

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION SIX

THE PENNSYLVANIA CYBER	)	
CHARTER SCHOOL,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 06-RC-159861
	)	
PA CYBER SPECIAL EDUCATION	)	
ASSOCIATION, PSEA/NEA	)	
	)	
Petitioner.	)	

**THE PENNSYLVANIA CYBER CHARTER SCHOOL'S REQUEST FOR REVIEW OF  
THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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	)	
<b>Employer,</b>	)	
	)	
<b>and</b>	)	<b>Case No. 06-RC-159861</b>
	)	
<b>PA CYBER SPECIAL EDUCATION ASSOCIATION, PSEA/NEA</b>	)	
	)	
<b>Petitioner.</b>	)	

**THE PENNSYLVANIA CYBER CHARTER SCHOOL’S REQUEST FOR REVIEW OF  
THE REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION**

Employer, the Pennsylvania Cyber Charter School (“PA Cyber”), hereby files this request for review of the Regional Director’s Decision and Direction of Election pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board (the “Board”). That Decision, rendered on October 8, 2015, granted the Petition filed by the PA Cyber Special Education Association, PSEA/NEA (“Petitioner”), and found that the Board has jurisdiction over PA Cyber in this case. The Regional Director’s Decision departed from Board and court precedent when it found that PA Cyber is an Employer as defined in Section 2(2) of the National Labor Relations Act (the “Act”). Contrary to the Regional Director’s Decision, the actual operations and characteristics of PA Cyber—a public school under Pennsylvania law—reveal that it is a political subdivision exempt from the Board’s jurisdiction that is: (1) created by the state; and (2) administered by individuals who are responsible to both public officials and to the general public.

## I. Introduction

Board review is necessary in this case to correct a departure from well-established Board precedent that has interpreted “political subdivision” as including entities that are either: (1) created directly by the State so as to constitute a departmental arm of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate. *Charter Sch. Admin. Servs., Inc.*, 353 NLRB 35 (2008) (applying the test set forth in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-05 (1971) (“*Hawkins County*”), to a privately-owned and for-profit educational management corporation). Despite the Board’s directive in *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB 41 (2012) (“*CMSA*”) that there is no bright-line rule with respect to Board jurisdiction over charter schools, the Regional Director misapplied both prongs of the *Hawkins County* test in finding that PA Cyber is not a “political subdivision” in Pennsylvania.

Applying the first *Hawkins County* prong, the Regional director focused on the fact that a group of private individuals applied for PA Cyber’s initial charter and found that PA Cyber is not a creation of the Commonwealth. In so doing, the Regional Director disregarded the fact that PA Cyber is statutorily defined as a public school under Pennsylvania law, and is subject to direct and ongoing oversight by the Pennsylvania Department of Education (“PDE”). Moreover, by focusing exclusively on the individuals who obtained the initial charter, the Regional Director misapplied the principles set forth in *Hawkins County*, in which the Court found that an entity was a political subdivision even though it was created by a group of individual citizens. Thus, the very basis for the Regional Director’s decision is undercut by court precedent, warranting review in this case.

The Regional Director also erred in applying the second *Hawkins County* prong by disregarding the fact that members of the PA Cyber Board of Trustees (the “Trustees”) are statutorily defined public officials that are responsible for electing other Trustees as well as appointing the CEO, Dr. Michael Conti. Thus, contrary to the Regional Director’s Decision, the Trustees are subject to appointment and removal by public officials, and PA Cyber is directly overseen by the public officials on the Board of Trustees.

Taken together, these considerations weigh strongly in favor of review in this case.

## II. Background

### A. Procedural Background

On September 11, 2015, the Petitioner sought certification for a proposed bargaining unit including “[a]ll special education teachers and reading specialists” at PA Cyber. (Bd. Ex. 1).<sup>1</sup> On September 22, 2015, the Regional Director conducted a hearing, during which the Hearing Officer heard testimony from PA Cyber’s Chief Executive Officer, Dr. Michael J. Conti, and admitted evidence. The parties stipulated to the admission of Board Exhibits 3(a) and 3(b), which are the transcript and exhibits, respectively, from the hearing in *The Pennsylvania Cyber Charter School*, No. 06-RC-120811.<sup>2</sup> The only issue before the Regional Director in both cases is whether PA Cyber is subject to the Board’s jurisdiction.

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<sup>1</sup> The proposed bargaining unit has been amended, by stipulation of the parties, to include “all full-time and regular part-time special education teachers and reading specialists employed by the Employer through its Midland, Pennsylvania facility; excluding virtual classroom instructors, nonprofessional employees, managerial employees, guards and supervisors as defined in the Act.” (Bd. Ex. 2).

<sup>2</sup> The Regional Director in the prior representation case ordered an election over PA Cyber’s objection to jurisdiction, and the full Board declined, by a vote of 2-1, to grant PA Cyber’s petition for review. However, the Board has recently granted review in a separate case involving a Pennsylvania cyber charter school in *The Pennsylvania Virtual Charter School*, No. 04-RC-143831. That case involves nearly the same issue as this case, and the Board noted in its order granting review that PA Virtual “raises substantial issues warranting review.” (Bd. Order Mar. 25, 2015). Because PA Virtual is subject to the same statutory scheme and state oversight as PA Cyber, the grant of review indicates that the Board’s jurisdiction in this case remains an open question.

The Regional Director issued her Decision and Direction of Election on October 8, 2015. A mail-ballot election was conducted between October 26, 2015 and November 16, 2015. Votes were tallied at the Region Six office on November 17, 2015. The Petitioner prevailed in the vote by a total of 41 votes for to 14 votes against. The Regional Director certified the results of the election on November 30, 2015. This Request for Review follows.

***B. Facts Introduced at the Fact-Finding Hearing***

1. History of PA Cyber

PA Cyber is a public cyber charter school that provides a K-12 public education to students throughout Pennsylvania primarily over the Internet, and is currently the largest public charter school in Pennsylvania with approximately 11,000 students. (Bd. Ex. 3(a) at 11:10-14; 12:17-21; 39:17-25). Students attending PA Cyber can work at their own pace, or directly with live teachers on a traditional schedule in a “synchronous environment.” (Bd. Ex. 3(a) at 11:14-18). Cyber charter schools are defined by statute as public schools in Pennsylvania. (Bd. Ex. 3(a) at 16:10-16); 24 P.S. § 17-1703-A.

PA Cyber (then the Western Pennsylvania Cyber Charter School), was granted its first five-year charter by the Midland Borough School District on October 7, 1999. (Bd. Ex. 3(a) at 17:13-18:6); (Bd. Ex. 3(b) at Er. Ex. 2). That charter was applied for and obtained by a group of individual citizens interested in starting a public cyber charter school. (Bd. Ex. 3(a) at 65:17-22). Following the grant of its charter, PA Cyber formed a public nonprofit corporation on September 1, 2000. (Bd. Ex. 3(a) at 19:15-20:22); (Bd. Ex. 3(b) at Er. Ex. 3). As a public nonprofit corporation, PA Cyber is responsible to the taxpayers of Pennsylvania. (Bd. Ex. 3(a) at 79:13-20).

On July 1, 2005 (Bd. Ex. 3(b) at Er. Ex. 6) and July 1, 2010 (Bd. Ex. 3(b) at Er. Ex. 7), PA Cyber's charter was renewed directly by the PDE, not by the Midland Borough School District. (Bd. Ex. 3(a) at 27:8-22; 28:6-16). Each charter renewal was signed by the then-Secretary (or Acting Secretary) of PDE. (Bd. Ex. 3(b) at Er. Ex. 6, 7). The application and renewal is submitted to PDE, and is posted on PDE's website. (Sept. 22, 2015 Tr. at 15:20-25; 26:7-12). PA Cyber is awaiting renewal of its current charter by PDE. (Sept. 22, 2015 Tr. at 15:4-9). The renewal application includes substantial information linked to school organization, governance, and performance that is used to determine eligibility for a charter renewal. (Bd. Ex. 3(a) at 29:25-30:8). It is "a way to report back to the [PDE] with respect to the things we've done, the things we're doing and the things we plan to do with our school in hopes of getting our charter renewed for another five year period." (Sept. 22, 2015 Tr. at 15:12-17; Er. Ex. B). Among the attached items are reports of students' state-mandated test scores, current teachers' certification status, and completed statements of financial interest for board members, administrators, and "any appropriate staff." (Sept. 22, 2015 Tr. at 15:10-18:21). If PA Cyber's renewal application is found to be insufficient, PDE has the authority to deny the application, and thus cause PA Cyber to cease to exist. (Sept. 22, 2015 Tr. at 23:9-20). PA Cyber's charter is limited to the operation of a cyber charter school within Pennsylvania, and cannot be broadened to include any other activity. (Bd. Ex. 3(b) at Er. Ex. 7).

## 2. Governance of PA Cyber

PA Cyber is governed by the CEO Dr. Conti, an administrative staff, and the Trustees, whose duties are set forth in the school's Bylaws. (Er. Ex. A). The top administrators at PA Cyber, as well as all Trustees, are deemed to be public officials in Pennsylvania. (Bd. Ex. 3(a) at 16:13-16; 26:10-13). As public officials, all Trustees are subject to the Pennsylvania Ethics Act,

and must file annual statements of financial interest. (Er. Ex. A at 9); (Bd. Ex. 3(a) at 43:17-23). Dr. Conti and other top administrators at PA Cyber also file statements of financial interest. (Bd. Ex. 3(a) at 16:23-17:1).

As CEO, Dr. Conti is responsible for PA Cyber's day-to-day operations. (Bd. Ex. 3(a) at 11:4-6). Other administrators oversee and manage the day-to-day operations of their particular departments. (Bd. Ex. 3(a) at 77:4-12). The Trustees, however, have the ultimate responsibility and authority to "establish, equip, finish, operate and maintain" PA Cyber, (Er. Ex. A at Art. 2 § 1), and are charged with creating policy for the school. (Bd. Ex. 3(a) at 77:6-8). Included in that authority is the responsibility for hiring and firing all school employees, (Er. Ex. A at 2); (Bd. Ex. 3(a) at 77:13-16), the authority to set employees' salaries, (Bd. Ex. 3(a) at 36:16-20), and the authority to oversee the school's finances. (Bd. Ex. 3(a) at 14:25-15:5). The Board is also responsible for appointing and removing its own members. (Er. Ex. A at 3); (Bd. Ex. 3(a) at 40:21-41:6; 55:25-56:3; 80:2-3).

The duties of the PA Cyber Trustees overlap substantially with those of school board members in a traditional brick and mortar public school, although they are not identical. (Bd. Ex. 3(a) at 14:15-15:12). PA Cyber's Bylaws, however, specify that "[t]he duties of the [Trustees] shall be consistent with the duties of officers described in the Pennsylvania School Boards Association's manual." (Er. Ex. A at 10).

### 3. PA Cyber Funding and Public Accountability

PA Cyber receives approximately ninety-eight percent of its funding from "sending organizations"—that is, public school districts whose students attend PA Cyber. (Bd. Ex. 3(a) at 11:23-12:14; 38:17-21); (Sept. 22, 2015 Tr. at 19:3-12; 21:21-22:1). Per-student funding is calculated based upon a legislatively-created formula that sets forth the per-student cost of

education at a brick-and-mortar public school, removes certain expenses such as foodservice, special education, and transportation, and provides the remainder (between seventy-five and eighty percent of the total cost) to PA Cyber. (Bd. Ex. 3(a) at 12:4-5); (Sept. 22, 2015 Tr. at 19:18-20:15). The funding from sending schools comes largely from local taxes and state-provided education funds. (Bd. Ex. 3(a) at 69:22-25). The remaining two percent (2%) comes from federal Title I and Title II funds, as well as federal funding under the Individuals with Disabilities in Education Act. (Bd. Ex. 3(a) at 38:22-39:1). Title I funding is given by the federal government to public schools that meet certain certification requirements with respect to socially and economically disadvantaged students. (Sept. 22, 2015 Tr. at 33:1-12). Neither parochial schools nor private schools are subject to the same certification requirements. (Sept. 22, 2015 Tr. at 33:5-15).

The funding formula is established by the Pennsylvania legislature, and is currently the subject of public criticism with respect to cyber charter school funding. (Sept. 22, 2015 Tr. at 21:7-20). Those criticisms are “not hard to find,” and have been made by way of phone calls to state legislators and the governor’s office, letters to the editor, and opinion pieces. (Sept. 22, 2015 Tr. at 21:10-17). As a result, the Pennsylvania legislature has proposed to cut funding to public cyber charter schools. (Sept. 22, 2015 Tr. at 21:18-20).

#### 4. State Oversight of PA Cyber

PA Cyber is subject to extensive oversight under the Pennsylvania Charter School Law (“CSL”) and regulations imposed by PDE. Dr. Conti testified that the state (by way of the PDE) oversees cyber charter schools by making visits, requesting records, requiring reports, and ultimately deciding whether to renew or revoke schools’ charters. (Bd. Ex. 3(a) at 26:3-9).

As part of the charter renewal process, PA Cyber must give PDE extensive information about its operations and progress. (Sept. 22, 2015 Tr. at 15:10-17). Additionally, PDE subjects all public cyber charter schools to a number of audits, including a recent special education audit at PA Cyber conducted in connection with its pending charter renewal application. (Sept. 22, 2015 Tr. at 22:14-21). As part of that audit, PDE officials interviewed staff, administrators, parents and students, and gathered records. (Sept. 22, 2015 Tr. at 22:22-23:4). PDE's audits seek to verify that the school is in compliance with all mandates and is ensuring the health, safety, and welfare of its students. (Sept. 22, 2015 Tr. at 23:5-8). Other audits include a yearly local financial audit conducted by an independent accounting firm, (Bd. Ex. 3(a) at 30:17-31:5), and audit reports by the Pennsylvania Auditor General, (Bd. Ex. 3(a) at 44:9-45:16) (detailing how PA Cyber is accountable to both the Auditor General and PDE); (Bd. Ex. 3(b) at Er. Ex. 11). Failure to comply with these requirements could result in charter revocation proceedings by PDE. (Bd. Ex. 3(a) at 31:6-13); (Sept. 22, 2015 Tr. at 23:13-20). PA Cyber must also file its annual budget with PDE for review. (Bd. Ex. 3(a) at 31:14-24).

Further evidence of PDE's oversight of public cyber charter schools can be found in the September 1, 2006 cyber charter school Basic Education Circular ("BEC"). (Bd. Ex. 3(b) at Er. Ex. 10). The BEC provides that "PDE is responsible for the oversight of cyber charter schools that it has chartered, including decisions whether to renew, non-renew or revoke the charter. . . . Cyber charter schools that had their charter initially approved by a school district must seek renewal of their charter from PDE." (Bd. Ex. 3(b) at Er. Ex. 10 § 1). The BEC further defines PDE's oversight vis-à-vis cyber charter schools, which includes annual assessment of: "(1) whether a cyber charter school is meeting the goals of its charter; (2) whether a cyber charter school is in compliance with its charter; and, (3) the cyber charter school's performance on the

PSSA, standardized tests and other performance indicators to ensure compliance with academic standards.” (Bd. Ex. 3(b) at Er. Ex. 10 § 3). The oversight provisions in the BEC, which by their own terms are “comprehensive,” also detail PDE’s ability to conduct site visits, request annual reports, access records, and access the schools’ facilities. (Bd. Ex. 3(b) at Er. Ex. 10 § 3).

### **III. Argument**

#### ***A. Basis for seeking review***

The “actual operations and characteristics” of PA Cyber, along with the statutory scheme governing cyber charter schools in Pennsylvania, make clear that PA Cyber is a “political subdivision” under both prongs of the controlling test in *Hawkins County*. The Regional Director’s Decision improperly narrowed the scope of the “political subdivision” exclusion and does not account for well-established Board and Supreme Court precedent.

Section 2(2) defines “Employer” for purposes of the Act to include “any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof.” 29 U.S.C. § 152(2). The Act does not define “political subdivision,” but the Supreme Court in *Hawkins County* established a two-prong test clarifying that an exempt entity is either: “(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.” *Hawkins County*, 402 U.S at 604-05.

At issue in *Hawkins County* was a natural gas utility district that was established by a group of private citizens under Tennessee law, which the High Court ultimately determined was a political subdivision exempt from the Board’s jurisdiction. *Id.* at 601. In making its determination, the Court held that federal law controls whether an entity is subject to Board

jurisdiction under the Act; nevertheless, in the process of doing so, it relied almost exclusively on the Tennessee statutes governing the creation of such utility districts. *Id.* at 604-08.<sup>3</sup>

In a subsequent case applying the *Hawkins County* test, the Board also looked to state law in determining that a brick-and-mortar charter school established under Illinois law was not a political subdivision for purposes of Section 2(2) of the Act. *Chicago Mathematics & Sci. Academy Charter Sch., Inc.*, 359 NLRB 41 (2012) (“*CMSA*”). Although the Board found that the political subdivision exemption did not apply in *CMSA*, it specifically acknowledged that

Our decision is based on the *facts of this case*, which involves the operation of a public charter school under the particular provisions of Illinois law. *We certainly do not establish a bright-line rule that the Board has jurisdiction over entities that operate charter schools*, wherever they are located and regardless of the legal framework that governs their specific relationships with state and local governments.

*Id.* at 1 (emphasis added).

The charter school in *CMSA* began as a private, nonprofit corporation established under Illinois nonprofit law. *Id.* at 2. Only after it was incorporated did the charter school enter into a “binding contract and agreement between the corporation and a local school board under the terms of which the local school board authorizes the governing body of the charter school to operate . . . on the terms specific in the contract.” *Id.* (quoting the contract language). That contract with the Chicago Public Schools expressly acknowledged that “*CMSA* [was] not operating as the agent of, or under the direction and control of, the Chicago Board, except as required by law or the charter agreement.” *Id.* at 3. Although the charter school in *CMSA* was

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<sup>3</sup> This is an important aspect of the *Hawkins County* decision because, while federal law controls, federal law does not create cyber charter schools. It is therefore necessary in this case (as it was in *CMSA*) to look to state law in determining what the federal law is, *i.e.* what “political subdivision” should mean in the cyber charter school context.

governed by a board of directors, “no member [was] a government official or [worked] for a government entity.” *Id.* at 2.

Applying the first prong of the *Hawkins County* test, the Board in *CMSA* focused on the charter school’s formation by private individuals as a not-for-profit corporation and concluded that it was not a creation of the state. The Board emphasized that:

There is no dispute that CMSA was created and incorporated by private individuals as a not-for-profit corporation under the Illinois General Not-for-Profit Act, *and only after it was established and incorporated did CMSA establish the Academy following the process set out in the Illinois Charter Schools Law. . . .* Indeed, absent the independent initiative of private individuals and the separate authority of the Not-for-Profit Corporation Act, the Charter Schools Law would do nothing to bring charter schools into existence. *Rather, the Charter Schools Law provides that if a charter school is to be created, it must be created by private individuals who first must establish a private corporation that in turn creates the charter school.* And that is what happened here: private individuals established CMSA *first as a nonprofit corporation*, and only then did CMSA establish the academy.

*Id.* at 7 (italic emphasis added, underline emphasis in original).

With respect to the second prong, the Board was unequivocal in stating that “we find it dispositive that none of CMSA’s governing board members are appointed by or subject to removal by any public official. No further inquiry is required.” *Id.* at 8. The Board acknowledged that CMSA was “a *private corporation* whose governing board members are privately appointed and removed. Our sole focus is on the composition of CMSA’s board of directors and to whom they are accountable, and we examine only the operations of CMSA, *which itself is not a public charter school.*” *Id.* at 9 (emphasis added).

Despite the hard line it took with respect to defining the second prong in *CMSA*, the Board cited a prior Board decision, *St. Paul Ramsey Medical Center*, 291 NLRB 755 (1988), which states that “[t]here is no requirement under the [law creating the entity] that the board of directors . . . either be themselves public officials or be appointed by public officials.” *St. Paul*

*Ramsey*, 291 NLRB at 758. This language appears to leave open the possibility that *had* the law in that case provided that the directors be public officials, then the entity could potentially pass muster under the second prong of the *Hawkins County* test.

Under *Hawkins County*, the Board must look to the “actual operations and characteristics” of PA Cyber in determining whether it is a political subdivision under the Act. 402 U.S. at 604. In doing so, “the Board has found the state’s characterization of an entity to be an important factor in determining the more specific issue of whether the Employer was created so as to constitute a department or administrative arm of government.” *Hinds County Human Resource Agency*, 331 NLRB 1404, 1404 (2000) (acknowledging that while state law might not be controlling in determining whether an entity is a political subdivision, such factors “are worthy of careful consideration”). In light of these considerations, PA Cyber meets both requirements of the *Hawkins County* test.

***B. The identity of those who applied for the first charter is not dispositive under the first Hawkins County prong***

The Regional Director’s Decision relied exclusively on the fact that a group of individuals applied for and were granted PA Cyber’s first charter in finding that it is not an exempt political subdivision under the first *Hawkins County* prong. This reliance is misplaced, however, because the *Hawkins County* decision itself makes clear that the identity of those who create an entity is not dispositive of whether that entity is a political subdivision exempt from the Board’s jurisdiction. Instead, PA Cyber, like all public cyber charter schools in Pennsylvania, is a state creation because its existence is based solely on a charter granted by PDE, it is subject to extensive oversight by PDE, and it is subject to several other state laws that apply to state-created entities.

The Public School Code of 1949, 24 P.S. § 1-101 *et seq.*, defines a “Cyber Charter School” as “an independent public school established and operated under a charter from the Department of Education. . .” 24 P.S. § 17-1703-A. The BEC emphasizes this point by noting that “[c]yber charter schools are established when the [PDE] grants the cyber charter applicant a charter.” (Bd. Ex. 3(b) at Er. Ex. 9 § 1); *see also* 24 P.S. § 17-1745-A(f)(3) (“The charter, when duly signed, shall act as a legal authorization of the establishment of a cyber charter school.”). Consistent with these definitions, Dr. Conti testified that PA Cyber is a public school under Pennsylvania law. (Bd. Ex. 3(a) at 23:11-16). Without a charter, therefore, a cyber charter school does not exist under Pennsylvania law; and, perhaps more importantly, if the PDE revokes the charter, that entity will cease to exist. (Sept. 22, 2015 Tr. at 23:5-20).

Contrary to the Regional Director’s Decision, nothing prevents private individuals from taking “independent initiative” to start the process of obtaining a charter from PDE under Pennsylvania law. *CMSA*, 359 NLRB at 7. In *Hawkins County*, the Supreme Court found that the utility district at issue was a political subdivision even though under Tennessee law, “residents may create districts to provide a wide range of public services . . . [and] [a]cting under [that law], 38 owners of real property submitted in 1957 a petition to the county court . . . requesting the incorporation of a utility district to distribute natural gas.” *Hawkins County*, 402 U.S. at 605-06. Nothing in the CSL prohibits private individuals (like in this case) from taking the initiative to apply for a charter from PDE. (Bd. Ex. 3(a) at 65:17-24). Unlike in *CMSA*, Pennsylvania law demonstrates that it is the charter from the state—not the identity of the applicants or the fact of incorporation—that “establishes” a cyber charter school. 24 P.S. § 17-1703-A. Because the charter is essential to the creation and continued existence of the school, PA Cyber is a state-created entity.

The Regional Director’s Decision runs contrary to the law as stated in *Hawkins County* insofar as the Decision explicitly acknowledges that its reasoning was based exclusively on the individuals’ actions in applying for the charter—an action that *Hawkins County* recognized can give rise to a political subdivision. (Op. at 16) (“Neither the granting of the charter by the Midland School District *nor the filing of incorporation papers with the Department of State* created the Employer.” (Emphasis added)).

The Decision further erred in its statement that “[t]here was no enabling action by the State present in the establishment of [PA Cyber]. . . .” (Op. at 16). This is incorrect because the legislature acted to create cyber charter schools by statute long before the founding coalition in this case took the initiative to seek a charter. Moreover, the charter itself (which is now issued by the PDE<sup>4</sup>) enables PA Cyber’s existence by being the only thing allowing it to continue operating as a cyber charter school. The Regional Director’s Decision elevates form over substance by narrowly construing what it means to “create” an entity while ignoring the elaborate state-created framework that allows cyber charter schools to operate in Pennsylvania. Absent that framework, PA Cyber would not exist.

**C. CMSA is distinguishable from the present case**

Although the Regional Director made only passing reference to *CMSA*, that decision is crucial here because the nonprofit entities operating the charter schools in that case were merely contractors of the local school districts. *See CMSA*, 359 NLRB at 2-3 (“The [Illinois] Charter Schools Law permits local public school boards *to contract with third parties to provide*

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<sup>4</sup> Although PA Cyber received its initial charter from the Midland Borough School District, *see* (Bd. Ex. 3(b) at Er. Ex. 2), the CSL was subsequently amended to require that all public cyber charter schools obtain their charters (and renewals) directly from PDE. 24 P.S. § 17-1703-A. Both the 2005 and 2010 renewals of PA Cyber’s charter were obtained directly from PDE, and were signed by the Secretary of Education (or the Acting Secretary) at that time. (Bd. Ex. 3(b) at Er. Ex. 6, 7). The Regional Director found that this distinction was without consequence for her Decision.

*educational services* to children who typically are served by local public schools.” (Emphasis added)). The contract in that case provided that the “parties to the agreement expressly acknowledge that the CMSA is *not operating as the agent of, or under the direction and control of, the Chicago Board*, except as required by law or the charter agreement.” *Id.* at 3 (emphasis added). No such limitation exists in the Charter granted by PDE in this case. (Bd. Ex. 3(b) at Er. Ex. 7). Instead, PA Cyber’s charter is granted by the state itself, and requires that the “Trustees shall operate the cyber charter school in accordance with the provisions of 24 P.S. §§ 17-1741-A – 17-1751-A, any amendments thereto enacted during the term of this charter and any regulations or standards applicable to cyber charter schools.” (Bd. Ex. 3(b) at Er. Ex. 7). Far from being a contractor, PA Cyber is closely overseen by PDE and is directly answerable to the PDE for its continued existence—indeed, the BEC defines the relationship between cyber charter schools and PDE as one where they “must work cooperatively.” (Bd. Ex. 3(b) at Er. Ex. 10 § 3). Thus, the relationship between the non-profit entity and the state of Illinois in *CMSA* was tenuous at best; whereas the relationship between PA Cyber and the PDE in this case is cooperative and heavily regulated by state law.

*CMSA* is also distinguishable from the present case due to the extent of the use of an educational management corporation. PA Cyber no longer wholly relies upon a management corporation, and instead contracts separately for certain services. (Sept. 22, 2015 Tr. at 24:5-17). Under the BEC, Pennsylvania cyber charter schools may use a management corporation for limited purposes, but the “Board of Trustees must maintain ultimate control of the cyber charter school.” (Bd. Ex. 3(b) at Er. Ex. 10 §1). The management corporation in *CMSA*, however, maintained a much greater degree of control over the school because it determined the wages and benefits package for the employees of the school (subject to board approval), and it hired and

employed the school's principal and business manager, (who were responsible for the day-to-day operation and payroll for the school, respectively). *CMSA*, 359 NLRB at 3; *see also Charter Sch. Admin. Servs.*, 353 NLRB at 395-96 (outlining the extensive role played by the management corporation in that case, including hiring, firing, and employment of the charter school teachers). No such close relationship exists between PA Cyber and any third-party management company in this case—further distinguishing it from the school in *CMSA*.

***D. The Regional Director disregarded Pennsylvania's extensive oversight scheme***

By focusing exclusively on the individuals who applied for PA Cyber's first charter, the Regional Director completely disregarded the extensive statutory oversight that PDE has over public cyber charter schools in Pennsylvania when applying the *Hawkins County* test. That oversight further demonstrates how PA Cyber is a state entity.

The BEC provides that "PDE is responsible for the oversight of cyber charter schools that it has chartered, including decisions whether to renew, non-renew or revoke the charter." (Bd. Ex. 3(b) at Er. Ex. 10 § 1). This oversight includes the ability to make site visits to PA Cyber's "main offices and/or other educational sites, [and] may include random parent and student contacts." (Bd. Ex. 3(b) at Er. Ex. 10 § 3); (Sept. 22, 2015 Tr. at 22:22-23:4). During such visits, PDE is permitted to access an extensive amount of information, including "[s]tudent performance data;" "[d]irect observation of teachers working with students;" "[f]iscal records;" "[a]udit reports;" and "[o]ther items as deemed necessary by PDE staff." (Bd. Ex. 3(b) at Er. Ex. 10 §3). With respect to charter renewals, PA Cyber must provide PDE with extensive information about its operations and performance to ensure its continued existence. (Sept. 22, 2015 Tr. at 22:22-23:20). Additionally, PA Cyber files its annual budget with PDE pursuant to the provisions of the Pennsylvania Public School Code. (Bd. Ex. 3(a) at 33:19-34:1).

Dr. Conti testified extensively about the oversight provided by PDE, including the recent special education audit, (Sept. 22, 2015 Tr. at 22:22-23:8), and the mandatory annual local audits conducted by an independent accounting firm. (Bd. Ex. 3(a) at 30:17-31:5). PA Cyber is also subject to audits by the Pennsylvania Auditor General, as are all other public schools in Pennsylvania. (Bd. Ex. 3(a) at 32:1-13). This oversight has a substantial impact on PA Cyber insofar as PDE ultimately determines whether or not to renew its charter and, therefore, whether it is able to continue operating. (Sept. 22, 2015 Tr. at 23:13-20).

In addition to the PDE-specific oversight, other aspects of Pennsylvania law also illustrate how PA Cyber is an arm of the state. Specifically, it is subject to numerous state law provisions that only apply to public entities such as the Sunshine Act, 65 Pa. C.S. § 701 *et seq.*, which provides that official action taken by an “agency” must be done at a meeting open to the general public. 65 Pa. C.S. § 704; (Bd. Ex. 3(a) at 43:7-16); 24 P.S. § 17-1716-A(c). “Agency” is defined in the Sunshine Act as including, *inter alia*, “any *political subdivision* of the Commonwealth.” 65 Pa. C.S. § 703 (emphasis added). PA Cyber is also subject to the Pennsylvania Right-to-Know Law, 65 P.S. § 67.101 *et seq.*, which provides that government agencies must make certain records available to the public. (Bd. Ex. 3(a) at 44:2-8). Both cyber charter schools and political subdivisions are defined as “Local Agencies” for purposes of the Right-to-Know Law. 65 P.S. § 67.102. Finally, the Trustees are “public officials” for purposes of the Public Official and Employee Ethics Act, 65 Pa. C.S. § 1101 *et seq.*, and are therefore required to file statements of financial disclosure and must comply with the dictates of the Ethics Act. (Sept. 22, 2015 Tr. at 18:12-21); (Er. Ex. A at Art. 4 § 9); (Bd. Ex. 3(b) at Er. Ex. 10 § 2)<sup>5</sup>

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<sup>5</sup> The BEC for cyber charter schools references the charter school BEC, which states that “[a]s public officials, members of the Board of Trustees of a charter school are subject to the provisions of the Public Official and Employee Ethics Act . . . and are required to file Statements of Financial Interest & Code of Conduct by May 1 each year.” Charter School BEC § 2, *available at*: <http://www.portal.state.pa.us/portal/server.pt/community/>

Additionally, the Pennsylvania Labor Relations Board (“PLRB”) has defined cyber charter schools as public employers under the Public Employee Relations Act, 43 P.S. § 1101.101 *et seq.* (“PERA”). See *Frontier Virtual Charter School*, PERA-C-12-80-E (2012 Proposed Decision and Order) (“Frontier is a public employer within the meaning of Section 301(1) of PERA.”). The CSL also provides that “[e]mployees of a charter school may organize under the act of July 23, 1970 . . . known as the ‘Public Employee Relations Act,’” further evidencing the notion that PA Cyber is a public employer and that its employees are public employees. 24 P.S. § 17-1724-A(a). The Board in *St. Paul Ramsey* has likewise found it significant that the employees of an alleged political subdivision were “excluded from coverage under the state public employment labor relations act and the state public employees [sic] retirement act.” 291 NLRB at 757.

The CSL further defines charter schools as public employers by mandating that all employees “shall be enrolled in the Public School Employees’ Retirement System . . .” 24 P.S. § 17-1724-A(a); see also *Hinds Cnty.*, 331 NLRB at 1405 n.12 (“In all three of these cases the fact that the employees participated in the state retirement system . . . weighed in favor of a finding that the first prong of *Hawkins* was satisfied.”). Additionally, “[f]or purposes of tort liability, employees of the charter school shall be considered public employees and the board of trustees shall be considered the public employer in the same manner as political subdivisions and local agencies.” 24 P.S. § 17-1727-A. Taken together, the statutory scheme governing public cyber charter schools in Pennsylvania appears to be aimed at ensuring their position as political subdivisions that owe their continued existence to direct approval by the state, *i.e.* PDE.

In light of these aspects of state law, which under *Hawkins County* and *Hinds County* are to be given “careful consideration” absent other relevant federal law,<sup>6</sup> public cyber charter schools in Pennsylvania are creations of the state, subject to extensive regulation and oversight by the state and PDE, and are thus political subdivisions not subject to the Board’s jurisdiction.

***E. PA Cyber is administered by individuals who are responsible to both public officials and the general public***

PA Cyber also meets the second prong of the *Hawkins County* test because the school itself is governed and overseen by the public officials on the Board of Trustees who in turn are responsible to other public officials (their fellow Trustees) as well as public officials at PDE. PA Cyber is also responsible to the general public by being subject to laws requiring public transparency, and by the fact that state funding for public cyber charter schools can be reduced in response to public dissatisfaction with current funding levels.

The CSL explicitly provides that “[t]rustees of a charter school shall be public officials.” 24 P.S. § 17-1715-A(11). The PA Cyber Trustees are, in turn, empowered to “establish, equip, finish, operate and maintain” the school itself. (Er. Ex. A at Art. 2 § 1). That responsibility includes authority over “the hiring and discharge of all School employees,” (Er. Ex. A at Art. 3 § 2), as well as the ability to “adopt and enforce rules and regulations for the management of school affairs and the conduct and deportment of employees and students.” (Er. Ex. A at Art. 2 § 2). The Trustees also have authority to oversee PA Cyber’s finances. (Bd. Ex. 3(a) at 14:25-15:5). Because all PA Cyber’s employees are subject to the rules and regulations established by the Trustees and may be hired or fired by them, they are thus “responsible” to the Trustees in their capacities as public officials.

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<sup>6</sup> It should be noted that PA Cyber is considered a public school with respect to Title I funding with respect to teacher certifications. (Sept. 22, 2015 Tr. at 33:1-15, 36:11-15). Thus, to the extent that federal law does address entities like PA Cyber, it treats them like any other public school.

The Regional Director glossed over the undisputed statutory language stating that the Trustees are, in fact, public officials and instead relied upon language from *Hawkins County* stating that “while such State law declarations and interpretations are given careful consideration . . ., [sic] they are not necessarily controlling.” (Op. at 17 (citing *Hawkins County*, 402 U.S. at 602)). Had such “careful consideration” been given, however, it would have led to the inescapable conclusion that because the Trustees are statutorily defined as public officials who are appointed and removed by other public officials—i.e. the other Trustees—they are, in fact, “responsible to public officials.” The Regional Director’s Decision misstates the *Hawkins County* test by requiring that the Trustees “stand for an election” or report to an elected official—without citation to any legal authority. The test is whether the Trustees, CEO, and employees of PA Cyber are “responsible to public officials.” To the extent that the controlling statute defines the Trustees (who are responsible for the appointment and removal of other Trustees, the CEO, and the employees of PA Cyber) as public officials, PA Cyber meets the second prong of the *Hawkins County* test.

Despite insisting that federal law controls, the Regional Director identified no federal law to contradict PA Cyber’s position. Interestingly, the Regional Director also relies on statements of the Pennsylvania Auditor General and decisions of the Pennsylvania Labor Relations Board in concluding that PA Cyber is not a political subdivision—with no explanation for why those particular state-law documents are worthy of more consideration than the statute that creates cyber charter schools in Pennsylvania. It is also worth noting that the Supreme Court in *Hawkins County* relied almost exclusively on provisions of Illinois law when determining that the utility district was a state entity.

Moreover, the Trustees themselves—in their capacities as public officials—are empowered to appoint and remove other Trustees. (Er. Ex. A at Art. 4 §§ 3, 6); (Bd. Ex. 3(a) at 40:21-41:6; 55:25-56:3; 80:2-3). This is notably different from the situation in *CMSA*, where “no member of the board of directors [was] a government official or [worked] for a government entity.” *CMSA*, 359 NLRB at 2. As a result, the “dispositive” issue in that case was the fact that “none of *CMSA*’s governing board members are appointed by or subject to removal by any public official.” *Id.* at 8. But that is not the case here. By statute, the PA Cyber Trustees are all public officials. 24 P.S. § 17-1715-A(11). As such, the appointment and removal of Trustees and the hiring and firing of other school employees is all done by public officials, in accord with the second prong of the *Hawkins County* test. *See St. Paul Ramsey*, 291 NLRB at 758 (finding that an entity can meet the second prong of *Hawkins County* if members of a board of directors “either [are] themselves public officials or [are] appointed by public officials,” and can be removed by public officials). Thus, because the Trustees in this case are public officials who have the ability to appoint and remove other Trustees, the sole dispositive issue under the Board’s interpretation of the *Hawkins County* test is met, and “[n]o further inquiry is required.” *CMSA*, 359 NLRB at 8.

As discussed at length above, however, PA Cyber is also subject to a second level of responsibility to public officials based upon PDE’s extensive oversight. The Secretary of Education, as the appointed head of the PDE, is a “public official” as defined in the Public Official and Employee Ethics Act. 65 Pa. C.S. § 1102 (defining public official as “[a]ny person . . . appointed by a governmental body or an appointed official in the executive . . . branch of this Commonwealth or any political subdivision thereof”). The Secretary of Education signs and approves each charter renewal, thus exercising direct oversight over whether a cyber charter

school like PA Cyber remains in existence. (Sept. 22, 2015 Tr. at 15:10-25). The charter renewal process, along with the oversight provided by audits and site visits, demonstrates PA Cyber's second level of responsibility to the public officials at PDE.

Finally, as a public nonprofit corporation, PA Cyber has a responsibility to the general public. (Bd. Ex. 3(a) at 79:11-20). As part of this responsibility, PA Cyber has a duty of transparency. That duty is manifest in the obligation to make its records available to the public for inspection under the Right-to-Know Law, and to hold meetings and conduct business in public under the Sunshine Act. The Trustees are directly accountable to the public because they are statutorily required to allow "residents of the political subdivision . . . to comment on matters of concern, official action or deliberation which are or may be before the [Board of Trustees] prior to taking official action." 65 Pa. C.S. § 710.1(a). Therefore, the PA Cyber Trustees must answer to the public and consider the public's concerns prior to taking any action.

Finally, Dr. Conti testified that charter school funding is dictated based on a formula set by the state legislature. (Sept. 22, 2015 Tr. at 20:5-15). That formula sets a per-student amount of money that "follows" students who attend a charter school from their school district of residence. (Sept. 22, 2015 Tr. at 18:25-19:17); 24 P.S. § 17-1725-A(a)(2). Sending school districts make payments based upon the number of students from those districts who attend charter schools. 24 P.S. § 17-1725-A(a)(5). Members of the public have recently criticized the current funding model, however, and have pressured the legislature to reduce the amount paid by sending school districts. (Sept. 22, 2015 Tr. at 21:7-20). This pressure, and the resulting potential funding cut, represents another way that PA Cyber is responsible to the general public.

Contrary to the Regional Director's Decision, PA Cyber is subject to multiple levels of oversight by public officials—both by its own Trustees and by individuals at the PDE—and it is

also accountable to the public for both oversight and as a check on its funding. Based upon these considerations, PA Cyber easily meets the second prong of the *Hawkins County* test and should be considered a political subdivision exempt from Board jurisdiction.

***F. The Board has discretion to decline jurisdiction***

As a final matter, the Board may, in its discretion, decline to exercise jurisdiction over cyber charter schools in Pennsylvania even if it finds that PA Cyber does not meet either prong of *Hawkins County*. Under 29 U.S.C. § 164(c)(1),

The Board, in its discretion, may, by rule of decision . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.

29 U.S.C. § 164(c)(1). If the Board declines jurisdiction, however, the states remain free to regulate and exercise jurisdiction over labor relations in the Board’s absence. 29 U.S.C.

§ 164(c)(2); *see also Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 181 (2007) (recognizing that the Act “leaves States free to regulate their labor relationship with their public employees”).

Declining jurisdiction is appropriate in this case because doing so would have only a minimal effect on commerce. Once a cyber charter school in Pennsylvania has received its charter, its operations are limited by the scope of the charter and the applicable state law. For instance, PA Cyber’s charter is limited to the operation of a public cyber charter school in Midland, Pennsylvania. (Bd. Ex. 3(b) at Er. Ex. 7). PA Cyber is also prohibited from “changing its curriculum, changing its location, or changing its mission and focus” absent approval from the PDE. (Bd. Ex. 3(b) at Er. Ex. 10 § 1). Enrollment is also limited to students who reside in school districts within the Commonwealth; so PA Cyber is unable to expand its reach to students outside of Pennsylvania. (Bd. Ex. 3(b) at Er. Ex. 10 § 6). In light of these restrictions, there is little else that PA Cyber is able to do, thereby limiting its effect on commerce.

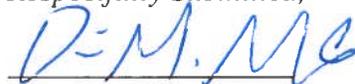
Perhaps most important, however, the CSL explicitly provides for state oversight of labor relations at cyber charter schools, as permitted in § 164(c)(2) of the Act. *See* 24 P.S. § 17-1724-A(a) (permitting charter school employees to organize under PERA). Declining jurisdiction in this case would allow oversight of labor relations to remain at the state level and to remain consistent among all public schools in Pennsylvania. This outcome would give effect to the statutory scheme in Pennsylvania, while having a minimal effect on other public school entities.

#### **IV. Conclusion**

In light of the foregoing, PA Cyber respectfully requests that the Board grant review in this case with important implications for Pennsylvania cyber charter schools.

Dated: December 14, 2015

*Respectfully Submitted,*



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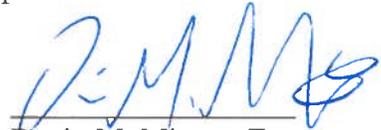
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Request for Review was filed with the Regional Director and the National Labor Relations Board by way of the Board's electronic filing system on December 14, 2015. A copy of the brief was also provided via electronic mail to the following:

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