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Charter Schools Are Not State Actors

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Eleven months ago a critical education case came before the 4th U.S. Circuit Court of Appeals in North Carolina (Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 116, 4th Cir. 2022). A main issue in the case pertains to the dress code at "Charter Day School" in Leland, North Carolina, specifically, whether the privately-operated but publicly-funded charter school had violated the rights of female students by stipulating what they could and could not wear. The ACLU reports that, "Girls at Charter Day School, together with their parents, challenged the skirts requirement as sex discrimination under the Equal Protection Clause of the U.S. Constitution and Title IX."

For general purposes and for the purpose of this case in particular, it is first important to appreciate that, while all non-profit and for-profit charter schools are privately-operated schools, many, including "Charter Day School," are also owned-operated by a private educational management organization (EMO).[1] This is another layer of privatization, another level of private ownership and control. In this vein, it is important to grasp that the legal framework that applies to private entities differs qualitatively from the legal framework that applies to public entities. Private actors and state actors operate in different legal spheres. The U.S. Constitution, for example, does not apply to the acts of private entities; it applies mainly to acts of government. Indeed, the private-public distinction shapes the laws and institutions of many countries. As a general rule, no public schools in America are operated by an EMO.

It is also legally significant that the parents of the students suing "Charter Day School" voluntarily enrolled their daughters in the privately-operated charter school. No one is forced or compelled to enroll in a charter school in the United States. Nor is the state compelling, encouraging, or coercing "Charter Day School" to adopt any particular dress code or educational philosophy for students.

As a general rule, privatized education arrangements in America (e.g., private Catholic schools that charge tuition) have always been able to adopt the dress code they want

without any government interference. It is generally recognized that, as private schools, they can essentially adopt whatever dress code or educational philosophy they wish to enforce, and that parents are under no obligation to enroll their child in a private school if they do not wish to do so. This has been the case for more than a century. It is one of many expressions of the long-standing public-private distinction in law, education, and society.[2]

It is also important to consider that the capital-centered ideologies of choice, individualism, and the free-market encompass the notion of doing something voluntarily, i.e., willingly and freely. It is the reason why charter school promoters repeat the disinformation that charter schools are "schools of choice" (even though charter schools typically choose parents and students more than the other way around).[3] This neoliberal logic is also consistent with the "free market" notion that parents and students are not considered humans or citizens by charter school operators, they are viewed instead as consumers and customers shopping for a "good" school that won't fail and close, which happens every week in the crisis-prone charter school sector.[4]

Charter schools, to be clear, represent the commodification of education, the privatization and marketization of a modern human responsibility in order to enrich a handful of private interests under the banner of high ideals. For decades, neoliberals and privatizers have painstakingly starved public schools of funds so as to set them up to fail. Then they have mass-tested them with discredited corporate tests to "show" that they are "failing." This is then followed by a sustained media and political campaign to vilify and demonize public schools so as to create antisocial public opinion against them, which then eventually "justifies" privatizing public education because "privatization will improve education." Suddenly "innovative" charter schools appear everywhere, especially in large urban settings inhabited by thousands of marginalized low-income minorities.

The typical consequences of privatization in every sector include higher costs, less transparency, reduced quality of service, greater instability, more inefficiency, and loss of public voice. Privatization essentially undermines social progress while further enriching a handful of people driven by profit maximization. To date, whether it is vouchers, so-called "Education Savings Accounts," or privately-operated charter schools, education privatization ("school-choice") has not solved any problems, it has only multiplied them.[5]

With this context in mind, let us return to the court case at hand. In a 10-6 vote on June 14, 2022, the Richmond, Virginia-based 4th U.S. Circuit Court of Appeals, "found that that the dress code [at "Charter Day School"] ran afoul of the U.S. Constitution's 14th Amendment guarantee of equal protection under the law." Girls at the K-8 charter school, it was concluded, should have the freedom to wear pants and not just skirts because they have "the same constitutional rights as their peers at other public schools – including the freedom to wear pants."

Marking the first time a federal appeals court has ever done such a thing, the Richmond Court found that "Charter Day School" is a state actor (i.e., it is a public school), which means that the Equal Protection Clause of the 14th Amendment does apply to the school.

Consistent with numerous other court rulings over the years, however, the lawyer for "Charter Day School," Aaron Streett, maintained that the Richmond court issued a flawed ruling because the Equal Protection Clause of the 14th Amendment does not apply to the charter school because the charter school is a private entity and not a state actor like a

public school.

According to legal precedent, as a private actor, "Charter Day School" did not deprive any person of their constitutional rights. This view stems in part from the long-standing premise that charter schools are "independent," "autonomous," "innovative" schools under the law, that is, they are deregulated "free market" schools, meaning that they are exempt from most of the laws, rules, policies, and regulations that govern public schools. They do not operate like public schools. They are not so-called "government schools." They are not arms of the state.[6] They are not connected to state authority in the same way public schools are. They are not governed by elected officials like public schools are. Charter schools operate in their own separate sphere. The fact that many charter schools are also owned or operated by private EMOs only adds an additional wrinkle to the public-private dynamic.

"Charter Day School" is currently appealing the case to the U.S. Supreme Court, which may hear the case this summer (2023).

The issue of whether a charter school is a state actor or not is critical because it hits at the core issue about charter schools. This point cannot be overstated. If it is the case that "Charter Day School" is not a state actor, as the lawyer for the privately-operated school argues, then the Virginia court's ruling represents a form of "harmful government interference" because the 14th Amendment does not apply to private actors.

Under U.S. law, "state action" is defined as "an action that is either taken directly by the state or bears a sufficient connection to the state to be attributed to it." Another source states that a state actor is "a person who is acting on behalf of a governmental body, and is therefore subject to regulation under the United States Bill of Rights, including the First, Fifth and Fourteenth Amendments, which prohibit the federal and state governments from violating certain rights and freedoms."[7]

However, as private actors charter schools are not in fact "acting on behalf of a governmental body." Private actors are not controlled or directed by the state, at least not in the way agencies and arms of the state are, which means that the actions of privately-operated charter schools cannot be called actions taken directly by the state. State action doctrine holds that government is not responsible for the conduct of a private actor.

Even most of the entities that authorize charter schools are not public or governmental in the proper sense of the word. Many charter school authorizers are operated or governed by unelected private persons. Many of the wealthy individuals who operate or govern such entities are hand-picked by wealthy governors. The public, as a matter of course, is omitted in these arrangements. The public has no meaningful say in any part of this set-up. This is on top of the fact that charter schools themselves are not governed by publicly elected citizens either, whereas public schools are. Unelected private persons governing a deregulated private entity (which may also be owned by another private entity) is not the same as elected public school officials governing a public school that serves no private interests, admits all students at all times, has unionized teachers, can levy taxes, and is accountable only to the public.

Unlike charter schools, regular public schools, which have been around for 180 years and educate 90% of America's youth, are in fact state actors; they are political subdivisions of the state because they not only carry out a public function but are also explicitly delegated authority by the state to carry out various public responsibilities. "Function" and "authority"

are not synonyms; they are different concepts. Carrying out a role is not necessarily the same thing as having power to carry out that role. A role can be carried out by a person or entity that derives its responsibility from a higher political power. Its role can be delegated by a more influential power.

Properly speaking, charter schools are not exercising state prerogatives. Nor do they enter into what may be called a symbiotic relationship with the state. Unlike public schools, they are not state agencies proper, which explains why the state does not coerce, encourage, or compel charter schools to act in the same way it coerces, encourages, or compels public schools to act. The state has more influence and control over public schools than it does over privately-operated "free-market" charter schools. In this neoliberal legal setup, the state is not responsible for the policies and operations of deregulated charter schools; charter schools can do as they please; "no rules;" "laissez-faire;" "hands-off," "autonomy." This usually means no meaningful accountability.

Charter schools are intentionally set up to operate outside the parameters and framework governing public schools. This is what makes them "innovative," "independent," and different. It is worth stressing again that, in the case of "Charter Day School," the state played no direct role in creating, directing, or shaping the dress code being challenged by parents who voluntarily enrolled their children in the school. The charter school's dress code policy was not therefore an expression of state action.

Unlike public schools, charter schools fall under private law, specifically contract law. Charter, by definition, means contract: a legally-binding agreement between two or more parties to do or not do something in a specified period of time with associated rewards and punishments. For state action doctrine this means that just because a private entity has a contract with the government that does not mean that the actions of private contractors like charter schools can be attributed to the state. Simply "partnering" with the state does not make the conduct of a private entity a form of state action. A private actor does not become public, does not become a state actor, just because it contracts with the state.

The issue of whether a charter school is public or not is often confusing to many because there is relentless disinformation from charter school promoters that charter schools are public schools when in reality they are privatized independent entities. Charter schools remain private, independent, deregulated, segregated entities even though they receive public money, are often called public, and ostensibly provide a service to the public. Interestingly, when asked what they think a charter school is, most people say they are not really sure or they think that charter schools are some sort of private school. The average person rarely thinks charter schools are public schools.

To be sure, charter schools cannot be deemed public just because they are called "public" 50 times a day. Under the law, this is not what makes an entity public. Simply labelling something a specific thing does not automatically make it that thing. In the U.S. legal system, merely labeling private conduct "public" does not make it a form of state action. Moreover, receiving public funds does not spontaneously make an entity public under the law. Thousands of private entities in the U.S. receive public money, for example, but they do not suddenly stop being private entities.[8]

Only narrow private interests benefit from obscuring the distinction between public and private. Public and private mean the opposite of each other. They are antonyms. They should not be confounded.

Public refers to everyone, the common good, all people, transparency, affordability, accessibility, universality, non-rivalry, and inclusiveness. Examples include public parks, public libraries, public roads, public schools, public colleges and universities, public hospitals, public restrooms, public housing, public banks, public events, and more. These places and services are available to everyone, not just a few people. They are integral to a modern civil society that recognizes the role and significance of a public sphere in modern times.

Private, on the other hand, refers to exclusivity, that is, something is private when it is "designed or intended for one's exclusive use." Private also means:

-Secluded from the sight, presence, or intrusion of others.

-Of or confined to the individual; personal.

-Undertaken on an individual basis.

-Not available for public use, control, or participation.

-Belonging to a particular person or persons, as opposed to the public or the government.

-Of, relating to, or derived from nongovernment sources.

-Conducted and supported primarily by individuals or groups not affiliated with governmental agencies or corporations.

-Not holding an official or public position.

-Not for public knowledge or disclosure; secret; confidential.

In its essence, private property is the right to exclude others from use of said property; it is the power of exclusion;[9] it is not concerned with transparency, inclusion, the common good, or benefiting everyone. This is why when something is privatized, e.g., a public enterprise, it is no longer available to everyone; it becomes something possessed and controlled by the few. This then ends up harming the public interest; it does not improve efficiency, strengthen services, lower costs, increase accountability, or expand democracy.

Charter schools are labeled "public" mainly for self-serving reasons, specifically to lay claim to public funds that legitimately belong to public schools alone. If charter schools were openly and honestly acknowledged as being private entities they would not be able to place any valid claim to public funds and they would not be able to exist for one day. This presents a contradiction for defenders of charter schools who want to "have it both ways," that is, be public when it suits them and act private when it serves them. This is the definition of arbitrary and irrational.

To be clear, the relationship between the state and charter schools is not the same as the relationship between the state and public schools. This is one reason why the rights of students, teachers, and parents in charter schools differ from the rights of students, teachers, and parents in public schools. Thus, for example, while the vast majority of public school teachers are unionized, about 90% of charter school teachers are not unionized. Charter schools are notoriously anti-union. They energetically fight efforts by teachers to unionize to defend their rights. Teachers in charter schools are considered "at-will"

employees, meaning that they can be fired at any time for any reason. This is not the case in public schools where due process, tenure, and some collective security still exist. Conditions are more humane and more pro-worker in public schools, even when these chronically-underfunded and constantly-vilified schools face one neoliberal assault after another. This is also linked to why many charter schools across the country can legally hire numerous uncertified and unlicensed teachers.

Another profound difference between charter schools and public schools is that the former cannot levy taxes while the latter can. A tax, as is well-known, can only be laid for a public purpose, which means that charter schools do not possess the characteristics of a political subdivision of the state; they are not fully exercising a public function.

Many other legal differences could be listed.

It would be more accurate to say that charter schools resemble traditional private schools far more than they resemble regular public schools, yet they continue to be mislabeled "public schools."[10] In practice, charter schools are quintessentially private schools. See Outlaw Charter Schools: Can A Charter School Not Be A Charter School? for additional analysis of these themes.

The question of whether a charter school is a state actor or not also has big implications for thousands of other organizations (e.g., hospitals, utility companies, colleges, etc.) across the country because various constitutional provisions typically do not apply to private entities and businesses. This case is therefore of national importance. The public-private distinction at stake in this education case goes beyond the issue of the dress code at "Charter Day School."

The "Charter Day School" case is currently in the hands of the U.S. Supreme Court. The issue at stake—the public-private distinction—is so significant that, on January 9, 2023, the U.S. Supreme Court asked President Joe Biden's administration to give their view on the case. The U.S. Supreme Court States that the key issue at stake is: "Whether a private entity that contracts with the state to operate a charter school engages in state action when it formulates a policy without coercion or encouragement by the government." This move is seen by charter school promoters as a positive sign that the highest court in the land is willing to consider the case.

On May 22, 2023, U.S. Solicitor General Elizabeth B. Prelogar filed a brief responding to the U.S. Supreme Court's January 9, 2023 request. Prelogar essentially reinforced the 10-6 ruling of the 4th U.S. Circuit Court of Appeals in North Carolina. She urged the U.S. Supreme Court to view "Charter Day School" as a state actor and to decline to hear the school's appeal.

In the final analysis, with or without a ruling from any court, as privatized, marketized, corporatized arrangements that celebrate consumerism, competition, and individualism, charter schools have no legitimate claim to the public funds, facilities, resources, and authority that belong only to public schools. No court ruling, one way or the other, will change this fact. Claiming that charter schools are public schools for the purpose of laying claim to public wealth that belongs solely to public schools, damages public schools, the public interest, the economy, and the national interest. It does not help low-income minority youth or close the long-standing "achievement gap" rooted in poverty, racism, inequality, and disempowerment.

Charter schools do not raise the level of education or improve society. Thirty plus years of evidence shows that charter schools mainly enrich narrow private interests. Without charter schools, public schools would have tens of billions of additional dollars to pay teachers and improve learning for all students, especially low-income minority students enrolled in urban schools. This would make a huge difference. No charter schools would also mean that thousands of students, teachers, and parents would no longer have to feel angry and abandoned by charter schools that close every week (often abruptly).

Neoliberals have never cared about public schools or the public interest; they are masters of disinformation and self-serving to the extreme. Neoliberals have worked ceaselessly over the last few decades to methodically privatize public education in America under the banner of high ideals while actually lowering the level of education, increasing chaos in education, and enriching a handful of people along the way. The so-called "school choice" political-economic project has little to do with advancing education and improving opportunities for millions of marginalized youth and more to do with profit maximization in the context of a continually failing economy. "School choice" has brought immense suffering to public education and the nation. "School-choice" does not have a human face.

The only sense in which charter schools may be called state actors is that they are *neoliberal* state actors because they are actively organized by wealthy individuals and groups that control and influence many state positions, levers, institutions, and individuals. In this sense, charter schools are indeed acting on behalf of the *neoliberal state* and are therefore *neoliberal* state actors. This is bound to happen in a society where Wall Street and the state become indistinguishable.

About 3.5 million students are currently enrolled in roughly 7,600 charter schools in 45 states, the District of Columbia, Puerto Rico, and Guam.

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[1] It is also worth recognizing that the non-profit/for-profit distinction is generally a distinction without a difference, that is, both types of charter schools engage in enriching a handful of private interests under the veneer of high ideals; profiteering takes place in both types of schools.

[2] See the works of Jürgen Habermas for further discussion and analysis of the origin and evolution of the public

sphere in the Anglo-American world.

[3] See *School's Choice: How Charter Schools Control Access and Shape Their Enrollment* (Teachers College Press,

2021).

[4] See 5,000 Charter Schools Closed in 30 Years (2021). This is a high number of charter school closures

given that there are only about 7,600 charter schools operating in the U.S. today.

[5] See *The Privatization of Everything: How the Plunder of Public Goods Transformed America and How We Can Fight Back* (2023).

[6] In March 2023, in a separate case, the US Court of Appeals for the Fifth Circuit affirmed that IDEA, a charter school operator, is not an arm of the state.

[7] The phrase "state action" does not appear in the U.S. Constitution.

[8] As a matter of principle, no public funds should flow to any private organization because such funds are produced by working people and belong rightfully to society as a whole.

[9] The right to exclude is "one of the most treasured" rights of property ownership.

[10] In *Rendell-Baker v. Kohn, 457 U.S. 830 (1982)*, the court held that "Even when a private school is substantially funded and regulated by the state, it is not a state actor if it is not exercising state prerogatives."

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