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ADJUDGING EDUCATION POLICY: HOW THE COURTS SHAPED OHIO'S CHARTER SCHOOL MOVEMENT

Introduction

EDUCATION policy has been a long-running source of debate in our country, in the national and state legislatures, at the grassroots, and seemingly everywhere in between. Over the last two decades, that debate has included the incorporation of parental school choice in public education, best reflected by public charter school programs. The first charter schools were opened in Minnesota in 1992. Today, 42 states and the District of Columbia authorize the use of public charter schools as a means for enhancing their individual public education systems.²

Ohio joined the charter school trend in 1997, at the time becoming the 28th state to do so.³ Signed into law by then-Governor George Voinovich, Ohio's charter school program was “part of a broader undertaking by the State to enhance the educational options” of Ohio's schoolchildren living in challenged school districts, where students have historically underachieved.⁴ “In enacting R.C. Chapter 3314, the General Assembly declared that its purposes included ‘providing parents a choice of academic environments for their children and providing the education community with the opportunity to establish limited experimental educational programs in a deregulated setting.’”⁵ The program affords innovative Ohioans the opportunity to offer public education to parents and students seeking an alternative to a traditional public education, allowing these students the chance to find the educational environment that best suits their individual needs.

*602 As explained in Ohio Revised Code Chapter 3314, Ohio's charter schools are “public school[s] . . . part of the state's program of education.”⁶ The schools are publicly funded, nonsectarian, and open to all students. In addition to adhering to state and federal standards, including statewide achievement assessments,⁷ Ohio's charter schools must also adhere to their contract with their authorizer, or “sponsor,”⁸ which requires the schools to comply with a host of other standards. And on top of that, the schools are subject to the demands of parents, as without interested parents, no charter school can remain open. For the 2013-14 school year, over 120,000 children in Ohio received their public education at a charter school,⁹ referred to as “community schools” in the Ohio Revised Code.⁰

To be sure, Ohio's charter school program has stirred debate, both at the time of its enactment and still today. The most aggressive opponents of the charter law included Ohio's teachers unions as well as others affiliated with the public education establishment. Union leaders have been blunt in their assessment of charter schools. Indeed, not long after the charter school program was implemented, Tom Mooney, then-president of the Ohio Federation of Teachers, described the schools this way: “Students are being exploited and parents are being deceived.” School districts as well, to varying

degrees, were less than helpful in advancing the charter school program. The Akron City School District, for example, unlawfully refused to bus children attending start-up community schools, which forced those schools to cut “programs, food service, and supply purchases, including computers and workbooks” to pay for student transportation.²

Even today, when charter schools have laid a solid foundation along the public school landscape, the schools remain a focus of public discussion and debate. In 2012 in Cleveland, the city and the school district worked together to enact a much-debated program that would create new teaching initiatives in the district, including collaboration with and support for existing and new charter *603 schools in the City.³ More recently in Columbus, the school board and the mayor proposed a ballot levy that would increase funding for the Columbus Public Schools, empower the mayor to authorize charter schools in the city, and allow limited funding from the Columbus Public Schools to flow to select charter schools in the community.⁴ The ballot issue, which divided public school proponents as well as charter school proponents and opponents, failed at the polls.⁵

All of this is to say that public education, and charter schools in particular, remains a preeminent public policy concern in Ohio, and that this policy debate will undoubtedly continue. Less obvious, but nonetheless significant, is the role that the courts, rather than policymaking bodies, have played in the Ohio charter school movement. Charter school opponents, having lost the public policy debate in the political branches of government, took many of those same debates to the courts, thinly veiled as legal arguments, as a way to impede, if not bring down altogether, Ohio's charter school initiative.

Those efforts failed. As a legal matter, charter school opponents lost the cases. Indeed, they failed at every turn in attempting to have the courts undo prior public policy determinations by the legislature. And in doing so, they gave the charter school program added momentum, both by allowing the charter school David to defeat the education establishment Goliath, and by confirming the constitutional nature of Ohio's public school choice program. Inasmuch as the charter school opponents attempted to utilize the courts as a way to defeat charter schools, the result was the reverse: charters not only secured their legal legitimacy, but they also gained confidence that state law meant what it said, namely, that charter schools are “part of the state's program of education,” not only in the pages of the Revised Code, but also in communities around Ohio.⁶

The legal obstacles employed by charter school opponents came in three varieties. First, the opponents attempted to simply ignore the law and the fledgling status of the new charter school program, in turn requiring court intervention to require opponents not to impede the law. From there, the opponents upped the ante, bringing a wholesale constitutional challenge with the hopes of scoring a knockout blow in the courts. Failing on those fronts, the opponents sought to enlist political allies to do their bidding through the courts. More recently, with nothing to show for their aggressive legal tactics, the opponents returned to their initial strategy of ignoring the law, albeit more creatively than they did at the charter school program's outset, which again required court intervention.

***604 I. With Charter Schools in Their Infancy, Charter Opponents Impeded the Schools' Development by Ignoring State-Mandated Obligations.**

With some exceptions, the public education establishment did not welcome with open arms Ohio's new charter school law. Nowhere was that unwelcoming attitude more prevalent than in Akron, where the Akron City School District refused to comply with its state-law obligation to transport students attending charter schools in Akron. That action resulted in the Ohio courts' first foray into the charter school realm.

Ohio's first charter schools opened in 1998, following the law's enactment in 1997.⁷ The following year, two charter schools were set to open in Akron. One of them, The Edge Academy of Akron, was developed by Susan and David Dudas, who believed that “public education policies were failing and wanted to make a difference” in their communities.⁸

Likewise, the Ida B. Wells Community School, founded by Dr. Edward Crosby and Jean Calhoun, sought to provide a quality public education with a curricular emphasis on Africa, African America and the world.⁹ Both schools aimed to enroll elementary school children.

During the schools' developmental phase, "the state department of education assured" the schools' developers that "Akron was required to provide transportation services for their students."²⁰ That assurance was consistent with state law which, at that time, required:

[A] local board of education [was] to provide transportation to its native students who were enrolled in a community school unless the local school board determined, and the state board confirmed, such transportation was unnecessary or unreasonable. If, in the judgment of the local school board, the transportation was unnecessary or unreasonable and the state board confirmed that determination, a local board of education might, in lieu of providing the transportation, pay a parent, guardian, or other person in charge of the child a statutorily determined amount.²

Section 3314.09 required the district to first determine that it was "impractical to transport a pupil to and from a community school" before it could take steps to deny school bus transportation to that student.²²

***605** The State's commitment to public charter school transportation was understandably important to the fledgling charter schools, whose students needed a way to reach the schools each morning and to arrive home safely each afternoon. Just two months before the schools were to open, however, Akron adopted a resolution that instead authorized transportation reimbursement (i.e., a small amount of money to pay for city bus transportation) to parents of children enrolled in community schools.²³ Then, on August 9, 1999, just two weeks before the schools' opening day, "Akron adopted a resolution that declared transportation of community school students impractical and authorized 'payment in lieu of transportation' contracts with parents of community school students."²⁴

Legally, the schools believed their rights had been trampled by the Akron City Schools. But practically speaking, there was little time for the start-up schools to seek relief from the state or the courts. Accordingly, at Edge Academy, in anticipation of their "scheduled opening on August 23, 1999," the developers, needing an instant resolution to their transportation dilemma, a school-threatening situation, "contracted with Laidlaw Transit, at an unbudgeted cost of \$50,000 for the school year, to provide transportation for its students. Later a monitor was added and the transportation cost was adjusted to approximately \$55,000 for the year."²⁵

Similarly, after learning that Akron would not provide transportation to community school students, Dr. Edward Crosby and Jean Calhoun, co-developers of Wells, urgently needed to arrange transportation. Accordingly, "Wells contracted with Laidlaw Transit to provide transportation for its students, and Dr. Crosby, one of Wells' co-developers, secured the agreement with a mortgage on his home."²⁶ The school's cost for transportation services was approximately \$64,000. But there were other costs too. Due to Akron's refusal to transport, "some students did not enroll in Wells," and, in addition, "programs, food service, and supply purchases, including computers and workbooks, were reduced or cut from Wells' budget due to the unbudgeted transportation expense."²⁷

Ultimately, once the initial transportation crisis was addressed, parents of students attending Edge and Wells requested an administrative hearing before the State Board of Education, in accordance with Revised Code Chapter 119. At the ensuing hearing, Akron argued that the costs of transporting students to charter schools was difficult and expensive (even if required by state law) and thus "unreasonable" and "impractical," as those terms was used in ***606** Ohio Revised Code

3314.09. Akron likewise argued that creating new bus routes over the summer to incorporate charter school students made providing transportation even more unreasonable.

Rejecting these arguments, a state hearing officer assigned to the matter “issued a report and recommendation that (1) found Akron had not demonstrated it was impractical or unreasonable to provide transportation to students that attended Edge and Wells, and (2) ordered Akron to repay Edge and Wells for direct expenses the two schools incurred in providing transportation for their students during the 1999-2000 school year.”²⁸ The State Board later adopted the hearing officer's report and recommendation, and the Franklin County Court of Common Pleas affirmed the State Board's order.²⁹

Rejecting both procedural and substantive arguments from Akron, the Tenth District Court of Appeals affirmed the trial court (and, thus, the State Board's order).³⁰ In affirming the decision finding Akron's actions in violation of Ohio Revised Code § 3314.09, the appellate court “agree[d] that former R.C. 3314.09 required a student-by-student assessment rather than a class-wide assessment, and Akron does not challenge that issue on appeal.”³¹ From there, the court highlighted Akron's complete disregard of its statutory obligation to consider the transportation needs of each student:

[I]n contravention of former R.C. 3314.09, and notwithstanding correspondence from the state department of education that informed Akron it had the responsibility to provide transportation while it awaited the state board's determination concerning impracticality, Akron did not provide transportation to students from Edge and Wells community schools. Moreover, . . . “[i]n neither resolution did Akron Public Schools address the specific transportation needs of any community school student. Instead, Akron's board of education made a class-wide determination that it was impractical to transport all students to and from community schools, including those attending the Edge Academy and Ida B. Wells.”³²

The court of appeals not only affirmed the schools' transportation right, but also the aspect of the State Board's order requiring “Akron to repay Edge and Wells community schools for direct transportation expenses for the 1999-2000 school year.”³³ “[B]ecause former R.C. 3314.09 was never called into play due to Akron's disregard of it, the general powers of the state board [[were] available to address Akron's blanket refusal to transport the community school students despite the practicality of doing so.”³⁴ And “[w]ithout question, the policy of the *607 state requires local school districts to provide transportation to community school students within their districts, as evidenced by former R.C. 3314.09.”³⁵ “Because Akron disregarded its obligation under the statute, . . . the state board, under the authority granted it by former R.C. 3301.07, could address and resolve the issues that contradicted the state's transportation policy. The state board's solution is reasonable, given its findings regarding Akron's conduct.”³⁶

The appellate court's unanimous decision had the immediate impact of restoring transportation rights to Akron-area community schools. But perhaps of more significance, it showed school districts and other public school authorities that charter schools could not be ignored, and that doing so came with consequences. The legal proceedings resonated beyond merely transportation concerns, providing charter schools with the assurance that they had legal recourse against the well-funded, powerful interests that opposed the schools' creations.

II. Unable to Undo the Charter School Program Through Obstinacy, Charter Opponents Raised the Stakes Through a Wholesale State Constitutional Challenge.

Having failed to persuade the legislature to thwart the charter school program, and realizing that they could not simply ignore the law, charter school opponents crafted a different strategy. Rather than policymakers, charter school opponents

would seek to convince judges, under the guise of state constitutional theories, that charter schools had no place in the Ohio education landscape. The result was *State ex rel. Ohio Congress of Parents and Teachers v. State Board of Education*, a case that made its way from the Franklin County Court of Common Pleas to the Supreme Court of Ohio and resulted in the State's high court deciding whether Ohio could continue with its public charter school program.³⁷

In a case originally filed by lead plaintiff the Ohio Federation of Teachers on May 14, 2001 and later amended,³⁸ a coalition of charter school opponents, under the litigation-created “Ohio Congress of Parents and Teachers” moniker, filed suit in the Franklin County Court of Common Pleas, naming the State Board of Education, White Hat Management, and other charter school-affiliated entities as defendants.³⁹ In addition to claims that certain charter schools were operating in violation of provisions in Ohio Revised Code Chapter 3314, the plaintiffs also asserted that Ohio's charter school program violated multiple provisions in the *608 Ohio Constitution.⁴⁰ Plaintiffs sought a declaratory judgment that Revised Code Chapter 3314 be deemed unconstitutional, requiring an end to the State's public school choice program.⁴¹ In response to the Complaint, nearly 100 charter schools intervened in the action to assist in the defense of the lawsuit.⁴²

The trial court bifurcated the case, allowing the constitutional theories to advance ahead of the statutory claims.⁴³ The trial court in turn granted a motion for judgment on the pleadings to defendants on the constitutional claims, and allowed an immediate appeal.⁴⁴ The court of appeals affirmed in part and reversed in part, remanding certain claims back to the trial court.⁴⁵ At the request of all sides in the litigation, the Ohio Supreme Court accepted the case for review.⁴⁶

Plaintiffs pursued four constitutional theories in the Ohio Supreme Court. First, plaintiffs argued that the charter school program violated the “thorough and efficient system of common schools” clause of Section 2, Article VI of the Ohio Constitution.⁴⁷ According to plaintiffs, charter schools run by unelected boards were not subject to uniform statewide standards and thus did not qualify as “common schools.”⁴⁸ Rejecting that contention, the Court, citing the legislature's “authority and latitude to set the standards and requirements for common schools, including different standards for [[charter] schools,” held that the legislature constitutionally classified charter schools as common schools.⁴⁹ Indeed, far from violating constitutional commands, the General Assembly instead “augmented the state's public school system with public community schools”--“statewide schools that have more flexibility in their operation.”⁵⁰

Plaintiffs also argued that by diverting funds from traditional public schools, the charter school program unconstitutionally deprived traditional public schools of their ability to provide a “thorough and efficient” education.⁵¹ But this argument too fell short. The Court noted that Ohio's charter schools are part of the state's system of public schools.⁵² And the legislature “has the exclusive authority to spend tax revenues to further a statewide system of schools compatible with the Constitution,” including funding public charter schools, *609 among other efforts.⁵³ State funds merely “follow the student” to charter schools.⁵⁴

Second, plaintiffs asserted that Ohio's charter schools violated Section 3, Article VI, which governs school districts.⁵⁵ Although the Ohio Constitution requires the General Assembly to provide for the organization and administration of the public school system, it also requires that “each school district . . . shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education . . .”⁵⁶ Plaintiffs argued that the charter school law's authorization of unelected boards to govern the schools ran afoul of this provision.⁵⁷ The Court, however, rejected the argument that school district residents must be able to vote on the members and organization of any school board operating in their community, explaining that “the Ohio Constitution does not prevent the General Assembly from creating additional schools that are located within city school districts but are not part of the district.”⁵⁸

Third, plaintiffs argued that charter schools ran afoul of Section 5, Article XII, which limits the proceeds of tax levies to their stated purposes.⁵⁹ They asserted that the Ohio charter school law unconstitutionally gave tax dollars that voters approved for the local school district to charter schools.⁶⁰ The Ohio Supreme Court rejected the argument based on the funding scheme for charter schools. By statute, charter school funding comes exclusively from state funds, not funds derived from local levies.⁶¹ Because no levy funds originally raised for local schools would be transferred to charter schools, no constitutional violation could occur.⁶²

Fourth, plaintiffs contended that charter schools violated Sections 4 and 5, Article VIII, which prohibit the lending of the state's credit to private organizations and the State's assumption of the debt of any private corporation.⁶³ The General Assembly established loan guarantee programs for charter schools and allowed charter schools to borrow money themselves.⁶⁴ The Court determined that, as public schools created to further the public purpose of education, charter schools do not violate the state credit provision.⁶⁵ Similarly, because charter schools are part of the state's system of common schools funded *610 by the state, "they are not private business corporations the debt of which the state is prohibited from assuming under Section 5."⁶⁶

All told, the state supreme court rejected each argument advanced by charter school opponents and upheld the program as constitutional. The Court noted that the General Assembly is "entrusted with making complicated decisions about our state's educational policy," that "policy decisions are within the purview of its legislative responsibilities, and that legislation is entitled to deference."⁶⁷ The charter school program falls well within that legislative prerogative.⁶⁸

III. Failing Themselves, Charter School Opponents Enlisted Their Political Allies to Attempt to Obstruct the Charter School Program.

Unable to torpedo the charter program on constitutional grounds, charter opponents nonetheless remained undeterred in their opposition. While the Ohio Congress case had failed on constitutional grounds, certain statutory claims remained. The charter opponents could have litigated those claims, but success was uncertain at best, and litigation expenses were undoubtedly mounting. It thus appeared the remaining claims would go away, one way or another. An intervening political event gave the opponents new life. In the Ohio statewide elections in the fall of 2006, Democrats swept the non-judicial statewide offices. This included the Attorney General's office, where Democrat Marc Dann upset the heavy favorite for the job, Betty Montgomery, who had *611 served two previous terms as Ohio Attorney General.⁶⁹ Dann, like many of the other Democrats elected in 2006, was not known as a charter school supporter and had received election support from Ohio's organized unions.

As revealed by public records requests to the Dann administration, following his election General Dann began negotiating a resolution of the remaining claims in the Ohio Congress case.⁷⁰ Rather than oppose the lawsuit, as prior Attorneys General had done, General Dann agreed to resolve the case. As part of that agreement, Dann agreed that he, himself would pursue the charter schools that the unions and other charter school opponents believed to be underperforming. "Communications between Dann's office and the union, obtained by The [Columbus] Dispatch through a public-records request, detail four months of amicable negotiations to settle the union's lawsuit, filed in March."⁷¹ During those negotiations, union lawyers asked that General Dann use his regulatory power over charitable trusts as a way to shutter public charter schools. Specifically, "[e]-mails show that the legal strategy of using the schools' status as charitable trusts to show they were failing their promised mission of teaching children was suggested by Sue A. Salamido, an attorney for the Ohio Education Association."⁷² "In the end, Dann's office agreed to 'aggressively use its charitable trust enforcement . . . and other powers to seek closure of underperforming and poorly managed community schools.'"⁷³

That agreement resulted in the filing of multiple lawsuits in Montgomery County, Ohio, seeking the closure of charter schools there based upon a novel use of the Attorney General's power to regulate charitable trusts. The eventual lead case, *State ex rel. Dann v. New Choices Community School*,⁷⁴ involved General Dann seeking to close defendant New Choices Community School, a Dayton-area community school sponsored by St. Aloysius Orphanage.⁷⁵

In the trial court, General Dann asserted a theory novel not only in Ohio, but seemingly elsewhere as well, namely, that charter schools are “charitable trusts” over which he has regulatory authority, including the ability to close charters that have purportedly “deviated” from their “intended charitable *612 purpose” through management or performance. Citing what he described as “poor stewardship of the extensive public resources entrusted to it,” General Dann argued the school should be closed.⁷⁶ To do so, the “Attorney General alleged that New Choices is a charitable trust within the meaning of R.C. 109.23, and that he has enforcement authority over New Choices under R.C. 109.24.”⁷⁷ Specifically, the complaint alleged:

All parties to the [New Choices] transaction have manifested their intent to create a fiduciary relationship to the public moneys provided to [New Choices]. The arrangement between the State, [New Choices], St. Aloysius, and the public is structured as a trust: The State (settlor) provides funds to [New Choices] and St. Aloysius (the trustees) for the benefit of [New Choices] students and the general public (the beneficiary). Further, R.C. 3314.03(A)(11)(d) and the contract between [New Choices] and St. Aloysius provide that R.C. Chapter 117, statutes conclusively construed as dealing with trust property, are applicable to [New Choices]. In addition, the act of declaring itself to be a charitable organization under the Internal Revenue Code and R.C. Chapter 1702 manifests [New Choices] acknowledgement [sic] of the fiduciary duties inherent in those statuses. Moreover, [New Choices] has represented that the funds it receives will be used for educational purposes.

[New Choices] has a charitable purpose: education.⁷⁸

On this basis, the Attorney General sought various forms of relief, any of which would have required closure of the school.

Both the trial court and appeals court rejected the Attorney General's claims. The trial court held that charter schools constitute “political subdivisions” under Ohio law and that political subdivisions can never be considered charitable trusts as a matter of law.⁷⁹ For that reason and others, the trial court granted defendants' Rule 12(C) motion for judgment on the pleadings.⁸⁰

On appeal, the court of appeals framed the issue differently. In the appellate court's mind, “the question before us is not whether a community school, as a political subdivision, may be the trustee of a charitable trust,” as the case law suggested that, in some instances, such a subdivision might be deemed a trust.⁸¹ “Rather, the heart of the Attorney General's first assignment of error is whether or not New Choices, as a matter of law, is operated as a charitable trust, which may be monitored and potentially dissolved under the Attorney General's authority to oversee charitable trusts.”⁸² The appeals court held “that it is not.”⁸³

*613 The court began with a discussion of the charter school program and the legislature's critical role in its creation. “The General Assembly is the branch of state government charged by the Ohio Constitution with making educational

policy choices for education of our state's children.' Pursuant to its constitutional authority, in 1997, the General Assembly made the decision to create community schools as part of the State's system of public education."⁸⁴

The court likewise emphasized the key role sponsors play in regulating charter school performance.

If problems arise in the school's overall performance, the sponsor must take steps to intervene in the school's operation in order to correct such problems. A sponsor may place a community school on probationary status, suspend operation of a school, choose not to renew a contract, or choose to terminate a contract prior to its expiration if the school fails to meet student performance standards, fails to meet fiscal management standards, violates any provision of the contract or applicable laws, or for other good cause.⁸⁵

The court then explained why, given this statutory backdrop, New Choices lacked the intent to create a charitable trust. "[U]pon entering into a contract with a sponsor pursuant to R.C. Chapter 3314, New Choices expressed its intent to become a political subdivision and a legislatively-created public school falling within the state's system of public education and the oversight of the Department of Education."⁸⁶ New Choices, moreover, receives "public funding to perform the governmental function of operating a public school."⁸⁷ The court, in turn, stated:

We find no authority to support the proposition that a political subdivision that receives public funds from the State and uses those funds for a governmental purpose--which includes the provision of public education--is subject to oversight by the Attorney General as a charitable trust solely by virtue of that funding . . .⁸⁸

Thus, "[a]s a matter of law, New Choices, a public community school, is not a charitable trust."⁸⁹

Equally true, "the Community Schools Act, which was enacted pursuant to the General Assembly's constitutional authority to establish a public school system, demonstrates an intention by the General Assembly that oversight of *614 community schools be conducted as set forth in R.C. Chapter 3314 and not by the Attorney General" as a charitable trust.⁹⁰ Specifically, "a review of R.C. Chapter 3314 reflects that the General Assembly created a comprehensive system of oversight for community schools that, in many respects, resembles the system of oversight for traditional public schools and, as with traditional public schools, places the ultimate burden of oversight on the Department of Education."⁹¹ And critically, "[n]othing in this system of oversight suggests that the General Assembly intended for community schools, as part of the public school system, to be subject to the oversight of the Attorney General as charitable trusts."⁹² Accordingly, "even if New Choices and other community schools were charitable trusts, the oversight provided in R.C. Chapter 3314 governs community schools and displaces the Attorney General's role in overseeing charitable trusts."⁹³

With that, the appellate court agreed that judgment on the pleadings should be awarded to defendants. The case was dismissed, and New Choices and the other impacted schools were allowed to continue with their educational missions. Charter schools had once again prevailed over significant opponents in the court of law, with the courts having upheld the schools' validity and denied novel theories for interfering with their growth. As for General Dann, he was ensnared in a different legal battle. Following his resignation and his pleading "guilty and pa[ying] a \$1,000 fine in 2009 for filing false financial statements and unlawfully compensating some of his own employees,"⁹⁴ Dann faced proceedings to revoke his law license. As in the New Choices litigation, here, too, Dann was unsuccessful in the courts.⁹⁵

IV. Failing in Each of These Tactics, Charter School Opponents Returned to Square One, Again Ignoring Ohio Charter Law, Albeit More Creatively.

Recently, charter school opponents have utilized more creative tactics in attempting to avoid laws promoting charter schools and, in the process, inhibit the schools' growth. Most notable in this regard is the Cincinnati City School District, whose attempts to obstruct charter school growth are documented in *Cincinnati City School District Board of Education v. Conners*.⁹⁶ Conners juxtaposed laws enacted by the General Assembly to help charter schools obtain *615 facilities against the Cincinnati City School District Board of Education's ("CPS") selling of unused school buildings with a deed restriction prohibiting the property from being used for school purposes.⁹⁷ Once again, the Ohio courts were called upon again to address the actions of charter school opponents.

In 2009, CPS auctioned off nine vacant school buildings to the public.⁹⁸ The purchase agreements for the buildings specified that the buyer would "use the Property for 'commercial development.'"⁹⁹ More specifically, the buyer agreed "not to use the Property for school purposes, and that the deed to the Property will be restricted to prohibit future use of the Property for school purposes."⁰⁰ The deed restriction did, however, include a carve-out that allowed CPS (but no one else), in the event CPS repurchased the property, to use it for school purposes.⁰

Dr. Roger and Deborah Conners purchased at auction a building for \$30,000.⁰² Several months after the auction, the Conners notified CPS that the deed restriction was void as against public policy and that they intended to open a charter school.⁰³ CPS in turn filed suit to enjoin the Conners from opening a school.⁰⁴ The trial court granted judgment on the pleadings to the Conners, finding the deed restriction to be void as against public policy.⁰⁵ The First District Court of Appeals affirmed, concluding that charter schools "having access to classroom space [is] clear Ohio public policy."⁰⁶ The Ohio Supreme Court agreed to hear CPS's appeal.⁰⁷

In reviewing the dispute, the Supreme Court first noted that school boards, including CPS, have statutory authority to enter into contracts and dispose of real property.⁰⁸ "The freedom to contract is a deep-seated right that is given deference by the courts."⁰⁹ That right, however, is restrained "by sound and substantial public policies."⁰ The court noted that Ohio courts have struggled to define public policy in the course of applying the exception to the right to contract. Recognizing that "the 'legislative branch . . . is the ultimate arbiter of public policy,'" the court stated the test as "whether the deed restriction *616 accomplishes a result that the state has sought to prevent or whether it accomplishes something that the state seeks to facilitate."²

To address whether Ohio had espoused a public policy of providing public classroom space to charter schools, the Court looked to Ohio Revised Code Section 3313.41(G).³ That statute provides that a school district cannot sell a school building "suitable for use as classroom space" without "first offer[ing] that property for sale to" charter schools.⁴ In further support of the public policy, the Court also pointed to the statutorily-created "Community School Classroom Facilities Loan Guarantee Program" designed to help charter schools acquire school buildings, as well as the General Assembly's stated purpose in adopting the Community Schools Act, which was to "provid[e] parents a choice of academic environments for their children and" enhance "experimental educational programs in a deregulated setting."⁵ What is more, while traditional school districts get money from the state to build or acquire school buildings, and thus have old buildings to sell, charter schools, until the 2013-14 state budget, have not received any money for facilities. One reason for Section 3313.41(G) was to provide charter schools with at least some access to facilities, albeit at fair market value. Yet even that modest effort was undercut by the actions of CPS.

Based on these public policy articulations, the Court determined that the deed restriction “prevents the free use of the property for educational purposes” and “thus directly frustrates the state's intention to make classroom space available to community schools.”⁶ Accordingly, the Court held that the deed restriction were unenforceable as against public policy.⁷

CPS had purported to avoid the requirement of making the classroom space available to charters by deeming the buildings not suitable for classroom use.⁸ But, as the Court noted, not only was that determination a self-interested one and one that was undercut by CPS allowing itself to use the building as a school, should it reacquire the building, but also the General Assembly had subsequently removed the “suitable for use as classroom space” requirement from the statute.⁹

The Connors decision has a multifold impact. For one thing, it represents another victory for charter schools over their opponents in the courts, confirming that the schools are here to stay, despite objections and undermining tactics from their opponents. For another, the decision further cements the fact that charter *617 schools are a critical aspect of Ohio's education policy. Although the Supreme Court emphasized that it “continue[s] to uphold the importance of the freedom to contract and recognize[s] the narrowness of the doctrine on public policy,”²⁰ it still found the exception to apply, as “the General Assembly has expressed a strong interest in community schools.”² Further, the Court criticized CPS for attempting to impede the growth of charter schools, noting that the deed “restriction is not neutral; it seeks to thwart competition by providing that the restriction applies to all buyers except CPS itself.”²² These comments could well cast a shadow over any future cases involving efforts by traditional school districts, unions, or others to inhibit charter schools in Ohio.

Conclusion

Collectively, these cases reveal the lengths to which charter school opponents have gone to attempt to undermine Ohio's charter school program. Those efforts backfired. The charter opponents failed in every court case. Perhaps more importantly, those decisions helped establish that charter schools are not second-class citizens in Ohio's public school community. Indeed, the court victories undoubtedly gave the growing charter school movement the certainty that their educational mission would not be undone by their powerful opponents in the traditional public school establishment. Charter schools did not seek out these fights, but they are better off as a result.

To be sure, charter schools, along with every other aspect of Ohio's public school system, will be debated and addressed in the Ohio General Assembly as well as at the grassroots. That debate is natural and healthy. What seems less healthy is deliberate obstruction of the charter school program by its opponents, and ensuing litigation. Going forward, public policy debates over education should remain on the floor of the General Assembly rather than the courtrooms of the judiciary.

Footnotes

^{a1} Mr. Readler and Mr. Grose are lawyers in the Columbus office of the international law firm Jones Day. Mr. Readler litigated on behalf of the charter school interests in the cases addressed in this article.

¹ Resources on Minnesota Charter Issues, Minn. Legis. Reference Libr., http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue_charter (last visited Apr. 7, 2014).

² See About Us, Nat'l Alliance for Pub. Charter Schs., <http://www.publiccharters.org/about-us> (last visited May 23, 2014).

³ H.B. No. 215, 122d Gen. Assemb., Reg. Sess. (Ohio 1997).

- 4 Zelman v. Simmons Harris, 536 U.S. 639, 647 (2002). See also Ohio Rev. Code Ann. §3314.02(C) (Westlaw current through 2013 Files 1 to 76, and 78 of the 130th Gen. Assemb.).
- 5 State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1152 (Ohio 2006) (quoting H.B. No. 215, § 50.52.2(B), 122d Gen. Assemb., Reg. Sess. (Ohio 1997)).
- 6 Ohio Rev. Code Ann. § 3314.01(B) (Westlaw current through 2013 Files 1 to 76, and 78 of the 130th Gen. Assemb.).
- 7 See Ohio Rev. Code Ann. § 3314.03(A)(3) (Westlaw current through 2013 Files 1 to 76, and 78 of the 130th Gen. Assemb.) (requiring sponsorship contract to require compliance with “statewide achievement assessments”).
- 8 Ohio Rev. Code Ann. §§ 3314.02(A), 3314.03 (specifications for contract between sponsor and governing authority specifications of comprehensive plan).
- 9 See Darlene Chambers, Update From Dr. Chambers (Summer 2013 Newsletter), Ohio Council of Cmty. Schs. (June 25, 2013), <http://ohioschools.org/news/update-dr-chambers-summer-2013-newsletter>.
- 10 Ohio Rev. Code Ann. § 3314.01(B) (Westlaw current through 2013 Files 1 to 76, and 78 of the 130th Gen. Assemb.).
- 11 Merit Brief of Appellee at 1 n.1, State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148 (Ohio 2006) (No. 04 1668) (quoting Jon Craig, Suit Aims at Charter Schools, Columbus Dispatch (Ohio), May 15, 2001, at 1B) (internal citations omitted)).
- 12 Akron City Sch. Dist. Bd. of Educ. v. Parents of Students Attending Edge Acad. of Akron, No. 01AP 786, 2002 WL 433585, at *1, *4 5 (Ohio Ct. App. Mar. 21, 2002).
- 13 See, e.g., H.B. 525: The Cleveland Plan, Ohio.gov, available at <http://www.governor.ohio.gov/Portals/0/pdf/MBR/ClevelandPlan.pdf>.
- 14 See Molly Bloom, What You Need to Know About the Columbus School Levy, State Impact (Oct. 25, 2013, 9:00 AM), <http://stateimpact.npr.org/ohio/2013/10/25/what-you-need-to-know-about-the-columbus-school-levy/>.
- 15 See Bill Bush & Jennifer Smith Richards, Voters Soundly Defeat Columbus School Levy, Columbus Dispatch (Nov. 6, 2013, 4:11 AM), <http://www.dispatch.com/content/stories/public/2013/11/1105-columbus-school-levy-defeated.html>.
- 16 Ohio Rev. Code Ann. § 3314.01(B) (Westlaw current through 2013 Files 1 to 76, and 78 of the 130th Gen. Assemb.).
- 17 See Key Facts About Ohio Charter Schools, Ohio Alliance for Pub. Charter Schs., available at <http://www.oapcs.org/files/grassrootscharterschool.pdf>.
- 18 Current News, The Edge Acad., http://www.edge4kids.org/joomla/index.php?option=com_content&view=section&layout=blog&id=1&Itemid=18&limitstart=63 (last visited Feb. 23, 2014).
- 19 The Ida B. Wells Cmty. Acad., <http://hierographics.tripod.com/IdaBWellsBarnett/IBWCAAnIntroductiontoEducationalQuality.html> (last updated Nov. 14, 2004).
- 20 Parents of Students Attending Edge Acad. of Akron, 2002 WL 433585, at *1.
- 21 Id. at *3. See also Ohio Rev. Code Ann. § 3327.01 (Westlaw current through Files 1 to 76, and 78 of the 130th Gen. Assemb.) (concerning local school districts' obligations to provide transportation to kindergarten through eighth grade students).
- 22 Akron City Sch. Dist. Bd. of Educ. v. Parents of Students Attending Edge Acad. of Akron, No. 01AP 786, 2002 WL 433585, at *4 (Ohio Ct. App. Mar. 21, 2002) (quoting Ohio Rev. Code Ann. 3314.09) (internal citation & emphasis omitted)). “F]ormer R.C. 3314.09 provided, in part: ‘Where it is impractical to transport a pupil to and from a community school ... a board may, in lieu of providing the transportation, pay a parent, guardian, or other person in charge of the child. Id. (emphasis omitted)).
- 23 Id. at *1.

- 24 Id.
- 25 Id.
- 26 Id.
- 27 Id.
- 28 Id.
- 29 See id.
- 30 Id. at *6.
- 31 Id. at *4 (citing Ohio Rev. Code Ann. § 3314.09 (amended 2002)).
- 32 Akron City Sch. Dist. Bd. of Educ. v. Parents of Students Attending Edge Acad. of Akron, No. 01AP 786, 2002 WL 433585, at *4 (Ohio Ct. App. Mar. 21, 2002) (internal citation omitted).
- 33 Id.
- 34 Id. at *5.
- 35 Id.
- 36 Id. at *6.
- 37 State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1166 (Ohio 2006).
- 38 See Bill Cohen, Ohio Teachers Union Sues Over Charter Schools, Pewstates.org (May 17, 2001), <http://www.pewstates.org/projects/stateline/headlines/ohio-teachers-union-sues-over-charter-schools-85899392482>; Case Information Online, Franklin County Clerk of Courts, <https://www.franklincountyohio.gov/clerk/cio.cfm> (last visited Mar. 26, 2014) (search case number “01 CV 004457”) (trial court docket).
- 39 State ex rel. Ohio Cong. of Parents & Teachers, 857 N.E.2d at 1151.
- 40 Id. at 1153.
- 41 Id.
- 42 See Case Information Online, Franklin County Clerk of Courts, <https://www.franklincountyohio.gov/clerk/cio.cfm> (last visited Mar. 26, 2014) (search case number “01 CV 004457”) (trial court docket).
- 43 State ex rel. Ohio Cong. of Parents & Teachers, 857 N.E.2d at 1153.
- 44 Id. at 1154.
- 45 Id. at 1155.
- 46 Id.
- 47 State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1156 (Ohio 2006).
- 48 Id.
- 49 Id. at 1157, 1159.
- 50 Id. at 1158-59.
- 51 Id. at 1159.

- 52 Id. at 1157.
- 53 Id. at 1160.
- 54 Id.
- 55 Id. at 1161.
- 56 Id.
- 57 State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1161 (Ohio 2006).
- 58 Id. at 1162.
- 59 Id. at 1154.
- 60 Id. at 1162.
- 61 Id.
- 62 Id. at 1164.
- 63 Id. at 1164 65.
- 64 See id. at 1164.
- 65 Id. at 1165.
- 66 Id. at 1165 66.
- 67 State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1166 (Ohio 2006).
- 68 Notably, other states have faced similar constitutional challenges to their charter school programs, and state courts have rejected them almost universally as well. See *Boulder Valley Sch. Dist. RE 2 v. Colo. State Bd. of Educ.*, 217 P.3d 918, 932 (Colo. App. 2009); *Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ.*, 17 P.3d 1125, 1129 (Utah 2001); *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 753 A.2d 687, 695 (N.J. 2000); *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 760 (Cal. Ct. App. 1999); *Council of Orgs. & Others for Educ. About Parochiaid v. Engler*, 566 N.W.2d 208, 222 (Mich. 1997). But see *Gwinnett Cnty. Sch. Dist. v. Cox*, 710 S.E.2d 773, 775 (Ga. 2011) (holding charter schools violated Georgia constitution, which provided that “a]uthority is granted to county and area boards of education to establish and maintain public schools within their limits and only allowed state legislature to establish “special schools and other specific types). Another constitutional challenge is currently pending against Washington's newly enacted charter school program. See *League of Women Voters of Wash. v. State*, No. 13 2 24977 4 SEA (King Cnty. Super. Ct. July 3, 2013). The trial court rejected several constitutional arguments against the program and found just one non-critical claim to have merit, which only prevents charter schools from receiving certain limited “common school funds. See *League of Women Voters of Wash. v. State*, No. 13 2 24977 4 SEA (Wash. Super. Ct. Dec. 12, 2013), available at [http://www.atg.wa.gov/uploadedFiles/Home/About the Office/Cases/charter%20schools% 20opinion.pdf](http://www.atg.wa.gov/uploadedFiles/Home/About%20the%20Office/Cases/charter%20schools%20opinion.pdf). Both sides have appealed to the Washington Supreme Court. See Superior Court Case Search, Washington Courts, http://dw.courts.wa.gov/index.cfm?fa_home.superiorSearch&terms_accept&flashform_0 (search case number “13 2 24977 4”).
- 69 See Editorial, *GOP Stunned and Staggered*, *The Blade* (Toledo, Ohio) (Nov. 9, 2006, 4:44 AM), available at http://www.toledoblade.com/Editorials/2006/11/09/GOP_stunned_and_staggered.html.
- 70 Catherine Candisky, *Teachers Behind Dann's Strategy?*, *Columbus Dispatch* (Oct. 2, 2007, 8:58 AM), http://www.dispatch.com/content/stories/local/2007/10/02/dann02.ART_ART_10_02_07_B2_5882UTI.html.
- 71 Id.
- 72 Id.

- 73 Id.
- 74 State ex rel. Dann v. New Choices Cmty. Sch., No. 2007 CV 7624 (C.P. Montgomery Cnty., Ohio, Sept. 12, 2007), available at <http://www.clerk.co.montgomery.oh.us/pro/> (search case number “2007 CV 7624”) (trial court dockets).
- 75 The case was later recaptioned State ex rel. Rogers v. New Choices Community School, No. 23031, 2009 WL 2857360, 2009 Ohio 4608 (Ohio Ct. App. Sept. 4, 2009), following Dann's resignation from office “amid the scandal of a sexual harassment investigation in his office and his extramarital affair. Ashby Jones, Marc Dann Resigns as Ohio Attorney General, Wall St. J. (May 14, 2008, 5:03 PM), <http://blogs.wsj.com/law/2008/05/14/marc-dann-watch-an-announcement-expected-shortly/>.
- 76 State ex rel. Rogers, 2009 WL 2857360, at *1.
- 77 Id.
- 78 Id. at *2.
- 79 Id. at *3 (noting the trial court's holding that “a political subdivision can not sic] be a charitable trust, express or otherwise”).
- 80 Id. at *12.
- 81 Id. at *6.
- 82 Id.
- 83 Id.
- 84 Id. at *6 (quoting State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1159 (Ohio 2006) (internal citations omitted); Ohio Const. art. IV, § 2 (requiring the provision of a “thorough and efficient system of common schools throughout the state”)).
- 85 State ex rel. Rogers v. New Choices Cmty. Sch., No. 23031, 2009 WL 2857360, at *7, 2009 Ohio 4608 (Ohio Ct. App. Sept. 4, 2009) (internal citations omitted).
- 86 Id. at *9.
- 87 Id.
- 88 Id.
- 89 Id.
- 90 Id.
- 91 Id. at *10.
- 92 Id. at *11.
- 93 Id. at *12.
- 94 James Ewinger, Former Attorney General Marc Dann Fights for His Law License, Cleveland.com (Nov. 3, 2011, 5:57 PM), <http://blog.cleveland.com/metro/2011/11/former-attorney-general-fights.html>.
- 95 See Reginald Fields, Former Ohio Attorney General Marc Dann Loses Law License for Six Months, Cleveland.com (Nov. 20, 2012, 10:22 AM), <http://www.cleveland.com/open/index.ssf/2012/11/former-ohio-attorney-general-m.html> (noting that Dann's law license was suspended for six months by the Ohio Supreme Court).
- 96 Cincinnati City Sch. Dist. Bd. of Educ. v. Conners, 974 N.E.2d 78, 78 (Ohio 2012).
- 97 See id. at 85.

- 98 Id. at 79.
- 99 Id. (internal citations omitted).
- 100 Id. at 84.
- 101 Id.
- 102 Id. at 80.
- 103 Id.
- 104 Id.
- 105 Id.
- 106 Cincinnati City Sch. Dist. Bd. of Educ. v. Conners, 974 N.E.2d 78, 80 (Ohio 2012) (quoting Cincinnati City Sch. Dist. Bd. of Educ. v. Conners, No. C 100399, 2011 WL 846582, at *2 (Ohio Ct. App. Mar. 11, 2011)).
- 107 Id.
- 108 Id. at 81.
- 109 Id. at 82 83.
- 110 Id. at 83 (internal citations omitted).
- 111 See id.
- 112 Id. (quoting Arbino v. Johnson & Johnson, 880 N.E.2d 420, 428 (Ohio 2007)) (internal quotation marks omitted).
- 113 Id.
- 114 See id. at 81 (internal citations omitted).
- 115 Id. at 82 (quoting H.R. 215, § 50.52(2)(B), 130th Gen. Assemb., Reg. Sess. (Ohio 2013 14)).
- 116 Cincinnati City Sch. Dist. Bd. of Educ. v. Conners, 974 N.E.2d 78, 84 (Ohio 2012) (internal citation omitted).
- 117 Id. at 85.
- 118 See id. at 80.
- 119 Id. at 82.
- 120 Id. at 85.
- 121 Id. at 82.
- 122 See id. at 84.

45 UTOLR 601