No Federal Case

Court says charter school is not a state actor

by JOSHUA DUNN and MARTHA DERTHICK

Teachers and students in public schools who believe that they have been deprived of a right guaranteed by the U. S. Constitution or laws can take their claims to a federal court. Not infrequently they do, to the consternation of school boards and administrators. Whether teachers and students in charter schools have a comparable right can be a tricky legal question, as a recent decision from the Ninth Circuit Court of Appeals shows.

Charter schools are created under state statutes, but they often retain a private character. Can they qualify as "state actors" for a plaintiff's purpose of using Section 1983 of Title 42 of the U. S. Code, which is the main gateway for achieving relief? In the case from Arizona that the Ninth Circuit decided, the answer was no, and the claims of the plaintiff were dismissed.

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The plaintiff, Michael Caviness, had been employed for six years as a teacher of health and physical education and a track coach at Horizon Community Learning Center, a nonprofit corporation that operated a charter school in Phoenix. A female student filed a grievance charging that he had crossed "the student-teacher boundary." At a hearing, Horizon's governing board learned that the student had a "crush" on Caviness and that the two had been communicating by telephone. The board concluded that he had exercised questionable judgment and kept him on paid administrative leave until his contract expired. When he applied for a job in the Mesa Public Schools, Horizon's executive director declined to evaluate him, and Caviness claimed that what the director said to Mesa was "purposely false and incomplete" and intended to harm him. He further claimed that some Horizon employees had defamed him by falsely calling him a pedophile.

Caviness filed a complaint under Section 1983 alleging that Horizon had, without due process, deprived him of his liberty interest in finding work, in that it had not granted him a hearing to clear his name. To establish that the school was a "state actor," he made five arguments: that Arizona law defines a charter school as a public school; that a charter school is a state actor for all purposes, including employment; that a charter school provides a public education, a function that is traditionally and exclusively the prerogative of the state; that a charter school is a state actor in Arizona because the state regulates the personnel matters of such schools; and that it is a state actor because charter schools, unlike traditional private schools, are permitted to participate in the state's retirement system.

The district court granted Horizon's petition for dismissal for lack of federal jurisdiction. It found no evidence "with respect to [Caviness's] specific employment claims, that Horizon acted in concert or conspired with state actors, was subject to government coercion or encouragement, or was otherwise entwined or controlled by an agency of the State."

Three circuit judges concurred that the actions that Horizon took or failed to take were all connected with its role as Caviness's employer, and that what it did as such did not constitute "state action." State action, it said, "may be found 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."

Caviness failed because he did not establish the close nexus. It was not enough to argue that under Arizona law all charter schools are state actors. Without facts to show that Horizon was acting as "the government," Caviness had no federal case.

While the *Caviness* case could be a harbinger of more cases to come, we would be surprised to see federal litigation lead to a broad characterization of charters as private actors. Charters will likely increase in both number and federal financial support under President Obama, and with federal aid comes the force of laws emphasizing charter schools' public character. Charters are explicitly obliged to abide by federal statutes prohibiting discrimination, for example. And while no federal law applies, the Department of Education's guidance has made clear that charter schools must be nonreligious as well. Balking at either constraint would put charters at risk of losing not only federal aid but also their status as public schools, which has been critical to the charter movement's success.

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