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Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?

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I. Introduction

Forty-two states, the District of Columbia, and Puerto Rico have charter schools.¹ As of 2010, there were nearly 5,000 charter schools educating around 1.5 million students.² Charter schools are established through a “performance contract detailing the school’s mission, program, goals, students served, methods of assessment, and ways to measure success.”³ Charter schools usually receive a contract of three to five years.⁴ At the end of the contract, a charter authorizer may renew the contract based on the school’s ability to meet the requirements set in the contract.⁵ In exchange for this accountability, charter schools receive waivers exempting them from a number of restrictions that apply to traditional public schools.⁶

Charter schools are becoming increasingly popular to students of color, especially African-American students.⁷ According to a 2010 survey conducted by Harvard’s Program on Educational Policy Governance and the journal, *Education Next*, 64% of African-Americans support charter

1. See THE CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES (2012), <http://www.edreform.com/issues/choice-charter-schools/laws-legislation/> (last visited Apr. 1, 2012) (noting that the states without charter schools are Alabama, Kentucky, Montana, Nebraska, North Dakota, South Dakota, Vermont, Washington, and West Virginia) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

2. See GARY MIRON ET AL., SCHOOLS WITHOUT DIVERSITY: EDUCATION MANAGEMENT ORGANIZATIONS, CHARTER SCHOOLS AND THE DEMOGRAPHIC STRATIFICATION OF THE AMERICAN SCHOOL SYSTEM 1 (2010), available at <http://nepc.colorado.edu/publication/schools-without-diversity> (explaining the rapid growth of charter schools over the past two decades) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

3. U.S. Dept. of State, *U.S. Charter Schools: An Overview and History of Charter Schools*, USINFO.ORG, http://usinfo.org/enus/education/overview/charter_schools_history.html (last visited April 1, 2012) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

4. See *id.* (“The length of time for which charters are granted varies, but most are granted for 3–5 years.”).

5. See *id.* (providing an overview of the charter renewal process).

6. PRESTON C. GREEN & JULIE F. MEAD, CHARTER SCHOOLS AND THE LAW: ESTABLISHING NEW LEGAL RELATIONSHIPS 5–6 (2004) (stating that charter schools are relieved from certain regulations in exchange for achieving certain educational outcomes).

7. Paul E. Peterson & Martin West, *African-Americans for Charter Schools*, WALL ST. J., Aug. 23, 2010, <http://online.wsj.com/article/SB10001424052748704271804575405121906353464.html> (last visited Apr. 1, 2012) (“Support for charters among African Americans rose to 49% in 2009, up from 42% in 2008. [In 2010] it leapt upward to no less than 64%.”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

schools while 14% of African-Americans were opposed.⁸ Scholars have also asserted that charter schools may more effectively meet the need of African-American and Latino students than traditional public schools.⁹ They have emphasized the charter schools' ability to adopt educational themes that specifically address the educational needs of students of color, a small school size, and the flexibility in hiring teachers as reasons for such optimism.¹⁰

Critics have countered that charter schools may not be an effective alternative for students of color because they are even more segregated than traditional public schools.¹¹ The percentage of black charter school students in 90–100% minority schools¹² is nearly twice as high as is the case for black traditional public school students (70% compared to 36%).¹³ Also, 43% of black charter school students attended schools in which 99% or more of the enrollment were students of color.¹⁴ Although segregation is not as extreme for Latino students in charter schools, 50% of these students also attend 90–100% minority charter schools, compared to 38% of Latino traditional public school students.¹⁵ These statistics are disconcerting because schools with high percentages of racial minorities are more likely than predominantly white schools to have problems with teacher turnover.¹⁶

8. *Id.*

9. *See, e.g.*, Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 *YALE L. J.* 2375, 2404 (1997) (noting the potential advantages charter schools provide for parental involvement and local control); *see* Preston C. Green III, *Preventing School Desegregation Decrees from Becoming Barriers to Charter School Innovation*, 144 *EDUC. L. REP.* 15, 23 (2000) (suggesting that charter schools may “reduce racial isolation in inner-city school districts”).

10. *See* Green, *supra* note 6, at 19 (explaining why many African-Americans support the charter school movement as a way to address their specific needs).

11. *See* ERICA FRANKENBERG ET AL., *CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 1* (2010), *available at* <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf> (“The charter effort, which has largely ignored the segregation issue, has been justified by claims about superior educational performance, which simply are not sustained by the research.”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

12. *Id.* at 41. Ninety-three percent of charter or traditional public schools where 90% of students are black and Latino are also schools in which a majority of students are low-income. *Id.* at 72–73.

13. *Id.* at 38 (comparing the percentage of charter and public school students in segregated minority schools by race).

14. *Id.*

15. *Id.*

16. *See* Brief of 533 Social Scientists as Amici Curiae in Support of Respondents at

Schools with high concentrations of minority students also tend to have lower educational outcomes, as quantified by test scores, high school graduation rates, and college graduation rates.¹⁷

A recent federal appellate court decision suggests that students of color should also be concerned about the legal protections that charter schools might provide to students.¹⁸ Because state authorizing statutes consistently define charter schools as “public schools,”¹⁹ it would appear that charter school students are entitled to constitutional protections.²⁰ Students attending public schools have challenged deprivations of federal constitutional and statutory rights under 42 U.S.C. § 1983, which establishes a cause of action for deprivations of federal constitutional and statutory rights “under the color of state law.”²¹ Students have sought

10, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151 (Wash. 2003) (Nos. 05-908 & 05-915) (explaining that teachers are more likely to leave predominantly minority schools, resulting in higher teacher turnover).

17. *See id.* (noting the correlation between teacher retention and educational outcomes).

18. *See Caviness v. Horizon Learning Center*, 590 F.3d 806, 818 (9th Cir. 2010) (concluding that the constitutional protections afforded under the state-action doctrine did not extend to a charter school in Arizona that had been subsidized and regulated by the state).

19. *See, e.g.,* ARIZ. REV. STAT. § 15–181 (2011) (“Charter schools are public schools that serve as alternatives to traditional public schools”); FLA. STAT. ANN. § 1002.33 (2011) (“All charter schools in Florida are public schools.”); N.M. STAT. ANN. § 22-8B-4J (2011) (“A charter school shall be a nonsectarian, nonreligious and non-home-based public school.”); UTAH CODE ANN. § 53A-1a-503.5(a) (2011) (stating that charter schools are “considered to be public schools within the state’s public education system”). Additionally, Maryland and Washington, D.C., refer to charter schools as “public charter schools.” *See* MD. EDUC. CODE § 9-102 (2011); DC STAT. § 38-1802.01 (2011). Also, the U.S. Charter Schools website, which is supported by the National Alliance of Public Charter Schools, defines charter schools as “nonsectarian public schools of choice that operate with freedom from many of the regulations that apply to traditional public schools.” *See* U.S. Dept. of State, *supra* note 3.

20. *See* *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.”). *See also* *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969) (“[S]tudents do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

21. Title 42, Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2011).

damage awards pursuant to § 1983; “actions for injunctive or declaratory relief are [also] a major portion of the case law.”²² However, in 2010, the Ninth Circuit concluded in *Caviness v. Horizon Learning Center*²³ that a private, nonprofit corporation running an Arizona charter school was not a state actor under § 1983.²⁴ The Ninth Circuit specifically rejected the assertion that charter schools were state actors because they were defined as “public schools” under the state statute.²⁵

This Article examines the dangers that the *Caviness* case may pose for students of color who are attending charter schools. The second section provides an overview of § 1983 and *Rendell-Baker v. Kohn*,²⁶ the Supreme Court case that examined the statute’s applicability to private schools. The third section discusses how courts prior to the *Caviness* decision have addressed the question of whether charter schools are state actors under § 1983. The fourth section discusses the *Caviness* case. The final section explores the legal implications that *Caviness* may have for the legal rights of students of color who attend charter schools.

II. The State Action Doctrine, Private Schools, and Rendell-Baker

In *Rendell-Baker*, the Supreme Court first examined the applicability of § 1983 to private schools. This case involved a Massachusetts private school that served maladjusted students.²⁷ Almost all of the students had been referred to the school by city school committees or by a state agency.²⁸

22. Mark C. Weber, *Fitzgerald v. Barnstable School Committee, Safford Unified School District No. 1 v. Redding, and the Future of Section 1983 Education Litigation*, 252 EDUC. L. REP. 8, 10 (2010).

23. *See Caviness*, 590 F.3d at 808 (9th Cir. 2010) (finding that the allegations were “insufficient to raise a reasonable inference” that the private corporation running a charter school was a state actor).

24. *See id.* at 808 (stating that neither the corporation nor its director was proceeding as a state actor with regard to employment actions taken against a former teacher).

25. *See id.* at 815 (stating that plaintiff’s “reliance on Arizona’s statutory characterization of charter schools as ‘public schools’ does not itself avail him in the employment context”).

26. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 831 (1982) (finding that a private school for maladjusted students was not a state actor).

27. *See id.* at 832 (explaining that the school is a private institution for students with drug, alcohol, or behavior problems who have difficulty completing public high schools).

28. *See id.* (noting that most students had been referred by the Brookline or Boston School Committees or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health).

Public funds had accounted for at least 90 percent of the school's budget.²⁹ To be eligible for tuition provided by a state statute, the school had to follow a number of regulations "concerning matters ranging from recordkeeping to student-teacher ratios."³⁰ With regard to personnel matters, the state statute required the state "to maintain written job descriptions and written statements describing personnel standards and procedures," but imposed few specific obligations.³¹ The school had a contract with the Boston School Committee, which stated that the school's employees were not city employees.³² The school also had a contract with the state's drug rehabilitation division.³³ Except for general requirements, that contract did not cover personnel policies.³⁴

A vocational counselor and teachers brought separate § 1983 challenges alleging that the school had fired them in violation of the First, Fifth, and Fourteenth Amendments.³⁵ The First Circuit consolidated the actions and dismissed the claims.³⁶ The Supreme Court granted certiorari and found that the private school was not a state actor.³⁷ According to the Court, "[t]he ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights fairly

29. *See id.* ("In recent years, public funds have accounted for at least 90%, and in one year 99%, of respondent school's operating budget.")

30. *Id.* at 833.

31. *Id.*

32. *See id.* (stating that the Boston School Committee referred to the school as a "contractor" and specified that school employees were not city employees).

33. *See id.*

34. *See id.* ("Except for general requirements, such as an equal employment opportunity requirement, the agreement does not cover personnel policies.")

35. *See id.* at 834–35 (stating that Rendell-Baker (the vocational counselor) brought suit in July 1977, followed by five teachers in December 1978, all alleging that their First, Fifth, and Fourteenth Amendment rights had been violated). *See* US CONST. amend. IV ("The right of the people . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); U.S. CONST. amend V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend XIV, § 2 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."))

36. *See* Rendell-Baker, 457 U.S. 830, 836–37 (providing an overview of the procedural history of the case).

37. *See id.* at 837 (affirming the First Circuit's decision that the private school was not a state actor).

attributable to the state?”³⁸ The Court answered this question in the negative; it found that the school’s relationship with the state “is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government.”³⁹ Such agreements did not become state action “by reason of their significant or even total engagement in performing public contracts.”⁴⁰ The Court also reasoned that the relationship between the school and the teacher did not change because the state paid the tuition of the students.⁴¹

Further, the Court found that the state regulations did not make the private school a state actor.⁴² “[I]n contrast to the extensive regulation of the school generally,” the Court asserted that “the various regulators showed relatively little interest in the school’s personnel matters.”⁴³ The Court rejected the argument that the school was a state actor because it performed the public function of providing education.⁴⁴ To qualify as a state action, the function would have to be the “*exclusive* prerogative of state.”⁴⁵ The legislature’s decision to provide services to maladjusted students at the public’s expense “in no way makes these services the exclusive province of the State.”⁴⁶ Moreover, the Court rejected the argument that the fiscal relationship between the school and the state created a “symbiotic relationship,” thus making the school a state actor.⁴⁷ This was the case because the school’s fiscal relationship was similar to that of many contractors performing governmental services.⁴⁸

38. *Id.* at 838 (internal quotation omitted).

39. *Id.* at 840–41.

40. *Id.* at 841.

41. *Id.* (analogizing the school to a public defender who, though paid by the state, had a relationship with her client like that of any other attorney and client).

42. *See id.* (explaining that the school’s decision to discharge the petitioners was unrelated to state regulations).

43. *Id.*

44. *See id.* at 842 (stating that the relevant question goes beyond whether a private group is serving a public function).

45. *See id.* (discussing what private activities receive constitutional protections under the state action doctrine’s public function exception) (emphasis in the original).

46. *Id.* (reasoning that government programs to aid maladjusted students do not make those programs the exclusive province of the state qualifying for the public function exception to the state action doctrine).

47. *See id.* (reasoning that providing the school with government aid did not transform the private school into a tool for state action).

48. *See id.* at 843 (explaining that the funding provided to the school was similar to many contractual relationships the government shares with private actors which are not

III. Charter Schools and § 1983 prior to the Caviness Case

In *Rendell-Baker*, the Supreme Court held that a private school was not a state actor under § 1983 for the purposes of employment issues for four reasons.⁴⁹ First, the contractual relationship with the state was similar to other contracts between private corporations and state governments.⁵⁰ Second, the state employment regulations were not extensive.⁵¹ Third, providing special education services to students was not the exclusive province of the state.⁵² Fourth, the fiscal relationship between the school and the state was similar to other contracts for public services.⁵³

The hybrid nature of charter schools raises the question of whether charter schools are state actors under § 1983 or private entities that are merely providing a public service. Prior to the *Caviness* case, federal courts in Illinois, New York, Pennsylvania, and Ohio have examined the question of whether charter schools were state actors under § 1983. All of these courts concluded in the affirmative. This section provides an overview of those cases.

A. Ohio

In 2002, an Ohio federal district court first addressed the question of whether charter schools and the private companies that operated these schools were state actors. In this case, *Riester v. Riverside Community School*,⁵⁴ a terminated teacher sued the charter school and the management companies that provided services for that school under § 1983. She alleged that the charter school and the management companies violated her First

transformed into state actors).

49. *See id.* at 841–42 (holding that a private school was not a state actor because the contractual, regulatory, and fiscal relationship, plus the services provided by the school, did not indicate the school was a state actor).

50. *See id.* at 841 (reasoning that the contract with the school resembled contracts between the government and other private corporations not deemed state actors via the contractual relationship).

51. *See id.* (reasoning the state regulation over the private school was insufficient to make the school a state actor).

52. *See id.* at 842 (reasoning that because the state was not the sole provider of special education services, the fact that the school offered such services did not make the school a state actor).

53. *See id.* (reasoning that because the contract with the school resembled other contracts for public services, the contract did not make the school a state actor).

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

Amendment rights by terminating her in retaliation for her complaints pertaining to the lack of services for a troubled student.⁵⁵

The charter school and the management companies then moved to dismiss the claim on the ground that the charter school and management companies were not state actors under § 1983.⁵⁶ The court denied the motion.⁵⁷ It found that the state charter school law defined charter schools as public schools.⁵⁸ It thus followed that the charter school, and by extension the management companies, were state actors.⁵⁹ The court further found that management companies were state actors under the public function and entwinement tests—two tests used to determine whether private companies are state actors.⁶⁰

Under the public function test, a private company is a state actor when it provides a traditional state function.⁶¹ The court found that the management companies were state actors because “free, public education, whether provided by public or private educators, is an historical, exclusive, and traditional state function.”⁶² The court rejected the defendant’s assertion that *Rendell-Baker* required a different conclusion because: (1) the charter school was created “only with the help of the state,” and (2) the charter school “is subject to various rules and regulations to which private schools are not.”⁶³

The court also agreed that the management companies were state actors under the entwinement test, which states that private conduct may become so “entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional

55. *See id.* at 969 (providing the facts which led to allegations of retaliation against a teacher by Riverside Community School).

56. *See id.* at 970 (stating that Riverside filed a motion to dismiss because the school was not a state actor).

57. *See id.* (denying Riverside’s motion to dismiss because the plaintiff pled a proper retaliation claim).

58. *See* OHIO REV. CODE ANN. § 3314.01 (West 2011) (declaring that community schools formed in Ohio are public schools and part of the state education system).

59. *Riester*, 257 F. Supp. 2d at 972 (reasoning that Ohio statutes and precedent deem charter schools to be public schools, and as such are state actors).

60. *See id.* (discussing the entanglements and public function exceptions to the state action doctrine).

61. *See id.* (discussing the requirements of the public function doctrine).

62. *See id.* (holding that the management companies satisfied the public function test because schooling was traditionally the exclusive province of the state).

63. *See id.* at 972–73 (holding that Riverside Community School satisfied the public function doctrine).

limitations of state actors.”⁶⁴ The court concluded that the private companies were state actors under the entwinement test because “they have been granted the authority to provide free public education to all students in a nondiscriminatory manner; no other entity . . . has been so mandated by the State of Ohio besides local school districts.”⁶⁵

B. Pennsylvania

In 2003, a federal district court in Pennsylvania found that charter schools were state actors under § 1983. In *Irene B. v. Philadelphia Academy Charter School*,⁶⁶ parents of a student attending a charter school filed a § 1983 action alleging that a charter school violated the Individuals with Disabilities Education Act (IDEA).⁶⁷ The child, who was attending a Philadelphia public school, was a “15-year old boy with Down Syndrome, mental retardation, and profound hearing loss in his right ear.”⁶⁸ His mother contacted the founder and principal of the charter school, who told the mother that it could meet his educational needs and would develop a new Individual Educational Plan (IEP) for the child that would incorporate life skills and academics.⁶⁹ When the child enrolled as an eighth-grader in the school, his parents provided the school with his IEP, which was developed by the Philadelphia School District.⁷⁰ The parents asserted that other than speech therapy and bus transportation, the charter school failed to provide the services promised to their child under his prior IEP.⁷¹ Also, the parents claimed that the charter school failed to develop a new IEP as it had promised.⁷²

64. *See id.* at 972 (internal quotation marks omitted) (holding that the management companies satisfied the entwinement exception to the state action doctrine).

65. *See id.* (holding that the management companies also qualify for the public function exception because the state allows no other entity besides those companies aside from school districts to provide public education).

66. *Irene B. v. Phila. Acad. Charter Sch.*, No. Civ.A. 02-1716, 2003 WL 24052009, *1, (E.D. Pa. Jan. 29, 2003).

67. *See id.* at *1 (alleging that Philadelphia Charter Academy School violated the IDEA by not developing programs to meet the needs of students with learning disabilities).

68. *Id.* at *2.

69. *See id.* (explaining that the school assured the student’s mother before his enrollment that the school could accommodate his learning disability).

70. *See id.* (recounting the events prior to the dispute, including providing the school with the disabled student’s IEP).

71. *See id.* (explaining that the school failed to provide the services it promised to provide the disabled child under a IEP).

72. *See id.* (explaining that the school failed to develop a new IEP for the disabled

The parents then sued in district court alleging a violation of IDEA.⁷³ The court rejected the charter school's motion to dismiss for failure to state a claim upon which relief could be granted.⁷⁴ The court found that the § 1983 claim could proceed because "[i]t is now well-settled that a municipal entity is a state actor for purposes of liability under § 1983."⁷⁵ Public school districts were municipal entities.⁷⁶ Similarly, the court noted that because charter schools were independent public schools, they were part of the school system.⁷⁷ Thus, it was appropriate to treat charter schools as state actors with respect to IDEA claims.⁷⁸

C. New York

In 2006 and 2007, two New York federal district courts also concluded that charter schools were state actors under § 1983. In the 2006 decision, *Matwijko v. Board of Trustees of Global Concepts of Charter School*,⁷⁹ a former teacher alleged that the principal and the board of a charter school terminated her, in violation of the First Amendment,⁸⁰ because of her actions as chairperson of the school's advisory council.⁸¹ The defendants moved for judgment on the pleadings on the ground that the defendants were not state actors pursuant to § 1983.⁸²

student as it promised the parents it would).

73. *See id.* at *1 (explaining the claims for violations of the IDEA filed by the student's parents against the school).

74. *See id.* (detailing the various claims which the court is dismissing and which are sufficient to state a claim).

75. *Id.* at *11.

76. *See id.* (explaining that the Philadelphia school district system is a municipal entity).

77. *See id.* (explaining that because the charter school was a public school, it was part of the public school system and thus a municipal entity acting under color of law for the purposes of the state action doctrine).

78. *See id.* (explaining that because the charter school acted under the color of law as part of a municipal entity, the plaintiffs may state a claim under the IDEA).

79. *Matwijko v. Bd. of Trs. of Global Concepts Charter Sch.*, No. 04-CV-663A, 2006 WL 2466868 (W.D.N.Y. 2006).

80. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

81. *Matwijko*, No. 04-CV-663A, 2006 WL 2466868, at *1 (explaining that the plaintiff filed a complaint for retaliatory firing in response to her criticisms of the defendant's allegedly unlawful practices).

82. *See id.* (explaining that the defendants moved to dismiss the claims by asserting the state action doctrine did not apply).

The court denied the defendants' motion on the ground that the New York charter school statute provides that charter schools are independent and autonomous *public schools* performing essential public purposes and governmental purposes of the state.⁸³ The court also noted that charter schools had "to meet the same health and safety, civil rights, and student assessment requirements applicable to *other public schools*."⁸⁴ Additionally, charter schools received 100% of the per-pupil funding provided to other public schools, and any public student was qualified for admission to a charter school.⁸⁵ Further, the school code permitted charter school employees to participate in the public retirement system and afforded these employees protection under New York's civil service law.⁸⁶ Therefore, the fact that the code did not consider charter schools otherwise as public employers "did not remove them from the realm of state actors."⁸⁷ The court concluded that the legislature intended charter schools to be public schools despite the fact that they were exempted "from certain regulatory burdens associated with traditional public schools."⁸⁸ The court found that *Rendell-Baker* was inapplicable because New York law did not consider charter schools to be private schools.⁸⁹

In *Scaggs v. New York State Department of Education*,⁹⁰ students attending a charter school brought a § 1983 action against a charter school and Edison Schools ("Edison"), the private entity that operated the school.⁹¹ The plaintiffs alleged that the defendants violated the Americans with

83. *Id.* at *5 (emphasis in the original).

84. *Id.* (emphasis in the original).

85. *See id.* at *3 (explaining that charter school students receive the same funding on a per-student basis as other public schools, and that public school students were eligible to attend the charter school).

86. *See id.* at *4 (explaining that employees of the charter school receive the same legal protections and retirement entitlements as public school employees).

87. *See id.* at *5 (concluding that, although the state code did not consider charter schools public schools, it did not preclude the possibility and that circumstances support a finding that the charter school was a state actor).

88. *See id.* (concluding that the charter school was a public school despite a laxer regulatory burden than most public schools have).

89. *See id.* (distinguishing *Rendell-Kohn* by indicating that New York law does not consider charter schools to be private schools).

90. *See Scaggs v. N.Y. Dep't of Educ.*, No. 06-CV-0799, 2007 WL 1456221, *24 (E.D.N.Y. 2007) (granting the defendants' motion to dismiss in part and denying it in part).

91. *See id.* at *2 (detailing the procedural history behind the case, including the initial complaint filed against defendant claiming their right to a free education was violated by the defendants).

Disabilities Act,⁹² the Rehabilitation Act of 1973,⁹³ and the Equal Protection Clause.⁹⁴ The defendants moved to dismiss the claim on the ground that Edison was not a state actor.⁹⁵ The district court contrasted the instant case to *Rendell-Baker*. Because *Rendell-Baker* was an employment action regarding a single teacher; the state was “only minimally or tangentially involved.”⁹⁶ Conversely, the plaintiffs’ allegations in the instant case “relate[d] to the alleged total inadequacy of a school to provide free public education to its students while receiving state funding, being bound by educational standards and purporting to offer the same educational services and facilities as any other public school.”⁹⁷ Because the plaintiffs’ claims challenged the quality of education provided by charter schools, the court held their § 1983 claim may proceed.⁹⁸

D. Illinois

In 2009, several months prior to the *Caviness* decision, a federal district court in Illinois held that a not-for-profit organization that owned a charter school was a state actor pursuant to § 1983.⁹⁹ In this case, *Jordan v. Northern Kane Educational Corp.*, the not-for-profit organization (“NKEC”) relieved an employee of her duties as executive director of the

92. See 42 U.S.C. § 12112(a) (2009) (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”).

93. See 29 U.S.C. § 794(a) (2002) (“No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability . . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

94. See Scaggs, No. 06–CV–0799, 2007 WL 1456221 at *3 (detailing the various claims filed by the plaintiffs against the defendant). See U.S. Const. amend. XIV, § 1 (“No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

95. See Scaggs, No. 06–CV–0799, 2007 WL 1456221 at *3 (discussing the motion to dismiss on the grounds that Edison did not qualify as a state actor).

96. See *id.* at *13 (distinguishing *Rendell-Baker* because that case involved employment action against a single teacher and only minimally involved the state).

97. See *id.* (distinguishing *Rendell-Baker* because this case involved the provision of facilities and services related to public education, which bears more directly on state action than the employment action in *Rendell-Baker*).

98. See *id.* (holding that the claim may be brought against Edison because it provides public education services).

99. See *Jordan v. N. Kane Educ. Corp.*, No. 08 C 4477, 2009 WL 509744, *3 (N.D. Ill. 2009) (denying defendants’ motion to dismiss).

charter school and made her a full-time teacher.¹⁰⁰ NKEC later terminated her employment as a teacher.¹⁰¹ The former employee then filed a complaint under § 1983, alleging that NKEC violated her due process rights by failing to provide a hearing before firing her.¹⁰² NKEC moved to dismiss the claim on the ground that it was not a state actor under § 1983.¹⁰³

The district court denied NKEC's motion to dismiss.¹⁰⁴ The court observed that although Illinois's charter school law did provide that charter schools were public entities, it failed to address explicitly whether the entity that owned the charter school was a public entity.¹⁰⁵ However, the charter school law did provide that "governing bod[ies] of charter school[s] [were] subject to the same disclosure requirements that applied to other [state] governmental entities."¹⁰⁶ Therefore, it was apparent that the legislature intended charter school bodies to function as public entities.¹⁰⁷ Consequently, the court concluded that NKEC was a state actor pursuant to § 1983.¹⁰⁸

E. The Caviness Case

Prior to the *Caviness* case, federal district courts consistently found that charter schools, their governing boards, and the private companies that either provide services or run these schools were state actors pursuant to § 1983.¹⁰⁹ The courts in New York, Ohio, and Pennsylvania ruled in this fashion because the state charter school laws defined charter schools either as public schools or municipal entities. An Illinois district court held that a private entity operating a charter school was a state actor because charter school governing boards were subject to the same disclosure requirements as other state governmental bodies.¹¹⁰ By contrast, in *Caviness*, the Ninth

100. *Id.* at *1.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at *3.

105. *Id.* at *2.

106. *Id.* at *3.

107. *See id.* ("It therefore appears that the Illinois legislature . . . intended that the governing body of a charter school function as a public, government entity.")

108. *Id.*

109. *See supra* section III (discussing cases decided prior to the *Caviness* case).

110. *See Jordan v. N. Kane Educ. Corp.*, No. 08 C 4477, 2009 WL 509744 (N.D. Ill. 2009) (ruling that a charter school should be treated as a government entity).

Circuit held that a private, non-profit corporation that operated an Arizona charter high school was not a state actor in § 1983.¹¹¹ This section provides an overview of the *Caviness* case.

I. Background

In February 2006, a female student accused Michael Caviness, a physical education teacher and track coach working at the charter school, of crossing student-teacher boundaries.¹¹² The private entity running the charter school (“Horizon”) placed Caviness on paid leave and then investigated the student’s claims.¹¹³ The Horizon board held a hearing in which it—but not the teacher—questioned the student.¹¹⁴ The board concluded that Caviness had exercised questionable judgment with regards to his interactions with the student and decided not to renew his teaching and coaching contract.¹¹⁵ The board decided to keep Caviness on paid leave until the end of his contract in June 2006.¹¹⁶

In April 2006, the executive director of Horizon wrote a letter to Caviness that he also sent to the Arizona Department of Education.¹¹⁷ Caviness claimed that the letter made several false and defamatory claims about him.¹¹⁸ In July 2006, Caviness applied for a position as a teacher and a coach in another Arizona school district. The district refused to hire Caviness after the executive director of Horizon declined the school district’s request to rate his ability and knowledge as a teacher.¹¹⁹

In August 2006, Caviness’s attorney sent a letter to Horizon claiming that a Horizon employee had called him a pedophile.¹²⁰ The letter demanded that Horizon provide written evidence that it had instructed all of its agents and employees to refrain making such claims.¹²¹ The executive director did not address this demand in his written response; Caviness

111. See *Caviness v. Horizon Cmty. Learning Ctr.*, 590 F.3d 806 (9th Cir. 2010) (finding that a charter high school was not a state actor).

112. *Id.* at 810.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 811.

121. *Id.*

asserted that another Horizon teacher subsequently falsely called him a pedophile.¹²²

In December 2006, Caviness requested a name-clearing hearing to address Horizon's conduct following the March 2006 hearing.¹²³ Horizon did not answer this request.¹²⁴

2. District Court Decision

In March 2007, Caviness filed a complaint under § 1983 in the United States District Court of Arizona.¹²⁵ Caviness claimed that Horizon, acting under the color of state law, deprived him of his liberty interest in “finding and obtaining work without due process by making ‘several false statements about’ him ‘in connection with his employment’” without providing him notice or a name-clearing hearing.¹²⁶ The district court granted Horizon's motion to dismiss for failure to state a claim for which relief could be granted under Federal Rule of Civil Procedure 12(b)(6).¹²⁷ It rejected Caviness's claim that Horizon was a state actor because of the enabling statute's characterization of it as a “public school.”¹²⁸ The district court also rejected the plaintiff's assertion that the school was a state actor because it performed the public function of education.¹²⁹

3. Circuit Court Decision

Caviness then appealed to the Ninth Circuit.¹³⁰ The court affirmed the district court's motion to dismiss with respect to the § 1983 claim.¹³¹ The Ninth Circuit observed that it would find that Horizon was a state actor “if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the state itself.”¹³² To determine whether there was a close nexus, the

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 818.

132. *Id.* at 812 (citations omitted).

court's inquiry began by examining the specific conduct at issue because an entity may be a state actor for some matters but not others.¹³³ The Ninth Circuit then found that Caviness failed to argue that Horizon's specific conduct rendered it a state actor.¹³⁴ Instead, Caviness asserted that Horizon was a state actor as a matter of law under the state's charter school scheme.¹³⁵ "Therefore," the court reasoned, "Caviness's appeal must fail unless being an Arizona charter school, is by that fact alone, sufficient to make Horizon the government for employment purposes."¹³⁶

The court rejected Caviness's first argument that charter schools were state actors for all purposes, including employment matters, under the state's statutory and regulatory scheme.¹³⁷ In support of his assertion, Caviness observed that Arizona statutes defined charter schools as "public schools" and that the state attorney general had concluded that charter schools were political subdivisions under the state open meeting act.¹³⁸ The court disagreed with this argument because a private entity may be a state actor for some purposes but not others.¹³⁹

Caviness also argued that Horizon was a state actor because it provided public education, which Caviness characterized as a "function that is 'traditionally and exclusively under the prerogative of the state.'"¹⁴⁰ The Ninth Circuit countered that *Rendell-Baker* foreclosed this argument.¹⁴¹ The Ninth Circuit found that the instant case was like *Rendell-Baker* in that the Arizona statute authorized the charter school sponsor to provide alternative educational choices at public expense.¹⁴² As in *Rendell-Baker*, such a

133. *Id.* at 812–13.

134. *Id.* at 813.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 813–14.

139. *Id.* at 814. Caviness also cited a Sixth Circuit case, *Greater Heights Acad. v. Zelman*, 522 F.3d 678 (6th Cir. 2008), which found that charter schools were state actors under § 1983 because they were political subdivisions under Ohio law. Caviness, 590 F.3d at 814. The Ninth Circuit found that *Greater Heights Academy* was irrelevant because it says nothing about Arizona's charter school law. *Id.*

140. Caviness v. Horizon Cmty. Learning Ctr., 590 F.3d 806, 814 (9th Cir. 2010).

141. *See id.* at 815 (countering that the legislative policy choice of allowing private organizations to run charter schools did not make education the exclusive province of the state).

142. *See id.* (discussing the similarities between Caviness and *Rendell-Baker*).

legislative choice did not place these services under the exclusive power of the state.¹⁴³

Third, Caviness claimed that Horizon was a state actor because the state regulated personnel issues related to charter schools.¹⁴⁴ The Ninth Circuit rejected this assertion, noting that state action may occur if the state had exercised coercive power over the private entity.¹⁴⁵ On the other hand, subjecting a business to mere regulation did not convert the private entity into a state actor.¹⁴⁶ Even extensive regulations did not make a private entity a state actor if the regulations did not compel the private entity's challenged conduct.¹⁴⁷ The court found that the charter school statute did not control Horizon's post-termination decisions.¹⁴⁸ Indeed, the statute expressly exempted Horizon from all rules relating to school districts, including providing employees the right to a hearing after dismissal.¹⁴⁹ The Ninth Circuit found further support for its conclusion because of the absence of any reference to charter schools in the statutory provisions related to certified teachers' employment rights.¹⁵⁰ Additionally, the court found that the fact that charter schools could participate in the state's retirement system did not make Horizon a state actor.¹⁵¹ It was settled case law that states could subsidize the operating costs of a private entity "without converting its acts into those of the state."¹⁵² Moreover, the Ninth

143. *See id.* (explaining the court's reasoning that even substantial state involvement in the charter school did not rise to the level necessary for it to be a state actor).

144. *See id.* at 816 (presenting Caviness' argument for Horizon being a state actor).

145. *See id.* ("A state may be responsible for a private entity's actions if it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982))).

146. *See id.* (stating that general state regulation is insufficient to make a business a state actor).

147. *See id.* ("Even extensive government regulation of a private business is insufficient to make that business a state actor if the challenged conduct is was not 'compelled or even influenced by any state regulation.'" (citing *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982))).

148. *See id.* at 817 (analyzing the Arizona Revised Statutes, to conclude that Horizon was not bound by any state regulation in its post-termination proceedings).

149. *See id.* ("Horizon is expressly 'exempt from all statutes and rules relating to schools, governing boards and school districts.'" (citing Arizona Revised Statutes § 15-187(A), (B))).

150. *See id.* at 816 ("The absence of any reference to charter schools in the statutory sections governing certified teachers' employment rights supports our conclusion.").

151. *See id.* (providing that a state's subsidization of a private business does not convert that business into a state actor).

152. *Id.* at 817.

Circuit rejected the fact that Horizon became a state actor because its sponsor had the power to approve and review its charter school, including its personnel policies.¹⁵³ Mere approval of the actions of private entities did not convert their personnel decisions into state action.¹⁵⁴ This was the case even when the state had the initial power to review the qualifications of the schools' employees.¹⁵⁵

IV. The Implications of the Caviness Case for Students of Color

Although the *Caviness* case was an employment case, it is important to recognize that a similar analysis could lead to the conclusion that charter schools are not state actors with respect to student constitutional issues. Students attending public schools are guaranteed constitutional protections.¹⁵⁶ There are constitutional safeguards for student expression.¹⁵⁷ Public school students are protected from unreasonable search and seizure.¹⁵⁸ The Constitution also requires public schools to provide procedural due process safeguards when suspending or expelling

153. *See id.* (explaining that reviewability of personnel decisions does not rise to the level of state actions).

154. *See id.* (stating that acquiescence or approval by the state did not make private entities into state actors).

155. *See id.* (“Even when the state has the power ‘initially to review the qualifications of a[n] employee] selected by the school,’ such regulation is not sufficient to make the school’s employment-related actions those of the state.” (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982))).

156. *See* *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.”).

157. *See* *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988) (“[Students] cannot be punished merely for expressing their personal views on the school premises—whether ‘in the cafeteria, or on the playing field, or on the campus during the authorized hours,’ (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13(1969))); *Morse v. Frederick*, 551 U.S. 393, 407–09 (2007) (elaborating on the safeguards in place for student expression at schools).

158. *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (“Rather, the legality of a search of a student should depend simply on the reasonableness, under all circumstances, of the search.”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (“As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is ‘reasonableness.’”) The Court goes further to state that “special needs” exist in the public school context, which means that the warrant requirement would interfere with swift disciplinary procedures. *Id.* at 653; *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 836 (2002) (examining the protections students are afforded from unreasonable search and seizures).

students.¹⁵⁹ Of the seven states in the Ninth Circuit with legislation authorizing charter schools,¹⁶⁰ only Oregon guarantees that all federal rights apply to charter schools.¹⁶¹ With the exception of Oregon, state legislatures do not compel charter schools to follow constitutional guidelines with respect to due process. California and Idaho merely require potential charter school operators to disclose their disciplinary policies in their initial charter application.¹⁶² Alaska, Arizona, Hawaii, and Nevada do not even demand that charter schools disclose their disciplinary policies at the time of application.¹⁶³

In *Goss v. Lopez*,¹⁶⁴ the Supreme Court held that students subject to suspensions of ten or fewer days were entitled to due process.¹⁶⁵ A student facing such a suspension had a right to “be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”¹⁶⁶ The *Goss* Court also observed that “[l]onger suspensions or

159. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (discussing the property and liberty interests public school students have in receiving a fair hearing before being suspended or expelled).

160. Montana and Washington have no legislation authorizing the operation of charter schools. See Rev. Code Wash. § 28A.208.010 (demonstrating that a Washington state referendum blocked the charter school provisions from becoming law).

161. See Or. Rev. Stat. § 338.115(1)(a) (2011) (explicitly stating that Federal law applies to public charter schools). Arizona’s charter school law limits its protection of students to the First Amendment. See also Ariz. Rev. Stat. § 15-110 (2011) (detailing Arizona’s protections of students’ religious viewpoint and expression).

162. See Calif. Educ. Code § 47605 (2011) (explicating the process of forming a charter school in California); see also Idaho Stat. § 33-5205 (2011) (detailing Idaho’s process for the formation of a charter school).

163. Alaska, Arizona, Hawaii and Nevada provide the minimum requirements for an application to form a charter school in each respective state. The statutes, in general, discuss educational quality, employment, facility selection, and governance. None of the statutes explicitly require that charter schools during the charter application process disclose their proposed disciplinary policies and how those policies will protect the rights of students. See Alaska Stat. Ann. § 14.03.255, Ariz. Rev. Stat. Ann. § 15-183(a), Haw. Rev. Stat. §§ 302(b)-5, 302(b)-6, and Nev. Rev. Stat. § 386.520(4). Both Alaska and Nevada explicitly grant their respective boards of education power to prescribe additional charter application requirements. This grant of power does not, however, guarantee that the administrative agencies will create the additional requirement of disclosing disciplinary policies and practices. See Alaska Stat. Ann. § 12.03.280 and Nev. Rev. Stat. Ann. § 186.520(4).

164. *Goss v. Lopez*, 419 U.S. 565 (1975).

165. See *id.* (“Students facing temporary suspension from a public school have property and liberty interests that qualify for protection under the Due Process Clause of the Fourteenth Amendment.”).

166. *Id.* at 584.

expulsions for the remainder of the school term, or permanently, may require more formal procedures.”¹⁶⁷ Circuit courts that have determined the due process requirements in situations involving long-term suspensions and expulsions have employed the balancing test of the Supreme Court’s *Matthews v. Eldridge*¹⁶⁸ to determine whether additional due process was required.¹⁶⁹ *Matthews* requires the Court to balance three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁷⁰

If constitutional due process does not govern the charter school-student relationship, then it is quite possible that a court will find that contract law applies, as in the case of private schools.¹⁷¹ Courts are very reluctant to intervene in the suspension and expulsion decisions of private schools.¹⁷² If a private school “has clearly stated the rule, preferably in writing, and a parent chooses to have his or her child attend the school, a court will generally uphold the rule.”¹⁷³ In *Flint v. Augustine High School*,¹⁷⁴ for example, a Louisiana private school expelled two students for violating its no smoking policy.¹⁷⁵ The school’s handbook called for a fine

167. *Id.*

168. *Matthews v. Eldridge*, 424 U.S. 319 (1976).

169. *See Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 923–24 (6th Cir. 1988) (“Without the aid of Supreme Court authority directly on point, we are left with resolving the procedural due process issues presented in this appeal under the more general rubric of *Matthews v. Eldridge*.”); *Palmer ex rel. Palmer v. Merluzzi*, 868 F.2d 90, 95 (3d Cir. 1989) (applying the test established in *Matthews v. Eldridge*); *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1240 (10th Cir. 2001) (showing how different courts have utilized the *Matthews* test in analyzing potential due process violations in educational settings).

170. *Matthews*, 424 U.S. at 335.

171. *See David Pollack & David Schnall, Expelling and Suspending Students: An American and Jewish Legal Perspective*, 9 *New Eng. J. Int’l & Comp. L.* 334, 343 (2003) (“Private schools, regardless of whether they include religious teachings, are governed by a contract between the parent and the school.”).

172. *See id.* (demonstrating the courts reticence to engage in overturning private school suspensions and expulsions).

173. Mary A. Shaughnessy, *Civil Law and Catholic Education: Past, Present, and Future*, 12 *Catholic Educ. A J. of Inquiry & Practice*, 519, 527 (2003).

174. *Flint v. St. Augustine High School*, 323 So. 2d 229 (La. App. 1975).

175. *See id.* at 230–31 (showing that the school had a specific policy against smoking, of which students were made aware in the student handbook).

of ten dollars for the first offense, and expulsion for the second offense.¹⁷⁶ The state court of appeals upheld the suspension of the students.¹⁷⁷ In reaching its decision, the court declared that private institutions “have a near absolute right and power to control their own internal disciplinary procedure which, by its very nature, includes the right and power to dismiss students.”¹⁷⁸ Although the court allowed that due process protections could not “be cavalierly ignored or disregarded,” it held that “if there is color of due process—that is enough.”¹⁷⁹

Students of color attending charter schools should be concerned about the potential lack of constitutional due process protection. Studies of data at the national, state, district, and building levels have consistently found that students of color are suspended at two to three times the rate of other students.¹⁸⁰ African-American students should be especially concerned about the possible lack of due process protection.¹⁸¹ According to the U.S. Department of Education Office for Civil Rights, in the 1970s African-Americans were two times more likely than white students to be suspended from school.¹⁸² By 2002, the risk of suspension for African-Americans increased to nearly three times that of white students.¹⁸³ Further, a study of office discipline referrals in 364 elementary and middle schools during the 2005–06 school year found that African-American students were more than two times as likely to be referred to the office for disciplinary issues as white students.¹⁸⁴ The same study found that African-American students were also four times more likely to be sent to the principal’s office than white students.¹⁸⁵

176. *See id.* at 230 (quoting from the student handbook).

177. *See id.* at 235 (“These young men were obliged, while at St. Augustine High School, to do as they were required by the rules of the school—which they deliberately chose to ignore.”).

178. *Id.* at 234.

179. *Id.* at 235.

180. *See* Russell J. Skiba et. al, *Race is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCH. REV. 85, 86 (2011) (showing that this has remained the case for over twenty-five years).

181. *See id.* (“Documentation of disciplinary overrepresentation for African American students has been highly consistent.”).

182. *Id.*

183. *Id.*

184. *Id.* at 101.

185. *Id.*

V. Conclusion

Because of their foci on autonomy and accountability, supporters of charter schools have argued that they are the perfect vehicle for addressing the educational needs of students of color. This article points out, however, that charter schools may not be state actors under federal law with respect to student rights. Consequently, students of color may be unwittingly surrendering protections guaranteed under the Constitution in order to enroll in charter schools.