FREEDOM FROM RELIGION *foundation*

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From: Freedom From Religion Foundation
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Re: Memorandum on religiously-affiliated charter schools

Recently you requested an official Attorney General Opinion from Oklahoma Attorney General John M. O'Connor regarding whether the statutory requirement that an Oklahoma charter school must not be "affiliated with a nonpublic sectarian school or religious institution," and must "be nonsectarian in its programs, admission policies, employment practices, and all other operations" could continue to be enforced. 70 O.S. 2021 § 3-136(A)(2). The resulting opinion misconstrued the relevant case law and was not an objective interpretation of the Oklahoma Charter School Act, § 3-131 *et seq*. As the Attorney General acknowledged in a footnote at the end of the opinion, the opinion is "advisory" only. We are providing additional information addressing the question you posed.

The Attorney General Opinion 2022-7 ("the Opinion") depends on a finding that charter schools in Oklahoma are not public entities. If Oklahoma charter schools are state actors, as we conclude they are, the charter schools are restricted by the Oklahoma Constitution and the United States Constitution. As such, the State of Oklahoma cannot establish religious charter schools and the charter school students cannot be coerced to engage in religious exercise. The Attorney General's bias is evident throughout the Opinion when he refers to concerns for "religious discrimination" only in terms of potential restrictions on applicant private religious entities, never once considering the religious discrimination that Oklahoma public school students would face in religious schools nor the burden on taxpayers who would be forced to fund the religious exercise.

I. Oklahoma charter schools are state actors.

A. Charter schools are public schools created by the Oklahoma Charter Schools Act.

The Oklahoma legislature created charter schools for many purposes, including to provide "additional academic choices," to encourage "different and innovative teaching

methods," to create "different and innovative forms of measuring student learning," and to create "new professional opportunities for teachers and administrators." § 3-131 (A).

Oklahoma charter schools are created by statute. § 3-131 *et seq*. A "'charter school' means a public school established by contract" with a sponsor. § 3-132 (D). Sponsors are public entities "only." § 3-132 (A). Public and private entities "may contract with a sponsor to establish a charter school," but "[a] private school shall not be eligible." § 3-134 (C). In other words, a charter school *only* exists as a public school; a private school cannot be converted to a charter school.

The contract between a sponsor and the charter school's governing body "shall" contain "[p]olicies that require that the charter school be as equally free and open to all students as *traditional* public schools" and "that require the charter school to be subject to the same academic standards and expectations as *existing* public schools." § 3-135 (A)(9), (11) (emphasis added). Additionally, the contract "shall" include a description of how the charter school will meet "the requirements and procedures [] to receive funding in accordance with statutory requirements and guidelines for *existing* public schools." *Id*. at 12 (emphasis added). Like a public school, admission to a charter school is limited only to a student's residential address, and submission of a timely application. § 3-140 (A).

The public sponsor "shall . . . [p]rovide oversight of the operations of charter schools" and "[m]onitor [] the performance and legal compliance." § 3-134 (I)(1), (6). "A sponsor may terminate a contract . . . for failure to meet the requirements for student performance . . ., failure to meet the standards of fiscal management, violations of the law or other good cause." § 3-137 (D). Charter school contracts are effective for five years. § 3-137 (A).

"A charter school shall be considered a school district for purposes of tort liability" and "shall comply with the Oklahoma Open Meeting Act and the Oklahoma Open Records Act." § 3-136 (A)(13), (16). A charter school leasing property receives government lease rates. § 3-142 (E). Employees may participate in the Teachers' Retirement System of Oklahoma. § 3-136 (A)(14). Additionally, a charter school may participate in insurance programs available to employees of the public sponsor. *Id*. at 15.

Oklahoma charter schools differ from "traditional" public schools in some aspects. A charter school can have more flexibility in curriculum and may "emphasize[] a specific learning philosophy or style or certain subject areas." § 3-136 (A)(3). Additionally, a charter school is not governed by an elected school board: "A charter school shall provide for a governing body . . . ." *Id*. at (8).

From the definition of a charter school through the provisions assigning governmental obligations to charter schools, such as transparency and reporting requirements, along with comparisons to "traditional" and "existing" public schools, the Oklahoma legislature indicated its intention for charter schools to be a type of public school. Charter schools differ in some respects from "traditional" public schools, but these differences serve to satisfy the purposes of charter schools.

B. Because charter schools are public schools, they have the corresponding duties and obligations required of all state actors.

Because Oklahoma charter schools are public schools, the legislature intended to delegate duties to the charter schools consistent with this status. Some of these duties, such as the open meeting and reporting requirements, and tort liability, are clearly legislated. The differences between traditional public and charter schools do not negate the overwhelming evidence provided by the Charter Schools Act that charter schools are a category of public school and have corresponding legal, including constitutional, obligations. Trying to find gray areas in the statutory framework, as the Opinion strives to do, to justify its conclusion that the State of Oklahoma can allow charter schools to violate the most fundamental of constitutional obligations to its taxpayers and public school children, relies on manipulating case law to fit this purpose.

The Opinion relies heavily on two cases to erroneously conclude that Oklahoma charter schools are not state actors. *Rendell-Baker v. Kohn* involved contractual relationships between public bodies in Massachusetts and a private school. 457 U.S. 830 (1982). Nearly all of the students at the private school were referred by public agencies and funding was primarily public. *Id*. at 832. Teachers and a counselor at the school filed constitutional claims when they were terminated. *Id*. at 834–35. Contracts referred to the school as a "contractor" and specified that school employees were not public employees. *Id*. at 833. The Supreme Court held that the constitutional claims failed because the school was not a state actor. *Id*. at 837, 843. Even though the State regulated the school to some degree, the State had little involvement in personnel policies. *Id*. at 836. The "nexus between the school and the State was not sufficiently close so that the action of the school . . . could be considered action of the Commonwealth." *Id*.

Rendell-Baker was decided a decade before the first charter school was established in the United States. Nonetheless, the Opinion finds the contractual relationships in the case to be similar to the contract between charter sponsors and schools in Oklahoma, despite the disparate facts that Oklahoma charter schools *never* exist as private schools, exist *only* by statutory fiat, and school employees are treated as government employees. Oklahoma's charter schools are subject to liability under the Governmental Tort Claims Act, must comply with Open Meeting and Open Records requirements, and are overseen by public sponsors. Seemingly, the fact that *Rendell-Baker* involved a contract, a school, and some public funds suffices for the Opinion to conclude that charter schools in Oklahoma are similarly not state actors. Precisely because the facts in *Rendell-Baker* differ so greatly from the facts surrounding Oklahoma charter schools and their relationship to the State, the case is better suited to support the contention that, by contrast, Oklahoma charter schools are state actors.

The Opinion also relies heavily on a Ninth Circuit case involving an Arizona charter school. In *Caviness v. Horizon Community Learning Center, Inc.*, a due process claim was brought by a former teacher at a charter school operated by a private, non-profit corporation. 590 F.3d 806 (9th Cir. 2010). The court found that the "statutory characterization" of a charter school as a public school did not necessarily control the argument. *Id*. at 816. Like the school in *Rendell-Baker*, the court decided that "Horizon [was] a private entity that contracted with the state to provide students with educational services that are funded by the state." *Id*. at 815. Additionally, again comparing *Rendell-Baker*, the court found that the state was not involved in

the employment actions in question and did not show any "interest in the school's personnel matters." *Id*. at 818 (quoting *Rendell-Baker*, 457 U.S. at 841). Given these considerations and others, the court held that the charter school was not a state actor. *Id*. at 818.

Specifics of charter school statutory frameworks vary between states complicating comparisons based on the limited facts presented in published opinions. Justice Breyer noted this variability in his dissent in *Espinoza v. Montana Department of Revenue* when he pointed to the weakness of that decision's distinction between public and nonpublic schools. 140 S. Ct. 2246, 2291 (2020) (Breyer, J., dissenting) ("What about charter schools? States vary widely in how they permit charter schools to be structured, funded, and controlled."). For this reason, comparing charter schools in Arizona to those in Oklahoma based on the limited facts in the *Caviness* opinion is problematic. The Oklahoma Charter Schools Act does more than "characterize" charter schools as public schools; it creates charter schools.

More importantly, *Caviness* is not a controlling opinion for the State of Oklahoma; Oklahoma is within the Tenth Circuit. A case in the Tenth Circuit—not considered in the Opinion—found that charter schools are public schools. *Coleman v. Utah State Charter School Board* involved constitutional claims alleged by a terminated director and co-founder of a charter school in Utah operated by a private nonprofit corporation. 673 Fed. Appx. 822 (10th Cir. 2016). The former director claimed a liberty interest was violated when the Charter School Board shared information with the board of the charter school (Monticello Academy) about an investigation. *Id*. at 830. In the court's discussion about the "fundamental character of intra-governmental meetings" between the State Board and the governing body of the charter school, the court acknowledged that "the Monticello Academy board members, unlike Monticello Academy's employees, are not, strictly speaking, government officials. But **charter schools are public schools using public funds to educate school children**. . . . [C]harter schools are not free-floating entities unmoored from state governmental oversight and control." *Id*. (emphasis added). The Tenth Circuit has indicated that it considers charter schools to be state actors.

Although the Opinion acknowledges that some courts in other circuits have found charter schools to be state actors, (p. 12), it downplays a recent and significant case in the Fourth Circuit because, again, it relies on *Rendell-Baker* as the benchmark case by which to measure all charter school litigation. The Opinion's "view" is that the dissenters in *Peltier v. Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022) (en banc), *petition for cert. filed*, "have the better of the argument." (p. 12).

Peltier involved constitutional claims for a discriminatory, female-specific dress code in a charter school. 37 F.4th at 112. The decision noted that "[c]harter schools may only operate under the authority granted to them by their charters with the state" and are "functioning as a component unit in furtherance of the state's constitutional obligation to provide free, universal [] education to its residents." *Id*. at 117, 119. The *Peltier* court analogized to a Supreme Court case that found "such a delegation of state's responsibility renders a private entity a state actor." *Id*. at 118 (citing *West v. Atkins*, 487 U.S. 42, 56 (1988)). A state cannot delegate away its duties and leave citizens without constitutional protections. *Id*. (citing *West*, 487 U.S. at 56–57). "*No* public school [] can violate the constitutional rights of its students." *Id*. at 119 (emphasis in original). It

was clear to the Fourth Circuit that it could "not permit [the state] to delegate its educational responsibility to a charter school operator that is insulated from the constitutional accountability borne by other [] public schools." *Id*. at 122.

The *Peltier* court, however, did find there were exceptions to the constitutional liability for some actors in the operation of the charter school; the management organization was not found to be a state actor responsible for the violations. *Id*. at 123. The court explained that the state delegated its duty to Charter Day School, not the management company. *Id*. The contract between Charter Day School and the management company was too attenuated to attribute its actions to the state. *Id*. Even though some peripheral entities involved with operating a charter school may not be considered state actors, the charter school itself is.

Peltier is an appropriate case to analogize to the circumstances in the State of Oklahoma regarding whether charter schools are state actors. It seems unlikely that the State legislated that charter schools are "public school[s]" and specified that they are governmental bodies for purposes of torts, while intending to allow them to escape constitutional obligations. Establishing a religious public school violates the First Amendment by forcing taxpayers to fund religion and harming the public school students. Flexibility in the curriculum and a private governing board—"the most significant factors" in the analysis per the Opinion, (p. 14)—do not negate the nexus between the State's educational duties and the school to such a degree that constitutional protections fall by the wayside. The State of Oklahoma has a duty to its taxpayers and the students of its charter schools, and the legislature has spoken.

Oddly, even the Opinion agrees that charter schools are public, except for First Amendment purposes. (p. 14). Just "because charter schools are considered public for various purposes," does not mean religious operators can be excluded. (*Id*.) The Opinion also refers to charter school students as "public school students." (p. 1).

The Oklahoma Charter Schools Act establishes and controls charter schools. Although charter schools are not "traditional" public schools, they are public schools. The fact that some characteristics of the operation of charter schools differ from traditional schools does not translate to charter schools being private actors that can shed government responsibilities. Oklahoma charter schools are held to the same transparency requirements as other public bodies, are governed by the Governmental Tort Claims Act, and are accountable to public bodies. Charter schools must satisfy the same standards and expectations as "existing" public schools and employees enjoy government benefits. As the Fourth Circuit aptly recognized, charter schools cannot avoid constitutional accountability; they cannot be a route by which the state evades constitutional protections in the public educational system. Oklahoma charter schools are state actors.

II. The State of Oklahoma cannot establish religious schools.

Because charter schools established under the Oklahoma Charter Schools Act are state actors, charter schools cannot be sectarian and students cannot be subjected to religious "traditions." The government "shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Establishment Clause prohibits the government from directly using

taxpayer money for religious instruction. *See, e.g., Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 778–79 (1973) (striking down government-subsidized maintenance and repair of nonpublic schools); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 210 (1948) (finding that the use of the tax-supported public school system to aid religious groups in religious instruction "falls squarely under the ban of the First Amendment"). The State of Oklahoma can no sooner establish a religious school than it can establish a church.

The Opinion attempts to manipulate recent Supreme Court decisions to fit its conclusion that the Oklahoma Charter Schools Act is hostile to religion and unconstitutionally excludes religious entities from a government benefit. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court held that a church could not be denied a public grant for playground surfacing material simply because it was a religious entity. 137 S. Ct. 2012 (2017). By the Opinion's analogy, the fact that the Charter Schools Act makes clear that religious and sectarian entities cannot apply to establish a charter school similarly violates the Free Exercise Clause. Even if a charter school was not a state actor, the ongoing contractual relationship with conditions and oversight between a charter school and a public sponsor is a far cry from a one-time benefit of recycled rubber. But, given that charter schools are state actors and not a government benefit for operators of such schools, *Trinity Lutheran* is not comparable because the State of Oklahoma cannot establish a religious public school system.

In *Carson v. Makin*, 142 S. Ct. 1987 (2022) and *Espinoza*, 140 S. Ct. 2246 (2020), tuition assistance to private schools that excluded religious schools, and tax credits given to people who sponsored scholarships at private schools that, likewise, excluded religious schools were held to be unconstitutional. "[A] State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Carson*, 142 S. Ct. at 1996. However, both cases made clear that "a State need not subsidize private education." *Id*. at 1997 (quoting *Espinoza*, 140 S. Ct. at 2261).

Applying *Carson* and *Espinoza* to charter schools in Oklahoma to conclude that Oklahoma must establish religious charter schools only works if a state must—or even can—establish religious public schools. Because this would, by definition, violate the Establishment Clause, excluding this result does not violate the Constitution; it upholds the Constitution. Stating this fact in the Charter Schools Act does not equate to religious hostility any more than a statute prohibiting establishment of an official state church. Additionally, the Charter Schools Act excludes all private schools from applying. § 3-134 (C). This provision prevents any argument that a charter school is, or ever was, a private school. Oklahoma need not subsidize private education, and cannot subsidize public religious education.

The Opinion also inappropriately analogizes to state and federal cases to suggest that the public funding of charter schools in Oklahoma is a result of independent choices by students and families. When "public funds flow to religious organizations through the independent choices of private benefit recipients," the Establishment Clause is not offended. *Carson*, 142 S. Ct. at 1197 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002)). In *Carson*, the parents designated the private school for their child to attend and only then did the public school district send the tuition assistance payments to that designated school. *Id*. at 1993. The Supreme Court

similarly found in *Zelman* that a voucher program did not violate the Establishment Clause because it was "a program of true private choice." 536 U.S. at 653.

In *Oliver v. Hofmeister*, the Oklahoma Supreme Court compared a state-funded scholarship for students with disabilities to the voucher program in *Zelman* and held that it did not violate the Oklahoma Constitution. 2016 OK 15, 368 P.3d 1270 (2016). The court found that "[e]ach family independently decide[d] without influence from the State whether to enroll their child in the scholarship program" and all "scholarship funds [were] paid to the parent [] and not to the private school." *Id*. ¶¶ 8, 15. It concluded that "[a]ny benefit to a participating *sectarian* school arises solely from the private and independent choice of the parent [] of the child and *not* from any decree from the State." *Id*. ¶ 21 (emphasis in original). This independent choice "breaks the circuit between government and religion." *Id*. ¶ 15.

By contrast, State funds "flow" to charter schools in Oklahoma through decisions made by public bodies. The State does "decree" a charter school into existence and *then* it receives public funds. This occurs *before* a student chooses to attend. There is an independent choice to attend a charter school, but this is wholly removed from the decision to fund the school. Interestingly, a point that the Opinion fails to appreciate was recognized by the court in *Oliver* when it was "convinced that the scholarships [would] have no adverse impact on the ability of churches to act independently of state control and to operate separately from the state." *Id*. ¶ 22. The separation of church and state protects both parties. In contrast, a charter school in Oklahoma does not act independently of state control; the circuit between government and a charter school is never broken.

The Opinion asserts that the *Oliver* decision means the "no-aid" clause in the Oklahoma Constitution does not apply to this situation. (p. 7). However, the Oklahoma Supreme Court has interpreted that "[t]he plain intent of Article 2, Section 5 is to ban State Government, its officials, and its subdivisions from using public money or property for the benefit of any religious purpose." *Prescott v. Oklahoma Capitol Preservation Com'n*, 2015 OK 54, ¶ 4, 373 P.3d 1032, 1033 (holding that a donated Ten Commandments monument on the Capitol grounds violated the Oklahoma Constitution). By attempting to manipulate the *Oliver* decision to fit the charter school question, the Opinion attempts to do what the *Prescott* court said the broad language of the no-aid clause is meant to protect against, that is, "circumvention based upon mere form and technical distinction." *Id*. ¶ 4, 373 P.3d at 1033–34. If a donated religious monument sitting on public property violates the Oklahoma Constitution, establishing religious charter schools does also, regardless of the attempt to circumvent the constitutional ban by misrepresenting the relationship between the State and the schools.

The State of Oklahoma cannot establish religious charter schools because it cannot establish religious schools. Any statement in the Charter Schools Act excluding religion merely states the constitutional duty that all state actors are obligated to follow. Case law in which nonreligious private entities were preferentially treated within a government benefit program cannot be compared to a scenario where the "benefit" argued is actually a part of the public school system.

III. Religiously-affiliated charter schools would violate constitutional rights and impermissibly fuse government and religion.

A. The separation of church and state protects both.

As the court recognized in *Oliver*, the separation of church and state serves to protect both sides of the wall. Religious entities enjoy strong constitutional protections, many of which originate from the Free Exercise Clause. U.S. Const. amend. I. If religious entities can operate charter schools in the State of Oklahoma, then the Opinion's conclusion that "a religiously affiliated applicant must be allowed to establish and operate a charter school in conformance with that applicant's 'sectarian' or 'religious' traditions" is the assumed sequela. (p. 8). The Free Exercise Clause prohibits the State of Oklahoma from "forcing" private entities to forego religious exercise. *See*, *e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that the government could not force a Seventh-Day Adventist to choose between working Saturdays in violation of her faith and losing unemployment benefits).

Missing from the Opinion is any discussion regarding the constitutional rights of the charter school students. Recent Supreme Court decisions confirm long-standing case law prohibiting public schools from coercing students to participate in religious exercise. *See Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2432 (2022) (finding that a coach's private prayers were not coercive because they "were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate."). "[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). In *Lee*, graduation prayers at a public school were found to be "religious conformance compelled by the State." 505 U.S. at 596. The prayers put the "school-age children who objected in an untenable position" and the school's practice ignored "the real conflict of conscience faced by the young student." *Id*. at 590, 596. Even student-delivered pre-game prayers at public school football games were held to have "the improper effect of coercing those present to participate in an act of worship." *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000).

The Opinion does not explain how its conclusion that a religiously-affiliated charter school would be allowed to operate "in conformance with that applicant's 'sectarian' or 'religious' traditions" can be achieved without violating the constitutional rights of the students. (p. 8). A charter school that employs "religious traditions" unconstitutionally coerces its students to participate in religious exercise.

For the church, state interference in matters of "faith and doctrine" would "violate the free exercise of religion, and any attempt by the government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). In *Our Lady of Guadalupe*, the Supreme Court held a religious school was exempt from an employment discrimination claim by a teacher because of its constitutional protections. 140 S. Ct. at 2069. Allowing religiously-affiliated charter schools begs the question as to where the lines are drawn for what the State can enforce when an operator is a religious entity.

As mentioned earlier, even the Opinion agrees that charter schools are public, just not for First Amendment purposes. (p. 14). The Opinion notably fails to explain how mixing private and public designations for schools would work in reality. The authors simply "believe" that the "anticipated use of public funds for religious purposes" is constitutionally required. (p. 14). Likewise, the authors felt it "important to emphasize" that some limitations in the Charter Schools Act "can *likely* be applied to religious charter schools." (pp. 14–15) (emphasis added). Such indefinite conclusions highlight the weakness—and defeat the purpose—of the Opinion. Without advising as to how the Charter Schools Act can actually be applied to a religiously-affiliated operator and how the constitutional rights of all parties involved can be protected, the Opinion does not practically answer the question posed.

B. Establishing religiously-affiliated charter schools would unconstitutionally fuse government and religion.

The Opinion also fails to discuss case law addressing the delegation of governmental power to religious entities. The Establishment Clause prohibits the "fusion of governmental and religious functions." *Larkin v. Grendel's Den, Inc*., 459 U.S. 116, 126 (1982) (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963)). In *Larkin*, a state statute that gave churches discretionary authority over liquor licenses "substitute[d] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body." 459 U.S. at 127. The Supreme Court found that "few entanglements could be more offensive to the spirit of the Constitution." *Id*. The law "enmeshe[d] churches in the exercise of substantial governmental powers contrary to . . . the Establishment Clause." *Id*. at 126.

A case involving the creation of a school district to specifically alleviate concerns of a religious sect was also decided on the basis of "impermissible establishment." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 710 (1994). The law creating the school district "delegat[ed] the State's discretionary authority over public schools to a group defined by its character as a religious community." *Id*. at 696. The delegation of a power the "Court has said 'ranks at the very apex of the function of a State'" to a religious group without oversight was an unconstitutional delegation of government authority. *Id*. at 710–11 (citation omitted).

Considering the delegation of public charter school authority to religious entities in Oklahoma creates the same concerns as in *Larkin* and *Kiryas Joel*; the constitutional conflict is inherent. Allowing religious entities to operate public charter schools unconstitutionally fuses government and religion. The result may be the State could be limited in its ability to oversee and enforce its own schools. The delegation of this apex public duty to operators held to different statutory and constitutional obligations fails the taxpayers and public school students, and contravenes the reasoned intent of the legislature.

In conclusion, rather than providing an objective legal answer to the question posed, the Opinion invites litigation with its biased manipulation of case law to arrive at the conclusion that the State must allow religious charter schools. Instead of advising, the Opinion simply admits compliance with the Charter Schools Act may be a problem pursuant to this conclusion. Mixing

government and religion is prohibited by the First Amendment and, in the case of public charter schools, violates the constitutional rights of Oklahoma taxpayers and students. The Charter Schools Act correctly prohibits religiously-affiliated charter schools because that is consistent with case law and the well-known premise that constitutional rights are protected by the separation of church and state.

We ask that the Statewide Virtual Charter School Board continue to prohibit religiously-affiliated charter schools. As the Opinion noted, it is advisory only. Until the judiciary has reason to interpret the constitutionality of the Charter Schools Act, no change or action is required.