

## Skirting State Action: Section 1983 Challenges to Education and Charter Management Organizations After *Peltier v. Charter Day School, Inc.*\*

*In Peltier v. Charter Day School, Inc., the Fourth Circuit held that a North Carolina charter school violated the U.S. Constitution by requiring girls to wear skirts and prohibiting them from wearing pants or shorts. In reaching that conclusion, the Fourth Circuit also became the first federal court of appeals to hold that a charter school is a state actor subject to constitutional claims—just like traditional public schools. While this decision has been lauded as advancing civil rights and affirming that charter schools are state actors, it did not go far enough. The court additionally held in Peltier that the for-profit education management organization that operated the charter school and helped create the dress code was not a state actor. This Recent Development critiques that aspect of the opinion and argues that the court drew an arbitrary line between public and private in finding the charter school, but not its management organization, to be a state actor. Effectively, the Fourth Circuit created a liability shield from Section 1983 challenges for education and charter management organizations operating in North Carolina.*

### INTRODUCTION

When Bonnie Peltier attended parents' orientation at Charter Day School ("CDS") in Leland, North Carolina, she learned that her daughter would be required to wear a skirt to school each day while her son could wear pants.<sup>1</sup> Concerned that her active daughter would not be able to play freely in a skirt, Peltier raised her objections to the school's founder,<sup>2</sup> who responded that the dress code served the school's educational mission of "preserv[ing] chivalry and respect."<sup>3</sup> Subsequently, Peltier and several other parents brought suit on behalf

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1. See Galen Leigh Sherwin, *A Federal Appeals Court Strikes a Blow Against Sexist School Dress Codes*, SLATE (June 16, 2022, 12:46 PM), <https://slate.com/news-and-politics/2022/06/school-dress-codes-skirts-sexist-unconstitutional.html> [<https://perma.cc/7NT5-N33K>].

2. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 113 (4th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2657 (2023).

3. *Id.* These kinds of dress codes are discriminatory and harmful. As Galen Sherwin, senior staff attorney with the ACLU Women's Rights Project, notes, "[D]ress codes that enforce different rules based on students' sex reinforce old-fashioned conventions of how girls should dress, and signal that

of their daughters against both CDS and the Roger Bacon Academy, Inc. (“RBA”), the education management organization that operates the school and creates its policies, charging violations of the Equal Protection Clause and Title IX.<sup>4</sup> To prevail on the equal protection claim, the plaintiffs had to first demonstrate that CDS and RBA were state actors subject to constitutional challenges under Section 1983.<sup>5</sup>

In June 2022, after six years of litigation, the Fourth Circuit struck down the skirts requirement at CDS, becoming the first federal court of appeals to rule that a charter school is a state actor.<sup>6</sup> While this ruling is a victory for students’ civil rights and puts North Carolina charter schools on notice that they have to follow the U.S. Constitution just like public schools,<sup>7</sup> the Fourth Circuit’s decision did not go far enough. The court also ruled that RBA was *not* a state actor.<sup>8</sup> Thus, *Peltier v. Charter Day School, Inc.*<sup>9</sup> is also a victory for education and charter management organizations seeking to skirt constitutional challenges. This Recent Development argues that the Fourth Circuit erred in not finding state action for RBA, and that the court’s ruling creates a de facto liability shield for management organizations.<sup>10</sup>

This Recent Development proceeds in four parts. Part I provides background information on charter schools, North Carolina’s charter school laws, and education and charter management organizations; Part II discusses the state action doctrine, its exceptions, and the only other circuit court of appeals case to decide whether a management organization is a state actor; Part III provides the background of *Peltier* and explains the Fourth Circuit’s state action analysis in the case; and Part IV critiques the decision, discusses its implications, and proposes a new approach.

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girls are not equal to boys.” Press Release, ACLU, Federal Appeals Court Says Charter School Students Enjoy Constitutional Rights in Case Involving School Dress Codes (June 14, 2022, 3:00 PM), <https://www.aclu.org/press-releases/federal-appeals-court-says-charter-school-students-enjoy-constitutional-rights-case> [https://perma.cc/Z723-BESE].

4. *Peltier*, 37 F.4th at 113–14.

5. *See id.* at 115 (finding that the state action requirement of § 1983 excludes private conduct, “no matter how discriminatory or wrongful” (quoting *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001))); *see also* Kevin Huffman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1307 (1998) (“Any challenge to charter schools under the Fourteenth Amendment must first demonstrate state action.”).

6. Press Release, ACLU, *supra* note 3. Another circuit court of appeals found that a charter school violated the Constitution, but the court in that case assumed the charter school was a state actor without conducting a state action analysis. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010).

7. *See* Press Release, ACLU, *supra* note 3.

8. *Peltier*, 37 F.4th at 123.

9. 37 F.4th 104 (4th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2657 (2023).

10. *See* Opening and Response Brief of Plaintiffs-Appellees at 64, *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc) (No. 20-1001) (“As the school’s operator, RBA should not be able to shield itself by creating a corporate buffer—in the form of CDS, Inc.—between itself and the state.”).

## I. CHARTER SCHOOLS AND EDUCATION/CHARTER MANAGEMENT ORGANIZATIONS

Since the plaintiffs in *Peltier* decided to file suit against both the charter school and its management organization, the Fourth Circuit had to conduct separate state action analyses for each entity. This inquiry required an understanding of the characteristics of both charter schools and management organizations and their relationships to the State. This section provides the necessary context on charter schools, management organizations, and the relevant North Carolina statutes discussed in the court's ruling.

### A. *Background on Charter Schools and North Carolina Charter School Laws*

Generally, charter schools share three characteristics: (1) they are tuition-free schools that are publicly funded but independently run; (2) they are schools of choice, meaning that families choose to send their children to them, and thus, charter schools do not enroll students from an assigned geographic area; and (3) they are overseen by an authorizer, or an entity that is granted power under state law to open new charter schools and close poorly performing ones.<sup>11</sup> For many, the charter school movement presents an attractive and innovative alternative to the traditional public school model.<sup>12</sup> In the last seventeen years, the number of charter school campuses has doubled, and charter school enrollment has tripled in the United States.<sup>13</sup>

11. Arianna Prothero, *What Are Charter Schools?*, EDUCATIONWEEK (Aug. 9, 2018), <https://www.edweek.org/policy-politics/what-are-charter-schools/2018/08> [https://perma.cc/7XDG-KRXX]. Most authorizers are local school districts, state education agencies, or municipalities. *What Is Charter School Authorizing?*, NAT'L ASS'N CHARTER SCH. AUTHORIZERS, <https://www.qualitycharters.org/authorizingmatters/> [https://perma.cc/RLL9-D8B6]. In North Carolina, the State Board of Education is the authorizer. *See Charter Schools*, N.C. DEP'T. PUB. INSTRUCTION, <https://www.dpi.nc.gov/students-families/alternative-choices/charter-schools> [https://perma.cc/58WJ-4J9D].

12. *See* Huffman, *supra* note 5, at 1294 (“These schools generally have more autonomy than other public schools in design, staffing, and spending.”). “Charter school proponents claim that the movement is the first public school reform effort that brings together school choice, entrepreneurial opportunities for teachers and parents, accountability for results, and competition with other schools.” *Id.* at 1300.

13. Jamison White, *How Many Charter Schools and Students Are There?*, NAT'L ALL. FOR PUB. CHARTER SCHS. (Dec. 6, 2022, 11:38 AM), <https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there/> [https://perma.cc/4VTR-TTQC]. Charter school enrollment has also sharply increased since the start of the COVID-19 pandemic with public charter school enrollments in North Carolina growing nearly 20 percent. Alex Granados & Katie Dukes, *Number of Students in Traditional Public Schools Still Trails Pre-Pandemic Total*, EDNC (Nov. 14, 2022), <https://www.ednc.org/2022-11-08-traditional-nc-public-school-student-numbers-charters-pandemic-covid/> [https://perma.cc/8Q6Q-UJSG].

Since 1991, forty-five states have enacted laws that establish the creation and oversight of charter schools,<sup>14</sup> including North Carolina in 1996.<sup>15</sup> In North Carolina, a nonprofit entity can apply to the State for a charter that, if granted, authorizes it to establish and run a charter school.<sup>16</sup> All applicants for charter schools must obtain approval from the State Board of Education before partnering with a management organization.<sup>17</sup> North Carolina charter schools are designated as “public school[s] within the local school administrative unit in which [they are] located”<sup>18</sup> and receive a per-pupil allotment from the State Board of Education similar to traditional public schools.<sup>19</sup> Employees of North Carolina charter schools are public school employees for the purposes of receiving state-funded employee benefits.<sup>20</sup> Additionally, North Carolina charter schools must conform their disciplinary codes to align with the constitutions of the United States and the State.<sup>21</sup> And finally, North Carolina charter schools must not “discriminate against any student on the basis of ethnicity, national origin, gender, or disability.”<sup>22</sup>

#### B. *Education and Charter Management Organizations*

Described as an “intriguing” and “controversial” aspect of the charter school movement,<sup>23</sup> Education Management Organizations (“EMOs”) and Charter Management Organizations (“CMOs”) are entities that “operate[] or manage[] one or multiple charter schools by centralizing support and operations.”<sup>24</sup> These organizations employ off-site corporate staff to make operational decisions for individual schools.<sup>25</sup> They provide services such as

14. See *What Is a Charter School?*, NAT’L CHARTER SCH. RES. CTR., <https://charterschoolcenter.ed.gov/what-charter-school> [<https://perma.cc/S9DS-LC2U>]. There are nearly 7,500 charter schools serving over three million students. *Id.*

15. See Charter Schools Act of 1996, ch. 731, 1995 N.C. Sess. Laws 424 (codified as amended at N.C. GEN. STAT. § 115C-218 (LEXIS through Sess. Laws 2023-105 of the 2023 Reg. Sess. of the Gen. Assemb.)).

16. N.C. GEN. STAT. § 115C-218.1(a).

17. 16 N.C. ADMIN. CODE 6G.0523(b) (2023).

18. N.C. GEN. STAT. § 115C-218.15(a).

19. *Id.* § 115C-218.105(a). Additionally, the State has the power to revoke a school’s charter for noncompliance with the terms of the charter, poor student performance, or poor fiscal management. See *id.* § 115C-218.95(a).

20. *Id.* § 115C-218.90(a)(4).

21. *Id.* § 115C-390.2(a).

22. *Id.* § 115C-218.55.

23. Katrina Bulkley, *Losing Voice? Educational Management Organizations and Charter Schools’ Educational Programs*, 37 EDUC. & URB. SOC’Y 204, 209 (2005).

24. 16 N.C. ADMIN. CODE 6G.0523(a)(1) (2023). Under North Carolina administrative regulations, the differences between the two types of management organizations include that EMOs are for-profit and CMOs are nonprofit, and that EMOs contract with new or existing public-school districts, charter-school districts, and charter schools to provide their services. *Id.* at 6G.0523(a)(2)–(3).

25. Bulkley, *supra* note 23, at 205.

bookkeeping, hiring, and report writing to comprehensive management that oversees every aspect of a school's operations.<sup>26</sup> And they vary in size: some are nationwide organizations that manage schools across multiple states,<sup>27</sup> while others manage only a few schools in their local area.<sup>28</sup> The first management organizations preceded charter schools, receiving contracts from school boards to operate individual schools within the district.<sup>29</sup> But as charter schools emerged, management organizations saw an ideal opportunity to broaden their market share.<sup>30</sup> And charter school founders facing challenges, like acquiring facilities and developing curricula, turned to management organizations, which have both the capital to finance facilities and ready-to-use curriculum packages.<sup>31</sup>

One controversial aspect of management organizations is their widely shared philosophy that achieving academic success depends on creating a “highly rule-ordered and regulated environment”<sup>32</sup> where students are constantly monitored and disciplined.<sup>33</sup> Management organizations instill in these “no excuse” schools what scholars call a “body pedagogic,” or the regulation of students’ bodies through posture correction, an emphasis on sustained attention spans, and compliance.<sup>34</sup> While this educational model may deliver higher test scores and greater postsecondary achievement,<sup>35</sup> it can also

26. *Id.* at 209.

27. Just seven EMOs manage 555 charter schools. See CAROL BURRIS & DARCIÉ CIMARUSTI, NETWORK FOR PUB. EDUC., CHARTERED FOR PROFIT: THE HIDDEN WORLD OF CHARTER SCHOOLS OPERATED FOR FINANCIAL GAIN 5 (2021), <https://networkforpubliceducation.org/wp-content/uploads/2021/07/Chartered-for-Profit.pdf> [<https://perma.cc/62S6-NES8>].

28. Nevbahar Ertas & Christine H. Roch, *Charter Schools, Equity, and Student Enrollments: The Role of For-Profit Educational Management Organizations*, 46 EDUC. & URB. SOC’Y 548, 570 (2014). The management organization in *Peltier* is an example of a management organization that oversees only a few schools.

29. Gary Miron, *Education Management Organizations*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 475, 477 (2008).

30. See Ertas & Roch, *supra* note 28, at 549.

31. Miron, *supra* note 29, at 479.

32. Joan F. Goodman, *Charter Management Organizations and the Regulated Environment: Is It Worth the Price?*, 42 EDUC. RESEARCHER 89, 89 (2013).

33. See *id.*; Garth Stahl, *Critiquing the Corporeal Curriculum: Body Pedagogies in ‘No Excuses’ Charter Schools*, 23 J. YOUTH STUD. 1330, 1331 (2020). Charter Day School’s management organization, RBA, employs this kind of strict monitoring using surveillance cameras that are installed in every classroom. Marian Wang, *Charter School Power Broker Turns Public Education into Private Profits*, PROPUBLICA (Oct. 15, 2014, 5:45 AM), <https://www.propublica.org/article/charter-school-power-broker-turns-public-education-into-private-profits> [<https://perma.cc/JW3T-KHHM> (staff-uploaded archive)] [hereinafter Wang, *Charter School Power Broker*].

34. See Stahl, *supra* note 33, at 1334. The skirts requirement in *Peltier* is a clear example of a management organization’s “body pedagogic,” especially since the dress code was instituted in part to “instill discipline and keep order.” See *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 113 (4th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2657 (2023).

35. Goodman, *supra* note 32, at 90.

come with costs, including lower levels of self-esteem and self-worth among students.<sup>36</sup>

Moreover, another controversial aspect is that the for-profit nature of some management organizations inevitably creates a conflict of interest between (1) doing what is best for the charter school and its students and (2) maximizing profits for the organization.<sup>37</sup> As one report found, some for-profit management organizations have implemented harmful cost-cutting measures to maximize profits such as paying teachers less, increasing class sizes, hiring uncertified teachers, and dissuading students who need the most services from enrolling.<sup>38</sup> Additionally, many of these for-profit management organizations utilize “sweeps” contracts, a self-dealing mechanism where the management organization provides all of a charter school’s services and, in return, rakes in an “amount equal to the total revenue received by the school from all revenue sources.”<sup>39</sup> In this kind of arrangement, “charter schools sometimes cede control of public dollars to [management organizations] that have no legal obligation to act in the best interests of the schools or taxpayers.”<sup>40</sup> Ultimately, this conflict of interest likely explains why charter schools run by for-profit management organizations have poorer student outcomes than those run by nonprofit organizations.<sup>41</sup>

## II. THE STATE ACTION DOCTRINE IN THE SCHOOL CONTEXT

Section 1983 provides a cause of action to individuals whose constitutional rights have been infringed upon by those acting “under color” of state law.<sup>42</sup> The state action doctrine ensures that the protections afforded by the Constitution apply *only* to claims against government actors and not to claims against private entities or conduct.<sup>43</sup> The policies behind the state action doctrine include preserving the individual freedoms of private actors,

36. *See id.* at 93.

37. BURRIS & CIMARUSTI, *supra* note 27, at 8.

38. *Id.* at 10.

39. Peter Greene, *How a Non-Profit Charter School Can Be Run for Profit*, FORBES (Mar. 19, 2021, 3:16 PM), <https://www.forbes.com/sites/petergreene/2021/03/19/report-how-a-non-profit-charter-school-can-be-run-for-profit/> [<https://perma.cc/DU3G-YGPL> (dark archive)] (citation omitted).

40. 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/Y3RH-XER3> (staff-uploaded archive)].

41. *See* JOSHUA COWEN, NAT’L EDUC. POL’Y CTR., NEPC REVIEW: FOR-PROFIT CHARTER SCHOOLS: AN EVALUATION OF THEIR SPENDING AND OUTCOMES 5 (2022) (finding that charter schools run by for-profit companies have lower student achievement gains and higher absentee rates than those run by nonprofit organizations), <https://nepc.colorado.edu/sites/default/files/reviews/NR%20Cowen.pdf> [<https://perma.cc/YMG7-TKYG>].

42. 42 U.S.C. § 1983.

43. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.4.1, at 569 (7th ed. 2023).

maintaining the separation of powers, and avoiding imposing liability on the State for conduct for which it “cannot fairly be blamed.”<sup>44</sup> However, there are exceptions in which private conduct must adhere to the Constitution,<sup>45</sup> and these exceptions have resulted in “inconsistencies and tensions”<sup>46</sup> in the case law, leading one scholar to call the state action doctrine “a conceptual disaster area.”<sup>47</sup> The Supreme Court of the United States itself has noted that its state action decisions “have not been a model of consistency,” in large part because the state action inquiry is so fact-specific.<sup>48</sup> The Court has recognized two exceptions to the state action doctrine: the public function exception and the entanglement exception.<sup>49</sup> Both exceptions have been examined in cases involving schools.<sup>50</sup> This part discusses (A) the two state action exceptions and their applications in the school context and (B) the only other federal circuit court of appeals case that examines whether a management organization is a state actor.

#### A. *State Action Exceptions Involving Schools*

##### 1. The Public Function Exception

The Supreme Court articulated the framework for the public function exception in *Jackson v. Metropolitan Edison Co.*,<sup>51</sup> noting that state action is present when a private entity exercises “powers traditionally exclusively reserved to the State.”<sup>52</sup> A private entity can also be deemed a state actor under the public function exception when the State delegates a public function to the

44. David M. Howard, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 CONN. PUB. INT. L.J. 221, 224–25 (2017) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)).

45. CHEMERINSKY, *supra* note 43, § 6.4.4.1, at 579.

46. *Id.* § 6.4.1, at 572.

47. Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

48. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961) (Stewart, J., concurring)).

49. CHEMERINSKY, *supra* note 43, § 6.4.4.1, at 579. “[T]he ‘public function exception’ . . . says that a private entity must comply with the Constitution if it is performing a task that has been traditionally, exclusively done by the government. The other is the ‘entanglement exception,’ which says that private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct.” *Id.* Many cases, including *Peltier*, involve both exceptions. *See id.* § 6.4.4.1, at 580.

50. *See generally* *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (examining the “public function” exception as applied to a private high school in Massachusetts); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001) (examining the “entwinement” (entanglement) exception as applied to a Tennessee interscholastic athletic association).

51. 419 U.S. 345 (1974).

52. *Id.* at 352 (holding that a private utility company, while heavily regulated by the State, does not exercise “powers traditionally exclusively reserved to the State”).

private entity.<sup>53</sup> Otherwise, the State would be incentivized to contract out services that it is constitutionally obligated to provide, leaving its citizens without means to redress violations of their constitutional rights.<sup>54</sup>

Eight years after *Jackson*, the Court examined the public function exception in the school context in *Rendell-Baker v. Kohn*.<sup>55</sup> In that case, the Supreme Court considered whether a publicly funded private high school in Massachusetts that primarily served students struggling with substance abuse and behavioral challenges was a state actor when several teachers filed suit under Section 1983 after being discharged.<sup>56</sup> The Court clarified that the public function exception is not simply whether a private entity is providing a public function but whether the function provided is “traditionally the *exclusive* prerogative of the State.”<sup>57</sup> In finding that the school was not a state actor, the Court noted that the State had only recently decided to provide educational services for students who could not be served by traditional public schools.<sup>58</sup> The Court concluded that “a private entity [that merely] performs a function which serves the public does not make its acts state action.”<sup>59</sup> Additionally, the Court dismissed the notion that substantial government funding makes an entity a state actor.<sup>60</sup> Even though the Court in *Rendell-Baker* made finding state action in the school context more difficult under the public function exception, courts can still find educational entities to be state actors under the entanglement exception.

## 2. The Entanglement Exception and “Pervasive Entwinement”

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*,<sup>61</sup> the Court defined the entanglement exception as a “‘close nexus between the State and the challenged action’ [where] seemingly private behavior ‘may be fairly treated as that of the State itself.’”<sup>62</sup> Factors that weigh in favor of finding state action under the entanglement exception include: (1) when the State provided significant encouragement, either directly or indirectly, to the challenged activity; (2) when a private actor operated as a willful participant in a joint activity with the State; and (3) when the private actor is entwined with

53. See *West v. Atkins*, 487 U.S. 42, 57 (1988) (holding that a physician who was under contract with the State to provide medical services to incarcerated persons at a state prison hospital acted under color of state law).

54. *Id.* at 56 n.14.

55. 457 U.S. 830 (1982).

56. *Id.* at 832.

57. *Id.* at 842 (quoting *Jackson*, 419 U.S. at 353).

58. *Id.*

59. *Id.*

60. *Id.* at 840–41.

61. 531 U.S. 288 (2001).

62. *Id.* at 295.



governmental policies or the government is entwined with the private actor's management and control.<sup>63</sup>

In *Brentwood*, which involved a private high school that sued a state interscholastic athletic association under Section 1983, the Court found that an athletic association's regulatory activity constituted state action—even though such activity did not constitute state action under the public function exception—due to the “pervasive entwinement” of public institutions and officials in the association's “composition and workings.”<sup>64</sup> For example: (1) over eighty percent of the association's members were public schools, (2) public school officials managed the association, (3) the association held meetings during official school hours, and (4) public schools supplied the vast majority of the association's financial support.<sup>65</sup> The Court also found that the State of Tennessee provided for this entwinement through its statutory designations.<sup>66</sup>

In *Brentwood*, the Court arguably created a much broader exception to the state action doctrine with “entwinement.”<sup>67</sup> And while the Court identified the entwinement present in *Brentwood*, it did not offer criteria for determining more generally when there is enough entwinement to constitute state action.<sup>68</sup>

#### B. *The Ninth Circuit's State Action Approach to Management Organizations*

The Ninth Circuit is the only other circuit court of appeals to consider whether a management organization is a state actor for the purposes of Section 1983.<sup>69</sup> In *Caviness v. Horizon Community Learning Center, Inc.*,<sup>70</sup> a former high school physical education teacher filed suit against an Arizona nonprofit corporation that operated a charter school.<sup>71</sup> The teacher alleged that

63. *Id.* at 296.

64. *Id.* at 298, 303 (“[T]his case does not turn on the public function test . . . . When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test.”).

65. *Id.* at 298–99.

66. *Id.* at 300 (reasoning that “the State of Tennessee has provided for entwinement from top down”).

67. See CHEMERINSKY, *supra* note 43, § 6.4.4.2, at 588. The dissent noted that before *Brentwood*, the Court “had never found state action based on mere ‘entwinement.’” *Brentwood*, 531 U.S. at 305 (Thomas, J., dissenting).

68. CHEMERINSKY, *supra* note 43, § 6.4.4.2, at 587.

69. See *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 808 (9th Cir. 2010) (holding that the private corporation that operated the charter school was not a state actor for the purposes of § 1983). Other circuit courts of appeals have analyzed § 1983 claims brought against charter schools but assumed that the charter schools were state actors. See, e.g., *Fam. C.L. Union v. Dep't of Child. & Fams.*, 837 F. App'x. 864, 869 n.22 (3d Cir. 2020); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010); *Fister v. Minn. New Country Sch., No. 97-2496*, 1998 WL 230907, at \*2 (8th Cir. May 11, 1998).

70. *Caviness*, 590 F.3d at 806.

71. *Id.* at 811.

the management organization deprived the teacher of their “liberty interest in finding and obtaining work.”<sup>72</sup> The Ninth Circuit did not find state action, concluding that “Arizona’s statutory characterization of charter schools as ‘public schools’ does not itself avail [the plaintiff] in the employment context,” and “a private entity may be designated a state actor for some purposes but still function as a private actor in other respects.”<sup>73</sup> The court also stated that *Rendell-Baker* foreclosed the public function exception for finding state action in the school context, explaining that the management organization’s “provision of educational services is not a function that is traditionally and exclusively the prerogative of the state.”<sup>74</sup> Additionally, the Ninth Circuit was not persuaded to find state action even though charter schools can participate in the State’s retirement plan under Arizona law, noting that a state can “‘subsidize the operating and capital costs’ of a private entity without converting [the entity’s] acts into those of the state.”<sup>75</sup>

### III. THE FOURTH CIRCUIT’S STATE ACTION APPROACH TO CHARTER SCHOOLS AND THEIR MANAGEMENT ORGANIZATIONS IN *PELTIER V. CHARTER DAY SCHOOL, INC.*

Charter Day School (“CDS”) is a coeducational kindergarten through eighth grade public charter school in Brunswick County, North Carolina.<sup>76</sup> Incorporated in 1999, CDS is managed by the Roger Bacon Academy, Inc. (“RBA”), a for-profit educational management organization that oversees the day-to-day operations at CDS.<sup>77</sup> Under the strict guidance of its founder and board, CDS has emphasized “traditional values” through its “traditional curriculum, traditional manners, and traditional respect.”<sup>78</sup> To implement this “traditional” educational mission and to “instill discipline and keep order,” CDS instituted a dress code requiring female students to wear a skirt, jumper, or skort to school each day.<sup>79</sup> The disciplinary sanctions for not adhering to the dress

72. *Id.*

73. *Id.* at 814.

74. *Id.* at 815–16.

75. *Id.* at 817 (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)).

76. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 112 (4th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2657 (2023).

77. *Id.* at 112, 138. RBA and CDS were both founded and are owned by Baker A. Mitchell, Jr. *Id.* at 138. RBA is a signatory on a CDS bank account, where RBA receives reimbursements for fees and expenses. *Id.* at 113.

78. *Id.* at 138. Beyond the dress code, CDS required boys to hold the door open for “young ladies” and to carry an umbrella “to keep rain from falling on the girls.” *Id.* at 125.

79. *Id.* at 113. Additionally, the dress code stated that all students must wear a unisex polo shirt and closed-toe shoes; “excessive or radical haircuts and colors” are not allowed; and male students are “forbidden from wearing jewelry” and must wear shorts or pants. *Id.*

code included parental notification, removal from class to comply with the dress code, or expulsion.<sup>80</sup>

In 2015, plaintiff Bonnie Peltier, mother of a female kindergarten student at CDS, voiced her opposition to the skirts requirement to the founder of CDS.<sup>81</sup> The founder of CDS responded in support of the requirement, asserting that the school community was “determined to preserve chivalry and respect.”<sup>82</sup> In defining “chivalry,” the founder of CDS stated that it is “a code of conduct where women are treated . . . as a fragile vessel that men are supposed to take care of and honor.”<sup>83</sup>

Peltier and two other CDS parents and guardians filed suit against CDS and RBA in the Eastern District of North Carolina on behalf of their children, stating violations of the Equal Protection Clause under Section 1983.<sup>84</sup> Before the court could consider the equal protection claims, it had to establish that CDS and RBA were state actors subject to constitutional challenges under Section 1983.<sup>85</sup> The district court held that CDS was a state actor, reasoning that “CDS’s provision of a free, public education is a function historically and exclusively performed by the state, and that, therefore, CDS’s conduct fairly is attributable to the state of North Carolina.”<sup>86</sup> But with respect to RBA, the educational management organization, the district court concluded that RBA

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Sex-specific appearance codes, such as this one, discriminate against people who are gender-nonconforming and uphold gendered divisions and binaries. See Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL’Y 535, 536–37 (2007).

80. *Peltier*, 37 F.4th at 113. CDS’s policy allowing for expulsion for dress code violations runs counter to North Carolina law that encourages school governing bodies to use long-term suspension and expulsion only for serious violations and not for dress code violations. See N.C. GEN STAT. § 115C-390.2(f) (LEXIS through Sess. Laws 2023-105 of the 2023 Reg. Sess. of the Gen. Assemb.).

81. *Peltier*, 37 F.4th at 113.

82. *Id.*

83. *Id.* The CDS founder’s explanation and defense of chivalry is troubling and recalls the militaristic period of the Middle Ages where girls were married at twelve and where men thought that women were “less than equal to a good horse or a fine lance thrust.” See LaWanna Blount, *Women in the Age of Chivalry and Heraldry*, J. WOMEN’S ENTREPRENEURSHIP & EDUC. 47, 49 (2010) (quoting LEON GAUTIER, *CHIVALRY* 139 (Jacque Levrone ed., 1959)). And as the majority in *Peltier* notes, during this time, men could commit violent crimes against their spouses with impunity. *Peltier*, 37 F.4th at 122 (citing Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 68–69 (2012)).

84. *Peltier*, 37 F.4th at 113–14. “The plaintiffs alleged that the skirts requirement is a sex-based classification rooted in gender stereotypes that discriminates against them based on their gender.” *Id.* at 114. The plaintiffs also alleged Title IX violations, but this Recent Development will not discuss that aspect of the case nor the court’s equal protection analysis. This Recent Development is solely focused on the court’s state action inquiry.

85. See Sherwin, *supra* note 3; see also Huffman, *supra* note 5, at 1307 (1998) (“Any challenge to charter schools under the Fourteenth Amendment must first demonstrate state action.”). The state action requirement of § 1983 excludes private conduct, “no matter how discriminatory or wrongful.” *Peltier*, 37 F.4th at 115.

86. *Peltier*, 37 F.4th at 114.

did not have a “sufficiently close tie to the state” to be deemed a state actor for the purposes of Section 1983.<sup>87</sup> When the case reached the Fourth Circuit, a three-judge panel reversed the district court’s finding of state action for CDS, but that decision was later vacated by a vote of the full court.<sup>88</sup> The Fourth Circuit then decided to hear the case en banc.<sup>89</sup>

A. *The Fourth Circuit’s State Action Analysis Regarding CDS (the charter school)*

In *Peltier*, the Fourth Circuit framed its analysis by explaining that the state action inquiry requires the court to determine whether there is a “‘sufficiently close nexus’ between the defendant’s challenged action and the state so that the challenged action ‘may be fairly treated as that of the State itself.’”<sup>90</sup> This inquiry required the Fourth Circuit to examine the relationship between charter schools, education management organizations, and the State as defined under the North Carolina Constitution and state statutory law.<sup>91</sup>

The court first acknowledged that the “coercion” and “pervasive entwinement” exceptions of state action were not met since the State of North Carolina was not involved in the decision to adopt the skirts requirement.<sup>92</sup> But the court stated that the public function exception was met via delegation because North Carolina’s statutory framework “delegated to charter school operators like CDS part of the state’s constitutional duty to provide free, universal elementary and secondary education.”<sup>93</sup> The Fourth Circuit reasoned

87. *Id.*

88. *Id.* at 114–15 (citing *Peltier v. Charter Day Sch., Inc.*, 8 F.4th 251, 257 (4th Cir. 2021), *aff’d in part and rev’d in part en banc*, 37 F.4th 104 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023)).

89. *Id.* at 115.

90. *Id.*

91. *Id.* at 116–23. Section 1983 claims are often complex and require courts to interpret not only the Federal Constitution but also state law. MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 4 (2d ed. 2008). And even if a plaintiff establishes a violation of a federally protected right under § 1983, they may be barred from relief by issues such as qualified immunity and lack of standing (i.e., state action). *Id.*

92. *Peltier*, 37 F.4th at 116 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Note that the Fourth Circuit uses the word “tests” to describe public function and entwinement; however, this Recent Development refers to them as exceptions.

93. *Id.* at 118–19; *see also* *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997) (concluding that the General Assembly recognizes the “constitutional right to a sound basic education”). The Fourth Circuit was persuaded that North Carolina delegated its responsibilities to charter schools like CDS given that they (1) must design their educational programming to satisfy standards adopted by the State Board of Education; (2) can have their charters revoked by the State for noncompliance with the terms of the charter; (3) are open to any student eligible to attend a public school in North Carolina; (4) are public schools for the purposes of providing state employee benefits and that the employees of charter schools are public school employees; (5) receive a per-pupil funding allotment from the State Board of Education based on the amount provided for students attending traditional public schools; and (6) receive substantial public funding. *See Peltier*, 37 F.4th at 146, 149; *see supra* Section I.A.; N.C. GEN. STAT. § 115C-218(b)(10) (LEXIS through Sess. Laws 2023-105 of the 2023 Reg. Sess. of the Gen. Assemb.).

that a state cannot delegate its constitutionally obligated responsibilities and “leave its citizens no means for vindication of those constitutional rights.”<sup>94</sup> Ultimately, the court found that the challenged action—the skirts requirement—was related to the school’s educational mission, which was “made possible only because the school is *clothed* with the authority of state law.”<sup>95</sup> Thus, the Fourth Circuit held that CDS was a state actor.<sup>96</sup>

B. *The Fourth Circuit’s State Action Analysis Regarding RBA (the educational management organization)*

The Fourth Circuit’s analysis regarding RBA, the education management organization that operates CDS, was woefully brief and conclusory, lacking the rigorous approach that was applied to the analysis of CDS.<sup>97</sup> Even though the court admitted there was a “close relationship” between CDS and RBA, it declined to find state action for RBA,<sup>98</sup> finding that North Carolina did not delegate its constitutional duty to provide free elementary and secondary education to for-profit management organizations like RBA.<sup>99</sup> The court also found it significant that RBA was not a party to the charter agreement between CDS and North Carolina.<sup>100</sup> Finally, the court characterized RBA’s actions in working for CDS as being “attenuated from the state” compared to CDS.<sup>101</sup> Thus, it found that RBA’s role in implementing the skirts requirement was not “fairly attributable” to the State.<sup>102</sup>

IV. WHERE THE FOURTH CIRCUIT WENT WRONG, THE NEGATIVE IMPLICATIONS OF ITS DECISION, AND THE WAY FORWARD

At the outset of its state action analysis in *Peltier*, the Fourth Circuit explained that the state action inquiry lacks “bright-line” rules and is “highly fact-specific in nature.”<sup>103</sup> Sections IV.A and IV.B of this Recent Development argue that the Fourth Circuit’s “fact-specific” approach did not carefully consider compelling arguments that RBA engaged in state action; Section IV.C discusses how the Fourth Circuit departed from other courts that have considered similar claims; Section IV.D explains how the court created a de

94. *Peltier*, 37 F.4th at 118.

95. *Id.* at 122 (quoting *West v. Atkins*, 487 U.S. 42, 49 (1988)).

96. *Id.* at 123.

97. *See id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001)).

103. *Id.* at 116.

facto liability shield; and Section IV.E proposes guideposts to remedy the Fourth Circuit’s state action approach as applied to management organizations.

A. *The Fourth Circuit Erred by Not Recognizing That North Carolina Delegated Its Constitutional Responsibilities to RBA*

With respect to RBA, the management organization that operates CDS, the Fourth Circuit did not rigorously apply its own state action framework and failed to consider statutory provisions that weigh heavily in favor of finding state action. The court erred by not considering how the State delegates its constitutional duty to provide free elementary and secondary education to management organizations during the charter school application and approval process.<sup>104</sup> The Fourth Circuit emphasized the fact that RBA was not “a party to the charter agreement between North Carolina and CDS” and thus “has no direct relationship with the state” in ruling that RBA was not a state actor.<sup>105</sup> But this reasoning failed to consider RBA’s relationship with North Carolina during the charter application process, where CDS was required to obtain State approval before partnering with RBA<sup>106</sup> and where RBA filed the charter application “in conjunction with” CDS.<sup>107</sup> That application included the management agreement outlining RBA’s role in operating the school. The charter eventually granted by the State Board of Education incorporated that management agreement and authorized RBA to “enforce” the “rules, regulations, and procedures at CDS.”<sup>108</sup>

This delegation is further demonstrated by the fact that the State “prohibited CDS from terminating RBA without its explicit approval.”<sup>109</sup> Thus, the Fourth Circuit’s analysis failed to realize how the State delegates its constitutional duty to management organizations like RBA each time it approves a charter application that includes a management organization’s role in operating a charter school.

B. *The Fourth Circuit Also Failed To Recognize the Entwinement Between RBA and the State of North Carolina*

Furthermore, in reasoning that RBA has no “direct relationship with the state,” the Fourth Circuit ignored the entwinement between RBA and the State,

104. See N.C. GEN. STAT. § 115C-218.1(b)(1)–(3) (LEXIS through Sess. Laws 2023-105 of the 2023 Reg. Sess. of the Gen. Assemb.) (stating that the charter application shall contain information on the school’s educational program and its governing structure).

105. *Peltier*, 37 F.4th at 123.

106. See 16 N.C. ADMIN. CODE 6G.0523(b) (2023).

107. See Opening and Response Brief of Plaintiffs-Appellees, *supra* note 10, at 62.

108. *Id.* at 62–63.

109. See Reply Brief of Plaintiffs-Appellees at 28–29, *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc) (No. 20-1001).

given RBA's role in designing educational programming to meet standards set by the State Board of Education.<sup>110</sup> RBA's role in operating CDS is documented in the State-approved management agreement, which requires RBA to be in compliance with state laws and regulations in carrying out its educational programming.<sup>111</sup> Part of RBA's educational programming included creating and enforcing the skirts requirement.<sup>112</sup> The Fourth Circuit overlooked the fact that RBA is listed as an author of the student handbook that contains the skirts requirement.<sup>113</sup> Also, the Fourth Circuit's argument that RBA is "attenuated from the state" because RBA works for CDS (and not the State of North Carolina) is not persuasive given that RBA hired the teachers and administrators who enforced the skirts requirement and who are classified as state employees.<sup>114</sup> Under the Fourth Circuit's reasoning, a management organization can help create an unconstitutional policy as part of its State-delegated "educational programming" and hire the personnel to enforce that unconstitutional policy and yet be shielded from accountability when that policy is challenged.<sup>115</sup>

### C. Peltier Departs from District Court Decisions

The Fourth Circuit's decision in *Peltier*—to hold the charter school to be a state actor but not its management organization—departs from how other courts have decided cases where a plaintiff brings Section 1983 claims against both a charter school and its management organization.<sup>116</sup> In *Riester v. Riverside Community School*,<sup>117</sup> a teacher brought a First Amendment retaliation claim against an Ohio charter school and its management organization, alleging she was terminated after complaining that a student with behavioral and emotional disabilities was being denied appropriate educational services.<sup>118</sup> The court found the charter school and the management organization to be state actors

110. See *Peltier*, 37 F.4th at 123; Reply Brief of Plaintiffs-Appellees, *supra* note 109, at 31; N.C. GEN. STAT. § 115C-218.85(a)(2) (LEXIS through Sess. Laws 2023-105 of the 2023 Reg. Sess. of the Gen. Assemb.).

111. See Reply Brief of Plaintiffs-Appellees, *supra* note 109, at 28–29.

112. See Opening and Response Brief of Plaintiffs-Appellees, *supra* note 10, at 63.

113. See *id.*

114. *Id.* at 64.

115. See *id.*

116. See *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 973 (S.D. Ohio 2002); *Scaggs v. N.Y. Dep't of Educ.*, No. 06-CV-0799, 2007 WL 1456221, at \*13 (E.D.N.Y. May 16, 2007); *Am. C.L. Union of Minn. v. Tarek Ibn Ziyad Acad.*, Civil No. 09-138, 2009 WL 2215072, at \*9 (D. Minn. July 21, 2009); see also *Daughtery v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 906 (W.D. Mich. 2000) (holding that both the charter school and private corporation operating such school could have violated the establishment clause, which would require them to be state actors).

117. 257 F. Supp. 2d 968 (S.D. Ohio 2002).

118. *Id.* at 969–70. Note that this case was decided before the Supreme Court's ruling in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which held that when government officials make statements in their official capacity, they are not speaking as citizens for First Amendment purposes. 547 U.S. at 421.

under both the public function and entwinement exceptions, respectively, given that Ohio law deems all community charter schools to be public; that the charter school was created only with the help of the State; and that the management organization's conduct was "so entwined with governmental policies" because it was "granted the authority to provide free public education to all students in a nondiscriminatory manner."<sup>119</sup>

In *Scaggs v. New York Department of Education*,<sup>120</sup> plaintiffs brought several Section 1983 claims against a New York charter school and its management organization, alleging that the defendants denied them the right to a free, appropriate public education when they failed to provide adequate services for students with learning disabilities.<sup>121</sup> The court held that because the education management organization received state funds to implement individualized education plans, was bound to state educational standards, and purported to offer the same educational services as any other public school, the education management organization was a state actor for the purposes of Section 1983.<sup>122</sup>

Further, in *American Civil Liberties Union of Minnesota v. Tarek Ibn Ziyad Academy*,<sup>123</sup> the district court of Minnesota found that a Minnesota charter school's sponsor (specifically, its management organization) was a state actor because the sponsor provided "certain oversight functions" that would normally be performed by a school district or school board if the school was not a charter school.<sup>124</sup> The court noted that a sponsor responsible for oversight functions of a charter school "may properly be viewed as having engaged in state action, despite being a private corporation."<sup>125</sup>

Departing from the rationale that these district courts used, the Fourth Circuit drew an arbitrary line in *Peltier* between state and private action even though the entities themselves—CDS and RBA—are not as distinct as the court made it seem. For example, CDS and RBA share a bank account, a founder, and operational responsibilities,<sup>126</sup> indicating a lack of independence between the charter school and its management organization. The U.S. Department of

119. *Riester*, 257 F. Supp. 2d at 972–73. "[F]ree, public education, whether provided by public or private actors, is an historical, exclusive, and traditional state function." *Id.* at 972.

120. No. 06-CV-0799, 2007 WL 1456221 (E.D.N.Y. May 16, 2007).

121. *Id.* at \*1–2.

122. *Id.* at \*13. "[T]he Court agrees with the district courts that have held, since *Rendell-Baker*, that claims addressing the nature and quality of education received at charter schools may be properly brought against such schools and their management companies under Section 1983." *Id.*

123. Civil No. 09-138, 2009 WL 2215072 (D. Minn. July 21, 2009).

124. *Id.* at \*10.

125. *Id.* (quoting *Scaggs v. N.Y. Dep't. of Educ.*, No. 06-CV-0799, 2007 WL 1456221, at \*13 (E.D.N.Y. May 16, 2007)).

126. See *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 113 (4th Cir. 2022) (en banc), cert. denied, 143 S. Ct. 2657 (2023); Wang, *Charter School Power Broker*, supra note 33.



Education has labeled such an overlap a risk.<sup>127</sup> The Department of Education’s guidance in assessing whether a charter school is independent from its management organization includes whether the charter school’s governing board “contains any employees or affiliates of the management organization.”<sup>128</sup> The founder of RBA (and CDS), Baker Mitchell, sat on CDS’s nonprofit board when RBA was chosen as the school’s management organization, an arrangement that is “illegal in many other states”<sup>129</sup> and advised against by the National Association of Charter School Authorizers.<sup>130</sup> The lack of independence between CDS and RBA implicates a kind of “overlapping identity”<sup>131</sup> that the court failed to acknowledge. Effectively, management organizations that share identities and responsibilities with charter schools can rely on the Fourth Circuit’s arbitrary line drawing in *Peltier* between state and private action as a liability shield in future litigation.

Relatedly, the court’s decision to characterize RBA’s relationship to the State as “attenuated”<sup>132</sup> as opposed to closely “entwined”<sup>133</sup> illustrates the confusing mess that contractual relationships pose to the state action doctrine.<sup>134</sup> Lacking clear guidance, the Fourth Circuit’s opinion in *Peltier* finding CDS, but not RBA, to be a state actor begs the question of where “‘public’ stops and ‘private’ begins,”<sup>135</sup> especially considering the overlapping nature of CDS and RBA’s identities. In drawing an arbitrary line between CDS and RBA, the court

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127. See U.S. DEP’T OF EDUC., FREQUENTLY ASKED QUESTIONS ON RISK MANAGEMENT FOR CHARTER SCHOOLS AFFILIATED WITH MANAGEMENT ORGANIZATIONS 3 (2016), <https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/charter-school-programs/faqs-on-risk-management-for-charter-schools-affiliated-with-management-organizations/> [<https://perma.cc/5SEB-U8A4>]. These risks include (1) the management organization making unauthorized expenditures when it has control over the charter school bank account and (2) the management organization retaining sole operational authority which “put[s] charter schools at greater risk of not adhering to programmatic or regulatory requirements.” *Id.* at 4.

128. *Id.* at 3.

129. Wang, *Charter School Power Broker*, *supra* note 33.

130. NAT’L ASS’N CHARTER SCH. AUTHORIZERS, PRINCIPLES AND STANDARDS FOR QUALITY CHARTER SCHOOL AUTHORIZING 15 (2023), [https://qualitycharters.org/wp-content/uploads/2023/03/Principles-and-Standards\\_2023.pdf](https://qualitycharters.org/wp-content/uploads/2023/03/Principles-and-Standards_2023.pdf) [<https://perma.cc/J5UG-P2HB>] (discussing that management organizations should be prohibited “from selecting, approving, employing, compensating, or serving as school governing board members”).

131. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 303 (2001) (“When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test.”).

132. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 123 (4th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2657 (2023).

133. See *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 973 (S.D. Ohio 2002).

134. See Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. C.R.L.J. 203, 205–06 (2001); Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1186–88 (1994).

135. Kennedy, *supra* note 134, at 206.

confuses the boundaries between public and private,<sup>136</sup> which matters in “a constitutional system that depends upon the distinction [between public and private] as a fundamental safeguard of private rights.”<sup>137</sup> In effect, the Fourth Circuit’s arbitrary line drawing allows a culpable management organization to escape accountability.

D. *The Fourth Circuit’s De Facto Creation of a Liability Shield*

The Fourth Circuit’s decision in *Peltier* encourages charter and education management organizations like RBA to shield themselves from constitutional liability by creating corporate buffers—in the form of incorporated charter schools like CDS.<sup>138</sup> After *Peltier*, management organizations will be encouraged to adopt a similar structure to that of CDS and RBA. That is, these management organizations are more likely to contract with or create one or more incorporated charter schools than to hold the charter themselves.<sup>139</sup> Given that the Fourth Circuit was persuaded not to find state action, in part, because RBA was not a party to the charter agreement with North Carolina,<sup>140</sup> other management organizations in North Carolina will likely opt out of holding charters to avoid state actor status. Thus, these management organizations are now emboldened to rely on their corporate structure and their removal from the charter agreement process as a shield from liability for any unconstitutional conduct.<sup>141</sup>

Moreover, the Fourth Circuit’s creation of a de facto liability shield for management organizations has implications beyond the future of equal protection challenges against these entities. Section 1983 suits can also arise in the due process context under the Fourteenth Amendment.<sup>142</sup> Much of the concern surrounding “no excuse” charter schools involves their excessively

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136. *See id.*

137. *Id.*

138. *See* Opening and Response Brief of Plaintiffs-Appellees, *supra* note 10, at 64 (“As the school’s operator, RBA should not be able to shield itself by creating a corporate buffer—in the form of CDS, Inc.—between itself and the state.”).

139. *See* U.S. DEP’T OF EDUC., *supra* note 127, at 2–3 (explaining that “a management organization is defined as a separate legal entity that 1) contracts with one or more charter schools to manage, operate, and oversee the charter schools; or 2) holds a charter, or charters, to operate a network of charter schools”).

140. *See Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 123 (4th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2657 (2023).

141. *See* Opening and Response Brief of Plaintiffs-Appellees, *supra* note 10, at 28.

142. *What Are the Elements of a Section 1983 Claim?*, THOMSON REUTERS (June 13, 2022), <https://legal.thomsonreuters.com/blog/what-are-the-elements-of-a-section-1983-claim/> [https://perma.cc/PU7G-C5KX].

punitive disciplinary practices,<sup>143</sup> many of which are established by management organizations.<sup>144</sup> Specific examples of these harmful practices include (1) vague disciplinary codes that give charter school administrators wide discretion to decide whether an act of misbehavior warrants suspension or expulsion, (2) punitive language that allows expulsion for repeated failure to wear school uniforms, and (3) a lack of clarity that does not place students on notice of school expectations.<sup>145</sup> These practices can raise due process concerns, especially when disciplinary codes fail to include the right to written notice of a suspension prior to the suspension taking place.<sup>146</sup> Due process violations disproportionately impact students of color, and more specifically, Black students, who are more likely to be suspended than white students.<sup>147</sup> In North Carolina, one study found that as the percentage of Black students at charter schools increases, the use of short-term suspension at the school would also likely increase.<sup>148</sup>

Beyond the due process implications, because of the Fourth Circuit's creation of a de facto liability shield, students will likely not be able to bring First and Fourth Amendment claims, and teachers will be prevented from bringing due process and equal protection claims against management organizations.<sup>149</sup>

143. See Jay Mathews, *Charter School Charged Students with 15,243 Violations in One Year. What Gives?*, WASH. POST (Mar. 29, 2021, 6:00 AM), [https://www.washingtonpost.com/local/education/charter-school-no-excuses/2021/05/28/620c5f2c-be55-11eb-b26e-53663e6be6ff\\_story.html](https://www.washingtonpost.com/local/education/charter-school-no-excuses/2021/05/28/620c5f2c-be55-11eb-b26e-53663e6be6ff_story.html) [<https://perma.cc/MMZ5-YBTM> (dark archive)] (discussing that at one school, teachers “assigned a total of 15,243 infractions to the school’s approximately 250 students”). It is important to note that lower-suspending charter schools are more numerous than high-suspending charter schools. See DANIEL J. LOSEN, MICHAEL A. KEITH II, CHERI L. HODSON & TIA E. MARTINEZ, *CHARTER SCHOOLS, CIVIL RIGHTS, AND SCHOOL DISCIPLINE 2* (2016), <https://scholarship.org/content/qt65x5j31h/qt65x5j31h.pdf> [<https://perma.cc/T8TG-KAZ4>]. These schools provide examples of nonpunitive approaches to school discipline that can reduce the harm of the school-to-prison pipeline. *Id.*

144. See Goodman, *supra* note 32, at 89.

145. Kerrin Wolf, Mary Kate Kalinich & Susan L. DeJarnatt, *Charting School Discipline*, 48 URB. LAW. 1, 31–42 (2016).

146. One study examining New York City charter schools found that out of 164 NYC charter school discipline policies, 133 failed “to include the right to written notice of a suspension prior to the suspension taking place, in violation of state law.” ADVOCS. FOR CHILD. OF N.Y., *CIVIL RIGHTS SUSPENDED: AN ANALYSIS OF NEW YORK CITY CHARTER SCHOOL DISCIPLINE POLICIES 6* (2015), [https://www.advocatesforchildren.org/sites/default/files/library/civil\\_rights\\_suspended.pdf](https://www.advocatesforchildren.org/sites/default/files/library/civil_rights_suspended.pdf) [<https://perma.cc/SYS3-MJW3>].

147. Preston C. Green III, Erica Frankenberg, Steven L. Nelson & Julie Rowland, *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 WASH. & LEE J.C.R. & SOC. JUST. 253, 274 (2012).

148. DUKE CHILD. ’S L. CLINIC, *DISCIPLINE IN NORTH CAROLINA’S CHARTER SCHOOLS 16* (2021), <https://law.duke.edu/sites/default/files/clinics/Discipline-in-North-Carolina-Charter-Schools.pdf> [<https://perma.cc/F9PK-3QQU>].

149. See *What Are the Elements of a Section 1983 Claim?*, *supra* note 142.

E. *Guideposts for the Delegation and Pervasive Entwinement Exceptions as Applied to Management Organizations*

In *Peltier*, the Fourth Circuit explained that state action occurs when a state has delegated duties that have been the “exclusive prerogative” of the state.<sup>150</sup> In determining whether the State had delegated duties that have been the “exclusive prerogative” of the state, the Fourth Circuit’s approach was to look at a state’s express statutory language.<sup>151</sup> This approach as applied in *Peltier* characterized RBA’s relationship to the State as “attenuated,” given that the express statutory language regarding approval and compliance mentions charter schools and not management organizations.<sup>152</sup>

The Fourth Circuit’s approach failed to consider how the State’s delegation of its constitutional duties can be both express and implied and also shared between two entities. As mentioned previously, CDS included its management organization, RBA, in its charter application, and the State not only approved of this relationship in granting the charter<sup>153</sup> but also “prohibited CDS from terminating RBA without its explicit approval.”<sup>154</sup> The Fourth Circuit failed to consider how the act of approving a charter application that includes both the charter school and the management organization implies that the State is delegating authority to *both* entities. Thus, the court’s framing of delegation was limited and should have also included an analysis of the charter application to determine whether the management organization shared delegated duties with the charter school.

In future Section 1983 claims, the Fourth Circuit should find state action under the public function exception if a charter school and its management organization share delegated duties under state law and those shared duties have historically been the “exclusive prerogative of the state.” Incorporating a shared delegation guidepost to the public function exception will remedy the error of allowing management organizations to skirt constitutional challenges because they are not explicitly named in statutory provisions.

150. *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 116 (4th Cir. 2022) (en banc) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)), *cert. denied*, 143 S. Ct. 2657 (2023).

151. *Id.* at 116–19 (examining how charter schools are described in North Carolina statutory law).

152. *See id.* at 117. In finding CDS, the charter school, to be a state actor, the Fourth Circuit placed considerable weight in this provision: “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. All charter schools shall be accountable to the State Board for ensuring compliance with applicable laws and the provisions of their charters.” *Id.* (emphasis added) (quoting N.C. GEN. STAT. § 115C-218.15(a) (LEXIS through Sess. Laws 2023-105 of the 2023 Reg. Sess. of the Gen. Assemb.)). This language only refers to charter schools and not management organizations, but the Fourth Circuit failed to recognize the implied delegation to management organizations in the words “approved by the state” and “accountable to the State Board.” *See id.*

153. *See* 16 N.C. ADMIN. CODE 6G.0523(b) (2023).

154. *See* Reply Brief of Plaintiffs-Appellees, *supra* note 109, at 28–29.

Additionally, with respect to the pervasive entwinement exception of state action, the Fourth Circuit’s state action analysis lacked the guideposts that would indicate whether a management organization is “pervasively entwined” with the state. The Fourth Circuit should apply *Brentwood*’s flexible, fact-based approach and find management organizations to be state actors when a combination of the *Brentwood* factors is present.<sup>155</sup> The first step of this approach would consider when a management organization is entwined with “governmental polices.”<sup>156</sup> A management organization’s entwinement with “governmental policies” should be found when it hires employees that are classified as *state employees* by statute.<sup>157</sup> Entwinement should also be found when a state statute requires disciplinary policies—many of which are created by management organizations—to be consistent with the state and federal constitutions.<sup>158</sup>

The next step of this approach would examine the *Brentwood* factor of whether the state is entwined in the “management or control”<sup>159</sup> of a management organization. The state should be considered entwined in the “management or control” of a management organization when a management organization designs a curriculum and school policies that are accountable to the state board of education.<sup>160</sup> Additionally, another guidepost that should signal the state’s “management or control” of a management organization is where state statute requires management organizations to report to the same state body as public schools, while home schools and private schools report to a different state body.<sup>161</sup> Thus, the Fourth Circuit should find state action under its “fact-specific” inquiry when there are several examples of entwinement present under different *Brentwood* factors.

155. See Maren Hulden, Comment, *Charting a Course to State Action: Charter Schools and § 1983*, 111 COLUM. L. REV. 1244, 1266 (2011) (recognizing that courts “rarely have . . . considered a claim that the combination of several *Brentwood* factors requires a finding of state action under that decision’s flexible, fact-based approach” likely because of how plaintiffs frame their claims).

156. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

157. N.C. GEN. STAT. § 115C-218.90(a)(4). In *Peltier*, the Fourth Circuit failed to acknowledge that RBA’s hiring of state employees would signal an entwinement similar to that in *Brentwood*. Compare *Peltier*, 37 F.4th at 113, 120, 123 (concluding that RBA has “no direct relationship with the state” after stating that RBA’s responsibilities include hiring charter school personnel who are public employees and eligible for the state-employee health and retirement plans), with *Brentwood*, 531 U.S. at 291 (finding that the Association was a state actor, in part, because while the Association’s staff members were not paid by the state, “they are eligible to join the State’s public retirement system”).

158. See N.C. GEN. STAT. § 115C-390.2(a).

159. *Brentwood*, 531 U.S. at 296 (quoting *Evans*, 382 U.S. at 301).

160. See N.C. GEN. STAT. § 115C-218.15(a) (“All charter schools shall be accountable to the State Board for ensuring compliance with applicable laws and the provisions of their charters.”).

161. “North Carolina’s Division of Nonpublic Education supervises private and home schools, while the state’s Department of Public Instruction provides oversight for charter schools.” *Peltier*, 37 F.4th at 119 n.9.

## CONCLUSION

As education management organizations like the Roger Bacon Academy, Inc. instill “body pedagogics” in charter schools, policing students’ bodies through discriminatory dress codes, students must have a means to redress violations of their constitutional rights. While the Fourth Circuit struck down the discriminatory dress code in *Peltier*, its ruling also allowed an education management organization to skirt accountability. In finding CDS to be a state actor but not RBA, the Fourth Circuit drew an arbitrary line between public and private, even though those entities, and many other charter schools and management organizations just like them, have overlapping identities and responsibilities. The implications of this decision extend beyond dress codes and will shield management organizations from other constitutional claims, including ones involving due process, searches and seizures, free speech, and free exercise. Following *Peltier*, it is hard to imagine how any management organization in North Carolina will be held accountable under Section 1983. And ultimately, accountability is of the utmost importance in our constitutional system.

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