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Legal Sidebar

Fourth Circuit Says Public Charter Schools Are State Actors, Supreme Court Declines to Weigh In

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On June 14, 2022, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) held in *Peltier v. Charter Day Schools* that a public charter school's dress code policy discriminated against female students on the basis of sex. The court reached this conclusion by finding that public charters are state actors and therefore bound by the Constitution. The U.S. Supreme Court denied Charter Day Schools' (CDS) petition to review the Fourth Circuit's opinion.

Public charter schools have grown in popularity over the past decade. Public charters are schools that operate within the bounds of a contract (or *charter*) with a state or local government. Because public charters operate through this separate agreement rather than under the rules and regulations of a school district, they typically have more flexibility to determine curricula and school policies, much like traditional private schools. Despite this additional flexibility, public charters are publicly funded entities that are subject to the performance standards outlined in their charters. This convergence of public and private features has led to confusion as to whether public charters are required to provide students with the same legal protections as a traditional public school or whether they may operate independently of federal and constitutional mandates. Students in traditional public schools are protected by the Constitution because traditional public schools are *state actors*, entities that perform their functions under and with the appearance of state authority. In contrast, traditional private schools operate with relative independence from the state. If public charters are state actors, they must provide students with the same level of protection as traditional public schools.

This Legal Sidebar first provides an overview of the *state action doctrine* under the Fourteenth Amendment. It then examines the Fourth Circuit's state action analysis in *Peltier*. The Sidebar concludes by discussing potential implications of the Supreme Court's decision not to review the decision. While *Peltier* also raises Title IX issues, this Sidebar does not address that topic.

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Legal Context: The State Action Doctrine

The Fourteenth Amendment of the Constitution provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The text of the amendment limits its protection to state action: individuals may only claim a violation of the Fourteenth Amendment for conduct by a governmental entity. Such a violation can occur both when a government actor directly discriminates and when the government coerces or encourages discrimination by private actors.

Courts have found it difficult to discern whether an entity is a state actor. The Supreme Court has held that to determine whether a nongovernmental entity is a state actor, a court must weigh all relevant circumstances in the relationship between the private actor and the state. "No one fact can function as a necessary condition" in making this determination, and no one fact is sufficient to prove state action on its own. Of particular interest is whether the state has delegated a *traditionally exclusive state function* to the private entity. For example, the Supreme Court has held that a public defender is not a state actor because, although funded by a state, she provides the same services that any lawyer provides to her client; the lawyer represents the client's interests without state interference, and the provision of legal service is not a traditionally exclusive state function. As noted above, courts also consider whether the state "coerced or encouraged" the action. Such coercion might occur, for example, if a state were to order that members of a private club comply with the club's racially discriminatory practices, but not if the state does nothing to require adherence to the otherwise voluntary discriminatory rule. A court will consider these tests alongside the specific facts of a case to determine whether state action is present, but there is no clear formula to make this determination.

Public schools are recognized as state actors for purposes of Fourteenth Amendment liability. Private schools, on the other hand, are not necessarily state actors for these purposes because they typically do not provide public education. The difference between *education* and *public education* is an important one for this analysis: the Supreme Court has held that states traditionally provide public education, which only includes nonsectarian, general education. Any education outside of these boundaries is no longer a traditionally exclusive state function. This principle is illustrated by *Rendell-Baker v. Kohn*, where the Court held that a private school that specialized in serving "students who have experienced difficulty completing public high schools [and] many [of whom] have drug, alcohol, or behavioral problems, or other special needs" was not a state actor in a claim brought by a former employee, even though it was funded and regulated by the state. The Court reasoned that the school was more like a contractor than a state actor because it specialized in the education of students with specific "special needs" rather than public education for all students. It also held that the school's reliance on government funding was not enough to show that the government encouraged or coerced the school to act in any particular way toward the employee. Because the state did not delegate a traditionally exclusive state function to the private school, and because the state did not have any significant control over the school's employment decisions, the Court concluded that the school was not a state actor.

The *Peltier* Case

At issue in *Peltier* was a dress code policy at a public charter school, CDS, in Brunswick County, North Carolina. The policy required female students to wear "skirts, jumpers, or skorts" in an effort to teach students the "traditional" concept of chivalry, emphasizing that "girls are 'fragile vessels' deserving 'gentle' treatment by boys." Parents of female CDS students sued the school under 42 U.S.C. § 1983 (Section 1983) on the grounds that the dress code discriminated against female students and reinforced gender stereotypes in violation of the Equal Protection Clause and Title IX, alongside separate state law claims. CDS argued that it was not liable as a state actor because it only contracts with, and operates separately from, the state.

In an en banc opinion authored by Senior Judge Keenan, the Fourth Circuit rejected CDS's argument and found that CDS was a state actor that can be subject to suit for violations of the Fourteenth Amendment Equal Protection Clause. In reaching this conclusion, the majority acknowledged the fact-specific nature of the state-actor analysis and weighed each characteristic of the charter school to determine whether actions taken by the school could be "fairly attributable" to the state. The court considered the following factors:

- CDS is a general educational program open to all students in the Brunswick County School District;
- CDS receives 95% of its funding from government sources;
- CDS is overseen by the North Carolina State Board of Education;
- Public charter schools are defined in the North Carolina Code as "public schools";
- CDS's charter is granted and revocable by the state;
- CDS's charter requires compliance with North Carolina's state constitution and the federal Constitution; and
- CDS's "day-to-day" operations are run by Roger Bacon Academy, Inc. (RBA), a privately owned corporation.

Taken as a whole, the majority found these factors indicated that North Carolina delegated its duty to provide public education to state residents to CDS, thereby making CDS a state actor in this context. The majority emphasized the state code's classification of public charters as public schools, stating that this designation made the state's intent to delegate public education clear. The court also held that the policy implications of finding that CDS was not a state actor were untenable and could not have been North Carolina's intent when adopting its public charter school programs. The court reasoned that if it were to hold that CDS was not a state actor, "North Carolina could outsource its educational obligation to charter school operators, and later ignore blatant, unconstitutional discrimination committed by those schools." The court did not find RBA's involvement in CDS's day-to-day operations determinative because RBA's management of day-to-day operations did not involve the public-education functions delegated to CDS, which remained accountable to the North Carolina Board of Education and was held to the same academic standards as the state's traditional public schools. Moreover, the court held that CDS's contract with RBA to run day-to-day operations did not constitute "intertwinement" such that RBA and CDS were the same entity, nor did the contract impact CDS's responsibility to the state for providing public education. As a result, the majority found that CDS was a state actor subject to the Equal Protection Clause and that the dress code violated both the Equal Protection Clause and Title IX.

In addition to her majority opinion, Senior Judge Keenan wrote a concurrence to underscore her disagreement with the view that CDS's dress code has any pedagogical value beyond teaching female students that they are not equal to their male counterparts.

In the first of two dissents, Judge Quattlebaum argued that finding state action in CDS's adoption of a dress code without evidence of state encouragement or compulsion eschews Supreme Court precedent, splits with other circuits, and opens charter schools up to liability that will hinder their ability to provide "innovative educational choices." The second dissent, authored by Judge Wilkinson, went further and said that charter schools should not be subject to "undue federal influence," including the Fourteenth Amendment, because to do so would promote a "monolithic" education system without any meaningful choice for parents. Judge Wynn wrote a separate concurrence to reject the second dissent: "The premise underlying this argument," according to Judge Wynn, "is that state schools must be allowed *to experiment with unconstitutional discrimination* to honor 'consumer' demand and achieve said 'educational progress.'"

Considerations for Congress

On June 26, 2023, the Supreme Court denied CDS's petition for a writ of certiorari. Even without a Supreme Court decision, *Peltier* appears to be a significant case because of its potential impact on the liability of public charter schools. Specifically, this case highlights the liability of public charters under both the Equal Protection Clause and Section 1983, which provides a cause of action when state action violates rights established under the Constitution and federal law. CDS argued that *Peltier* creates a circuit split between the First, Third, and Ninth Circuit Courts of Appeals, which have applied a "substantial encouragement" or "coercion" test to assess whether charter schools are state actors, and the Fourth Circuit, which applied a more holistic balancing test. While the denial of certiorari indicates that the Supreme Court disagrees with this assessment at present, a circuit split may develop as more cases like *Peltier* arise.

In the wake of the Supreme Court's decision not to take up *Peltier*, there will likely be ongoing debate about whether to treat public charters as state actors. Some argue that holding public charter schools to the same level of liability as traditional public schools would impede their ability to provide innovative educational approaches. Opponents also worry that the Fourth Circuit's opinion marks the beginning of a wave of liability for all private entities providing public services. On the other hand, the Solicitor General and others in agreement with the Fourth Circuit's decision in *Peltier* distinguish it as impacting only the State of North Carolina because the analysis largely relies on the state's statutory classification of public charter schools as "public schools" and because CDS's charter binds it to the federal Constitution regardless of state action.

Congress may address whether public charters should be subject to requirements like those under the Fourteenth Amendment and other federal civil rights laws. State and local governments primarily control public K-12 education. However, this state control does not preclude all federal influence. For example, there are federally funded programs that support public charter schools through discretionary grants, which create an avenue for federal oversight. Congress may be able to exert control over charter schools or the state agencies that authorize and regulate charter schools through these discretionary grants. For example, Congress could pass legislation creating rights equivalent to the Fourteenth Amendment and a cause of action, separate from Section 1983, applicable to public charters that receive discretionary grants. Conversely, Congress could further insulate public charters from liability by exempting them from other statutory requirements, such as Title IX. If Congress does nothing, the potential liability of public charters will likely depend on whether courts throughout the country apply the reasoning of *Peltier* to other public charter schools.

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