

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

HYDE LEADERSHIP CHARTER SCHOOL - BROOKLYN
Employer-Petitioner

and

Case No. 29-RM-126444

UNITED FEDERATION OF TEACHERS,
LOCAL 2, AFT, AFL-CIO
Union¹

DECISION AND DIRECTION OF ELECTION

The Hyde Leadership Charter School – Brooklyn (“the Employer”) is a charter school located in Brooklyn, New York. The United Federation of Teachers, Local 2, AFT, AFL-CIO (“the Union”) is a labor organization claiming to represent a unit of approximately 35 teachers employed by the Employer. On April 14, 2014, the Union filed a petition² with the New York State Public Employment Relations Board (“PERB”), seeking to be certified as the teachers’ bargaining representative under state law covering public employees. However, on the same day, the Employer filed the instant representation petition under Section 9(c) of the National Labor Relations Act (“the Act” or the “NLRA”) seeking an election in the same unit of charter school employees. The school contends that it is an employer subject to the jurisdiction of the National Labor Relations Board (“Board”). By contrast, the Union contends that the school is a “state or political subdivision thereof,” i.e., a public entity excluded from the definition of

¹ The Petitioner’s name has been corrected to include its affiliations with the American Federation of Teachers and the AFL-CIO.

“employer” in Section 2(2) of the Act. The Union moved to dismiss the Employer’s NLRB petition for lack of jurisdiction. Thus, this case essentially raises the jurisdictional issue of whether the charter school is a public or private entity.

A hearing on these issues was held before Lynda Tooker, a Hearing Officer of the Board. In support of its position, the Employer called its executive director, Sandra DuPree, to testify. The Union called one witness, Christina Collins, who is the lead researcher and policy analyst for the United Federation of Teachers’ Alliance of Charter Teachers and Staff. Generally speaking, the facts herein are not disputed, although the parties obviously draw different conclusions regarding the legal and policy issues raised by those facts. The parties introduced numerous documents as joint exhibits,³ including a copy of the New York State Charters Schools Act, documents regarding the creation of the Hyde Leadership Charter School in Brooklyn in 2010, and subsequent annual reports and financial statements.

Pursuant to Section 3(b) of the Act, the Board has delegated authority in this proceeding to the undersigned Regional Director.

For the reasons discussed below, I conclude that under such recent Board cases as Chicago Mathematics & Science Academy Charter School, Inc., 359 NLRB No. 41 (2012), the Hyde Leadership Charter School – Brooklyn must be considered a government contractor and employer subject to the Board’s jurisdiction. I will therefore direct an election below among employees in the petitioned-for unit.

² See Union Exhibit 3.

³ References to the record will hereinafter be abbreviated as follows: “Jt. Ex. #” and “Un. Ex. #” refer to Joint Exhibit numbers and Union Exhibit numbers, respectively.

I. The New York State Charter Schools Act of 1998

New York State enacted its Charter Schools Act in 1998.⁴ The statute established a complex regulatory scheme which keeps charter schools within the public realm in many respects, but which also exempts charter schools from many public-school laws and regulations. This somewhat “hybrid” nature is apparent from the very first section, declaring that the purpose of the act is both “to establish and maintain schools that operate *independently* of existing schools and schools districts,” but also to give families more choices “*within the public school system.*” §2850(2), emphasis added. As the State’s highest court has acknowledged: “[T]he status of charter schools has often been difficult to define because they may not be easily identified as either a purely private or public entity.” New York Charter School Association et al. v. Smith, 15 N.Y.3d 403, 410 (2010).

A. Procedure for establishing a charter school

Under the New York Charter Schools Act, an application to establish a charter school may be submitted by individuals, such as teachers, parents, school administrators and community residents. §2851(1). The application may be filed “in conjunction with” a college, university, museum, educational institution, non-profit corporation under Section 501(c)(3) of the Internal Revenue Code, or with a for-profit corporation authorized to do business in New York State. §2851(1). However, the name of the proposed charter school may not include the name or identification of a for-profit business or corporate entity. §2851(2)(k).

⁴ The Charter Schools Act is codified at Sections 2850 - 2857 of New York State’s Education Law (Chapter 16 of the State’s Consolidated Laws). The full text, as subsequently amended and as published by McKinney’s, was entered into the record in this case as Joint Exhibit 16. The full legal citation is N.Y.

The individuals' application must be submitted to a "charter entity," defined as either a local school district, a city school Chancellor, or the New York State Board of Regents.⁵ §2851(3). However, only the Board of Regents is authorized to issue a charter. §2851(3)(c). There is no dispute that both the New York City Department of Education (headed by a Chancellor) and the New York State Education Department are public entities, or state "political subdivisions" in the parlance of Section 2(2) of the NLRA.

The application must contain detailed information about the proposed school, including its educational program, governance structure, fiscal plan, admission policies, specific student achievement goals, the location of the school (if known) and how students will be transported to the school. §2851(2). The proposed governance structure must include a list of the initial "board of trustees" members, and the method of appointment for future trustees. §2851(2)(c). The application must also give background information regarding the applicant and proposed trustees. §2851(2)(m). There is no requirement that the trustees include public officials, nor must the trustees be appointed by public officials. The proposed charter may be for a term of up to five years. §2851(2)(p), and the charter may be renewed upon application and approval. §2851(4).

Notice of a proposed charter school must be given to the local school district, with opportunity for community comment. §2857. If the applicants seek to "convert" an *existing* public school into a charter school, the charter entity must require that parents of

Educ. Law §§2850-2857 (McKinney's 2014). For the sake of brevity, citations to specific provisions of the Charter Schools Act will hereinafter be referred only by the section numbers.

⁵ The New York State Education Department is formally considered part of the "The University of the State of New York," which is governed by the Board of Regents. The state Commissioner of Education is also known as president of "The University." Thus, charters are officially granted by the "Board of Regents of The University of the State of New York, for and on behalf of the State Education Department." (See Jt. Ex. 4.)

the majority of students in the existing public school vote in favor of the “conversion.”

§2851(3). Existing private schools may not be converted into public charter schools.

§2852(3).

The charter school may be located in part of an existing public school building, or in another public building, or in a private building. §2853(3)(a). However, before a charter school is co-located within an existing public school, the charter entity must provide notice to parents of the students enrolled in the existing public school, and hold a public hearing on the proposed “usage plan”. Id. A decision regarding “co-location” may be appealed to the NYS Education Commissioner. §2853(3)(a-5).

If the public “charter entity” approves the application, then the charter entity and the applicant must enter into a proposed charter agreement. §2852(5). The charter entity must then submit the proposed charter agreement to the NYS Board of Regents.

§2852(5). If the Board of Regents approves the proposed charter, it officially incorporates the new entity as a non-profit “education corporation,” and issues “provisional charter” for the purpose of operating the charter school for up to five years.

§2853(1).⁶ Trustees of the newly-approved school must obtain federal tax-exempt status under Section 501(c)(3) within one year. §2853(1).

Once the Board of Regents has approved a charter, the board of trustees has final authority for “policy and operational decisions of the school.” §2853(1)(f).

Nevertheless, the Board of Regents and the charter entity have responsibility to oversee charter schools, to ensure that they are in compliance with all applicable laws, regulations and charter provisions. §2853(2). They may visit the school and inspect its records.

§2853(2). Each charter school must submit detailed annual reports to the charter entity and to the NYS Board of Regents. §2857.

Charter schools in New York receive public funding. Specifically, the public school district pays a certain amount (called the “tuition”) for each student enrolled in the charter school within its district, plus additional funding for students with disabilities.

§2856. The schools are also allowed to accept private donations and gifts. §2856(3).

Charter schools do not have to pay “rent” or other fees for their use of space in public school buildings.

⁶ New York State law provides for various types of incorporations, including incorporation for business purposes under Chapter 4 of NY State’s Consolidated Laws (“the Business Corporation Law”) and for certain charitable or other non-profit purposes under Chapter 35 of the Consolidated Laws (“the Not-for-Profit Corporation Law”). The Board of Regents’ authority to approve the incorporation of “education corporations” is generally granted in Sections 216 and 217 of the Education Law (Chapter 16), and specifically granted for charter schools under the Charter Schools Act (Article 56 of Chapter 16). An education corporation, therefore, is a legal entity with specific rights and obligations under the state’s Education Law. Under Section 216, an education corporation may not be formed under the Business Corporation Law or the Not-for-Profit Corporation Law without the Board of Regents’ consent. Section 216-a of the Education Law specifies the extent to which education corporations are, and are not, subject to the Not-for-Profit Corporation Law. As noted above, when the Board of Regents incorporates a charter school, it is creating an “education corporation” under the Education Law, although the newly-chartered entity is also subject to some provisions of Not-for-Profit Corporation Law. It should be noted that education corporations under the Charter Schools Act may be incorporated for a maximum term of five years, subject to renewal for another five years, whereas incorporations under the Not-for-Profit Corporations Law may be indefinite. A charter to operate such a school is called a “provisional charter” presumably because of the five-year time limit.

After reviewing certain information (a school’s progress in meeting educational goals, its financial information, etc.), the Board of Regents may renew a charter incorporation for another term of up to five years. §2851(4).

B. Other statutory provisions regarding charter schools

The Charter Schools Act expressly states that charter schools are public schools in most respects. For example, §2853(1)(c) states: “A charter school shall be deemed an independent and autonomous *public* school, except as otherwise provided in this article, and a *political subdivision* having boundaries coterminous with the school district ... in which the charter school is located” (emphasis added). This subsection of the act further states that both the charter entity such as DOE and the Board of Regents shall be deemed to be the “*public agents*” authorized to supervise and oversee the charter school.

§2853(1)(c), emphasis added. Finally, this subsection also declares: “The powers granted to a charter school under this article constitute the *performance of essential public purposes* and governmental purposes of this state. A charter school shall be *exempt to the same extent as other public schools* from all taxation.” §2853(1)(d), emphasis added.

Charter schools must comply with the same health and safety requirements, civil rights requirements and student assessment requirements as other public schools.

§2854(1)(b). They are also subject to certain “public officers” laws such as the NYS Open Meetings Law, Freedom of Information Law, and conflict of interest laws.

§2854(1)(e). In New York City, charter schools are subject to financial audits by the City comptroller. §2854(1)(c).

On the other hand, charter schools are deemed “non-public” for certain other purposes, such as designation of textbooks, school library materials, and software programs; health services; and eligibility for student transportation. They are otherwise exempt from “all other laws and regulations governing public or private schools” except as specifically provided in this law. §2854(1)(b).

Charter schools must be non-sectarian, and must not charge tuition. §2854(2)(a). Any child who is qualified under state law to enroll in public school is qualified to enroll in a charter school. §2854(2)(b). The school must enroll each eligible student who applies, without discrimination. §2854(2)(a) and (b). If the number of applicants exceeds the school’s capacity, students must be selected by a “random” process (such as a lottery), with preferences allowed for students within the district and siblings of enrolled students. §2854(2)(b).

A charter entity or the Board of Regents may revoke a school’s charter if they find certain specified problems, such as fiscal mismanagement or failure to meet student achievement goals. §2855(1). If a charter school closes, its assets and remaining funds must go back to the local school district, or to another charter school within the district, and the students may transfer to another public school in the district. §2851(2)(t).

C. Provisions regarding charter school employees

Under §2854(3)(a) of the Charter Schools Act, charter school employees are considered employees of the “education corporation” that runs the charter school, not the public school district. Nevertheless, for purposes of the state’s Public Employees’ Fair Employment Act (a.k.a. the Taylor Act), charter school employees are deemed to be

“public” employees, and the school’s board of trustees “shall constitute a board of education,” and a charter school is deemed to be a “public employer.” §2854(3)(a).

Under §2854(3)(b), people who were employed by an existing public school which was “converted” into a charter school are deemed to be included in the same bargaining unit for the school district under the Taylor Act, and are covered by the same collective bargaining agreement (“CBA”). Nevertheless, a majority of the members of “a negotiating unit within a charter school” may modify a CBA with the approval of the school’s board of trustees.

Under §2854(3)(b-1), employees of a school that was not converted from a pre-existing public school (i.e., that was created as a new entity) are not deemed to be included in the public/district bargaining unit, and are not covered by the district CBA. Nevertheless, in non-conversion charter schools with more than 250 students, the charter school employees are deemed to be represented by the same union as the public/district school employees’ union, but in a separate bargaining unit. “The charter school may, in its sole discretion, choose whether or not to offer the terms of any existing collective bargaining to school employees.”

Charter school employees may be deemed public employees of the local school district for purposes of providing retirement benefits. §2854(3)(c). Public school teachers may request a leave of absence to teach in a charter school, but they may also return to their former public school position without losing seniority, salary status or other benefits under the relevant CBA. §2854(3)(d). It should be noted that public employees who are subject to the Taylor Act are not permitted to strike, and are subject to severe penalties if they do so.

Reasonable access must be granted to unions. §2854(3)(c-1). A subsection called “employer neutrality,” states that it shall be an “improper practice” for charter school managers to violate the Taylor Law, and may result in revocation of the charter.

§2854(3)(c-2). If the state’s Public Employment Relations Board (“PERB”) finds a pattern of “egregious and intentional” Taylor Law violations by a charter school, its charter may be revoked on that basis. §2855(1)(d).

II. The creation of Hyde Leadership Charter School – Brooklyn

The Employer’s witness in the instant case, Dr. Sandra DuPree, testified that she previously worked for the Hyde Foundation, which she described as a non-profit institution supporting a “public schools initiative” affiliated with Hyde boarding schools. The locations of the Hyde Foundation, its “charter school center” and the Hyde boarding schools do not appear on the record, although DuPree testified that there is a Hyde-affiliated public charter school in the Bronx, New York.

As stated above, the Charter Schools Act allows individuals to apply to establish charter schools in New York State, possibly “in conjunction with” existing educational institutions, non-profits corporations or for-profit corporations. The record in the instant case indicates that DuPree herself was named as the “applicant” in the Employer’s founding documents in 2009. DuPree testified that she sought to open another Hyde charter school in New York City (in addition to the Bronx location), and sought other individuals who were interested in assisting her as part of the “founding board.” She also testified that the Hyde Foundation assisted this group of individuals to start the school, although the Foundation is not identified on the school’s founding documents. However, references to the Hyde Foundation appear in subsequent documents, such as the 2012-

2013 annual report (Jt. Ex. 11) stating that the Brooklyn school “retained” the Hyde Foundation to provide some educational materials and consulting and management services.⁷

DuPree testified that she submitted an application to the New York City Department of Education (“DOE”). One of the founding documents submitted into evidence is Joint Exhibit 2, a proposed charter agreement to establish the “Hyde Leadership Charter School” at an unspecified location in New York City. The agreement was signed in October 2009 by Dr. Sandra DuPree as the “applicant” and by Elyssa Siminerio, chief of staff to the former DOE Chancellor, Joel Klein. The proposed charter refers to information provided in the application (such as the school’s proposed governing structure, fiscal plan, student enrollment, achievement goals, etc.). By the terms of the agreement (Jt. Ex. 2), the underlying application is supposed to be attached to it as “Exhibit A” but, for some reason, the application was not attached to copy of the charter agreement introduced into evidence, and does not otherwise appear in the record. In any event, there is no dispute that DOE approved the application for DuPree to run an “independent public school” school within “the City School District” under the Charter Schools Act.

A location in Brooklyn was secured some time after the proposed charter agreement was executed in October 2009. Specifically, the DOE proposed to “co-locate” the new charter school within a public school building known as “K328” at 330 Alabama Avenue in the East New York neighborhood of Brooklyn, which already housed an elementary public school known as P.S. 328. This site is located in District 19 of DOE’s

⁷ See also Jt. Ex. 13, p. 42, Joanne Goubourn who is on the board of trustees of the Hyde Leadership Charter School – Brooklyn, is also executive director of the Hyde Foundation.

public school districts. An “educational impact statement” announcing this proposed co-location was issued by the DOE Chancellor’s office on January 8, 2010 (Jt. Ex. 5). DOE also issued an educational impact statement on February 4, 2010 (Un. Ex. 1), adding information about public hearings and ways for the public to submit comments. DuPree testified that DOE indeed held a public hearing on the proposed co-location to allow the community to comment. The DOE issued a “public comment analysis” document on February 24, 2010 (Un. Ex. 2), noting some community opposition and other comments. There is no dispute that DOE ultimately approved the co-location.

The next founding document in the record is Joint Exhibit 4, the NYS Board of Regents’ Provisional Charter dated January 12, 2010, incorporating Dr. Sandra DuPree and 7 other named individuals⁸ and their successors, as an “education corporation” formed to operate the “Hyde Leadership Charter School – Brooklyn.” As allowed by the Charter Schools Act, the Board of Regents granted the charter for a period of five years, 2010 – 2015, subject to renewal for another five years. The document indicates that the “corporation hereby created” shall be a “nonstock corporation organized and operated exclusively for educational purposes as defined in section 501(c)(3) of the Internal Revenue Code.” Thus, the NYS Board of Regents’ issuance of the charter constituted the creation of the non-profit “education corporation” itself. DuPree acknowledged in her testimony that the Board of Regents “incorporated” the Hyde Leadership Charter School – Brooklyn based upon her application, and that she had not already created any other separate or pre-existing corporate entity. On January 20, 2010, the State Education Department notified the NYC Chancellor of the Board of Regent’s action (Jt. Ex. 3.)

DuPree explained that, once the charter school was incorporated and approved by the Board of Regents, the initial “founding” board of trustees became the “governing” board of trustees. The Employer’s board has had regular meetings, and appointed additional trustees. DuPree testified that board members are not appointed by DOE or any other public entity. (*See also* by-laws, Jt. Ex. 1.) Nevertheless, Section 2.12(a) of its charter agreement with DOE (Jt. Ex. 2) requires that, when the board wants to appoint a new trustee, the board must give the person’s name and background information to DOE’s Office of Portfolio Development (“OPD”), and the OPD must reject or approve the proposed trustee within 45 days. Similarly, although DuPree also testified that only the board of trustees may remove a trustee from office, Section 2.12(a) of the charter agreement provides that the Board of Regents may remove a trustee if the trustee’s background information “contains material misstatements or material omissions of fact.” Similarly, Section 212.2(d) of the charter agreement contains the following provision:

In the event that any Trustee fails to file a Disclosure of Financial Interest by a Charter School Trustee Report within thirty (30) days of its due date of August 1, or such report is in material respects incomplete, misleading or untruthful, and the Chancellor informs the Board [of trustees] of its determination in this regard, the Charter School, notwithstanding any provision of its By-laws, shall in a timely fashion remove such Trustee pursuant to a vote of the Board and the failure of the Board to so act shall be a material violation of the Charter and be subject to further action in accordance with law.

Thus, the Employer’s charter allows DOE to remove, or make the board of trustees remove, any trustee who has submitted incomplete or misleading background information or financial interest disclosure reports.

Dupree testified that the Employer’s current board does not include any people appointed by DOE or otherwise “affiliated” with DOE, except that one member (Leticia

⁸ The charter identified the “first trustees” as Sandra DuPree, Joanne Goubourn, Jack Brown,

Green, identified as a parent) happens to be a public school teacher. Consistent with the Charter Schools Act provisions described above, DuPree testified that the trustees are required to file documents with the NYC Conflicts of Interest Board, reporting that they are not receiving impermissible financial gain from the school.

Shortly after the incorporation in early 2010, the board of trustees hired DuPree as the executive director of the school corporation. She in turn hired a “head of school”⁹ and, subsequently hired the teachers and other staff. DuPree testified that the Hyde Foundation “supports” the school by providing some curriculum material and the “Hyde brand” of mission, character education and “parent programming.” The school’s 2012-2013 annual report (Jt. Ex. 11) stated that it pays the Hyde Foundation 3% of its per-pupil funding to provide educational materials and consulting services. However, DuPree testified that the Hyde Foundation does not actually manage the school.

The record indicates that the Hyde Leadership Charter School – Brooklyn indeed opened at the K328 location starting in the 2010-2011 school year. Initially, the school started with two classes (kindergarten and first grade), and has added another class for each subsequent school year. DuPree testified that, for the current school year (2013-2014), the school has a total of 330 students, in kindergarten through fourth grade.

DuPree testified that the Employer set its own salaries for employees. Employees are paid by the Employer, not by DOE. DuPree further stated DOE does not “mandate” any employee benefits, and that employees have a 401(k) plan. Although it is not entirely clear from the record, it appears that the Employer’s teachers do not participate in the public teachers’ retirement system.

Christine DePina-Forbes, Michelle James, Christina Brown, James Cecil Simpson and Cicely Robinson.

⁹ The current head of school, Christine DePina Forbes, was also a founding board member.

The school is funded primarily by the DOE. According to its annual report for the 2012-2013 school year (Jt. Ex. 13), the Employer received \$3,924,178 in “per pupil” funding from the government, which was 99% of its \$3,958,243 in revenues for the year. The Employer does not pay rent or any other fees to DOE for its use of the K328 building. It does not charge the students’ families any tuition.

Consistent with the monitoring requirements of the Charter Schools Act and its charter agreement with DOE, the Employer has submitted annual reports to the DOE (Jt. Exs. 12 and 13). The record also includes DOE monitoring reports such as site visit reports (Jt. Exs. 9 and 10) and an annual comprehensive review report (Jt. 11, for the 2012-2013 school year).

III. Legal precedent, both state and federal

A. Section 2(2) of the NLRA; the *Hawkins* test for political subdivisions

As noted *supra*, Section 2(2) of the National Labor Relations Act excludes from its definition of employer “any State or political subdivision thereof.” It is well settled that Section 2(2) exempts only government entities or wholly owned government corporations from its jurisdiction, not private entities acting as contractors for the government. Research Foundation of the City University of New York, 337 NLRB 965 (2002), and cases cited therein at 968.

Under the United States Supreme Court’s decision in NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600 (1971)(“Hawkins County”), an entity may be considered a “political subdivision” if it is either (1) created directly by the state so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general

electorate. Hawkins County, *supra*, at 604-5. The Hawkins County two-pronged test is disjunctive, i.e., an entity need meet only one of the two prongs to be considered a public entity. It should be noted that the first prong, in turn, has two sub-parts: that the entity was created directly by the state, *and* that it was created “so as to constitute” an arm of the government.

The Board has held that neither a state’s legislative intent in passing an enabling statute, nor subsequent determinations by state courts or other state entities, would be “controlling.” Hinds County Human Resource Agency, 331 NLRB 1404 (2000). Nevertheless, the state’s characterization of an entity as private or public is an “important factor” in determining whether it was created *as* an arm of the government. *Id.* Thus, the entity in Hinds County was deemed to be a political subdivision because the state legislature had expressly empowered local, public governing bodies to create “human resource agencies” to administer certain programs. *Id.* The Board found that the particular agency in question was “directly created” by the county government pursuant to the enabling statute, *and that the state’s intention was clearly to allow the county to create it as an arm of the government*, using public funds and subject to significant public control. *Id.* at 1405-6. *See also* State Bar of New Mexico, 346 NLRB 674 (2006) (integrated state bar created by the state supreme court as an administrative arm of the court, to help regulate the legal profession). By contrast, in Research Foundation of CUNY, *supra*, the Board found that a non-profit corporation founded to assist a public university (in fundraising and financing certain research) was not intended to operate as an arm of the university. 337 NLRB at 968.

B. Conflicting interpretations of the Charter Schools Act of 1998 within New York state courts and state agencies

As noted above, the Charter Schools Act enacted by the New York State legislature established a complex regulatory scheme which keeps charter schools within the public realm in many respects, but which also exempts charter schools from many public-school laws and regulations. Perhaps because of this hybrid nature, the status of charter schools has been “difficult to define” and “not be easily identified as either a purely private or public entity.” New York Charter Schools Association et al. v. Smith, 15 N.Y.3d 403, 410 (2010). Even the state’s own courts and agencies have made contradictory findings in this regard.

For example, in New York Charter Schools Association, et al. v. DiNapoli, 13 N.Y.3d 120 (2009), New York State’s highest court reversed a lower court in concluding that the state Comptroller is not authorized to conduct performance audits of charter schools as “political subdivisions” of the State. Nevertheless, two concurring opinions in that case noted that charter schools may be considered “public corporations” for other auditing purposes such as financial audits. A year later, in New York Charter Schools Association et al. v. Smith, *supra*, the same court found that the charter schools in question were not public entities required to pay “prevailing wages” under New York State labor law, for renovating buildings that the schools owned. In this 5-to-2 decision, the majority opinion pointed to the charter schools’ self-selecting boards of trustees, and the legislature’s decision to exempt charter schools from many laws and regulations governing public schools, among other factors. 15 N.Y.3d at 410. In a dissenting opinion, Chief Judge Lippman contended that charter schools should be subject to prevailing-wage laws because they act in the place of local school districts. The dissent mentioned *inter alia* that “chartering entities” such as DOE are undeniably public; that

charter schools may be located in public school buildings or private buildings; that upon closure, a charter school's assets return to the public school system; that §2853 of the Charter Schools Act calls charter schools independent "public schools" chartered by "public agents" to perform "essential public purposes"; and that the renovation of charter school buildings inures to the benefit of public school students. 15 N.Y.3d at 414-5.

Shortly after these state court decisions, New York State's Public Employment Relations Board ("PERB") issued decisions holding that charter schools are essentially public schools, subject to the state's Public Employees' Fair Employment Act (a.k.a. the Taylor Act). In Brooklyn Excelsior Charter School, Buffalo United Charter School et al., 44 PERB ¶3001 (2011), PERB conducted a detailed analysis of the state Charter Schools Act, including all the indicia of public school status described *supra*. PERB also emphasized the public Board of Regent's role in issuing the incorporating charter and its subsequent oversight role; the provisions allowing charter school trustees or employees to be removed for violating certain conflict-of-interest and ethics rules; and especially the Charter Schools Act's express references to the Taylor Act. For example, as noted above, the references include §2855.1(d), allowing the Regents to revoke a charter if PERB finds a pattern of "egregious and intentional violations" of the Taylor Act. Finally, since the Taylor Act prohibits public employees from striking, PERB concluded that the legislature would not have made such a "sharp volte-face" in public policy (i.e., allowing teachers and other public school employees to strike) without saying so explicitly. *Id.* at fn 87. Thus, PERB concluded that the state legislature intended it (PERB) to have jurisdiction over all charter schools, even those that were created "in conjunction with" for-profit corporations. In an appeal, a state trial court upheld PERB's jurisdiction,

Brooklyn Excelsior Charter School et al. v. NYS PERB et al., reported at 45 PERB ¶7005 (May 2012), although that decision was later reversed, as described below.

In the meantime, PERB also asserted jurisdiction in Frances Corcoran and Kipp Academy Charter School, 45 PERB ¶3013 (March 2012). Specifically, in that case, a teacher who worked in an existing public school that “converted” to a charter school, sought to decertify the incumbent teachers’ union. However, under §2854(3)(b) of the Charter Schools Law, the relevant bargaining unit was deemed to be the district-wide, public-school unit. Since the petitioner did not have an adequate showing of interest in the district-wide unit, his decertification petition was dismissed.

C. The Chicago Mathematics decision (2012) and subsequent developments

In Chicago Mathematics & Science Academy Charter School, Inc., 359 NLRB No. 41 (Dec. 2012), the Board¹⁰ reversed a Regional Director’s decision, and held that the particular charter school created under Illinois state law was a private government contractor subject to NLRB jurisdiction. In that case, five individuals first created a non-profit organization under the Illinois General Not-for-Profit Corporation Act, and then obtained a “charter” from the City of Chicago’s Board of Education to establish and operate a charter school. The majority opinion in Chicago Mathematics put great emphasis on that sequence of events – i.e., that the legal corporation was created *before* the charter was obtained – in finding that the charter school was not “created directly by the state.” *See* 359 NLRB No. 41, slip op. at 6-7. In fact, the Board characterized the Illinois Charter Schools Act as requiring the incorporation of a non-profit entity before applying to create a charter school, *id.* at 7, which differs from the New York State

¹⁰ The Board at that time included “recess appointees” whose status is being litigated in Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S.Ct. 2861 (June 2013).

Charter Schools Act. In other respects, the Illinois statute was similar to the New York statute involved herein, including: its stated purpose of creating options “within the public school system”; its inclusion of charter schools within the definition of “public educational employer” under the relevant state labor law; its authorization of five-year charter terms; the schools’ public funding; and the public school board’s oversight function. In addition, the corporation’s self-appointed board of directors in the Illinois case was similar to the “board of trustees” contemplated in the New York statute.

Thus, the Board majority in Chicago Mathematics held that the charter school in question did not meet the first prong of Hawkins County, in that it was not “created directly” by the state. Given that conclusion, the Board stated that it did not need to address the second sub-part of the first prong, i.e., whether the school was created as an arm of the government. Id. at fn. 18. Furthermore, the Board held that the school did not meet the second prong of the Hawkins County test, in that none of the school’s governing board members were appointed by, or subject to removal by, any public official. Id., slip op. at 8. The Board found the State of Illinois’ characterization of charter schools as being “within the public school system” to be “worthy of careful consideration,” but ultimately “not controlling.” Id. at 7. Finally, the Board concluded that the charter school in question was more akin to a government contractor subject to the Board’s jurisdiction than an exempt “political subdivision” under Section 2(2). Nevertheless, the Board stated that its decision in Chicago Mathematics did not establish a “bright-line rule” for all charter schools, regardless of the “legal framework that governs their specific relationships with state and local governments.” Id. at 1.

It should be noted that when the Board granted review in the Chicago Mathematics case, it invited and obtained briefs from various amici. Dissenting in part from the majority, Member Hayes stated that he was persuaded by arguments of some amici that the Board should exercise its discretion *not* to assert jurisdiction, as it does in the horse-racing and dog-racing industries, because charter schools are essentially local in nature and highly regulated by the states, including their labor relations. Id. at 12-14. Responding to this specific point, the majority found “no policy reasons” to decline jurisdiction under Section 14(c)(1) of the Act. Id. at 11. The Board further noted that, although Section 10(a) of the Act allows it to enter into “cession agreements” ceding its jurisdiction to state agencies in some circumstances, neither the State of Illinois nor the City of Chicago had petitioned the Board to negotiate such an agreement. Id.

In the meantime, while the Board’s review of Chicago Mathematics was pending, the charter schools in the Brooklyn and Buffalo cases described above were still pursuing their appeal of the New York State trial court’s decision upholding PERB’s finding of jurisdiction over charter schools as public schools. In June 2013, six months after the Board’s Chicago Mathematics decision, the New York Appellate Division reversed the trial court’s decision, citing the Chicago Mathematics case, and noting that the NLRB’s jurisdiction may pre-empt PERB’s jurisdiction. Buffalo United Charter School et al. v. NYS PERB et al., 107 A.D.3d 1437 (NY, June 2013). The Appellate Division therefore decided to hold those cases indefinitely, pending a determination by the NLRB. The State’s highest court subsequently rejected PERB’s “motion for leave to appeal,” on the procedural grounds that the Appellate Division’s order is a non-final order of the type that cannot be appealed. Buffalo United Charter School et al. v. NYS PERB et al., 22

N.Y.3d 1082 (Jan. 2014). Thus, it appears that those cases are still being held by the Appellate Division, pending an NLRB determination.

Finally, the Board recently denied review of a Regional Director’s Decision finding jurisdiction over a charter school in Pennsylvania. The Pennsylvania Cyber Charter School (Case 06-RC-120811, unpublished opinion denying review, reported at 2014 WL 1390806, dated 4/9/2014). In the Pennsylvania case, similar to the instant New York case, the state Department of Education granted a “charter” to a group of unincorporated individuals. Unlike the Chicago Mathematics case, the individuals had not already created a corporate entity under the state’s general non-profit corporation law. In his dissent, Member Johnson argued that the state “directly created” the school entity under Hawkins County, and urged the Board to grant review, to fully set forth its reasoning in this “extremely important” area of the law, and possibly to reconsider its Chicago Mathematics decision. Pennsylvania Cyber Charter, *supra*, slip op. at 3. However, the majority (Members Hirozawa and Schiffer) denied review, concluding that the individuals “created” the corporation, not the state. Id., slip op. at 1. Although the Board in Chicago Mathematics had placed so much emphasis on the sequence of events (i.e., the nonprofit corporation had already been created *before* its charter application was approved) in finding that the school was not “created directly” by any state agency or legislation, the majority placed no emphasis on the opposite sequence in the Pennsylvania case. Furthermore, Members Hirozawa and Schiffer called Pennsylvania’s choice to characterize charter school employees as public employees “immaterial.” Slip op. at 2. Finally, the majority found “no compelling reason” to reconsider the Chicago Mathematics decision. Id.

IV. Application to the instant case

In seeking to allow public schools to be run “independently,” state legislatures seem to have deliberately created hybrid entities, with both public and private characteristics. It is obvious, therefore, that characterizing charter schools as public or private is no simple task. In many of the cases cited above, the Board reversed Regional Director’s decisions, the New York appellate state courts reversed lower court decisions and state agency determinations, and the decisions themselves often had dissenting opinions. As the Board said in the Chicago Mathematics case, *supra*, a “bright-line” jurisdictional rule may not be possible for charter schools, without a careful consideration of the legal framework that governs their specific relationships with state and local governments. 359 NLRB No. 41, slip op. at 1. Since the Board has delegated authority to the undersigned Regional Director, my task in this case, therefore, is to determine how the Board would likely characterize charter schools under the specific provisions of New York’s Charter Schools Act.

As described above in more detail, the relevant New York legislation allows individual “teachers, parents, school administrators, community residents or any combination thereof” to apply to establish a charter school, although the individuals’ application may be filed “in conjunction with” other educational institutions, non-profit corporations or for-profit corporations. §2851(1). If the applicants obtain a charter agreement with a public school board, and if the New York State Board of Regents approves the proposed agreement, then the Board of Regents actually issues a “charter” which, by its terms, incorporates the individual applicants as an “education corporation.” In this case, for example, the Board of Regents’ provisional charter (Jt. Ex. 4) expressly

incorporated Sandra DuPree and seven other trustees and their successors as an education corporation known as “Hyde Leadership Charter School – Brooklyn” for a term of five years. Thus, it appears that the New York State Board of Regents is specifically authorized by the state legislature to create the education corporation itself, unlike the Illinois statute allowing pre-existing non-profit corporations to apply to run a charter school. It could be argued, as the Union argues in this case, that charter schools are “created directly” by the New York State Board of Regents, and therefore that they meet the first prong of the Hawkins County test. However, based on its unpublished opinion in The Pennsylvania Cyber Charter School, *supra*, I believe that the Board would reject this argument. Specifically, my view is that the Board would see Sandra DuPree and the other individual founding trustees, not the Board of Regents, as having “created” the Employer’s charter school corporation. Under that analysis, the Board of Regents’ act of incorporating the school would not be seen as “directly creating” it under Hawkins County.

Furthermore, even if the Board were to find that the New York Charter Schools Act authorized the Board of Regents directly to “create” a charter school, it would not find that it did so “so as to constitute” an administrative arm of the government. Research Foundation of CUNY, *supra*, 337 NLRB at 968 (non-profit corporation founded to assist a public university was not intended to operate as an arm of the university). Rather, the Board would probably conclude that the governance and control of the charter school are “vested solely in the private incorporators” rather than in public entities such as the DOE. Id. The Board would find it “not controlling” at best, and “immaterial” at worst, that the New York legislature intended charter schools to be public

schools in many respects, including specifically being subject to the state's Public Employees' Fair Employment Act. Chicago Mathematics, Pennsylvania Cyber Charter School, *supra*.

Finally, the Hyde Leadership Charter School – Brooklyn does not appear to meet the second prong of the Hawkins County test, i.e., that it is administered by individuals who are responsible to public officials or to the general electorate. None of the Employer's governing trustees are appointed by public officials. Furthermore, although the Employer's charter agreement with DOE (Jt. Ex. 2) allows the Board of Regents or DOE to remove a trustee in certain circumstances, those circumstances are limited to certain specific rules requiring background information and financial interest disclosure reports. This provision may have been included by DOE as part of its contractual agreement with the Employer and its oversight function, but it does not appear to be required by the Charter Schools Act itself. Rather, as stated above, the Charter Schools Act allows self-appointed boards of trustees to govern the charter schools, and states that the trustees have final authority for policy and operational decisions of the school. § 2853. *See also* Research Foundation of CUNY, *supra*, 337 NLRB at 969 (appointment and removal of board of directors not governed by statutory provisions).

In sum, applying the Chicago Mathematics precedents, I find that the Hyde Leadership Charter School – Brooklyn is not exempt as a "political subdivision" within the meaning of Section 2(2) of the Act. I find therefore that the NLRB has jurisdiction over the Employer in this case. Accordingly, I deny the Union's motion to dismiss the Employer's petition in the instant case, and I will direct an election in an appropriate unit of teachers employed by the Employer.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, the undersigned finds and concludes as follows:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.

2. The record indicates that the Employer is a domestic educational corporation, with its principal office and place of business located at 330 Alabama Avenue, Brooklyn, New York. The parties stipulated that it is engaged in operating an educational institution. During the past year, which period represents its annual operations generally, the Employer received gross revenue in excess of \$1,000,000, and purchased and received at its Brooklyn, New York facility, goods and supplies valued in excess of \$5,000 directly from suppliers located outside the State of New York.

Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. As indicated above, I have also concluded that the Employer is an employer as defined in Section 2(2) of the Act, subject to the Board's jurisdiction. It will therefore effectuate purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I hereby find, that the Union, is a labor organization as defined in Section 2(5) of the Act. It claims to represent certain employees of the Employer.

4. A question concerning commerce exists concerning the representation of those employees within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The parties stipulated, and I hereby find, that the following unit of employees is an appropriate unit for purposes of collective bargaining:

All full-time and regular part-time teachers, including AIS (academic intervention services) teachers, school counselors and ELL (English language learning) coordinators, employed by the Hyde Leadership Charter School – Brooklyn, located at 330 Alabama Avenue, Brooklyn, New York, but excluding all literary specialists, deans of students, operations assistants, managerial employees (including executive directors, heads of school, directors of operations and directors of special education), confidential employees, office clerical employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by United Federation of Teachers, Local 2, AFT, AFL-CIO. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Unit employees in the military services of the United States who are employed in the unit may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201, on or before **June 4, 2014**. No extension of time to file this list will be granted except in extraordinary

circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,¹¹ by mail, or by facsimile transmission at (718) 330-7579. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least three (3) working days prior to 12:01 of the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

¹¹ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **June 11, 2014**. The request may be filed electronically through the Agency's website, www.nlr.gov,¹² but may **not** be filed by facsimile.

Dated: May 28, 2014.

/S/

James G. Paulsen
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201

¹² To file the request for review electronically, go to www.nlr.gov, select **File Case Documents**, click on the NLRB Case Number, and follow the detailed instructions.