UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

KIPP Academy Charter School
Employer,

and Case No. 02-RD-191760

Nicole Mangiere and Christopher Diaz
Petitioner,

and

United Federation of Teachers, Local 2,
AFT, AFL-CIO
Union

DECISION AND DIRECTION OF ELECTION

KIPP Academy Charter School (KIPP Academy or the Employer) is a charter school serving elementary and middle school students in the Bronx, New York. On January 25, 2017, Nicole Mangiere and Christopher Diaz (the Petitioner) filed a decertification petition under Section 9(c) of the National Labor Relations Act (the Act), as amended, seeking to decertify the United Federation of Teachers, Local 2, AFT, AFL-CIO (the Union), as the collective bargaining representative of a unit of all full-time and regular part-time teachers, deans, counselors, social workers, teaching fellows,[1] team leaders, specialists, and the director of support services, at the Employer's Bronx school, excluding all other employees, including substitute teachers, clerical, maintenance, supervisors, managers, and guards as defined in the Act.[2]

The Union moves to dismiss the petition. Citing the Employer's status as a "conversion" charter school under the New York State Charter Schools Act of 1998, as amended, the Union contends that the petitioned-for unit would be improperly severed from the citywide unit of public school employees of the New York City Department of Education (DOE). Further, the

[1] During the hearing, the parties stipulated that the petitioned-for classifications of deans, the director of support services, and teaching fellows would vote subject to challenge. Subsequent to receipt of Board Exhibit 2, which includes this stipulation, the Petitioner amended the petition to exclude teaching fellows. Although the Hearing Officer accepted the amendment, I find that the inclusion or exclusion of deans, the director of support services, and teaching fellows is deferred and that those classifications will vote subject to challenge.

[2] On January 30, 2017, the Region blocked further processing of the petition pending disposition of the unfair labor practice charges filed by the Union and the Employer in Case Nos. 02-CA-191370 and 02-CB-192177. On March 30, 2018, the undersigned decided that the showing of interest submitted by the Petitioner in support of the petition was untainted by the unfair labor practices and sufficient for processing the petition. Pursuant to Casehandling Manual Item 11731.4, I requested the Division of Advice to return the unfair labor practices charges to the Region to hold the charges in abeyance pending resolution by the Board of the threshold common issues of jurisdiction and appropriate unit through the processing of the instant untainted petition.

Union contends that the teachers at KIPP Academy share a community of interest with DOE teachers. Alternatively, the Union urges the National Labor Relations Board (Board) to exercise its discretion under Section 14(c)(1) of the Act and, in the interest of labor stability, decline to assert jurisdiction in this matter.[3]

The Employer and the Petitioner,[4] by contrast, argue that KIPP Academy is an "employer" within the meaning of Section 2(2) of the Act, and that the Board can, and should, assert jurisdiction in this case, as it has done in all other cases involving New York State charter schools since the issuance of *Hyde Leadership Charter School-Brooklyn*, 364 NLRB No. 88 (Aug. 24, 2016).[5] Regarding the composition of the unit, both the Employer and the Petitioner posit that the petitioned-for unit is an appropriate unit that does not share a community of interest with the citywide DOE unit.

Hearing Officer Jacob Frisch conducted the hearing in this matter, during which the parties were invited to present their positions and supporting evidence regarding jurisdiction and the appropriateness of the petitioned-for unit. Following the conclusion of the hearing, I allowed the parties the opportunity to submit post-hearing briefs.

Having duly considered the parties' positions, as raised during the hearing and in their respective post-hearing briefs, I find, based on the record and consistent with relevant case law, including *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), and *Hyde Leadership,* citation *supra*, that KIPP Academy is an "employer" within the meaning of Section 2(2) the Act, and is not a state or political subdivision exempt from the Act's coverage. Further, based on an analysis of the Board's community-of-interest factors, I conclude that a unit limited to employees of the KIPP Academy Charter School is appropriate in this case. Finally, while acknowledging the reasoned policy arguments raised by the Union against the assertion of jurisdiction, I conclude that those concerns are outweighed by factors strongly favoring the exercising of jurisdiction over the Employer in this matter.

Accordingly, I am directing an election in the unit described below.

I. KIPP ACADEMY IS AN "EMPLOYER" UNDER SECTION 2(2)

The threshold issue is whether KIPP Academy is an "employer" within the meaning of Section 2(2) of the Act, or whether it is a state or political subdivision statutorily excluded from the Act's coverage. For the reasons discussed below, I find that KIPP Academy is an employer, within the meaning of Section 2(2) of the Act, and the Board may assert jurisdiction.

---

[3] During the hearing, but not in its post-hearing brief, the Union argued that the Employer is a political subdivision because it's a conversion charter school, thus should be treated differently from non-conversion charter schools.

[4] In its post-hearing brief, Petitioner did not explicitly address the jurisdictional issue. However, during the hearing, Petitioner argued that the Board may exercise jurisdiction over the Employer.

[5] Following *Hyde Leadership*, the Board, in two unpublished decisions, asserted jurisdiction over New York State charters, relying on its analysis in that case. See *Evergreen Charter School*, 29-RD-175250, 2016 WL 6354580 (Oct. 27, 2016); *Riverhead Charter School*, 29-RD-132061, 2016 WL 6069608 (Oct. 7, 2016).

A. The New York State Charter Schools Act of 1998

KIPP Academy is a 501(c)(3) tax exempt organization which operates a charter school in the Bronx, New York, pursuant to the New York State Charter Schools Act of 1998 (CSA), as amended, codified at NY Educ. Law Ch. 16, Title II, Art. 56, § 2850 *et seq.*

New York State recognizes two types of charter schools. The first are those founded as standalone, independent entities, such as the one discussed in *Hyde Leadership*. As KIPP Academy founder David Levin testified during the hearing, these independent, or "startup" schools, are "started from scratch where you have an application and then you go recruit" students for the school. The second category of charters comprises those known as "conversion" charters, described by the Board in *Hyde Leadership* as "pre-existing public schools that have been converted to charter schools." 364 NLRB No. 88, slip op. at 8. The record indicates that conversion schools differ from startup charters in that they, for example, retain the students and teachers of the converted public school.

Under the CSA, the process for founding a charter school, whether as an independent or conversion, is identical in almost all respects. It begins with the filing of an application with the relevant "charter entity," which, in the case of the City of New York, is the Chancellor of the Department of Education. CSA § 2851(3)(a). By statute, the charter application must contain detailed information concerning the operation and governance of the prospective school, including academics, finances, and the makeup and functioning of the school's proposed board of trustees. CSA § 2851(2). If approved by both the New York City Chancellor and the New York State Board of Regents, and, in the case of conversion schools, a vote of "the parents or guardians of a majority of the students then enrolled in the existing public school," the charter applicant will receive a provisional 5-year charter, subject to future renewal, and will be incorporated as a not-for-profit education corporation. CSA § 2851(3)(c).

During the life of the charter, the New York City Chancellor and Board of Regents retain oversight over the school's compliance with applicable laws, regulations, and the terms of the charter. The charter may be revoked if it is found that the school has: failed to meet student assessment measures and enrollment requirements; engaged in "[s]erious violations of law" or "[m]aterial and substantial violation of the charter, including fiscal mismanagement;" or, engaged in "egregious and intentional violations" of the New York Public Employees Fair Employment Practices Act, known as the Taylor Law, which outlines collective bargaining rights afforded to public sector employees in New York State. CSA § 2855(1).

B. KIPP Academy's Establishment and Operation as Charter School

In 2000, David Levin, then a teacher at P.S. 156, a public school in the Bronx, submitted a charter application to the New York City Chancellor, seeking to open KIPP Academy as a conversion charter school under the recently passed CSA. Levin, in filing his application, hoped that receipt of the charter would allow him to continue the educational intervention program that he had developed and operated first in Houston, Texas, and, since 1995, operated at P.S. 156. Known as the Knowledge is Power Program, or KIPP, the program focused on delivering a rigorous academic experience to students in low-performing public schools.

Levin testified that at the time of his charter application, KIPP, having grown considerably since its introduction to P.S. 156, was at risk of losing its classroom space due to competing demands from other public schools. After consultation with his fellow KIPP instructors, all of whom were P.S. 156 employees, Levin deliberately elected to file for a charter as a conversion school, having "realized that a startup charter, the timing of that startup charter wouldn't work for us." Specifically, Levin and the other KIPP teachers were worried that they would lose their longtime KIPP students to other schools during the estimated fifteen to eighteen month approval process for a startup charter.

Consistent with the requirements of the CSA, Levin's conversion charter application included detailed information concerning: the proposed charter's educational plan; its student body; its projected budget and financial operations; its spatial needs; and, the program's past activities at P.S. 156. The application also included the names of the initial Board of Trustees, none of whom was an elected official or a representative of an elected official, or selected by any governmental entity. Further, the application contained proposed bylaws governing the activity of the Board of Trustees, which provided, in accordance with the CSA, that the Trustees were "responsible for overall policy and direction of the school." (Employer Exh. 1, p. A-380.)[6] As per the bylaws, the Trustees retained the power to increase the number of trustees, elect new trustees, remove trustees by a three-fourths majority vote, and amend the bylaws by a two-thirds majority vote.

On March 6, 2000, the Chancellor approved the application and signed a charter agreement with Levin for the creation of KIPP Academy. On May 4, 2000, the New York State Board of Regents issued KIPP Academy a provisional charter and incorporated KIPP Academy as a nonprofit educational corporation. After KIPP Academy received its provisional charter, P.S. 156, minus the KIPP program students, continued to exist as a traditional public school in the New York City system.

Since its founding, KIPP Academy has renewed its charter several times by New York State.[7] Over the last 18 years, KIPP Academy has grown to serve approximately 800 students, encompassing both elementary and middle schools, and it employs about eighty staff members.[8] KIPP Academy is part of a network of charter schools, which utilize Levin's KIPP intervention program. This network is supported by an entity called, KIPP NYC, which, in the words of Levin, is a "service support organization that does back office functions for the 11 schools in New York City... like operations, finance, technology, curriculum, assessments, that type of stuff." KIPP Academy also receives support from the KIPP Foundation, which is, again in the words of Levin, a "nationwide support organization that supports the expansion of KIPP Schools

[6] Consistent with the numbering system used during the hearing, when citing to Employer Exhibit 1, I use the page numbers located at the top of the pages, which are preceded by the prefix "A-."

[7] The record does not reflect the precise number of times that the charter has been renewed. I note, however, that the 2008 version of the Employer's bylaws indicates that a renewal charter was issued on March 30, 2005. Further, KIPP NYC Chief Operating Officer Alicia Johnson testified that the Employer's charter was most recently renewed in 2015.

[8] Sometime after the middle school was operational, the elementary school was created and added to the Charter in 2009.

nationwide and helps to do... alumni support, college supports, federal issues that relate to schools." KIPP Academy receives most of its funding from public sources, through a per-pupil funding formula outlined in the CSA, and it receives supplemental revenue through private fundraising.

The record indicates that since its founding, 26 individuals have served on KIPP Academy's Board of Trustees.[9] To date, no Board member has been, or is, an elected or governmental official, or a representative of, or selected by, any governmental entity.[10]

The bylaws have been amended five times, in the years 2000, 2004, 2005, 2008, and again in 2015. Through these amendments, the governing board retained the authority to add and remove trustees, to set meeting agendas, and to amend the bylaws, among other enumerated powers.[11] In this regard, the current bylaws, as amended in 2015, provide that the trustees, in addition to appointing a chief executive officer (identified as the "superintendent"), are responsible for: approving the employment of all instructional and non-instructional personnel; setting the number of trustees, which can range from five to 25 members, as chosen by a majority of trustees; selecting new trustees, who are elected to two-year terms, by a majority vote of the trustees; removing trustees, by a majority vote; choosing officers of the corporation, including a chair, a superintendent, a secretary, and a treasurer; and, amending the bylaws, also by a majority vote.

C. Under *Hawkins County*, the Employer is Not a State or Political Subdivision Exempt from the Act's Coverage

Under the test enunciated by the Supreme Court in *NLRB v. Natural Gas Utility District of Hawkins County (Hawkins County)*, an employer is a political subdivision of a state where it is: (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." 402 U.S. at 604-5.

In the instant case, the evidence is insufficient to establish that KIPP Academy satisfies either prong of the *Hawkins County* test. Accordingly, I find that the Employer is not a political subdivision, but rather is an "employer" within the meaning of Section 2(2) of the Act.

---

[9] Employer Exhibit 10 lists 25 current and former trustees of the Employer who served from the school's founding through the present. Current KIPP Academy Board Chairman Rafael Mayer testified that the list inadvertently excluded current Treasurer Brian Zaid.

[10] No party to the instant proceeding has argued that Board Member Gwendolyn Brunson, who is employed by the New York City Department of Probation, serves on the Board as public official or representative of a governmental entity. See *Hyde Leadership*, 364 NLRB No. 88, slip op. at 2 ("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").

[11] I note that in the bylaws, as amended in 2000, included reference to "KIPP America," whose board retained certain authority over KIPP Academy. As Levin testified, the board of KIPP America consisted of himself and an individual named Mike Feinberg, who co-founded a KIPP school in Houston. Levin, however, stated that KIPP America "never really went into operation or function." No party has contended that KIPP America was a governmental entity, or that Feinberg was a public official.

1. Not Created Directly by the State to Constitute a Department or Administrative Arm of the Government

Under the first prong of the *Hawkins County* test, the Board must first determine "whether the entity was created directly by the state, such as by a government entity, legislative act, or public official." *Hyde Leadership*, 364 NLRB No. 88, slip op. at 5. If the answer is in the affirmative, the Board then must consider "whether the entity was created so as to constitute a department or administrative arm of the government." *Id.* Both of these criteria must be met in order to establish that an employer is exempt from jurisdiction. *Id.*; *Pennsylvania Virtual Charter School*, 364 NLRB No. 87, slip op. at 6 (Aug. 24, 2016) (in asserting jurisdiction over a Pennsylvania charter school, the Board found that "although the [Charter Schools Law] provides that the Department of Education issues the charter... the Founding Coalition's incorporation of the School as a nonprofit entity and its promulgation of the School's governing and operating documents 'created' the School").

In *Hyde Leadership*, the Board concluded that a New York City charter school, established under the CSA, was "not created directly by any New York government entity, special statute, legislative, or public official, but instead by private individuals as a nonprofit corporation," and therefore was not exempt from jurisdiction under *Hawkins County*'s first prong. *Hyde Leadership*, 364 NLRB No. 88, slip op. at 5.[12] Expressly rejecting arguments that the New York State Board of Regents "directly created" the school by issuing the charter and incorporating the educational corporation, the Board wrote: "[W]e agree with the Regional Director that it was [the founder'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." *Id.* Further, although concluding that it was "unnecessary" to decide whether the school was created so as to constitute a department or administrative arm of the government, the Board went on to say that were it to address the issue, it "would find that the record evidence does not support the... claim that Hyde was created to be an administrative arm of the state's government." *Id.* at 6, n. 15. In so doing, the Board rejected arguments that certain language within the CSA, as well as public funding and state oversight, rendered Hyde an administrative arm of the government. *Id.*

In the instant matter, *Hyde Leadership* is controlling. As the Board did in that case, I find that KIPP Academy is not a state or political subdivision exempt from jurisdiction under the first prong of the *Hawkins County* analysis. Here, the evidence shows that the Employer was created by Levin, a private individual, who successfully petitioned the New York City Chancellor and the New York State Board of Regents for a charter and for incorporation under the CSA.[13]

---

[12] In *Hyde Leadership*, it appears that the Board analyzed the CSA as amended in 2014. See *Hyde Leadership*, 364 NLRB No. 88, slip op. at 1 ("The Hyde Leadership Charter School-Brooklyn operates under the New York Charter Schools Act of 1998, as amended in 2014"). As indicated in Employer Exhibit 2, the CSA was subsequently amended in 2015, 2016, and 2017. These amendments did not materially alter any of the statutory provisions, analyzed by the Board in that case, in a way which would affect the *Hawkins County* analysis.

[13] No party to the instant proceeding has argued, and I find no basis to conclude, that Levin's employment status as a public school teacher at the time of the KIPP Academy charter application, or the similar employment status of founding board member Francis (Frank) Corcoran, rendered them "public officials" for purposes of the *Hawkins*

While Levin's decision to incorporate KIPP Academy as a conversion school added an additional step to the application and approval process, *viz.*, a majority vote of students' parents, this fact alone is insufficient to distinguish this case from the Board's assessment in *Hyde Leadership*, for purposes of the *Hawkins County* analysis.[14] Accordingly, as the founding of KIPP Academy under the CSA was, in all material respects, identical to the founding of the school analyzed in *Hyde Leadership*, I find that the Employer "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." *Id.* at 6.

Further, while not required to reach the question, I find, as the Board did in *Hyde Leadership*, that KIPP Academy's founding under the CSA does not establish that it "was created to be an administrative arm of government." *Id.* at 6, n. 15. In particular, as discussed in *Hyde Leadership*, I note that the CSA's definition of charter schools as a "political subdivision," the public funding of charters, and the State's oversight over charters through the Board of Regents, are insufficient to establish jurisdiction under *Hawkins County*. *Id.*

2. Not Administered by Individuals Who Are Responsible to Public Officials or the General Electorate

Under the second prong of the *Hawkins County* test, "the dispositive question is whether a majority of the individuals who administer the entity - [the school's] governing board members and executive officers - are appointed by or subject to removal by public officials." *Id.* at 6. In conducting this analysis, 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." *Id.* An entity will be subject to the Board's jurisdiction if the Employer's governing documents "indicate that appointment and removal are controlled by private individuals - as opposed to public officials." *Id.*; see *Excalibur Charter School, Inc.*, 366 NLRB No. 49, slip op. at 2 (Mar. 29, 2018) (asserting jurisdiction over an Arizona charter school whose "board members are appointed and subject to removal only by the other sitting members of its board, not by public officials," and where the "method of selecting board members is dictated by the [school's] charter and bylaws, and not by any State or local law or regulation"); *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 8 (asserting jurisdiction over a Pennsylvania charter school as "a private corporation whose governing board members are privately appointed and removed").

General state statutory provisions granting governmental entities the authority to remove trustees of corporations for malfeasance are insufficient, on their own, to establish exemption from jurisdiction under the second prong of the *Hawkins County* analysis. See *Hyde Leadership*,

---

County analysis. See *Hyde Leadership*, 364 NLRB No. 88, slip op. at 2 (although noting that a board of trustees member "happens to be a public school teacher," the Board concluded that there was no evidence that she, or any other member, "has been affiliated with a public entity or the Department of Education").

[14] In its post-hearing brief, the Employer argues that KIPP Academy is not a conversion school within the meaning of the CSA, because P.S. 156 did not "convert" in its entirety, and because the KIPP program was not itself a public school initiative. The uncontroverted record evidence, however, shows that Levin applied for, and was granted a charter to operate a conversion school. Accordingly, I find that KIPP Academy is, and always has been, a conversion school under New York law.

364 NLRB No. 88, slip op. at 7; see also *Universal Academy*, 366 NLRB No. 38, slip op. at 1, n. 1 (Mar. 15, 2018) (in finding a Texas charter school to be exempt from jurisdiction as a political subdivision, the Board contrasted New York's Education Law, noting that the New York Board of Regents is permitted "to remove for malfeasance a trustee of any corporation it created, which include[s] private educational institutions that clearly fall under the Act's jurisdiction"). Similarly, ongoing state oversight of the charter is not enough to conclude that the school is administered by public officials. See *Pennsylvania Virtual*, 364 NLRB No. 87, slip op. at 8 ("that the School is subject to oversight and regulation by the Secretary of Education is insufficient to find that the School is accountable to a public official").

In *Hyde Leadership*, the Board analyzed the operations of the school's governing board, and concluded that it was exempt from the Board's jurisdiction because it was "a private corporation whose governing board members are privately appointed and removed." *Hyde Leadership*, 364 NLRB No. 88, slip op. at 7. In so finding, the Board highlighted the following aspects of the school's operation and governance:

> 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... It was [the founder] who, on her application to establish the School, identified the individuals who would be members of the "founding board"... 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...

Id. The Board went on to reject arguments that the school did not fall under the Board's jurisdiction because the Board of Regents, in granting the charter, effectively "appointed the initial board of trustees," and "may, under certain limited circumstances, remove Hyde's trustees," including for failing to satisfy certain obligations listed in the charter, and for malfeasance under Section 226(4) of the New York Education Law. *Id.* at 6-7. Rather, the Board, focusing its analysis on the school's governing documents and the makeup of the board of trustees, concluded 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." *Id.* at 7.

In the instant case, the evidence demonstrates that the Employer's board of trustees, as in *Hyde Leadership*, is a self-perpetuating body whose internal documents govern the appointment and removal of trustees and of the corporation's executive officers. In this regard, the bylaws establish that only the trustees may set the number of trustees, elect new trustees, and remove trustees, as well as select the corporation's officers. No provision is made in the Employer's

governing documents for any state involvement in the composition and operation of the board or in the selection of executive personnel. Further, there is no evidence that any board member since the founding of KIPP Academy was, or is, a public official, or representative of any governmental entity, or has been selected or removed by a governmental officer or department. Accordingly, consistent with the Board's decision in *Hyde Leadership*, I find that that KIPP Academy's board of trustees is not responsible to public officials or the general electorate, and as such, I conclude that the Employer is not a political subdivision under the second prong of the *Hawkins County* test.

As the Employer does not satisfy either prong of the *Hawkins County* analysis, I find that KIPP Academy is an employer within the meaning of Section 2(2) of the Act over which the Board may exercise jurisdiction.

II. THE PETITIONED-FOR KIPP ACADEMY UNIT IS APPROPRIATE

Having found that KIPP Academy is an employer within the meaning of Section 2(2) of the Act, I now turn to whether the petitioned-for unit is an appropriate unit. As mentioned above, the Union urges that KIPP Academy is a fractured unit which instead, must be included with other New York City public school employees; whereas, the Petitioner and the Employer argue that the petitioned-for KIPP Academy unit is appropriate because they do not share a community of interest with traditional public school employees. As discussed below, I find that a separate KIPP Academy unit is appropriate because the record does not establish that the KIPP Academy employees share a community of interest with public school employees.

A. CSA Provisions on Conversion Charter Employees

In its opinion in *Hyde Leadership*, the Board analogized the role of charter schools within the New York City system to government contractors, noting that, like contractors, charter schools, while not public employers themselves, "provide public services and are subject to government oversight and regulation." 364 NLRB No. 88, slip op. at 8, n. 26. Consistent with the Board's characterization, under the CSA, charter school employees are considered "employee[s] of the education corporation formed to operate the charter school and not... of the local school district in which the charter is located." CSA §§ 2854(3). Although the CSA provides that charter school employees are covered by the Taylor Law, and may be considered public employees for the purposes of retirement benefits, "[g]enerally," as the Board observed in *Hyde Leadership*, "employees of a charter school are not part of the local school district's bargaining unit and are not covered by its collective bargaining agreement." *Hyde Leadership*, 364 NLRB No. 88, slip op. at 2.

Employees of conversion charters, however, are an exception to this general rule. Specifically, under the CSA:

> The school employees of a charter school that has been converted from an existing public school who are eligible for representation under [the Taylor Law] shall be deemed to be included within the negotiating unit containing like titles or positions, if any, for the

school district in which the charter school is located and shall be subject to the collective bargaining agreement covering that school district negotiating unit...

CSA § 2854(3)(b). The statute further permits "a majority of the members of a negotiating unit within a [conversion] charter school [to] modify, in writing, a collective bargaining agreement for the purposes of employment in the charter school with the approval of the board of trustees of the charter school." *Id.* The CSA, however, does not explain the process by which the collective bargaining agreement may be amended, such as whether the collective bargaining representative must be involved in any interactions between the "negotiating unit" and the trustees. *Id.*

Following the passage of the CSA, in 1999, the New York City Board of Education (which was the predecessor entity of the Department of Education) and the Union negotiated an MOU concerning conversion charter employees. Levin included the MOU in his KIPP Academy charter application. Tracking the language of the CSA, the MOU provides that "employees of a Conversion Charter School shall be subject to the collective bargaining agreements for like titles or positions.. including but not limited to salary, medical, pension and welfare benefits and applicable due process procedures." (Employer Exh. 1, p. A-328.) The MOU also addresses the placement rights of conversion charter school employees in the event of layoff or closure. Basically, the Board will use its best efforts to place employees in public school jobs. Finally, in accordance with the CSA, the MOU notes that "nothing shall limit the Board of Trustees of the converted Charter School from exercising their rights to modify the collective bargaining agreements for the purposes of employment in the charter school." *Id.*

The record further establishes that traditional public school employees in New York City are currently covered by classification-specific collective bargaining agreements, which are effective by their terms from November 1, 2009, through November 30, 2018. The record contains three such contracts: First, the teachers' collective bargaining agreement, which covers teachers in the regular day school instruction program, per session teachers, teachers at WNYE, all primary and non-primary adult education employees, teachers assigned to headquarters and district offices, certain education administrators, certain education officers, education analysts, associate education officers and associate education analysts, substitute vocational assistants, and teacher's assistants (Union Exhibit 12); Second, the social workers' collective bargaining agreement, which covers school psychologists, school social workers, and individuals training in those positions (Employer Exhibit 12); and, Third, the counselors' collective bargaining agreement, which covers educational and vocational counselors and guidance counselors in the regular day school instructional program, as well as, counselors assigned to headquarters and per-session counselors (Employer Exhibit 13). The record does not contain any collective bargaining agreements predating 2009, including those agreements in effect at the time of KIPP Academy's incorporation as a charter school.

B. Community of Interest Factors

1. KIPP Academy's Supervisory Structure

The record reflects that KIPP Academy's employees have separate supervision from other workers within the New York City public school system. As discussed above, KIPP Academy, a private employer, is managed by a Board of Trustees which is responsible for

overseeing the overall operations of the school, including ratifying hiring decisions and choosing a chief executive officer for the school. Rafael Mayer is the current Chair of the Board of Trustees.

Although not discussed in detail during the hearing, the record establishes that KIPP Academy is comprised of an elementary and a middle school, each with its own principal, who serves as the instructional leader of the school. Mayer testified that the principals are selected by the Board of Trustees. It appears that Tyritia Groves is the elementary school principal and Frank Corcoran serves as the principal for the middle school. The record indicates that among their duties, the principals extend employment offers to prospective school staff members, which are subsequently ratified by the Board of Trustees; assign employees to a particular class or grade; evaluate employee performance, including through in-class observations; and determine bonus amounts. Some evidence suggests that the principals are supported in their work by directors of operations; however, the duties and identities of the directors of operations was not developed on the record.

KIPP Academy, as part of the KIPP NYC network, shares certain centralized operations with the other schools in the network. As an example, KIPP schools share a superintendent whose role is to oversee all KIPP schools in NYC."[15] Further, the KIPP NYC schools share a centralized human resources department, which manages a common job application system, student support services, academics, and data and assessments. Further, certain corporate officers of KIPP NYC, including the chief operating officer, the chief academic officer, and the chief financial officer, interact with all KIPP schools, including KIPP Academy, with some degree of regularity, although the precise nature of their involvement in the operations of KIPP Academy was not explored in detail on the record.[16]

The record is slight concerning the organization and supervisory structure of traditional public schools in the New York City school system. Some evidence indicates that within traditional public schools, the school's principal, as at KIPP Academy, can hire and assign employees, and that at least in some schools, the assistant principal participates in the evaluation of teachers. The record further suggests that the work of the principals and assistant principals is overseen by a district superintendent, who in turn reports to the Chancellor. As the head of the New York City public school system, the Chancellor oversees all public schools in New York City, including all charters. No record evidence indicates that DOE staffers supervise KIPP Academy employees, or vice versa. KIPP NYC Chief Operating Officer Johnson testified that there is no blurring whatsoever of the KIPP Academy and DOE supervisory hierarchies.[17]

---

[15] The title of "superintendent" appears in the Employer's bylaws as the chief executive officer of KIPP Academy. According to the Employer, however, the role of "superintendent," as envisioned in the bylaws, is fulfilled by the school's principals, rather than by the individual holding the KIPP NYC superintendent position.

[16] No party to the instant proceeding has argued that the appropriate unit must include all KIPP NYC schools.

[17] I find unpersuasive the Union's argument in its post-hearing brief that, "although KIPP and NYC DOE teachers do not share immediate direct supervision, the NYC DOE Chancellor has ultimate supervisory power over both KIPP and NYC DOE teachers," by virtue of the Chancellor's role in ensuring KIPP Academy's compliance with the CSA and its charter. The Union failed to adduce any instances of the Chancellor exercising supervisory authority, within the meaning of Section 2(11) of the Act, over any employees of KIPP Academy. Further, the Union's argument appears to be a variation of a jurisdictional argument already rejected by the Board in *Hyde Leadership*:

2. Similar Skills and Training to Perform Similar Work

The record indicates that KIPP Academy teachers[18] have similar skills and training, and perform similar work, as DOE teachers in traditional public schools. KIPP Academy and DOE teachers are similarly engaged in the work of teaching elementary and middle school students. Virtually all witnesses during the hearing offered testimony exploring the work, skills, and training of KIPP Academy teachers, [19] as compared with their DOE counterparts.

The testimony reveals that their job duties are essentially identical - they are required to teach public school students in accordance with New York State educational standards. In performing this work, KIPP Academy and DOE teachers make use of lesson plans; grade students and issue report cards at regular intervals; interact with students' parents, including at mandatory parent-teacher conferences; administer New York State standardized tests; make use of certain shared systems, including, for special education teachers, the Special Education Student Information System (SESIS); and, have their performance evaluated through in-class observations. They have college degrees, and typically either have, or are working towards, a Master's degree and a New York State teaching certification. They are both also required to attend mandatory weekly professional development, and are trained in the Common Core standards. Indeed, while there are certain distinctions between KIPP Academy and traditional DOE public school teachers, for example the number who are permitted by statute to teach without certification, as well certain teacher and student evaluation methods and the frequency of interaction with students' parents, the record reflects no significant difference between the type of work, the skills, or the training, of KIPP Academy and DOE teachers.

The record is far less detailed concerning the other petitioned-for classifications at KIPP Academy for which I permitted the presentation of evidence at the hearing: team leaders, counselors, and social workers.[20] Concerning team leaders, the record suggests that it is a position that may be held by teachers. Current KIPP Academy teacher Alvarez testified that at some point after he began working for the Employer in 2010, he was a "grade team leader" for a time. There is no evidence in the record, however, concerning the day-to-day activities of team leaders, their qualifications, or whether a similar position exists in traditional public schools in

---

that public entities, whether that be the Board of Regents or the Chancellor, simply by operation of the CSA, exercise meaningful control over the operations over New York City charter schools, such that the Board cannot, and should not, exercise jurisdiction over them. See *Hyde Leadership*, 364 NLRB No. 88, slip op at 8 ("Many government contractors are subject to exacting oversight by statute, regulation, or government. Yet the Board routinely asserts jurisdiction over private entities that provide services, under contract, to governmental bodies.").

[18] The Employer's Statement of Position (Board Exhibit 3) indicates that approximately 67 employees fall within the petitioned-for classification of "teacher." No evidence was adduced as to whether employees in certain other job titles also fall within the "teacher" classification, including the Assistant Principal, the Empire Fellow, and the Dean Fellow.

[19] Johnson testified that at KIPP Academy, "[w]e have learning specialists who are teachers," and interventionists, who are "teachers [who] provide support to special education students." Saraiya, KIPP NYC's chief academic officer, analogized specialists at KIPP Academy with "cluster teachers" at traditional DOE schools.

[20] As noted above, I ruled at the outset of the hearing that the parties would not be permitted to litigate the status of the petitioned-for classifications of deans, teaching fellows, and the director of support services.

New York City. Notably, Johnson, KIPP NYC's chief operating officer, during her testimony concerning job titles at KIPP Academy, did not even mention the position of team leader.

Regarding KIPP Academy's counselor,[21] the limited testimonial evidence offered at the hearing suggests that she works with social workers and teachers, although the full scope of her duties is not clear in the record. Johnson, the chief academic officer, testified that counselors generally "provide... support to the social workers," but differ from the social workers in that they are not required to have a Masters' degree in social work. Kerr, a current KIPP Academy teacher, testified that counselors accompany middle school teachers during their observations of fourth graders, when the students are transitioning from elementary to middle school.[22] The record is unclear as to what extent these duties are similar to those performed by counselors in traditional DOE public schools. While the collective bargaining agreement covering guidance counselors offers some insight into the work of DOE counselors, it is insufficient to establish what similarities and differences, if any, may exist with KIPP Academy's counselors.

Finally, concerning KIPP Academy's social workers,[23] KIPP NYC's Chief Academic Officer Saraiya testified that their duties include assisting struggling students both inside and outside of the classroom, as well as, occasionally "do[ing] a read aloud" or "teach[ing] a character class." Social workers also perform home visits and participate in the Employer's "Café con Leche" program, during which information about the school's operations is shared with students' families, and families are invited to provide their feedback. Additionally, social workers are involved in the creation of an Individualized Education Plan (IEP), under the auspices of the DOE geographic district or region-based Committee on Special Education (CSE), for students requiring special education instruction. As with counselors, the record is not clear concerning the commonality of their daily duties, and skills and training, with social workers within traditional DOE public schools. In this regard, Saraiya testified that when she worked in a traditional DOE public school, she interacted with social workers, but "not in the same way" as do teachers at KIPP Academy, without further elaboration. Additionally, as with the counselors, the collective bargaining agreement sheds some light on the experience of social workers within the traditional public school system, but it is of limited value in determining the commonalities, if any, between the DOE social workers and those at KIPP Academy regarding duties, skills, and qualifications.

[21] The Employer's Statement of Position in the instant matter indicates that there is one employee who falls within the classification of "family coordinator," which, as discussed more fully below, is the actual title for the petitioned-for classification of "counselor."

[22] I note that Levin's charter application contains numerous references to the role of "the KIPP counselor," whose specified duties included meeting regularly with KIPP students, serving as KIPP Academy's liaison to the Committee on Special Education, a DOE organization servicing special education students in public and private schools in a given geographic area, and playing a role in staff hiring. The record is silent as to what extent, if any, these enumerated duties may have changed since the founding of the school nearly twenty years ago.

[23] The Employer's statement of position indicates that there are three social workers at KIPP Academy.

3. No Functional Integration and No Interchange

The record establishes that KIPP Academy is located on the Mott Haven Educational Campus in the Bronx. The evidence indicates that KIPP Academy's elementary school and middle school are located in separate buildings on the campus: the elementary school is located in Tower D, while the middle school is located at 250 East 156th Street. The record further establishes that the campus includes three towers in addition to Tower D, which house DOE high schools connected to Tower D by an underground walkway. The record shows that the schools on the Mott Haven Educational Campus share a football field, cafeteria, gym, and auditorium, and that KIPP Academy's students may also access a medical facility run by Montefiore Medical Center, which is located in one of the towers.

While KIPP Academy teachers occasionally encounter DOE students and teachers in passing in these shared spaces, the frequency is "as little as once a week to a few times a week." The record reflects that there is virtually no interchange or functional integration between KIPP Academy and DOE employees. Alvarez stated that he does not attend faculty meetings with DOE teachers, although he noted that recently, DOE personnel have visited the school as part of the charter renewal process. Similarly, Saraiya testified that KIPP Academy and DOE teachers do not substitute for one another, and do not share lesson plans or curriculum with one another. Further, Johnson testified that KIPP Academy employees cannot transfer to DOE schools, although they may transfer to other schools within the KIPP network.

This lack of contact, interchange, and functional integration appears to mirror that between DOE schools. Specifically, DOE teachers do not substitute for teachers at other DOE schools, attend professional development with them, or go to the same faculty meetings.

The record indicates that in certain limited circumstances, DOE employees may substantively interact with KIPP Academy employees and students. Kerr, for example, testified that when she worked as an itinerant DOE teacher for hearing impaired students, she visited KIPP Academy daily to conduct sessions with a hearing impaired kindergarten student, which required interactions with his KIPP Academy teacher. In this role, she also attended the student's IEP meetings, which included KIPP Academy teachers and, it appears based on other evidence in the record, may have also included KIPP Academy social workers. Similarly, Padilla, another teacher at KIPP Academy, testified as to her experience with IEP meetings, including working with DOE employees concerning students' special education needs. However, Procida, the Union's grievance director, testified that the CSE, under whose auspices the IEP meetings occur, includes public and private schools within the DOE-geographical district or region, including parochial schools over which the Board does not have jurisdiction.

4. Different Terms and Conditions of Employment

The record establishes that KIPP Academy's teachers work under terms and conditions of employment different from those of teachers in traditional DOE public schools. Numerous witnesses during the hearing testified to these differences, including Levin (working hours, grievance and arbitration procedure, pay, work duties); Alvarez (working hours, paid time off, tenure); Kerr (working hours); and Wilson (paid time off). Notably in this regard, on November

6, 2016, the Union filed a demand for arbitration, alleging eighteen violations, of nine contract articles and an appendix, of the citywide teachers' collective bargaining agreement, touching on numerous substantive aspects of the employment relationship between KIPP Academy and its teachers. Specifically, in its filing, the Union alleged that the Employer is actively violating the contract in the following ways:

- Kipp NYC improperly informs teachers that discussion of their compensation could lead to immediate termination;
- Kipp NYC improperly provides the teachers with a school handbook and Kipp contract that sets forth working conditions that differ from the Collective Bargaining Agreement;
- Kipp NYC improperly pays teachers performance bonuses;
- Kipp NYC fails to provide teachers summer vacation pay;
- Kipp NYC failed to pay teachers the contractual "Lump Sum" payments;
- Kipp NYC fails to adhere to the work day, week and year that is set forth in the CBA;
- Kipp NYC improperly requires that teachers perform several home visits to incoming students, outside of the regular workday;
- Kipp NYC improperly requires 12 hour Parent-Teacher Conferences;
- Kipp NYC fails to provide elementary teachers a daily, 50 minute, duty-free, lunch;
- Kipp NYC fails to provide intermediate school teachers with a daily duty free lunch period;
- Kipp NYC fails to provide teachers 5 unassigned preparation periods per week;
- Kipp NYC fails to provide teachers with at least one unassigned period each day;
- Kipp NYC improperly programs teachers for more than four consecutive working assignments;
- Kipp NYC fails to provide teachers with the appropriate number of sick days per school year;
- Kipp NYC fails to allow teachers to "bank" unused sick time in a Cumulative Absence Reserve (C.A.R.);
- Kipp NYC fails to pay teachers the appropriate base salary, yearly increases, differentials, and salary steps; and,
- Kipp NYC failed to hold a Step 2 hearing for UI Kipp Academy.

(Union Exh. 16 (lower case KIPP in the original)). The grievance remains pending at this time. See *KIPP Academy Charter School v. United Federation of Teachers, AFT NYSUT, AFL-CIO*, 723 Fed. Appx. 26 (2d Cir. Jan. 30, 2018) (describing procedural history of the grievance).

The record concerning any differences between terms and conditions of employment between KIPP Academy and DOE social workers, counselors, and team leaders, is far less developed. However, the Employer entered into evidence its Employee Handbook (Employer Exh. 15), which applies to workers in those petitioned-for classifications, as well as all other employees working within the KIPP NYC network. The Handbook includes, for example, an at-will employment policy; a dispute resolution policy which is not the Union's contractual

grievance and arbitration procedure; an internal transfer policy; and, KIPP NYC-specific leave policies. Further, other fringe benefits, which all KIPP NYC employees receive, such as a gym membership and tuition reimbursements, are not benefits received by DOE employees.

The evidence establishes that many of these deviations from the citywide collective bargaining agreements are not recent developments, but rather date to the very first days of KIPP. In this regard, Levin's unrebutted testimony is that, from the beginning of the KIPP program at P.S. 156 and continuing through the incorporation of KIPP Academy as a charter school in 2000, the Employer has openly flouted the terms of the citywide collective bargaining agreements for like titles as they pertain to areas including working hours and pay, as well as, the grievance and arbitration process, tenure, and the just cause standard.

Notably, in his charter application, Levin included a copy of the "Commitment to Excellence Form," which set a work day of 7:25 am, Monday through Friday, through 5:00 pm, Monday through Thursday; specified mandatory Saturday work; and required teaching in July, differing markedly from the standard workday and work year in New York City public schools. Further, the charter application characterized adherence to these terms as a condition of employment. The charter application provided that, "[e]ach KIPP staff member will be required to fulfill the specific responsibilities as outlined in their individual employment contracts as well as described by the KIPP Commitment to Excellence Form," as failure to do so will "subject [the employee] to a dismissal at hearing at request of the School Director," with the hearing to be administered by the Board of Trustees. (Employer Exh. 1, p. A-319- A-320.) The application also included the signatures of the prospective employees, "attest[ing] to the fact that [they] met as an entire staff repeatedly and discussed the details of becoming and running a charter school," including, according to testimony from Levin, their willingness to work in abrogation of the collective bargaining agreements' terms.[24] (*Id.* at A-327.) The record indicates that the "Commitment to Excellence Form," with only slight modification, remains in effect to this day.

In other respects, however, KIPP Academy and DOE employees share certain common terms and conditions of employment. It is undisputed, for example, that KIPP Academy's staff members have had dues regularly deducted and remitted to the Union; that they participate in the Union's pension plan; and that they receive the same medical and welfare benefits as other DOE employees represented by the Union, including through the Union's Welfare Fund (Union Exh. 11).

The Union also admitted that variation from the terms of the citywide collective bargaining agreements within the DOE sometimes occurs. Union Grievance Director Procida testified concerning the school-based option (SBO), which she described as a "mechanism by which a school can make modifications to the contract," with the agreement of the principal and the Union, to provisions including class size, work day, period length, scheduling changes, and positions. Further, Procida testified concerning community learning schools, which she

[24] I find it unnecessary to pass on whether this list of signatures constitutes, as urged by the Employer, an agreement to modify the citywide collective bargaining agreements as per CSA § 2854(3)(b). The signatures do, however, lend support to the Employer's contention that from its earliest days, KIPP Academy's employees knowingly and willingly worked under conditions which differed from those outlined in the citywide collective bargaining agreements.

characterized as schools with "extra community and social support," which offer social and mental health services, as well as, "activities outside the school day, on weekend and... for the families as well." Additionally, the record describes PROSE schools as deviating considerably from the standard CBA, with some requiring that teachers work extended hours and four-day weeks.

5. Bargaining History

The record establishes that KIPP Academy and the Union have had a collective bargaining relationship, albeit one characterized by limited interaction, dating to the school's founding in the year 2000. Since that date, it is undisputed that the Employer has remitted dues/agency fees to the Union. Further, it is undisputed that the Employer's employees have received pension, health, and welfare benefits matching those of represented DOE employees. Additionally, KIPP Academy's employees have received retroactive pay increases in accordance with the Union's collective bargaining agreements, although I note that the Employer contends that it granted these increases for competitive purposes, and not because it believed it was obligated to do so.

The record also reflects, however, that contacts between the Union and the Employer have been sparse until recent years. The record is silent regarding any interaction whatsoever between the Union and the Employer until 2011. Beginning in 2011, the evidence establishes that various representatives of the Union interacted periodically with the Employer on matters, such as: employee parking spaces (Union Exh. 3); the Union's Member Assistance Program (Union Exh. 7); retroactive pay increases (Union Exh. 8-9); and grievances (Union Exh. 10). Further, at least since 2016, the Union has been particularly active in the school. The Union's Coordinator of Services and Negotiations Trager testified that since 2016, he has visited KIPP Academy approximately 10 to 15 times. The record also reflects that in the same year, Fatima Wilson and Ashley Padgett, both teachers, were elected to the positions of chapter leader and delegate, respectively. Additionally, as discussed above, also in 2016, the Union's grievance department filed for arbitration concerning almost two dozen alleged contract violations by KIPP Academy, a grievance which remains open at this time.

C. The KIPP Academy Unit is Appropriate

Based on the record in this case and relevant case law, I find, in accordance with Petitioner and the Employer, that KIPP Academy's employees share a community of interest with one another, but do not share a community of interest with DOE employees, such that they must be included together in a single unit.

The Act does not require a petitioner to seek representation of employees in the most appropriate unit possible, but only in an appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). Where one party argues that additional employees must be added to a petitioned-for unit to render it appropriate, the Board evaluates whether petitioned-for employees share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group. Among the factors the Board considers are:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

PCC Structurals, Inc., 365 NLRB No. 160, slip op. at 6 (Dec. 15, 2017) (clarifying the standard to apply when one party contends that the appropriate unit must include additional employees).

The Board, reflecting the Act's stated goal of fostering "efficient and stable collective bargaining," may also consider past bargaining history between the parties in determining whether employees share a community of interest. *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 3, n. 8, citing *Kalamazoo Paper Box Co.*, 136 NLRB 134 (1962); see *ADT Security Services, Inc.*, 355 NLRB 1388 (2010). In this regard, the Board will not process a decertification petition unless the petitioned-for unit is coextensive with the certified or recognized unit. See e.g., *Campbell Soup Co.*, 111 NLRB 234 (1955). The Board has noted, however, that while it "is reluctant to disturb units established by collective bargaining," it will do so if those units are "repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act." *Buffalo Broadcasting Co.*, 242 NLRB 1105, 1106 n. 2 (1979); see *Washington Post Co.*, 254 NLRB 168 (1981).

In the instant case, I find that the petitioned-for KIPP Academy employees share a community of interest with one another, but do not share a community of interest with DOE employees, such that DOE employees must be included to render the unit appropriate. The evidence establishes that KIPP Academy's petitioned-for employees are separately organized and supervised, and, indeed, separately employed, from all other DOE employees. Further, the evidence indicates that KIPP Academy's employees have limited, incidental contact with DOE employees. Although I acknowledge that certain KIPP Academy employees, including special education teachers and social workers interact on a more frequent and substantial basis with DOE special education providers than their colleagues, the record shows that overall, KIPP Academy and DOE employees do not interchange and are not functionally integrated.

I further find that KIPP Academy employees do not share common terms and conditions of employment with DOE employees. In this regard, while KIPP Academy's employees enjoy the same pension and health benefits as DOE employees, in virtually all other material respects, KIPP Academy's employees work under different conditions than DOE employees. Notably, while the Union argues that the Employer should not be, in effect, rewarded for abrogating the terms of the citywide collective bargaining agreements, the Union has not presented any evidence rebutting the Employer's claim that at least some of these differences in terms and conditions of employment, such as working hours and school year length, have existed for as long as twenty years, and that these differences go to the core educational model of the school. Further, although I agree with the Union that KIPP Academy's employees have similar job duties, skills, and training, these commonalities are insufficient to overcome the other factors weighing strongly in favor of finding a unit of KIPP Academy employees to be appropriate. Similarly, although DOE schools may differ from one another in certain respects, these

differences merely establish that individual DOE schools may not share a community of interest with one another, rather than show that KIPP Academy's employees necessarily share a community of interest with DOE employees.

In its post-hearing brief, the Union urges me to place significant weight on the bargaining relationship between the Union and the Employer to find that any unit which does not include both KIPP Academy and DOE employees is a severed unit. However, the cases the Union cites in support of its position, including *Mo's West*, 283 NLRB 130 (1987), and *Battelle Memorial Institute*, 363 NLRB No. 119 (2016), are distinguishable. In *Mo's West*, the Board, citing *Campbell Soup Co.*, citation *supra*, affirmed the Regional Director's dismissal of a decertification petition based on a finding that the petitioned-for unit was not coextensive with the previously recognized, multi-employer unit, from which the employers named in the petition had not timely withdrawn. 283 NLRB at 130. Similarly, in *Battelle Memorial*, the Board dismissed a petition seeking to sever a craft unit of carpenters and millwrights from a historic unit including workers in thirteen different crafts. In dismissing the petition, the Board noted that where a petition seeks to sever a craft or departmental unit from a larger unit, the Board "balances the special interest of the petitioned-for employees in seeking separate representation," with the "interest of the employer and the total employee complement in maintaining the industrial stability and resulting benefits of an historical unit," as well as "the public interest and the interests of the employer and the incumbent union in maintaining overall plant stability in labor relations and uninterrupted operation of integrated . . . facilities." 363 NLRB No. 119, slip op. at 1 (internal citations and brackets omitted).

Crucially, unlike in the cases cited by the Union, the mixed KIPP Academy-DOE unit sought by the Union is by definition inappropriate. Although the Union states in its brief that "nothing in the Act explicitly prohibits such a unit," there is no basis in Board law to find appropriate a unit which includes multiple classifications of public and private sector employees working for, on the one hand, the Education Department of New York City, and, on the other, an educational institution which is an "employer" under Section 2(2) of the Act. Indeed, I must reject such a unit as inherently inappropriate, even if, as here, both groups of employees are represented by the same union.

As KIPP Academy employees share a community of interest with one another, but do not share a community of interest with DOE employees, I find that a unit limited to KIPP Academy employees is appropriate in this case. See *United Operations, Inc.*, 338 NLRB 123 (2002) (after applying the community of interest analysis, finding that petitioned-for unit "constitute[s] a readily identifiable and functionally distinct group, with common interests distinguishable from the Employer's other field service employees," such that an appropriate unit need not include additional employees).

I reach the same conclusion under the test discussed by the Board in *J&L Plate*, 310 NLRB 429 (1993). Under that analysis, the Board, in determining whether a presumptively appropriate single-facility unit has "been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity," looks at factors such as: central control over daily operations and labor relations, including the extent of local autonomy; similarity of skills, functions, and working conditions; degree of employee interchange; distance

between locations; and bargaining history, if any. *Id.* Here, between KIPP Academy and DOE, there is no central control over daily operations and labor relations. Similarity of skills and functions must be assessed in the context of dissimilar working conditions and no employee interchange. Finally, although KIPP Academy may be in close geographic proximity to other DOE schools, the evidence does not establish that KIPP Academy has been effectively merged into other DOE schools such that "it has lost its separate identity." *Id; see, New Foundations Charter School*, 04-RC-199928, 2018 WL 329945 (Jan. 3, 2018) (in denying review, the Board majority found that the employer's high school facility was a presumptively appropriate single-facility unit because the evidence failed to demonstrate that the operations of the high school had been effectively merged or functionally integrated with its K-8 facility so as to lose its separate identity).[25]

III. THE BOARD SHOULD NOT DECLINE TO ASSERT JURISDICTION

Having found that KIPP Academy is an "employer" within the meaning of Section 2(2) of the Act, and that KIPP Academy employees share a community of interest separate and distinct from DOE teachers, counselors, and social workers, I next turn to the Union's argument that I should decline to assert jurisdiction over the Employer under Section 14(c)(1) of the Act. For the reasons discussed below, I find that policy reasons weighing in favor of asserting jurisdiction far outweigh those militating against a jurisdictional assertion in this case.

In its post-hearing brief, the Union makes numerous, well-reasoned arguments as to why I should decline to assert jurisdiction in the instant case on policy grounds. First, the Union notes that the New York State Public Employment Relations Board (PERB) has previously asserted jurisdiction over the Employer. In that case, *Matter of Corcoran (KIPP Academy Charter School)*, 45 PERB ¶ 3013 (2012), PERB also made numerous findings concerning the Employer's status as a conversion charter school and its employees' inclusion in citywide DOE bargaining units of like titles.[26] However, the parties have represented that since the issuance of *Hyde Leadership*, PERB has uniformly declined jurisdiction over New York State charter schools, whether they be start-ups or conversions. While it does not appear that PERB has issued a ruling, advisory opinion, or other pronouncement in this regard, I note that PERB seems to have adopted the Board's analysis as its own by publishing *Hyde Leadership* in its entirety as 49 PERB ¶ 8002 (2016). Thus, should I decline to assert jurisdiction in the instant case, KIPP Academy's employees would be left in a jurisdictional limbo, and effectively denied their statutory right under the Act to choose whether they wish to continue to be represented by the Union for purposes of collective bargaining.

The Union also argues that I should decline to assert jurisdiction due to the heavy regulation of KIPP Academy by the Board of Regents and the DOE, analogizing charter schools to state-regulated industries like horseracing and dogracing. The Board in *Hyde Leadership*, over a vigorous dissent by then-member Miscimarra, explicitly rejected that argument. See *Hyde*

[25] Although housed in two separate buildings on the same campus, no party to the proceeding has argued that KIPP Academy's elementary and middle-schools have separate identities, such they should not be regarded as single facility.

[26] As discussed by the Board in *Hyde Leadership*, I am not bound by any determinations made by PERB. See *Hyde Leadership*, 364 NLRB No. 88, slip op. at 6, n. 15 (noting that "federal, not state, law governs").

Leadership, 364 NLRB No. 88, slip op. at 8 ("We are not persuaded that the Board's determination to decline jurisdiction over the horseracing and dogracing industries serves as guiding precedent here... Those rules do not establish a general intent or inclination to decline jurisdiction over any industry that may be regulated by the state.") I also note that more recently, (then-Chairman, now-member) Kaplan has suggested that the decisions in *Hyde Leadership* and *Pennsylvania Virtual*, citation *supra*, to "expressly reject[ ] declining jurisdiction over charter schools as a class... might warrant review by a full five-member Board in a future case." *Excalibur Charter School, Inc.*, 366 NLRB No. 49, slip op. at 2, n. 6 (Mar. 29, 2018). I am, however, bound by the Board's decision in *Hyde Leadership*, and, accordingly, I find that the extensive state regulation of charter schools is an insufficient basis to warrant declining jurisdiction in the instant matter.

The Union further argues in its post-hearing brief that "[s]evering this [KIPP Academy] bargaining unit instead of declining jurisdiction would disturb the long-standing bargaining relationship that both KIPP and the UFT have benefitted from under the Charter Schools Act." However, the premise of this argument is fundamentally flawed. An assertion of jurisdiction will not disturb the bargaining relationship, but rather will allow the employees of KIPP Academy to choose whether they continue to wish to be represented by the Union. Notably, a failure to assert jurisdiction in this case would be disruptive to the apparent industry-wide stability which has existed in New York State since the Board in *Hyde Leadership* found that it can, and should, exercise jurisdiction over New York charter schools.

Finally, in asserting jurisdiction in this case, I am mindful the Supreme Court "has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963).

For the foregoing reasons, I find that the Board should not decline to assert jurisdiction over KIPP Academy under Section 14(c)(1) of the Act.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer, a domestic corporation with its principal office and place of business located at 730 Concourse Village West, Tower D, Bronx, NY 10541, has been engaged in the operation of an educational institution. During the past twelve month period, which period is representative of its annual operations in general, the Employer received gross annual revenue in excess of $1,000,000, and purchased and received goods, supplies, and materials valued in excess of $5,000 directly from points located outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of Sections 2(6) and (7) the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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

5. I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time teachers, counselors, social workers, team leaders, and specialists employed by the Employer at its facility located in the Bronx, New York.

Excluded: All other employees, including substitute teachers, clerical, maintenance, supervisor, managers, and guards, within the meaning of the Act.

The following classifications will vote subject to challenge: deans, director of support services, and teaching fellows.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they want to be represented for purposes of collective bargaining by the United Federation of Teachers, Local 2, AFT, AFL-CIO.

Election Details

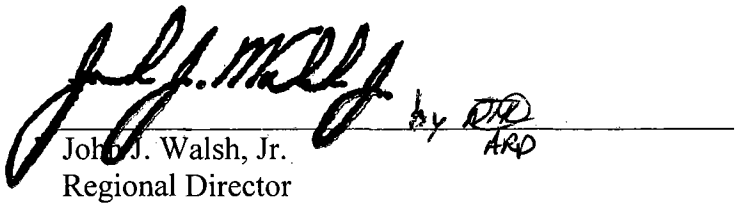
I am taking administrative notice of the related blocking charges, Case Nos. 02-CA-191370; 02-CA-214570; 02-CA-218327; and, 02-CA-219324. As such, I will direct the election at an appropriate time. The Direction of Election will include details as to voting eligibility, voter list, and posting of the Notice of Election.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review. Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: August 24, 2018



John J. Walsh, Jr.
Regional Director
National Labor Relations Board
Region 02
26 Federal Plz Ste 3614
New York, NY 10278-3699