Hyde Leadership Charter School—Brooklyn *and* United Federation of Teachers, Local 2, AFT, AFL-CIO. Case 29–RM–126444

August 24, 2016

DECISION ON REVIEW AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

The issue in this case is whether the Hyde Leadership Charter School-Brooklyn (Hyde or School) is a political subdivision within the meaning of Section 2(2) of the National Labor Relations Act, and therefore exempt from the Board's jurisdiction.[1] The Regional Director, applying the Board's longstanding test,[2] found that Hyde is not a political subdivision because it was neither created directly by the state so as to constitute a department or administrative arm of the government nor is it administered by individuals who are responsible to public officials or the general electorate. Having carefully considered the entire record, including the parties' briefs and amicus briefs, we agree with the Regional Director's conclusion that Hyde is not a political subdivision. We further find that there are no compelling reasons for declining, as a matter of discretion, to exercise our jurisdiction. Accordingly, we remand the case to the Regional Director to take appropriate action.[3]

I. BACKGROUND

On April 14, 2014, the Union filed a petition with the New York State Public Employment Relations Board (PERB) seeking to represent the School's 35 teachers. The same day, Hyde filed the instant petition with the Board seeking an election in the same unit. On May 28, 2014, after a hearing, the Regional Director issued a Decision and Direction of Election finding that Hyde was not exempt from the Board's jurisdiction under the *Hawkins County* test. The Union sought review, arguing that Hyde is exempt. Alternatively, the Union argues that the Board should, in the exercise of its discretion, decline to assert jurisdiction over charter schools in New York. The Board granted review and received amicus briefs, as well as briefs and reply briefs from the Union and Hyde.[4]

New York Charter Schools Law

The Hyde Leadership Charter School—Brooklyn operates under the New York Charter Schools Act of 1998, as amended in 2014 (CSA).[5] Pursuant to the CSA, an individual seeking to establish a charter school files an application with a "charter entity": a local school district, the New York City schools chancellor, the Board of Trustees of the State University of New York, or the Board of Regents, the governing body of the state's Department of Education. CSA § 2851(3)(a)-(c). The application must contain detailed information about the proposed school's educational program, fiscal plan, student admissions and enrollment criteria, and governance structure, including the names of the initial trustees and the method of appointment for future trustees. CSA § 2851(2)(a)-(x). If the charter entity approves the application, it enters into a charter agreement, also known as a proposed charter, with the applicant, and submits the proposed charter to the Board of Regents for approval. CSA § 2852(5) & 2853(3). If the Board of Regents approves the proposed charter, it issues a provisional charter for a period of up to 5 years and incorporates the new entity as a non-profit education corporation to operate the school. CSA § 2853(1)(a). A charter may be renewed, upon application, for a term of up to 5 years. The renewal application is submitted to a charter entity and includes a progress report, financial statements, annual reports, indications of parent and student satisfaction, and retention and enrollment plans. CSA § 2851(4)(a)-(e).

The CSA defines a charter school as "an independent and autonomous public school, except as otherwise provided in this article, and a political subdivision having boundaries conterminous with the school district . . . in which the charter school is located." CSA § 2853(c). Charter schools must comply with state requirements regarding health and safety, civil rights, and student assessments but are "exempt from all other state and local laws, rules, regulations, or policies governing public or private schools, boards of education, school districts, and political subdivisions . . . except as specifically provided

[1] Sec. 2(2) provides that the term "employer" shall not include any state or political subdivision thereof.

[2] See *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971). In *Pennsylvania Virtual Charter School*, 364 NLRB 87 (2016), the Board adopted the *Hawkins County* test as the Board's framework for evaluating whether a charter school is a political subdivision.

[3] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[4] The Board received amicus briefs from the Council of School Supervisors and Administrators, Local 1 American Federation of School Administrators, AFL–CIO (CSSA) and the AFLCIO, and a joint amicus brief from the American Federation of Teachers, AFL–CIO (AFT) and the National Education Association (NEA).

[5] The CSA is part of the New York Education Law, and applies to charter schools in the State of New York. NY Educ. Law Ch. 16, Title II, Art. 56.

in the school's charter or in this article." CSA § 2854(1)(b). The Board of Regents and the charter entity oversee the school's compliance with applicable laws, regulations, and the terms of the new charter. CSA § 2853(c). The Board of Regents is authorized to visit the school and inspect its records, and the charter school must submit annual reports to the charter entity and the Board of Regents. CSA § 2857. However, the charter school's board of trustees, its governing body, has "the final authority for policy and operational decisions of the school." CSA § 2853(f). Trustees must comply with "public officer" laws regarding transparency and conflicts of interest. CSA § 2854(1)(e).

The CSA provides that charter school employees are employees of the education corporation and that they are employees for the purposes of the New York Public Employees Fair Employment Act, also known as the "Taylor Law." Charter school employees may be deemed public employees of the local school district for purposes of providing retirement benefits. CSA § 2854(3)(c). Public school teachers may request a leave of absence to teach in a charter school and may return to their former public school position without losing seniority. CSA § 2854(3)(d). Generally, employees of a charter school are not part of the local school district's bargaining unit and not covered by its collective-bargaining agreement. If the charter school has more than 250 students, the CSA provides that the school's employees will be represented by the same union as the local school district employees' union, but in a separate bargaining unit. CSA § 2854(3)(b-1).

The charter entity or the Board of Regents may revoke a school's charter for fiscal mismanagement, not meeting student assessment measures, or if the school demonstrates a practice and pattern of "egregious and intentional violations of" the Taylor Law. CSA § 2855(1)(d). Charter schools receive their funding primarily from school districts, which pay a set fee, or tuition, for each student enrolled in the school, along with extra funding for students with disabilities. CSA § 2856. The charter school may accept private donations and gifts. CSA § 2856.

Hyde Leadership Charter School-Brooklyn

Hyde opened on September 8, 2010, pursuant to a 5-year provisional charter issued by the Board of Regents. The School has 35 teachers and 330 students, in kindergarten through fourth grade.

The initial application to establish the School was submitted to the chancellor of the New York City Department of Education in 2009 by Dr. Sandra Dupree, who would eventually become Hyde's executive director.[6] As required by the CSA, the application included detailed information about the proposed school's educational program, fiscal plan, and governance structure, including the names of the initial trustees and the method of appointment for future trustees. In October 2009, Dr. Dupree, on behalf of Hyde**,** entered into a charter agreement with the chief of staff for the chancellor of the Department of Education. The agreement contained information about the School's operations, including sections regarding services to students with disabilities, personnel policies and hiring, fiscal management, annual reports and oversight by the Department of Education, and renewal applications and revocation of the charter. Pursuant to the CSA, after public notice and comment, the Department of Education approved the co-location of Hyde within a currently operating public elementary school building in Brooklyn, New York. CSA § 2853(a-3)(1).

The Department of Education submitted the proposed charter, along with the application, to the Board of Regents for approval. In January 2010, the Board of Regents approved the proposed charter, issued a 5-year provisional charter, and incorporated Dr. DuPree and 7 others—the initial board of trustees—as an education corporation to operate the School. The initial trustees became the governing board of trustees and hired Dr. Dupree as the executive director of the School. Dr. Dupree hired the School's staff, including all of the teachers.

Pursuant to Hyde's bylaws, the board of trustees is composed of five to nine members, is "responsible for establishing an overall policy of the School," and has "the power to control and manage the affairs and property of the Corporation." The board of trustees approves the School's policies and budget and appoints the executive director. Trustees are elected by the current trustees for a term of three years and may be reelected for unlimited successive terms. A trustee may be removed or suspended from office by vote of the majority of the board for misconduct, incapacity, or neglect of duty. Likewise, if a vacancy results from removal of a trustee, it may be filled by a vote of the trustees. Trustees may be appointed by majority vote to serve on different committees, such as the executive, education, and the finance and audit committees. No member of Hyde's original board of trustees or those appointed since has been affiliated with a public entity or the Department of Education, except that one member happens to be a public school teacher.

[6] Dr. Dupree previously worked for the Hyde Foundation, a nonprofit institution that also operates a charter school in the Bronx, New York.

Hyde receives 91 percent of its funding from the New York Department of Education, 8 percent from Federal grants, and 1 percent from private contributions, interest, and "other income." According to an annual report for the 2012–2013 school year, Hyde received close to 4 million dollars in "per pupil" funding from government sources, which was 99 percent of its revenue for the year. Consistent with the CSA, Hyde does not pay rent or other fees to the Department of Education for its use of a public school building.

The Regional Director's Decision

Under the *Hawkins County* test, an entity may be considered a political subdivision exempt from the coverage of the National Labor Relations Act 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. 402 U.S. at 604-605; *The Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 3. The Regional Director found that Hyde is not exempt under either prong of that test. The Regional Director relied mainly on two Board decisions, *Chicago Mathematics & Science Academy*[7] and *Pennsylvania Cyber Charter School*,[8] where the Board applied the *Hawkins County* test and found that neither of the charter schools involved was an exempt political subdivision. The Regional Director also noted that, although New York's Public Employee Relations Board (PERB) has issued decisions in which it asserted jurisdiction over charter schools,[9] the state's highest court has ruled that charter schools are not public entities (*New York Charter Schools Association v. Smith*, 15 N.Y.3d 403, 410 (N.Y. 2010)) and are not political subdivisions of the state (*New York Charter Schools Association v. DiNapoli*, 13 N.Y.3d 120 (N.Y. 2009)).[10]

The Regional Director, comparing the present case to *Chicago Mathematics* and *Pennsylvania Cyber Charter*, found that Hyde did not meet either prong of the *Hawkins County* test. Regarding the first prong, the Regional Director found that Hyde was not created directly by the State of New York but by a group of private individuals. He acknowledged that the *Chicago Mathematics* Board found it significant that the individuals incorporated the charter school before a charter was issued by the Illinois Department of Education. The same sequence—incorporation before issuance of the charter—occurred in *Pennsylvania Charter*. Here, however, the Board of Regents incorporated Hyde as an education corporation after issuing the School's charter. Nonetheless, the Regional Director reasoned that Dr. DuPree and the founding board "created" the charter school corporation and that the Board of Regents' act of incorporating the School did not amount to "directly creating" it under *Hawkins County*.

Further, the Regional Director found that even if the CSA directly authorized the Board of Regents to create a charter school, it did not authorize the Board of Regents to do so as an administrative arm of the government. See *Research Foundation of the City Univ. of New York*, 337 NLRB 965, 968 (2002) (nonprofit corporation founded to assist a public university was not intended to operate as an independent arm of the university). The Regional Director reasoned that the governance and control of the School is "vested solely with the private incorporators" rather than public entities, such as the Department of Education. Id. He further found that, although the CSA may state that the New York state legislature intended charter schools to be public schools in many respects, the CSA is not binding on a federal agency like the Board. See *Hinds County Human Resource Agency*, 331 NLRB 1404, 1404 (2000) citing *Hawkins County,* 402 U.S. at 602 (state's characterization of entity is "worthy of care-

[7] 359 NLRB No. 41 (2012). In *Chicago Mathematics*, the Board applied *Hawkins County* and determined that a private nonprofit corporation that established and operated a public charter school in Chicago, Illinois was subject to the Board's jurisdiction. The Union correctly notes that *Chicago Mathematics*, which was decided by a Board that included two recess appointees, was later rendered invalid by the Supreme Court's decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014). The Union, however, does not dispute that *Hawkins County* is the appropriate test in these cases.

[8] 06–RC–120811, 2014 WL 1390806 (April 9, 2014) (unpublished) (Board majority denied employer's request for review of regional director's decision and direction of election finding a Pennsylvania nonprofit charter school was not a political subdivision).

[9] *Brooklyn Excelsior Charter Schoo*l, 44 PERB ¶ 3001 (2001) (asserting jurisdiction over charter school); *Buffalo United Charter School v. New York State Public Employment Relations Board*, 107 A.D.3d 1437, 965 N.Y.S.2d 905 (N.Y. App. Div. 2013) (reserving decision on appeal from PERB assertion of jurisdiction pending NLRB determination). The Regional Director noted that the New York Appellate Division is holding *Brooklyn Excelsior* and *Buffalo United* in abeyance pending the Board's determination of whether its jurisdiction preempts PERB's assertion of jurisdiction.

[10] We acknowledge that these state court decisions are distinguishable. In *Smith*, where the Court of Appeals of New York held that charter schools are not public entities, 15 N.Y.3d at 409, the precise question was whether the state's prevailing wage laws applied to charter school projects. Id. In *DiNapoli*, where the court held that charter schools are not political subdivisions, the precise question was whether the state legislature could assign charter school audits to the state comptroller, pursuant to the comptroller's authority over the state and its political subdivisions. 13 N.Y.3d at 131. In addition, the Court of Appeals did not apply the *Hawkins County* test, which is controlling, in either case. That said, we regard these decisions of New York's highest court as significant support for our determination that charter schools in the state of New York are not arms of the state and should not be exempt from the jurisdiction of the Board. See additional discussion below, fn. 15.

ful consideration" but is "not controlling in ascertaining whether an entity is a political subdivision.").

Regarding the second prong of *Hawkins County*, the Regional Director found that Hyde was not administered by individuals who are responsible either to public officials or to the general electorate. Rather, the CSA places decision-making authority for Hyde's policy and operations in the self-appointed and self-perpetuating board of trustees rather than any public entity. The Regional Director found that public officials did not appoint any of the trustees on the School's board and that the Department of Education could remove a trustee only in specific, limited circumstances set out in the charter agreement itself, namely for material misstatements or omissions in the trustee's background information and financial disclosure reports.

Contentions of the Parties and Amici

The Union urges the Board to reverse the Regional Director, find that the School is exempt as a political subdivision under both prongs of the *Hawkins County* test, and dismiss the petition. Alternatively, even if the Board finds that Hyde is not exempt, the Union urges the Board to decline to exercise jurisdiction over charter schools in New York.

Regarding the first prong of *Hawkins County*, the Union argues that the language of the CSA shows that the School was created directly by the Board of Regents, a state entity. The Union emphasizes that only the charter entity can submit the proposed charter to the Board of Regents for review and that the final step of the process requires the Board of Regents to issue a provisional charter.

The Union also asserts that the Board of Regents created the School to operate as a public school—an administrative arm of government. The Union notes that the Board of Regents incorporated the charter school as a New York State education corporation. Further, under the CSA, charter schools, like public schools, must comply with health, safety, and sanitary requirements, civil rights laws, and student assessment criteria. The School does not pay rent for the use of a public school building and is overseen by the Board of Regents. Moreover, under the CSA, if the charter school closed, students would automatically be transferred to the school district where the charter school was located, and the funds would be relinquished to that public school. The Union also focuses on the CSA's references to the Taylor Law, under which charter schools are designated as public employers and employees of charter schools are declared public employees subject to that law. Under the CSA, a charter entity can terminate a charter if there is a "practice and pattern of egregious violations of" the Taylor Law.

Regarding the second prong of *Hawkins County*, the Union argues that the Regional Director incorrectly determined that the members of the board of trustees are not responsible to public officials. The Union points out that each member of the Board of Regents is elected by the New York State legislature to a 7-year term. In turn, the Board Regents appointed the initial trustees, and every trustee is subject to removal by the Board of Regents for certain kinds of misconduct.

The Union argues that the Regional Director erred by relying on New York State court of appeals cases *DiNapoli* and *Smith*, supra, as neither case concerned the CSA. Instead, the Union urges the Board to rely on the PERB decisions in *Brooklyn Excelsior* and *Buffalo United*, supra.

Finally, the Union argues that if the Board determines that the School is not a political subdivision, it should nevertheless decline to exercise jurisdiction. The Union contends that public education is a matter of local concern and highly regulated at the state level. The Union relies on cases in which the Board has discretionarily declined to assert jurisdiction over the horseracing and dogracing industries.

Three amicus briefs were filed in support of the Union's contention that Hyde is exempt from the Board's jurisdiction. Amici fully adopt the Union's arguments above. The amicus brief of the Council of School Supervisors and Administrators, Local 1 (CSSA) and the joint amicus brief of the AFT and the NEA additionally focus on why the Board should exercise its discretion to decline jurisdiction over New York charter schools. In essence, they argue that the Board should decline jurisdiction because of the state's unique responsibility for providing and overseeing education and the state's extensive role in regulating the employment of teachers and other employees in the public school system.

Although the AFL–CIO's amicus brief does not expressly argue that the Board should decline jurisdiction over New York charter schools, it argues that the language of the CSA evinces the legislature's intent to integrate charter schools into the existing public school system. The AFL–CIO further contends that the legislature went to great lengths to ensure that charter school teachers, like other public schools teachers in the state, could not interfere with the orderly provision of public education by engaging in strikes and other work stoppages under the Taylor Law.

Hyde agrees with the Regional Director that the School is an "employer" within the meaning of Section 2(2) of the Act. Under the first prong of the *Hawkins*

County test, Hyde asserts that the School was created through the work of Dr. Dupree and the founding board in planning its operations, submitting the technical application, and navigating the process to establish a charter school. Further, Hyde agrees with the Regional Director that the CSA's characterization of the School as a public school is not controlling under Board law and, in any event, has been refuted by two New York Court of Appeals cases, *DiNapoli and Smith*, supra, where the court found that the charter schools are not public entities. In response to the amici's argument that there will be a lack of uniformity if the Board asserts jurisdiction over charter schools in New York, Hyde points out that uniformity is already lacking. For example, wages and benefits vary from one New York charter school to another, and per pupil spending varies dramatically among New York state school districts. This lack of uniformity will continue whether or not the Board declines to exercise jurisdiction.

II. APPLICATION

Hyde was Not "Created Directly by the State"

As stated in *Pennsylvania Virtual Charter School*, supra, in order to determine whether an entity is a political subdivision under the first prong of the *Hawkins County* test, the Board determines first whether the entity was created directly by the state, such as a government entity, legislative act, or public official.[11] If it was, the Board then considers whether the entity was created so as to constitute a department or administrative arm of the government.[12] Both of these criteria need to be met for the employer to be exempt under this prong. We find that Hyde does not share the key characteristic of political subdivision status with entities that the Board has found to be exempt. That is, Hyde was not created directly by any New York government entity, special statute, legislation, or public official, but instead by private individuals as a nonprofit corporation.

The Board has consistently held that entities created by private individuals as nonprofit corporations are not exempt under the first prong of *Hawkins County*.[13] Furthermore, an entity is not exempt simply because it receives public funding or operates pursuant to a contract with a government entity, as does Hyde. The Board routinely asserts jurisdiction over private employers that have agreements with government entities to provide services.[14] As the Board stated in *Research Foundation*, supra, 337 NLRB at 968, the "plain language" of Section 2(2) does not exempt private entities acting as government contractors from the Board's jurisdiction. Further, "[t]he creation of the Employer by private individuals as a private corporation, without any state enabling action or intent, clearly leaves the Employer outside the ambit of the Section 2(2) exemption." Id.

The School was founded in 2010, when Dr. Dupree and the other members of the founding board prepared and filed a comprehensive application to establish the charter school**.** The application contained detailed information about the proposed school, including the names of the initial trustees. Thereafter, Dupree and the Department of Education entered into a charter agreement, which included the application. The Board of Regents then approved the charter and incorporated Hyde as a nonprofit education corporation. There is no evidence that the Board of Regents amended any part of the School's proposed charter or rejected any of the initial trustees. After incorporation, the founding board became the governing board of trustees, who then appointed Dr. Dupree as the executive director.

Citing the CSA, the Union and the dissent argue that the Board of Regents, a state agency, is the only entity that may incorporate a charter school, and until then, a charter school does not exist as a legal entity. Thus, they argue that the state "directly created" Hyde. We do not agree with this narrow interpretation. Rather, we agree with the Regional Director that it was Dr. Dupree's initiative and her and the founding board's preparatory work, including the promulgation of the School's governing and operating documents, that "created" the School, not the Board of Regents' approval of the charter and incorporation of the School. See *Pennsylvania Virtual Charter School*, slip op. at 6 (finding charter school was not created directly by the state but by a group of private individuals who organized and filed a comprehensive application for a charter with a state entity).

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[11] See e.g., *New York Institute for the Blind*, 254 NLRB 664, 667 (1981) (corporation formed by special act of New York State legislature); *University of Vermont*, 297 NLRB 291 (1989) (university created directly by special act of Vermont General Assembly).

[12] *Hawkins County*, supra, at 604; *Hinds County Human Resource Agency*, supra, at 331 NLRB at 1404.

[13] *Pennsylvania Virtual*, slip op. at 3. See also *Research Foundation of the City University of New York*, 337 NLRB 965 (2002) (private individuals created employer as nonprofit education corporation under the New York State Educational Law; employer was acting as government contractor and was not created directly by state as an arm of government).

[14] See, e.g., *Connecticut State Conference Board, Amalgamated Transit Union*, 339 NLRB 760 (2003) (private employer contracted with the state to provide public bus service); *Jefferson County Community Center, Inc.*, 259 NLRB 186 (1981), enfd. 732 F.2d 122 (10th Cir. 1984), cert. denied 469 U.S. 1086 (1984) (employer that contracted with or was licensed by the state to perform services for citizens with special needs); *Parents and Friends of the Specialized Living Center*, 879 F.2d 1442 (7th Cir. 1989) (same).

In sum, we find that Hyde does not satisfy the first prong of the *Hawkins County* test, because the School was not directly created by a New York government entity, special statute, legislation, or public official, but instead by private individuals as a nonprofit corporation.[15]

Hyde is Not Administered by Individuals Who Are Responsible to Public Officials or the General Electorate

Under the second prong of the *Hawkins County* test, an entity will be deemed a political subdivision if "it is administered by individuals who are responsible to public officials or the general electorate." *Hawkins County*, supra at 605. In making this determination, the dispositive question is whether a majority of the individuals who administer the entity—Hyde's governing board members and executive officers—are appointed by or subject to removal by public officials.[16] The Board examines whether the composition, selection, and removal of the members of an employer's governing board are determined by law, or solely by the employer's governing documents.[17] The latter indicate that appointment and removal are controlled by private individuals—as opposed to public officials—and the entity will be subject to the Board's jurisdiction.[18]

Hyde is a private corporation whose governing board members are privately appointed and removed. The method of selection of Hyde's governing board is dictated by its bylaws, and not by the CSA or any other law, statute, or governmental regulation. Those bylaws provide that only sitting members may appoint, remove, and fill vacancies on the Hyde board of trustees, and only board members may appoint and remove Hyde's executive director. The record contains no evidence that any local or state official has had any involvement in the selection or removal of any members of the board of trustees, or in the hiring of the School's staff, including its executive director. The bylaws list reasons for which a trustee may be removed, all of which require a majority vote of the board and no action by a state official.

We find no merit in the Union's and the dissent's argument that the School is exempt under this prong because the Board of Regents appointed the initial board of trustees and may, under certain limited circumstances, remove Hyde's trustees. It was Dr. Dupree who, on her application to establish the School, identified the individuals who would be members of the "founding board"; her application also included background information for each trustee and the method of appointment for future trustees in describing the School's proposed governance structure. After incorporation, the initial founding board of trustees became Hyde's governing board. Moreover, since the School's incorporation, the board has appointed additional trustees, none of whom were appointed by any public entity, nor are any of the trustees otherwise affiliated with the Department of Education.[19] This is consistent with the CSA, which has no requirement that trustees be public officials. Thus, the governance and struc-

[15] In light of our finding that Hyde was not directly created by the state, we find it unnecessary to decide whether Hyde was created to be an administrative arm of government. *Pennsylvania Virtual Charter*, slip op. at 6 (unnecessary to examine whether charter school is an administrative arm of government because Board found it was not directly created by the state); see also *Regional Medical Center of Memphis*, 343 NLRB 346, 358 (2004) (because employer was not created by the state, it could be exempt under *Hawkins County* only under a second prong analysis, i.e., "only if officials who are responsible to public officials or to the general electorate administer it.").

However, if we were to address this issue, we would find that the record evidence does not support the Union's and dissent's claim that Hyde was created to be an administrative arm of the state's government. We find no merit in the dissent's reliance on the CSA's language that a charter school is a "political subdivision" that "performs … essential public services." As explained above, federal, not state, law governs the determination of whether an entity created under state law is a political subdivision under Sec. 2(2) of the Act. *Hawkins County*, 402 U.S. at 602–603. And in any event, as stated above, decisions of the New York's highest court support our determination that charter schools are not political subdivisions. See discussion above, p. 3 and fn. 10. Nor are we persuaded by the dissent's argument that the structure and operation of Hyde, including the fact that Hyde receives public funds and that the Board of Regents oversees Hyde, offer compelling reasons to find that Hyde is an administrative arm of government. See cases cited in fn. 14 above.

[16] See *Pennsylvania Virtual*, slip op. at 7; *Hawkins County*, supra at 608; *Aramark Corp. v. NLRB*, 156 F.3d 1087, 1093 (10th Cir. 1998), vacated in part on rehearing en banc 179 F.3d 872 (10th Cir. 1999); *Research Foundation*, 337 NLRB at 969, citing *FiveCAP, Inc.*, 331 NLRB 1165 (2000); and *Enrichment Services Program*, 325 NLRB at 819. "This requirement is consistently evidenced throughout Board decisions." *Regional Medical Center at Memphis*, 343 NLRB at 359.

[17] *Pennsylvania Virtual*, slip op. at 8. See also *Research Foundation*, supra at 969.

[18] See, e.g., *Research Foundation*, supra at 969 (no exemption where employer's bylaws, not state law, defined appointment and removal of members of the board of directors). *St. Paul Ramsey Medical Center*, 291 NLRB 755 (1988) (medical center not a political subdivision because there was no requirement that board of directors be public officials or appointed and removed by public officials).

[19] In support of his assertion that Hyde's board of trustees is responsible to public officials, the dissent relies on a provision in the charter agreement requiring that, prior to its appointment of a member, the board provide the chancellor with the proposed member's name and background information. The dissent emphasizes the language in this provision that "[w]ithin forty-five days of receiving the name of the proposed member of the Board, [the chancellor] shall…reject or approve such individual." The significance of this language is diminished, however, by the very next sentence, which states, "In the event that [the chancellor] does not provide in writing an approval or rejection within forty-five days (45) . . . the proposed member may be seated by the Board." In this case, Dr. Dupree's uncontroverted testimony was that the board appointed all subsequent members; she made no mention of the chancellor playing any role in those appointments.

ture of the School lies with private individuals—Dr. Dupree and the board of trustees—not the state. See CSA § 2853 (1)(f) (once the Board of Regents has approved the charter, the board of trustees has final authority for "policy and operational decisions of the school").

Although the charter agreement allows the Board of Regents or the Department of Education to remove trustees, we find, contrary to the dissent, that the Regional Director correctly found that the grounds for such removal are limited to certain specific rules in the charter agreement requiring background information and financial interest disclosure reports. The removal authority is thus based on Hyde's own governing documents and does not appear to be required by the CSA.[20] See *Truman Medical Center v. NLRB*, 641 F.2d 570, 573 (8th Cir. 1981) (the court noted that the responsibility of the hospital's self-perpetuating board of directors to public agencies, "while undoubtedly heavy, derive[d] from the contractual relations between [the hospital] and these political subdivisions, and is not the sort of direct personal accountability to public officials or to the general public required to support a claim of exemption under 2(2).").

We reject the contention by the Union and the dissent that New York Education Law § 226(4), which authorizes the Board of Regents to remove any trustee of a corporation for "misconduct, incapacity, neglect of duty, or . . . fail[ing] or refus[ing] to carry into effect its educational purposes," establishes trustee responsibility to public officials for purposes of the *Hawkins County* standard. We find that the Board of Regents' limited authority to remove a trustee for malfeasance, which applies to the trustees of all educational institutions in the State of New York, public and private,[21] is insufficient to make the trustees individuals who have "direct personal accountability" to public officials or to the general electorate within the meaning of *Hawkins County*. *Cape Girardeau Care Center*, 278 NLRB 1018, 1019 (1986) and cases cited therein.

Given the method of appointment and removal of Hyde's board members, we find that none of the trustees are responsible to public officials in their capacity as board members, and therefore that Hyde is not "administered" by individuals who are responsible to public officials or the general electorate. Accordingly, Hyde is not a political subdivision under the second prong of *Hawkins County*.

The Board Should Not Decline to Assert Jurisdiction over Hyde

In the alternative, the Union and amici argue that even if the Board has statutory jurisdiction over the School, the Board should nonetheless decline jurisdiction over New York charter schools under Section 14(c)(1) of the Act, because public education is a matter of local concern to the state and because the state legislature intended charter schools established in New York to be public schools. The dissent likewise argues that the Board should decline jurisdiction under Section 14(c)(1), not only over Hyde but over all charter schools, because charter schools assertedly have an insubstantial effect on interstate commerce and the Board's exercise of jurisdiction over charter schools would lead to instability and confusion. We reject those arguments.[22]

Under Section 14(c)(1) of the Act, the Board may "in its discretion . . . 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."

The Union argues that in determining whether to decline jurisdiction under Section 14(c)(1), the Board often takes into account a number of factors in addition to whether the dispute has an effect on interstate commerce.

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[20] In determining whether the individuals who administer the entity are responsible to public officials, the Board examines whether the composition, selection, and removal of the members of an employer's governing board are determined by law or solely by the employer's governing documents. *Charter School Administration Services*, 353 NLRB 394, 397 (2008), adopted by *Pennsylvania Virtual*, slip op. at 7. See also *Hawkins County*, supra at 605; *Aramark Corp. v. NLRB*, 156 F.3d 1087, 1093 (10th Cir. 1998), vacated in part on rehearing en banc 179 F.3d 872 (10th Cir. 1999); *Research Foundation*, 337 NLRB at 969, citing *FiveCAP, Inc.*, 331 NLRB 1165 (2000); and *Enrichment Services Program*, 325 NLRB at 819. "This requirement is consistently evidenced throughout Board decisions." *Regional Medical Center at Memphis*, 343 NLRB at 359.

[21] Section 226 applies, by its terms, to "[t]he trustees of every corporation created by the [Board of Regents]," which is to say, of every educational institution established in the State of New York. Thus, the New York courts have applied it to such unquestionably private institutions as Columbia University, Adelphi University, and the Masters School. See, e.g., *Sheridan v. Trustees of Columbia University*, 296 A.D.2d 314, 745 N.Y.S.2d 18 (1st Dept. 2002), leave to appeal denied, 99 N.Y.2d 505, 755 N.Y.S.2d 711 (2003); *Adelphi University v. Board of Regents*, 229 A.D.2d 36, 652 N.Y.S.2d 837 (3d Dept. 1997); *The Masters School v. Town of Greenburgh*, 140 N.Y.S.2d 399 (Sup. Ct. Spec. Term 1955). Consistent with the Board's long-established practice of asserting jurisdiction over private educational institutions, the Board, of course, asserted jurisdiction over each of those institutions, notwithstanding the Board of Regents' limited removal power under Section 226. See, e.g., *Trustees of Columbia University*, 222 NLRB 309 (1976); *Adelphi University*, 195 NLRB 639 (1972); *The Masters School*, Case No. 02–RC–023472 (Cert. of Rep. issued June 22, 2010).

[22] Our colleague repeats the same policy arguments that he raised in *Pennsylvania Virtual Charter School*. We reject those arguments for the reasons stated in that decision. See slip op. at 9-11.

For example, the Board has consistently declined to assert jurisdiction over the horseracing and dogracing industries owing to the local nature of these industries. See *Yonkers Raceway, Inc.*, 196 NLRB No. 81 (1972); *Meadow Stud, Inc.*, 130 NLRB No. 121 (1961); *Jefferson Downs, Inc.*, 125 NLRB No. 58 (1959); *Hialeah Race Course, Inc.*, 125 NLRB No. 57 (1959). Here, the Union argues that the state has a substantial interest in and responsibility for public education, and that public education is highly regulated by the state. Thus, the Union argues that New York should continue to be allowed to promulgate policies concerning public education, including the manner in which charter schools are regulated.

Moreover, the Union argues, the language of the CSA shows the legislature intended charter schools to be public schools, including defining charter schools as public and charter school teachers as public school teachers. § CSA 2853(1)(c) and 2854(3)(a). The Union emphasizes the state's regulation and oversight of charter schools, including through audits, site visits, and annual reports. Further, the Union argues there is a direct issue of federal-state comity before the Board because PERB has asserted jurisdiction over New York charter schools. Finally, the Union argues that PERB retains jurisdiction over some charter school employees, such as employees of pre-existing public schools that have been converted to charter schools, and that it would therefore be irrational to subject other charter school employees to the jurisdiction of the NLRB. Such lack of uniformity, the Union argues, would diminish the Board of Regents' authority to revoke a charter under the CSA when a charter school engages in a "pattern of egregious and intentional violations of the Taylor Law." CSA § 2855(1)(d).

Having carefully considered the Union's and amici's contentions, we have decided that the Board should not, under Section 14(c)(1), decline to assert jurisdiction over Hyde on the basis of the charter schools' local character. It is true that the Board does not assert jurisdiction over public schools established by state or local governments, but that is because unlike Hyde, they do not come within the Section 2(2) definition of "employer." *The Children's Village, Inc.*, 197 NLRB 1218, 1220 (1972).

As we have explained, Hyde was not established by a state or local government, and is not itself a public school. Notwithstanding the state's statutory characterization of charter schools as being "within the public school system," state law does not *mandate* the establishment of charter schools as a means of fulfilling "the state's obligation to provide public education" in the same manner that it mandates the establishment of public schools. The Board has long exercised jurisdiction over private schools, both for-profit and nonprofit. See *The Windsor School*, 200 NLRB 991 (1972); *Shattuck School*, 189 NLRB 886 (1971).

The Board exercises its discretionary jurisdiction when doing so would effectuate the purposes of the Act and fairly protect the interests of employees. In keeping with these purposes, we have asserted jurisdiction over both private schools and nonprofit organizations, even when such entities have some relationship to the state or local government. See, e.g., *Boys and Girls Aid Society*, 224 NLRB 1614 (1976); *St. Aloysius Home*, 224 NLRB 1344 (1976). As earlier discussed, we find that the relationship between the State of New York and its charter schools resembles that of contractors providing services to the government, over which the Board routinely asserts jurisdiction.[23]

We are not persuaded that the Board's determination to decline jurisdiction over the horseracing and dogracing industries serves as guiding precedent here. That determination—which codified the holding of prior cases—was a response to the unique character of those industries, including, notably, the extensive involvement of state regulatory bodies to preserve the integrity of those activities.[24] Those rules do not establish a general intent or inclination to decline jurisdiction over any industry that may be regulated by the state. Furthermore, even though, as the Union suggests, Hyde and other New York charter schools may be subject to state and local regulatory oversight, we find that in many, if not most, respects, charter school cases are not much different from other Board cases involving government contractors. Many government contractors are subject to exacting oversight by statute,[25] regulation, or agreement. Yet the Board routinely asserts jurisdiction over private entities that provide services, under contract, to governmental bodies.[26] "The plain language of Section 2(2) 'exempts only government entities or wholly owned government

[23] *Pennsylvania Virtual*, slip op. at 10, fn. 31.

[24] Sec. 103.3, Board's Rules and Regulations, 29 CFR 103.3 (1989).

[25] See, e.g., McNamara–O'Hara Service Contract Act of 1965 (SCA) (covering most federal contractors), 41 U.S.C. §§ 351–358.

[26] See, e.g., *Connecticut State Conference Board*, 339 NLRB 760 (2003) (employer managed and operated public bus system pursuant to contract with state); *Bergensons Property Services*, 338 NLRB 883 (2003) (private corporation performed road work for State of New Jersey); *Servicios Correccionales de Puerto Rico*, 330 NLRB 663 (2000), enfd. 234 F.3d 1321 (D.C. Cir. 2000) (Delaware corporation operated and managed prisons in Puerto Rico); *Correctional Medical Services*, 325 NLRB 1061 (1998) (private employer provided health care services at prisons pursuant to contract with state).

We are not saying, as the dissent asserts, that government contractor cases are exactly like charter school cases and therefore that the same analytical framework applies in both. Rather, we observe that the Board has routinely asserted jurisdiction over government contractors, who similar to charter schools, provide public services and are subject to government oversight and regulation.

corporations from its coverage—not private entities acting as contractors for the government.'" *Research Foundation*, supra 337 NLRB at 968, quoting *Aramark Corp. v. NLRB*, 179 F.3d at 878.

In sum, we find no compelling reasons to discretionarily decline to assert jurisdiction over this private, nonprofit education corporation.[27]

III. CONCLUSION

For all of these reasons, we find that Hyde is an employer within the meaning of Section 2(2) of the Act. As Hyde satisfies the Board's monetary jurisdictional standards, we find that the Board should assert jurisdiction over Hyde. Accordingly, we shall remand the case to the Regional Director for further processing.

ORDER

The case is remanded to the Regional Director for appropriate action.

Dated, Washington, D.C. August 24, 2016

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

Section 2(2) of the National Labor Relations Act (NLRA or Act) defines the term *employer* as "any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or *any State or political subdivision* thereof."[1] In *NLRB v. Natural Gas Utility District of Hawkins County*,[2] the Supreme Court held that entities are "political subdivisions" of a state if they are "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."[3]

I believe the record clearly establishes that Hyde Leadership Charter School–Brooklyn (Hyde Leadership or the School) is a "political subdivision" of the State of New York under *both* of the *Hawkins County* standards, which divests the Board of jurisdiction under Section 2(2). That is, the evidence proves that Hyde Leadership was "created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government," *and* that Hyde Leadership is "administered by individuals who are responsible to public officials or to the general electorate." Again, if either of these standards is met, a charter school constitutes a "political subdivision," which means the Board lacks jurisdiction under Section 2(2). Accordingly, I respectfully disagree with my colleagues, who find that Hyde Leadership fails to satisfy either *Hawkins County* test, and therefore that Section 2(2) jurisdiction exists in this case.

Even if Section 2(2) jurisdiction existed here (i.e., if Hyde Leadership did not constitute a "political subdivision" of New York State), this would not dictate the outcome of this case or other charter school cases, for two reasons. First, even if statutory jurisdiction exists under Section 2(2), the Board may nonetheless decline to exercise jurisdiction over charter schools as a class or category of employers, consistent with Section 14(c)(1) of the Act. Second, the existence of Section 2(2) jurisdiction over Hyde Leadership does not mean that the Board has Section 2(2) jurisdiction over *other* charter schools. Rather, under the *Hawkins County* test, the question of Section 2(2) jurisdiction over any charter school depends on the particular facts of each case, which vary significantly because many different state and local laws govern the creation, structure and operation of charter schools.

In my view, the Board should decline to exercise jurisdiction over Hyde Leadership, and charter schools generally, for reasons explained more fully in Part C below and in my dissenting opinion in *Pennsylvania Virtual Charter School (Pennsylvania Virtual)*,[4] a second charter school case decided by the Board today. I believe the Board should decline to exercise jurisdiction based on the following considerations:

- The Board should decline to exercise jurisdiction here and in other charter school cases, consistent with Section 14(c)(1) of the Act, because any dispute involving this particular

[27] Additionally, we note that New York's Appellate Division has indicated that it will hold cases involving this jurisdictional issue in abeyance pending the Board's determination, and neither the State of New York nor any state agency, including PERB, has sought to intervene or otherwise participate in this proceeding.

[1] Sec. 2(2) (emphasis added). Sec. 2(2) also excludes from the Act's definition of *employer* "any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

[2] 402 U.S. 600 (1971).

[3] Id. at 604-605.

[4] 364 NLRB No. 87, slip op. at 11-18 (2016) (Member Miscimarra, dissenting).

"class or category of employers" will have an insubstantial effect on interstate commerce. Id., slip op. at 11-15 (Member Miscimarra, dissenting). This conclusion is reinforced by the fact that state and local issues overwhelmingly predominate the creation, structure and operation of charter schools, which exist for the purpose of satisfying public education requirements between kindergarten and grade 12 (K-12), spanning elementary school, middle school, and high school.

- Even if Section 2(2) jurisdiction existed here, there is little question that Section 2(2) jurisdiction will *not* exist in various other charter school cases. Moreover, based on the fact-specific inquiry required under *Hawkins County*, there is no way for parties to reliably determine, in advance, whether or not Section 2(2) jurisdiction exists, and this uncertainty will persist given the length of time that it takes to obtain a Board determination regarding Section 2(2) jurisdiction, not to mention the uncertainty associated with potential court appeals from any Board decision. Therefore, the only certain outcome of the Board's attempted exercise of jurisdiction here and in other charter school cases will be substantial uncertainty and long-lasting instability.
- One of the Board's primary roles is to foster "stability of labor relations,"[5] and the policy underlying our statute is to produce a "single, uniform, national rule" displacing the "variegated laws of the several States."[6] As I have explained more fully in *Pennsylvania Virtual*, the most that could result from Board efforts to exercise jurisdiction over charter schools will be a jurisdictional patchwork—where federal jurisdiction exists here and state jurisdiction exists there, depending on how the "political subdivision" question is resolved—with substantial uncertainty for employees, unions, employers, and state and local governments. Id. slip op. at 16. Therefore, I believe the Board's involvement in these cases will be self-defeating: the Board cannot possibly achieve "stability of labor relations,"[7] nor can there be any hope that a "single, uniform, national rule" will displace the "variegated laws of the several States."[8]
- By declining to exercise jurisdiction here and in other charter school cases, the Board would permit state and local governments to regulate charter school labor relations.

Again, contrary to my colleagues, I believe jurisdiction is foreclosed in the instant case by Section 2(2) and the "political subdivision" test set forth in *Hawkins County*. More generally, the Board should decline to exercise jurisdiction in any event consistent with Section 14(c)(1) of the Act. Accordingly, I respectfully dissent.

DISCUSSION

A. Hyde Leadership Was Created Directly by the State as an Administrative Arm of the Government

The process of bringing a charter school into existence in the State of New York is complex. However, for purposes of determining, under *Hawkins County*, whether Hyde Leadership was created directly by the state, the key point is simple, and it is this: each and every charter school in the State of New York is created by the state through the New York State Board of Regents, not by private entities or individuals.

The State of New York enacted the New York Charter Schools Act of 1998, last amended in 2014 (hereinafter "CSA"), to open a new approach to public education that would improve learning, encourage innovation, expand choice for parents and students, provide new opportunities for educators, and increase performance-based accountability.[9] The CSA gives "teachers, parents, school administrators, community residents or any combination thereof" the opportunity to apply to establish a charter school.[10] Under the CSA, any charter school approved by the state under the procedure described below is "an independent and autonomous public school, except as otherwise provided in this article, and a political subdivision having boundaries coterminous with the school district or community school district in which the charter school is located."[11] Charter schools are publicly funded on a per-student basis from the funds of the school district in which the student lives.[12] Charter schools cannot

[5] *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. at 362–363; *NLRB v. Appleton Electric Co.*, 296 F.2d at 206; *Northwestern University*, 362 NLRB No. 167, slip op. at 1. See also fn. 53, infra.

[6] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 239 (1959).

[7] See cases cited in fn. 5 supra.

[8] Id.

[9] CSA § 2850.

[10] CSA § 2851(1). The application may be filed in conjunction with, but not solely by, "a college, university, museum, educational institution, [Sec. 501(c)(3)] not-for-profit corporation . . . or for-profit business or corporate entity authorized to do business in New York state." CSA § 2851(1).

[11] CSA § 2853(1)(c).

[12] CSA § 2856.

"charge tuition or fees," and "[a]ny child who is qualified under the laws of this state for admission to a public school is qualified for admission to a charter school."[13] In sum, charter schools are alternative public schools to New York State's traditional public schools.

Under the CSA, "[t]he powers granted to a charter school . . . constitute the performance of essential public purposes and governmental purposes of this state,"[14] and the state oversees each charter school to ensure these public, governmental purposes are carried out. Specifically, the New York State Board of Regents—the presiding body over the New York State Education Department—and the "charter entity" (explained more fully below) "shall oversee each school approved by such [charter] entity, and may visit, examine into and inspect any charter school, including the records of such school, under its oversight. Oversight by a charter entity and the Board of Regents shall be sufficient to ensure that the charter school is in compliance with all applicable laws, regulations and charter provisions."[15] In addition, charter schools must submit to the Board of Regents and the charter entity a detailed annual report on academic and fiscal performance.[16] The CSA also provides that the labor relations of charter-school employees are governed by the New York Public Employees' Fair Employment Act,[17] which prohibits public employees from striking.[18] Charter schools possess other characteristics of government entities, including exemption from taxation and being shielded from civil liability.[19]

To initiate the process of establishing a charter school, a detailed application must be filed with the charter entity, setting forth the proposed charter school's anticipated goals, operational details, and much more.[20] The charter entity may be the school district (specifically, the school district's board of education or, in New York City, the New York City Schools Chancellor) where the charter school would operate, the Board of Regents, or the Board of Trustees of the State University of New York.[21] The charter entity reviews the application and decides whether to approve, deny, or require modifications to the application.[22] When the charter entity approves an application, it enters into a detailed proposed charter with the applicant(s).[23] Assuming the charter entity is not the Board of Regents, the charter entity then sends the proposed charter and application materials to the Board of Regents for approval.[24]

At this point in the process, the charter school as a legal entity does not exist. If the Board of Regents approves the proposed charter, the Charter Schools Act provides that *the Board of Regents* "shall incorporate the charter school as an education corporation for a term not to exceed five years."[25] This certificate of incorporation is called the "provisional charter."[26] The charter entity or the Board of Regents may terminate the charter during its term if the charter school falls below certain student-achievement levels or for "serious violations of law," "material and substantial violation of the charter, including fiscal mismanagement," a pattern of egregious or intentional violations of the Public Employees' Fair Employment Act, or repeated failure to comply with enrollment and retention targets of certain students.[27] Moreover, charter schools must apply to renew their charter every 5 years.[28] "Upon termination or nonrenewal of the charter . . . , the certificate of incorporation of the charter school shall be revoked by the board of regents," and "the charter school shall proceed with dissolution."[29] When the Board of Regents revokes the charter school's certificate of incorporation, the legal entity ceases to exist.

In 2009, Dr. Sandra Dupree submitted an application for the creation of Hyde Leadership to the New York City Schools Chancellor as the charter entity. In October 2009, the Chancellor approved the application and entered into a proposed charter with Dr. Dupree. The Chancellor sent the proposed charter and application materials to the Board of Regents. The Board of Regents approved the proposed charter and incorporated Hyde Leadership as an education corporation, effective January 12, 2010, through January 11, 2015. Co-located with an existing traditional public school, Hyde Leadership opened its doors in fall 2010 to provide public elementary education under the framework of the CSA.

[13] CSA § 2854(2)(a)-(b). If there are more applicants than space at the school, admission is by a "random selection process." CSA § 2854(2)(b).

[14] CSA § 2853(1)(d).

[15] CSA § 2853(2). The charter entity may be, but need not be, the local school district. Even if the local school district is not the charter entity, it still has the right to visit, examine, and inspect the charter school and to forward any evidence of noncompliance to the charter entity or the Board of Regents. CSA § 2853(2-a).

[16] CSA § 2857(2).

[17] N.Y. Civ. Serv. §§ 200-214.

[18] CSA § 2854(3)(a).

[19] CSA § 2853(1)(d), (g).

[20] CSA § 2851.

[21] CSA § 2851(3).

[22] CSA § 2852.

[23] CSA § 2852(5).

[24] Id.

[25] CSA § 2853(1)(a).

[26] Id.

[27] CSA § 2855.

[28] CSA § 2851(4).

[29] CSA §§ 2853(1)(a), 2855(2).

Under any reasonable interpretation of the *Hawkins County* standard, Hyde Leadership was "created directly by the state." It did not exist as a legal entity until the New York State Board of Regents—the governing body of the New York State Education Department—exercised the power bestowed on it by the state legislature in the CSA and created Hyde Leadership on January 12, 2010, through the certificate of incorporation or "provisional charter." In fact, Hyde Leadership is entirely a creature of the state: it was created by the state, and it will cease to exist as a legal entity if and when the Board of Regents or the New York City Schools Chancellor either terminates or decides not to renew the provisional charter.

My colleagues reason that Hyde Leadership was not "created directly by the state" because Dr. Dupree provided the "initiative" for Hyde Leadership and was responsible for "preparatory work," which, in turn, "created" the School. I believe this analysis distorts the unambiguous language in *Hawkins County*, which makes no reference to who provides the "initiative" or engages in "preparatory work." The Supreme Court in *Hawkins County* stated that an entity is a "political subdivision" of a state if it was "created" directly by the state to constitute a department or administrative arm of the government.[30] The term "create" means "to bring into existence."[31] An entity is not "created" whenever someone takes the "initiative" to do "preparatory work" that is followed by the entity's creation. As a matter of law under the New York Charter Schools Act, a single governmental body "created" Hyde Leadership: the Board of Regents brought Hyde Leadership into existence, just as it creates every other charter school in New York State.[32]

Under the first part of the *Hawkins County* test, the Board must further determine whether the entity was created directly by the state "so as to constitute [a] department[] or administrative arm[] of the government."[33] In my view, the record supports a finding that Hyde Leadership meets this further test.[34] Several considerations support this conclusion.

First, although not determinative, "the state's characterization of an entity [is] an important factor in determining the more specific issue of whether the [e]mployer was created so as to constitute a department or administrative arm of government." *Hinds County Human Resource Agency*, 331 NLRB 1404, 1404 (2000). As mentioned above, the CSA characterizes charter schools as "a political subdivision" of the state. CSA § 2853(1)(d). The CSA also states that charter schools "perform[] . . . essential public purposes and governmental purposes of this state." Id. These are phrases describing an administrative arm of the state.[35]

Second, Hyde Leadership is a *public* school, both in name and in fact. The CSA describes charter schools as "public schools," and all children qualified to attend a traditional New York public school must be allowed to attend Hyde Leadership (space permitting) free of charge. "Providing public schools ranks at the very apex of the function of a State," *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), and by providing public elementary education, Hyde Leadership is performing a core state function. Cf. *State Bar of New Mexico*, 346 NLRB 674, 677 (2006) (finding state bar to be an administrative arm of the government because it "was created to assist the judicial branch of the State of New Mexico in regulating the legal profession").

Third, other details regarding the structure and operation of Hyde Leadership reinforce a conclusion that it is an administrative arm of the state. Nearly all of Hyde Leadership's funds come from public sources. Hyde Leadership is exempt from taxation and civil liability. The Board of Regents and the New York City Schools

[30] 402 U.S. at 604-605.

[31] http://www.merriam-webster.com/dictionary/create (last viewed July 13, 2016).

[32] CSA § 2853(1)(a). In contrast, in the other charter school case the Board issues today, *Pennsylvania Virtual*, private individuals incorporated a public non-profit corporation for educational purposes, and the Pennsylvania Department of Education subsequently issued the charter to that corporation. Thus, my colleagues in *Pennsylvania Virtual* find that the legal entity was directly created by the private individuals who incorporated it under Pennsylvania law and was not "created directly by the state." 364 NLRB No. 87, slip op. at 5 relying on *Hawkins County*, 402 U.S. at 604–605. In contrast, under New York law, as described in the text above, the New York State Education Department, acting through its governing Board of Regents, incorporates charter schools and incorporated Hyde Leadership.

[33] 402 U.S. at 604–605.

[34] Id.

[35] The majority dismisses the fact that the State of New York itself, in the New York Charter Schools Act, has characterized charter schools as political subdivisions of the state, on the grounds that federal, not state law is determinative. Paradoxically, they then rely on state court decisions regarding the status of charter schools for other purposes, under other provisions of state law, in decisions that do not apply the *Hawkins County* test, as "significant support" for their position. See *New York Charter Schools Association v. Smith,* 15 N.Y.3d 403 (N.Y. 2010) (charter schools are not "public entities" for purpose of state prevailing wage laws); *New York Charter Schools Association v. DiNapoli,* 13 N.Y. 3d 120 (N.Y. 2009) (provision of state constitution limiting legislature's authority to assign duties to state comptroller did not authorize assigning charter school audits to comptroller). Contrary to my colleagues, I believe that the provisions of the CSA, and the decisions of the New York Public Employment Relations Board asserting jurisdiction over charter schools pursuant to the CSA, discussed below, are entitled to substantial weight in determining whether charter schools are political subdivisions of the state within the meaning of Sec. 2(2) of the Act.

Chancellor (as charter entity) retain broad oversight authority over Hyde Leadership. They have unlimited access to Hyde Leadership and its records. Failing to fulfill its educational mission or fiscal mismanagement, among other things, can lead to the Board of Regents' or the Chancellor's terminating or not renewing Hyde Leadership's certificate of incorporation. Hyde Leadership's employees are public employees under the New York Public Employees' Fair Employment Act, which means, for example, that, like other public employees of New York State, they are prohibited from striking. Hyde Leadership's board of trustees has the latitude to make the "policy and operational decisions of the school,"[36] but this is no different than authority that might be exercised by any other political subdivision, which can range from a small state agency to a large city. See *Hinds County*, supra at 1405 (fact that the entity's board is responsible for the entity's "plans, priorities, and activities . . . . do[es] not negate a finding that the [entity] was created as an administrative arm of government"). All these considerations support a finding that Hyde Leadership is an administrative arm of the state. See id. at 1404–1406 (finding that Hinds County Human Resource Agency was an administrative arm of the government based in part on the fact that it "receives virtually all of its funds from State and Federal governmental sources," is subject to state oversight, and is exempt from taxes).

Therefore, even if one considers only the portion of the *Hawkins County* test regarding whether an entity is "created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government,"[37] I believe the Board must conclude that Hyde Leadership is a "political subdivision" for purposes of Section 2(2), which divests the Board of jurisdiction in the instant case.

B. Hyde Leadership Is Administered by Trustees Who Are Responsible to Public Officials.

Under the *Hawkins County* test, even if an entity is not "created directly by the state," it still constitutes a "political subdivision" of a state—meaning the Board lacks jurisdiction—if the entity is "administered by individuals who are responsible to public officials or to the general electorate."[38] The Board has held that this portion of the *Hawkins County* test is satisfied when a majority of an entity's board of trustees is "appointed by and subject to removal by public officials." *Research Foundation of the City Univ. of New York*, 337 NLRB 965, 969 (2002).

This aspect of the *Hawkins County* test separately warrants a finding that Hyde Leadership is a "political subdivision" over which the Board lacks jurisdiction under Section 2(2) of the Act. Several aspects of the record and New York law compel a conclusion that Hyde Leadership is administered by individuals who are "responsible to public officials or to the general electorate."[39]

First, the Board of Regents appointed Hyde Leadership's initial board of trustees. Under the CSA, the applicant(s) for the charter school must "includ[e] a list of members of the initial board of trustees" together with "background information on . . . proposed members of the board of trustees."[40] If any of the proposed initial trustees are deemed unacceptable, the charter entity or Board of Regents requires the application to be amended to replace them with different proposed initial trustees. When the Board of Regents incorporates an approved charter school, it sets forth in the certificate of incorporation (the provisional charter) a list of the names and addresses of the initial trustees. Thus, just as the Board of Regents creates the charter school entity, it also appoints the initial trustees. Accordingly, the Board of Regents, consistent with New York law, appointed Hyde Leadership's initial trustees.[41]

Second, under the Hyde Leadership charter agreement, only the New York City Schools Chancellor's Office of Portfolio Development (OPD) has the authority to approve new trustees to the School's board of trustees. The charter agreement provides as follows:

> Prior to the appointment or election of any individual to the Board who is not a Founding School Trustee, the Board must submit to OPD (pursuant to and together with a duly approved resolution of the Board), the name of the proposed member of the Board and such individual must timely provide to OPD, in writing and/or in person, such background information as OPD shall require . . . . *Within forty-five days of receiving the name of the proposed member of the Board, OPD shall in writing reject or approve such individual*. In the event that OPD does not provide in writing an approval or rejection within the forty-five (45) day time period, the proposed member may be seated by the Board.[42]

[36] CSA § 2853(f).
[37] 402 U.S. at 604-605.
[38] Id.
[39] 402 U.S. at 604-605.
[40] CSA § 2851(2)(c), (m).
[41] Dr. Dupree could exercise no authority regarding the initial trustees except to propose individuals for consideration by the Board of Regents.
[42] Emphasis added.

Here, there is no suggestion that any new trustee's appointment was handled in a manner that differed from the mandatory process set forth in Hyde Leadership's charter agreement. New trustees cannot serve on the Board unless they have been approved by a "public official[]"[43]—namely, the New York City Schools Chancellor, acting through the OPD—and this is the exclusive manner in which new trustees can be approved.[44]

Third, the trustees who administer Hyde Leadership are "responsible to public officials or to the general electorate"[45] in yet another way: they are "subject to removal by public officials."[46] Hyde Leadership's charter agreement provides that the Board of Regents may remove a Hyde Leadership trustee if his or her background information contained "material misstatements or material omissions of fact." And the charter agreement empowers the New York City Schools Chancellor to require a Hyde Leadership trustee's removal if he or she fails to file an annual financial-interest disclosure report or if the report, in material respects, is "incomplete, misleading or untruthful."

As described above, therefore, I believe the record establishes that Hyde Leadership must be considered a "political subdivision" of the State of New York under Section 2(2), based on the second test in *Hawkins County* under which the Board lacks jurisdiction over entities "administered by individuals who are responsible to public officials or to the general electorate,"[47] which is satisfied when a majority of an entity's board of trustees is "appointed by and subject to removal by public officials."[48]

C. Even If the Board Has Section 2(2) Jurisdiction over Hyde Leadership, the Board Should Decline to Exercise Jurisdiction in This Case and Similar Charter School Cases.

Even if Section 2(2) jurisdiction otherwise existed, I believe the Board should decline to exercise its jurisdiction in this case and in charter school cases generally for the reasons set forth more fully in my separate opinion in *Pennsylvania Virtual Charter School*, supra, slip op. at 11-18 (Member Miscimarra, dissenting).

As explained in *Pennsylvania Virtual*, the Board has previously decided against the exercise of jurisdiction over certain employers in reliance on Section 14(c)(1) of the Act, which states that the Board has "discretion . . . [to] 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."[49] Like other employers over which the Board has declined to exercise jurisdiction under Section 14(c)(1), charter schools are "essentially local in nature"[50] and their operations are "peculiarly related to, and regulated by, local governments."[51] As this case and *Pennsylvania Virtual* illustrate, state and local issues overwhelmingly predominate the creation, structure and operation of charter schools, which exist for the purpose of satisfying public K-12 education requirements spanning elementary school, middle school, and high school.[52]

I fully support the protection afforded by our statute to employees, unions, and employers who are subject to the Act. For several reasons, however, I believe our efforts to assert jurisdiction over charter schools will be self-defeating and will operate to the substantial detriment of the parties in many or most cases.

First, the Board can only choose to exercise jurisdiction over charter schools in those cases where Section 2(2) jurisdiction exists, and this means the Board will not even have the option of exercising jurisdiction when charter schools qualify as "political subdivisions" of a state under the *Hawkins County* test described and applied above. The result of Board efforts to assert jurisdiction over charter schools will be a jurisdictional patchwork—where federal jurisdiction exists here and state jurisdiction exists there, depending on how the "political subdivision" question is resolved—with substantial uncertainty for employees, unions, employers, and state and local governments.

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[43] 402 U.S. at 604–605.

[44] Contrary to the majority, I do not believe that the provision allowing proposed trustees to be seated absent timely action by OPD negates OPD's approval authority for the purpose of determining jurisdiction under *Hawkins County*.

[45] Id.

[46] *Research Foundation of the City Univ. of New York*, supra.

[47] Id.

[48] *Research Foundation of the City Univ. of New York*, 337 NLRB at 969.

[49] Sec. 14(c)(1).

[50] *Hialeah Race Course, Inc.*, 125 NLRB 388, 391 (1959).

[51] 38 Fed. Reg. 9537, 9537 (1973).

[52] My colleagues say that charter schools are little different from government contractors, in that both operate under governmental oversight. The comparison is misleading. Historically, the dispositive question regarding whether the Board would exercise jurisdiction over particular government contractors was whether the contractor had sufficient control over its employees' terms and conditions of employment to enable it to engage in meaningful collective bargaining. See *Res-Care, Inc.* 280 NLRB 670 (1986). The need to make that challenging determination vanished in 1995, when the Board rejected the *Res-Care* "extent of control" test. *Management Training Corp.*, 317 NLRB 1355, 1358 (1995). Thus, the extent of regulatory oversight is simply not an issue in cases involving government contractors.

Second, one of the Board's primary roles is to foster "stability of labor relations,"[53] and the policy underlying our statute is to produce a "single, uniform, national rule" displacing the "variegated laws of the several States."[54] Declining to exercise jurisdiction is the only way that the Board can foster stability, certainty and predictability in this important area. Based on the fact-specific inquiry required under *Hawkins County*, there is no way for parties to reliably determine, in advance, whether or not Section 2(2) jurisdiction exists, and this uncertainty will persist given the length of time that it takes to obtain a Board determination regarding Section 2(2) jurisdiction, not to mention the uncertainty associated with potential court appeals from any Board decision. Therefore, the only certain outcome of the Board's attempted exercise of jurisdiction here and in other charter school cases will be substantial uncertainty and long-lasting instability.

Third, the instant case and *Pennsylvania Virtual* illustrate these problems. Here, New York law gives charter school employees the right to form a union and bargain under the New York Public Employees' Fair Employment Act,[55] and the New York's Public Employment Relations Board (PERB) decided in 2011 that it has jurisdiction over New York charter schools.[56] After the PERB decision was upheld by a state trial court, a further appeal to the Appellate Division of the New York Supreme Court was held in abeyance after an NLRB majority in *Chicago Mathematics* asserted jurisdiction over the charter school in that case.[57] In 2013, the Appellate Division stayed the PERB appeal indefinitely "pending a determination of the NLRB whether the NLRA applies to the collective bargaining matters herein at issue and thus preempts PERB's jurisdiction."[58] In 2014, however, the Supreme Court's *Noel Canning* decision resulted in the invalidation of the NLRB's decision in *Chicago Mathematics*,[59] and even if *Chicago Mathematics* had not been invalidated, it would not control the jurisdictional determination here, which depends on the particular facts presented in this case. In sum, the Board's efforts to assert jurisdiction over charter schools have produced years of uncertainty regarding the applicability of federal law, and employees have been denied years of protection they would otherwise have had under New York state law. The NLRB's efforts to exercise jurisdiction over charter schools produced a similar sequence of events in *Pennsylvania Virtual*, where for years, employees, unions and employers have been denied the protection of Pennsylvania state law regarding union representation and collective bargaining.[60]

Finally, charter schools remain relatively new, and the states—along with local governments and school districts—have been laboratories for experimentation.[61] Based on the approach embraced by my colleagues today, employees concerned about their working conditions will not know what set of rules apply to them or to whom to turn if the employer infringes on their rights, and employees are likely to face years of delay if they try to secure relief from the NLRB. Unions and employers will have difficulty understanding their respective rights and obligations, given the uncertainty about whether federal, state, or local laws apply. Most poorly served will be the students whose education is the primary focus of every charter school. In most instances, the likely result will be protracted disputes that are not definitively resolved until many or most students (and many teachers and other employees) have come and gone.

For the reasons set forth above, I believe that the Board's effort to assert jurisdiction over charter schools

[53] *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations."); *Northwestern University*, 362 NLRB No. 167, slip op. at 1 (2015) (declining to assert jurisdiction where the union sought to represent grant-in-aid scholarship football players because doing so "would not serve to promote stability in labor relations").

[54] *San Diego Building Trades Council v. Garmon*, 359 U.S. at 239.

[55] N.Y. Civ. Serv. §§ 200–214. See New York Charter Schools Act of 1998, as amended, § 2854(3)(a).

[56] See *Brooklyn Excelsior Charter Schoo*l, 44 PERB ¶ 3001 (2011).

[57] See *Chicago Mathematics & Science Academy Charter School*, 359 NLRB No. 41 (2012). The Board's decision in *Chicago Mathematics* was invalidated by the Supreme Court decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), because some Board members who participated in *Chicago Mathematics* received recess appointments that were held to be unconstitutional in *Noel Canning*. Former Member Hayes dissented from the majority decision in *Chicago Mathematics*. Id., slip op. at 12-14 (Member Hayes, dissenting).

[58] *Buffalo United Charter School v. New York State Public Employment Relations Board*, 107 A.D.3d 1437 (N.Y. App. Div. 2013).

[59] See explanation in fn. 57, supra.

[60] Charter school employees have the right to form unions and engage in collective bargaining under Pennsylvania state law, but the Pennsylvania Labor Relations Board dismissed two proceedings involving that state's charter schools based on a divided NLRB's assertion of jurisdiction in *Chicago Mathematics*, which was subsequently invalidated by the Supreme Court's *Noel Canning* decision. See *Pennsylvania Virtual*, supra, slip op. at 19, fn. 45 (Member Miscimarra, dissenting). Although the events in *Pennsylvania Virtual* took a different route than those in this case, the destination is the same: the NLRB's effort to assert jurisdiction over charter schools has *deprived* employees of protection they otherwise would have had under state law.

[61] See, e.g., Christopher A. Lubienski & Peter C. Weitzel (eds.), THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS (Harvard Educ. Press 2010).

is not likely to advance any policy goal under the National Labor Relations Act. Therefore, in my view, the Board should decline to exercise jurisdiction in this case and in other cases involving charter schools, even if Section 2(2) jurisdiction otherwise exists.

CONCLUSION

I believe that the Board lacks statutory jurisdiction in the instant case under Section 2(2) of the Act because Hyde Leadership constitutes a "political subdivision" of the State of New York under both tests established by the Supreme Court in *Hawkins County*. Furthermore, even if Section 2(2) jurisdiction exists, I believe the Board should decline to exercise jurisdiction over charter schools consistent with Section 14(c)(1), which would permit state and local governments to regulate charter school labor relations, as described more fully in my dissenting opinion in *Pennsylvania Virtual*. This will provide much greater certainty and predictability than could ever be afforded by the NLRB in this area, and the rights of charter school employees would more closely align with those afforded to public school employees under state and local laws.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 24, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD