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REPLY BRIEF OF THE UNION

ARGUMENT

I. CMSA is a statutorily-created public charter school and is therefore an exempt political subdivision under the first prong of *Hawkins County*.

CMSA asserts that “state and local legislatures are often driven by ever shifting parochial interests when enacting labor legislation” and that “the NLRB should not hesitate in this case to disregard another Illinois law that encroaches on its exclusive jurisdiction for regulating private sector labor relations.” CMSA Brief at 11, 12. CMSA refers to laws that sought to regulate the payment of back pay awards resulting from Board unfair labor practice cases, hotel room attendant breaks, and employment of strikebreakers. CMSA Brief at 12. The National Alliance for Public Charter Schools asserts that the Illinois Educational Labor Relations Act is preempted by the Act because it attempts to assert control over the labor relations of employers subject to Board jurisdiction. National Alliance Brief at 18. The National Alliance also asserts that allowing the State of Illinois to “impose state labor law obligations on private charter school employers, even in a public school setting, is inconsistent with the goal of differentiating these schools from ‘traditional’ public schools” and that it is contrary to federal policy to allow Illinois “to take away” charter school employees’ “right to vote in a secret ballot election.” National Alliance Brief at 19.

The Illinois Charter Schools Law is not merely a state law that regulates charter schools but is the state law that provides for the creation of such schools. The Chicago Mathematics and Science Academy Charter School exists only by virtue of the Illinois Charter Schools Law and a charter issued by the Chicago Public Schools with the approval of the Illinois State Board of Education. The requirements imposed on CMSA by the Charter Schools Law and the IELRA are imposed on it as an Illinois public school and an Illinois public employer which is a political subdivision exempt from

Board jurisdiction. Thus, the provisions of the IELRA and of the Charter Schools Law to which CMSA and the National Alliance object are not preempted by the Act.

The National Alliance asserts that the Regional Director incorrectly looked at the Illinois Charter Schools Law in examining whether CMSA was created by the State so as to constitute a department or administrative arm of the government and that the Regional Director should instead have looked only at the Illinois Not-For-Profit Act. National Alliance Brief at 11-12. The National Alliance asserts that the Illinois Charter Schools Law does not address the makeup of a charter school's governing body. National Alliance Brief at 12, fn. 9. In fact, the Illinois Charter Schools Law requires that: "A charter school shall be organized and operated as a nonprofit corporation or other discrete, legal, nonprofit entity authorized under the laws of the State of Illinois" (105 ILCS 5/27A-5(a)) and that "[t]he governing body of a charter school shall be subject to the Freedom of Information Act and the Open Meetings Act." 105 ILCS 5/27A-5(c). Moreover, a proposal to open a charter school must include a description of the governance and operation of the charter school. 105 ILCS 5/27A-7(a)(10). In accordance with the requirement in its charter agreement, CMSA has a board of directors consisting of a minimum of five members. Tr. 63-4. It was only as a result of the approval by the Chicago Public Schools of CMSA's charter proposal, including the description of its governance and operation, that the Chicago Mathematics and Science Academy Charter School was created as a school within the Illinois public school system. Since the Chicago Mathematics and Science Academy Charter School was created pursuant to the provisions of the Charter Schools Law, it is appropriate to give careful consideration to such law in determining whether CMSA was created by the State so as to constitute an administrative arm of government.

The National Alliance asserts that in *Charter School Administration Services*, 353 NLRB No. 35 (2008), the Board “dismissed as self-evident the first prong of Hawkins County.” National Alliance Brief at 12, fn. 10. However, the parties and the Board in *Charter School Administration Services* all assumed that the charter holder in that case was an exempt political subdivision. The issue before the Board there was whether a for-profit management company operating a Michigan charter school was a political subdivision. Moreover, the mere fact that CMSA is incorporated as an Illinois not-for-profit corporation does not mean that it is an employer subject to the Board’s jurisdiction. See *Jervis Public Library Association, Inc.*, 262 NLRB No. 145 (1982) [finding entity incorporated under the laws of the State of New York and governed by a board of trustees elected by the dues-paying members of the entity to be an administrative arm of the state in providing educational services to the public and thus exempt from Board jurisdiction under the first prong of *Hawkins County*]; *New York Institute for the Education of the Blind*, 254 NLRB No. 85 (1981) [finding an educational and residential care facility for blind children operated under the overall direction of its own board of managers, a body of private citizens elected annually with no input from the State, to be an administrative arm of the State of New York in providing educational services for the handicapped]; *Association for the Developmentally Disabled*, 231 NLRB No. 121 (1977) [finding a mental health services agency that was incorporated as a nonprofit corporation and whose board of directors members themselves selected new board members to be an exempt political subdivision under the first prong of *Hawkins County*].

The National Alliance asserts that the determination of whether a charter school is an exempt political subdivision should not be “subject to manipulation or alteration by state or local law.” National Alliance Brief at 2. At the same time, however, the National Alliance concedes that: “Some

states allow a charter school's charter to be held by a public entity" and that "determinations about whether a charter school . . . is an employer under the Act are fact specific and not subject to broad generalization." National Alliance Brief at 4, fn. 4.

Here, the evidence shows that, pursuant to the Illinois Charter Schools Law and the actions of the Chicago Public Schools and the Illinois State Board of Education, CMSA was created by the State so as to constitute an administrative arm of the government in providing educational services to the public as part of the public school system. Accordingly, CMSA is an exempt political subdivision under the first prong of *Hawkins County*, and the Charter Schools Law insofar as it regulates CMSA is not regulating a private employer subject to the Board's jurisdiction.

II. CMSA is administered by individuals who are responsible to public officials or to the general electorate and is therefore an exempt political subdivision under the second prong of *Hawkins County*.

CMSA asserts that the sole focus under the second prong of *Hawkins County* is on whether CMSA's governing board is subject to appointment or removal by the State or the Chicago Public Schools. CMSA Brief at 17. The National Alliance asserts that "the only time the Board has declined jurisdiction when analyzing the second prong of the Hawkins County test was where the state had the authority to appoint or remove an employer's board members." National Alliance Brief at 15. However, in *Rosenberg Library Association*, 269 NLRB No. 197 (1984), the Board found an entity that operated a library to be administered by individuals who were responsible to public officials or the general electorate where the library's board of trustees was established pursuant to the terms of a private will and successor trustees were selected by remaining members of the board of trustees. The Board there relied on findings that the employer operated under state library

regulations; was heavily dependent on city, county, state, and federal tax moneys as sources for operating funds; was answerable to the city for its expenditures of revenues; was required to submit a line-item budget annually for approval by the county; operated the library as a public facility to serve the needs of city and county residents; and was part of the Houston Area Library System, which established certain standards for employee qualifications, staffing, hours, and funding.

CMSA, citing *Rural Fire Protection Co.*, 216 NLRB 584 (1975), *National Transportation Services, Inc.*, 240 NLRB 565 (1979), *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Management Training Corp.*, 317 NLRB 1355 (1995), asserts that the Board has changed its application of the *Hawkins County* test over the years. CMSA Brief at 25-8. CMSA confuses the issue of whether an entity is a political subdivision exempt from the Board's jurisdiction with the issue of the Board's exercise of its discretion to decline jurisdiction over nonexempt entities. In *Rural Fire Protection Co.*, the Board found that it would not be appropriate to assert jurisdiction over a nonexempt employer if it was intimately connected with an exempt entity. In *National Transportation*, the Board found that, in deciding whether to assert jurisdiction over an employer with ties to an exempt entity, it was appropriate to look at whether the nonexempt entity could engage in meaningful bargaining with respect to terms and conditions of employment of its employees. In *Res-Care*, the Board stated that in determining whether to assert jurisdiction over an employer providing services to or for an exempt entity it would look at the control over essential terms and conditions of employment retained by the employer and the control exercised by the exempt entity over the employer's labor relations in order to determine whether the employer was capable of engaging in meaningful collective bargaining. In *Management Training*, the Board stated that henceforth in determining whether the Board would assert jurisdiction the Board would consider only whether an employer

meets the definition of employer under Section 2(2) of the Act and whether the employer meets the applicable monetary jurisdictional standards. If an employer is a political subdivision of a state, then it is not an employer under Section 2(2) of the Act.

The National Alliance for Public Charter Schools, citing *NLRB v. Kemmerer Village*, 907 F.2d 661 (7th Cir. 1990), and *NLRB v. Parents and Friends of the Specialized Living Center*, 879 F.2d 1442 (7th Cir. 1989), asserts that in order to find that CMSA is an exempt political subdivision under the second prong of *Hawkins County*, the Regional Director was required to find “that the government exercises so much control over CMSA to render collective bargaining futile.” National Alliance Brief at 15-16. The National Alliance, like CMSA, confuses the issue of whether an entity is an exempt political subdivision with the issue of the Board’s exercise of its discretion to decline jurisdiction over nonexempt entities. In *Kemmerer Village*, the employer argued that it was exempt from Board jurisdiction as an exempt political subdivision, as an exempt religious institution, and as incapable of engaging in meaningful bargaining under *Res-Care*. 907 F. 2d at 662. The Seventh Circuit, in enforcing the Board’s bargaining order, summarily dismissed the employer’s arguments that it was exempt as either a political subdivision or as a religious institution, and then went on to find that the employer retained sufficient control over terms and conditions of employment to engage in meaningful bargaining. 907 F.2d at 663-4. In *Parents and Friends of the Specialized Living Center*, the employer argued that it was an exempt political subdivision as an arm of the government, not under the second prong of *Hawkins County*, and also argued that it could not engage in meaningful bargaining due to the extent of control retained by the state over financial terms and conditions of employment of its employees. 879 F.2d at 1448,1452. The Board asserted jurisdiction after analyzing the employer’s ability to bargain under *Res-Care*. 879 F.2d at 1447, 1453. The

Seventh Circuit found that the employer, which was licensed by the state and received state funding, was not created by the state within the meaning of the first prong of *Hawkins County* and that the employer possessed sufficient control over terms and conditions of employment to engage in meaningful bargaining. 879 F.2d at 1449, 1454-5. *Kemmerer Village* and *Parents and Friends of the Specialized Living Center* were both decided prior to the Board's decision in *Management Training*, and the Seventh Circuit's discussion in those cases of the Board's pre-*Management Training* analysis of when the Board would decline to assert jurisdiction over employers with ties to exempt government entities is not applicable to the issue of whether CMSA is an exempt political subdivision under the second prong of *Hawkins County*.

CMSA, in support of its argument that it is not a political subdivision under the second prong of *Hawkins County*, asserts that "almost every CMSA reporting requirement" has "nothing to do with employee terms and conditions of employment" but rather relate to the "business" of a charter school. CMSA Brief at 22. CMSA's assertion that its accountability and reporting requirements do not relate to employee terms and conditions of employment is incorrect. Moreover, the focus under the second prong of *Hawkins County* is on whether CMSA is administered by individuals who are responsible to public officials or to the general electorate, not on whether CMSA retains sufficient control over labor relations to enable it to engage in meaningful bargaining.

The Charter Schools Law provides that CMSA's employees are subject to the IELRA (105 ILCS 5/27A-5(g)); that charter school employees are to be represented in a separate bargaining unit than a unit of other employees in the school district in which the charter school is located (105 ILCS 5/27A-7(a)(11)); that charter school employees have tort immunity and defenses applicable to public employees (105 ILCS 5/27A-5(g)(3); 105 ILCS 5/27A-5(g)(3)); that a charter school must comply

with all health and safety requirements applicable to public schools under Illinois law (105 ILCS 5/27A-5(d)); that charter school employees are subject to the same criminal history, sex offender, and child murderer background checks applicable to other public school employees (105 ILCS 5/27A-5(g)(1)); and that charter school teachers must be certified in accordance with the School Code or possess alternative qualifications (105 ILCS 5/27A-10(c)). Chicago charter school teachers are under Illinois law participants in the Chicago Public School teachers' pension fund. 40 ILCS 5/17-106. A charter school proposal must include "[a]n explanation of the relationship that will exist between the charter school and its employees, including evidence that the terms and conditions of employment have been addressed with affected employees and their recognized representative, if any." 105 ILCS 5/27A-7(a)(11). All such requirements relate to employee terms and conditions of employment.

CMSA asserts that CPS merely serves a regulatory role by ensuring that CMSA meets certain contractual goals outlined in its renewal application and charter agreement. CMSA Brief at 23. CMSA, however, must comply both with its charter agreement and with the extensive requirements of the Charter Schools Law and the other laws made applicable to Illinois charter schools under such law, and CMSA's charter can be revoked if it fails to comply with any such laws. 105 ILCS 27A-9(c)(4).

CMSA asserts that CPS "does not interfere with" its curriculum development, which CMSA calls "one of the central aspects of CMSA's operations." CMSA's Brief at 23. However, under the Charter Schools Law, a charter school proposal must include a description of the charter school's educational program, pupil performance standards, and curriculum. 105 ILCS 5/27A-7(a)(7). A charter renewal application must report on the progress of the charter school in achieving the goals,

objectives, pupil performance standards, content standards, and other terms of the initial approved charter proposal. 105 ILCS 27A-9(b)(1). A charter may be revoked if a charter school fails “to meet or make reasonable progress toward achievement of the content standards or pupil performance standards identified in the charter. 105 ILCS 27A-9(c)(2). In accordance with CPS’s renewal application requirements, CMSA’s charter renewal application contains detailed information about CMSA’s curriculum. Tr. 48-9; 97; Er. Ex. 9. The renewal application is part of the charter agreement. Tr. 48-9; Er. Ex. 8, Exhibit A, p. 28. CMSA’s curriculum must be consistent with CMSA’s charter application, and CMSA must give CPS notice of any material changes in the curriculum. Er. Ex. 8, p. 4. The Illinois State Board of Education must approve any material revisions to a previously certified charter school contract. 105 ILCS 5/27A-6. Thus, material changes to CMSA’s curriculum would have to be approved by the State Board.

CMSA, with respect to its employees’ terms and conditions of employment, with respect to its curriculum and student achievement, with respect to student enrollment, attendance, and discipline, with respect to its funding, and with respect to its operations, is administered by individuals who are responsible to public officials or to the general electorate. CMSA is therefore a political subdivision exempt from Board jurisdiction under the second prong of *Hawkins County*.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Union's opening brief, the Employer is a political subdivision exempt from Board jurisdiction. The Regional Director's Decision and Order dismissing the RM petition should therefore be affirmed.

Respectfully submitted,

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By: 
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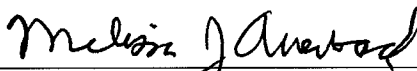
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CERTIFICATE OF SERVICE

Melissa J. Auerbach, an attorney, hereby certifies that she caused a true and accurate copy of the foregoing **Reply Brief of the Union** to be served upon the following by electronic mail on this 25th day of March 2011.

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