

## Charter Schools, EMOs, and Sovereign Immunity\*

*In the 2019 case Cooper v. Kinston Charter Academy, the North Carolina Court of Appeals announced a bright-line rule allowing all public charter schools to claim, without reservation, the state’s sovereign immunity from civil lawsuits. This decision arrived during a time of continued growth for charter schools. Three million American children are educated each year in charter school classrooms, and at least 200 North Carolina public charter schools—each sponsored and managed by a private nonprofit—are in operation as of the 2020–2021 school year.*

*And yet, the public charter school model remains controversial. Some argue that charter schools exacerbate racial disparities, while others fear the general lack of transparency in the system. Whatever your opinion, charter schools in North Carolina clearly occupy a legal middle ground: statutorily defined as “public schools,” they receive state funds on a per-pupil basis while remaining free from requirements facing traditional public schools in areas such as teacher licensure.*

*This Comment argues that the bright-line rule in Kinston improperly extends the state’s sovereign immunity. Specifically, schools operated by Educational Management Organizations (“EMOs”)—private companies that manage charter schools for a fee—should not benefit from immunity where the EMO’s authority practically precludes the state’s authority over a school’s day-to-day functions. Instead, this Comment proposes a fact-specific test for charter school immunity centered around the school’s function as a state subdivision rather than the school’s statutory designation as a “public school.” This fact-specific test would prevent misuse of state funds by private bad actors and mirror North Carolina’s treatment of immunity claims by other quasi-public entities while allowing most public charter schools to innovate in the classroom without fear of liability.*

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## INTRODUCTION

Public education policy is a controversial issue in North Carolina and across the United States, and charter schools—their funding, benefits, and relationship with the state—are a key component of the debate.<sup>1</sup> Charter schools are alternatives to traditional public schools. Publicly funded and privately organized by nonprofit organizations, they exist under the authority of state educational boards yet educate their students with more autonomy than traditional public schools.<sup>2</sup> Operated in forty-three states and the District of Columbia, charter schools seek to provide teachers and administrators with increased freedom to develop innovative educational techniques while

1. See, e.g., Maddie Hanna, *Wolf Pushing Charter-School Bill That Would Change Funding, Accountability Rules*, PHILA. INQUIRER, <https://www.inquirer.com/news/charter-school-reform-pennsylvania-tom-wolf-budget-20200203.html> [<https://perma.cc/L8ZK-V9ZD>] (Feb. 4, 2020) (describing Pennsylvania Governor’s proposed charter legislation); Kevin Lavery, *Charter Schools Wary of Whitmer’s K-12 Funding Proposal*, WKAR (Feb. 6, 2020), <https://www.wkar.org/post/charter-schools-wary-whitmers-k-12-funding-proposal#stream/0> [<https://perma.cc/U3HL-VVQT>] (summarizing charter school advocates’ concerns over funding structure in Michigan Governor’s proposed bill).

2. PUB. SCH. F. OF N.C., 2018 NORTH CAROLINA EDUCATION PRIMER: SCHOOL CHOICE 1 (2018), [https://www.ncforum.org/wp-content/uploads/2018/08/School-Choice\\_2018.pdf](https://www.ncforum.org/wp-content/uploads/2018/08/School-Choice_2018.pdf) [<https://perma.cc/ZS78-MRJS>] [hereinafter SCHOOL CHOICE].

remaining accountable to state-dictated assessment thresholds for student performance.<sup>3</sup>

At first glance, this model appears to be a win-win for educators seeking professional freedom, parents seeking school choice, and political leaders touting educational innovation. As the number of charters increases, however, so too has the number of for-profit Educational Management Companies (“EMOs”)—private companies that contract with charter school boards and perform day-to-day services including writing curriculum, training teachers, disciplining students, and making personnel decisions in return for a management fee drawn from the school’s state-awarded funds.<sup>4</sup> Not all charter schools work with EMOs, but the notable and increasing number of EMO-run schools reveals a legal and ethical gray area in the tension between private,

3. *Id.*; see also *About Charter Schools*, NAT’L ALL. FOR PUB. CHARTER SCHS., <https://publiccharters.org/about-charter-schools> [<https://perma.cc/ZLK4-H6LH>].

4. See, e.g., Douglass Academy’s Education Service Provider Agreement with Roger Bacon Academy § 4.03 [hereinafter *Douglass Bacon Agreement*] (on file with the North Carolina Law Review). While this Comment focuses on for-profit EMOs, it is important to note that North Carolina charter schools also commonly partner with nonprofit Charter Management Organizations (“CMOs”). Like EMOs, CMOs are private, often large entities that provide administrative and instructional support to charter schools pursuant to a contract with the charter school board. See *ESP, EMO, CMO?*, AM. SCH. CHOICE, <http://americanschoolchoice.com/what-is-school-choice/what-purpose-do-network-charter-operators-serve/> [<https://perma.cc/82YK-BXZQ>]. Like EMOs, many CMOs seek to replicate their model of top-down educational management across multiple schools and states. *Id.* The most prominent example of an interstate CMO is the Knowledge is Power Program (“KIPP”), which currently operates 255 schools serving primary, middle, and high school students in twenty states and the District of Columbia, including at least seven schools in North Carolina. *Find a KIPP School*, KIPP, <https://www.kipp.org/schools/kipp-school-directory/> [<https://perma.cc/TYN3-6FL8>]. While EMOs and CMOs provide many of the same services—one source notes that “[t]he difference between CMOs and EMOs is thin”—there are at least three notable differences between the two. See AM. SCH. CHOICE, *supra*. First, EMOs have traditionally placed more emphasis than CMOs on operating primary schools—a choice that some attribute to the fact that elementary education requires fewer extracurriculars and technical classes and is therefore cheaper than teaching high school-aged students. David N. Plank, David Arsen & Gary Sykes, *Charter Schools and Private Profits*, AASA, THE SCH. SUPERINTENDENT’S ASS’N, <https://www.aasa.org/SchoolAdministratorArticle.aspx?id=14510> [<https://perma.cc/9K6G-3MXL>] (arguing that EMOs have a “powerful incentive . . . to specialize in the education of elementary students” because state subsidies paid to charter schools are typically “greater than the average per-pupil cost of educating elementary students, but less than the average per-pupil cost of educating high school students”); see also Gary MIRON & CHARISSE GULOSINO, NAT’L EDUC. POL’Y CTR., *PROFILES OF FOR-PROFIT AND NONPROFIT EDUCATION MANAGEMENT ORGANIZATIONS* 18 (14th ed. 2013), <http://nepc.colorado.edu/files/emo-profiles-11-12.pdf>. [<https://perma.cc/ZG3T-A96H>]. Second, EMO-led schools traditionally have much larger enrollments. See *id.* Third, the for-profit nature of EMOs allows increased freedom to accumulate large amounts of capital and to make independent purchases using state funds. AM. SCH. CHOICE, *supra*. Thus, although EMOs and CMOs ultimately perform similar services, I focused on EMOs in this Comment because their ability to accumulate capital and their tendency to serve larger, younger student populations presents unique opportunities for fraud and other harmful misconduct. To maximize transparency and prevent abuse, the changes to North Carolina’s charter school statute suggested below should apply equally to all charter schools, whether they are operated by EMOs, CMOs, or another entity.

profit-driven enterprise and the public imperative to educate our state's children. One issue attendant to this tension is the degree of civil immunity afforded to charter schools wholly operated by EMOs: Although it is clear that traditional public schools are afforded sovereign immunity against civil claims due to their status as arms of the state, should the same automatic immunity be afforded to a charter school that has passed practical decision-making responsibility to a for-profit, third-party EMO? And should any immunity be extended to the EMO itself?

The North Carolina Court of Appeals recently answered the first of these questions, declaring a bright-line rule that all public charter schools in the state—including those managed by EMOs—may automatically claim the state's civil immunity.<sup>5</sup> This Comment addresses the background and implications of this decision to extend immunity to EMO-run charter schools. Ultimately, this Comment argues that a bright-line rule overextends the state's immunity and that courts should instead adopt a case-by-case test, extending immunity to a charter school defendant only if the school can reasonably claim to be acting as an arm of the state.

To examine this issue, Part I of this Comment discusses the history of charter schools nationally and in North Carolina, providing a brief overview of the state's charter legislation and examples of regulatory differences between its charter and traditional public schools. Part II defines the typical roles of EMOs in further detail and outlines several recurring and potential abuses that arise in the EMO-charter school relationship. Part III describes the law of sovereign immunity in North Carolina generally. Part IV traces this law through two recent court cases—*Yarbrough v. East Wake First Charter School*<sup>6</sup> and *State v. Kinston Charter Academy*<sup>7</sup>—which established the current rule that awards sovereign immunity to all public charter schools in the state. This part further presents several arguments for why a bright-line rule is the wrong decision on this issue, arguing instead for a case-by-case approach dependent on a given school's level of control over its own state funding and day-to-day operations. Finally, Part V presents suggestions for reform.

## I. A BACKGROUND ON CHARTER SCHOOL GROWTH AND REGULATION

Despite the prodigious state and federal resources dedicated each year toward public schools, children living in the United States do not currently have

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5. See *State ex rel. Cooper v. Kinston Charter Acad.*, 268 N.C. App. 531, 538, 836 S.E.2d 330, 336 (2019) (“[A]s an extension of the sovereign, charter schools are entitled to exercise the State's sovereign immunity.”). See *infra* notes 126–32 and accompanying text for a discussion of *Kinston Charter*.

6. 108 F. Supp. 3d 331 (E.D.N.C. 2015).

7. 268 N.C. App. 531, 836 S.E.2d 330 (2019).

a fundamental constitutional right to a free, public education.<sup>8</sup> The Supreme Court has declared, however, that the Equal Protection Clause of the Fourteenth Amendment requires that no child living in a state with a public school system (which is the entire United States) shall be denied equal access to schooling.<sup>9</sup> To help meet this mandate and to allow for educational innovation, forty-three states and the District of Columbia have passed legislation authorizing the creation of public charter schools within their borders.<sup>10</sup>

8. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

9. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

10. States currently operating public charter schools, and the statutes authorizing said charters and explaining the respective state legislature's purpose, are as follows: Alabama (ALA. CODE § 16-6F-2(a) (Westlaw through Act 2020-206)); Alaska (ALASKA STAT. § 14.03.255 (LEXIS through 2020 SLA, ch. 32)); Arizona (ARIZ. REV. STAT. ANN. § 15-181 (Westlaw through the 2d Reg. Sess. of the 54th Leg. (2020))); Arkansas (ARK. CODE ANN. § 6-23-102 (Westlaw through the 2020 1st Extraordinary Sess. and the 2020 Fiscal Sess. of the 92d Arkansas Gen. Assemb.)); California (CAL. EDUC. CODE § 47601 (2021)); Colorado (COLO. REV. STAT. ANN. 22-30.5-102 (LEXIS through all laws passed during the 2020 Reg. Sess. and 1st Extraordinary Legis. Sess.)); Connecticut (CONN. GEN. STAT. § 10-66aa (2019)); Delaware (DEL. CODE ANN. tit. 14 § 501 (LEXIS through 82 Del. (2019–2020))); District of Columbia (D.C. CODE ANN. § 38-1800.02(29) (LEXIS through Dec. 7, 2020)); Florida (FLA. STAT. ANN. § 1002.33 (Westlaw through Ch. 184 (End) of the 2020 2d Reg. Sess. of the 26th Leg.)); Georgia (GA. CODE ANN. § 20-2-2061 (LEXIS through the 2020 Reg. Sess. of the Gen. Assemb.)); Hawaii (HAW. REV. STAT. ANN. § 302D-3(a)–(b) (LEXIS through 2020 Legis. Sess.)); Idaho (IDAHO CODE § 33-5202 (LEXIS through 2020 Reg. and 1st Extraordinary Sess.)); Illinois (105 ILL. COMP. STAT. ANN. § 5/27A-2 (Westlaw through P.A. 101-651)); Indiana (IND. CODE ANN. § 20-24-2-1 (Westlaw through all legislation of the 2020 2d Reg. Sess. of the 121st Gen. Assemb.)); Iowa (IOWA CODE ANN. § 256F.1 (Westlaw through legislation from the 2020 Reg. Sess.)); Kansas (KAN. STAT. ANN. § 72-4206 (Westlaw through laws enacted during the 2020 Reg. and Spec. Sess.)); Louisiana (LA. STAT. ANN. § 17:3972 (Westlaw through the 2019 Reg. Sess.)); Maine (ME. REV. STAT. ANN. tit. 20 § 2402 (Westlaw through the 2019 2d Reg. Sess. of the 129th Leg.)); Maryland (MD. CODE ANN., EDUC. § 9-101 (Westlaw through all legislation from the 2020 Reg. Sess. of the Gen. Assemb.)); Massachusetts (MASS. GEN. LAWS ANN. ch. 71, § 89(a)–(b) (Westlaw through Ch. 113 of the 2020 2d Ann. Sess. of the Gen. Court)); Michigan (MICH. COMP. LAWS ANN. § 380.501 (Westlaw through P.A.2020, No. 243, of the 2020 Reg. Sess., 100th Leg.)); Minnesota (MINN. STAT. ANN. § 124E.01 (Westlaw through all legislation from the 2020 Reg. Sess. and 1st through 5th Spec. Sess.)); Mississippi (MISS. CODE ANN. § 37-28-3 (LEXIS through 2020 Reg. Sess. legislation)); Missouri (MO. ANN. STAT. § 160.400 (Westlaw through West ID No. 28 of the 2020 1st Extraordinary Sess. of the 100th Gen. Assemb.)); Nevada (NEV. REV. STAT. ANN. § 388A.087 (LEXIS through all legislation from the 80th Reg. Sess. (2019), the 31st Spec. Sess. (2020) and the 32d Spec. Sess. (2020))); New Hampshire (N.H. REV. STAT. ANN. § 194-B:2 (Westlaw through Chapter 39 of the 2020 Reg. Sess.)); New Jersey (N.J. STAT. ANN. § 18A:36A-2 (Westlaw through L.2020, c. 109 and J.R. No. 2)); New Mexico (N.M. STAT. ANN. § 22-8B-3 (Westlaw through the end of the 2d Reg. Sess. and 1st and 2d Spec. Sess. of the 54th Leg. (2020))); New York (N.Y. EDUC. LAW § 2850 (Westlaw through L.2019, ch. 758 and L.2020, chs. 1 to 249)); North Carolina (N.C. GEN. STAT. § 115C-218(a) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.)); Ohio (OHIO REV. CODE ANN. § 3314.01 (LEXIS through File 115 (HB 295) the end of the 133d (2019–2020) 133d Gen. Assemb.)); Oklahoma (OKLA. STAT. tit. 70, § 3-131 (Westlaw through enacted legislation of the 2d Reg. Sess. of the 57th Leg. (2020))); Oregon (OR. REV. STAT. ANN. § 338.015 (Westlaw through laws enacted in the 2020 Reg. Sess. of the 80th Legis. Assemb.)); Pennsylvania (PA. STAT. AND CONS. STAT. ANN. § 17-1714-A (Westlaw through 2020 Reg. Sess. Act 79)); Rhode Island (16 R.I. GEN. LAWS ANN. § 16-77-3.1 (LEXIS through all acts of the 2020 Sess.));

The majority of charter school statutes explicitly define charter schools as public schools within the state's education system.<sup>11</sup> As their name suggests, however, all charter schools exist based on the conditions set out in the school's charter. The charter is a controlling contract between the charter school's operator—usually a nonprofit organization, with ultimate decision-making authority regarding school policies—and an entity designated by state statute as a charter school authorizer.<sup>12</sup> In North Carolina, the State Board of Education (“State Board”) is the sole charter school authorizer<sup>13</sup> and all charter school organizers are required to be nonprofit organizations.<sup>14</sup>

Whether charter schools are a beacon of hope or a harbinger of doom for public education is an emotional and often partisan debate.<sup>15</sup> Regardless of one's views on the merits of the charter school concept, however, it is indisputable that charter schools are growing in number and popularity. During the 2007–2008 academic year, 4,297 charter schools educated approximately 1.3 million children nationwide.<sup>16</sup> These numbers increased to 5,272 schools and 1.8 million students by 2010–2011,<sup>17</sup> and to 7,038 schools and over 3.2 million students by 2017–2018.<sup>18</sup> As the following section illustrates, North Carolina exemplifies this trend toward partially private control over public education.

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South Carolina (S.C. CODE ANN. § 59-40-20 (Westlaw through the 2020 Sess.)); Tennessee (TENN. CODE ANN. § 49-13-102 (LEXIS through the 2020 Reg. Sess.)); Texas (TEX. EDUC. CODE ANN. § 12.001 (Westlaw through the end of the 2019 Reg. Sess. of the 86th Leg.)); Utah (UTAH CODE ANN. § 53G-5-104 (LEXIS through all acts of the 2020 Sess. (through ch. 80))); Virginia (VA. CODE ANN. § 22.1-212.5 (LEXIS through the 2020 Reg. Sess., and 2020 Spec. Sess. I, c. 1 of the Gen. Assemb.)); Washington (WASH. REV. CODE § 28A.710.010 (Westlaw through all legislation from the 2020 Reg. Sess. of the Wash. Leg.)); Wisconsin (WIS. STAT. ANN. § 118.40(1) (Westlaw through 2019 Act 186, published April 18, 2020)); Wyoming (WYO. STAT. ANN. § 21-3-301 (LEXIS through 2020 Budget Sess. and 1st Spec. Sess. of the Wyo. Leg.)).

11. For examples of explicit public designations, see the charter school statutes of Michigan, MICH. COMP. LAWS ANN. § 380.501(1) (Westlaw) (“A public school academy is a public school . . .”), and Mississippi, MISS. CODE ANN. § 37-28-3(2) (LEXIS) (“All charter schools . . . are public schools . . .”).

12. SCHOOL CHOICE, *supra* note 2, at 1.

13. See N.C. GEN. STAT. § 115C-218.5(a) (2020) (LEXIS).

14. See *id.* § 115C-218.1(a) (LEXIS).

15. Compare, e.g., *About Charter Schools*, *supra* note 3 (explaining that charter schools are “led by dynamic principals who have the flexibility to create a school culture that fosters student performance and parent satisfaction”), with *The Facts on Charter Schools*, PUB. SCH. FIRST NC, <https://www.publicschoolsfirstnc.org/resources/fact-sheets/quick-facts-on-charter-schools/> [<https://perma.cc/273B-3P7X>] (last modified Nov. 2020) (“In addition to disappointing academic performance, and siphoning money away from traditional public schools, charters maintain and often exacerbate segregated schools.”).

16. Anna Nicotera, *Growth in Charter Schools Operated by Management Organizations*, NAT'L ALL. FOR PUB. CHARTER SCHS.: BLOG (Apr. 24, 2012), <https://www.publiccharters.org/latest-news/2012/04/24/growth-charter-schools-operated-management-organizations> [<https://perma.cc/K5FU-CZRS>].

17. *Id.*

18. SCHOOL CHOICE, *supra* note 2, at 2.

A. *History (and Rapid Growth) of Charter Schools in North Carolina*

Unlike students in some other states, children in North Carolina have a constitutional right to a state-sponsored and state-protected education.<sup>19</sup> Specifically, the North Carolina Constitution states that “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”<sup>20</sup> The General Statutes of North Carolina further define this duty, stating that “[a] general and uniform system of free public schools shall be provided throughout the State, wherein equal opportunities shall be provided for all students . . . .”<sup>21</sup> Additionally, the Supreme Court of North Carolina imposed a qualitative element on the state’s public schools in *Leandro v. State*<sup>22</sup> in 1977, holding that each student was entitled to a “sound basic education.”<sup>23</sup> This includes, among other things, the ability to “read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society . . . .”<sup>24</sup> In a subsequent holding, the court decided to leave the “nuts and bolts” of decisions regarding how to provide this sound basic education—including curriculum and funding provisions—to the state.<sup>25</sup>

In response to this state constitutional mandate to provide free public education to all North Carolina children, the General Assembly passed legislation authorizing the creation of a system of public charter schools in

19. This right is first announced in the North Carolina Constitution, article I, section 15, *see infra* note 20 and accompanying text, and is strengthened by article IX, section 2(1), which requires the General Assembly to “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.” N.C. CONST. art. IX, § 2(1). The Supreme Court of North Carolina assigned a qualitative standard to the state’s obligations under article I, section 15 and article IX, section 2 in *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997), discussed *infra* notes 22–25.

20. N.C. CONST. art. I, § 15.

21. N.C. GEN. STAT. § 115C-1 (2020) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

22. 346 N.C. 336, 488 S.E.2d 249 (1997).

23. *Id.* at 347, 488 S.E.2d at 255.

24. *Id.*

25. Hoke Cty. Bd. of Educ. v. State (“*Leandro II*”), 358 NC 605, 609, 599 S.E.2d 365, 373 (2004) (“[T]he State . . . [must] assume the responsibility for, and correct, those educational methods and practices that contribute to the failure to provide students with a constitutionally-conforming education . . . .”). The State Department of Education must make decisions about how to provide free public education against a backdrop of increasingly disparate wealth—and, accordingly, an increasingly disparate ability to support local public schools—among North Carolina’s counties. According to a 2019 study by the Public School Forum of North Carolina, “in 2016–17, the ten counties that spent the most per student averaged \$3,200 per student compared to the ten that spent the least, which averaged \$775 per student. That represents a gap of \$2,445 between the top ten and lowest spending districts.” PUB. SCH. F. OF N.C., 2019 LOCAL SCHOOL FINANCE STUDY 9 (2019), <http://www.ncforum.org/download/29198/> [<https://perma.cc/Q9ST-WJ7D>].

1996.<sup>26</sup> The stated purpose of these schools is notable. The opening lines of North Carolina’s current charter school statute expresses an intent “to establish and maintain schools that operate *independently of existing schools*, as a method to accomplish all of the following: Improve student learning; . . . [and] [p]rovide parents and students with expanded choices in the types of educational opportunities that are available *within the public school system* . . . .”<sup>27</sup> From this prefatory material alone, it appears that North Carolina charter schools occupy a middle ground in the state’s public education system—operating at once “independently of existing schools” and “within the public school system.”<sup>28</sup>

Once charter schools were authorized in North Carolina, the state joined a nationwide trend toward exponential proliferation of public charters.<sup>29</sup> Thirty-four charter schools opened in North Carolina in the initial class of 1997.<sup>30</sup> There was a 100-school cap on the number of public charters that could be granted at any given time until 2011, when the General Assembly removed the cap on the number of charter schools with the passage of Senate Bill 8.<sup>31</sup> Removing the cap led to a rapid increase in the number of public charter schools: 148 schools were open by 2014, and 184 were operating as of Spring 2019.<sup>32</sup> The Office of Charter Schools (a division of the North Carolina Department of Education) reports that 200 charter schools are operating during the 2020–2021 school year,<sup>33</sup> with 14 new applicants proposing new schools for fall 2021.<sup>34</sup> As of November 2019, 116,316 students—7.6% of the state’s total

26. See Charter Schools Act of 1996, ch. 731, 1995 N.C. Sess. Laws 1 (codified as amended at N.C. GEN. STAT. § 115C-218 (LEXIS)). The General Assembly’s intent to create a quasi-public education space is on full display in the Act’s full title, which reads “An Act to Increase Educational Opportunity by Authorizing the Creation and Funding of Charter Schools, which are Deregulated Schools Under Public Control.” *Id.*

27. N.C. GEN. STAT. § 115C-218(a), (a)(1), (a)(5) (LEXIS) (emphasis added).

28. *Id.* § 115C-218(a), (a)(5) (LEXIS).

29. For nationwide statistics on charter school growth, see *Data Dashboards*, NAT’L ALL. FOR PUB. CHARTER SCHS., <https://data.publiccharters.org/> [<https://perma.cc/FMX2-QHKG>] (showing 2,859,956 students in public charters and 7,062 public charter schools as of 2016).

30. Thomas A. Kelley III, *North Carolina Charter Schools’ (Non-?) Compliance with State and Federal Nonprofit Law*, 93 N.C. L. REV. 1757, 1766–67 (2015).

31. Act of June 17, 2011, ch. 164, 2011 N.C. Sess. Laws 647 (codified as amended at N.C. GEN. STAT. § 115C-218).

32. Kelley, *supra* note 30, at 1767.

33. See DIV. OF SCH. BUS., N.C. DEP’T OF PUB. INSTRUCTION, 2020–21 NC LOCAL EDUCATION AGENCIES 2 (2020), [files.nc.gov/dpi/documents/charterschools/leacharterlist20-21.pdf](https://files.nc.gov/dpi/documents/charterschools/leacharterlist20-21.pdf) [<https://perma.cc/L32L-EVMM>].

34. Press Release, N.C. Dep’t of Pub. Instruction, 14 Applicants Propose Charter Schools for Fall 2021 (Sept. 11, 2019) (on file with the North Carolina Department of Public Instruction), <https://www.dpi.nc.gov/news/press-releases/2019/09/11/14-applicants-propose-charter-schools-fall-2021> [<https://perma.cc/X6jY-PLLQ>].



public school-student population—were attending North Carolina charter schools.<sup>35</sup>

Charter schools are statutorily defined as public schools,<sup>36</sup> meaning that they receive per-pupil state funding<sup>37</sup> according to the *Leandro* mandate to provide a sound basic education.<sup>38</sup> It also means that charter schools share in the state’s continued failure to meet that mandate.<sup>39</sup> As reported in a December 2019 nonpartisan study commissioned by Superior Court Judge Lee, the state’s efforts to this point have been “insufficient to adequately address the *Leandro* requirements,” and North Carolina “now faces greater challenges than ever” in ensuring a sound basic education.<sup>40</sup> One such challenge at EMO-managed charter schools, for example, is the lack of experienced classroom teachers. EMO-managed schools—due to the market motivation engendered by their for-profit status—tend to hire younger, less experienced (and cheaper) teachers than independent charter schools or traditional public schools.<sup>41</sup> One national study found that this market-based hiring tendency mixed with generally lower

35. See STATE BD. OF EDUC. & N.C. DEP’T OF PUB. INSTRUCTION, REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY: 2019 ANNUAL CHARTER SCHOOL REPORT 11 (2020), <https://files.nc.gov/dpi/documents/charterschools/resources/report-charter-schools-annual-report-2.15.2020.pdf> [<https://perma.cc/G6WU-RBMX>].

36. N.C. GEN. STAT. § 115C-218.15(a) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

37. From 2018 to 2019, charter schools educated 7.2% of the state’s student population and received 7.1% of the state’s public education funding (\$674,314,240 of \$9.44 billion). See STATE BD. OF EDUC. & N.C. DEP’T OF PUB. INSTRUCTION, *supra* note 35, at 49.

38. See *State ex rel. Cooper v. Kinston Charter Acad.*, 268 N.C. App. 531, 537, 836 S.E.2d 330, 340 (2019) (acknowledging, definitively, the General Assembly’s intent to designate charter schools as public).

39. North Carolina’s failure to meet the *Leandro* standard has been formally recognized in multiple ways. In 2017, Governor Roy Cooper issued an Executive Order establishing a nineteen-member “Governor’s Commission on Access to Sound Basic Education” to draft guidelines for statewide remedial education reform. Exec. Order No. 27 (Nov. 15, 2017), <https://files.nc.gov/governor/documents/files/EO27%20-%20Amending%20the%20Governor%27s%20Commission%20on%20Access%20to%20Sound%20Basic%20Education.pdf> [<https://perma.cc/LW66-AAUQ>]. The Commission has issued draft recommendations for reforming the education system’s funding, teaching, administration, early childhood offerings, and accountability measures since its founding. Lindsay Marchello, *Governor’s Commission Makes Draft Recommendations To Meet Leandro Mandate*, CAROLINA J. (June 26, 2019, 4:00 AM), <https://www.carolinajournal.com/news-article/governors-commission-makes-draft-recommendations-to-meet-leandro-mandate/> [<https://perma.cc/RFY3-CD63>]. Separate from the Governor’s Commission, independent consultant WestEd compiled an exhaustive report on the state system’s shortcomings in response to a 2017 Superior Court order. See LEARNING POL’Y INST. & WILLIAM & IDA FRIDAY INST. FOR EDUC. INNOVATION, SOUND BASIC EDUCATION FOR ALL: AN ACTION PLAN FOR NORTH CAROLINA 13–14 (WestEd ed., 2019) (reporting that North Carolina public school student scores in reading and math have declined since 2013, and that this decline appears to correlate with both racial and income data).

40. LEARNING POL’Y INST. & WILLIAM & IDA FRIDAY INST. FOR EDUC. INNOVATION, *supra* note 39, at 17.

41. Christine H. Roch & Na Sai, *Stay or Go? Turnover in CMO, EMO and Regular Charter Schools*, 55 SOC. SCI. J. 232, 234 (2018).

administrative support meant that teachers in EMO-managed schools are 97% more likely to leave their schools at the end of any given academic year than their peers at other schools.<sup>42</sup>

I do not repeat these negative statistics to disparage our state's educators, thousands of whom work faithfully and well in traditional and EMO-led classrooms each school day. Instead, I emphasize the continued shortcomings in our system to highlight the areas in which potential abuses by for-profit companies have the greatest potential to do harm. EMOs and the schools they operate are not inconsequential to North Carolina's future, and it is crucial to implement rational regulations that can hold both school and company reasonably accountable for their actions. The next section takes a step in this direction by examining the current statutory framework governing the formation of charter schools in North Carolina and the regulatory differences between these charters and traditional public schools.

#### B. *North Carolina's Charter School Statute*

Section 115C of the General Statutes of North Carolina reflects the General Assembly's intent for charter schools to originate and operate in a flexible, state-controlled, and quasi-private system. The law states that "any nonprofit corporation" (regardless of educational experience) may submit an application to the State Board for consideration, and that the application may seek to either establish a charter school or "convert a public school to a charter school."<sup>43</sup> Notably, the local school district encompassing the proposed charter school's location has no formal input on the need for a charter school in that area or whether the charter application is approved.<sup>44</sup> Rather, the application is reviewed by the Charter School Advisory Board, which recommends specific applicants to the State Board of Education for approval.<sup>45</sup> The State Board is then authorized to approve the recommended charter application if (1) the application complies with form requirements, (2) the applicant "has the ability to operate the school and would be likely to operate the school in an

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42. *Id.* at 240.

43. N.C. GEN. STAT. § 115C-218.1(a) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

44. Although the charter school statute does not prevent the State Board from informally consulting officials from a local school administrative unit about whether a charter school is necessary in their community, there is no requirement that local officials be consulted at all. *See id.* § 115C-218.5(a) (LEXIS) (giving the State Board authority to "grant final approval" over all charter applications as long as the application "would achieve one or more of the purposes set out in G.S. 115C-218"); *see also id.* § 115C-218(b)(10) (LEXIS) (designating the state-level Charter School Advisory Board as the body that will "review applications and make recommendations to the State Board for final approval of charter applications").

45. *See* Press Release, N.C. Dep't of Pub. Instruction, *Five Charters Seek Fast-Track or Acceleration OKs for 2020* (Aug. 7, 2019), <https://www.dpi.nc.gov/news/press-releases/2019/08/07/five-charters-seek-fast-track-or-acceleration-oks-2020> [<https://perma.cc/YVL5-G8YC>].

educationally and economically sound manner,” and (3) granting the application would achieve a stated purpose of the charter school law.<sup>46</sup> Once a charter application is approved, the nonprofit board of directors is statutorily charged with deciding all “matters related to the operation of the school, including budgeting, curriculum, and operating procedures.”<sup>47</sup>

The lack of local school board involvement in approving applications is only one difference between traditional public schools and public charter schools. The list of statutory differences can generally be grouped into organizational and student-facing issues. Organizational differences between traditional public schools and charter schools include: the nonprofit corporation sponsorship of charter schools,<sup>48</sup> the fact that charter schools are accountable to only the State Board rather than local boards of education or school districts for student academic assessment,<sup>49</sup> the requirement that the board of directors of a charter school must carry liability insurance;<sup>50</sup> the charter school’s ability to raise and use private funds to lease or purchase real estate,<sup>51</sup> and the need for charter schools to seek renewal of their charters from the State Board at least every ten years.<sup>52</sup>

46. § 115C-218.5(a)(1)–(3) (LEXIS).

47. *Id.* § 115C-218.15(d) (LEXIS). The application approval rate has steadily increased during the last half decade, rising from 14% (ten of seventy-one applications approved) in 2014 to 43% (fifteen of thirty-five applications approved) in 2019. STATE BD. OF EDUC. & N.C. DEP’T OF PUB. INSTRUCTION, *supra* note 35, at 16.

48. *See* § 115C-218.1(a) (LEXIS).

49. *Id.* § 115C-218.15(a) (LEXIS).

50. *Id.* § 115C-218.20(a) (LEXIS).

51. *Id.* § 115C-218.105(b) (LEXIS).

52. Charter renewal is a two-year process that includes a site visit by Office of Charter School personnel and interviews with administration, staff, and parent committees. *Renewal Process*, N.C. DEP’T OF PUB. INSTRUCTION, <https://www.dpi.nc.gov/students-families/innovative-school-options/charter-schools/renewals/renewal-process> [https://perma.cc/HJ9S-PJS6]. Charter schools seeking renewal are also required to complete a two-page “[s]elf [s]tudy” discussing how the school has fulfilled the school’s mission and education program over the previous decade. N.C. DEP’T OF PUB. INSTRUCTION, THE NORTH CAROLINA CHARTER SCHOOLS SELF-STUDY 2, <https://files.nc.gov/dpi/documents/charterschools/renewals/selfstudy.pdf> [https://perma.cc/T8FC-722T]. The brevity of this self-study requirement and the long periods for which charters are renewed highlight the increased autonomy inherent in charter schools’ quasi-public status. Although the State Board requires lengthy procedures for renewal, the effectiveness of these procedures as a check on mismanaged charter schools is questionable given that schools’ eligibility for renewal is based on their performance during the last two to three years of their existing charter rather than performance over the entire previous decade. *Renewals*, N.C. DEP’T PUB. INSTRUCTION, <https://www.dpi.nc.gov/students-families/innovative-school-options/charter-schools/renewals> [https://perma.cc/XG5Y-E5QA] (explaining that charters will not be renewed if the school is not substantially in compliance with its charter or has not provided financially sound audits or made academic progress similar to the surrounding local school administrative unit for the immediately preceding three years); *see also Charter School Advisory Board Renewal Rubric*, N.C. DEP’T PUB. INSTRUCTION, <https://www.dpi.nc.gov/students-families/innovative-school-options/charter-schools/renewals/charter-school-advisory-board-rubric> [https://perma.cc/5PVK-NM7T] (listing requirements for three-, seven-, and ten-year renewals).

Student-facing differences include: charter schools' lack of obligation to provide transportation;<sup>53</sup> charter schools' ability to limit admission on the basis of sex if the school's mission is "single-sex education";<sup>54</sup> potentially decreased due process obligations before expelling a student from the school and forcing them to go to a local traditional public school;<sup>55</sup> charter schools' lack of obligation to develop a school risk management plan,<sup>56</sup> to develop an anti-bullying or harassment policy,<sup>57</sup> or to hold annual lockdown exercises;<sup>58</sup> and decreased teacher licensure requirements which state that only fifty percent of all teachers at any given charter school must hold teaching licenses.<sup>59</sup>

Although some of the regulatory differences mentioned above may seem benign, charter schools' quasi-public status can affect their potential liability in stakeholder lawsuits and their ability to get immunity from such claims. As an example of how section 115C narrows a charter school's potential liability, consider the following hypothetical: An EMO-run charter school chooses not to offer transportation to school based upon the EMO's recommendation, even though doing so is well within the school's financial means. If a student were attacked by a stray dog while walking to school, neither the EMO nor the charter school would be liable under North Carolina's current statutes due to a lack of duty. What would happen, however, if a charter school board asked the managing EMO to develop a transportation plan, the EMO did not follow through, and the board was ignorant of the EMO's failure? Although the student may have a claim against the charter school board for negligent oversight, would the EMO itself be liable? This issue—whether an EMO can

53. N.C. GEN. STAT. § 115C-218.40 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.). As of November 2019, fifty percent of North Carolina charter schools provide bus transportation for students. See STATE BD. OF EDUC. & N.C. DEP'T OF PUB. INSTRUCTION, *supra* note 35, at 14, <https://files.nc.gov/dpi/documents/charterschools/resources/report-charter-schools-annual-report-2.15.2020.pdf> [<https://perma.cc/G6WU-RBMX>].

54. N.C. GEN. STAT. § 115C-218.45(e) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

55. See *id.* § 115C-218.60 (LEXIS) (“[A] charter school may also exclude the student from the charter school and return that student to another school in the local school administrative unit . . . .”); see also *Lindsey v. Matayoshi*, 950 F. Supp. 2d 1159, 1171 (D. Haw. 2013) (holding a charter school did not have to provide a due process hearing to a student expelled from a charter school under the Due Process Clause because the child could return to a public school).

56. N.C. GEN. STAT. § 115C-218.75(b) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

57. *Id.* § 115C-218.75(c) (LEXIS).

58. *Id.* § 115C-218.75(d) (LEXIS).

59. *Id.* § 115C-218.90(a)(1) (LEXIS). While charter schools are, of course, free to require that more than fifty percent of their teaching staff be licensed by the state, such a heightened licensure percentage is not a feature of any EMO contract that I have been able to locate. Instead, most EMO management contracts contain a clause reserving the EMO's right to decide the percentage of teachers above the fifty percent threshold, if any, who will be licensed. See, e.g., *Douglass Bacon Agreement*, *supra* note 4, § 7.03 (“[E]ach teacher assigned to or retained . . . shall hold a valid teaching certificate issued by the state board of education under the Law, to the extent required under the Law.”).

be held liable for failing to follow the board's requests regarding day-to-day, noninstructional management of a charter school—depends on the EMO's scope of authority within its management contract<sup>60</sup> and invites the question of just how far North Carolina's courts would be willing to extend the (seemingly) expansive immunity afforded under section 115C.<sup>61</sup>

The potential for an EMO to claim sovereign immunity independent from a charter school or nonprofit charter organization itself is foreign to the traditional, public school context yet potentially feasible given the specific language of section 115C. The question is one of scope rather than intent. It is clear that the General Assembly wishes public charter schools to be public schools,<sup>62</sup> and the North Carolina Court of Appeals has allowed them to claim sovereign immunity.<sup>63</sup> What is not clear is the scope of "organization" in the following sentence in section 115C-218.20: "Any sovereign immunity of the charter school, *of the organization that operates the charter school*, or its members, officers, or directors, or of the employees of the charter school or of the organization that operates the charter school, is waived to the extent of

60. Although a typical EMO contract will specify that the EMO manages the school under the ultimate authority of the charter school's board, the practical impact of this oversight is thrown into doubt by: (1) the incredibly expansive definition of the EMO's actual day-to-day authority over school functions, and (2) the fact that EMOs seek to limit their actual responsibility to comply with board requests to those functions *for which they are given adequate funding*. See Charter Management Agreement Between Charter Schools USA ("CUSA") and Triangle Charter Educational Association, Inc., art. III, paras. A–C (Sept. 14, 2017) (on file with the North Carolina Law Review) (stating that CUSA "shall perform all management, operation, accounting, and administrative functions for the Charter School . . . without limitation" and that this management shall be "subject to the [board's] ultimate authority," but also expressly limiting the EMO's responsibility under the contract by "the approved Annual budget" and "the availability of state funding to pay for the Management Functions"). This budgetary limitation is important—it is not difficult to imagine a scenario in which a charter school board orders an EMO to provide transportation, for example, only for the EMO to say that the allotted state funds for that academic year are insufficient to cover both transportation and the EMO's internal administrative costs. In such a scenario, the EMO seemingly would not be exposed to any potential claims by an injured student.

61. As discussed later, the scope of immunity under section 115C is unclear because "organization" is not defined in section 115C-218.20, allowing a private entity with managerial responsibilities a potential opening to argue that it falls under the statute. See *infra* notes 64–69 and accompanying text. While I think this is a misreading, the *Kinston* decision's broad grant of immunity suggests that at least some appellate panels may be sympathetic to an expansive interpretation of the statute.

62. See N.C. GEN. STAT. § 115C-218.15(a) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.) ("A charter school that is approved by the State *shall be a public school* within the local school administrative unit in which it is located." (emphasis added)). Notwithstanding this clear identification of charter schools as "public," North Carolina's statute also clearly indicates that there is a practical difference between charter and traditional public schools. See, e.g., *id.* § 115C-218.1(a) (LEXIS) (establishing procedures "to convert a public school to a charter school"); *id.* § 115C-218.1(b)(12) (LEXIS) (requiring charter applicants to create procedures "by which students can be excluded from the charter school and returned to a public school").

63. See *State ex rel. Cooper v. Kinston Charter Acad.*, 268 N.C. App. 531, 538, 836 S.E.2d 330, 336 (2019) ("Charter schools, as public schools . . . are entitled to exercise the State's sovereign immunity.").

indemnification by insurance.”<sup>64</sup> On its face, and as interpreted by the court in *Kinston*, “organization” seems to refer to the nonprofit chartering organization itself, which, through its board of directors, is required by statute to carry liability insurance.<sup>65</sup> The charter organization waives any immunity up to the amount of insurance purchased, above which it is again able to assert sovereign immunity as a state actor.<sup>66</sup>

Since “organization” is not defined in the charter school statute, however, an intrepid EMO heavily involved in day-to-day management could attempt to argue that it qualifies as an “organization that operates the charter school,”<sup>67</sup> and should therefore be afforded immunity against claims for which it is not insured. In fact, at least one EMO has already tried this argument (and lost).<sup>68</sup> While the state’s courts have announced per se immunity for all charter schools,<sup>69</sup> they have not directly considered the question of EMO immunity. North Carolina courts should answer this question by directly stating that (1) charter schools’ per se immunity does not extend to EMOs, and (2) EMOs cannot independently claim sovereign immunity.

The next part considers the potential issue of EMOs’ immunity claims by giving a brief definition of EMOs and their typical relationships with charter schools before describing several potential abuses of power in the EMO-charter school relationship.

64. N.C. GEN. STAT. § 115C-218.20(a) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.) (emphasis added).

65. *Id.* The North Carolina Department of Public Instruction provides a blank standard charter agreement on its website, describing that the document was adopted by the State Board in 2015 and that it “must be signed by each nonprofit corporation approved by the State Board to operate in NC.” *Charter Agreements*, N.C. DEP’T PUB. INSTRUCTION, <https://www.dpi.nc.gov/students-families/innovative-school-options/charter-schools/additional-resources/charter-agreements> [perma.cc/RS5Z-F4BW]. For the blank standard charter agreement, see generally N.C. DEP’T OF PUB., INSTRUCTION, CHARTER AGREEMENT (2019), [https://files.nc.gov/dpi/documents/charterschools/resources/guidance-documents/sample\\_charter.pdf](https://files.nc.gov/dpi/documents/charterschools/resources/guidance-documents/sample_charter.pdf) [https://perma.cc/HN9U-UJXY]. Section 13 of this Agreement, titled “Insurance,” requires the chartering nonprofit to obtain at least \$1 million in general liability insurance per occurrence as a condition of charter approval. *Id.* at 6.

66. See *Kinston*, 268 N.C. App. at 541, 836 S.E.2d at 338 (examining language from section 115C-218.20(a) to interpret sovereign immunity).

67. § 115C-218.20(a) (LEXIS) (“Any sovereign immunity of the charter school, of the organization that operates the charter school, . . . or of the employees of the charter school or the organization that operates the charter school, is waived to the extent of indemnification by insurance.”).

68. See *Peltier v. Charter Day Sch., Inc.*, 384 F. Supp. 3d 579, 594 (E.D.N.C. 2019) (finding that the EMO and its charter school “are significantly intertwined, yet legally distinct entities” and that the EMO could logically never be a state actor).

69. See *infra* Section III.B.

## II. AN INTRODUCTION TO EDUCATIONAL MANAGEMENT ORGANIZATIONS (EMOs)

### A. *Definition and Typical Roles of the EMO*

An educational management organization, or EMO, is “a for-profit corporation, business, organization or other entity that provides services relating to the operation and management of charter schools.”<sup>70</sup> EMOs are not the nonprofit organization that applies for a charter or forms the board of the charter school itself. Rather, an EMO is an entity separate from the school—a private company that contracts with a charter school board to provide services varying from back-office support to day-to-day management responsibilities, including developing curriculum, hiring teachers, and disciplining students.<sup>71</sup> EMOs vary widely in size,<sup>72</sup> but they are generally characterized by their: (1) for-profit nature, (2) generally high degree of control over the day-to-day school operations, and (3) tendency to partner with relatively inexperienced or hands-off charter school boards.<sup>73</sup>

Many inexperienced charter school boards partner with full-service EMOs for simple convenience. As one pro-charter school organization boasts, EMOs allow “community leaders to charter a school in their neighborhood, without all the hassle of filing a charter, finding vendors, purchasing textbooks, hiring teachers/admins/custodians/etc., creating a budget, finding an existing facility, building a new facility, etc.”<sup>74</sup> It is precisely this level of board member

70. NEV. REV. STAT. ANN. § 388A.030 (LEXIS through legislation from the 80th Reg. Sess. (2019), the 31st Spec. Sess. (2020), and the 32d Spec. Sess. (2020)).

71. See, e.g., Charter Management Agreement Between Charter Schools USA and Steele Creek Charter Educational Foundation, Inc., art. III, para. C (Sept. 21, 2017) [hereinafter Steele Creek Mgmt. Agreement] (on file with the North Carolina Law Review) (giving the EMO authority over “the day-to-day management of the Charter School”); Douglass Bacon Agreement, *supra* note 4, § 4.03 (listing the EMO’s duties, including picking curriculum, training all faculty/staff, and conducting all food service); Services Agreement Between Torchlight Academy Schools, LLC and Power Elite Male Preparatory Academy (Aug. 17, 2019) (on file with the North Carolina Law Review) (listing the EMO’s duties, including “testing, promotion, and retention” of students, “student behavior management and discipline,” the development of a school uniform policy, and the hiring and firing of all educational and support staff).

72. Based on a 2016–2017 report by the National Alliance for Public Charter Schools, forty-one percent of EMOs in operation that year oversaw three to five schools, thirty-seven percent oversaw six to fifteen schools, nine-percent oversaw sixteen to twenty-five schools, and thirteen percent oversaw more than twenty-six schools. REBECCA DAVID, NAT’L ALLIANCE FOR PUB. CHARTER SCHS., NAT’L CHARTER SCH. MGMT. OVERVIEW 14 (2018), [https://www.publiccharters.org/sites/default/files/documents/2019-10/napcs\\_management\\_report%20%283%29.pdf](https://www.publiccharters.org/sites/default/files/documents/2019-10/napcs_management_report%20%283%29.pdf) [<https://perma.cc/B75H-8DJL>].

73. See AM. SCH. CHOICE, *supra* note 4 (“An education management organization . . . tends to manage all aspects of the educational experience . . . without waiting for boards to call on it for help. EMOs are typically for-profit companies with . . . a successful model that it replicates across the state or country. It does this by seeking out community leaders who want to start a charter school, *but who lack the wherewithal to do so.*” (emphasis added)).

74. *Id.*

disconnect from educational operations that some claim is so dangerous at EMO-run schools. Unlike independent charter schools or traditional public schools, EMO-run schools are managed by businesses with no duty of obedience<sup>75</sup> to the school's mission of educating children and potentially no fiduciary duty<sup>76</sup> to ensure that state funds are spent in accordance with the public school's constitutional mandate, despite the EMOs' intensive control over day-to-day operations and student achievement.

As the number of charter schools climbs across the nation, so too does the number of schools managed by EMOs. EMOs now manage approximately 12% of charter schools both nationally and in North Carolina.<sup>77</sup> The increasing popularity of EMOs is clearly visible among recent applications for charters submitted to the North Carolina Department of Public Instruction: A total of twenty-nine applications for new schools were submitted in the 2017 application cycle, four of which (14%) would have been managed by EMOs.<sup>78</sup> In the 2019 cycle, thirteen of thirty-five applications contained EMO agreements (37%);<sup>79</sup> in the 2020 cycle, EMOs were attached to ten of nineteen applications (53%).<sup>80</sup>

Charter school boards and EMOs do not always get along. When conflicts arise, these disputes—often caused by the EMO's influence over the schools'

75. The "Duty of Obedience" is a nonprofit law doctrine that nonprofit board members must ensure that the nonprofit spends its resources in a way that supports its defined charitable mission. In the context of a nonprofit organized to apply for a charter school, fulfilling the Duty of Obedience requires board members to ensure that state funds are not being used for corporate or private enrichment rather than educational purposes. *See* Kelley, *supra* note 30, at 1819. The Duty of Obedience does not apply to for-profit entities, however, and there is no analogous doctrine outside of contract remedies to hold EMO directors accountable for misuse of funds. For an in-depth discussion of the nonprofit law obligations of charter schools and evidence that many charter schools across North Carolina (especially those operated by a select group of EMOs) may be violating said duties, see *id.*

76. North Carolina courts have not definitively found whether EMOs or CMOs owe fiduciary duties to the schools they serve. Based on cases from other jurisdictions, this question is a fact-specific inquiry turning on the amount of managerial control ceded to the EMO via contract. *See, e.g.,* Hope Acad. Broadway Campus v. White Hat Mgmt., LLC, 46 N.E.3d 665, 676 (Ohio 2015) (finding that the EMO owed a fiduciary duty where the contract put it in charge of "staffing levels, recordkeeping, teacher training, and hiring and firing teachers").

77. *See* DAVID, *supra* note 72, at 6.

78. *See* N.C. DEP'T OF PUB. INSTRUCTION, 2017 FALL APPLICATIONS (2017), <https://files.nc.gov/dpi/documents/charterschools/applications/19-20/application-progress-master.xlsx> [<https://perma.cc/NN3A-2S4L> (staff-uploaded archive)].

79. *See* N.C. DEP'T OF PUB. INSTRUCTION, 2019 SUBMITTED APPLICATIONS DATA (2019), [https://files.nc.gov/dpi/documents/charterschools/applications/21-22/applications-progress-master\\_march-2020.pdf](https://files.nc.gov/dpi/documents/charterschools/applications/21-22/applications-progress-master_march-2020.pdf) [<https://perma.cc/46T2-43PY> (staff-uploaded archive)].

80. *See* N.C. DEP'T OF PUB. INSTRUCTION, 2020 SUBMITTED APPLICATIONS DATA (2020), [https://files.nc.gov/dpi/documents/charterschools/applications/21-22/nc-applications2020\\_website.xlsx](https://files.nc.gov/dpi/documents/charterschools/applications/21-22/nc-applications2020_website.xlsx) [<https://perma.cc/82BR-4XXT> (staff-uploaded archive)]. For a complete list of submitted and accepted charter school applications from the 2013–2020 application cycles, see *Submitted Apps*, N.C. DEP'T PUB. INSTRUCTION, <https://www.dpi.nc.gov/students-families/innovative-school-options/charter-schools/applications/submitted-apps#2019-applications-to-open-in-2020-accelerated--2021-regular-> [<https://perma.cc/YB5R-XW84>] (select the application year of interest, then click "Applications Progress Chart," then download excel file).



budgets and finances<sup>81</sup>—can throw school operations into flux and result in wasted state dollars. In one recent example, Essie Mae Kiser Foxx Charter School, a public charter located in East Spencer, North Carolina (a town with approximately 1,500 mostly minority and low-income residents and no public school since the 1980s) split with EMO Torchlight Academy Services after the school suffered a \$50,000 deficit one year into the parties' contract.<sup>82</sup> The board, which attributed the deficit to Torchlight's failure to pay operating costs or account for expenditures, was forced to bill Torchlight \$30,000 and secure a separate line of credit to cover the deficit because the EMO had technically not breached its contractual duties.<sup>83</sup>

#### B. *Potential Abuses of the EMO-Charter School Contractual Relationship*

As the Essie Mae Kiser Foxx example illustrates, the business relationships between charter school boards and EMOs presents opportunities for abuse. Three recurring structural problems in these contracts ultimately support the arguments against immunity for EMOs (and, likely, against per se immunity for charter boards compliant in forming such agreements): (1) "sweep" contracts; (2) EMO retention of property purchased with state funds; and (3) contracts granting EMOs the ability to cancel management agreements based solely on the board's refusal to implement the EMO's suggested policies.

##### 1. "Sweep" Contracts

Imagine the following hypothetical: As in many typical charter school scenarios, a group of like-minded business leaders want to start a school in their community with the honest intention of giving students a chance to succeed. They form a nonprofit organization with the intention of applying for a charter from the state, but they have no experience running a school or educating children. They are then contacted by a representative from Charters Inc.—an EMO that runs successful charter schools across the state. Charters Inc. meets with the board, discusses their goals for the school, and proposes entering into an exclusive management contract. The terms are simple: Charters Inc. will purchase and provide all the school's books and computers, hire all teachers and administration personnel, supply a proprietary curriculum that meets the state's required academic benchmarks, and provide a building that the school will rent

81. See, e.g., *Services Agreement Between Torchlight Academy Schools, LLC and BEAM Academy*, art. III, para. E (Aug. 18, 2019) [hereinafter *BEAM Acad. Servs. Agreement*] (on file with the North Carolina Law Review) (giving the EMO control over "all aspects of the School's accounting operation," subject to board oversight).

82. See Greg Childress, *Rowan County Charter School Seeks To Sever Agreement with Raleigh-Based Management Firm*, NC POL'Y WATCH (Aug. 1, 2019), <http://www.ncpolicywatch.com/2019/08/01/rowan-county-charter-school-seeks-to-sever-agreement-with-raleigh-based-management-firm/> [https://perma.cc/ZLSZ-YA9S].

83. *Id.*

from Charters Inc.'s real estate subsidiary. In return, the school is required to establish a joint bank account with Charters Inc. and deposit all revenue from the state of North Carolina into said account within three days of receipt. Once the funds are deposited, Charters Inc. has the ability to withdraw, spend, and allocate the funds as they see fit (so long as their expenditures align with the general purpose of running the school). During the school's first year of operation, the nonprofit pays Charters Inc. over \$1 million in state funds. Regarding the destination of these funds, the nonprofit simply knows that they are being spent on line items such as "staff development," "back office support," and "misc. equipment rental." The school appears to be running well, the parents are satisfied, and no questions are asked.<sup>84</sup>

The imaginary contract described above is a prototypical example of a "sweep" contract—an agreement by which nearly all of a school's public funding (typically well over 90%) is "swept" into a separate or joint account over which the EMO has discretionary control.<sup>85</sup> In this setup, used in practically every EMO-operated school in North Carolina,<sup>86</sup> the charter school, intentionally or not, essentially functions as a pass-through entity for the for-profit company providing the actual educational services. This pass-through nature is even more evident in contracts such as BEAM Academy's 2019 service agreement with Torchlight Academy Schools, LLC, which explicitly states that the EMO "shall receive all Revenues as its services fee . . . from which it shall pay all operating costs of the School."<sup>87</sup>

The obvious consequences of sweep contracts are twofold. First, by automatically contracting away its right to exclusive discretionary control over *all* state funds rather than just the EMO's share, the charter school is creating potential for abuse by funneling public money into a for-profit entity with "no legal obligation to act in the best interest of the schools or taxpayers."<sup>88</sup> Although EMOs are ostensibly bound to spend these funds in accordance with

84. The details of this imaginary school's contract are taken from a real-life Charter-EMO contract used by Roger Bacon Academy at multiple schools in North Carolina. See Kelley, *supra* note 30, at 1791–95 (describing Roger Bacon Academy's financial management practices).

85. Marian Wang, *When Charter Schools Are Nonprofit in Name Only*, PROPUBLICA (Dec. 9, 2014, 11:49 AM), <https://www.propublica.org/article/when-charter-schools-are-nonprofit-in-name-only> [<https://perma.cc/5F8H-EX93>]. Sweep contracts can generate consistently massive revenue for EMOs that operate multiple schools—for example, three Roger Bacon Academy schools received more than \$13 million in state funds from 2013 to 2014 alone. Kelley, *supra* note 30, at 1793. Because the EMOs themselves are private, however, it is usually "impossible" to determine exactly how much profit a given EMO generates in a given year. *Id.*

86. See, e.g., Douglass Bacon Agreement, *supra* note 4, § 6.01 (providing for a joint account between the Academy and the EMO, requiring deposit by Academy of all revenue within three days, and authorizing the EMO to disburse funds from account "for the compensation of RBA").

87. BEAM Acad. Servs. Agreement, *supra* note 81, art. VIII para. E.

88. Wang, *supra* note 85. See also *State ex rel. Cooper v. Kinston Charter Acad.*, 268 N.C. App. 531, 539, 836 S.E.2d 330, 337 (2019) ("In other words, under our State Constitution, every public school in North Carolina—whether traditional or chartered—is the State.").

the school's approved budget, evidence from board meeting minutes across the state suggests both that: (1) EMOs do not supply board members with detailed enough reports to understand how the money is being spent, and (2) some boards appear not be taking a close enough look to fulfill their fiduciary duties of care and loyalty.<sup>89</sup> Second, sweep contracts make it more difficult for state regulators to track the specific uses of state funds, as EMOs are not subject to the same open records laws as the charter schools they serve.<sup>90</sup>

## 2. Retention of Property Purchased with State Funds

In addition to the sweep clause in the contract with Charters Inc. described above, imagine that the board members also (perhaps unwittingly) agreed to a provision that Charters Inc., rather than the charter school, would retain control over some of the materials purchased for educational purposes by the EMO using state funds. If the board ever decided to fire Charters Inc., how would they do it? Would they be able to declare the contract void and recover all the desks, computers, books, and other equipment needed to operate the school?

This was the factual situation presented in *Hope Academy Broadway Campus v. White Hat*,<sup>91</sup> a 2015 Ohio Supreme Court case. White Hat, the EMO that Hope Academy wished to fire, had received over ninety-five percent of Hope Academy's state funds in return for conducting nearly all day-to-day activities—pursuant to the parties' contract.<sup>92</sup> A problem arose, however, when the school realized that the vast majority of property White Hat had purchased with these funds—including computers, books, and other equipment essential for operating the school—was titled in White Hat's name and therefore unavailable to the charter school if it ever wanted to fire White Hat.<sup>93</sup> The court was forced to decide whether the contract between the parties, which expressly required the school to buy back any personal property purchased by White Hat with state funds, was enforceable.<sup>94</sup> Surprisingly, the court said yes. Specifically, the court wrote that although “a private entity such as White Hat engaged in the business of education is accountable for the manner in which it uses public funds,”<sup>95</sup> Hope Academy was bound to the terms to which it had agreed in the arm's-length deal. Because the court could not determine based on the record whether White Hat had breached any fiduciary duty that may have been created by its involvement in a government function (education),

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89. See Kelley, *supra* note 30, at 1805–06.

90. Wang, *supra* note 85.

91. Hope Acad. Broadway Campus v. White Hat Mgmt., LLC, 46 N.E.3d 665, 667–68 (Ohio 2015).

92. *Id.* at 668.

93. *Id.* at 669.

94. *Id.* at 668.

95. *Id.* at 674.

Hope Academy was forced to buy back any personal property it wished to retain from its EMO (presumably with more state money).<sup>96</sup>

Although North Carolina's courts have not specifically decided a case analogous to the *Hope Academy* facts, the case reveals a need for more stringent regulation of contracts between charter schools and EMOs. This need is especially real because North Carolina charter schools continue to enter into service agreements (like the one in *Hope Academy*) that give the EMO perpetual ownership of school assets.<sup>97</sup> The current North Carolina statutory framework helpfully requires charter organizations to include executed EMO management contracts with their charter applications and mandates annual audits of the school itself.<sup>98</sup> Without more involved contractual assistance from the State Board or the Office of Charter Schools, however, charter schools could find themselves in a position similar to Hope Academy—buying back textbooks, desks, or computers with state funds due to their own poor contracting.<sup>99</sup>

### 3. EMO Ability To Cancel Management Contracts

Beyond the substantive rights of discretionary spending and property ownership in EMO contracts, a third danger in the current system is the power held by some EMOs to cancel their contracts based solely on the charter school board's refusal to implement the EMO's preferred policy or personnel decisions.<sup>100</sup> This power does not appear as commonly as sweep contracts and is sometimes hidden in generally worded clauses,<sup>101</sup> but it clearly grants EMOs notable leverage over their schools. If the management company is free to break its contract and abandon the school at the board's first refusal to hire a suggested teacher or to implement a suggested administrative policy, the board's practical power seems reduced regardless of its ultimate control over all "matters related

96. *Id.* at 668.

97. For an example of such a clause, see Steele Creek Mgmt. Agreement, *supra* note 71, art. III, para. D (making EMO's purchases of most equipment the school's property but stating that EMO retains ownership of all curriculum-related materials).

98. See N.C. GEN. STAT. § 115C-218.30 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.) (requiring annual audits).

99. At least one other case directly shows the need for external review of charter school contracts. See *Banyan GW, LLC v. Wayne Preparatory Acad. Charter Sch., Inc.*, 263 N.C. App. 709, 822 S.E.2d 791, 2019 WL 438327, at \*9 (2019) (unpublished table decision) (holding that a contract for operating costs between a charter school and an EMO was enforceable even though the contract was not approved by the State Board and the charter school misrepresented to the State Board that it would not operate the school with assistance of the EMO).

100. See *Douglass Bacon Agreement*, *supra* note 4, § 8.01 (granting an EMO the right to terminate the agreement based on "the Board's failure to adopt reasonable personnel recommendations made by RBA").

101. See *Chatham Preparatory Academy Management Agreement with Charter Schools USA*, art. VIII, § A(3) (Sept. 14, 2017) (on file with the North Carolina Law Review) (granting the EMO the right to terminate the contract if the board "fails to adopt a policy regarding the Charter School which prevents [the EMO] from satisfying its obligations").

to the operation of the school, including budgeting, curriculum, and operating procedures.”<sup>102</sup> Put differently, an EMO can walk away from a school board relationship (sometimes even taking the literal kitchen sink with them) with little to lose. School boards, on the other hand, are left with a school full of children, angry parents, and no teachers or day-to-day plan.

The next part takes this discussion into the real world of board and EMO liability, discussing sovereign immunity as applied in North Carolina and the recent *Kinston* decision that expanded the doctrine to automatically cover all charter schools in the state.

### III. SOVEREIGN IMMUNITY AND ITS CURRENT APPLICATION TO NORTH CAROLINA CHARTER SCHOOLS AND EMOS

#### A. *Sovereign Immunity in North Carolina*

The doctrine of sovereign immunity dictates that when an individual sues the State of North Carolina, the suit will be barred for lack of jurisdiction unless the state has specifically waived immunity.<sup>103</sup> The doctrine is based on a fundamental distinction between public and private roles—our society does not want senators, police officers, or other government agents to be deterred from fulfilling their duties due to fear of potential litigation, and so we grant them immunity for acts performed in the scope of those duties.<sup>104</sup>

Sovereign immunity protects both the State of North Carolina and its subdivisions—that is, suits against parties such as the University of North Carolina, the Department of Agriculture, or the Lieutenant Governor acting in their official capacity would be barred by sovereign immunity unless those parties had expressly waived the defense.<sup>105</sup> Charter schools are now considered, without limitation, a subdivision of the state.<sup>106</sup>

102. N.C. GEN. STAT. § 115C-218.15(d) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

103. See, e.g., *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 548, 660 S.E.2d 662, 665 (2008) (holding that marketing fee charged by state’s e-procurement website was constitutionally barred by sovereign immunity because defendants were (1) state officials, (2) sued in their official capacity, (3) who had not expressly waived sovereign immunity).

104. See generally TREY ALLEN, IMMUNITY OF THE STATE AND LOCAL GOVERNMENTS FROM LAWSUITS IN NORTH CAROLINA (2013) (describing ways that state and local government actors may be immune from lawsuits), [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course\\_materials/R03.1%20Local%20gov't%20immunity%20\(Superior%20Court%20Judges2\).pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/R03.1%20Local%20gov't%20immunity%20(Superior%20Court%20Judges2).pdf) [<https://perma.cc/DC4L-KB7U>].

105. There are several notable exceptions to the state’s blanket immunity, including breach of contract claims, state constitutional claims, and claims based in federal law. *Id.*; see also *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976) (“[W]henver the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.”).

106. *State ex rel. Cooper v. Kinston Charter Acad.*, 268 N.C. App. 531, 539, 836 S.E.2d 330, 337 (2019). Other than waiver through contract, announced in *Smith*, 289 N.C. at 320, 222 S.E.2d at 423–

The State Board is a subdivision of the State of North Carolina and may claim sovereign immunity accordingly.<sup>107</sup> Additionally, the Supreme Court of North Carolina held in 1960 that a county or city board of education, unless it has duly waived immunity from tort liability as authorized by statute, is not liable in a tort action or a proceeding involving a tort, except as such liability may be established under statute.<sup>108</sup> It is important to note that North Carolina courts interpret possible waiver of immunity very strictly. For example, the Supreme Court of North Carolina held in *Craig ex rel. Craig v. New Hanover Board of Education*<sup>109</sup> that the defendant board of education had not waived its immunity against a claim that a principal negligently failed to protect the plaintiff from a sexual assault because (1) the board's \$150,000 indemnification coverage through the North Carolina School Boards Trust "did not qualify as a purchase of liability insurance"; and (2) the board's actual excess insurance policy covered claims "arising out of . . . sexual misconduct of any kind," but did not specifically indemnify the board against *negligence* claims involving another party's sexual misconduct.<sup>110</sup> Accordingly, the plaintiff's negligence claims against the school board were completely barred.<sup>111</sup>

#### B. *Per Se Immunity for Charter Schools (Yarbrough and Kinston)*

Despite the strong tradition of governmental immunity outlined above, North Carolina's courts did not directly address the question of whether public charter schools can claim sovereign immunity until 2019, when the North Carolina Court of Appeals announced a bright-line rule in the affirmative.<sup>112</sup> In so ruling, the court joined with most jurisdictions to have considered the issue—the majority rule is that charter schools, as statutorily defined public schools,

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24, the most important express waiver of state sovereign immunity relevant to charter schools and EMOs is the State Tort Claims Act ("STCA"), The Tort Claims Act, ch. 1102, 1955 N.C. Sess. Laws 1088 (codified as amended at N.C. GEN. STAT. § 143-291 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.)). The STCA expressly waives immunity for negligence claims against "any officer, employee, involuntary servant or agent of the State," arising under circumstances that would make the State liable if it were a private entity. Two important limitations on the waiver of liability by STCA are that it: (1) only waives liability if employees are acting in their official capacity, and (2) does not waive liability for intentional torts by state employees (because there is a presumption that intentionally tortious behavior is not within the scope of a state employee's employment). See N.C. GEN. STAT. § 143-299.1 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

107. That is not to say that there are not opponents to absolute school board immunity. See, e.g., *Thomas v. Broadlands Cmty. Consol. Sch. Dist.*, 109 N.E.2d 636, 640–41 (Ill. App. Ct. 1952) (suggesting that the goal of protecting public funds was no longer served by sovereign immunity after a quasi-public entity such as a school district purchased liability insurance).

108. *Fields v. Durham City Bd. of Educ.*, 251 N.C. 699, 700, 111 S.E.2d 910, 911 (1960).

109. 363 N.C. 334, 678 S.E.2d 351 (2009).

110. *Id.* at 336, 678 S.E.2d at 353.

111. *Id.* at 342, 678 S.E.2d at 357.

112. See *State ex rel. Cooper v. Kinston Charter Acad.*, 268 N.C. App. 531, 538, 836 S.E.2d 330, 336 (2019).

are arms of their respective states and should thus be allowed to claim immunity to the same extent as other state agencies.<sup>113</sup> This section explains the current state of charter school immunity in North Carolina by examining two recent cases. In the first case, *Yarbrough*, the Eastern District of North Carolina in 2015 allowed a public charter school to claim immunity based on a prediction that the state courts would eventually formally adopt the doctrine based on charter schools' designation as public schools in section 115C.<sup>114</sup> This prediction bore fruit in *Kinston*—a 2019 North Carolina Court of Appeals case in which the court declared a per se rule that all charter schools may claim immunity as extensions of the state.<sup>115</sup>

In addition to accurately predicting per se immunity, *Yarbrough* is a cautionary tale for teachers seeking to sue their employer schools. In *Yarbrough*, several charter school teachers sued a public charter school—East Wake Academy (“EWA”)—and an individual school administrator for assault, battery, intentional and negligent infliction of emotional distress, and violations of the state constitution connected to sexual harassment at the hands of a former school employee.<sup>116</sup> The Eastern District of North Carolina predicted that the North Carolina courts would find that “charter schools, as statutorily-defined public schools, enjoy the same governmental immunity as traditional public schools,”<sup>117</sup> and dismissed plaintiffs' tort claims against EWA for lack of jurisdiction.<sup>118</sup>

In justifying its ruling, the *Yarbrough* court stressed that state and local government immunity is (1) judge made, and (2) firmly established in the state's

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113. For examples of other jurisdictions allowing charter schools to claim immunity, see *King v. United States*, 53 F. Supp. 2d 1056 (D. Colo. 1999), *rev'd in part*, 301 F.3d 1270 (10th Cir. 2002). In *King*, the district court found that a charter school was protected by sovereign immunity from negligence claims brought by property owners whose property had been destroyed by a forest fire inadvertently set by charter school students during a field trip because (1) the charter school was a “district, agency, instrumentality, or political subdivision” of the State of Colorado, as required for immunity under the state's Colorado Governmental Immunity Act; (2) the school was not a licensee with the state; and (3) charter schools were not too autonomous in their daily operations or financial dealings to be considered a state agency or instrumentality. *Id.* at 1065–68. Another example is *Warner v. Lawrence*, 900 A.2d 980 (Pa. Commw. Ct. 2006), in which a Pennsylvania court found that the charter school defendant was protected by sovereign immunity as a political subdivision of the state. *Id.* at 988. Notably, the *Warner* court struck down the plaintiff's state constitutional challenge in part due to the reasoning that charter schools function as political subdivisions of the state *because local school boards exercise considerable control over charter schools' existence and approved charter school applications in Pennsylvania*. *Id.* at 986–88. Since similar local control over charter school applications and operations does not exist in North Carolina, our state's courts should specify the specific manner in which the state exerts control over charter schools in any decision upholding immunity as a defense. This was the approach taken in *Kinston*, as discussed below.

114. *See id.* at 337.

115. *See Kinston*, 268 N.C. App. at 538, 836 S.E.2d at 336.

116. *Yarbrough*, 108 F. Supp. 3d at 336.

117. *Id.* at 337.

118. *Id.* at 339.

caselaw and public policy.<sup>119</sup> In so ruling, the court rejected the plaintiffs' argument that the statutory mandate for charter schools to carry liability insurance,<sup>120</sup> and the absence of such a requirement for either municipalities<sup>121</sup> or traditional public schools,<sup>122</sup> showed an intent by the General Assembly to differentiate the civil immunity available to charter and traditional public schools.<sup>123</sup> Instead, the court held that EWA enjoyed an identical degree of immunity as both municipalities and traditional public schools across the state, and further held that EWA had not waived this immunity because the school's insurance policy contained a clause which read in part, "This policy does not constitute a waiver of any governmental immunity to which you are entitled."<sup>124</sup> *Yarbrough* therefore predicted that public charter schools were free to (1) assert sovereign immunity against any nonfederal, nonconstitutional civil claims not brought under the State Tort Claims Act,<sup>125</sup> and (2) avoid section 115C-218.20's waiver trap by merely inserting a clause in their liability policies stating that immunity had not been waived.

The Eastern District's prediction rang true in *Kinston*, the 2019 North Carolina Court of Appeals case which announced a bright-line rule allowing all public charter schools to assert sovereign immunity against civil claims.<sup>126</sup> *Kinston* was a North Carolina False Claims Act ("NCFCA") suit brought by the State against Kinston Charter Academy ("KCA") and its individual administrator to recover state funds paid to KCA due to an alleged false claim regarding enrollment figures prior to the school's closing.<sup>127</sup> The North Carolina Court of Appeals dismissed all claims against KCA,<sup>128</sup> reasoning that:

119. *Id.* at 337.

120. N.C. GEN. STAT. § 115C-218.20(a) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

121. *Id.* § 160A-485(a) (LEXIS).

122. *Id.* § 115C-42 (LEXIS).

123. *See Yarbrough*, 108 F. Supp. 3d at 339.

124. *Id.* at 338.

125. The Tort Claims Act, ch. 1102, 1955 N.C. Sess. Laws 1088 (codified as amended at N.C. GEN. STAT. § 143-291 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.)). The State Tort Claims Act is one of the most important statutory waivers of North Carolina's sovereign immunity. For discussion of the Act, including limitations on its scope, see *supra* note 106.

126. *See State ex rel. Cooper v. Kinston Charter Acad.*, 268 N.C. App. 531, 538, 836 S.E.2d 330, 336 (2019).

127. *Id.* at 533-34, 836 S.E.2d at 333-334. Each charter school is required to supply the Department of Public Instruction with estimated enrollment figures for each upcoming school year in addition to actual enrollment figures as of the first and twentieth days of school. If a school's anticipated and actual enrollment figures do not match, the school's subsequent funding is adjusted to "recapture" the excess on behalf of the state. In this case, KCA told the state that 366 students would enroll during the 2013-2014 school year, but only 189 students actually attended. KCA lost its charter during the fall 2013 semester, meaning that the state could not recapture its excess funding grant to KCA through the normal means of subsequent adjustment. This lawsuit—alleging intentional exaggeration of estimated enrollment—was the result. *Id.*

128. *Id.* at 532, 836 S.E.2d at 333.



(1) KCA was a charter school created pursuant to section 115C, and that all such schools are public schools based on the plain wording of the statute;<sup>129</sup> (2) all public schools, including KCA, “directly exercise the power of the State” because they are “under the exclusive control of the state”;<sup>130</sup> and (3) all charter schools “perform a core constitutional function of the highest order with the benefit of State appropriated funds.”<sup>131</sup> The court thus announced that “charter schools, as public schools in the State of North Carolina, exercise the power of the State and are an extension of the State itself. Therefore, as an extension of the sovereign, charter schools are entitled to exercise the State’s sovereign immunity.”<sup>132</sup>

After announcing the *per se* rule in favor of immunity for charter schools, the *Kinston* court stated in dicta that KCA would not be liable even if it could not claim sovereign immunity under an explicit statutory grant because it met the Fourth Circuit’s arm-of-the-state test and should therefore be considered part of the state.<sup>133</sup> The test referenced is a nonexclusive, four-factor test to determine whether an organization is “truly subject to sufficient state control to render [it] a part of the state.”<sup>134</sup> It is worth describing the Fourth Circuit’s test in detail because an examination of the factors shows that—in the absence of a bright-line rule—an EMO-managed school may actually fail a fact-specific inquiry of its arm-of-the-state status. The Fourth Circuit’s four factors for arm-of-the-state status are:

- (1) whether any judgment against the entity as defendant will be paid by the State or whether any recovery by the entity as plaintiff will inure to the benefit of the State;
- (2) the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity’s directors or officers, who funds the entity, and whether the State retains a veto over the entity’s actions;
- (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and

129. *Id.* at 537, 836 S.E.2d at 336.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 538, 836 S.E.2d at 337.

134. *Id.* at 540, 836 S.E.2d 338 (quoting *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579 (4th Cir. 2012)). The North Carolina Court of Appeals cited this test because the plaintiff in *Kinston* sued under the NCFCA, which only allows claims against a “person” who makes false claims. The NCFCA’s definition of “person” defaults to the Federal False Claims Act’s definition, and the Fourth Circuit’s test is the test used to define “person” for the purpose of the Federal False Claims Act. *Id.* There is no indication in the *Kinston* decision, however, that the court thinks that any other test would be needed for a claim not involving the NCFCA.

(4) how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State.<sup>135</sup>

Although the *Kinston* court provided little context for this test, the Fourth Circuit itself has explained the purpose of the test by stating that “these factors endeavor to draw the line between ‘a State-created entity functioning independently of the State from a State-created entity functioning as an arm of the State or its alter ego.’”<sup>136</sup>

While many public charter schools across North Carolina may be rightly characterized as an arm of the state due to their total control over state funds and their day-to-day decision making authority, the next section argues against the bright-line *Kinston* rule based on the idea that some charter schools—and specifically those schools with sweep contracts and other questionable management agreements with EMOs—are practically functioning “independently of the State” and would arguably fail at least the first three of the four factors listed above.<sup>137</sup>

### C. *The Argument Against Per Se Immunity for Charter Schools*

It cannot be ignored that section 115C-218.15(a) of the General Statutes of North Carolina defines charter schools as “public school[s].”<sup>138</sup> But section 115C creates a quasi-public education system in which some charter schools across North Carolina have contracted away day-to-day educational, administrative, employment, and financial decision making to EMOs.<sup>139</sup> The *Kinston* court's decision to extend per se sovereign immunity to all public charter schools in North Carolina based on this statutory definition alone ignores the very real (though limited) autonomy from state oversight that charter schools enjoy.<sup>140</sup> Rather than applying a bright-line rule, a more flexible and grounded approach would apply a case-by-case determination based on whether a given charter school—EMO-run or not—actually qualifies as an “arm of the State” under the Fourth Circuit's four-factor test and should thus be entitled to wield the state's immunity.<sup>141</sup> Surprisingly, there is a strong argument for all charter

135. *Id.*

136. *Oberg*, 681 F.3d 575 at 580 (quoting *S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 303 (4th Cir. 2008)).

137. *See supra* notes 134–35 and accompanying text.

138. N.C. GEN. STAT. § 115C-218.15(a) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

139. *See supra* notes 85–90 and accompanying text.

140. *Kinston*, 268 N.C. App. at 541–42, 836 S.E.2d at 336.

141. In the specific context of EMO-run schools, a school could fail the arm-of-the-state analysis if the facts show that it has, for example, ceded meaningful discretionary control over administrative and employment decisions, fallen out of compliance with state reporting requirements, or yielded

schools that the answer is no. Applying the Fourth Circuit test to North Carolina's charter school scheme suggests that the *Kinston* court erred by assuming that: (1) all charter schools operate “under the exclusive control of the State,” [factor 2 above]; (2) that any judgement against these schools will be paid with state funds [factor 1 above]; and (3) that the charter school is involved with “state” rather than “local” concerns [factor 3 above].<sup>142</sup>

First, although the State Board has final authority to grant and revoke charters, that authority does not mean that the state exerts “exclusive control” over any given school's actual performance of its constitutional function. Indeed, the *Kinston* court's blanket conclusion that EMO-run schools exist “under the exclusive control of the State”<sup>143</sup> reveals an unwarranted equation of “exclusive control” with the state's power to forcibly close schools. It is of course true that the state can revoke the charter of any charter school it wishes, eliminating the school's ability to legally operate.<sup>144</sup> The state wields this same cancelling power, however, over all of the 188 occupations licensed by the State of North Carolina—including some, such as floor sanders and locksmiths, that no one would argue should have access to governmental immunity.<sup>145</sup> For the state to actually “exclusively control” a charter school and so render the school an arm of the state, the state would need to exert minute control over the school's day-to-day management decisions<sup>146</sup>—setting general curriculum goals that establish the constitutionally required minimum simply should not be enough to obtain arm-of-the-state status.<sup>147</sup>

The Fourth Circuit discussed the degree of influence required for “extensive control” in *Cash v. Granville County Board of Education*,<sup>148</sup> a case in which the court ultimately held that county school boards in North Carolina are

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control over state funding through the contract structures discussed above. *See id.* at 540, 836 S.E.2d at 338.

142. *See id.* at 543–44, 836 S.E.2d at 340 (applying the four-factor test); *see also supra* notes 134–35 and accompanying text (stating the four-factor test used to determine whether a charter school has arm-of-the-state status for immunity purposes).

143. *Kinston*, 268 N.C. App. at 544, 836 S.E.2d at 340 (quoting *Bridges v. City of Charlotte*, 221 N.C. 472, 478, 20 S.E.2d 825, 830 (1942)).

144. N.C. GEN. STAT. § 115C-218.95 (LEXIS through Reg. Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

145. PATRICK A. MCLAUGHLIN, MATTHEW D. MITCHELL, ANNE PHILPOT & TAMARA WINTER, MERCATUS CTR. AT GEO. WASH. UNIV., THE STATE OF OCCUPATIONAL LICENSURE IN NORTH CAROLINA 1 (May 2018), [https://www.mercatus.org/system/files/mclaughlin2c\\_mitchell2c\\_philpot2c\\_and\\_winter\\_-\\_policy\\_brief\\_-\\_the\\_state\\_of\\_occupational\\_licensure\\_in\\_north\\_carolina\\_-\\_v1.pdf](https://www.mercatus.org/system/files/mclaughlin2c_mitchell2c_philpot2c_and_winter_-_policy_brief_-_the_state_of_occupational_licensure_in_north_carolina_-_v1.pdf) [<https://perma.cc/D4NG-XS6W>].

146. *See Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 226 (4th Cir. 2001).

147. Recognizing the granular level of influence logically required by the “exclusive control” factor in the arm-of-the-state analysis, in 2001 the Fourth Circuit held that the Granville County Board of Education—a government entity tasked with overseeing *traditional* public schools—was not controlled by the state to the extent required to qualify for immunity. *See id.* at 226–27.

148. 242 F.3d 219 (4th Cir. 2001).

not state subdivisions and therefore cannot claim sovereign immunity against federal statutory claims.<sup>149</sup> The court rejected the school board's argument that it was under the "exclusive control" of the state because the state mandated its curriculum, writing that:

[T]hese State-imposed requirements involve *only* the substance of the educational program and not the local school board's prerogatives in administration. The fact that in limited circumstances the State Board of Education can suspend the powers of the local board . . . does not mean that, in the matters of administration and employee relations, the local school boards are not autonomous.<sup>150</sup>

Public charter schools in North Carolina are similarly autonomous in their administrative and employment-related decision making—a fact completely ignored by the *Kinston* court.<sup>151</sup>

In addition to ignoring the state's lack of "exclusive control," the *Kinston* court's decision that all charter schools would satisfy the first factor of the Fourth Circuit's arm-of-the-state test ignores the fact that civil recovery against charter schools—EMO or non-EMO—is usually only possible to the extent that they have indemnified themselves through the mandatory purchase of *private insurance*.<sup>152</sup> Thus, damages awarded in suits against any charter school will typically not be "paid by the state."<sup>153</sup> If a suit against an EMO-run school was caused by the EMO's wrongdoing—a likely scenario, due to the company's day-to-day level of engagement—a judgment against the charter school would either be paid by the EMO or paid by the charter school's insurance provider, who would then doubtlessly seek to recoup its loss from the company. In either case, there is an argument that some (if not all) of the judgement would be paid

149. *Id.* at 226.

150. *Id.*

151. *See* CTR. FOR CMTY. SELF-HELP, A.J. FLETCHER FOUND. & PUB. IMPACT, NORTH CAROLINA CHARTER SCHOOLS: EXCELLENCE AND EQUITY THROUGH COLLABORATION 4–5 (2014), [https://publicimpact.com/wp-content/uploads/2014/07/NC\\_Charter\\_Schools\\_Excellence\\_and\\_Equity\\_through\\_Collaboration\\_Full-Report-Public\\_Impact.pdf](https://publicimpact.com/wp-content/uploads/2014/07/NC_Charter_Schools_Excellence_and_Equity_through_Collaboration_Full-Report-Public_Impact.pdf) [<https://perma.cc/4WFK-QREP>]. Although it is arguable whether an independent charter school is under "exclusive control" of the state, it seems clear that EMO-run schools—where the state has little part in directing day-to-day decision making—do not fit the bill. *See id.*; *see also* Kelley, *supra* note 30, at 1794 (discussing how the EMO-run Roger Bacon Academy enjoyed day-to-day management control). This transfer of responsibility is potentially even more dangerous—and should even more obviously eliminate a charter school's ability to claim immunity—when schools attempt to hide their relationship with EMOs from the Department of Public Instruction by contracting with the third-party organization in a merely consulting or administrative role. *See, e.g.,* Banyan GW, LLC v. Wayne Preparatory Acad. Charter Sch., Inc., 263 N.C. App. 709, 822 S.E.2d 791, 2019 WL 438327, at \*1–2 (2019) (unpublished table decision).

152. *State ex rel. Cooper v. Kinston Charter Acad.*, 268 N.C. App. 531, 541–42, 836 S.E.2d 330, 339 (2019).

153. N.C. GEN. STAT. § 115C-218.20 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

by a third party rather than the state. A per se ruling that *all* judgments against charter schools will *always* be paid by the state thus ignores the reality of North Carolina's own statutory indemnification requirements for charter schools (not to mention the sweep contracts that often divert state funds to private control in EMO-run schools).

Additionally, the third factor of the arm-of-the-state test—whether the entity is involved with state concerns (as distinct from nonstate concerns)—does not cut in favor of the *Kinston* court's ruling that all charter schools are arms of the state. Although the *Kinston* court reasoned that Kinston Charter was involved with a state concern because the North Carolina Constitution charges the state with providing a public education system,<sup>154</sup> the Fourth Circuit considered and rejected this very argument in *Cash*.<sup>155</sup> Although the school board defendant in *Cash* argued that its role in carrying out the state's educational mandate meant that it was involved with state concerns, the court wrote that “the School Board’s jurisdiction is limited to Granville County. The fact that *education* is a statewide concern does not indicate otherwise.”<sup>156</sup> Similar to the county school board in *Cash*, any single charter school’s “jurisdiction” is extremely limited—it is defined as a public school within a local administrative unit,<sup>157</sup> and each school is focused on educating local children rather than advancing statewide goals. Given this lack of statewide concerns, in combination with the other factors referenced above, charter schools simply cannot meet the arm-of-the-state test and should therefore not be granted sovereign immunity absent a factual showing that such treatment is warranted.

Finally, adopting a fact-specific test for charter school immunity centered around the school's *function* (or lack thereof) as a state subdivision rather than the school's *statutory designation* mirrors North Carolina courts' treatment of immunity claims by other quasi-public entities. In *News & Observer Publishing Co. v. Wake County Hospital System, Inc.*,<sup>158</sup> for example, the North Carolina Court of Appeals considered whether the defendant—a quasi-public hospital operated by a nonprofit board created by Wake County—was a state agency or subdivision for the purpose of a state public records law.<sup>159</sup> Although the relevant health care statutes seemingly dictated that the defendant was not a “public agency,”<sup>160</sup> the court ultimately held that the “nature of the relationship between the [hospital] and the county,” rather than the statutory language,

154. *Kinston*, 268 N.C. App. at 538, 836 S.E.2d at 337 (“In other words, under our State Constitution, every public school in North Carolina—whether traditional or chartered—is the State.”).

155. *Cash*, 242 F.3d at 226.

156. *Id.*

157. N.C. GEN. STAT. § 115C-218.15(a) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

158. 55 N.C. App. 1, 284 S.E.2d 542 (1981).

159. *Id.* at 7, 284 S.E.2d at 546.

160. *Id.*

showed that the hospital was indeed a subdivision of the state.<sup>161</sup> Specifically, the court asked whether the hospital's "'independent authority' so overshadows the county's supervisory responsibilities that it forecloses a conclusion that the System is an 'agency of North Carolina government or its subdivisions.'"<sup>162</sup> Facts proving the county's "manifest" control over the hospital in *Wake County Hospital System* included: the county's power to reject any appointment to the hospital's board of directors; the requirement that the hospital operate on land owned by the county and be funded exclusively by county bonds; and the hospital's inability to amend its articles of incorporation in any way without the county's written consent.<sup>163</sup>

The analysis in *Wake County Hospital System*, focused on the "nature of the relationship" between the quasi-public entity and the state, provides a logical framework through which to analyze public charter schools' immunity claims on a case-by-case basis. Rather than applying a per se rule, this test would measure the school's "independent authority" against the state's *practical* control. If the courts adopted such a test, charter nonprofits' relatively large degree of administrative freedom could result in a surprising number of schools falling outside the state's protective umbrella—perhaps an undesirable result, but one more in line with the reality of day-to-day charter school administration.

#### D. *The Argument Against Immunity for EMOs*

Regardless of whether North Carolina courts are willing to reverse *Kinston's* bright-line rule, the prospect of an EMO claiming sovereign immunity based on its role in performing the school's governmental objective is a troubling potential corollary issue that should be directly addressed and directly rejected by the Supreme Court of North Carolina. If an EMO was to argue that it enjoys some measure of immunity, it would likely argue either that (1) section 115C-218.20 implies at least some measure of EMO immunity by mentioning "[a]ny sovereign immunity of the charter school, [or] of the *organization that operates* the charter school";<sup>164</sup> or that (2) EMOs share the charter school's immunity to the extent that the EMO functions as the charter school's agent. The following sections address these arguments in turn, stressing the facts that

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161. *Id.* at 11, 284 S.E.2d at 548.

162. *Id.* at 9, 284 S.E.2d at 547.

163. *Id.* at 11, 284 S.E.2d at 548–49. For other cases in which North Carolina courts have looked to similar factors to determine whether hospitals operate as subdivisions of the state, see generally *Sides v. Cabarrus Mem. Hosp., Inc.*, 287 N.C. 14, 213 S.E.2d 297 (1975) (holding a hospital to be a public agency), and *Coats v. Sampson Cty. Mem. Hosp., Inc.*, 264 N.C. 332, 141 S.E.2d 490 (1965) (holding hospital to be a public agency because the hospital operated on government-owned land and was led by a board of trustees appointed by the county board of commissioners).

164. N.C. GEN. STAT. § 115C-218.20 (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.) (emphasis added).

EMOs are not public, operate expressly for profit, and appear to be bound to their charter schools solely by contract rather than by fiduciary duty. Given this situation, awarding any immunity to EMOs would be an ill-advised extension of state privilege.

#### 1. Does Section 115C-218.20 Give EMOs a Path to Immunity?

As mentioned above, section 115C-218.20 of the General Statutes of North Carolina states that “any sovereign immunity of the charter school, [or] of the organization that operates the charter school,” is waived to the extent of that party’s indemnification by insurance.<sup>165</sup> Although a literal reading of this statute may suggest that EMOs should be afforded some degree of immunity, this interpretation is strongly countered by (1) precedent holding that EMOs are not state actors, and (2) a lack of effort by the General Assembly to identify EMOs as public anywhere in the charter school statute.

First, regarding state-actor status, the Eastern District of North Carolina held in *Peltier v. Charter Day School*<sup>166</sup> that EMOs are not state actors regardless of the degree of their day-to-day managerial responsibilities.<sup>167</sup> In *Peltier*, plaintiffs brought federal constitutional challenges against an EMO-run charter school’s dress code, alleging that a requirement that girls wear skirts or skorts was an equal protection violation.<sup>168</sup> The claims were brought directly against the charter school itself, the board of directors, and the EMO.<sup>169</sup> The court ultimately dismissed the claim against the EMO, reasoning that EMOs, as private companies, are independent contractors rather than state actors and are therefore shielded from constitutional claims.<sup>170</sup> Similar reasoning should prevail if North Carolina’s state courts are called upon to decide the issue of whether EMOs are state actors.

Second, Ohio’s Court of Appeals rejected an EMO’s claim to immunity in *Cunningham v. Star Academy of Toledo*,<sup>171</sup> basing its decision that the company was not a political subdivision of the state partly on the fact that the Ohio legislature had proven its capacity to specifically designate educational entities as public, yet had explicitly failed to so designate EMOs.<sup>172</sup> Similar logic could

165. *Id.*

166. No. 7:16-CV-30-H, 2017 WL 1194460 (E.D.N.C. 2017).

167. *Id.* at \*4.

168. *Id.* at \*3.

169. *Id.* at \*1.

170. *Id.* at \*4. Alongside this conclusion that EMOs are not state actors, they also uniformly fail the arm-of-the-state test described in *Kinston*: judgments against EMOs are not paid by the state, they enjoy total autonomy from the state, they are involved with nonstate concerns, and they are treated as private businesses under state law. See *State ex rel. Cooper v. Kinston Charter Acad.*, 268 N.C. App. 531, 541, 836 S.E.2d 330, 338 (2019).

171. No. L-12-1272, 2014 WL 523196 (Ohio Ct. App. 2014).

172. *Id.* at \*5.

be applied in North Carolina—we have already seen that section 115C-218.90 reads “it is the determination of the General Assembly that charter schools are public schools,” yet there is no attempt in the statute to directly define an EMO as public despite multiple references to “charter management organization[s]” and “education[al] management organization[s]” throughout section 115C.<sup>173</sup>

## 2. Can EMOs Claim Derivative Immunity Given Their Status as Independent Contractors?

Despite their broad discretionary power, most EMOs in North Carolina operate as independent contractors of the schools they manage.<sup>174</sup> Independent contractor status is usually explicitly established in the management contract between the school and the EMO. In addition to potentially removing employment decisions from direct board oversight,<sup>175</sup> independent contractor status gives the EMOs an additional argument for immunity. In addition to pointing to section 115-218.20, EMOs may try to argue that, as agents with discretionary power to carry out charter schools’ educational mandate, they should receive the schools’ immunity.

While independent contractors who work for the government can sometimes claim sovereign immunity, EMOs likely cannot do so due to the wide scope of their discretion. EMOs’ argument for derivative immunity would essentially be a state-level application of the U.S. Supreme Court’s *Yearsley* doctrine, which states that the United States’ sovereign immunity can be claimed by government contractors if (1) the government validly authorized the contractor’s actions, and (2) the contractor did not exceed their authority.<sup>176</sup> *Yearsley* arguments continue to have teeth in both state and federal courts, as evidenced by the Fourth Circuit’s 2018 dismissal of a Telephone Consumer Protection Act<sup>177</sup> suit against an independent contractor who called the plaintiff and attempted to collect health information without consent.<sup>178</sup>

Crucially, however, the contractors in *Yearsley* and *Cunningham* were not granted wide discretionary authority. In contrast, the EMOs that operate North Carolina charter schools are given wide latitude to accomplish their educational

173. See N.C. GEN. STAT. §§ 115C-218.90(a)(1), 115C-218.3(2) (LEXIS through Sess. Laws 2020-97 of the 2020 Reg. Sess. of the Gen. Assemb.).

174. See, e.g., BEAM Acad. Servs. Agreement, *supra* note 81, art. I para. C. (“T.A.S. shall provide the Services as an independent contractor, and not as an employee, partner, agent, or associate of the School.”).

175. The Charter Agreement (which all new boards must sign) states in section 4.4 that “[t]he Nonprofit shall have ultimate responsibility for employment, management, dismissal, and discipline of its employees.” See *Charter Agreements*, *supra* note 65, § 4.4 (emphasis added). The Agreement imposes no requirements on the board’s oversight or management of contractors.

176. See *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 20–21 (1940).

177. 47 U.S.C. § 227.

178. See *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 647 (4th Cir. 2018).



mission. EMOs' situation is thus less similar to *Cunningham* than to *Brown & Gay Engineering, Inc. v. Olivares*,<sup>179</sup> a 2015 Texas Supreme Court case in which the state hired an independent contractor engineering firm to design a highway interchange.<sup>180</sup> Later, an intoxicated driver hit and killed the plaintiff's son, and the plaintiff sued the independent contractor for negligence.<sup>181</sup> The court denied the engineering firm's attempt to claim sovereign immunity, rejecting the firm's argument that refusing to extend immunity to contractors would result in an unacceptable increase in the state's cost of doing business.<sup>182</sup> Additionally, and crucially as applied to the context of EMOs, the court distinguished between independent contractors who operate with no discretion and work solely at the direction of the state—who may claim immunity—and those who do exercise discretion—who may not.<sup>183</sup>

While North Carolina's courts have not directly considered the question of whether independent contractors with discretionary authority to carry out state governmental objectives may claim immunity, withholding immunity seems to better align with the doctrine's purpose of protecting *state actors and agents* from liability. To hold otherwise would extend the state's immunity through nothing but the connective tissue provided by the private contract.<sup>184</sup>

179. 461 S.W.3d 117 (Tex. 2015).

180. *Id.* at 119.

181. *See id.*

182. *Id.* at 123.

183. *Id.* at 124 (“[P]rivate parties exercising independent discretion are not entitled to sovereign immunity.”).

184. In addition to the argument that private contracts should not be able to transmit state immunity, my belief that EMOs should be denied derivative immunity is also based on the unsettled issue of whether EMOs generally owe fiduciary duties to the schools they serve. The answer seems to be no (see the high bar set forth below), but if the answer is yes, negligent acts by the EMO would (1) expose the EMO to breach of fiduciary duty claims by the charter school, *see Hope Acad. Broadway Campus v. White Hat Mgmt., LLC*, 46 N.E.3d 665, 667 (Ohio 2015) (allowing school's claim for breach of fiduciary duty), yet (2) give the EMO a stronger argument for derivative immunity due to the likelihood of a principal-agent relationship between the school and EMO. *See* RESTATEMENT (SECOND) OF AGENCY § 13 (AM. L. INST. 1958) (listing fiduciary duty as a defining characteristic of the agent-principal relationship). The existence of a fiduciary duty is a highly fact-specific question and will turn on the degree of control that the charter school board exerts over the EMO based on the parties' contractual relationship. For example, the district court for the Western District of Missouri found such a fiduciary duty when an EMO exerted such dominating influence that the charter school board was “subservient to the dominant mind and will.” *See Renaissance Acad. for Math & Sci. of Mo., Inc. v. Imagine Schs., Inc.*, No. 4:13-CV-00645-NKL, 2014 U.S. Dist LEXIS 174728, at \*2 (W.D. Mo. 2014). In North Carolina, it is not clear what facts would be needed to prove fiduciary duty between an EMO and a charter school. In 2019, the North Carolina Court of Appeals ruled that EMO Banyan GW, LLC (extensively experienced) owed no fiduciary duty to Wayne Preparatory Academy (a first-time school), apparently finding that despite a vast difference in negotiating and operational experience between the parties, the contract was not unconscionable and WPA was not subservient to Banyan's will. *See Banyan GW, LLC v. Wayne Preparatory Acad. Charter Sch., Inc.*, 263 N.C. App. 709, 822 S.E.2d 791, 2019 WL 438327 at \*9 (2019) (unpublished table decision). Clearly, the bar for imposing a fiduciary duty is high.

Even if North Carolina EMOs succeeded in their *Yearsley* arguments, they would still be liable for intentional torts and any negligent acts which fall outside the scope of their grant of authority from the charter school.<sup>185</sup> They would also be liable for breach of contract claims brought by the school itself, although the scope of discretion in the typical EMO contract would make proving breach difficult.<sup>186</sup>

#### IV. PROPOSED REFORMS

As the number of North Carolina public charter schools continues to grow, the courts should (1) award charter school immunity based on a fact-specific inquiry measuring the school's practical decision-making authority over day-to-day operations and the exclusive discretionary authority that the school retains over its state funding, and (2) deny EMOs immunity under either statutory claims based in section 115C or in arguments based in their derived discretion in carrying out a governmental duty.

The Supreme Court of North Carolina could address both of these immunity-related goals—while generally increasing the accountability of both charter schools and the private organizations who operate them—by striking down the Court of Appeals' bright-line rule and declaring that neither charter schools nor EMOs are per se arms of the state in the current *Kinston* appeal.<sup>187</sup> Additionally, section 115C should be amended to clarify the parameters of permissible EMO-school relationships by (1) prohibiting sweep contracts, (2) prohibiting EMOs from claiming ownership of property purchased with former state funds for educational purposes, (3) prohibiting contract provisions allowing EMOs to terminate management agreements based on the charter school board's refusal to implement the EMO's preferred instructional or personnel policies, and (4) requiring charter school directors to fulfill a continuing legal education ("CLE") requirement regarding their duties under nonprofit and North Carolina constitutional law.<sup>188</sup> With the exception of the

185. See *Yearsley v. W.A. Ross Const. Co.*, 39 U.S. 18, 20–21 (1940).

186. See *supra* note 60 (discussing a real-world example of the enormous discretion of some EMOs).

187. The Supreme Court of North Carolina allowed the State's petition for discretionary review on September 23, 2020. See *State ex rel. Cooper v. Kinston Charter Acad.*, 375 N.C. 490, 490, 847 S.E.2d 412, 412 (2020).

188. For an example of state-level guidance to charter schools regarding EMO contracts from another jurisdiction that recommends some of these measures as best practices, see generally MINN. DEP'T OF EDUC., GUIDANCE FOR CONTRACTS WITH MANAGEMENT ORGANIZATIONS (May 2019), [https://education.mn.gov/mdeprod/idcplg?IdcService=GET\\_FILE&dDocName=MDE089260&RevisionSelectionMethod=latestReleased&Rendition=primary](https://education.mn.gov/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE089260&RevisionSelectionMethod=latestReleased&Rendition=primary) [https://perma.cc/YLE9-T45N]. Although a statutory requirement that charter school teachers be employees of the school rather than the EMO would also be an advisable method of increasing both students' ability to recover for teacher wrongdoing and schools' control over the educational process, such a change would be very large for the current system and could be difficult to pass for that reason.

CLE requirement, these statutory revisions would not affect non-EMO charter schools and thus would not significantly hinder charter schools' ability to innovate. At the EMO-run margins, however, these protective measures would provide an additional safeguard against the potential loss of state funds to private bad actors.

Finally, any future court decisions or statutory changes to North Carolina's charter school laws should be formulated in light of sovereign immunity's original purpose of ensuring that public officials fulfill their duties without fear of reprisal. Rather than serving this purpose, *per se* immunity could have the perverse effects of allowing private actors to escape harm and of disincentivizing charter school boards at EMO-run schools from taking an active role in overseeing the EMO's acts. If the board knows that neither it nor the school faces any potential liability, little formal accountability remains.

#### CONCLUSION

This Comment has sought to look both backward and forward, describing the prodigious growth of charter schools as an innovative segment in North Carolina's public education system while highlighting the potential dangers inherent in awarding the state's sovereign immunity to all charter schools and allowing for-profit EMOs to claim any immunity at all.

Charter schools are an important part of North Carolina's educational future, and EMOs are, in turn, a key component in enabling some of these schools to operate well. What is needed is neither a blanket ban nor the current blanket acceptance of such arrangements, but rather a reasoned and fact-based approach that measures the school's continuing execution of its constitutional mandate to provide a sound, quality education before deciding whether to grant it the use of the state's shield.

ANDREW M. BENTON\*\*

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