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IMLA NEWS
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## FEATURED CASE:

### Education: Charter School is State Actor; Skirt Requirement for Female Students Violates Equal Protection and Title IX

***Peltier v. Charter Day School, Inc.*, no. 20-1001 (4th Cir. June 14, 2022).**

**Vacating and remanding in part, the Fourth Circuit, sitting en banc, holds (1) that a charter school is a state actor for Section 1983 purposes and is therefore susceptible to an Equal Protection claim by female students due its dress code; and (2) the gender-specific dress code violated the provisions of Title IX. The 103-page opinion included several concurrences and two dissents.**

**Background:**

Charter Day School (CDS) is a public charter school in Brunswick County, North Carolina founded by Baker Mitchell (Mitchell) in 1999. It receives 95% of its funding from federal, state, and local governmental authorities. Enrollment at CDS is open to all kindergarten through eighth grade students eligible to attend North Carolina public schools. CDS was managed by a separate for-profit management company also founded by Mitchell, Roger Bacon Academy (RBA), which was responsible for the day-to-day operations of CDS, including hiring school personnel and carrying out the school's education program.

Since its inception, CDS has "emphasize[d] traditional values," including a "traditional curriculum, traditional manners and traditional respect." Among other requirements, all students must wear a unisex polo shirt and closed-toe shoes; "[e]xcessive or radical haircuts and colors" are prohibited; and boys are forbidden from wearing jewelry. Female students are required to wear a "skirt," "jumper," or "skort." In contrast, boys must wear shorts or pants. All students are required to comply with the dress code unless they have physical education class, when they wear unisex physical education uniforms, or an exception is made for a field trip or other special event. A student's failure to comply with the dress code requirements may result in disciplinary action, including notification of the student's parent, removal from class to comply with the dress code, or expulsion.

In 2015, plaintiff Bonnie Peltier (Peltier), the mother of a female kindergarten student at CDS, informed Mitchell that she objected to the skirt requirement. CDS responded to Peltier in support of the policy, stating that the Trustees, parents, and other community supporters were determined to preserve chivalry and respect among young women and men in this school of choice. For example, young men were to hold the door open for the young ladies and to carry an umbrella, should it be

needed. “Ma’am” and “sir” were to be the preferred forms of address. There was felt to be a need to restore, and then preserve, traditional regard for peers. Mitchell elaborated that chivalry is “a code of conduct where women are treated, they’re regarded as a fragile vessel that men are supposed to take care of and honor,” and that in implementing the skirt requirement, CDS sought to “treat[] [girls] courteously and more gently than boys.”

Peltier and two other CDS parents and guardians, on behalf of their female children (plaintiffs), sued CDS, its Board, and RBA (defendants), alleging violations of the Equal Protection Clause and Title IX, arguing that the skirt requirement is a sex-based classification rooted in gender stereotypes that discriminates against them based on their gender. The parties filed cross-motions for summary judgment. In support of their summary judgment motion, the plaintiffs submitted evidence of the harms they suffer based on the skirt requirement--one testified that the requirement conveys the school’s view that girls “simply weren’t worth as much as boys,” and that “girls are not in fact equal to boys.” Another plaintiff stated that the requirement “sends the message that girls should be less active than boys and that they are more delicate than boys,” with the result that boys “feel empowered” and “in a position of power over girls.” The plaintiffs also explained that they avoid numerous physical activities, including climbing, using the swings, and playing soccer, except for days on which they are permitted to wear their unisex physical education uniforms.

**Decision Below:**

The district court concluded that CDS, in imposing and implementing the skirt requirement, was a state actor for purposes of the Equal Protection claim brought under Section 1983. That court reasoned that CDS’ provision of a free, public education is a function historically and exclusively performed by the state and that, therefore, CDS’ conduct fairly was attributable to the state of North Carolina. However, the district court concluded that RBA did not have a sufficiently close tie to the state to qualify as a state actor.

On the Equal Protection claim, the court held that the skirt requirement violates the Equal Protection Clause and granted summary judgment to the plaintiffs on that claim against CDS. But it reached a different conclusion regarding the Title IX claim, holding that dress codes categorically are exempt from Title IX’s prohibition against gender discrimination. The court reasoned that when the United States Department of Education rescinded a prior regulation governing dress codes, the Department reasonably had concluded that Congress did not intend for such policies to be subject to Title IX. The court thus granted summary judgment to the defendants on the Title IX claim. The district court denied summary judgment without prejudice on the plaintiffs’ state law claims and entered partial final judgment on the remainder of the case.

**Appeal - State Action:**

On appeal, a panel of the Fourth Court reversed the district court’s judgment on both the Equal Protection and the Title IX claims. That decision was vacated by a vote of the full Circuit Court, which then considered the appeal en banc.

The Supreme Court has identified various circumstances in which a private actor may be found to have engaged in state action. For example, when the state has coerced, or has provided “significant encouragement” to, a private actor, or if there is “pervasive entwinement of public institutions and public officials” with a private entity, that entity’s conduct is considered state action. A state also will be held responsible for a private actor’s decision when the state’s engagement or encouragement is so significant that “the choice must in law be deemed to be that of the State.”

The plaintiffs argued that CDS was a state actor because the operation of schools designated as “public” under North Carolina law is an exclusively public function that the state had delegated in part

to charter school operators to fulfill the state's constitutional duty to provide free, universal elementary and secondary schooling.

CDS argued that because the state of North Carolina was not involved in CDS' decision to implement the skirt requirement, there was no "coercion" or "pervasive entwinement" by the state with the challenged conduct. Furthermore, because no North Carolina student was required to attend CDS, the state had not delegated to charter schools its responsibility to educate North Carolina students. In addition, CDS cited the fact that the Supreme Court has never held that the provision of elementary and secondary education is exclusively a state function. In sum, CDS was merely is a private actor providing a service under its charter contract with the state.

The Fourth Circuit majority (Senior Judge Keenan and nine others) disagreed. To fulfill its duty to provide an education to state residents, the North Carolina legislature authorized the creation of public charter schools overseen by a state board. Among other requirements imposed by the state, charter schools must design their educational programming to satisfy student performance standards adopted by the state board of education--a requirement not applicable to non-public schools. And in defining the nature of charter schools, North Carolina law expressly provides: "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."

The majority concluded that "The statutory framework of the North Carolina charter school system compels the conclusion that the state has delegated to charter school operators like CDS part of the state's constitutional duty to provide free, universal elementary and secondary education. . . . Were we to adopt CDS' position, North Carolina could outsource its educational obligation to charter school operators, and later ignore blatant, unconstitutional discrimination committed by those schools. We need look no further than the shameful history of state-sponsored racial discrimination in this country to reject an application of the Equal Protection Clause that would allow North Carolina to abdicate its duty to treat public schoolchildren equally." Thus, for purposes of Section 1983, CDS was acting under color of state law and was susceptible to an Equal Protection claim.

The court reached a different conclusion as to RBA, a for-profit management company. It was distinguishable from CDS: North Carolina has not chosen to delegate its constitutional duty to provide free, universal elementary and secondary education to for-profit management companies like RBA. "To the contrary, RBA has no direct relationship with the state and is not a party to the charter agreement between CDS and North Carolina. Instead, RBA manages the daily functioning of the school under its management agreement with CDS. In working for CDS, rather than for the state of North Carolina, RBA's actions are more attenuated from the state than those of CDS, the entity authorized by the state to operate one of its public schools." The Circuit concluded that RBA's actions implementing the skirt requirement were not "fairly attributable" to the state.

**Appeal - Equal Protection:**

The plaintiffs had asserted that the skirt requirement failed heightened scrutiny, because CDS had not identified an important governmental interest that justifies the sex-based classification; instead, CDS had relied on gender stereotypes to support the skirt requirement, a plainly illegitimate justification under well settled Supreme Court precedent. In response, CDS argued that "comprehensive sex-specific dress codes" do not violate the Equal Protection Clause when male and female students are subject to comparable burdens under the policy: the skirt requirement did not violate the Constitution because boys also were limited in dressing and grooming options, including prohibitions against long hair and wearing jewelry, which were applicable only to male students. And because its female students had achieved academic and extracurricular success, these students have not been "hobbled" by the skirt requirement.

The majority disagreed with CDS. Among other precedents, it cited *United States v. Virginia*, 518 U.S. 515, 532-33 (1996). There, the Supreme Court rejected the Commonwealth of Virginia's attempt to preserve single-sex education for males at the Virginia Military Institute by establishing a "leadership" program for women at a nearby private, women's college. *Virginia* held that, to satisfy the heightened scrutiny applicable to gender-based discrimination, a defendant "must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."

This the defendants could not demonstrate: "Applying the demanding lens of intermediate scrutiny, we conclude that the skirt requirement is not supported by any important governmental objective and, thus, falls woefully short of satisfying this constitutional test. CDS does not attempt to disguise the true, and improper, rationale behind its differential treatment of girls, which plainly does not serve an important governmental interest."

**Appeal - Title IX:**

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Unlike the Section 1983 analysis which found no liability by RBA, the majority found that Title IX did extend to RBA, which received Federal monies—even if indirectly through CDS.

While there are various exceptions to Title IX, "Notably, dress, appearance, and grooming policies are not included among the[m]…." The Circuit found that, based on the plain language and structure of the statute, Title IX "unambiguously encompasses sex-based dress codes" promulgated by covered entities: "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." Because it concluded that Title IX unambiguously covered such sex-based dress codes, the Circuit did not apply *Chevron* to defer to the Department of Education's rescission of its earlier regulation applicable to such policies.
The majority affirmed the district court's award of summary judgment to the plaintiffs on their Equal Protection claim against CDS and affirmed the court's award of summary judgment to RBA on that claim. It vacated the district court's judgment on the Title IX claim and remanded for an evidentiary hearing on that claim asserted against all defendants.

**DISSENTS:** Six judges, including Judge Quattlebaum and Judge Wilkinson, dissented to varying degrees.

Judge Quattlebaum and four others disagreed that a publicly funded charter school is a state actor, pointing to an emerging circuit split on the issue:

Prior to today, neither the Supreme Court nor any federal appellate court had concluded that a publicly funded private or charter school is a state actor under § 1983. The majority, however, breaks that new ground. In my view, in deciding that a private operator of a North Carolina charter school is a state actor, the majority misconstrues and ignores guidance from the Supreme Court and all of our sister circuits that have addressed either the same or very similar issues. The immediate casualty of the majority's decision is a small part of a dress code at a particular charter school. That is the least of my concerns. My worry is that the majority's reasoning transforms all charter schools in North Carolina, and likely all charter schools in the other states that form our circuit, into state actors. As a result, the innovative alternatives to traditional public education envisioned by North Carolina when it passed the Charter Schools Act, and thus the choices available to parents, will be limited. But the implications of the majority's decision extend beyond even charter schools. By casting aside guidance from Supreme Court precedent, the majority significantly broadens the scope

of what it means for the actions of a private party to be attributed to the state for purposes of a § 1983 claim. Frankly, it is hard to discern, much less define, the limits of what constitutes "state action" after the majority's decision.

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Providing an option of charter schools does not mean that North Carolina delegated its obligation to provide a public education system. To the contrary, charter schools are another option beyond the "traditional public schools that have been established in order to comply with [Article IX of the North Carolina Constitution]." See *Sugar Creek Charter Sch., Inc. v. State*, 712 S.E.2d 730, 742 (N.C. Ct. App. 2011).

Judge Wilkinson concurred with Judge Quettlebaum and wrote separately to argue that Title IX did not reach the issue of dress codes and that the majority decision was yet another example of federal meddling in what should be a local issue.

**201001A.P.pdf (uscourts.gov)**

## SHORT SUMMARIES:

### *Supreme Court – Vega vs. Tekoh*

A Miranda violation does not support a claim under Section 1983 for damages. This case is quite important as I believe an avalanche of suits could be filed claiming Miranda violations by anyone who purports to have been in custody and questioned by police. Traffic stops, Terry stops, witnesses, etc. the list is long and the case did not seek to limit the violation to those situations where the statements were used against the speaker in court. Great win. IMLA was an amicus in support of the police and city in this case.

***Vega v. Tekoh***
**21-499 Vega v. Tekoh (06/23/2022) (supremecourt.gov)**

### *4th Circuit – Defamation – Social Media Regulation – Police*

I'm guessing that most police and fire departments have officers who like to text and share gossip as well as joke about their superiors. I'm basing this on some 40 years of life in and around local government and representing police and fire agencies. With the advent of social media, the gossip and joking takes on a larger problem for management because the gossip and joking live on much more than the casual radio and barroom chatter of years gone by. So, in one community, officers engaged in typical conduct that included criticizing the chief, some homophobic chatter, and so on. These criticisms apparently took place on private phones and during off duty hours, but nevertheless management believed them to be violations of the local government's communications policy and the chief recommended termination and the city manager terminated the employees. After termination, the Human Resources director on the manager behalf sought to reinforce the importance of the communication policy and emailed the city's employees letting them know about the firing of several folks for violating policy without naming them. News agencies picked up on this and requested information which led to the city sending them the termination letters each officer received. Shortly thereafter the chief prepared affidavits regarding the matter to be sent to the state's

certifying agency regarding the officers' termination. In those affidavits, the chief asserted that the incident came to light due to a complaint. That the court found not to be true. Instead, the court understood the issue came to light when one person was being counselled about conduct who then said something like "well if you think what I did was bad, look at all this email and text chatter from these folks" leading to the investigation into the Plaintiffs' social media. Long story short, the claims against the city and the manager were ultimately dismissed, but the defamation claim against the chief was not. Clearly, the learning lesson here includes establishing a social media policy that you can defend – IMLA worked on a model that is available to members – and be careful not to exaggerate or color the basis of a disciplinary action that is reported or "published" to third parties.

***Cannon v. Peck***
**202382.P.pdf (uscourts.gov)**

### *6th Circuit – Seizure of dog by killing it – reasonableness*

*In a case that includes some really great language about Monday Morning Quarterbacking by the courts, the 6th* Circuit upheld a lower court's decision to dismiss a claim against a police officer who shot and killed a dog during a search. The officer was responding with a K-9 dog and during the course of the search the Plaintiffs' pit bull attacked the K-9 grabbing its snout between its teeth and forcibly shaking the K-9. Commands to stop and tugs on the leash were to no avail. The officer shot the Plaintiffs dog to save the K-9. In the course of the decision describing the reasonableness of the officer's actions the court wrote: "Only the ignorant peace of a judge's chamber would prompt the passing thought that the officer should use her hands to remove the one dog from the other. That of course would replace one hazard with another, and in the process insert the officer, never a judge, into harm's path."

***White v. City of Detroit***
**22a0132p-06.pdf (uscourts.gov)**

### *6th Circuit – First Amendment – Protests – Division of groups based on viewpoint*

In another case coming out of Detroit, the court upheld a lower court decision that found the city was not liable for its actions at the Democratic candidates debate in Detroit in 2019 in separating groups based on viewpoint among other claims. While the case arises in the 6th Circuit and its jurisprudence may differ from other circuits, calling Detroit for advice on how to handle similar political events may be a good idea as what the court described seemed reasonable and likely supported the outcome. The issues are many and I refer you to the case to understand them, but in essence the court concluded that separating the groups based on viewpoint satisfied a "compelling governmental interest" of public safety.

***Reform America v. City of Detroit***
**22a0133p.06**

### *11th Circuit – Boycott Israel – First Amendment*

A state's ban on entering contracts with contractors who boycott Israel is constitutional and survives First Amendment scrutiny. Crux of decision:

"Under Arkansas's canons of statutory interpretation, we think the Arkansas Supreme Court would read Act 710 as prohibiting purely commercial, non[1]expressive conduct. It does not ban Arkansas Times from publicly criticizing Israel, or even protesting the statute itself. It only prohibits economic decisions that discriminate against Israel. Because those commercial decisions are invisible to observers unless explained, they are not inherently expressive and do not implicate the First Amendment."

***Arkansas Times v. Waldrip***
**191378P.pdf (uscourts.gov)**

### *Texas Supreme Court – Fees – Solid Waste – Dillon's Rule*

Barry Shanoff, a terrific lawyer and General Counsel of SWANA alerted me to this interesting case from the Supreme Court of Texas. Although the court did not call it Dillon's Rule, it sure seemed as if it was reciting it when it concluded that a general law city in Texas was limited to exercising only its express powers and those powers impliedly necessary to implement an express power. So, does the authority to regulate solid waste include the power to impose fees tied to that regulation? The short answer in Texas seems to be – maybe. If the fees are related and tied to the cost of regulation then they may survive under the facts of the case, but where, as here, the fees were based on a percentage of revenue, they do not. There are a number of interesting questions for the inquiring mind of a municipal lawyer, whether in Texas or elsewhere, that bear some further study. In some instances, I seem to recall a court or two finding that fees themselves are regulatory. If that is the case then one might think fees designed to reduce the waste stream might form a part of the overall regulatory picture. With CATV and all the litigation around FCC regulatory control over local government authority regarding franchising, perhaps, we've strayed from the historical understanding of the authority to franchise. In this case, the city offered an exclusive franchise to one solid waste hauler and sought through licensing to regulate the party involved in the case. But, what if the city had sought to require all entities operating within the city to obtain franchises as opposed to licenses? Could the city have done so? See this older case from Kentucky involving ambulance services and its reference to trash hauling *Ray v. City of Owensboro*, 415 S.W.2d 77, 79 (Ky. 1967). I don't know the answer, but could there be a lot more authority for local government in franchising? I think we'll need to know as companies seek to use robots on our sidewalks and streets.

***Builder Recover Services v. Town of Westlake***
**https://www.txcourts.gov/media/1454230/210173.pdf**

## BLOG ARTICLE:

### Federal jury awards damages to woman whose house was damaged during a SWAT action