

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 5**

In the Matter of:)
)
ISLAMIC SAUDI ACADEMY)
)
Employer,)
)
and)
)
ISLAMIC SAUDI ACADEMY)
EMPLOYEE PROFESSIONAL)
ASSOCIATION)
)
Petitioner.)

Case No. 05-RC-080474

**PETITIONER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR DECISION AND
ORDER DATED JUNE 14, 2012**

Submitted by:

Kevin M. Plessner
Law Office of Kevin M. Plessner
228 Homewood Rd.
Linthicum, MD 21090
Tel (267) 340-7024
Fax (703)-237-4321

I. RULE CONCERNING REQUEST FOR REVIEW

Section 102.67(C) of the Board's Rules and Regulations provides that the grounds for granting a Request for Review include:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party...

The Regional Director's decision departs from a substantial question of law because he has departed from and has not discussed officially reported Board precedent.

The Regional Director reached his incorrect legal conclusion by way of numerous factual findings that are clearly erroneous on the record, and these errors have prejudicially affected the rights of the Petitioner and of the employees in the petitioned-for unit.

II. STATEMENT OF THE CASE

From May 17, 2012 until May 21, 2012, a formal hearing was held before the National Labor Relations Board. During the hearing, Employer Islamic Saudi Academy (hereinafter, "ISA") disputed the Board's jurisdiction on the basis of its argument, *inter alia*, that ISA is a church-operated school. Petitioner Islamic Saudi Academy Employee Professional Association ("Petitioner") states that ISA is not a church-operated school under the United States Supreme Court case Catholic Bishop and its progeny, since, *inter alia*, it is not run by a religious organization, the Acting Director General of the school is not Muslim, the curriculum is based on Virginia public schools and controlled in large part by an outside, non-religious organization, many teachers and high-ranking administrators at the school are non-Muslim, the school is accredited by numerous non-religious organizations, the school does not follow many tenets of Islam and the purpose of the school is substantially non-religious.

The employer also disputed Petitioner's presumptively appropriate unit, but only to the extent that it includes eight (8) "department heads" employed by the Islamic Saudi Academy. Petitioner

disagrees, and states that the department heads at ISA are not supervisors under National Labor Relations Act §2(11). The Regional Director did not reach this issue within his Decision and Direction of Election. *See* Regional Director's Decision and Direction of Election, at page 3, fn. 2.

Petitioner and employer stipulated during the hearing to a collective bargaining “unit of all full-time and regular part-time employees employed by the Employer, but excluding all bus driver managers; maintenance managers; vehicle maintenance foremen; temporary health employees; English as a second language temporary teachers, also known as ESL temporary teaches; physical education temporary teachers, also known as PE temporary teachers; controllers; elementary coordinators; West campus coordinators; assistant principals; vice principals; principals; directors of education; personnel managers; business managers; finance officers; transportation managers; directors general; acting directors general; executive assistants; managerial employees; guards; and supervisors as defined in the Act. *See* the Hearing Transcript from May 17, 2012, attached hereto as Exhibit A, at 14:4-15:1. The employer only objected to the unit as to whether it included Department Heads. *Id.* The parties also stipulated that the unit sought by petitioner is “an employer-wide unit”. *Id.* at 20:13-20. The parties stipulated that the unit sought was a presumptively appropriate unit. *Id.* at 20:22-21:8.

III. ISSUES FOR REVIEW

(1) Whether the Regional Director erred when he held that the NLRB does not have jurisdiction over the employer pursuant to NLRB v. Catholic Bishop of Chicago, 440 US 490 (1979).

(2) Whether the Regional Director erred when he did not reach the issue regarding whether Department Heads at the ISA are supervisors under the meaning of §2(11) of the National Labor Relations Act (NLRA).

IV. STATEMENT OF FACTS

1. Non-religious Character of the School

I. Administration

Dr. Ronald Henry Schultz has been the Acting Director General of ISA, and the Chief of Staff, since 2008. Exhibit A at 29:3-12; 32:25-33:7. The Acting Director General is the chief administrator of the school, and supervises “all the divisions of the school, from transportation, food service, education, HR, admissions, and technology, security. All of those department heads, division heads report— division heads report to me. I report directly to the Master and to the board of directors, and the board of trustees, and I supervise the entire school.” Exhibit A at 35:16-24. There is a Board of Trustees for the school, but the Acting Director General has only met with them twice in his entire tenure at the school. Exhibit A at 137:4-25. **Acting Director General Schultz is not a Muslim.** Exhibit A at 194:9-16. Assistant Principal Dana Nicholas is not Muslim and department head Rader is not Muslim. Exhibit C at 740:3-10. Vice Principal Tenery is not Muslim. Exhibit C at 796:6-10. The Board of Directors for the school is not a religious organization. Exhibit A at 194:17-195:4. Acting Director Schultz is also a member of the Board of Directors and he is non-Muslim. Exhibit A at 195:13-196:1. There is no requirement for members of the Board of Directors to be Muslim. Exhibit A at 209:12-18.

ii. Curriculum

Acting Director General Schultz testified that the school is responsible for developing its own curriculum. Exhibit A at 43:1-4. The school changed the Islamic program from Saudi Arabia and sent the Islamic portions of the program to Saudi Arabia for approval. Exhibit A at 43:10-23. ISA uses the International Baccalaureate (IB) program for grades 11-12, which is an outside international program, not a Saudi program. Id. at 43:3-10. All of the other programs taught at ISA are traditional subjects taught in American schools, which mostly follow the Fairfax County public school system. Exhibit A at 43:24-44:44:22. Acting Director General Schultz described ISA as a school that “[f]ollows an American curriculum with Saudi Arabian Islamic and Arabic.” Exhibit A at 87:4-10. There is no requirement for students to be Muslim at ISA, and there have been non-Muslim students at the school in the past. Exhibit A at 87:11-22. After describing what the written mission statement in ISA

documents states, Acting Director General Schultz further explained that for ISA, “we follow Fairfax County curriculum and use that as our curriculum bases so that they can transfer anyplace in the world and be successful. The ultimate goal is if they stay with us and graduate, which most of them do, they can get admissions to outstanding universities and go on and—excuse me—continue in professional careers, prepare for professional careers.” Exhibit A at 89:4-14. The Director of Education testified that the ISA curriculum was matched up with the Virginia Standards of Learning (SOLs) from Fairfax County and Loudoun County, Virginia. Exhibit A at 262:19-4. ISA wants to be accredited by outside organizations and submits to the IB curriculum so that the graduating students may go to colleges and universities. Exhibit A at 97:2-13. Students who are not part of the IB program receive a typical high school diploma, consistent with the requirements of the Fairfax County curriculum. Exhibit A at 100:13-101:3. ISA submits to the IB curriculum for 11th and 12th grade and they are moving more grades into IB, which is not a religious organization and does not teach religion. Exhibit A at 209:19-210:23. ISA submitted to IB's curriculum for college preparation purposes. Exhibit A at 210:24-211:2. Acting Director Schultz admitted that college prep is the school's main goal, or one of them, and that nearly every student who goes to ISA attends college. Exhibit A at 193:3-12. The academic program and the graduation requirements at ISA are created so that students can go to any university in the world. Exhibit B 480:8-481:9. ISA uses Virginia Board of Education regulations for physical education. Exhibit B at 480:1-7.

ISA has applied for and uses the Middle Years Program (MYP), which is an IB program that will extend IB to grades 6-10. Exhibit A at 254:18-255:6. In 2010, ISA began to implement the MYP, which is based on the IB curriculum, but although they are teaching MYP, they are not approved yet. Exhibit A at 273:25-274:21. IB's mission and ISA's mission merged once ISA became a part of IB. Exhibit A at 255:8-256:1. IB's mission “is fostering intercultural awareness, promoting students to work together towards a better and more peaceful [world].” Id. ISA does not have their own school mission anymore. Id. The IB mission statement is hung in the school next to the ISA mission

statement. Id. IB's mission is also “to provide students with an academically rigorous program of study that will enable them to...be citizens of the world and to promote peace and to internalize what other people with their differences can also be right.” Exhibit A at 256:2-8. IB is not a religious organization and does not maintain any positions on religion. Exhibit A at 256:9-13. The Director of Education for ISA stated that ISA's mission statement is not consistent with how the school conducts its business, since it is not a religious school. Exhibit A at 317:2-22. The Director of Education also testified that the students are not gaining religious knowledge from the school, since the school is secular. Exhibit A at 318:21-319:7. The Director of Education supported her statement by explaining that religion is reserved to a 45-minute period and prayer is constrained to 10 only minutes, and that religious values do not permeate throughout the day—values of good character permeate throughout the school but religious values do not. Exhibit A at 319:8-320:5.

iii. Accreditations

ISA is accredited by an American association called AdvancED, so that they may provide their students with a typical American high school diploma. Exhibit A at 89:19-90:8. ISA had to go through an accreditation process with AdvancED. Id. AdvancED is not affiliated with religion, and most public schools in Virginia are accredited by AdvancED. Exhibit A at 265:5-10. ISA received a certificate from the Virginia Private School Association, a small organization that is part of AdvancED, SACS. Exhibit A at 266:3-6. ISA applied to and became a member of the National Honor Society, which is not a religious organization. Exhibit A at 266:7-267:21. ISA is a member of International Baccalaureate (IB), which is an academic program which prescribes the curriculum that ISA must follow. Exhibit A at 90:23-91:19. IB requires that ISA administer tests to their students that are not created by ISA – they are created by IB. Exhibit A at 91:18-21. IB allows the students at ISA to earn a diploma from IB in addition to the high school diploma. Exhibit A at 91:21-92:21. All students in grades 11 and 12 were administered IB tests this year. Exhibit A at 93:10-17. IB staff regularly observe and investigate classes

at ISA to make sure ISA is carrying out the IB education. Exhibit A at 93:23-94:2. Before each year, IB staff regularly visit for accreditation and go through ISA's curriculum. Exhibit A at 94:3-20. ISA is required to follow the IB curriculum, which IB submits to ISA, and IB is very demanding on ISA. Id. ISA does not design or originate final tests to their IB students, ISA must purchase the tests from IB. Exhibit A at 94:14-95:1. ISA is also a member of the Northern Virginia Independent Athletic Conference, which is a competitive sporting conference where the schools compete against each other, and this is a non-religious conference. Exhibit B at 635:19-636:17.

iv. Subjects taught at ISA

ISA teaches evolution and other scientific subjects, and the subjects are in the textbooks. Exhibit A at 269:18-270:3. Evolution is taught in the classroom and ISA teaches their students to be open-minded by teaching the students subjects that they would not hear in a mosque or in a church. Exhibit A at 271:3-6. Evolution was taught even before ISA adopted the IB program, within biology. Exhibit A at 271:17-19. Before the IB program, only students in the AP classes would learn biology, but after IB, 97-98 percent of students learn biology. Exhibit A at 272:17-273:23.

Dr. Sheena Friend is a teacher at ISA who teaches 7th grade life science for the boys' and girls' schools and 11th and 12th grade IB biology for both the boys' and girls' schools. Exhibit B at 598:12-599:13. The 7th grade life science course is part of the MYP (IB) curriculum and the IB biology program is also part of the IB program. Exhibit B at 600:3-601:11. Dr. Friend explained that the biology curriculum includes lessons on such topics as DNA, genetics, cloning, evolution, human anatomy and physiology. Exhibit B at 606:18-608:5. According to Dr. Friend, lessons on in vitro fertilization teach subjects that Islam would “consider against God's will.” Exhibit B at 608:9-22. As part of the curriculum, the students have to learn evolution whether or not it is contrary to their religion. Exhibit B at 608:23-609:18. The department head for the science department teaches the same curriculum as Dr. Friend. Exhibit B at 609:21-610:10. Drinking alcohol is prohibited by Islam. Exhibit

A at 155:15-16. Notwithstanding, the biology curriculum includes topics about alcohol consumption and the way that it affects the kidneys. Exhibit B at 610:12-23. Dr. Friend teaches lessons in cells during her life sciences class, which includes topics about the way life came into being, which are part of the curriculum and are contrary to the Islamic belief that Allah created the world. Exhibit B at 610:24-612:4. The life sciences curriculum also includes topics in genetics, cells, human anatomy and physiology and evolution. Exhibit B at 610:24-612:13. The lessons that Dr. Friend teaches in stem cell research are part of the curriculum and “one of the arguments against stem cell research is the fact that some people see it as playing God, not following God's will.” Exhibit B at 612:14-613:5. Nobody at the school has ever told Dr. Friend to teach religion and nobody has told her not to teach anti-religious ideas. Exhibit B at 613:6-15.

Students only take one credit per year in Islamic Studies. Exhibit A at 183:5-23. To graduate from ISA, a student needs 26 credits, and only 4 of these are in courses involving religion—22 are in classes that do not involve religion. Exhibit A at 285:25-286:7. Students are only in Islamic studies for 45 minutes per day. Exhibit A at 184:1-22. ISA teaches primarily American subjects, with Islamic studies taking up about 45 minutes each day. Exhibit A at 211:23-212:10. Ms. Turkistani testified that there are two pages in the Arabic textbook which mention Mohammed, but she has never read the textbook herself. Exhibit B at 468:3-470:14 and 490:10-491:11. Mr. Alzakari testified that there were a few more references to Mohammed in the same book, but the book is only used for the second semester 8th grade Arabic. Exhibit B at 525:1-529:1. There are also some elements of Islam in Arabic social studies, but there was no specific testimony regarding what those elements were and only half of the students ever take this class at ISA. Exhibit B at 545:14-549:13. When asked what other elements of Islam are in the other courses at ISA, principal Alzakari testified that he sees the curriculum “through Islamic lenses”, however the only examples that he could give regarding what this means is that (1) the school does not allow drawing naked bodies and (2) it is unacceptable for a teacher to show a DVD that states that “Islam was distributed by sword and terror.” Exhibit B at 549:15-551:12.

Virginia history is taught as part of the 4th grade curriculum, American history in 5th grade, world history in 6th grade, civics and geography in 7th grade, geography in 8th, world history in 9th, global studies in 10th and IB courses in 11th and 12th. Exhibit A at 289:5-25. Students take elective courses in grades 9-12, but ISA does not offer any elective courses in religion or Islamic studies. Exhibit A at 291:16-292:11. The health class goes by Virginia state regulations. Exhibit A at 293:8-15.

Arabic is a language. Exhibit A at 212:11-12. Arabic studies is akin to taking English class in American schools, to perfect a student's language skills in Arabic. Exhibit A at 219:23-220:10. Students take Arabic language class from 40-45 minutes per day, or less. Exhibit A at 220:14-19. Students in Arabic language classes do not read the Quran, other than maybe a passage in the textbook, and in 11th and 12th grade, the Arabic class curriculum comes from IB. Exhibit A at 315:5-316:6. None of the books used at ISA were developed in Saudi Arabia, they were all developed at ISA. Exhibit A at 277:20-278:3. ISA went to “great lengths to prove that [the Islamic Studies] books were not the Saudi curriculum” and hired non-Muslim consultants to review and rewrite the books to make sure they were okay to teach in the United States.” Exhibit A at 279:8-281:25.

Mr. Kovalik has been with the school since 1999 and is currently an 11th and 12th grade psychology teacher. Exhibit B at 625:16-628:11. Religion does not come up often in his 11th grade lessons, but once when it did, Mr. Kovalik explained that it is the student's choice to agree or disagree with the lesson. Exhibit B at 628:17-631:7. Religion has not come up in his 12th grade course at all this year or last year. Exhibit B at 631:8-632:15.

Mr. Kovalik also coaches sports such as wrestling, baseball and football and nothing about coaching these sports involves religion. Exhibit B at 633:21-634:21.

v. *Prayer*

The school has a prayer room for the boys and a gymnasium for the girls. Exhibit A at 56:18-24. Director General Schultz was not sure if students were required to participate in the prayer. Exhibit A at

176:9-17. Although some witnesses referred to the prayer room as a “mosque”, the Director of Education explained that she calls it a “prayer room” and “it's also used as a storage room.” Exhibit A at 283:2-11.

There is a “call to prayer” at the school each day. Exhibit A at 155:17-21. Only Muslim faculty **who are not busy** are encouraged to attend, and you keep working if you are not Muslim. Exhibit A at 155:22-156:2 [emphasis added]. The Director of Education does not attend the call to prayer. Exhibit A at 300:15-20. It is not mandated for any adult to pray at the school. Exhibit A at 307:7-8. The afternoon prayer lasts a total of about 7 minutes each day and 20-25 minutes on Fridays. Exhibit B at 537:4-18.

There is a morning assembly wherein boys and girls grades 2-6 meet together, in the same room, in the auditorium. Exhibit A at 295:23-296:22; 297:13-14; Exhibit B at 411:12-23. Boys grades 7-12 meet in the cafeteria in the morning and girls grades 7-12 meet in the gym, but not every day. Exhibit A at 297:13-18. The morning meetings are about 5 minutes long. Exhibit A at 298:13-18. During the boys' and girls' meeting, someone will read a short passage from the Quran, there are brief announcements, and then students go to class. Exhibit A at 299:4-14. Students grades K-1 do not have a morning meeting. Exhibit B at 411:24-412:3. Students grades 2-6 do not attend the morning assembly if the bus is late, or if their parents drop them off at school. Exhibit B at 416:13-18. The girls' morning assembly for grades 7-12 is in the gym and lasts 15 minutes. Exhibit B at 418:8-419:5. There is a Quran reading and it is about 1 minute long, and then announcements are read and then the students go to their classrooms. Exhibit B at 419:6-420:24. Only staff with a first period in the same school where the meeting is held has to attend the meeting. Exhibit B at 420:25-421:6. There is no prayer at the end of the morning meeting. Exhibit B at 421:7-13. Students are not required to attend the morning meeting, which begins at 7:45AM, and are not considered tardy unless they do not make their first period at 8AM. Exhibit B at 485:4-488:1. There is no discipline for students who arrive at the school after 7:45AM, only about 30% of male students grades 6-12 actually attend the morning assembly, and

the principal of the boys' school himself does not arrive until 8AM. Exhibit B at 566:11-568:7.

vi. Inconsistent Separation Between Boys and Girls

The school does not consistently keep the boys and girls separated. The boys and girls sometimes use the auditorium together, such as for special programs at the school about half a dozen times per school year. Exhibit A at 60:19-61:23. In classes where there is a small number of students interested, the school will combine boys and girls in the same classes. Id. at 63:19-64:13. Male and female students ride on the same bus. Exhibit A at 77:1-7 and 285:9-11.

There are classes where male teachers teach female students. Exhibit A at 18-20. There are female teachers who teach male students. Exhibit A at 285:6-8. Some Arabic, social studies, English and math teachers teach classes in the boys' school and classes in the girls' school. Exhibit B at 335:14-22. The only subjects where there is no crossover of male and female teachers into female and male classes is Islamic studies and physical education. Exhibit B at 336:2-337:8.

vii. Food Restrictions

ISA does not restrict the type of food that the students bring to the school. Id. 66:14-19. Students are allowed to bring in lunches from outside of the school and there is no requirement as to what food they may bring with them. Exhibit B at 471:15-472:4. The Director General testified that the cafeteria staff purchases food from a "food supplier". Exhibit A at 81:8-18. The Director General believed that the food was halal, however, he later admitted that the school serves Dominoes Pizza twice per week. Exhibit A at 186:4-6. Students and faculty are permitted to eat during Ramadan during the day when they are at school. Exhibit A at 321:6-22. There is no requirement at the school that food served in the cafeteria is halal. Exhibit B at 472:8-13. Ms. Turkistani testified that Dominoes and the children told her that Dominoes pepperoni is halal. Exhibit B at 472:14-25.

viii. Teacher Interviews

When advertising a teaching position, ISA does not state that they are a religious school, they say that they are a private school. Exhibit A at 69:21-70:4. ISA does not ask an interviewee what their religion is, since “[t]hat's not a factor.” Id. Arabic teachers do not have to be Muslim, they only need Arabic to be their first language. Id. at 70:17-71:1. The only teacher who ISA requires to be Muslim is a teacher who teaches Islamic studies. Id. Only about sixty percent of the teachers at the school are Muslim. Exhibit A at 153:3-8. ISA has Christian teachers and had Jewish teachers but Acting Director General Schultz is not sure about now, since they do not ask about a teacher's religion. Exhibit A at 211:3-22. There are 102 teachers at ISA, and only 11 teach subject involving religion. Exhibit A at 304:19-305:6.

ix. Dress Code and Holidays

ISA does not require religious garb to be worn at the school. Exhibit A at 152:22-24. There are women at the school who do cover their hair or wear long gowns, but there are no women who cover their faces in the school. Exhibit A at 152:22-153:2. The school does not have a policy for women to cover all but their face and hands. Exhibit A at 185:17-21. The employer's own paid expert testified that in Saudi Arabia, women cover everything, including one eye, because that is their understanding of modesty. Exhibit A at 233:8-13. The dress code at the school is not religiously motivated. Exhibit A at 302:1-9. There is nothing religious about the dress code for students at the school, and the uniforms come from a large uniform company that many public and private schools use. Exhibit A at 303:15-304:17. Principal Alzakari has never spoken to a teacher about violating the “dress code” and is not aware of any discipline for the same. Exhibit B at 552:11-553:17.

The school closes on Muslim holidays and on holidays that the United States government recognizes, since ISA “honor[s] local customs in the US in addition to Islamic holidays and customs...” Exhibit A at 187:14-24.

x. Informational Brochure to Parents

Employer's exhibit 15 is an informational brochure which is distributed to prospective parents and students at ISA. Exhibit A at 173:6-17. On the page marked as “1”, the brochure states “ISA is a college-prep institution, which serves Pre-K through 12th grade students with an American curriculum, in addition to Arabic and Islamic Studies. ISA is fully accredited with SACS (Southern Association of Colleges and Schools) and CITA (Commission for International and Trans Regional Accreditation). The Academy seeks to provide students with a balanced and thorough education in English and Arabic with an atmosphere conducive to building Muslim character. Our bilingual curriculum enables our students to enter American, Saudi Arabian, or other colleges and universities.” Employer Exhibit 15. On the same page, the brochure states “[t]he mission of the Islamic Saudi Academy is primarily to enable our students to excel academically, while maintaining the values of Islam and proficiency with Arabic language. The Academy endeavors to provide a caring, challenging and supportive learning environment where students can achieve their highest potential while exhibiting civic responsibility and multicultural appreciation.” Id. Throughout this same brochure (contrary to certain witness statements), there are multiple pictures of male and female students studying, learning and riding the bus together. Employer's Exhibit 15 and Exhibit A at 187:25-192:14.

xi. Saudi Arabia

One of the employer's own paid experts, Dr. David Long, admitted that in Saudi Arabia, women are required to wear an abaya and a hijab, since this is what is thought of as “modesty”. Exhibit C at 766:19-767:23 and 769:4-23. In Saudi Arabia, women do not teach at men's schools and men do not teach at women’s schools. Exhibit C at 768:25-769:3. Saudi Arabia's system of government is a Monarchy and it is run by a King. Exhibit C at 769:24-770:6.

2. Department Heads

There are eight (8) or nine (9) Department Heads at the school. Exhibit A at 181:12. All of the

Department Heads are teachers. Exhibit A at 24:8-13. Three (3) of the department heads in the girls' school are non-Muslim. Exhibit B at 473:3-22. Department Heads are for science, math, English, social studies, Arabic , Islamic studies, art and physical education. Exhibit A at 181:23-182:3.

Employer's Exhibit 5 is a position description for department heads. Exhibit A at 181:1-7. Exhibit 5 is an accurate description of the department head position, but does not mention anything about hiring teachers. Exhibit B at 478:4-24. Nothing in the position description for department heads would suggest that department heads are supervisors within the meaning of section 2(11) of the Act. *See* Employer Exhibit 5.

The personnel department decides who will get an interview for a position at ISA. Exhibit A at 67:23-68:17. The personnel department will invite principals, vice principals, assistant principals and department chair (aka department head) to conduct an interview. Id. The HR person collects the summaries from each of the persons present at the interview and asks the principal whether they want to hire the candidate. Id.

Department heads are present during interviews of teachers, and the principal respects the Department head's judgment regarding resumes. Exhibit B at 345:10-22. If they terminate a teacher, the principal lets the department head know about it. Exhibit B at 345:23-25. The department head reads resumes and then tells the principal which one is liked the most. Exhibit B at 349:6-14. The personnel department will schedule interviews, which will consist of principals, HR, education department, and department head. Exhibit B at 350:2-24. Each person at the interview will complete an evaluation form for the candidate and then give it to the personnel department. Exhibit B at 352:9-353:5. Ms. Turkistani testified that the candidate for the position is chosen “[b]ased on, you know, everybody's opinion on that person. We ask questions. We make sure that this person is qualified. Most of the time, it is the department heads who decide if that person is fit or not.” Exhibit B at 359:10-13. Ms. Turkistani could not remember any specific instances of hiring a teacher. Exhibit B at 360:15-19. Despite the fact that she could not recall any specific instances of hiring a teacher, Ms. Turkistani

testified that she always asks the department head how she feels about the candidate and if the department head is comfortable with the candidate, since the department head is the one who works with the candidate, it is fine with her. Exhibit B at 362:17-20. The Director General is the person who has the final say and signs the contract. Exhibit B at 363:4-7. Ms. Turkistani testified that she values the opinion of the department head since the department head has to work with the teacher. Exhibit B at 364:13-23. Whether or not a teacher is hired is done by consensus of the committee consisting of boy's principal, girl's principal, department head, HR person and director of education, but if there is a disagreement, the boy's or girl's principal will make the decision. Exhibit C at 701:14-704:11.

If a teacher resigns, they tell the principal or the department head and then the department head tells the principal. Exhibit B at 347:8-20. Next, the principal tells personnel or HR that the department is in need of a teacher. Id.

Ms. Turkistani testified that department heads prepare evaluations for teachers. Exhibit B at 368:7-8. She has made changes to department head evaluations of teachers. Exhibit B at 369:5-370:2. Only new teachers get evaluated. Exhibit B at 370:3-16. She receives 3-4 evaluations from each department head per year, since teachers are not evaluated every year. Exhibit B at 371:12-19. Ms. Turkistani testified that she used evaluations and spoke to department heads when she made the decision of whether or not to extend a teacher's contract, but she could not remember any specific example of when she spoke to a department head about promoting an employee and did not give any examples of when she spoke to department heads about extending a teacher to keep their contract. Exhibit B at 374:11-375:3. Ms. Turkistani testified that if she is told that a teacher is not good, she will look at the evaluations to see if the contract should be extended to the teacher, however, she could not remember any time that this happened. Exhibit B at 474:5-19. As the principal, she recommends to the Director General when a teacher should not have a contract extended, and she requires the consensus of the department head, but neither she nor the department head can fire a teacher.. Exhibit B at 474:5-475:21. Evaluations do not have any effect on a teacher's salary or other benefits. Exhibit C at 707:20-

708:2.

The Department head for the girls' social studies department (8 teachers) receives weekly lesson plans from each of the 8 teachers and the department head responds to them if she needs to, such as one time when she suggested to a teacher that the teacher would be better off not showing a movie. Exhibit C at 659:24-662:5. The department head does not often do anything with lesson plans, maybe 0-2 times per month. Exhibit C at 662:6-663:3. She cannot read the lesson plans for the Arabic Social Studies classes. Exhibit C at 740:20-741:11. The Social Studies department head makes the substitute teacher schedule, and if the teacher knows they will be out, it is the teacher's responsibility to get the lesson plan to the substitute teacher, but if the teacher does not know they will be out, the substitute teacher will use an emergency lesson plan which was designed by the teacher. Exhibit B at 664:4-668:22.

Department heads do not promote employees, grant time off for employees, grant vacation time to employees. Exhibit B at 377:2-378:15. Department heads cannot transfer teachers. Exhibit B at 398:12-21. The assistant principal makes the teacher schedule, not the department head. Exhibit B at 403:24-404:2 and 405:13-14.

Ms. Turkistani testified that she could not remember a specific example of a teacher whose contract was not renewed, but that she had a vague recollection of one teacher that was probably two years ago in the social studies department whose contract was not renewed. Exhibit B at 385:11-386:22. She further testified that the department head was not happy so she personally observed the teacher in the teacher's class, and after she personally observed the teacher, the Director General terminated the teacher after a recommendation from the Department Head and the principal. Exhibit B at 386:23-391:21. Department heads do not have any authority to terminate teachers. Exhibit C at 738:17-19.

A department head complained to the principal of the girl's school about a teacher over a period of about 2 months and the Director General eventually terminated the teacher. Exhibit B at 432:22-

437:15. Ms. Rader, girls' social studies department head, testified that once there was a problem with a teacher and she and the boys' school principal and the girls' school principal talked about the teacher but she cannot remember what they talked about, but the decision to terminate this teacher was “a mutual agreement” between the two principals, maybe the director of education and maybe the Director General.” Exhibit C at 677:16-681:4. Ms. Rader also testified that she recommended termination for 2 teachers in years past, who were not offered new contracts to stay at the school, but those decisions were made at a higher level—note that there was no testimony regarding the reasons those teachers were not offered new contracts, who decided not to extend new contracts to those teachers, or whether those teachers ever sought to have new contracts. Exhibit B at 693:19-696:25.

Ms. Turkistani is the principal for the girls' school, and has no involvement with the department heads for the boys' school. Exhibit B at 475:22-476:5. Ms. Rader testified that she does not know how any department heads, other than herself, fulfill their duties. Exhibit C at 739:2-7.

Mr. Alzakari, principal of the boys' school since June 2011, testified that department heads report to him and approve leave for teachers before he approves the same leave for teachers. Exhibit B at 508:15-511:4.

Ms. Alzakari testified that the procedure for hiring teachers begins with HR sending out an email to him, the department head and others, and he recommends which teachers are to be interviewed. Exhibit B at 579:23-581:24. The interview committee consists of various principals, the department head and school admin or personnel. Exhibit B at 581:20-582:8. After the candidate leaves, everyone except personnel fills out an evaluation form and gives it to personnel, and personnel later lets him know who was selected for the position. Exhibit B at 583:25-585:13. The Director General is the only one who may make the decision to hire and fire teachers. Exhibit B at 585:14-19. The principal does not have to follow any recommendation that a department head makes for hiring. Exhibit C at 738:7-10.

The principal for the boys' school did not testify about any department head involvement in

transferring teachers or disciplining teachers. Exhibit B at 585:20-590:5. Teachers are not promoted and he does not know about bonuses. Exhibit B at 590:6-591:13. Evaluations given to him by department heads have never resulted in discipline and he does not know of any time that it affected the teacher's compensation. Exhibit B at 593:3-594:20. Only the Director General can fire teachers. Exhibit B at 594:21-595:16. Mr. Kovalik, a teacher, was counseled for punctuality and the counseling was done by the principal with no involvement from the department head. Exhibit B at 640:20-641:9. The vice principal is in charge of discipline of students, not the department head. Exhibit B at 645:23-646:6.

Teacher Kovalik testified that if he is approved for leave, he is notified by the principal or the secretary, not the department head. Exhibit B at 642:4-643:13.

IV. ARGUMENT

1. The Regional Director Based His Decision on Incorrect Facts

The Regional Director based his Decision and Director of Election of June 14, 2012 (“Regional Director's Decision”) on facts that are not supported by the record, and for which he gives no record citations. The Regional Director's Decision states that “the school's purpose and function in substantial part is to propagate the religious faith of Islam and so find [sic] that I am precluded from asserting jurisdiction over the teachers.” *See* Regional Director's Decision at page 24. The Regional Director's Decision is based on six different faulty factual and legal findings, each of which are not supported by the record or are a misapplication of Board regulations and precedent. *Id.* at 24-26.

i. Employer's Selected Documents

The Regional Director's reliance on documents which were selected by the employer is misguided. On page twenty-four (24) of his Decision, the Regional Director starts with a recitation of various documents which have been provided by the employer in an attempt to show that the school is substantially religious. This documentation should not be given much weight, since it is how the

school actually runs its day-to-day activities, not the documentation which the employer may choose to provide, that dictates whether the school is substantially religious or not. It is “the purpose of the employer's operations, **the role of the unit employees in effectuating that purpose**, and the potential effects if the Board exercised jurisdiction” that dictates whether the school is substantially religious for purposes of the National Labor Relations Act. University of Great Falls, 331 NLRB 1663, 1664 (2000). Therefore, whether or not the school is substantially religious such that the Board should decline jurisdiction should not be based on documents that the employer chooses to provide, it should be based on testimonial evidence which is provided by the teachers and non-teaching staff themselves.

Furthermore, there was testimony from the Director of Education establishing that the mission statement in the documents from ISA is no longer the mission statement of the school. IB's mission and ISA's mission merged once ISA became a part of IB. Exhibit A at 255:8-256:1. IB's mission “is fostering intercultural awareness, promoting students to work together towards a better and more peaceful [world].” Id. ISA does not have their own school mission anymore. Id. The IB mission statement is hung in the school next to the ISA mission statement. Id. IB's mission is also “to provide students with an academically rigorous program of study that will enable them to...be citizens of the world and to promote peace and to internalize what other people with their differences can also be right.” Exhibit A at 256:2-8. IB is not a religious organization and does not maintain any positions on religion. Exhibit A at 256:9-13. The Director of Education for ISA stated that ISA's mission statement in the documents is not consistent with how the school conducts its business, since it is not a religious school. Exhibit A at 317:2-22.

ii. Islamic Studies and Prayer

The Regional Director next explains that his Decision was based on the presence of Islamic Studies classes and prayer at the school. *See* Regional Director Decision at page 25. However, the record reflects that students only take one credit per year in Islamic Studies. Exhibit A at 183:5-23. The Director of Education at ISA explained that religion is reserved to a 45-minute period and prayer is

constrained to only 10 minutes, and that religious values do not permeate throughout the day—values of good character permeate throughout the school but religious values do not. Exhibit A at 319:8-320:5. To graduate from ISA, a student needs 26 credits, and only 4 of these are in courses involving religion—22 are in classes that do not involve religion. Exhibit A at 285:25-286:7. ISA teaches primarily American subjects, with Islamic studies taking up only about 45 minutes each day. Exhibit A at 211:23-212:10. Students take elective courses in grades 9-12, but ISA does not offer any elective courses in religion or Islamic studies. Exhibit A at 291:16-292:11.

The Arabic classes are not religious classes. Ms. Turkistani testified that there are two pages in the Arabic textbook which mention Mohammed, but that she has never read the textbook herself. Exhibit B at 468:3-470:14 and 490:10-491:11. Mr. Alzakari testified that there were a few more references to Mohammed in the same book, but the book is only used for the second semester 8th grade Arabic. Exhibit B at 525:1-529:1. There are also some elements of Islam in Arabic social studies, but there was no specific testimony regarding what those elements were and only half of the students ever take this class at ISA. Exhibit B at 545:14-549:13.

Arabic is a language, not a religion. Exhibit A at 212:11-12. Arabic studies is akin to taking English class in American schools, to perfect a student's language skills in Arabic. Exhibit A at 219:23-220:10. Students take Arabic language class from 40-45 minutes per day, or less. Exhibit A at 220:14-19. Students in Arabic language classes do not read the Quran, other than maybe a passage in the textbook, and in 11th and 12th grade, the Arabic class curriculum comes from IB. Exhibit A at 315:5-316:6.

The Regional Director's reliance on prayer at the school is similarly misguided, since teachers are required to participate in the prayer and the prayer is very short period of time during the day. Only Muslim faculty **who are not busy** are encouraged to attend, and you keep working if you are not Muslim. Exhibit A at 155:22-156:2 [emphasis added]. The Director of Education does not attend the call to prayer. Exhibit A at 300:15-20. It is not mandated for any adult to pray at the school. Exhibit A

at 307:7-8. The afternoon prayer lasts a total of about 7 minutes each day and 20-25 minutes on Fridays. Exhibit B at 537:4-18. There is also a morning meeting where there is a very short prayer along with the announcements, but students are not required to attend. Exhibit B at 416:13-18; 485:4-488:1; 566:121-568:7; 411:24-412:3. The morning meetings are about 5 minutes long. Exhibit A at 298:13-18. Students, grades 2-6, do not attend the morning assembly if the bus is late, or if their parents drop them off at school. Exhibit B at 416:13-18. The girls' morning assembly for grades 7-12 is in the gym and lasts 15 minutes. Exhibit B at 418:8-419:5. Only staff with a first period in the same school where the meeting is held has to attend the meeting. Exhibit B at 420:25-421:6. Students are not required to attend the morning meeting, which begins at 7:45AM, and are not considered tardy unless they do not make their first period at 8AM. Exhibit B at 485:4-488:1. There is no discipline for students who arrive at the school after 7:45AM, only about 30% of male students grades 6-12 actually attend the morning assembly, and the principal of the boys' school himself does not arrive until 8AM. Exhibit B at 566:11-568:7.

iii. There is no integration of Islamic principles with other subjects

The Regional Director's third stated reason for his erroneous finding is simply incorrect. The Regional Director stated that:

Third, there is some integration of Islamic principles in other subjects. Teachers are required to raise Islamic principles during discussions of various issues in the biological and other natural sciences, and they teach students Islamic-based objections to certain scientific practices.

Regional Director's Decision, page 3. The Regional Director misunderstands the testimony. There was no testimony or or any other evidence supporting his conclusion that teachers who teach subjects other than Arabic and Islamic Studies have any Islamic influence in their classes. In fact, the record testimony is the complete opposite – teachers teach subjects which are completely contrary to the tenets of Islam. For example, Dr. Sheena Friend, a non-Muslim science teachers at ISA, explained that the biology curriculum includes lessons on such topics as DNA, genetics, cloning, evolution, human

anatomy and physiology. Exhibit B at 606:18-608:5. According to Dr. Friend, lessons on in vitro fertilization teach subjects that Islam would “consider against God's will.” Exhibit B at 608:9-22. As part of the curriculum, the students have to learn evolution, whether or not it is contrary to their religion. Exhibit B at 608:23-609:18. The department head for the science department teaches the same curriculum as Dr. Friend. Exhibit B at 609:21-610:10. Drinking alcohol is prohibited by Islam. Exhibit A at 155:15-16. Notwithstanding, the biology curriculum includes topics about alcohol consumption and the way that it affects the kidneys. Exhibit B at 610:12-23. Dr. Friend teaches lessons in cells during her life sciences class, which includes topics about the way life came into being, which are part of the curriculum and are contrary to the Islamic belief that Allah created the world. Exhibit B at 610:24-612:4. The life sciences curriculum also includes topics in genetics, cells, human anatomy and physiology and evolution. Exhibit B at 610:24-612:13. The lessons that Dr. Friend teaches in stem cell research are part of the curriculum and “one of the arguments against stem cell research is the fact that some people see it as playing God, not following God's will.” Exhibit B at 612:14-613:5. Nobody at the school has ever told Dr. Friend to teach religion and nobody has told her not to teach anti-religious ideas. Exhibit B at 613:6-15.

Mr. Kovalik has been with the school since 1999 and is currently an 11th and 12th grade psychology teacher. Exhibit B at 625:16-628:11. Religion does not come up often in his 11th grade lessons, but once when it did, Mr. Kovalik explained that it is the student's choice to agree or disagree with the lesson. Exhibit B at 628:17-631:7. Religion has not come up in his 12th grade course at all this year or last year. Exhibit B at 631:8-632:15. The Regional Director's assertion that “there is some integration of Islamic principles in” subjects other than Islamic Studies is clearly erroneous and is contrary to the record.

The only evidence that course other than Islamic Studies has anything to do with religion is contained in Exhibit B at 549:15-550:22. Under direct examination for the employer, Mr. Alzakari testified that students cannot draw nude bodies in art class and that a teacher showed a DVD which said

“that the Islam was distributed by sword and terror”, which was inappropriate. Id. It is no surprise that middle and high school students are not permitted to learn to draw nude bodies, since this would be inappropriate for any school for students of this age group. Ms. Alzakari's other example was that the school disciplined a teacher for showing a DVD which seemingly proclaimed Islam to be conducive to terrorism. The fact that this teacher was disciplined (but not terminated) similarly does not establish that classes other than Islamic studies have anything to do with religion – it only suggests that the school does not tolerate lessons which connect Islam with terrorism. The Regional Director's reliance on the above testimony as establishing that the school is substantially religious is clearly erroneous and is not supported by the record.

iv. The school does not require that the students eat halal.

The Regional Director's reliance on inconsistent testimony regarding whether the cafeteria is halal is misguided, since there is no requirement for the students to eat halal at the school. ISA does not restrict the type of food that the students bring to the school. Id. 66:14-19. Students are allowed to bring in lunches from outside of the school and there is no requirement as to what food they may bring with them. Exhibit B at 471:15-472:4. The Director General testified that the cafeteria staff purchases food from a “food supplier”. Exhibit A at 81:8-18. The Director General believed that the food was halal, however, he later admitted that the school serves Dominoes Pizza twice per week. Exhibit A at 186:4-6. Ms. Turkistani testified that Dominoes and the children told her that Dominoes pepperoni is halal. Exhibit B at 472:14-25. Students and faculty are permitted to eat during Ramadan during the day when they are at school. Exhibit A at 321:6-22. There is no requirement at the school that food served in the cafeteria is halal. Exhibit B at 472:8-13.

v. Teachers are not required to maintain Islamic values

The Regional Director's conclusion that teachers are required to maintain “Islamic values” is misguided, since there was no evidence as to what “Islamic values” are, and many teachers at ISA are not even Muslim. ISA does not ask an interviewee for a teaching position what their religious is, since

“[t]hat's not a factor.” Id. Arabic studies teachers do not have to be Muslim, they only need Arabic to be their first language. Id. at 70:17-71:1. The only teacher who ISA requires to be Muslim is a teacher who teaches Islamic studies. Id. Only about sixty percent of the teachers at the school are Muslim. Exhibit A at 153:3-8. ISA has Christian teachers and had Jewish teachers but Acting Director General Schultz is not sure about now, since they do not ask about a teacher's religion. Exhibit A at 211:3-22. There are 102 teachers at ISA, and only 11 teach subject involving religion. Exhibit A at 304:19-305:6. Teachers at ISA can not be expected to “maintain the Islamic values” at ISA, since many of them are not Muslim and so would not know what “Islamic values” are.

vi. The dress code at ISA is the same as any other private school

The Regional Director's reliance on a “dress code” at ISA is clearly erroneous, since there is nothing religious about the dress code at ISA. ISA does not require religious garb to be worn at the school. Exhibit A at 152:22-24. There are some women at the school who choose to cover their hair or wear long gowns, but there are no women who cover their faces in the school. Exhibit A at 152:22-153:2. The school does not have a policy for women to cover all but their face and hands. Exhibit A at 185:17-21. The employer's own paid expert testified that in Saudi Arabia, women cover everything, including one eye, because that is their understanding of modesty. Exhibit A at 233:8-13. The dress code at the school is not religiously motivated. Exhibit A at 302:1-9. There is nothing religious about the dress code for students at the school, and the uniforms come from a large uniform company that many public and private schools use. Exhibit A at 303:15-304:17. Principal Alzakari has never spoken to a teacher about violating the “dress code” and is not aware of any discipline for the same. Exhibit B at 552:11-553:17.

2. ISA is Not Substantially Religious

i. Islamic Saudi Academy is not Substantially Religious Under Board Precedent

The Islamic Saudi Academy is not a religious school within the meaning of NLRB v. Catholic

Bishop of Chicago, 440 US 490 (1979). In Catholic Bishop, the United States Supreme Court held that schools which are church-operated are not subject to the the National Labor Relations Act. Id. at 504. The Catholic Bishop case involved two schools which the Supreme Court referred to as a “church-operated”. Id. The Catholic Bishop schools were actually run by the Catholic Bishop of Chicago and the Diocese of Fort Wayne-South Bend, Indiana. Id. at 492. The purpose of the Catholic Bishop schools was to train Priests and other Christian leaders (only after being recommended to the school by the student's parish priest). Id. The Supreme Court, throughout its decision, made it clear that its opinion only applied to schools which were operated by churches. Id. Of course, this decision may also apply to a school which is operated by a mosque. However, the Islamic Saudi Academy is not operated by a Mosque. It is operated by a non-religious (and non-Muslim) Director General and a non-religious Board of Directors. Exhibit A at 194:9-16 and 194:17-195:4 and 195:13-196:1 and 209:12-18. Many of the teachers and principals at ISA are also not Muslim. Exhibit C at 740:3-10 and 796:6-10. The Director General, who is the person who oversees and directs the school, is not Muslim. Exhibit A at 194:9-16. For these and other reasons, the employer is forced to argue that the school is operated by Saudi Arabia, which the employer is attempting to show is the same as a mosque. This argument is flawed, since Saudi Arabia is a Monarchy that is run by a King, and would lead to the ridiculous result that any business that Saudi Arabia chooses to run in the United States would not be subject to United States law.

Whether a school is church-operated depends on whether the school is “substantially religious.” In University of Great Falls, 331 NLRB 1663 (2000), the Board held that it had jurisdiction over the University of Great Falls since it did not have a “substantial religious character”. The Board held that “since Catholic Bishop, the Board has decided on a case-by-case basis whether a religion-affiliated school has a 'substantial religious character' and therefore whether the exercise of the Board's jurisdiction would present a significant risk of infringing on that employer's First Amendment rights.” Id. at 1664. Therefore, whether or not the Catholic Bishop jurisdictional bar applies to ISA depends on

whether ISA is “substantially religious” under Board jurisprudence.

The Board has repeatedly interpreted Catholic Bishop as standing for the proposition that it is the purpose of the school's operations and **the employees' role in effectuating that purpose** that dictates whether the school is substantially religious for purposes of the National Labor Relations Act. University of Great Falls at 1664. In Catholic Bishop, the Supreme Court similarly recognized the “critical and unique role” of teachers in fulfilling the “religious mission” of church operated schools. Catholic Bishop at 501. At ISA, only eleven (11) teachers teach Islamic studies, and ninety-one (91) teach non-religious subjects. Exhibit A at 304:19-305:6. There are many teachers at ISA who are not Muslim and non-Muslim teachers are not permitted to teach about Islam. The highest ranking official at the school, Acting Director Schultz, is not Muslim and neither are some of the principals and department heads. ISA's curriculum is modeled after Fairfax and Loudoun counties, and also incorporates subjects in Arabic and Islamic studies. ISA has completely submitted its curriculum to the IB curriculum for grades 11-12 and uses the MYP (IB) curriculum for grades 6-10, with the expectation that they will be certified to continue using MYP after this year. These, and many other facts which are listed above, establish that the teacher's purpose in the school is non-religious.

The Board uses other factors to determine whether a school is substantially religious for purposes of the Act. “The Board has not relied solely on the employer's affiliation with a religious organization, but rather has evaluated the purpose of the employer's operations, the role of the unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction.” University of Great Falls at 1664. “The Board considers such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious missions and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty.” Id. at 1664-65. The facts in this case show that all three of these criteria indicate that the Islamic Saudi Academy is not substantially religious, it is primarily a college-prep school. ISA itself has a college preparatory mission, not a religious mission. Students only take one course in religion

per semester. The school is not run by a religious organization, whether it be a Mosque or otherwise, and the Director General of the school is not even Muslim himself. Religious criteria are in no way used in the appointment and evaluation of faculty, and the school does not even ask about the religion of a candidate during an interview. Neither a mosque, or Saudi Arabia for that matter, are involved in the day-to-day operations of the school, including such matters of hiring and firing of faculty, modifying the curriculum and in purchasing supplies and materials, factors which were considered important by the Board in the University of Great Falls decision. The school uses a curriculum which is designed from the Virginia public schools, and has submitted otherwise to the curriculum of IB and MYP, a non-religious organization. ISA is accredited by many outside, non-religious organizations and there was no testimony indicating that ISA is a member of even one religious organization. ISA often places male and female students together in classes, on the bus and in other areas in the school, which is contrary to Islam. Male teachers teach female students and female teachers teach male students. Women are not required to cover themselves with a head scarf, hijab other otherwise at the school, and the school does not impose any religious food restrictions on faculty or students. These facts, and others, indicate that the ISA is primarily a secular school, which is consistent with the opinion of ISA's Director of Education.

ii. *Jewish Day School of Greater Washington, Inc. is Distinguishable*

Contrary to the Regional Director's decision, this case is distinguishable from Jewish Day School of Greater Washington, Inc., 283 NLRB 757 (1987). In Jewish Day School, fifteen (10) of the twenty-five (25) members of the board of governors for the school were required to be active in the "United Jewish Appeal and the Board of Jewish Education". Id. at 757. The responsibility of the board of governors included "maintaining a liaison with a UJAF, the Board of Jewish Education, and other Jewish community organizations." Id. At the time of the hearing, all thirty-three (33) members of the board of directors were Jewish and three (3) were rabbis. Id. The Board of directors determined the employer's policies and managed the affairs of the employer. Id. The bylaws required that the

education committee, which determined the school's educational policies, include religious educators.

Id. All members of the board of governors were required to be liaisons for Jewish organizations. There is no requirement for the board of directors for ISA to be Muslim and the Director General himself, who is a member of the board, is not Muslim. At ISA, the Board is not involved in the day-to—day activities at the school and the Director General testified that he has only met with the Board twice in his entire time at ISA.

The Jewish Day School received 20% of its funds from the UJAF, which was a religious organization. Id. The Islamic Saudi Academy receives zero dollars in funding from religious organizations. ISA receives 80% of its funds from the Foreign Ministry of Saudi Arabia and 20% of its funds from tuition, its transportation program and its lunch program. Exhibit C at 775:18-776:4.

The articles of incorporation in Jewish Day School provided that the Jewish faith shall be the only religion taught at the school. Id. at 758. There is no similar requirement at the ISA. In fact, teachers are not even asked about their religion during interviews and 40% of the teachers at the school are non-Muslim. The school uses a curriculum which is designed from the Virginia public schools, with the addition of Islamic Studies and Arabic (as a second language or as a first language), and has submitted otherwise to the curriculum of IB and MYP, a non-religious organization. There is a class called “Islamic studies”, but this deviation from Fairfax County's curriculum is only one out of 8 classes taught at the school for each grade. It is taught during only one of nine periods during the day. There was also some testimony that some of the Arabic Courses might have religious undertones, however, one class plus intermittent religious references in another class do not make the character of the curriculum “substantially religious.” Some teachers teach lessons which are contradictory to the tenets of Islam, and which are part of the IB curriculum, such as evolution, in vitro fertilization, stem cell research and effects of alcohol on the body. Exhibit B at 606:18-613:5; Exhibit A at 155:15-16.

The articles of incorporation in Jewish Day School also stated that the purpose of the school

was “[t]o establish, operate and maintain a synagogue or synagogues for religious worship and to provide for and conduct religious services in the Jewish faith in said synagogue or synagogues.” Jewish Day School at 758. In contrast, no statement by the employer Islamic Saudi Academy purports to have the purpose of establishing or maintaining a mosque or to conduct religious services. Every mission statement that the employer chose to provide to the Board contained statements that the mission of the school was for the students to excel academically while maintaining Muslim “character” or “values”. Nothing about any mission statement provided by the employer stated that the mission of the school was substantially Islamic or substantially religious. The mission statements are centered around academic excellence, and the Director of Education testified that this is what the mission statements meant to her. In fact, the “mission statement” provided by the employer is no longer the mission statement of the school. IB's mission and ISA's mission merged once ISA became a part of IB. Exhibit A at 255:8-256:1. IB's mission “is fostering intercultural awareness, promoting students to work together towards a better and more peaceful [world].” Id. ISA does not have their own school mission anymore. Id. IB's mission is also “to provide students with an academically rigorous program of study that will enable them to...be citizens of the world and to promote peace and to internalize what other people with their differences can also be right.” Exhibit A at 256:2-8. IB is not a religious organization and does not maintain any positions on religion. Exhibit A at 256:9-13. The Director of Education for ISA stated that ISA's mission statement in the documents is not consistent with how the school conducts its business, since it is not a religious school. Exhibit A at 317:2-22. The Director of Education also testified that ISA was required to adopt the IB mission statement when it submitted to the IB curriculum, so that IB's mission statement is also hanging in the school next to the original ISA mission statement. IB is a secular organization that requires a secular curriculum.

By way of further example of the non-religious interpretation of the mission statements that the employer provided, Employer's exhibit 15 is an informational brochure which is distributed to prospective parents and students at ISA. Exhibit A at 173:6-17. On the page marked as “1”, the

brochure states “ISA is a college-prep institution, which serves Pre-K through 12th grade students with an American curriculum, in addition to Arabic and Islamic Studies. ISA is fully accredited with SACS (Southern Association of Colleges and Schools) and CITA (Commission for International and Trans Regional Accreditation). The Academy seeks to provide students with a balanced and thorough education in English and Arabic with an atmosphere conducive to building Muslim character. Our bilingual curriculum enables our students to enter American, Saudi Arabian, or other colleges and universities.” Employer Exhibit 15. On the same page, the brochure states “[t]he mission of the Islamic Saudi Academy is primarily to enable our students to excel academically, while maintaining the values of Islam and proficiency with Arabic language. The Academy endeavors to provide a caring, challenging and supportive learning environment where students can achieve their highest potential while exhibiting civic responsibility and multicultural appreciation.” Id. This particular mission statement clearly indicates that the primary mission of the school is academic, not religious. It states that ISA is a college-preparatory institution that uses “American curriculum, in addition to Arabic and Islamic Studies.” I note that Islamic Studies is noted as only in addition to the “American curriculum.” Id. The mission statement also mentions “Muslim character”, but does not mention any religious purpose of the school. As ISA's Director of education explained, these “values” are not religious values, the values are “good character values.” Exhibit A at 317:2-320:5. Throughout this same brochure (contrary to certain witness statements), there are multiple pictures of male and female students studying, learning and riding the bus together. Employer's Exhibit 15 and Exhibit A at 187:25-192:14.

The students at ISA are not required to be Muslim. In contrast, in the Jewish Day School case, there was testimony that the purpose of the school was for “an intense Jewish education” so that the students “will choose an intense Judaic identity.” Id. at 758. This is not the case at ISA, where only one (1) religious class is taught during any semester. The Jewish Day School had 40% of the day spent in Judaic studies courses. Id. The Jewish Day School sought “to integrate the Judaic studies and

general studies programs.” Id. It is clear from the facts, exhibits and testimony that ISA does not attempt to integrate religion into its general curriculum, and there is no credible evidence that it does. At Jewish Day School, “the Employer seeks to integrate the Judaic studies and general studies programs...there is no line of demarcation between the two, and that 'the teaching of Judaism in all its elements is inextricably woven' into the secular courses.” Id. In contrast, many of the teachers at ISA are non-Muslim and know little or nothing of the Muslim faith. There was testimony that if the teacher is non-Muslim, the teacher is not permitted to teach anything about Islam. Furthermore, there are subjects taught at the school as part of the curriculum that are contrary to the teachings in Islam.

The Jewish Day school conducts separate orthodox, conservative, and reform prayer services in Hebrew in the morning. Id. All students are required to attend one of the services, and failure to do so results in suspensions and other discipline. Id. Full-time teachers who are present at Jewish Day School in the morning are required to attend. Id. at 758-759. At ISA, there is a short prayer time each day, but teachers are not required to pray or even to attend unless they are escorting their class to the period. There is no discipline policy for teachers who do not pray or attend the prayer session. The prayer lasts only about 7-10 minutes. Many of the teachers are non-Muslim. Prayer time is short, does not have its own period and is mixed into the lunch time. This is not a religious service as it was at the Jewish Day School. There is also a short reading from the Quran in the morning during the morning announcements, which lasts between 1 and 2 minutes. However, students are not required to attend since this is before school begins at 8AM and there is no discipline for not attending. Many students do not attend morning prayer time. Teachers are similarly not required to attend the morning announcements. At Jewish Day School, teachers were required to attend religious services, but there is obviously no such requirement at ISA.

Meals in the upper schools at Jewish Day School began with a benediction. Id. There is no similar requirement at ISA. Jewish Day School also required strict religious, kosher dietary restrictions. All witnesses agreed that ISA provides its students with Dominoes pizza twice per week.

Although there was conflicting testimony as to whether Dominoes pizza was halal, I ask that the Board use its common sense to determine whether Dominoes pizza is halal. I note that a quick web search will provide that the answer is “no”. At Jewish Day School, there were penalties if non-kosher food is brought to school. Id. Student lunches are not screened to check to see if they are halal, as students at ISA are not restricted in what they are permitted to eat in the school.

In Jewish Day School, boys were required to wear a religious cap. There is no similar dress code restriction at ISA. It is not required for the students to wear religious garb at ISA. There is no requirement for teachers to wear religious clothing, and the students wear a basic private school uniform. Neither female teachers nor female students are required to cover all but their face and hands. At ISA, no dress code is enforced and female students and teachers alike are not required to, and generally do not, wear a hijab.

I also note that the Jewish Day School decision emphasized that the Supreme Court's analysis in Catholic Bishop “focused on the teacher's role in effectuating a school's religious purpose. We note the Court's emphasis on 'the **critical and unique role of the teacher in fulfilling the mission of a church-operated school,** and its recognition that the teacher's 'key role' was 'the predicate' for its **holding in cases involving aid to parochial schools**” Jewish Day School at 761. At the Islamic Saudi Academy, there is no requirement that the teachers are Muslim, many of them are not Muslim and only one in eight classes is Islamic studies. In fact, the interviewers for teaching positions do not even ask applicants what their religion is, or if they even have one. The curriculum for most teachers is created by IB and MYP, outside non-religious organizations, so their lessons have nothing to do with religion.

Islamic Saudi Academy does not operate like a religious school, and has in fact allowed outside secular organizations to shape its curriculum and regulations. ISA submits to the IB curriculum for 11th and 12th grade and they are moving more grades into IB, which is not a religious organization and does not teach religion. Exhibit A at 209:19-210:23. ISA submitted to IB's curriculum for college preparation purposes. Exhibit A at 210:24-211:2. Acting Director Schultz admitted that college prep is

the school's main goal, or one of them, and that nearly every student who goes to ISA attends college. Exhibit A at 193:3-12. In 2010, ISA began to implement the MYP, which is based on the IB curriculum, but although they are teaching MYP, they are not approved yet. Exhibit A at 273:25-274:21. IB's mission and ISA's mission merged once ISA became a part of IB. Exhibit A at 255:8-256:1. IB's mission "is fostering intercultural awareness, promoting students to work together towards a better and more peaceful [world]." Id. ISA does not have their own stated school mission anymore. Id. The Director of Education testified that the students are not gaining religious knowledge from the school, since the school is secular. Exhibit A at 318:21-319:7. The Director of Education supported her statement by explaining that religion is reserved to a 45-minute period and prayer is constrained to 10 only minutes, and that religious values do not permeate throughout the day—values of good character permeate throughout the school but religious values do not. Exhibit A at 319:8-320:5. ISA is required to pay IB to administer IB tests to their students each year, based on the IB program. All students in grades 11 and 12 were administered IB tests this year. Exhibit A at 93:10-17. IB staff regularly observe and investigate classes at ISA to make sure ISA is carrying out the IB education. Exhibit A at 93:23-94:2. Before each year, IB staff regularly visit for accreditation and go through ISA's curriculum. Exhibit A at 94:3-20. ISA is required to follow the IB curriculum, which IB submits to ISA, and IB is very demanding on ISA. Id. ISA does not design or originate final tests to their IB students, ISA must purchase the tests from IB. Exhibit A at 94:14-95:1.

ISA does not run independently, since it submits to IB's curriculum, to various accreditation organizations and also to the regulations and laws of Virginia. ISA is accredited by an American association called AdvancED, so that they may provide their students with a typical American high school diploma. Exhibit A at 89:19-90:8. ISA had to go through an accreditation process with AdvancED. Id. AdvancED is not affiliated with religion, and most public schools in Virginia are accredited by AdvancED. Exhibit A at 265:5-10. ISA received a certificate from the Virginia Private School Association, a small organization that is part of AdvancED SACS. Exhibit A at 266:3-6. After it

applied, ISA became a member of the National Honor Society, which is not a religious organization.

Exhibit A at 266:7-267:21. ISA is a member of International Baccalaureate (IB), which is an academic program which prescribes the curriculum that ISA must follow. Exhibit A at 90:23-91:19. ISA is also a member of the Northern Virginia Independent Athletic Conference, which is a competitive sporting conference where the schools compete against each other, and this is a non-religious conference.

Exhibit B at 635:19-636:17. The school further submitted to the laws in Virginia and in the United States when it incorporated the school in 2009.

iii. Other Relevant Board Precedent

Since the United States Supreme Court Catholic Bishop decision, the Board has reviewed several cases relating to whether a school is “church-operated”. To my knowledge, the Board has never declined jurisdiction for a school that is not actually run by a religious organization, since it would not be “church-operated”. I specifically point the Board to cases such as University of Great Falls, Carroll College and Livingstone College. The Regional Director declined mention Carroll College or Livingstone College in his June 14, 2012 Decision.

In Livingstone College, 286 NLRB 1308 (1987), the Board asserted jurisdiction over a college that was affiliated with the African Methodist Episcopal (AME) Zion Church. The Board found that “the assertion of jurisdiction would not create the same significant risk of entanglement between church and state as that envisioned by the Court in Catholic Bishop.” Id. at 1308. Livingstone College is a university which also maintains a theological seminary. Id. Although Livingstone College received much of its funding from the Church and half of the members of the board of trustees were required to be bishops (the senior bishop of the church would serve as chairman of the board), the Board asserted jurisdiction. Id. Similar to the written “mission statement” at Islamic Saudi Academy, the faculty handbook in Livingstone College “aims primarily to foster higher education in an atmosphere supportive of Christian values contributing to moral integrity and human dignity.” Id. at 1307. Also worth noting is that the the Church in Livingstone College owned the school's property. Id. at 1310.

The Board found that the purpose of Livingstone College was primarily secular, the college was not financially dependent on the church and the church was not involved in the day-to-day administration of the college. The Board deemed it particularly significant that the college's faculty members were not required to conform to Church doctrine or promote the Church's ideals, nor were they prohibited from knowingly inculcating ideas that are contrary to the Church's position on matters of faith and morals. Id. at 1309-10. In sum, the Board held that “[t]he absence of a religious mission, and the absence of a requirement that the faculty propagate or conform to a particular religious faith significantly diminishes any risk of impermissible constitutional infringement posed by asserting jurisdiction over the College.” Id. at 1310. Livingstone College is similar to the case at bar, since the mission statements are substantially the same and since there is no religious organization which is involved in the day-to-day at ISA. The faculty members at ISA are also not required to conform or promote any Islamic ideals, and are not ever asked about religion by the school. For these reasons, and for all of the other reasons discussed above, there is no risk of impermissible constitutional infringement posed by asserting jurisdiction over the ISA.

As described above, the Board in University of Great Falls asserted jurisdiction over a university affiliated with a religious organization. “The Regional Director found that neither the Order nor the Catholic Church is involved directly in the day-to-day administration of the University, including such matters as hiring and firing of faculty, modifying the curriculum, and purchasing educational supplies and materials.” Id. at 1665. At ISA, no religious organization is involved in the day-to-day at the school and the Acting Director General is not even Muslim. Some parts of the curriculum are modeled after Virginia public schools and other parts are created exclusively by and are imposed by IB, an outside, non-religious organization. “Most significantly, the Regional Director found that the propagation of a religious faith is not the primary purpose of the Respondent, but rather that the University's purpose and function are primarily secular” since “(1) the curriculum does not require the Catholic faith to be emphasized, nor is there in fact a particular emphasis on Catholicism;

(2) the Respondent's board of trustees is not required to establish policies consistent with the Catholic religion; (3) the University's president and other administrators are lay persons who need not be members of the Catholic faith; (4) faculty members are not required to be Catholics, to teach Church doctrine, or to support the Church or its teachings; (5) students may come from any religious background, and no preference is given to applicants of the Catholic faith; of approximately 1450 students, only about 32 percent are Catholic; and (6) although undergraduate students are required to take one course in religious studies, the course does not have to be one involving Catholicism." *Id* at 1665-66. At ISA, Islam is not emphasized in the curriculum, and in fact, only one class religious class is taken by a student each year. There are also no religious or Islamic studies electives which are offered by the school. There is no evidence at the Director General, or the Board for that matter, is required to establish any religious policies at ISA. There is no evidence that any of the administrators are required to be Muslim, and in fact, many principals and department heads are non-Muslim, as is the Director General. Faculty are not required to be Muslim, many of them are non-Muslim, and the school does not ask their religion at the interview for the teaching position. ISA accepts students regardless of their religion, and there have been non-Muslim students in the past. Students at ISA only take one course in religion (Islamic Studies) per semester and out of 9 periods per day, only one period is spent in Islamic Studies (45 minutes). For these, and all of the other reasons above, ISA is not substantially religious under University of Great Falls.

In Carroll College, 345 NLRB 254 (2005), the Board asserted jurisdiction over a college which was "affiliated" and "related" with the Presbyterian Church and synod. "The College and the Church are parties to a covenant" which commits the board of trustees to "(1) recognize and affirm its origin and heritage in the concern of the Church for intellectual and spiritual growth of its students, faculty, administration, and staff; (2) offer education of high quality committed to the wholeness of life interpreted and illuminated by the Christian faith; (3) continue to be a liberal arts institution that offers classes with a goal of academic excellence; (4) relate to the whole Church; (5) recognize opportunity to

provide leadership to the Church; (6) administer church gifts faithfully...and (9) nominate and elect at least one Presbyterian minister in each elected class of the board of trustees.” Id. at 255. Carroll College's mission statement included “[w]e will demonstrate Christian values by our example.” Id. The board of trustees of Carroll College adopted a statement of Christian Purpose: “The Christian purpose of Carroll College is summarized in its motto 'Christo et Litteris'—for Christ and Learning. By means of a faculty dedicated to the Christian purpose and assured of the academic freedom necessary to the performance of its tasks, the college seeks to provide a learning community devoted to academic excellence and congenial to Christian witness. To this learning community, the college welcomes all inquirers.” Id. Despite these written church statements, the Board asserted jurisdiction over Carroll College since (1) faculty were not required to subscribe to the Christian faith or to teach or promote the goals or values of the Church or of Christianity Id.; (2) the College's materials stated that the College could not discriminate against applicants based on their religion Id. at 258; (3) no faculty member was ever disciplined, denied promotion or salary increase for engaging in conduct contrary to the teachings of the Church Id. at 259; and (4) No religious-based disputes have arisen as a result of collective bargaining. Id. Faculty at ISA are not required to subscribe to the Muslim faith or teach the values of Islam. ISA has an anti-religion discrimination policy which states that “Behavior that discriminates because of race, color, national origin, sex, religion, age, or disability with reasonable accommodation will not be tolerated; nor will sexual harassment in any form, verbal or physical, be allowed.” Employer Exhibit 2 at page 31 [emphasis added]. The lease agreement between ISA and Fairfax County for the school property also contains multiple provisions which choose the laws of Virginia and the United States as the applicable laws in relation to the use of the school building. Employer Exhibit 42. These applicable laws include Virginia non-discrimination laws and US laws relating to non-discrimination based on religion, including Title VII of the Civil Rights Act of 1964. Faculty are not told to teach Islam and, in fact, the curriculum includes topics and lessons which are directly contrary to Islamic beliefs. There is no history of collective bargaining at the school, so this inquiry does not

apply to ISA. For these reasons, and for all of the other reasons above, the ISA is not “substantially religious” under the meaning of Catholic Bishop.

In analyzing this case in the context of the Religious Freedom Restoration Act, the Board in Carroll College asserted “[n]or will application of the Act compel the Employer to engage in conduct that its religion forbids or prevent it from engaging in conduct that its religion requires. Indeed, the Employer does not claim that Presbyterian doctrine forbids collective bargaining or requires it to engage in unfair labor practices.” Id. “Additionally, there is no evidence that the fact that the Employer may have to bargain with the Petitioner puts pressure on the Employer to modify its religious behavior or to violate its beliefs.” Id. at 260. These polices apply equally to ISAEPA's collective bargaining unit, where there is no evidence that Islam prohibits collective bargaining or that the school will have to modify any policies, curriculum, or anything else, because of collective bargaining.

Finally, the first Amendment concerns that are raised by ISA are not present here. There is no chilling effect on religion by the Board exercising jurisdiction over this school, which would force management to bargain with the employees. It similarly would not excessively entangle itself in religion. Management are not religious officials at this school, indeed many are not even Muslim. The Director General is not Muslim. There can be no chilling of religion of the school, since it is not run by a Mosque or any other religious organization. Application of the Act will not compel the employer to engage in conduct that its religion forbids, or prevent the school from engaging in conduct that its religion requires. The employer has not claimed that Islam forbids collective bargaining or requires it to engage in unfair labor practices. There is no evidence that the fact that ISA may have to bargain with the Petitioner puts pressure on ISA to modify its behavior or violate any beliefs.

3. Department Heads Are Not Supervisors Under the Act

The Regional Director did not discuss or reach the issue of whether Department Heads are

supervisors under §2(11) of the Act. *See* June 14, 2012 Regional Director Decision and Direction of Election, page. 3, fn. 2. Since the Regional Director did not even discuss the issue of whether the department heads at ISA are supervisors under the Act, his decision is clearly erroneous under Section 102.67(C) of the Board's Rules and Regulations.

Department Heads are not supervisors under §2(11) of the Act. The burden of establishing supervisory status rests on the party asserting that status. NLRB v. Kentucky River Community Care, 532 US 706, 711-712 (2001). In this case, Islamic Saudi Academy is asserting that Department Heads are supervisors under the Act. Any lack of evidence is construed against the party asserting the supervisory status. Elmburst Extended Care Facilities, 329 NLRB 535 fn. 8 (1999). Conclusory statement without supporting evidence do not establish supervisory authority. Volair Contractors, Inc., 341 NLRB 673 (2004). Supervisory status must be proven and conclusory evidence will not satisfy the burden of proof. Lynwood Manor, 350 NLRB 489 (2007). It is an individual's duties, not job title, that determines status. Dole Fresh Vegetables, Inc., 339 NLRB 785 (2003).

In each case, whether an employee is a supervisor depends on the differentiation between the exercise of independent judgment and the routine following of instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact. *See* Chevron Shipping Co., 317 NLRB 379 (1995); J.C. Brock Corp., 314 NLRB 157 (1994); Clark Marine Corp., 308 NLRB 555 (1992); McCullough Environmental Services, 306 NLRB 565 (1992); Quadrex Environmental Co., 308 NLRB 101 (1992), all of which found no independent judgment. Where recommendations concerning discipline or reward “were not shown to be effective or to result in personnel action being taken without resort to individual investigation by higher authority,” a nonsupervisory determination must follow. Hawaiian Telephone Co., 186 NLRB 1 (1970); Mower Lumbar Co., 276 NLRB 766 (1985). Mere suggestions are not effective recommendations. Brown & Root, Inc., 314 NLRB 19 (1994). Authority to submit reports on employee conduct that are merely records of instruction or are investigated independently, does not establish supervisory status.

Williamette Industries, 336 NLRB 743 (2001); Ken-Crest Services, 335 NLRB 777 (2001). Occasional isolated instances of actions which might otherwise be indicative of supervisory authority are insufficient to predicate a supervisory finding. Volair Contractor, Inc., *supra*; Kanawho Stone Co., 334 NLRB 235 (2001); Commercial Fleet Wash, 190 NLRB 326 (1971). Where any authority by a supervisor is not actually exercised, the employee is not a supervisor. Northwest Steel, 200 NLRB 108 (1972).

Section 2(11) of the Act defines the term “supervisor” as:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

National Labor Relations Act, §2(11).

The employer has not met its burden in establishing that Department Heads are supervisors within the meaning of the Act. Employer's Exhibit 5 is a position description for department heads. Exhibit A at 181:1-7. Exhibit 5 is an accurate description of the department head position, but does not mention anything about hiring teachers. Exhibit B at 478:4-24. Nothing in the position description for department heads would suggest that department heads are supervisors within the meaning of section 2(11) of the Act. *See* Employer Exhibit 5.

Hiring decisions are made by a committee and there is no evidence that the department uses any independent judgment about the hiring of a teacher. The personnel department decides who will get an interview for a position at ISA. Exhibit A at 67:23-68:17. The personnel department will invite principals, vice principals, assistant principals and department chair (aka department head) to conduct an interview. Id. The HR person collects the summaries from each of the persons present at the interview and asks the principal whether they want to hire the candidate. Id. Department heads are present during interviews of teachers, and the principal respects the Department head's judgment

regarding resumes. Exhibit B at 345:10-22. Each person at the interview will complete an evaluation form for the candidate and then give it to the personnel department. Exhibit B at 352:9-353:5. Ms. Turkistani testified that the candidate for the position is chosen “[b]ased on, you know, everybody’s opinion on that person. We ask questions. We make sure that this person is qualified. Most of the time, it is the department heads who decide if that person is fit or not.” Exhibit B at 359:10-13. Ms. Turkistani could not remember any specific instances of hiring a teacher. Exhibit B at 360:15-19. Despite the fact that she could not recall any specific instances of hiring a teacher, Ms. Turkistani testified that she always asks the department head how she feels about the candidate and if the department head is comfortable with the candidate, since the department head is the one who works with the candidate, it is fine with her. Exhibit B at 362:17-20. The Director General is the person who has the final say and signs the contract. Exhibit B at 363:4-7. Ms. Turkistani testified that she values the opinion of the department head since the department head has to work with the teacher. Exhibit B at 364:13-23. Whether or not a teacher is hired is done by consensus of the committee consisting of boy’s principal, girl’s principal, department head, HR person and director of education, but if there is a disagreement, the boy’s or girl’s principal will make the decision. Exhibit C at 701:14-704:11. Mere suggestions are not effective recommendations. Brown & Root, Inc., 314 NLRB 19 (1994). Supervisory status must be proven and conclusory evidence will not satisfy the burden of proof. Lynwood Manor, 350 NLRB 489 (2007). The employer has not met its burden to prove that department heads exercise independent judgment in hiring.

The employer may attempt to argue that the evaluations done for teachers by department heads are indicative of supervisory authority. However, the authority to evaluate is not a supervisory indicia if the evaluation does not affect employee status or tenure. Volair Contractors, Inc., 341 NLRB 673 (2004). The evidence shows that the evaluations do not affect compensation, status or tenure of the teachers. Ms. Turkistani testified that department heads prepare evaluations for teachers. Exhibit B at 368:7-8. She has made changes to department head evaluations of teachers. Exhibit B at 369:5-370:2.

Only new teachers get evaluated. Exhibit B at 370:3-16. She receives 3-4 evaluations from each department head per year, since teachers are not evaluated every year. Exhibit B at 371:12-19. Ms. Turkistani testified that she used evaluations and spoke to department heads when she made the decision of whether or not to extend a teacher's contract, but she could not remember any specific example of when she spoke to a department head about promoting an employee and did not give any examples of when she spoke to department heads about extending a teacher to keep their contract. Exhibit B at 374:11-375:3. Ms. Turkistani testified that if she is told that a teacher is not good, she will look at the evaluations to see if the contract should be extended to the teacher, however, she could not remember any time that this happened. Exhibit B at 474:5-19. As the principal, she recommends to the Director General when a teacher should not have a contract extended, and she requires the consensus of the department head, but neither she nor the department head can fire a teacher.. Exhibit B at 474:5-475:21. Evaluations do not have any effect on a teacher's salary or other benefits. Exhibit C at 707:20-708:2. Supervisory status must be proven and conclusory evidence will not satisfy the burden of proof. Lynwood Manor, 350 NLRB 489 (2007). Where recommendations concerning discipline or reward “were not shown to be effective or to result in personnel action being taken without resort to individual investigation by higher authority,” a nonsupervisory determination must follow. Hawaiian Telephone Co., 186 NLRB 1 (1970); Mower Lumbar Co., 276 NLRB 766 (1985). Mere suggestions are not effective recommendations. Brown & Root, Inc., 314 NLRB 19 (1994). Authority to submit reports on employee conduct that are merely records of instruction or are investigated independently, does not establish supervisory status. Williamette Industries, 336 NLRB 743 (2001); Ken-Crest Services, 335 NLRB 777 (2001). The employer has not met its burden to prove that teacher evaluations have any effect on a teacher's tenure, status or compensation.

The employer may argue that department head review of teacher lesson plans are indicative of supervisory status. However, nothing about the lesson plans has anything to do with supervisory status. The lesson plans do not affect compensation, status or tenure of a teacher. The Department head for the

girls' social studies department (8 teachers) receives weekly lesson plans from each of the 8 teachers and the department head responds to them if she needs to, such as one time when she suggested to a teacher that the teacher would be better off not showing a movie. Exhibit C at 659:24-662:5. The department head does not often do anything with lesson plans, maybe 0-2 times per month. Exhibit C at 662:6-663:3. She cannot read the lesson plans for the Arabic Social Studies classes. Exhibit C at 740:20-741:11. The Social Studies department head makes the substitute teacher schedule, and if the teacher knows they will be out, it is the teacher's responsibility to get the lesson plan to the substitute teacher, but if the teacher does not know they will be out, the substitute teacher will use an emergency lesson plan which was designed by the teacher. Exhibit B at 664:4-668:22.

Department heads do not promote employees, grant time off for employees, grant vacation time to employees. Exhibit B at 377:2-378:15. Department heads cannot transfer teachers. Exhibit B at 398:12-21. The assistant principal makes the teacher schedule, not the department head. Exhibit B at 403:24-404:2 and 405:13-14.

The employer may argue that department heads have the ability to effectively recommend termination. However, they do not have any such authority. Ms. Turkistani testified that she could not remember a specific example of a teacher whose contract was not renewed, but that she had a vague recollection of one teacher that was probably two years ago in the social studies department whose contract was not renewed. Exhibit B at 385:11-386:22. She further testified that the department head was not happy so she (the principal) personally observed the teacher and after she personally observed the teacher, the Director General terminated the teacher after a recommendation from the Department Head and the principal. Exhibit B at 386:23-391:21. Department heads do not have any authority to terminate teachers. Exhibit C at 738:17-19. A department head complained to the principal of the girl's school about a teacher over a period of about 2 months and the Director General eventually terminated the teacher. Exhibit B at 432:22-437:15. Ms. Rader, girls' social studies department head, testified that once there was a problem with a teacher and she and the boys' school principal and the girls' school

principal talked about the teacher but she cannot remember what they talked about, but the decision to terminate this teacher was “a mutual agreement” between the two principals, maybe the director of education and maybe the Director General.” Exhibit C at 677:16-681:4. Ms. Rader also testified that she recommended termination for 2 teachers in years past, who were not offered new contracts to stay at the school, but those decisions were made at a higher level—there is no testimony regarding the reasons those teachers were not offered new contracts, who decided not to extend new contracts to those teachers, or whether those teachers ever sought to have new contracts. Exhibit B at 693:19-696:25. Where recommendations concerning discipline or reward “were not shown to be effective or to result in personnel action being taken without resort to individual investigation by higher authority,” a nonsupervisory determination must follow. Hawaiian Telephone Co., 186 NLRB 1 (1970); Mower Lumbar Co., 276 NLRB 766 (1985). Mere suggestions are not effective recommendations. Brown & Root, Inc., 314 NLRB 19 (1994). Authority to submit reports on employee conduct that are merely records of instruction or are investigated independently, does not establish supervisory status. Williamette Industries, 336 NLRB 743 (2001); Ken-Crest Services, 335 NLRB 777 (2001). Quality-control work, such as inspecting and reporting the work of others, is not supervisory. Brown & Root, Inc., 314 NLRB 19, 21 fn. 6 (1994). Authority to issue instructions and minor orders based on greater job skills does not amount to supervisory authority. Byers Engineering Corp., 324 NLRB 740 (1997). Although an individual's duties may include relaying to management complaints of inefficiency, if these are investigated independently by higher management, he is not a supervisor under the Act. Pepsi-Cola Bottling Co., 154 NLRB 490, 493-494 (1965). The employer has not met its burden to show any effective recommendation by department heads. The principal independently investigates teachers and there is no evidence that the department head report resulted in the termination of any teacher.

The employer had only one department head, Ms. Rader, testify regarding her duties. Ms. Rader testified that she does not know how any department heads, other than herself, fulfill their duties.

Exhibit C at 739:2-7. Therefore, her testimony is only applicable to her department head position.

Ms. Turkistani is the principal for the girls' school, and has no involvement with the department heads for the boys' school. Exhibit B at 475:22-476:5.

Mr. Alzakari, principal of the boys' school since June 2011, testified that department heads report to him and approve leave for teachers before he approves the same leave for teachers. Exhibit B at 508:15-511:4. Therefore, there is no independent judgment or authority, since the leave form also needs to be signed by the principal.

Ms. Alzakari testified that the procedure for hiring teachers begins with HR sending out an email to him, the department head and others, and he recommends which teachers are to be interviewed. Exhibit B at 579:23-581:24. The interview committee consists of various principals, the department head and school admin or personnel. Exhibit B at 581:20-582:8. After the candidate leaves, everyone except personnel fills out an evaluation form and gives it to personnel, and personnel later lets him know who was selected for the position. Exhibit B at 583:25-585:13. The Director General is the only one who may make the decision to hire and fire teachers. Exhibit B at 585:14-19. The principal does not have to follow any recommendation that a department head makes for hiring. Exhibit C at 738:7-10. There is nothing within Mr. Alzakari's testimony about hiring of teachers which would indicate supervisory authority for department heads.

The principal for the boys' school did not testify about any department head involvement in transferring teachers or disciplining teachers. Exhibit B at 585:20-590:5. Teachers are not promoted and he does not know about bonuses. Exhibit B at 590:6-591:13. Evaluations given to him by department heads have never resulted in discipline and he does not know of any time that it affected the teacher's compensation. Exhibit B at 593:3-594:20. Only the Director General can fire teachers. Exhibit B at 594:21-595:16. Mr. Kovalik, a teacher, was counseled for punctuality and the counseling was done by the principal with no involvement from the department head. Exhibit B at 640:20-641:9. The vice principal is in charge of discipline of students, not the department head. Exhibit B at 645:23-

646:6. Teacher Kovalik testified that if he is approved for leave, he is notified by the principal or the secretary, not the department head. Exhibit B at 642:4-643:13.

V. CONCLUSION

The Regional Director erred both factually and legally and in his application of clear Board precedent concerning whether Islamic Saudi Academy is substantially religious such that the Board should decline to exercise its jurisdiction. None of the teachers, except for the 11 Islamic Studies teachers, teach any religious subjects to the students at the school. 102 teachers teach secular subjects at the school. The regional Director also erred in declining to determine whether department heads at the school are supervisors under the Act. The Board should not permit the Regional Director's errors to survive and spread. The Board should take review and should clarify the application of Board precedent to the facts of this case.

Saudi Arabia seeks to run a commercial school of more than six-hundred (600) students within the United States, without being subject to United States labor law. The school has attempted to shield itself from United States laws in the past, as is demonstrated in the Ghawanmeh case. Ghawanmeh v. Islamic Saudi Academy, 672 F. Supp.2d 3 (2009) (holding, *inter alia*, that Islamic Saudi Academy is not immune from Title VII of the Civil Rights Act and Family and Medical Leave Act, since the Foreign Sovereign Immunities Act does not bar jurisdiction over the school). The US District Court in DC did not allow ISA to be immune from United States law, and neither should the National Labor relations Board.

ISA not a church-operated school within the meaning of the Supreme Court case Catholic Bishop and its progeny, since, *inter alia*, it is not run by a religious organization, the Acting Director General of the school is not Muslim, the curriculum is based on Virginia public schools and controlled in large part by an outside, non-religious organization, many teachers and high-ranking administrators at the school are non-Muslim, the school is accredited by numerous non-religious organizations, the

school does not follow many tenets of Islam and the purpose of the school is substantially for non-religious college preparation. Petitioner respectfully requests that the National Labor Relations Board assert jurisdiction over the Islamic Saudi Academy, find the petitioned-for unit appropriate, including the department heads, and set an election date.

Respectfully Submitted,

/s/

Kevin M. Plessner
Law Office of Kevin M. Plessner
228 Homewood Rd.
Linthicum, MD 21090
Tel. 267-340-7024

Attorney and Representative for ISAEPA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **PETITIONER'S POST-HEARING BRIEF** was served by sending a true and correct copy via email on this 27th day of June, 2012, to the parties listed below:

Joseph B. Farrell
LATHAM & WATKINS LLP
355 South Grand Avenue
Los Angeles, CA 90071-1560
Email: joe.farrell@lw.com

Maureen Mahoney
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
Email: maureen.mahoney@lw.com

Abid Qureshi
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
Email: abid.qureshi@lw.com

Paul T. Crane
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
Email: Paul.Crane@lw.com

Daniel M. Heltzer
Field Attorney
National Labor Relations Board, Region 5
Email: Daniel.Heltzer@nlrb.gov

/s/
Kevin M. Plessner
Attorney and Representative for ISAEPA