id.* at 19–20.

under state constitutional law instead of federal constitutional law. They would do so with the hope that state courts would find that charter schools are public schools under state constitutional law, and that state constitutions require charter schools to provide constitutional protection to students.

The *Cesar Chavez Academy* case suggests that charter schools might claim that they are private entities with respect to student disciplinary decisions, despite the fact that charter school law defines them as public schools. Recall that a number of charter school states have authorizing bodies that are nonprofit private entities governed by boards of directors consisting of private citizens.<sup>311</sup> Also recall that charter school statutes permit private boards of directors to operate charter schools.<sup>312</sup> Thus, a state court might find that a charter school is a private school with respect to disciplinary decisions because there is no governmental oversight or compulsion.

If charter schools succeed in convincing state courts that they are private schools under state law, then they might expose themselves to subsequent state constitutional claims alleging that their private characteristics make charter schools ineligible for public funding. Recall that charter schools survived state constitutional challenges that they are ineligible for public funding by emphasizing their public characteristics. If charter schools begin emphasizing their private characteristics in state constitutional cases, they might cause courts to more carefully examine claims that they are “public” for funding purposes.

## CONCLUSION

This Article has argued that charter school supporters, private charter school boards, and EMOs have opportunistically emphasized their public nature to be eligible for funding under state constitutional law, while emphasizing their private characteristics to evade federal and state statutory requirements that apply to public entities. While such opportunistic lawyering may provide charter schools with short-term advantages, it may have the unintended consequences of exposing them to more federal oversight and

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<sup>311</sup> Baker, *supra* note 7.

<sup>312</sup> *Id.*

making them vulnerable to claims that they are really private schools that are ineligible for state public funding.<sup>313</sup>

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<sup>313</sup> See Adam Emerson, *A Bad Precedent for Charter Schools*, THOMAS B. FORDHAM INST., <http://www.edexcellence.net/commentary/education-gadfly-daily/choice-words/2013/a-bad-precedent-for-charter-schools.html> (last updated Jan. 17, 2013) (arguing charter schools might expose themselves to challenges that they are ineligible for funding under state constitutional law by claiming that they are private with respect to state regulations).