

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

CHICAGO MATHEMATICS AND)	
SCIENCE ACADEMY CHARTER)	
SCHOOL, INC.)	
)	
Petitioner-Employer,)	
)	Case No. 13-RM-1768
-and-)	
)	
CHICAGO ALLIANCE OF CHARTER)	
TEACHERS AND STAFF, IFT, AFT,)	
AFL-CIO,)	
)	
Respondent-Union.)	

***AMICUS CURIAE* BRIEF OF NATIONAL ALLIANCE FOR
PUBLIC CHARTER SCHOOLS IN SUPPORT OF
EMPLOYER'S REQUEST FOR REVIEW**

Respectfully submitted on behalf of *Amicus Curiae*
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This *amicus curiae* brief is filed by the National Alliance for Public Charter Schools (the "National Alliance") in support of the request for review by The Chicago Mathematics and Science Academy Charter School, Inc. ("CMSA"). For the reasons stated below, the National Labor Relations Board should reverse the Decision and Order of the Acting Regional Director of Region 13, direct Region 13 to exercise the Board's jurisdiction and remand the case for further proceedings as appropriate.

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Alliance is the only national non-profit organization committed solely to advancing the public charter school sector. The National Alliance aims to lead public education to unprecedented levels of high academic achievement for all students by fostering a strong public charter school sector across the country. The National Alliance advocates for improved public policies, builds the capacity of state charter school associations to better serve charter schools, and provides strategic communications on behalf of the large and diverse charter school movement.

As part of its efforts to advocate for improved public educational policies, the National Alliance has partnered with several state charter school associations to try to eliminate common obstacles to charter schools' success. For example, the National Alliance has helped states change their charter school laws to lift arbitrary caps on the number of charter schools, strengthen charter school accountability, increase charter school funding levels, and create independent authorizers of charter schools. Regarding this matter, the National Alliance has an interest in ensuring that independently run charter schools are subject to the Board's jurisdiction rather than to the inconsistency, and in some instances, regulatory overreaching, of states' labor laws, policies and regulations.

SUMMARY OF ARGUMENT

The Acting Regional Director of Region 13 misapplied the long-standing test for whether the employer, a privately-run charter school, was subject to the broad jurisdictional reach of the National Labor Relations Act. To do so required a cramped and incorrect application of the Act's definition of an employer that is inconsistent with (a) applicable law, including established Board precedent, (b) the purposes and policies of the Act, including a federally created balance of labor rights that is not subject to manipulation or alteration by state or local law, and (c) the prudent policy of allowing employers of charter school employees to enjoy the same "zone protected and reserved for market freedom" as other private employers subject to the Act. The Decision and Order below results in a denial of CMSA's teachers' rights under the National Labor Relations Act ("Act" or "NLRA") and should be overturned by the Board.

ARGUMENT

I. Charter Schools are Independent, Public Schools

Charter schools are public schools that come into existence through a contract with a state agency, a local school board or another entity.¹ They are nonsectarian public schools of choice that operate with freedom from many of the regulations that apply to traditional public schools, while being held accountable for improved student achievement.² Although public, most charter schools are different from traditional public schools where the school district employs the teachers and staff. Instead, public charter schools typically employ their teachers

¹ The State of Charter Schools 2000, National Study of Charter Schools Fourth-Year Report, U.S. Dep't of Education (2000) at p. 1 (which is available at <http://www2.ed.gov/PDFDocs/4yrrpt.pdf>).

² In addition to the information in the Department of Education Research Report cited in note 1, general background information about charter schools included herein, is available at the website http://www.uscharterschools.org/pub/uscs_docs/o/index.htm and at the website of the National Alliance for Public Charter Schools, located at <http://www.publiccharters.org/> (hereafter, "National Alliance Website").

and other employees independently through a private entity. Oftentimes the employing entity is the charter school itself, which is typically a private, non-profit entity. (See, e.g., Acting Regional Director's Decision and Order in this case, hereafter "D&O," p. 2 ("[CMSA] is a privately run 503(c)(3) not-for-profit corporation.")).³ In other situations, the charter school contracts with a private management company, commonly referred to as an Educational Management Organization ("EMO") or a Charter Management Organization ("CMO") which may be a not-for-profit or a for-profit private entity. See, e.g., Charter School Admin. Serv. Inc., 353 NLRB 394, n.21 (2008) (two-member Board decision); and Civitas Schools, LLC and Chicago Alliance of Charter Teachers and Staff, Illinois Federation of Teachers (AFT), AFL-CIO, Case 13-RM-1764 at p. 2 (cited at D&O, p. 13).

Public charter schools are intended to improve our nation's public school system. By being allowed the freedom from various state regulations under various states' charter school laws, charter schools are intended to create healthy competition in the educational marketplace, thus challenging all types of institutions, including traditional public schools, other charter and alternative schools, and private schools to be at their best to attract students. See National Alliance Website, at <http://www.publiccharters.org/aboutschools>. Currently, more than 1.6 million public school students attend the nearly 5,000 public charter schools in 40 states and the District of Columbia. Id. Charter schools are public schools because, while operated independent of the public school district, they are:

- tuition-free and open to every student who wishes to enroll;
- non-sectarian, and do not discriminate on any basis;
- primarily publicly funded by local, state and federal tax dollars based on enrollment, similar to (but often to a lesser extent than) other public schools; and

³ A copy of this Decision and Direction of Election is attached as Appendix A, in alphabetical order along with any other cited, unpublished decisions.

- held accountable to state and federal academic standards.

Id.

As explained below, however, the fact that charter schools are public schools does not make them political subdivisions of the states in which they operate. To the contrary, as set forth below, charter schools are intended to be and usually are run by corporate entities that are administered independently from the state and local governments in which they operate.⁴ Indeed, such independence is the whole idea. States across the nation, as well as our federal government, have recognized there is a critical need to try new and innovative approaches to improve student achievement in our public schools, while holding all public schools accountable for student outcomes. Charter schools give parents options within the public school system. They have the flexibility to innovate in order to improve learning with the goal of sharing what works with the broader public school system so that all students benefit. Id.

Moreover, charter schools are closing the achievement gap. They are raising the bar of what is possible—and what should be expected—in public education. Id. This is why charter schools enjoy broad public support that defies common dividing lines, including traditional party politics. Evidence of this is ubiquitous, but as mere examples, the Obama Administration and the Bush Administration have been outspoken advocates and financial

⁴ Some states allow a charter school's charter to be held by a public entity, for example, by a school district applicant. See, e.g., Louisiana's Charter School Law, La. RS 17:3992, relevant provisions of which are summarized on the Louisiana Department of Education website at http://www.doe.state.la.us/bese/charter_schools.html. Cases involving a public entity holding the charter present a different factual scenario than the one analyzed by this case and emphasize the fact that determinations about whether a charter school (or any other organization) is an employer under the Act are fact specific and not subject to broad generalization. The National Alliance takes no position with regard to factual situations other than as described in this brief.

supporters of public charter schools.⁵ The Chicago Alliance of Charter School Teachers and Staff, IFT, AFT, AFL-CIO ("Respondent Chicago ACTS" or the "Union") in this case also espouses its strong support for public charter schools.⁶

II. The Board's Broad Jurisdiction Covers the Private Entities that Run Charter Schools

Under the NLRA, the Board's jurisdiction extends to enterprises whose operations affect interstate commerce. The Board's "jurisdiction is to be interpreted broadly." NLRB v. Parents and Friends of the Specialized Living Ctr., 879 F.2d 1442, 1448 (7th Cir. 1989) (internal citations omitted) (enforcing the Board's order exercising NLRB jurisdiction over not-for-profit corporation that received 99% of its funding from public sources). In addition, the party that seeks to avoid the NLRB's jurisdiction carries the burden of proving it is exempt from the reach of the NLRA. Delta Health Ctr., Inc., 310 NLRB 26, 28 (1993); Int'l Ass'n of Firefighters, 292

⁵ See, e.g., President Barack Obama's published, educational position statement at <http://www.whitehouse.gov/issues/education> ("The President believes that investment in education must be accompanied by reform and innovation. The President supports the expansion of high-quality charter schools. He has challenged States to lift limits that stifle growth among successful charter schools and has encouraged rigorous accountability for all charter schools."). President George W. Bush's Administration's support for charter schools is also well-established. See, e.g., <http://georgewbush-whitehouse.archives.gov/news/releases/2008/05/20080502-10.html> ("Charter schools are educational alternatives that empower families with additional choices for their children. By providing flexibility to educators while insisting on results, charter schools are helping foster a culture of educational innovation, accountability, and excellence. Charter schools also encourage parental involvement and help contribute to the national effort to close the achievement gap."). Arne Duncan, Secretary of Education was a well-know advocate of charter schools when he served as CEO of Chicago Public Schools and he remains one today. See, e.g., <http://www.ed.gov/news/press-releases/education-secretary-arne-duncan> ("The [Obama] Administration will invest more than \$256 million this year to assist in the planning and implementation of public charter schools and dissemination of their successful practices through the Charter School Grants Program. In addition, the President's fiscal year 2011 budget requests a \$54 million increase in the Charter School Grants Program, seeking \$310 million and representing another step toward meeting the Administration's commitment to double financial support for the program."). There is ample evidence, not cited here, that the Administrations of William J. Clinton and George H.W. Bush also supported charter schools. Printed copies of cited, supporting materials are attached as Appendix B.

⁶ See, e.g., Respondent Chicago ACTS' website at http://www.chicagoacts.org/index.php?option=com_content&task=view&id=14&Itemid=43 ("The American Federation of Teachers strongly supports charter schools that embody the core values of public education and a democratic society: equal access for all students; high academic standards; accountability to parents and the public; a curriculum that promotes good citizenship; a commitment to helping all public schools improve; and a commitment to the employees' right to freely choose union representation.").

NLRB 1025 (1989) (citing NLRB v. Austin Develop. Ctr., Inc., 606 F.2d 785 (7th Cir. 1979) (finding that the NLRB had jurisdiction over nonprofit corporation engaged in providing educational and counseling services to school age children and noting that "[t]he statutory limitation contained in Section 2(2) has not been broadly construed.").

Despite these dictates, the Acting Regional Director determined that CMSA is exempt from the Board's broad jurisdiction. Specifically, the Acting Regional Director found that CMSA was a "political subdivision" exempt from the Board's jurisdiction pursuant to Section 2(2) of the Act.⁷ In arriving at its finding, the Acting Regional Director ignored Board precedent, improperly shifted the burden of proof to CMSA and employed a flawed analysis that would greatly expand the number of employers who would fall under the political subdivision exemption. If the Board were to uphold the Acting Regional Director's findings, not only would CMSA's employees be denied their rights under the Act, but the Board's broad jurisdictional reach would be eroded beyond the charter school setting.

In Management Training Corp., 317 NLRB 1355, 1358 (1995), the Board decided that in determining whether to assert jurisdiction, it would consider only whether the employer meets the definition of "employer" under Section (2) of the Act. One class of employers specifically excluded from the definition of "employer" under Section (2) of the Act is a "political subdivision" of the state. To determine whether an employer is such a political subdivision the Supreme Court, in NLRB v. Natural Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600, 604 (1971), adopted the Board's two-part test. Specifically, the Court

⁷ The Act, at 29 U.S.C. § 152(2), defines the term "employer" to include any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, . . . or any State or political subdivision thereof, . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

held that an employer is a "political subdivision" if it is either: (1) created directly by the State so as to constitute a department or administrative arm of government; or (2) administered by individuals who are responsible to public officials or to the general public. *Id.* The party alleging that an employer is exempt from the Act's coverage must prove that the Hawkins County test is met. In this case, CMSA meets neither prong of the Hawkins County test; as such, the Acting Regional Director's ruling must be overturned.

III. Entities that Run Charter Schools are Generally Subject to the Board's Jurisdiction

A. *Federal Labor Policy is Consistent with the Mission of Charter Schools*

The NLRA was enacted to federalize and bring uniformity to labor-management relations in the United States. See NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971) (the NLRA is designed "to obtain uniform application of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies") (internal quotations and citations omitted). To resolve labor disputes, the NLRA created the Board to interpret and to administer the federal labor statutes and their uniform policies. 29 U.S.C. § 153. Allowing states to usurp, at their will, jurisdiction over private employers, including private entities that run or manage charter schools runs afoul of these principles. Teachers and other employees in charter schools that are, or are run by, private entities cannot be stripped of their rights under the Act without creating the exact types of diversities and conflicts from a variety of local procedures and attitudes that the Act is designed to prevent.

B. *The Private Entities That Run Charter Schools or Hold Their Charters Are Not Exempt from the NLRA or the Board's Jurisdiction*

Private entities that run charter schools cannot be exempt from the Board's jurisdiction unless they meet either prong of the Hawkins County test—regardless of what a state

legislature states to the contrary. Hawkins County, 402 U.S. at 604. The question of whether an employer is a political subdivision exempt from the Board's jurisdiction is a question of federal law, not state law. Id. Accordingly, unless the private-governing body of a charter school was created directly by the state, it cannot meet the first prong of Hawkins County test.

Similarly, unless a majority of the private-governing body of a charter school is directly accountable to a public official or the general electorate, it cannot meet the second prong of the Hawkins County test. No existing rule or decision dictates that the private entity operating a privately-run public charter school should be treated any differently than any other private employer. To the contrary, the opposite is true. In Charter School Admin Serv., 353 NLRB at 399, n.21, the Board rejected the Regional Director's attempt to skirt the strictures of Hawkins County on this basis. In Charter School Admin. Serv., the Regional Director opined that the Board should not assert jurisdiction over a charter school, theorizing that asserting jurisdiction would create "policy and legal issues unique to education involving State legislation and outside the Board's expertise." Id. The Board reversed the Regional Director's Decision and Order, stating, "[I]t is clear that the provision of education is not a unique state function. . . . We see no policy or legal issues in the public charter school setting that would warrant denying employees their Section 7 rights." Id.; see also, Civitas Schools, LLC and Chicago Alliance of Charter Teachers and Staff, Illinois Federation of Teachers (AFT), AFL-CIO, Case 13-RM-001764 at p. 2 (finding that Civitas, the private employer of the petitioned-for employees, which employed all of the teachers at an Illinois charter school, was not a political subdivision of the State of Illinois and therefore was an employer within the meaning of Section 2(2) of the Act).⁸

⁸ A copy of this Decision and Direction of Election is attached as Appendix B, in alphabetical order along with any other cited, unpublished decisions.

IV. Region 13 Misapplied the *Hawkins County* Test

As is stated above, in order to be considered a political subdivision under the Act, an employer must be either: (1) created directly by the State so as to constitute a department or administrative arm of government; or (2) administered by individuals who are responsible to public officials or to the general public. Hawkins County, 402 U.S. at 604. In this case, because CMSA meets neither part of the Hawkins County test, the Acting Regional Director's ruling must be reversed.

A. *CMSA Is Not a Political Subdivision of the State Because It Was Not Created Directly By the State*

Region 13's Decision and Order must be overturned because CMSA was not created directly by the state so as to constitute a department or administrative arm of the government. Like the Hawkins County test itself, whether an employer was created "directly by the state, so as to constitute departments or administrative arms of the government" is a two-part test. Initially, in order for an employer to meet the first prong of the Hawkins County test, the Board must find that the employer was created directly by the State. If, and only if, the answer to that inquiry is affirmative, then the Board must determine whether the employer "was created 'so as to constitute an administrative arm of the government.'" Family Healthcare, Inc., 354 NLRB No. 29 (2009) ("Even if an employer is an entity that is created directly by a State or county, an issue remains as to whether it was created 'so as to constitute an administrative arm of government'"). In order to make the second determination, the Board will carefully consider state law under which the employer was created. See Hinds County Human Resource Agency, 331 NLRB 1404 (2000) (examining the statute under which the agency was created to determine whether the agency was created for the purpose of "constituting a department or administrative arm of government").

When a for-profit or not-for-profit employer is created by private individuals, it necessarily fails the first prong of the Hawkins County test because it is "not created directly by the State." See Family Healthcare, Inc., 354 NLRB No. 29 (holding that employer was not a political subdivision because it "was not created by the State of Ohio; it is a nonprofit corporation"); Research Found. of the City Univ. of NY, 337 NLRB 965 (2002) (holding that privately created non-for-profit was not a political subdivision because it was not "created directly by the government"); Enrichment Serv. Program, Inc., 325 NLRB 818 (1998) (finding that the employer did not meet the first prong of Hawkins County where it was a "private, not-for-profit, tax-exempt corporation incorporated under the laws of the State of Georgia"). Nor was CMSA directly created by the State, as detailed below.

In Research Found., twelve private individuals created the employer as a private, not-for-profit corporation. The law under which the employer was incorporated authorized the incorporation of institutions or associations whose purpose is, in whole or in part, educational. Although the employer's charter indicated a corporate purpose that benefits the City University of New York (a political subdivision ("CUNY")), nothing in the charter indicated that the employer was intended to operate under CUNY's control or as a department or administrative arm of CUNY. Rather, the charter specifies that the governance and powers of the corporation are vested solely in the private incorporators, and not in any governmental entity such as CUNY.

In holding that the employer was not directly created by the government, the Board specifically noted that the creation of the employer by private individuals as a private corporation clearly leaves the employer outside the ambit of the Section 2(2) exemption. Research Found., 337 NLRB at 968; see also Southwest Texas Public Broadcasting Council, 227 NLRB 1560, 1562 (1977) (holding that an employer set up by a political subdivision (a public

university) was not itself a political subdivision, where "it is clear that the Employer was established as a private corporation under a corporate charter bearing its own name").

Here, like the employer in Research Found., it is undisputed that CMSA is a privately run, not-for-profit corporation. (D&O, p. 3). This is evident from the factual findings of the Acting Regional Director, which demonstrate conclusively that the State did not directly create CMSA. For example, he found that, CMSA "is a privately run 503(c)(3) not-for-profit corporation. CMSA was created in October 2003 by a group of private individuals." Id. at p. 2. He also noted that the school did not even enter into a charter agreement until July 2004, nine months after its creation. Id. Further, just as with the employer in Family Healthcare, it is undisputed that CMSA was created by a group of private individuals. Id. The Acting Regional Director ignored these dispositive facts and the Board's precedent in finding that CMSA met the first prong of the Hawkins County test. As such, the Decision and Order must be reversed because it is inconsistent with the law of the Supreme Court and the Board's precedent.

That CMSA was not directly created by the State of Illinois should have ended the Acting Regional Director's inquiry. As indicated in Family Healthcare and Hinds County, the Board will "carefully consider" the state law under which an employer was created only once it has determined that the employer was directly created by the state. Not only did the Acting Regional Director err when he chose to analyze state law when there was no need to do so, he further erred by examining the wrong law. Hinds County and Family Healthcare instruct the board to examine the statute under which the employer was created. In this case, that law is the

Illinois Not-For-Profit Act. 805 ILCS 105/101.01, *et seq.*; (Tr. 14-16; Employer Exhibits 1-2).⁹

Instead, Region 13 examined the law that governed the operations of charter schools—the Illinois Charter School Law, 105 ILCS 5/27A-6(a). Neither for-profit nor not-for-profit companies can be created under that law; in fact, it requires an Illinois charter school to be organized as a discrete, nonprofit corporation. *Id.* at 5/27A-5(a). Nonetheless, based on its analysis of the Charter School Law, the Region arrived at the conclusion that CMSA was directly created by the state so as to constitute a department or administrative arm of government. Specifically, the Acting Regional Director held that based on requirements of the Charter School Law, "CMSA and its Board of Directors are subject to statutory restrictions, regulations and privileges that a private employer would not be subject to and negate a finding that CMSA is a private employer." (D&O, p. 2). In doing so, he skipped over the requirement of first finding that CMSA was directly created by the State of Illinois and focused instead on issues of state oversight that should never have been reached.¹⁰

Conflating these distinct analyses has been and should be rejected. The NLRB Division of Judges recently addressed the interplay of charter school laws and the Hawkins County test in Excalibur Charter School, Inc., 28-CA-23039, 2011 WL 245526, *2 (NLRB Div. Judges Jan. 26, 2011). In Excalibur Charter School, a charter school was found not to be

⁹ Ironically, despite his laser focus on the "legislative intent" of the Illinois Legislature in amending the Illinois Charter School Law while somehow finding that CMSA was directly created under that law, the Acting Regional Director failed to note that the express language of that law does not even address the makeup of an Illinois charter school's governing body, let alone require that it be appointed or controlled by public officials.

¹⁰ In Charter School Admin. Serv., the Board readily dismissed as self-evident the first prong of Hawkins County because the employer at issue (who managed a public charter school) was a private, not-for-profit corporation. 353 NLRB at 397 ("There is no dispute that the Employer does not come within the first analytical prong of *Hawkins County* because it was not created directly by the State of Michigan so as to constitute an arm of the government.")

"directly created by the state so as to constitute departments or administrative arms of state government." Id. In finding that the employer did not meet the first prong of the Hawkins County test, the judge in Excalibur Charter School noted that the entity was incorporated by a private individual. Id. at *2. In making its finding, the judge noted that although the Arizona charter school law provided for extensive oversight of the employer, that did not affect the Hawkins County analysis. Specifically, the Excalibur Charter School judge stated:

Clearly, the facts herein do not satisfy the first prong of the test set out in Hawkins that the Respondent was created directly by the state so as to constitute departments or administrative arms of the state government. Rather the legislature established a frame-work and rules by which individuals could establish charter schools that were subject to approval by state officials. . . . While the State Board has substantial regulatory authority over charter schools, and must approve the board members, the school's charter, its location, mission, curriculum, business plan, the number of students attending the school, and budget, and checks to see that the teachers possess the necessary educational requirements, that is not enough to exempt the school pursuant to Section 2(2) of the Act.

Id. at *2-3. Here, as with the employer in Excalibur Charter School, CMSA does not meet the first prong of the Hawkins County test.

B. *CMSA Is Not a Political Subdivision Because It Is Not Administered By Individuals Who Are Responsible to Public Officials or the General Electorate*

The Acting Regional Director erred in determining that CMSA was administered by individuals who are responsible to public officials or the general electorate, within the meaning of the Act. The Board has made it perfectly clear that when determining whether an entity is "administered" by individuals responsible to public officials or to the general electorate, "the Board considers whether the entity's governing body is appointed by, and subject to, removal by public officials." Charter School Admin Serv., 353 NLRB at 397 ("In determining whether an entity is 'administered' by individuals responsible to public officials or to the general

electorate, the relevant inquiry is whether the individuals who administer the entity are appointed by and subject to removal by public officials"); Research Found., 337 NLRB at 969 (same); Regional Medical Ctr. at Memphis, 343 NLRB 346, 359 (2004) ("For an entity to be deemed 'administered' by individuals responsible to public officials or to the electorate, those individuals must constitute a majority of the board); Enrichment Serv. Program, Inc., 325 NLRB at 819, (holding that an employer whose bylaws provided that "at least one-third of its board of directors 'shall be comprised of democratically selected representatives of the poor'" not to be "administered by individuals who are responsible to public officials or the general electorate" because the poor did not constitute the general electorate); Fivecap, Inc., 331 NLRB 1165 (2000) (holding that an employer whose bylaws required that to be eligible for the board of directors, an individual was required to submit a petition signed by 20 residents of the county to be served, was not administered by individuals responsible to the general electorate). Region 13 ignored established Board precedent to find that CMSA "was administered by" a government entity.

It is undisputed that none of the individuals comprising CMSA's board of directors are government officials, nor do they work for any government entity. (D&O, pp. 2-3). It is further undisputed that no government entity has the power to appoint a CMSA board member. (D&O, p. 3). Likewise, no member of CMSA's Board is subject to removal by the Chicago Public Schools or by the Illinois State Board of Education. Id. Accordingly, just as in Charter School Admin. Serv., Research Found., Regional Medical Ctr., Enrichment Serv. Program and Fivecap, Inc., because CMSA is not administered by individuals responsible to a public official or the general electorate, it is not exempt from the definition of "employer" under the Act.

Accepting these facts, Region 13 ignored the Supreme Court and Board's dictates by finding that because CMSA had "direct reporting and compliance responsibilities to public

officials it is therefore a political subdivision exempt from NLRB jurisdiction." (D&O, p. 13). In doing so, the Acting Regional Director also failed to identify the amount of reporting and compliance responsibilities to public officials that are needed to allow for an otherwise private employer to become a political subdivision. Indeed, his opinion is devoid of any case where the Board determined it was without jurisdiction because of the amount of oversight that a state provided to an employer. This is so because decisions of the Board, without fail, are focused on who controls the governing board of the employer; indeed, the only time the Board has declined jurisdiction when analyzing the second prong of the Hawkins County test was where the state had the authority to appoint or remove an employer's board members. There was undisputed, affirmative evidence that this was not the case in CMSA's situation. (Tr. 15; D&O, p. 3).

Nor was the Acting Regional Director correct to equate government oversight with government administration by individuals who are responsible to public officials. This concept was specifically rejected by the Board in Charter School Admin. Serv., 353 NLRB at 397. ("The Board routinely has asserted jurisdiction over private employers who have agreements with government entities to provide certain types of services."). As the Board well knows, every government contractor is subject to exacting oversight, and at risk of losing its contract if it fails to meet the government's required specifications for having been awarded the contract. In rejecting the idea that a public body's oversight of contractual compliance was sufficient to show control akin to that over a political subdivision, the Board noted that "[i]t would be a rare government contract that did not afford the government oversight of the contract, and the ability of the government to correct or cancel a contract does not, without more, change the private nature of the contracting entity." 353 NLRB at 398, n. 20 (citations omitted); see also NLRB v. Kemmerer Village, 907 F.2d 661, 664 (7th Cir. 1990) (even though government had "substantial control" over the putative employer's wages and benefits, it was not "so much

control" as to render collective bargaining over employee compensation futile); Specialized Living Ctr., 879 F.2d at 1449 (finding that Illinois did not exercise such substantial control, even though the State controlled the nonprofit's total expenditures).

Here, the Acting Regional Director found that "[n]o governmental entity plays a role in the hiring, supervision or termination of CMSA employees. Further, no government entity plays a role in determining the specific amount of wages, . . . the type of health insurance plan, . . . or the member of paid leave days enjoyed by CMSA employees." (D&O, p. 4). As such, it was impossible for him to find, as he was required to do under Seventh Circuit precedent, that the government exercises so much control over CMSA to render collective bargaining futile. Kemmerer Village, 907 F.2d at 664. Moreover, contrary to the Supreme Court's express directive in Hawkins County to examine the entity's actual operations and characteristics, the Acting Regional Director states that, "While CPS has yet to reject CMSA's budget submissions, it is significant that CPS has the authority to do so. . . ." (Hawkins County, 402 U.S. at 604; D&O, p. 13). The Acting Regional Director's Decision and Order contradicts binding precedent and must be reversed.

V. The Portions of the Recently-Amended Illinois Educational Labor Relations Act Relied Upon By the Acting Regional Director Are Preempted By the NLRA

Pursuant to the doctrine of primary jurisdiction, only the NLRB has the jurisdiction and authority to control the labor relations of private employers, and as a general rule, the NLRB preempts both federal and state laws that purport to govern conduct that is "arguably" within the scope of the NLRA. San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 242-45 (1959). When an activity is arguably subject to § 7 or § 8 of the Act, the States must defer to the exclusive competence of the Board if the danger of state interference with national policy is to be averted. Id. at 245. Garmon preemption "is

designed to protect the primary jurisdiction of the NLRB . . . by providing the NLRB with exclusive jurisdiction to determine whether given conduct falls within the NLRA." Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 659 (7th Cir. 1992).

The "arguably subject" test for determining whether the NLRA preempts state law is intentionally broad in order to ensure that the federally created balance of rights is preserved. If the conduct arguably falls within the scope of the Act, then the interest in a uniform federal labor policy identified in Garmon requires that the states defer to the exclusive jurisdiction of the NLRB. See Garmon, 359 U.S. at 245. Because the employers that operate America's charter schools are typically privately created and independently run entities, they are subject to the Board's jurisdiction.

In arriving at its decision that the CMSA is exempt from the Act's coverage, however, the Acting Regional Director relied on recent amendments to the Illinois Educational Labor Relations Act ("IELRA"). (D&O, pp. 7-9). Specifically, Illinois Legislature amended the IELRA in 2010 such that the IELRA purportedly governs the labor relations of the "governing body of a charter school" as well as "a subcontractor of instructional services to a . . . charter school" – regardless of whether those entities are private and already otherwise subject to the

Board's jurisdiction. 115 ILCS 5/2(a). These amendments, however, are necessarily preempted under Garmon.¹¹

As discussed in detail above, a private "governing bod[y] of a charter school" is not exempted from the Act because it is not a political subdivision as defined by Section 2(2). Moreover, the Illinois law purports to restrict the Board's jurisdiction over even private subcontractors who perform work for charter schools, without regard for whether they are otherwise employers under the Act. See 115 ILCS 5/2(a). Accordingly, because the IELRA attempts to assert control over the labor relations over private employers that are subject to the Board's jurisdiction, it is preempted by the NLRA.

CONCLUSION

The mischaracterization of CMSA or other charter schools as political subdivisions would be harmful to federal labor and educational policy. As found in Charter School Admin. Serv., there is no reason to avert the policy of broad, federal jurisdiction over private employers in the field of charter school education. 353 NLRB at 399, n. 21. To the

¹¹ Illinois' law also contains other restrictions that would be preempted by the NLRA, under the Machinists Doctrine. Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132 (1976). For example, employers covered by the IELRA are expressly restricted from the use of public funds "to any external agent, individual, firm, agency, partnership, or association in any attempt to influence the outcome of representational elections held pursuant to paragraph (c) of Section 7 of this Act." 115 ILCS 5/14(a)(9). Applied against a private employer such as CMSA, this provision would "frustrate the comprehensive federal scheme" achieved by the NLRA by virtue of regulating "within a zone protected and reserved for market freedom." Chamber of Commerce of the United States of America v. Brown, 554 U.S. 60, 62-63, 128 S.Ct. 2408, 2410-11 (2008) (state law prohibition on expenditure of funds to, inter alia, use "consulting fees . . . incurred for . . . an activity to assist, promote, or deter union organizing" was preempted by NLRA as an inappropriate regulation of activities the NLRA intended to be unregulated). As explained in Brown, it is the policy of the NLRA, through its section 8(c), not only to "implement the First Amendment," but also to manifest a "congressional intent to encourage free debate on issues dividing labor and management." Brown, 554 U.S. at 60, 128 S. Ct. at 2410 (internal citations omitted) (this policy judgment, "which suffuses the NLRA as a whole" favors "uninhibited, robust, and wide-open debate in labor disputes"). As in Brown, a state's attempt to place restrictions on the parties' use of public funds to hire labor consultants in an attempt to regulate such debate violates these policies and is preempted by the NLRA. Id. at 68, 2421-2422. As such, the IELRA's provision, aimed at private employers such as CMSA and even its subcontractors, is void because it impermissibly predicates benefits (the receipt of state funds) on refraining from conduct protected by federal labor law.

contrary, the federal policy of the United States supports charter schools, and federal labor law and policy should as well. Allowing states like Illinois to pass laws to attempt to take away rights that employees of private companies enjoy under the Act, including notably their right to vote in a secret ballot election, or to otherwise interrupt the federally created balance of rights it preserves, violates the prudent policy of the United States.

Charter schools thrive and succeed in the view of charter advocates like the National Alliance when they are allowed to innovate and be flexible, free of obstacles to their success. To impose state labor law obligations on private charter school employers, even in a public school setting, is inconsistent with the goal of differentiating these schools from "traditional" public schools. Employees of these schools are free to organize, or not organize, as they wish, all within the same, well-established rights and the "zone protected and reserved for market freedom" to which other private employees subject to the Act are provided.

For these reasons, the National Alliance respectfully requests that the Board reverse the Acting Regional Director's Decision and Order by finding that CMSA is an employer within the meaning of Section 2(2) of the Act; issue a Decision and Direction of Election, and proceed under the Board's jurisdiction in a manner consistent with that order.

Dated: March 10, 2011

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Respectfully submitted,

National Alliance for Public Charter
Schools, as *Amicus Curiae*

By: Michael L. Sullivan
One of Its Attorneys

APPENDIX A

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

Chicago, Illinois

CIVITAS SCHOOLS, LLC,

Employer

and

CASE 13-RM-1764

**CHICAGO ALLIANCE OF CHARTER
TEACHERS AND STAFF, ILLINOIS
FEDERATION OF TEACHERS (AFT),
AFL-CIO,**

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on before a hearing officer of the National Labor Relations Board to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.¹

I. Issues and Parties' Positions

The Petitioner, Civitas Schools, LLC (herein Civitas or the Employer), seeks an election conducted by the Board among a unit of its employees. The Union, while agreeing that the petitioned-for unit is an appropriate unit for the purposes of collective bargaining, contends that the Board does not have jurisdiction over Civitas to process the instant petition. The Union's contention is based on its assertion that Civitas and Chicago Charter Schools Foundation ("CCSF"), doing business as Chicago International Charter School ("CICS"), are a single employer (herein collectively referred to as CCSF/CICS), and as such are political subdivisions of the State of Illinois exempt from the jurisdiction of the Board under Section 2(2) of the Act. Civitas asserts it is the sole employer of the petitioned-for unit of employees, that is is not a

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of 9(c)(1) and Sections 2(6) and (7) of the Act.

single employer with CCSF, and that neither it or CCSF/CICS are political subdivisions of the State of Illinois.

Based on the parties positions regarding whether the Board can assert jurisdiction over Civitas and the record in this matter, the issues or potential issues are:

1. Whether Civitas is on its own a political subdivision of the State of Illinois?
2. If Civitas on its own is not a political subdivision of the State of Illinois, is it a single employer with CCSF/CICS?
3. If Civitas on its own is not a political subdivision of the State of Illinois but is a single employer with CCSF/CICS, is Civitas, as part of a single employer with CCSF/CICS, a political subdivision of the State of Illinois?

II. Decision

Based on the entire record of this proceeding and for the reasons set forth below, I find that Civitas and CCSF/CICS do not constitute a single employer and that Civitas, the sole employer of the petitioned-for employees, is not a political subdivision of the State of Illinois. Accordingly, I do not have to reach the issue of whether CCSF/CICS is a political subdivision of the State of Illinois. In sum, I find that Civitas is an employer subject to the jurisdiction of the Board within the meaning of Section 2(2) of the Act, and that it is appropriate to process the instant petition.

Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 13 in the following bargaining unit:

All full-time and part-time teachers, counselors and social workers employed by the Employer at the Wrightwood Campus located at 8130 South California Avenue, Chicago, Illinois 60652, Northtown Academy currently located at 3900 West Peterson Avenue, Chicago, Illinois 60659, and the Ralph Ellison Campus currently located at 1817 West 80th Street, Chicago, Illinois 60620, and excluding all confidential employees, managerial employees, and guards and supervisors as defined by the National Labor Relations Act.

III. Statement of Facts

A. Background on Civitas and CICS

Chicago Charter School Foundation, doing business as Chicago International Charter School, is a privately run 501(c)(3) non-profit organization with a mission to provide a high quality college preparatory education for children through the operation of charter schools. As provided in the Illinois Charter Schools Law, CCSF/CICS has a board of directors that governs the organization and sets the mission of the organization. Pursuant to a charter granted under the

Illinois Charter Schools Law, CCSF/CICS operates as one charter school with 12 separate campuses throughout Chicago, Illinois. Each campus is designated with the CICS moniker in addition to the individual campus name. CCSF/CICS has plans to open a charter school in Rockford, Illinois in 2010.

A charter school is a privately-run public school of choice, although it is not subjected to the same rules and regulations as a typical public run school in a public school system, such as Chicago Public Schools (“CPS”). Charter school laws vary from state to state, but most, if not all, states have an authorizer for charter schools. In Illinois, the local public school system where the charter school is located is the authorizer. Charter schools in Chicago are authorized by the Office of New Schools within CPS. Rockford Public School District 205 is the authorizer for the school that CICS plans to open in Rockford next year.

Charter contracts in Illinois are five-year contracts and at the end of that period, schools, like CICS, go through an extensive renewal process during which the authorizer reviews the original charter, financial information, governance information, and student performance data. A charter may be revoked if a school cannot meet its contractual charter obligations. CCSF/CICS’s charter was most recently renewed in 2007 and expires in 2012.

B. Civitas’s Operations

Civitas is an educational management organization (“EMO”) with an office currently located at 1033 West Van Buren in Chicago, Illinois. EMOs are private management companies that manage charter schools. Civitas was organized in Illinois as a limited liability company consisting of a single member and manager: CCSF. As the Executive Director of CCSF, Dr. Elizabeth Purvis acts on behalf of CCSF with respect to Civitas. Simon Hess, the current CEO of Civitas, is responsible for the management and strategic development of the organization as well as its internal operations, external relations, and making sure that Civitas meets the objectives regarding student academic achievement, financial efficiency, and growth. Hess, like previous Civitas CEO Theresa Nelson, was hired by Purvis and reports directly to her, but is paid through Civitas, not CCSF/CICS. The CEO position is the only position in which Purvis is involved with respect to hiring for Civitas. While Purvis is designated as manager of Civitas, she has no day-to-day involvement with management of Civitas.

CCSF/CICS contracts with EMOs, such as Civitas, to operate and manage its campuses including hiring and supervising the school’s teaching staff. Civitas has a contract with CCSF/CICS to operate and manage three CICS campuses: Northtown Academy, Wrightwood, and Ralph Ellison.³ CCSF/CICS also has contracts with three other EMOs—Edison Schools, Victory Schools, and American Quality Schools—to operate and manage its other campuses in the Chicago area. CCSF/CICS contracts with EMOs are negotiated individually by Purvis and the EMOs. Although possible, there has never been a situation where CCSF/CICS did not renew a contract with an EMO because the parties could not agree on the terms of the contract. However, CCSF/CICS may not renew a contract over performance problems. CCSF/CICS decided not to renew its contract with Civitas for the CICS Basil campus after Civitas failed to

³ Civitas previously managed a fourth campus, CICS Basil Campus.

improve and remedy inadequate student progress in reading. Victory Schools now contracts with CCSF/CICS to operate and manage CICS Basil Campus. All four of CICS contracts with the EMOs are similar and provide for the same terms and expectations of each EMO with respect to the use of funds and the implementation of a rigorous and relevant curriculum. The contracts also set very specific student performance targets for each campus. In sum, the individual contracts between CCSF/CICS and the EMOs are used to manage CCSF/CICS's relationship with each EMO to insure that CCSF/CICS meets the requirements of its charter agreement with the state.

CCSF/CICS has contracted with Civitas for the last four to five years and such contracts come up for renegotiation before the end of the fiscal year, which is June 30. In the relationship between CCSF/CICS and the EMOs, CCSF takes care of everything from the campus walls out. All personnel who work within the campus walls are the responsibility of the EMO that runs the particular campus. CICS campuses are in buildings that CCSF/CICS either owns or have long-term leases on, and the EMOs pay rent to CCSF/CICS on a per pupil basis as part of their contracts.

The contract that CCSF/CICS has with the EMOs, including Civitas, provides that they will hire personnel necessary for the operation of the CICS campuses they manage, such as the campus directors or principals, teachers, and other employees. As previously stated, CEO Simon Hess is the head of Civitas and is ultimately responsible for the operations staff of the three CICS campuses it manages pursuant to its contract with CCSF/CICS. Civitas has a chief academic officer, Stacy Beardsley, to whom Campus Directors Cheryl Kalkirtz, Eboni Wilson, and David Lewis report. Curriculum Directors Dawn Sandoval and Loretta O'Brien also report to Beardsley. Chief Financial Officer David Savage oversees an accounting and finance staff, and Civitas Director of Technology Chris Taubanese reports directly to Savage. Director of Human Resources Doris Badillo, Director of External Relations Erika Callahan, and the Director of Family and Community Engagement report directly to Hess.

Civitas interviews, hires, disciplines, and terminates all of its employees through its own human resources personnel without prior approval by CCSF/CICS, including Purvis or its Board of Directors.⁴ Civitas must be sure that potential hires have the right credentials and meet certain requirements and background checks. Civitas may consult CCSF/CICS Associate Director Erin Lanoue regarding legal requirements applicable for certain positions. All personnel working at campuses managed by Civitas are considered employees of Civitas according to the contract between Civitas and CCSF/CICS. The contract further provides that "Civitas shall compensate all such employees according to Civitas's compensation policies, which may include performance-based incentives...[in addition to] salaries, fringe benefits, employment taxes and other employment related costs and expenses." With the exception of the Chicago Teachers' Pension Fund, which only certified teachers are eligible to participate in, all benefits that employees who work on Civitas campuses receive are provided by Civitas and not CCSF/CICS or any other entity, including the government. CCSF/CICS does not participate in negotiations of or approve contracts between Civitas (or any other EMOs) and the teachers they hire to teach and work in its schools.

⁴ Purvis testified that there have been occasions when she was asked for her personal opinion with regard to personnel issues, but that her opinions were simply that and not binding on Civitas.

During the last fiscal year, Civitas' revenues totaled approximately \$15 to \$17 million, about 90 percent of which came from its contractual relationship with CCSF/CICS. The remainder of Civitas's revenues come from its passive investments in a money market account as well as campus or cafeteria funds. Civitas is not currently engaged in any efforts to raise money through private donations. Of the 14 million dollars in expenditures that Civitas had last fiscal year, approximately 60 to 65 percent of that was spent on salaries for its employees, while the remaining amount was applied to student costs, administrative fees, facility, and professional services. A statement of annual deposits and filings, prepared by Civitas' payroll processor ADP for each campus Civitas manages, is submitted to the IRS every year. Civitas creates its own budget, which its CFO David Savage is responsible for coordinating and managing. Although Civitas submits a copy of its budget to CCSF/CICS as part of its contractual agreement, CCSF/CICS is not involved in the creation of Civitas's budget. Civitas does not submit its budget directly to Chicago Public Schools or any government entity, including the Illinois State Board of Education.

C. CCSF/CICS's Operations

CCSF/CICS employs about 17 or 18 full-time employees and four part-time employees at its office located at 228 South Wabash Street, Suite 500, in Chicago, Illinois. As the executive director of CCSF/CICS, Elizabeth Purvis is responsible for the strategic planning and thinking of CCSF/CICS, in addition to the oversight of its budget and its relationship with the Board of Directors. As head of CCSF/CICS, Purvis reports to the Board of Directors and is subject to removal by the Board. CCSF/CICS has a "Leadership Team" that reports directly to Purvis: Associate Director Erin Kerry Lanoue, Chief Academic Officer Andrea Brown-Thurston, Chief Data Analyst Christine Poindexter, Director of Special Projects Megan Schmidt, Development Director Michael Barnhill, and Chief Operating Officer Tom McGrath.

CCSF was incorporated on January 30, 1997, for the purpose of owning and operating "a charter school or to make distributions to charitable, educational and scientific organizations qualified under Section 501(c)(3) of the Internal Revenue Code." The Board of Directors is self-appointed in that Board members nominate someone to join and the Board then votes according to the bylaws to determine whether the person joins the Board. According to CCSF bylaws, the Board of Directors cannot have less than 11 members, or more than 15. Members may be removed with or without cause only by a vote of two-thirds of the Board. No member of the Board is subject to removal by Chicago Public Schools ("CPS") or by the Illinois State Board of Education. The Board's primary responsibility is to set the mission and vision of the organization. The Board also has a fiduciary responsibility to make sure that money is being spent appropriately. CCSF/CICS has specific growth targets for each of the EMOs it contracts with and if a campus fails to meet those targets, Purvis may make a recommendation to the Board as to whether or not it should renew an EMO's contract.

As the executive director, Purvis is responsible for the hiring of Civitas' CEO who reports to her during his or her tenure. Consequently, Purvis takes the role of announcing the departure of an exiting CEO, or the introduction of a new CEO, to the affected Civitas campuses. Civitas' CEO is evaluated primarily based on adherence to its contract with CCSF/CICS.

Although the CEO is generally responsible for the day-to-day operations on Civitas' campuses, complaints against the CEO by Civitas personnel or teachers are handled directly by Purvis. For other concerns or complaints, Civitas personnel are advised to go through the appropriate Civitas chain of command. By contrast, Purvis is responsible for all personnel who work for CCSF/CICS. Neither Purvis or any other officer or Board member of CCSF/CICS is appointed by a government entity or subject to removal by public officials.

Aside from their separate physical locations, staffs, and reporting hierarchy, CCSF/CICS's day-to-day operations and administration are handled differently than those of Civitas. For example, CCSF/CICS employees have their own handbook, payroll, work, and holiday schedules, which includes a 12-month operation, rather than a "school" schedule that includes a summer vacation. CCSF/CICS employees do not participate in the State Teachers Pension Plan.

CICS receives money from Chicago Public Schools through CCSF, and CICS pays each EMO for the management of the schools in accordance with their contracts. As part of its contract with EMOs, CCSF/CICS sets a cap on the EMOs' site-based contribution, or profit, at a certain percentage and uses a sliding scale depending on how many students are enrolled in campuses managed by each EMO. Last year, CCSF/CICS received about \$60 million of non-private funds (Chicago, state, and federal funds), which made up about 95 percent of the funds that CCSF/CICS received. EMOs do not receive money directly from Chicago Public Schools or any government entity. The amount that CCSF/CICS receives from the Chicago Public Schools is based on the number of students in its campuses, as well as the percentage of students in specific categories, such as those receiving free or reduced lunches, special education, homelessness, and English language learner services. CCSF/CICS also monitors this information for the purposes of making sure that the EMOs are meeting their contractual requirements.

Unlike Civitas, CCSF/CICS is actively involved in fundraising and receives private funds including funding from private foundations, such as Charter School Growth Fund, and individual donors. Money received from private donors may have requirements attached such as providing reports, giving tours, attending meetings, or putting a member from a donor foundation on the Board of Directors. These requirements are not mandated by any public or government official or entity. Although CCSF/CICS submits quarterly budget reports to Chicago Public Schools, there has never been a situation where CCSF/CICS has been requested to alter or amend its budget.

D. Relationship between Civitas and CCSF/CICS

The interchange of employees directly between Civitas and CCSF/CICS has been minimal and limited. Former CCSF employee Theresa Nelson left to become the CEO of Civitas, and Nelson Acevedo, who used to work for Civitas as head of maintenance at Northtown Academy, now works as the facilities manager at CCSF/CICS. In both cases, the individuals applied for the positions available at the respective places. Several other individuals who previously worked for organizations affiliated with CCSF/CICS also applied for and accepted positions with Civitas. Prior to accepting his current position as CEO of Civitas, Hess had worked for an organization called ChicagoRise, a LLC of CCSF that ceased operations in mid-

March 2009. In addition, David Savage and Megan Quailles, current chief financial officer and former CEO for Civitas, respectively, worked for Chicago Charter Management, which also managed schools for CCSF, prior to working for Civitas. When Hess was appointed CEO of Civitas, Purvis took Hess to the three campuses managed by Civitas and introduced him as the new CEO.

Although Hess reports to Purvis, he does not have any direct personal accountability to any government official. Civitas is not subject to any governmental competitive civil service requirements, competitive bidding, or purchasing practices, does not have a state-issued insurance policy, and Civitas employees are not subject to any state of local government wage scales. Civitas designs and implements its own compensation and benefits package. Civitas also develops and maintains its own policy manual that applies to “employees and families of students enrolled at school campuses managed by Civitas Schools.” Hess testified that he is not aware of CCSF/CICS being consulted prior to the hiring, firing, or disciplining of any Civitas staff. Hess stated that when he hired Stacy Beardsley as the Chief Academic Officer, a nurse and a Spanish teacher for Civitas, he did not consult with CCSF/CICS or Chicago Public Schools or any government entity. Although CCSF/CICS and Teach for America have an agreement under which CICS pays a set amount of money to sponsor a certain number of Teach for America members across its network, EMOs, including Civitas, are not obligated to hire any of them. However, if an EMO chooses to hire a teacher from Teach for America, the EMO is responsible for that teacher’s salary and through its sponsorship agreement with Teach for America, CCSF/CICS pays for the extra costs associated with Teach for America teachers. Civitas and CCSF/CICS also share costs on some advertising related to enrollment at the schools.

At a minimum, CCSF/CICS meets quarterly with the EMOs, including Civitas, to go over business and review progress reports on student performance. Purvis testified that she meets with EMO representatives as often as weekly, and sometimes daily, to make sure that the terms of their contracts are being implemented and goals are being met. All EMOs are treated similarly. To this end, CCSF/CICS established a similar code of conduct, required under its contract with authorizer Chicago Public Schools, across all 12 of its campuses. However, EMOs are not required and do not, in fact, offer their employees the same pay and benefits. And although CCSF/CICS has oversight on the curriculum implemented across its campuses, the EMOs determine the textbooks, professional development, materials, and instruction strategies used on its campuses for its curriculum.

IV. Analysis

A. Civitas is Not a Political Subdivision of the State of Illinois

Section 2(2) excludes from the definition of “employer” “...any State or political subdivision thereof.” To determine whether an entity is a political subdivision, the Board applies the test described in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-05 (1971). See also *Charter School Administration Services, Inc.*, 353 NLRB No. 35 (2008), where the Board found that a private, for-profit Michigan corporation, engaged in the management of charter schools, was an employer within the

meaning of Section 2(2) of the Act and not exempt from the Board's jurisdiction.⁵ The test set forth in *Hawkins* provides that an entity is exempt from the Board's jurisdiction as a political subdivision if it is: (1) created directly by the State so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. *Id.* at 604-05. As explained below, I find under the *Hawkins* test that Civitas is not a political subdivision.

First, the record clearly establishes that Civitas does not fall within the first prong of the *Hawkins* test because it was not created directly by the State of Illinois so as to constitute a department or administrative arm of the government. As the Board stated in *Research Foundation of the City Univ. of NY*, 337 NLRB 965, 968 (2002), "[t]he creation of the Employer by private individuals as a private corporation, without any state enabling action or intent, clearly leaves the Employer outside the ambit of the Section 2(2) exemption."

Second, I find that Civitas is not exempt under the second prong of the *Hawkins* test. In *Charter School Administration Services*, supra, slip op. at 4 (citing *Research Foundation*), the Board provided that the relevant inquiry in determining if an entity is "administered" by individuals responsible to public officials or to the general electorate, is whether the individuals who administer the entity are appointed by and subject to removal by public officials or the electorate.

The record shows that Civitas is not administered by or responsible to any public official or to the general electorate. Civitas has no direct reporting requirements to the State, does not submit its budget to any government entity, and does not receive any revenue directly from public bodies. Civitas, like the three other EMOs, derives its operating revenues from fees paid by CCSF/CICS for the charter school campuses it manages. As the CEO of Civitas, Hess does not take a public oath or enjoy government immunity—Hess is appointed by and subject to removal by Purvis, who is not a public official⁶. Civitas's business operations are conducted by a chain of administrators hired

⁵ Citing *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 2009 WL 1162574 (D.C. Cir., 2009), the Union contends this case should "be given no precedential weight" as it was issued by a two-member Board. I disagree. Pursuant to the provisions of Section 3(b) of the Act, the four members of the five-member Board who held office on December 28, 2007 (Members Liebman, Schaumber, Kirsanow, and Walsh) delegated all of the Board's powers to a three-member group, consisting of Members Liebman, Schaumber and Kirsanow. When the recess appointments of Members Kirsanow and Walsh expired three days later, a properly-established, two-member quorum of that group remained, consisting of Members Liebman and Schaumber. Chairman Schaumber and Member Liebman acted with the full powers of the Board in issuing the Board's in this case. In *Northeastern Land Services, Ltd.*, 560 F.3d 36, 40-42 (1st Cir. 2009), the First Circuit approved the authority of the two-member Board—as a legitimate quorum of a three-member group—to issue decisions. In doing so, the Court relied on the plain text of Section 3(b) and a Ninth Circuit decision upholding the Board panel's authority to act after the resignation of one of its three members, as well as analogous approaches by other administrative agencies that have been upheld by the courts.

⁶ While Purvis is not a public official and is not directly responsible to the general electorate, I have take into account for the sake of argument the possibility that CCSF/CICS could be considered a subdivision of a public body under the second prong of the *Hawkins* test. However, I do not find hiring or removal authority over Hess by CCSF/CICS, another non-public entity, that may be subject to some control by a public body, makes Hess or Civitas

solely for the purpose of implementing and complying with Civitas' obligations under its contract with CCSF/CICS, and are ultimately accountable to Hess and not any public official. No one at Chicago Public Schools or the Illinois State Department of Education has any involvement in the hiring or removal of anyone on Civitas's administrative or teaching staff. Civitas teachers' certification requirements are a direct requirement of the teachers individual contracts with Civitas and failure to obtain certification is a violation of their contract with Civitas, not with Chicago Public Schools or any other government or public entity.

Civitas develops the curriculum implemented on each of its campuses without review or oversight by the Illinois State Board of Education. Civitas has no reporting obligations and does not submit any reports directly to either Chicago Public Schools, the Board of Education, or any public bodies as part of its operations. The record establishes that Civitas is ultimately responsible for the professional training and development of its teachers, and while CCSF/CICS offers some training opportunities, it is up to Civitas and the EMOs to decide whether or not to take advantage of them. The record shows that Civitas and its CEO Hess have complete and sole control over all aspects of the terms and conditions of employment for its employees and teachers, its management structure, labor relations, budget, spending, and all of the day-to-day operations that arise on Civitas' three campuses. As in *Research Foundation*, the fact that Civitas submits certain reports related to budget and curriculum to CCSF/CICS as part of its contractual relationship with CCSF/CICS does not demonstrate any significant control by the government. 337 NLRB at 968-69. Even assuming for the sake of cautious consideration that CCSF/CICS meets the second prong of the *Hawkins* test, the accountability of Civitas to CCSF/CICS under the terms of their contract does not change Civitas from a private entity to a political subdivision of a public body. As the Board observed in *Charter School Administration Services*, slip op. at fn. 20, "It would be a rare government contract that did not afford the government oversight of the contract, and the ability of the government to correct or cancel a contract does not, without more, change the private nature of the contracting entity."

In sum, Civitas, on its own or through its contractual responsibilities to CCSF/CICS, is not a political subdivision of a public body exempt from the Board's jurisdiction. Furthermore, Civitas is clearly an "employer" within the meaning of Section 2(2) of the Act given the high degree of control that Civitas exercises over the labor relations with its employees regarding hiring, firing, discipline, rates of pay, subject matter taught, and the negotiation of contracts of teachers who work on Civitas campuses. *Charter School Administration Services*, slip op. at 6.

Most of the factors and cases cited by the Union in support of its position that Civitas is a subdivision of the State of Illinois are more appropriately applicable to the operations of CCSF/CICS rather than Civitas. They would be applicable to Civitas only if it is a single employer with CCSF/CICS as the Union contends. Thus, most of the cases relied upon by the Union, particularly the Regional Director decisions finding

responsible to the public body. Such indirect authority is too amorphous to define Hess' responsibility to the public body.

charter schools operating under the California charter school law to be exempt from the Board's jurisdiction, involve entities that are directly chartered by a public body and have a direct relationship with that public body, including being subject to certain state laws and directly receiving their funding from the public body. These factors are more comparable to CCSF/CICS, which directly receives funding from political bodies and has the more direct relationship with a political body, the Chicago Public Schools, than does Civitas. The situation of Civitas is more closely related to the employer in *Charter School Administration Services*. The employer in that case, like Civitas, was an EMO that contracted with the Academy holding the charter with the State of Michigan. While the issue of single employer was not raised in *Charter School Administration Services*, the parties and the Board for the purposes of the decision, assumed that Academy, which hold the charter, was a political subdivision of the state. Nevertheless, the Board found that the EMO operating under contract with the Academy was subject to the Board's jurisdiction because the EMO, like Civitas, did not directly receive public funding and no one at the EMO was directly accountability to public officials or the general electorate.

B. Civitas and CCSF/CICS Do Not Constitute a Single Employer

To a great extent, the Union's position that Civitas is a political subdivision of the State of Illinois is based on its contention that: "Since CICS and Civitas are a single employer, and CICS is a political subdivision, Civitas is also a political subdivision." However, I find that the predicate for the Union's position, that Civitas is a single employer with CCSF/CICS, is not supported by the record.

The Board considers four factors to determine whether two "ostensibly separate entities" constitute a single employer: common ownership, common management, interrelation of operations, and common control of labor relations. *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283-84 (2001). See also *Dow Chemical Co.*, 326 NLRB 288 (1985), citing *Radio Technicians Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965); *Emsing's Supermarket*, 284 NLRB 302 (1987), *enfd.* 872 F.2d 1279 (7th Cir. 1989). In applying this test, no single factor is controlling, and not all need be present. Rather, single-employer status depends on all the circumstances, and is characterized by the absence of the arm's-length relationship found between unintegrated entities. *Mercy Hospital*, 336 NLRB at 1284. The Board has generally held that the most critical factor is centralized control over labor relations. *Id.*

In *Dow Chemical*, the Board found that a company and its wholly-owned subsidiary were not a single employer. In applying the four-part test of whether two separate entities constitute a single employer, the Board held that despite the common ownership, the absence of the other three factors determined that no single employer situation existed. 326 NLRB at 289-90. In *Mercy Hospital*, the Board reversed the administrative law judge's decision that Respondent Mercy Hospital and its joint venture, Southtowns Catholic MRI, were a single employer. 336 NLRB at 1282. Like its decision in *Dow Chemical*, the Board in *Mercy Hospital* found that despite "some degree of common ownership," the "other three factors, including the 'critical' factor of centralized control of labor relations, [were] absent." *Id.* at 1287. Applying the single

employer analysis to the record in the instant matter, I find that Civitas and CCSF/CICS do not constitute a single employer for the reasons set forth below.

1. *Common Ownership*

Since Civitas is owned by CCSF, the factor of common ownership is present. However, common ownership alone does not establish a single-employer relationship. Common ownership by itself indicates only *potential* control over the subsidiary by the parent entity; a single-employer relationship will be found only if one of the companies exercises *actual* or *active* control over the day-to-day operations or labor relations of the other. *Dow Chemical*, 328 NLRB at 288 (emphasis in original), citing *Masland Industries*, 311 NLRB 184, 186 (1993). The record establishes that Civitas and CCSF/CICS each maintains operational independence.

2. *Common Management*

The record establishes that Civitas and CCSF/CICS do not share common management. Similar to the situation and findings in *Dow Chemical*, the record in the instant matter clearly establishes that Civitas and CCSF/CICS are comprised of a top manager, who each has a separate line of individuals who report to him or her. 329 NLRB at 288-89. As described above, Simon Hess, who is in charge of Civitas as its CEO, has individuals who report directly to him and to no one at CCSF/CICS. Elizabeth Purvis, the Executive Director of CCSF/CICS, has her own “leadership team” that reports directly to her only. The record shows that despite the fact that Hess was hired by Purvis and ultimately reports to her, this does not provide Purvis with opportunity to control, let alone actively participate, in the day-to-day operations of Civitas. Given that Civitas and CCSF/CICS have no common officers and there are no CCSF/CICS managers who control the day-to-day operating decisions of Civitas, I find no common management to support single employer status.

3. *Interrelation of Operations*

It is undisputed that Civitas’ business is dependent on CCSF/CICS. However, that fact alone does not suggest that the operations of Civitas and CICS are so interrelated that they are a single employer. Rather, the record shows that the daily operations of Civitas and CICS are not integrated. In *Research Foundation*, supra at 971 (2002), the Board looked at a variety of factors in determining that the operations of the employer and City University of New York (CUNY) were not substantially interrelated despite the fact that the employer operated its outreach programs on CUNY’s campus. In making its determination, the Board considered the operating locations of the entities, computer and payroll systems, compensation plans and benefits, interchange of employees, separate filing of tax returns, and separate legal representation—in sum, whether there was “a legal and fiscal separation” between the two.

In the instant case, Civitas and CCSF/CICS maintain their own separate office space, administrative staff, bank accounts, phone systems, computers, software licenses,

workers compensation insurance, and general liability insurance. Civitas employs its own office staff, none of whom are also CCSF/CICS employees. Until the hearing in the instant matter, Civitas and CCSF/CICS had separate legal counsel, CCSF/CICS was represented by the law firm of Goldberg Kohn and Civitas was represented by the law firm of Seyfarth Shaw. Their decision to share representation by Goldberg Kohn for the hearing was a cost-effective way to address the situation, with each entity to be billed separately for their proportionate share. Civitas and CCSF/CICS also file separate tax returns.

Civitas pays CICS a three percent management fee and part of that fee covers Civitas' access to CICS staff members for providing professional development seminars on campus, or school-related data that its chief data analyst may maintain. While CICS does not oversee or monitor the professional development of teachers in the Civitas schools, CICS does offer professional development opportunities that EMOs can choose to participate or not, and Civitas can, if it chooses, obtain training and development courses from other vendors. The management fee also covers Civitas' use of the PowerSchool software that resides on the CICS server, and which teachers on Civitas' campuses use to input information about students, including attendance, grades, or special accommodations.

Although CICS employees may participate in Civitas' 401(k) plan, payments for the 401(k) plan come directly through CICS payroll system and Civitas is not involved in processing CICS payroll or 401(k) payments or making any contributions on behalf of CICS employees. Further, money contributed from CICS employees does not go to Civitas, but goes to a managing company that manages the plan for CICS. While CICS employees can also participate in Civitas' health insurance plan, Civitas bills CICS for all premiums related to CICS employees on a monthly basis. Although CICS owns or leases the buildings and the land that CICS campuses operate on, and in turn leases them to Civitas, those arrangements are pursuant to their contractual agreement, which provides for reimbursement. As part of their contract, CICS charges Civitas a per pupil rent for buildings leased to them. There is no evidence that any of these agreements between Civitas and CICS is not at arm's length and the Board has found that such mutually convenient agreements do not detract from the corporate independence of the entities. *Mercy Hospital*, supra at 1286. Furthermore, Civitas is only one of four EMOs that contract with CCSF/CICS, all of which operate with CCSF/CICS under similar terms and conditions.

4. *Centralized Control of Labor Relations*

In determining whether two entities are a single employer, the Board generally finds centralized control of labor relations to be the most critical factor. *Mercy Hospital*, supra at 1284; *Dow Chemical*, supra. The record shows that there is no centralized control of labor relations between Civitas and CICS. The labor relation functions of both entities are completely separate. While Hess ultimately reports to Purvis and is subject to removal by CICS, he is the only one at Civitas subject to any control by CCSF/CICS.

Further, the record shows that this does not provide CCFS/CICS the opportunity to be directly involved in the day-to-day operations at Civitas (or that of any other EMOs).

Labor relations decisions such as hiring, firing, disciplining employees, assigning work, and directing the work of Civitas employees rests solely in the hands of Civitas as provided for in the contract between Civitas and CCSF/CICS. Teachers who work on the CICS campuses managed by Civitas enter into contracts only with Civitas and all aspects of a teachers' employment—for example, salary, certification requirements, benefits, length of employment, discipline, termination, and other responsibilities and expectations—are negotiated solely between Civitas and the individual teacher. The record does not show that CCSF/CICS has any part in the negotiation or approval of contracts negotiated between teachers and Civitas. All certified teachers at Civitas who are eligible and participate in the Chicago Teachers Pension Fund Plan contribute two percent of their salaries and Civitas pays seven percent. Civitas made the decision on its own to contribute seven percent (out of the nine percent mandated) for each teacher in an effort to be more competitive with the market. Although CCSF/CICS provides professional development seminars to Civitas teachers on occasion at the request of Civitas, this does not show a centralized labor relations function. Aside from the fact that a portion of the fee that Civitas pays CCSF/CICS covers this type of activities, the record also shows that other entities and vendors provide similar inservices to teachers for professional development training. The only time that CCSF/CICS would be involved in any personnel matters at Civitas concern problems or complaints that involved the CEO.

The Union asserts that CCSF/CICS and Civitas are a single employer because Purvis, on behalf of CCSF/CICS, distributed a letter to teachers that stated CCSF/CICS's position with respect to unionization on CICS campuses. However, I do not find that such distribution, even coupled with surveys conducted to gauge teacher satisfaction at the schools, are sufficient on their own to show centralized control over labor relations. The Board has clearly established that a multitude of factors, described above, are to be considered when determining whether two separate entities have centralized control over labor relations. Based on the record, I find no centralized control of labor relations between Civitas and CCFS/CICS. I further find that the evidence does not support a single employer relationship between Civitas and CCFS/CICS.

C. Whether CCSF/CICS is a Political Subdivision

The issue of whether CCSF/CICS is a political subdivision of the State of Illinois only needs resolution if Civitas was found to be a single employer with CCSF/CICS and its status as a political subdivision was dependent upon the status of CCSF/CICS being a political subdivision of the State of Illinois. As I have found that Civitas, on its own, is not a political subdivision and that it is not a single employer with CCSF/CICS, the status of CCSF/CICS by itself does not impact the status of Civitas. Accordingly, I do not need resolve whether CCSF/CICS is a political subdivision of the State of Illinois.

V. Direction of Election

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Chicago Alliance Of Charter Teachers And Staff, Illinois Federation Of Teachers (AFT), AFL-CIO.

VI. Notices of Election

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. List of Voters

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, 209 South LaSalle Street, 9th Floor, Chicago, Illinois 60604, on or

before **June 9, 2009**. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **June 16, 2009**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

DATED at Chicago, Illinois this 2nd day of June, 2009.



Joseph A. Barker, Regional Director
National Labor Relations Board
Region 13
209 South LaSalle Street, 9th Floor
Chicago, Illinois 60604

Blue Book – 177-1683-5000; 177-1600

CATS — Jurisdiction – Exempted Employer

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2011 WL 245526 (N.L.R.B. Div. of Judges)

National Labor Relations Board
Division of Judges
New York Branch Office

EXCALIBUR CHARTER SCHOOL, INC.
AND
NATHANIEL WICKE, AN INDIVIDUAL

Case No. 28-CA-23039
JD(NY)-03-11
Apache Junction, AZ

January 26, 2011

Eva Herrera, Esq. and Paul Irving, Esq., Counsel
for the General Counsel.

Leonidas Condos, Esq., The Condos Law Group,
Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge:
This case was heard by me on October 19, 2010 in Phoenix, Arizona. The Complaint herein, which issued on July 30, 2010, and was amended on August 26, 2010 and September 20, 2010, was based upon an unfair labor practice charge that was filed by Nathaniel Wicke on May 14, 2010. The Complaint alleges that Excalibur Charter School, Inc., herein called the Respondent and/or the school, has maintained overly broad and discriminatory rules in its Employee Handbook regarding the non-disclosure of “confidential” information, including certain internet usage, solicitations and employee conduct and work rules and, through its handbook, has threatened its employees who violate these rules with discipline or discharge. The Complaint further alleges that on about December 19, 2009 the Respondent, by Jeffrey Parker, who incorporated the

Respondent, is a trustee and is on the Board of Directors, promulgated, maintained and enforced an overly broad and discriminatory rule prohibiting employees from discussing their wages or terms of conditions of employment with other employees, and Respondent, by Eric Walt, Respondent's Dean of Students, on about January 8, 2010 promulgated and maintained an overly broad and discriminatory rule prohibiting employees from communicating with one another regarding their terms and conditions of employment, and threatened employees who violate the rule with unspecified reprisals. The Complaint also alleges that since about January 10, 2010 the Respondent, by Carol Parker, a charter owner, has reaffirmed these unlawful rules. The Complaint further alleges that since about December 19, 2009, Wicke and other employees of the Respondent have concertedly complained to the Respondent about terms and conditions of employment, among other things that the Respondent was not providing teachers with technology and equipment that the Respondent had received grants for, and that the teachers need in order to properly perform their jobs, and that on about January 19, 2010 the Respondent discharged Wicke because he had engaged in these protected concerted activities. These actions by the Respondent are alleged to have violated Section 8(a)(1) of the Act.

I. Jurisdiction

Respondent has been engaged in the operation of a charter school for kindergarten through the 12th grade in the State of Arizona since about 1999. While admitting that it operates a charter school in the State of Arizona, and that during the twelve month period ending May 14, 2010 it derived gross revenues in excess of \$1,000,000 from various funding sources and, during the same period, purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Arizona, Respondent denies that it is subject to the Board's jurisdiction under Section 2(2) of the Act because of the control exerted by the State

of Arizona in the operation of the school.

Parker is the individual who was primarily responsible for incorporating the Respondent and is a trustee as well as being on its board of directors. Carol Parker, Parker's wife, was employed by the Respondent until August 2, 2010, primarily in human resources as a district administrative assistant, and was also a member of the school's board of directors from 1999 to August 2, 2010, when she resigned from the Board. Originally, the Board of Directors was composed of interested parents of students at the school, and others who were willing to participate; over the past eleven years the board members have changed. The names of the board members are submitted to the State Board for Charter Schools, herein called the State Board, for approval. Parker was personally responsible for obtaining the charter for the school from the State of Arizona. In the process of obtaining the charter, and approval of the state, which took over a year, he submitted the application, spoke to people who were knowledgeable on the subject, prepared "...a good mission statement and all the necessary paperwork, and then submitted it to the State, and eventually they approved it." As part of the application to the State Board, he had to present a curriculum, a business plan, a mission statement, and a three to five year budget, all of which were subject to approval by the State Board. He also had to notify the State Board of the location of the school, together with the number of students who were expected to attend. In addition, he provided the State Board with the Articles of Incorporation and its bylaws, as well as the names of the Respondent's Board members. Amendments to its charter, changes in board members or the location of the school must be, and have been, submitted to the State Board for approval. Further, the State Board may conduct site visits to the school, announced or unannounced, and may take disciplinary action against the school for failure to meet the academic needs of the children, or what it perceives as threats to the health and safety of the school children.

The school was originally sponsored by a local school district which charged the Respondent \$60,000 a year for the sponsorship; they changed to the State Board, which does not charge to be its sponsor. The school's charter is for a fifteen year period, although the State Board has the authority to revoke the charter prior to the time. At the conclusion of that period, the school reapplies to the State Board for a new charter. Parker and Ray Webb, the school principal, are responsible for the hiring and firing of employees; the State Board has no responsibility for that, or for the administration of the school. The State Board enforces the regulations that must be met by all charter schools within the State of Arizona, but it does not oversee the day-to-day operation of the school. That is handled, at the top, by Parker and Webb. At the present time there are 265 students and about 40 employees. Each teacher hired by the school has to be approved by the State Board, which checks to see that he/she has the necessary educational requirements, although charter school teachers are not required to be certified by the State of Arizona.

The school's yearly gross revenue, presently approximately \$2.5 million, is dependent upon the number of students attending. Approximately \$2.3 million of this was received from the State of Arizona. The balance was from the federal government, private contributions, and other sources.

The Supreme Court, in *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 604 (1971) set out a two part test for determining whether employers are exempt as "political subdivisions" of the state under Section 2(2) of the Act and are therefore exempt from the Act: (1) was the entity created directly by the state so as to constitute departments or administrative arms of the state? or (2) is it administered by individuals who are responsible to public officials or to the general electorate? The Court also stated (at p. 604) that it is the "actual operations and characteristics" of the employer that determine whether it is a "political subdivision" within the meaning of the Act. Also

on point is *Kentucky River Community Care, Inc. v. NLRB*, 193 F.3d 444 (6th Cir. 1999).

Clearly, the facts herein do not satisfy the first prong of the test set out in *Hawkins* that the Respondent was created directly by the state so as to constitute departments or administrative arms of the state government. Rather the legislature established a framework and rules by which individuals could establish charter schools that were subject to approval by state officials. The second prong of the test is whether the school is administered by individuals who are responsible to public officials or to the general electorate. I find that the Respondent fails this test of *Hawkins* as well. The school was the idea of, and was incorporated by, Parker and Carol Parker in 1999. They solicited individuals from the area, principally interested parents, to act as members of the school's board of directors. No public official or member of "the general electorate" had any input in the selection of board members, principals, administrators, teachers or students. While the State Board has substantial regulatory authority over charter schools, and must approve the board members, the school's charter, its location, mission, curriculum, business plan, the number of students attending the school, and budget, and checks to see that the teachers possess the necessary educational requirements, that is not enough to exempt the school pursuant to Section 2(2) of the Act. As the Court stated in *Kentucky River, supra*:

To be sure, the Secretary of the Cabinet for Human Resources exercises significant oversight of KRCC's operations...but it does not necessarily follow that such oversight means that the individuals in charge of KRCC are responsible to public officials. We find nothing in the oversight authority of the Cabinet for Human Resources or in the internal structure of the KRCC that makes the individuals in charge at KRCC responsible to the Cabinet for Human Resources.

Similarly, in the instant matter, although the State Board exercises significant oversight over the oper-

ations of the Respondent and all charter schools in the state, the day to day operation of the school, including the hiring and firing of teachers and other employees, is handled by Parker and Webb. I therefore find that the Respondent is an employer within the meaning of Section 2(2) of the Act.

II. The Facts

All employees are given a copy of the Respondent's Employee Handbook and they are told that it is their responsibility to read and understand it. Carol Parker testified that at orientation sessions for new employees in about September and January, the handbooks were distributed to the employees and she conducted a Power Point presentation to make it more palatable. These orientations last a couple of hours and cover the policies discussed in the handbook along with other policies and procedures. One of the subjects discussed was that the school felt that it was "inappropriate" for personnel to discuss wages with each other. During these sessions, she stated:

We felt that it was inappropriate for personnel to be discussing wages with each other...it just wasn't appropriate or ethical...or professional to be discussing with each other wages. We are there to teach kids and do our job, and whatever your job description is, that is what you were to be held accountable for and paid for, and just to take care of school business.

Parker was also questioned about this subject and after being shown the affidavit that he gave to the Board, he eventually testified that in their annual staff meetings, he and Carol Parker told the employees not to discuss their wages with other employees because it could cause a problem among the employees: "If people hear other's wages...there may be hard feelings." Webb testified that in about March 2010, he told his receptionist, Angie Baca, that she should not discuss her wages with other people, and he did so at the request of Carol Parker.

Wicke testified that after he was hired he attended an orientation session conducted by Carol Parker, who discussed the policies and programs at the

school. The handbook was distributed to all those present and he testified that he remembers Carol Parker saying: "Please do not discuss your pay, your salary, your jobs or title with others." However, he also testified that he was never told, at that time or at any time, that if he continued to compare salaries at the school, that he would be terminated.

There are a number subjects covered by the Employee Handbook that are alleged to violate the Act.

Non-Disclosure:

The protection of confidential business information and trade secrets is vital to the interests and the success of Excalibur Charter Schools, Inc. Lists of students, parents and staff are confidential and for the purpose of conducting school business only. They may not be sold, lent, given or used for any other purpose, including solicitation of business. All employee contracts are individually negotiated. Therefore, discussing specific employee contract terms and compensation is prohibited and subject to disciplinary action, including but not limited to termination.

Confidential information includes, but is not limited to, the following examples:

Compensation data

Internet Usage:

The following behaviors are examples of previously stated or additional actions and activities that are prohibited and can result in disciplinary action:

Sending or posting confidential material, trade secrets or proprietary information outside the organization.

Sending or posting messages or material that could damage the organization's image or reputation.

Sending or posting chain letters, solicitations, or advertisements not related to business purposes or activities.

Solicitation

Excalibur Charter Schools, Inc. recognizes that employees may have interest in events and organizations outside the workplace. However, employees may not solicit or distribute literature concerning these activities during working time. (Working time does not include lunch periods, work breaks or other periods in which employees are not on duty.)

Examples of impermissible forms of solicitation include:

The circulation of petitions.

The distribution of literature not approved by the employer.

The solicitation of memberships, fees, or dues.

Employee Conduct and Work Rules

To ensure orderly operations and provide the best possible work environment, Excalibur Charter Schools, Inc. expects employees to follow rules of conduct that will protect the interest and safety of all employees and the organization. It is not possible to list all the forms of behavior that are considered unacceptable in the workplace.

The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment:

Boisterous or disruptive activity in the workplace.

Insubordination or other disrespectful conduct.

Wicke was hired by Parker in July 2009 on a full time basis as the school's Title I Coordinator at an hourly wage rate of \$15.00. The parties signed an Employment Agreement effective from July 1, 2009 to June 30, 2010, specifically stating that it is "At-Will Employment" that is terminable by either party with or without cause. Title I funds are given by the Federal Government to assist schools that are servicing underprivileged children to advance reading, mathematics and other subjects. Wicke's job, basically, was to keep track of the Title I funds

that the school received and to see that they were spent properly. Parker testified that the school usually receives approximately \$200,000 annually in Title I funds, and testified that Wicke's job as Title I Coordinator was to review the grants and to ensure that the funds from these grants was spent appropriately.

The Respondent conducted monthly Administrative Team Meetings to discuss outstanding issues at the school. The meetings were chaired by Parker and Carol Parker, and were attended by the school principals, and the people in charge of Special Education, Transportation, and Title I (Wicke). Parker testified that Wicke never raised any issues or made any comments at these meetings, or on other occasions, about teachers or staff not receiving certain technology as required by the Title I grants received by the school. Parker was asked if he ever had conversations with Wicke regarding his concerns that the school was not in compliance with its Title I grants; he answered: "Not that I can remember." On January 8, 2010, Wicke sent a lengthy e-mail entitled: "2010-ARRA Title I Grant" to Parker, Carol Parker, Webb, Walt and others stating, *inter alia*, that the school was not in compliance with a certain grant, and recommending certain action that would bring it into compliance. Parker was asked if he had ever received any e-mails from Wicke regarding the lack of compliance with Title I grants, and he said that he couldn't remember. He testified that he received the January 8, 2010 e-mail, but he did not speak to Wicke about this subject after receiving the e-mail. He also testified that Title I grants can be amended and modified, and the Title I grant that Wicke was referring to in his e-mail had not been finalized at the time.

Carol Parker testified that Wicke attended the monthly district team meetings at the school, and at one of these meetings he stated that he thought that the teachers did not have the technology that they should have received. At that point he was "corrected" by Webb, Parker, the IT Director, Mark Sheen, or the Business Manager, Ted Polzin, who

told him that "he didn't have his facts right." In addition, sometime in the Fall of 2009, at a meeting with Carol Parker and Webb, Wicke brought up the subject of computers and Title I and she said that the computers had been purchased with the Title I funding: "He thought that he knew how it all worked, but he was not correct." Other than on these two occasions Wicke never spoke to her about his allegation that the school was not in compliance with Title I funding. She received his January 8, 2010 e-mail, but did not pay much heed to it because she was not his supervisor, nor was she involved in technology issues at the school. Another reason she did not get involved in this issue: "It wasn't factual. The teachers had their computers. We had the computers in the lab, so...it wasn't an issue. I don't know why he kept bringing that up, because it wasn't an issue..."

Webb testified that as principal, it was his obligation to be certain that the school was in compliance with Title I requirements, so he spoke about it to Wicke a couple of times a week. Wicke first brought up the subject in October or November 2009:

He was concerned...that there were computers that were written into the grant, and he was concerned...that they weren't furnished by the grant, and there was a time beforehand where teachers had donated monies and bought computers. Those computers were given to the teachers, and then there was a group of computers that were bought by grant monies, and that were put into a computer lab.

In response to Wicke's concern, Webb told him that the teachers donated money for the computers that they received, and that the computers from the grant money were in the computer lab. As to how many times Wicke discussed this subject with him, he testified, "He was fixated on it for quite a long time." He testified that he always believed that the school was in compliance with all the Title I requirements because he saw the Title I funded computers in the computer lab and the high school.

Wicke testified that his initial discussion with someone from the school about computers was with Webb in about August 2009; Webb told him that the teachers were upset because they were told that they had to turn back half of their government grant money so that they could purchase computers for their classroom use. Over the next few months he had occasional discussions with Webb about the subject, and discussed the subject with two teachers at the school in about December. In addition, at an administrative team meeting in December he stated his concern that they were not spending the Title I money in an appropriate fashion. He testified that there was “tension” but no response from those present. In December 2009, Wicke met with Webb and Carol Parker, and he told them that the Drop-Out Prevention grant guidelines, under Title I, were not being met by Walt; Carol Parker responded, “This isn’t about him.” He then spoke about the Title I grants for the computers and that he felt that they were not in compliance with the requirement of Title I. At the conclusion of this testimony, Wicke testified that this meeting was not in December 2009, but was on January 15, 2010, a few days prior to his termination.

On January 7, 2010, Wicke sent a two page e-mail entitled: “Dropout prevention Title I compliance monitoring” to Walt, Webb, Parker, Carol Parker and Janette Benziger, who writes Title I grants for the school. The e-mail states, *inter alia*:

This is Nathan Wicke, your friendly district Title I director. I am monitoring this Dropout prevention program based off the 2010- AIMS Intervention & Dropout Prevention Program grant. Please read all below, which comes directly from the grant, paying specific attention to the wording in color. As you will read in the grant narrative below, I am monitoring this as the Title I director because we are using this program to meet Title I goals...Please respond to me with remarks regarding all the questions I ask you as you read this. I sent out an email yesterday explaining what the state informed us we could use as plans. Please review that email

for clarification. I appreciate your cooperation in having all of us make sure this program is in Title I compliance. Thanks and have a great day.

The “at risk” population target for service included students from Avalon Elementary and Excalibur High School. Both of these schools failed to make AYP for the 2008 school year and Excalibur High School was identified as Underperforming for the 2009 school year. The schools are in economically depressed areas and both schools qualify for the free and reduced lunch plan.

The e-mail then lists five “priorities”, involving students who failed standardized tests, students behind in their credits, students who are pregnant or parenting, disabled or handicapped, and students with discipline problems. The e-mail then asks Walt for the names of all students and their plans and portfolios, stating:

I need to see them and make sure they meet compliance standards, so when the state comes to visit and monitor...we will have all our compliance “ducks” in a row.

The final portion of the e-mail relates to the seventh and eighth grades:

The priorities for 7th-8th grade inclusion are getting students to grade level academic proficiency prior to secondary school, facilitating long term goals for students to motivate them through graduation, and to give students basic career research and employment skills. Mr. Webb, who is doing this at your school and what paper evidence can you give me showing students’ progress which I can put in the title I folders?

An hour and a half later, Walt responded to Wicke’s e-mail, with a one page e-mail, stating, *inter alia*, that the AIM program is defunct, and will not be returning, and that Wicke should contact Benziger, who wrote the grants, for her assistance on some of his concerns. Later that afternoon, Wicke meant to send an e-mail to Jeff and Carol Parker, but inadvertently sent it to Walt:

This is what Eric sent me regarding reporting

for the dropout prevention program which I understood from you, Jeff, is the main way that you are paying Eric his salary. As you can read in this e-mail, he says that the district did not get the money for this grant and program and that it is dead. I need your council and direction regarding what he said in this email, not only about the dropout prevention program, but all grants and me following them to make sure we are in compliance. I was not given any training from you how to do Title I compliance and this is what I have figured out how to do: to follow grants wording. I have learned to do this compliance this way from Jill and the state. So when Eric, whose own admission by saying I should talk with Jill, has limited knowledge about Title I and suggests that I should not use grants as a basis for measuring compliance, I am a little more than leary of his lack of experimental knowledge advice. My question to you is what do you want me to do? Who do you want me to listen to and how do you want me to do my job? I feel you have confidence in me and feel you are and have been happy with the way I have been doing my job. Please let me know.

The following morning, Walt sent an e-mail to Wicke: "Please don't send me any insulting communications, as well as copies of any such communications about me to others."

Wicke testified that he sent this e-mail because he was reviewing the grants that the school had received, in particular, the 2010 AIMS Intervention Drop Out Prevention grant, which is part of the Title I documentation that has to be submitted to the state, and he wanted to notify Parker and the others that he was not getting cooperation from Walt.

Wicke had a meeting with Carol Parker and Webb on January 15, 2010; she said that she wanted to become more involved in the Title I programs. He told her of his concerns with the grants and she told him that he should bring them up at the school's

monthly administrative team meetings. On the following Monday, January 19, 2010 he was terminated.

Wicke testified that his initial discussion about pay at the school was with Webb in about August or September 2009. At that time Webb said that he was upset that Walt was making more money than he was. Wicke testified that he was not upset about it because he did not have Walt's experience or credential. Rather he told Webb that Walt was not properly complying with the Title I requirements in performing his job. In addition, in about December, he was talking to the reading specialist at the school and asked her how she liked her job, and she told him what her salary was. In December he met with Parker and Carol Parker shortly after he received his degree in a Masters Program. He gave Parker a list of his responsibilities at the school, and asked for an increase in pay based upon his job performance. Wicke mentioned an employee whose salary he learned from Webb, and also mentioned the reading specialist at the school who told him of her salary. Parker said that he would look at the budget, discuss it with others, and would let him know. About a week later, Wicke received an e-mail response from Parker dated December 18, 2009, stating, *inter alia*:

I have talked with Ted, Carol and Mr. Webb. It appears that we have way to [sic] many hands in the pot...If you have expressed a desire to move after this year, I can't make that investment now for there just isn't any money or haven't you heard? When talking with Ted, we may be able to give some kind of bonus at the end of the year, depending on our windfall, if any. Mr. Webb says that your work is good and that you are very diligent, and I already knew that. But coming from others helps. The fact is, that with the demise of 301 monies down to less than 50% and the state looking for more cuts, it comes down to a wait and see. You are a valuable asset, I've said that to Carol many times. Yet, when you took the job, we agreed on an amount and that should be good until we

reassess the situation. One last thought, please in the future, don't discuss your pay or your plans with others when it comes to things like this. It stirs the pot too much. I am the one to bring it to. Sometimes things don't happen as fast as we wish, be patient. When you want to move on, I am completely for that...I will do what I can, but I have 49 other employees who have been with us far longer. You are worth it, let's see how it rolls out after Christmas vacation. We love you, Jeff and Carol.

Carol Parker testified that the first time that she saw Parker's December 18, 2009 e-mail to Wicke was when she gave her affidavit to the Board agent in this matter. However, she was present at the latter part of the meeting that Parker had with Wicke in December. The only thing that she could recollect about that meeting was Wicke stating that he thought that the school's grant writer, Jill Gaitens was unqualified for the job, which Carol Parker disagreed with. At the January 15, 2010 meeting that she had with Wicke and Webb, Wicke attempted to bring up Walt's wages, but she stopped him and said that she wasn't there to discuss Walt's wages because Walt had a different job: "I wasn't even going to go down that avenue with him." Webb testified that in about late November or December 2009, he and Carol Parker met with Wicke in his office. At this meeting, Wicke asked them why Walt was earning more money than he was, and Carol Parker told him that was between management and Walt. Wicke only responded that as the Title I Director he felt that he deserved to be paid more. Webb also testified that in about December, after Wicke obtained his Masters Degree, he noticed a change in Wicke: "It was more of an arrogance... now that...he had received that degree, he was worth...more and more money."

Wicke was terminated on January 19, 2010. That day was a holiday, and there was a voice mail on his phone stating that his services were no longer needed; no reason was given. Parker was questioned by counsel for the General Counsel about his

reason for terminating Wicke. Because his testimony is so difficult to follow (and, often, to believe) it is best to start with the affidavit that he gave to the Board agent investigating this matter. In that affidavit he stated:

Nathan Wicke was terminated on 1/19/2010. I made the decision to terminate him, and I was the only one involved in making that decision. The reason I terminated Wicke was disruption of the school atmosphere and going outside the boundaries of his job description by looking into other peoples' salaries, comparative to his own. This was none of his business. With respect to disrupting the school atmosphere, Wicke personally questioned me regarding how I paid people. This suggested a loyalty problem with him. I cannot remember exactly what he said to me that made me feel this way, but this was it.

His affidavit also states:

Our IT guy [Sheen] was another person that I learned that Wicke had gone to and asked what his salary was, and they had been discussing what they were worth as employees, and Wicke came to me and used that information to ask for a pay increase.

When questioned about these portions of his affidavit, Parker testified: "I am sure that it is accurate."

Parker was asked by Counsel for the General Counsel:

Q And the reason you terminated him was disrupting the school atmosphere and going outside the boundaries of his job description by looking into other people's salaries; is that correct?

A No to the last part and yes to the first part of the question.

In answer to no particular question, Parker testified: And, so, he had his choices, and with all the other stuff that...that bothered him that I saw...and with his comments to people, and e-mails and so forth, it was obvious that he

wasn't happy there, and he wasn't happy with \$15.00 an hour, so he had choices.

He testified that although "there were some good things being done," Wicke "...was not focused on his work, he is focused on some other agenda...his only agenda was himself, in my opinion." He also testified that it was not until after Wicke was fired that he learned about his conversations with other employees about their salaries, although he never spoke to him about his termination.

Carol Parker was involved in discussions with Parker and Walt regarding the decision to terminate Wicke, but the final decision was Parker's. Their discussions entailed:

Just the problems, insubordination, the difficulty of working with him. He was very abrasive. He just caused a lot of problems on campus. I didn't appreciate being accused of things that weren't true...His accusations of misappropriation of funds which were absolutely not true, He is definitely not a team player. I felt very much on the defensive with him. He was doing his very best to find everything wrong that he could possibly find.

She testified further that the work that he was directed to perform- school-wide plans and Title I grants- was not being taken care of. He was interested in financial matters and was upset that he was not included in those decisions. She received complaints from Sheen, Webb, Walt, Benziger and Gaitens who were offended by his approach to them and by his e-mails, and they said that they found him unprofessional, but she never met with Wicke to tell him of these concerns. Gaitens sent Parker and Carol Parker an e-mail dated October 12, 2009 stating that she felt uncomfortable talking to Wicke, that he feels that he is being "left out of the loop," and that he intends to leave the school at the end of the year to earn more money. In addition, Wicke told her that he didn't believe that Walt was properly performing his job. In a series of emails on January 6, 2010 to Parker, Carol Parker, Webb, Walt and others, Wicke referred to a conversation that he had with someone from the Arizona Depart-

ment of Education. He referred to Title I programs and stated: "So if anyone in the future does not like me telling them their specific program is not in compliance in some way, specifically how it relates to Title I, which our schools are, do not take it out on me, I am merely the messenger; delivering what the state tells me to do after visiting and talking with them." Carol Parker responded that, in the future, he should discuss these issues with people from the school prior to having discussions with representatives of the state: "I would rather have stronger 'horizontal' communications within our district than the 'vertical' communication you don't hesitate to engage in with the state." When Wicke responded that he did not feel that people were listening to him when he communicated "horizontally," Carol Parker sent him two e-mails, the last one (on January 6, 2010) ending: "Thank you for what you do. I truly believe we are much more compliant with our Title I program than we have been in the past due to your efforts. You are moving us forward leaps and bounds."

Webb testified that he was not involved in the decision to terminate Wicke and he learned of the decision first from Parker and, later, from Carol Parker. Neither one told him why Wicke was terminated, and he did not ask about it. "It is my understanding that he was terminated because of lack of performance." Although he is sure that somebody told him that, he cannot specifically recall somebody saying that, although it probably was discussed at an administrative team meeting.

III. Analysis

It is alleged that since about November 14, 2009 the Respondent has maintained the following overly broad and discriminatory rules in its Employee Handbook: Non-Disclosure, Internet Usage, Solicitation, and Employee Conduct and Work Rules, as reinforced by Carol Parker in her Power Point presentations to employees, and since on about November 14, 2009, the Respondent threatened employees who violated these rules with discipline or discharge. The Complaint further alleges that on

about December 19, 2009 Respondent, by Parker promulgated, maintained and enforced an overly broad and discriminatory rule prohibiting employees from discussing their wages or terms of conditions of employment with other employees, and on about January 8, 2010 Respondent, by Walt in an e-mail, promulgated and has maintained an overly broad and discriminatory rule prohibiting employees from communicating with other employees regarding their terms and conditions of employment, and threatened employees who violate the rule with unspecified reprisals. It is further alleged that since on about January 10, 2010 Respondent, by Carol Parker reaffirmed these rules and that on about January 19, 2010 the Respondent discharged Wicke because he violated these rules and because he concertedly complained to the Respondent about the Respondent's employees' wages and conditions of employment, by complaining that, among other things, the Respondent was not providing teachers with the technology and equipment that the Respondent had received grants for, and which the teachers needed to properly instruct their students. It is alleged that by these actions the Respondent violated Section 8(a)(1) of the Act.

Credibility obviously plays an important part in this case and, stated briefly, Parker was one of the least credible witnesses I have ever experienced, and I say that reluctantly because of his admirable deed in establishing the school. However, when it came to answering a question from Counsel for the General Counsel, he was totally incapable of answering in a direct and believable manner. On the other hand, Wicke, Carol Parker and Webb appeared to be credible witnesses attempting to testify in an honest and truthful manner.

In *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), in determining the legality of certain portions of the employer's employee handbook, the Board stated:

In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is

whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.

Further, in determining that one of the employer's standards of conduct prohibiting "unlawful or improper conduct" off its premises was not unlawful, the Board's majority stated at p. 827:

...we do not believe that this rule can reasonably be read as encompassing Section 7 activity. In our view, employees would not reasonably fear that the Respondent would use this rule to punish them for engaging in protected activity that the Respondent may deem to be "improper." To ascribe such a meaning to these words is, quite simply, farfetched. Employees reasonably would believe that this rule was intended to reach serious misconduct, not conduct protected by the Act.

In *Flamingo Hilton-Laughlin*, 330 NLRB 287, 289 (1999), the Board had to determine the legality of a rule prohibiting "off-duty misconduct." Citing *Lafayette Park*, *supra*, the Board found that this rule could not reasonably be read as encompassing Section 7 rights, or that the employer would use it to punish its employees for engaging in protected activities, and it therefore did not violate the Act. In *NLS Group*, 352 NLRB 744, 745 (2008), the Board summarized these findings as follows:

If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; (3) the rule has been applied to restrict the exercise of Section 7 rights.

The Non-Disclosure provision herein includes some clearly lawful provisions, such as restrictions on the dissemination of information regarding students

and parents. However, it also states: “All employee contracts are individually negotiated. Therefore, discussing specific employee contract terms and compensation is prohibited and subject to disciplinary action, including but not limited to termination.” As this rule explicitly restricts Section 7 activity of discussing wages and other terms of employment, it, together with the Power Point presentation discussing it, clearly violates Section 8(a)(1) of the Act, as does the following provision that confidential information includes “Compensation data.”

The Internet Usage provision states, *inter alia*:

The following behaviors are examples of previously stated or additional activities that are prohibited and can result in disciplinary action:

Sending or posting confidential material, trade secrets, or proprietary information outside of the organization.

Because the Non-Disclosure rule discussed above equates employee contract terms and compensation with confidential information, employees reading the Internet Usage restrictions could reasonably interpret it as encompassing their terms and conditions of employment, i.e. Section 7 activity. I therefore find that this provision, together with the Power Point presentation enforcing it, violates Section 8(a)(1) of the Act. The Solicitation provision in the Employee Handbook states that employees

...may have interests in events and organizations outside the workplace. However, employees may not solicit or distribute literature concerning these activities during working time. (Working time does not include lunch periods, work breaks, or any other period in which employees are not on duty.)

Examples of impermissible forms of solicitation include:

The circulation of petitions.

The distribution of literature not approved by the employer.

The solicitation of memberships, fees, or dues.

The restrictions in the Employee Handbook clearly curtail employees' Section 7 rights, except for the

caveat that it does not apply during lunch periods, work breaks or any other period in which the employees are not on duty. As it only applies during employees' working time, it is a lawful restriction on their activities. *Our Way, Inc.*, 268 NLRB 394(1983). As Carol Parker's Power Point presentation does not include the “working time” *caveat*, I find that it violates Section 8(a)(1) of the Act. The final provision of the Employee Handbook being challenged is entitled “Employee Conduct and Work Rules.” The prohibited conduct therein is boisterous or disruptive behavior in the workplace and insubordination or other disrespectful conduct. As the Board stated in *Lafayette Park*, *supra*, I do not believe that this provision can reasonably be read as restricting Section 7 activity, and therefore recommend that this allegation be dismissed.

It is next alleged that on about December 19, 2009 Respondent, by Parker, promulgated, maintained and enforced an overly broad and discriminatory rule prohibiting the school's employees from discussing their wages or terms and conditions of employment with other employees, and on about January 8, 2010 Respondent, by Walt, by e-mail, promulgated and maintained an overly broad and discriminatory rule prohibiting its employee from communicating with other employees regarding their terms and conditions of employment and threatened employees who violated the rule with unspecified reprisals. The initial allegation is established in the December 18, 2009 e-mail that Parker sent to Wicke stating, *inter alia*: “...please, in the future, don't discuss your pay or your plans with others when it comes to things like this. It stirs the pot too much. I am the one to bring it to.” This e-mail clearly violates Section 8(a)(1) of the Act as an invalid restriction on his Section 7 rights. As the Board stated in *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 281 (2003):

It is well established that discussion of wages, benefits, and working conditions is an important part of organizational and other concerted activity. Although employers may have a substantial and legitimate interest in limiting or

prohibiting discussion about some aspects of their affairs, they may not prohibit employees from discussing their own wages and working conditions or attempting to ascertain the wages of other employees.

However, I find that Walt's January 8, 2010 e-mail to Wicke was a not unreasonable response to Wicke's sarcastic and misdirected January 7, 2010 e-mail, and that alleging it as a Section 8(a)(1) violation is a substantial overreach.

The final allegation is that by terminating Wicke on about January 19, 2010, the Respondent violated Section 8(a)(1) of the Act. Counsel for the General Counsel alleges three theories supporting this allegation: that Wicke was terminated for discussing wages with other employees, for complaining about the manner in which the school spent its Title I funds, and for violating the school's unlawful rule restricting the discussion of employees' wages.

Under *Wright Line*, 251 NLRB 1083 (1980) it is the General Counsel's initial burden to establish that the employee's protected activities were a motivating factor in the employer's decision. Once that is established, it is the employer's burden to establish that it would have taken the same adverse action even absent the employee's protected conduct. Counsel for the General Counsel's burden is established through the testimony and e-mails of Parker. In December 2009, Wicke met with Parker and Carol Parker, compared his salary with two other employees, and asked for an increase in pay. In an e-mail dated December 18, 2009 denying this request, Parker stated, *inter alia*: "One last thought, please in the future, don't discuss your pay or your plans with others when it comes to things like this. It stirs the pot too much. I am the one to bring it to." In addition, in the same e-mail, Parker commented on Wicke's work performance: "Mr. Webb says that your work is good and that you are very diligent, and I already knew that. But coming from others helps...You are a valuable asset..."

As to the reason for Wicke's discharge, Parker's affidavit given to the Board states:

The reason I terminated Wicke was disruption of the school atmosphere and going outside the boundaries of his job description by looking in to other peoples' salaries, comparative to his own. This was none of his business... Wicke personally questioned me regarding how I paid people. This suggested a loyalty problem with him.

Parker testified that he is sure that this portion of his affidavit was accurate. While Carol Parker testified that Wicke was difficult to work with, was not a "team player", made accusations that were not true and did his best "to find everything wrong that he could possibly find," two weeks before he was discharged she sent him an e-mail ending: "Thank you for what you do. I truly believe we are more compliant with our Title I program than we have been in the past due to your efforts. You are moving us forward leaps and bounds." Also relevant in establishing General Counsel's burden is that Wicke was given no warning, or reason, for his discharge. He was terminated by a voice mail left on his phone simply stating that his services were no longer needed. Even without factoring in Wicke's numerous complaints about the expenditure of Title I funds (whether warranted or not) I find that the evidence clearly sustains General Counsel's initial burden that his protected conduct was a motivating factor in the Respondent's decision to terminate him. The final question then is whether the Respondent satisfied its burden that it would have fired him even absent his protected conduct. I find that it has not done so. As stated above, within a month of his discharge, Wicke was sent e-mails from both Parker and Carol Parker complimenting him on the quality of his work. Although some of his e-mails were sarcastic and abrasive, and as Webb testified Wicke could be arrogant, there was no evidence that his work was ever criticized or that he was ever warned about the quality of his work. Finally, that he was fired abruptly on January 19, 2010, without warning or a reason, further establishes that his discharge resulted from his protected conduct. I therefore find that by terminating Wicke on January 19, 2010, the Respondent viol-

ated Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by maintaining some rules in its Employee Handbook, and in the Power Point presentation made to its employees, which restrict employee Section 7 rights and by telling Wicke that he was not to discuss his pay with other employees.
3. The Respondent violated Section 8(a)(1) of the Act by discharging Wicke on about January 19, 2010.
4. The Respondent did not violate the Act as otherwise alleged.

The Remedy

Having found that the Respondent unlawfully discharged Wicke, I recommend that Respondent be ordered to offer him immediate reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, and to make him whole for all loss of earnings and other benefits as set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950) along with interest as prescribed in *Kentucky River Medical Center 356 NLRB No. 8 (2010)*. I have also found that certain portions of the Respondent's Employee Handbook and Power Point presentation violate Section 8(a)(1) of the Act because they overly restrict employee Section 7 rights. I therefore recommend that Respondent be ordered to delete from the Non-Disclosure provision of the handbook the sentences: "All employee contracts are individually negotiated. Therefore, discussing specific employee contract terms and compensation is prohibited and subject to disciplinary action including, but not limited to termination" as well as the words "Compensation Data." As I have found that the term "confidential material" in the Internet Usage

provision could unlawfully restrict employee Section 7 rights, that term should be deleted from the Internet Usage provision. Finally, the Power Point presentation explaining the terms of the Employee Handbook did not contain the working time *caveat* contained in the Handbook, in violation of Section 8(a)(1) of the Act. I recommend that Respondent be ordered to either delete that provision from the Power Point presentation, or add the working time *caveat* to it.

ORDER [FN1]

The Respondent, Excalibur Charter School, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from
 - (a) Warning employees not to discuss their wages with other employees
 - (b) Maintaining rules in its Employee Handbook and in a Power Point presentation made to its employees that restricts or prohibits employees' Section 7 rights.
 - (c) Discharging, or otherwise discriminating against its employees for engaging in protected concerted activities.
 - (d) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights as guaranteed by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
 - (a) Delete from its Employee Handbook and Power Point presentation the provisions found to be unlawful in the Non-Disclosure, Internet Usage and Solicitation sections as described above.
 - (b) Within 14 days from the date of this Order offer Wicke full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously en-

joyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth above in the remedy section of this Decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Apache Junction, Arizona, copies of the attached notice marked "Appendix." [FN2] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 14, 2009

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Re-

gion attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., January 26, 2011.

Joel P. Biblowitz
Administrative Law Judge

[FN1]. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[FN2]. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

*1 The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these pro-

tected activities

WE WILL NOT prohibit you from discussing your wages or other terms of conditions of employment with other employees and **WE WILL NOT** in our Employee Handbook, or in Power Point presentations, restrict you from engaging in the rights guaranteed by Section 7 of the Act.

WE WILL NOT discharge, or otherwise discriminate against you because you engaged in protected concerted activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL delete from our Employee Handbook and from our Power Point presentation explaining it, the provisions that restricts you in the exercise of your rights under the Act.

WE WILL offer Nathaniel Wicke immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and **WE WILL** make him whole for any loss of earnings and other benefits resulting from his discharge, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Nathaniel Wicke, and **WE WILL**, within 3 days thereafter, notify him, in writing that this has been done and that the discharge will not be used against him in any way.

EXCALIBUR CHARTER SCHOOL, INC.

(Employer)

Dated _____ By _

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146

2011 WL 245526 (N.L.R.B. Div. of Judges)

END OF DOCUMENT

APPENDIX B

ISSUES

- Civil Rights
- Defense
- Disabilities
- Economy
- Education**
- Educate to Innovate
- Higher Education
- Race to the Top
- Commencement Challenge
- Energy & Environment
- Ethics
- Family
- Fiscal Responsibility
- Foreign Policy
- Health Care
- Homeland Security
- Immigration
- Poverty
- Rural
- Seniors & Social Security
- Service
- Taxes
- Technology
- Urban Policy
- Veterans
- Women
- Additional Issues

Education

Progress

The [American Recovery and Reinvestment Act](#) invested heavily in education both as a way to provide jobs now and lay the foundation for long-term prosperity.

- The Act includes \$5 billion for early learning programs, including Head Start, Early Head Start, child care, and programs for children with special needs.
- The Act also provides \$77 billion for reforms to strengthen elementary and secondary education, including \$48.6 billion to stabilize state education budgets (of which \$8.8 billion may be used for other government services) and to encourage states to:
 - Make improvements in teacher effectiveness and ensure that all schools have highly-qualified teachers;
 - Make progress toward college and career-ready standards and rigorous assessments that will improve both teaching and learning;
 - Improve achievement in low-performing schools, through intensive support and effective interventions; and
 - Gather information to improve student learning, teacher performance, and college and career readiness through enhanced data systems.
- The Act provides \$5 billion in competitive funds to spur innovation and chart ambitious reform to close the achievement gap.
- The Act includes over \$30 billion to address college affordability and improve access to higher education.

Guiding Principles

Providing a high-quality education for all children is critical to America's economic future. Our nation's economic competitiveness and the path to the American Dream depend on providing every child with an education that will enable them to succeed in a global economy that is predicated on knowledge and innovation. President Obama is committed to providing every child access to a complete and competitive education, from cradle through career.

Focus on Early Childhood Education

The years before a child reaches kindergarten are among the most critical in his or her life to influence learning. President Obama is committed to providing the support that our youngest children need to prepare to succeed later in school. The President supports a seamless and comprehensive set of services and support for children, from birth through age 5. Because the President is committed to helping all children succeed – regardless of where they spend their day – he will urge states to impose high standards across all publicly funded early learning settings, develop new programs to improve opportunities and outcomes, engage parents in their child's early learning and development, and improve the early education workforce.

Reform and Invest in K-12 Education

President Obama will reform America's public schools to deliver a 21st Century education that will prepare all children for success in the new global workplace. He will foster a race to the top in our nation's schools, by promoting world-class academic standards and a curriculum that fosters critical thinking, problem solving, and the innovative use of knowledge to prepare students for college and career. He will push to end the use of ineffective, "off-the-shelf" tests, and support new, state-of-the-art assessment and accountability systems that provide timely and useful information about the learning and progress of individual students.



RELATED BLOG POSTS

March 11, 2011 10:52 AM EST

ED's FBNP Office Launches Strategic Outreach Effort

More than 60 African-American faith-based and community leaders met Department of Education senior staff and White House officials to discuss collaboration.

March 11, 2011 12:00 AM EST

West Wing Week: "Law School in 15 Seconds"

This week, President Obama focused on education, visiting some innovative classrooms in Miami and Boston, and dropping in on a US History class in Alexandria, Virginia with Australian Prime Minister Julia Gillard.

March 10, 2011 6:00 AM EST

Add Your Voice to the White House Conference on Bullying Prevention

Today, President Obama and First Lady Michelle Obama are hosting the White House Conference on Bullying Prevention to bring together students, parents, educators, policymakers, non-profit leaders, and administration officials to address the challenges posed by bullying.

[VIEW ALL RELATED BLOG POSTS](#)

RELATED VIDEO

Teachers are the single most important resource to a child's learning. President Obama will ensure that teachers are supported as professionals in the classroom, while also holding them more accountable. He will invest in innovative strategies to help teachers to improve student outcomes, and use rewards and incentives to keep talented teachers in the schools that need them the most. President Obama will invest in a national effort to prepare and reward outstanding teachers, while recruiting the best and brightest to the field of teaching. And he will challenge State and school districts to remove ineffective teachers from the classroom.

The President believes that investment in education must be accompanied by reform and innovation. The President supports the expansion of high-quality charter schools. He has challenged States to lift limits that stifle growth among successful charter schools and has encouraged rigorous accountability for all charter schools.

Restore America's Leadership in Higher Education

President Obama is committed to ensuring that America will regain its lost ground and have the highest proportion of students graduating from college in the world by 2020. The President believes that regardless of educational path after high school, all Americans should be prepared to enroll in at least one year of higher education or job training to better prepare our workforce for a 21st century economy.

To accomplish these overarching goals, the President is committed to increasing higher education access and success by restructuring and dramatically expanding college financial aid, while making federal programs simpler, more reliable, and more efficient for students. The President has proposed a plan to address college completion and strengthen the higher education pipeline to ensure that more students succeed and complete their degree. His plan will also invest in community colleges to equip a greater share of young people and adults with high-demand skills and education for emerging industries.



March 11, 2011 12:00 AM

[West Wing Week: "Law School in 15 Seconds"](#)

FROM THE PRESS OFFICE

March 10, 2011 11:11 AM EST

[Remarks by the President and First Lady at the White House Conference on Bullying Prevention](#)

March 10, 2011 8:47 AM EST

[President and First Lady Call For a United Effort to Address Bullying](#)

March 10, 2011 7:42 AM EST

[Background on White House Conference on Bullying Prevention](#)

WWW.WHITEHOUSE.GOV

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For Immediate Release
Office of the Press Secretary
May 2, 2008

National Charter Schools Week, 2008

A Proclamation by the President of the United States of America

Education is the cornerstone of a hopeful tomorrow. During National Charter Schools Week, we highlight the contributions of charter schools to ensuring that our Nation's future leaders have the skills and knowledge necessary for a lifetime of achievement.

 [White House News](#)

Charter schools are educational alternatives that empower families with additional choices for their children. By providing flexibility to educators while insisting on results, charter schools are helping foster a culture of educational innovation, accountability, and excellence. Charter schools also encourage parental involvement and help contribute to the national effort to close the achievement gap.

The No Child Left Behind Act has played a central role in America's efforts to improve our public schools and expand the opportunities available to our children. In 2007, American students reached record achievement levels on reading and math tests, and the achievement gap is beginning to close. Charter schools have been an important part of this success. National Charter Schools Week is an opportunity to recognize the strength, vitality, and excellence of outstanding schools.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim May 4 through May 10, 2008, as National Charter Schools Week. I applaud our Nation's charter schools and all those who make them a success, and I call on parents of charter school students to share their success stories and help Americans understand more about the important work of charter schools.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of May, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-second.

GEORGE W. BUSH

###

Return to this article at:

</news/releases/2008/05/20080502-10.html>

 [CLICK HERE TO PRINT](#)

Education Secretary Arne Duncan Announces Twelve Grants for \$50 Million to Charter School Management Organizations

SEPTEMBER 29, 2010

Contact: Press Office , (202) 401-1576 , press@ed.gov (<mailto:press@ed.gov>)

U.S. Secretary of Education Arne Duncan today announced 12 charter school grants totaling \$50 million for charter management organizations to replicate and expand high-quality charter schools that have demonstrated success. The Charter School Grant Program competition represents the first time the Department has specifically sought out to replicate and expand the nation's highest-performing charter management organizations. Today's grants will serve 76,000 students in 127 new and 31 expanded charter schools over the next five years.

"Several high-quality charter schools across the country are making an amazing difference in our childrens' lives, especially when charters in inner-city communities are performing as well, if not better, than their counterparts in much wealthier suburbs," Duncan said. "Every one of our grantees serves a student population that is at least 70% low-income and virtually all exceed the average academic performance for all students in their state."

The Administration will invest more than \$256 million this year to assist in the planning and implementation of public charter schools and dissemination of their successful practices through the Charter School Grants Program. In addition, the President's fiscal year 2011 budget requests a \$54 million increase in the Charter School Grants Program, seeking \$310 million and representing another step toward meeting the Administration's commitment to double financial support for the program.

The purpose of the Charter School Grants Program, managed by the Department's Office of Innovation and Improvement, is to increase financial support for these public schools, build a better national understanding of the public charter school model and increase the number of high-quality public charter schools across the nation.

More information about the Charter Schools Program is available from the Education Department's Office of Innovation and Improvement at: <http://www.ed.gov/programs/charter/index.html> (<http://www.ed.gov/programs/charter/index.html>).

Following is a list of grantees by state. The list includes the first-year grant award amount for each grantee.

Grantee	FY10 Award
<p>Achievement First</p> <p><i>Project description: 14 new schools and 2 expanded schools serving an additional 5,500 students in New Haven, CT, Bridgeport, CT, Hartford, CT, Brooklyn, NY, Providence, RI, and Cranston, RI</i></p>	\$1,675,403
<p>Aspire</p> <p><i>Project description: 15 new schools serving an additional 4,500 students in California</i></p>	\$5,587,500
<p>Foundation for a Greater Opportunity</p> <p><i>Project description: 1 new school and 3 expanded schools serving an additional 4,000 students in Bronx, NY</i></p>	\$1,483,796
<p>IDEA</p> <p><i>Project description: 22 new schools serving an additional 19,000 students in the Rio Grande Valley in Texas</i></p>	\$8,734,617
<p>KIPP Foundation in consortium with KIPP Regions</p> <p><i>Project description: 21 new schools and 11 expanded schools serving an additional 15,000 students in Helena, AR, Denver, CO, Washington, DC, Jacksonville, FL, Atlanta, GA, Chicago, IL, Gary, IN, New Orleans, LA, Lynn, MA, Newark, NJ, New York, NY, Philadelphia, PA, Houston, TX, San Antonio, TX, and Austin, TX</i></p>	\$14,550,084
<p>LEARN</p>	\$1,025,750

<i>Project description: 3 new schools and 2 expanded schools serving an additional 1,350 students in Chicago, IL</i>	
Mastery <i>Project description: 15 new schools serving an 8,500 additional students in Philadelphia, PA and Camden, NJ</i>	\$5,130,000
Noble <i>Project description: 6 new schools and 5 expanded schools serving an additional 5,000 students in Chicago, IL</i>	\$3,269,766
Project Yes <i>Project description: 6 new schools and 2 expanded schools serving an additional 4,000 students in Houston, TX</i>	\$2,781,511
Propel <i>Project description: 4 new schools and 1 expanded school serving an additional 1,800 students in Pittsburgh, PA</i>	\$1,149,586
Success <i>Project description: 13 new schools and 3 expanded schools serving an additional 4,200 students in New York, NY and Bronx, NY</i>	\$1,986,987
Uncommon <i>Project description: 7 new schools and 2 expanded schools serving an additional 3,000 students in Troy, NY, Rochester, NY, and Newark, NJ</i>	\$2,625,000
	\$50,000,000

Grant Contact	Phone	Email
Achievement First <i>Erica Schwedel</i>	(203) 773-3223	ericaschwedel@achievementfirst.org (mailto:ericaschwedel@achievementfirst.org)
Aspire <i>Mike Barr</i>	(510) 434-5000	mike.barr@aspirepublicschools.org (mailto:mike.barr@aspirepublicschools.org)
Foundation for a Greater Opportunity <i>Julie Goodyear</i>	(212) 702-4353	jgoodyear@sfire.com (mailto:jgoodyear@sfire.com)
IDEA <i>Susanna Crafton</i>	(956) 377-8224	susanna.crafton@ideapublicschools.org (mailto:susanna.crafton@ideapublicschools.org)
KIPP Foundation in consortium with KIPP Regions <i>David Wick</i>	(617) 669-8850	dwick@kipp.org (mailto:dwick@kipp.org)
LEARN <i>Greg White</i>	(312) 391-6959	gwhite@learncharter.org (mailto:gwhite@learncharter.org)
Mastery <i>Courtney Collins-Shapiro</i>	(267) 688-6868	courtney.shapiro@masterycharter.org (mailto:courtney.shapiro@masterycharter.org)
Noble <i>Sara Kandler</i>	(312) 348-1879	skandler@noblenetwork.org (mailto:skandler@noblenetwork.org)
Project Yes <i>Stephanie Jones</i>	(713) 253-6080	Stephanie.jones@yesprep.org (mailto:Stephanie.jones@yesprep.org)
Propel <i>Jeremy Resnick</i>	(412) 325-7305	jresnick@propelschools.org (mailto:jresnick@propelschools.org)
Success <i>Keri Hoyt</i>	(917) 881-9295	keri.hoyt@successcharters.org (mailto:keri.hoyt@successcharters.org)
Uncommon <i>Carolyn Hack</i>	(212) 844-7905	chack@uncommonschoools.org (mailto:chack@uncommonschoools.org)

Tags:

Record of Accomplishment

President William Jefferson Clinton led America into the 21st century as the world's leading force for peace and prosperity, freedom and security, and a more integrated global community rooted in shared values, shared benefits, and shared responsibilities. At home, he presided over unprecedented economic growth and dramatic social progress, which grew out of his core values of opportunity, responsibility, and community.

He advanced new ideas consistent with those values and governed beyond the old politics of left and right to build a new vital center in American life. In so doing he redefined the role of government for 21st century America: to create the conditions and give people the tools to make the most of their own lives. From beginning to end he pursued this vision, sometimes in conflict with the traditional positions of his own party, and often in the face of attacks from an increasingly partisan opposition party. President Clinton's political philosophy, known as the Third Way, attracted followers around the world and continues to inspire innovative leaders in many nations.

Here are the results of eight years of sustained effort by President Clinton, Vice President Gore, and one of the most accomplished - and most diverse - administrations ever to serve the American people.

Changing the Way Government Does Business

Crime and Drugs

Education

[Expanding Access to Technology >](#)

[Teaching Every Child to Read >](#)

Expanding Choice and Accountability in Public Schools

The Administration worked to expand public school choice and support the growth of public charter schools, which have increased from one public charter school in the nation when the President was first elected to more than 2,000 when he left office. By the end of the Administration, charter schools operated in 34 states and the District of Columbia. President Clinton won a \$45 million increase in funds in FY 2001 to support the start up of 450 new or redesigned schools that offer enhanced public school choice.

Providing Safe After-School Opportunities for 1.3 Million Students Each

[Year >](#)

[Investing in School Construction >](#)

[Ensuring a Safe School Environment and Protecting Children »](#)

[Turned Around Failing Schools »](#)

[Enacted the GEAR UP College Opportunity Program for Middle School](#)

[Children »](#)

[More High-Quality Teachers with Smaller Class Sizes »](#)

[Made College More Affordable »](#)

[Expanded Work Study and Pell Grants »](#)

[Opened the Doors of College to All Americans with the Hope](#)

[Scholarships and Lifetime Learning Tax Credits »](#)

[President Clinton Provided for the Largest Increase in Aid to Higher](#)

[Education Since the GI Bill 50 Years Ago »](#)

[Environment](#)

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[Protection of Religious Freedom](#)

[Science and Technology](#)

[The Strongest Economy in a Generation](#)

[Welfare Reform and Community Empowerment](#)



Federal Education Policy and the States, 1945-2009

The George H.W. Bush Years: Charter Schools, Summary

In addition to an emphasis on systemic reform, the idea of school choice garnered increasing attention in the 1990s. As noted earlier, President Bush's America 2000 proposal included publicly funded vouchers for parents to enroll their children in private schools. Charter schools offered yet another option in the school choice arena. As early as the 1980s, the relatively new concept of charter schools—that is, schools with special or independent dispensations, or charters, from their states to experiment with alternative publicly financed approaches to education—had emerged on the national scene. The name *charter schools* can be traced back to Dr. Ray Budde, a professor at the University of Massachusetts at Amherst, who wrote a report, *Education by Charter*, in 1988. In this report, Budde describes the shift of responsibility and control over student learning away from removed administrators to those who do the teaching. Minnesota was the first state formally to allow the creation of charter schools, and other states eventually followed, including Arizona, California, Georgia, Massachusetts, Colorado, Delaware, Hawaii, Idaho, Maryland, New Jersey, New York, Tennessee, Wisconsin, Rhode Island, Washington, Missouri, Maine, Illinois, Texas, and Florida. The basic idea behind charter schools was that more freedom to innovate at the school level would lead to improved results.

Relatively early in the Bush administration, the charter school movement gained support from the American Federation of Teachers (AFT), which previously had supported ideas such as site-based management, schools-within-schools, and school-community partnerships. In a 1988 *New York Times* column and a speech at the National Press Club, AFT president Albert Shanker described charter schools as a promising front in improving education. With his faith in teachers as professionals, he saw the freedom that charter schools could offer and the scientific results from standardized tests as fostering a good environment for teachers and students to thrive. Although interest in charter schools was growing, there was no legislation enacted to support them during this administration.

Between 1989 and 1992, federal spending for education increased by 25 percent (meanwhile, the budget of the federal Department of Education increased 41 percent). In unadjusted dollars, federal aid to education had increased from \$5.3 billion in 1965 to \$23.3 billion in 1975 to \$40.0 billion in 1985 to \$71.7 billion in 1995. Although the administration of President George H. W. Bush did not produce significant breakthroughs in education legislation, funding for extant programs did increase, and the stage was set for new federal strategies to improve education results.

[<< Previous...Next >>](#)

[Information about footnotes](#)

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

CHICAGO MATHEMATICS AND SCIENCE)	
ACADEMY CHARTER SCHOOL, INC.)	
)	
Petitioner-Employer,)	
)	
-and-)	Case No. 13-RM-1768
)	
CHICAGO ALLIANCE OF CHARTER)	
TEACHERS AND STAFF, IFT, AFT, AFL-)	
CIO,)	
)	
Respondent-Union.)	

CERTIFICATE OF SERVICE

Michael L. Sullivan, an attorney, hereby certifies that he cause the foregoing *Amicus Curiae Brief of National Alliance for Public Charter Schools in Support of Employer's Request for Review* to be served by electronic mail on this 11th day of March, 2011:

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National Alliance for Public Charter Schools

By /s/ Michael L. Sullivan
One of Its Attorneys

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