Judges' Ruling on "Public" Threatens Continued Independence of Charter Schools. Perhaps Their Existence

By Baker A. Mitchell and Robert P. Spencer (byline ???)

Even learned judges get things wrong. What sometimes trips them up is language.

That appears to be the case in a federal lawsuit decided recently by the Fourth U.S. Circuit Court of Appeals in Richmond. The 10 to 6 split decision seems to contradict earlier decisions by both the U.S. Supreme Court and three federal appeals courts, so the Supreme Court has been asked to sort things out.

The case is known as *Peltier v. Charter Day School, Inc*. You may know it as the "skirts" case or the case against chivalry.

The defendant, Charter Day School, Inc. (CDS) is a private educational nonprofit that operates four North Carolina charter schools, now known as the Classical Charter Schools of America. The schools stress traditional values, such as courtesy, respect, and responsibility, and use a classical curriculum and proven teaching methods, including phonics-based reading instruction and grammar lessons starting in kindergarten. Latin instruction begins in the 4th grade.

Charter Day, the original school, is located in Leland, NC, near Wilmington, and currently enrolls nearly 1,000 students in kindergarten through eighth grade. The other schools—in downtown Wilmington, Whiteville, NC, and Southport, NC—enroll some 1,700 additional students. All four are Title 1 schools, serving large numbers of low-income students, and outperform most of the district schools in the areas they serve.

The American Civil Liberties Union, representing three female students at CDS, sued the school in 2015, alleging that its uniform policy, or dress code, violates the girls' constitutional rights by requiring them to wear jumpers, skirts or skorts, while boys wear slacks.

After a federal district court arrived at a mixed decision, the Fourth Circuit Court of Appeals on June 14 ruled 10-6 that the dress code is unlawful, violating the "equal protection clause" of the Fourteenth Amendment. Because the equal protection clause doesn't apply to private entities, the reasoning behind the decision seemed to rest on a single word: "public."

While the four CDS schools are "public charter schools," they're public only up to a point. Most of America's 7,700-plus charter schools are, in fact, operated by private, nonprofit organizations—a legal requirement in North Carolina and many other states. The schools are public in the sense that they are open to all students, tuition-free, and receive state funding for each student that enrolls.

North Carolina's 1996 Charter School Act, authorizing these alternative schools of choice, says the aim is to "improve student learning … encourage the use of different and innovative teaching methods" and "provide parents and students with expanded [educational] choices." The law gives charter-school operators lots of leeway in the methods and policies they employ and states clearly that charter schools "operate independently of existing schools" and are "exempt from statutes and rules" applicable to local government-run schools.

So, how can they be both legally independent—run by private, nonprofit corporations, with their own curricula, teaching methods, and policies—and, according to the Fourth Circuit, also be "state actor[s]," the legal equivalent of government-run schools?

To reach their decision, Fourth Circuit majority seems to have been transfixed on one set of facts to the exclusion of another.

The facts they took into account were that CDS 1) is called a "public charter school," 2) receives most of its funding "from public sources" and, 3) allegedly "performs a function traditionally and exclusively reserved to the state."

The third point is easiest to deal with because childhood education in the United States has never been "exclusively reserved to the state." Today, according to the most recent data available from the National Center for Education Statistics, more than 4.7 million K-12 students are enrolled in private schools: most of them religiously affiliated. So, the court was wrong to suggest that education in any way is "exclusively" the purview of the state.

What about the fact that charter schools are called "public charter schools" and receive the bulk of their funding from public sources? Well, so what? Hundreds of U.S. cities rely on private companies to provide public transit and there are numerous privately run public libraries, privately operated public water systems and even privately owned public parks. Are they also de facto state agencies?

It's not what they're called that counts, it's their legal status. In the case of Charter Day School, Inc. it's a private, nonprofit corporation; and its charter is a contract with the state to [provide parents an option to] educate their North Carolina children. It's compensated for its services to parents, just as cybersecurity firms, military contractors, private transit companies, and others are compensated for providing products and services to citizens or to federal, state, and local governments.

What's alarming about the Fourth Circuit's decision is not that it defies common sense, which it does; and not that it flies in the face of a decisive December 2021 ruling by the Supreme Court of North Carolina (in *State of North Carolina v. Kinston Charter Academy*) "that North Carolina charter schools are not state agencies," it's that the Fourth Circuit ruling could undermine the entire charter school movement.

If charter schools are "state actors" they will lose their independence, become subject to the same rules, regulations, and political machinations that have crippled many

government-run school systems, and leave many low-income parents and students with no alternative to their district schools.

And we know how well most of those schools are doing. That's why some 3.5 million American children are now enrolled in charter schools, with many more on waiting lists.

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