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Mission Statement

The primary purpose of the *Illinois State Education Law and Policy Journal* (formerly *Illinois School Law Quarterly On-Line*) is to provide a forum for the interchange of ideas, theories, and issues on various aspects of school law among practitioners, professors, and attorneys. The emphasis is on analyzing issues in school law for the purposes of developing new theories to explain current and past developments in the law and to provide the theoretical framework which can be used to anticipate and predict future developments in school law.

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SCHOOL DISTRICT

Baar v Jefferson Cnty. Bd. of Educ., Nos. 10-5704/10-5741 (6th Cir. Mar. 7, 2012): Baar was a chemistry teacher. After sending an inappropriate letter to a female colleague, he agreed to sign a memorandum of Understanding that prohibited him from having any further communication, written or oral, with the woman. Baar was given a written reprimand and transferred to another school. He filed a grievance and the letter of reprimand was removed from his file. Three years later he Baar communicated with the woman again because she was listed as the contact person for the Louisville Area Chemistry Alliance and Baar wanted to renew his membership and attend the conference. Baar was disciplined for violating the earlier Memo of Understanding and was told that he could not attend the conference. Baar filed suit in federal district court alleging violation of his First Amendment rights by banning him from attending a professional meeting. While Baar ultimately prevailed on his First Amendment claim, he was unable to personally sue the individual board members because the court found that they enjoyed a qualified immunity from suit.

C. A. v William S. Hart Union High Sch. Dist., No. S188982 (Cal. Mar. 8, 2012): C. A. was subjected to sexual abuse and harassment by Hubbell, a guidance counselor, while he was a student. The abuse continued from January to September of 2007. In his lawsuit for negligent hiring and retention, C. A. alleged that the school district knew, or should have known, of Hubbell's past sexual abuse of minors and her propensity and disposition to engage in such abuse. C. A. made this allegation based on personnel records that reflected numerous incidents of inappropriate sexual contact both off and on school premises. In his suit, C.A. further alleged that defendant school district failed to use reasonable care in investigating Hubbell's past or safe-guarding C. A. The trial court dismissed the suit stating that C.A. failed to state a valid claim because of the lack of statutory authority for holding a public entity liable for negligent supervision, hiring or retention of its employees. The California court of Appeal affirmed. The California Supreme Court reversed and remanded stating that "administrative employees who allegedly knew or had reason to know of Hubbell's dangerous propensities and acted negligently in hiring, supervising and retaining her, would themselves be subject to liability to plaintiff for his injuries." The court rejected the school district's claim that vicarious liability could not attach stating, "School principals and other supervisory employees, to the extent their duties include overseeing the educational environment and the performance of teachers and counselors, also have the responsibility of taking reasonable measures to guard pupils against harassment and abuse from foreseeable sources, including any teachers or counselors they know or have reason to know are prone to such abuse." After finding that a cause of action did exist, the court went on the state that actually prevailing may be difficult because of the lack of actual power over hiring and firing that is held by the principal.

Ollier v Sweetwater High Sch. Dist., No. 07-714 (S.D. Cal. Feb. 9, 2012): A suit was filed against the school district by a class of female athletes alleging that the school district discriminated by gender as regarding practice and competitive facilities, locker rooms, training facilities, equipment and supplies, travel and transportation, coaches and coaching facilities, scheduling of games and practice times, publicity, and funding all in violation of Title IX. It was also alleged that the district "failed to provide female students with equal athletic participation opportunities, despite their demonstrated athletic interest and abilities to participate in athletics." The district court granted plaintiff's motion for summary judgment. On the claims of violation of Title IX

based on unequal treatment and benefits and retaliation, the case went to trial. After trial, the district court found in favor of the plaintiffs. The court found the disparities between female and male athletic programs to be significant and therefore in violation of Title IX.

Parker v Franklin Cnty. Cmty. Sch. Corp., No. 10-3595 (7th Cir. Jan. 31, 2012): Female basketball players filed suit under Title IX against 14 Indiana school districts alleging that the boys' basketball teams were disproportionately scheduled to play on the preferred dates of Friday and Saturday nights—"primetime" for high school basketball. The district court granted the school districts' motion for summary judgment on the 1983 claims based on 11th Amendment sovereign immunity. Summary judgment was also granted on the Title IX claim, finding that the disparity was not substantial. The 7th Circuit vacated and remanded the grant of summary judgment on Title IX grounds. According to the 7th Circuit, a policy interpretation on this issue had already been agreed upon earlier. The policy interpretation divided the issue into three sections: (1) scholarships; (2) equal treatment; and (3) accommodation. While a disadvantage of one sex in one program can be balanced against a comparable advantage in another program, no such comparable advantage in another program had been shown. Therefore the disparity had to be isolated with the one sport. The court noted that the disparity was systemic on long-standing, and therefore did present a question for trial as to whether the harms caused by the disparity was substantial enough to deny equal athletic opportunity.

K. J. v Sauk Prairie Sch. Dist., No. 11-622 (W.D. Wis. Feb. 6, 2012): K. J. along with several classmates wore bracelets to school which said "I heart Boobies (Keep a Breast). The wearing of the bracelets was banned by the principal. Punishment for wearing the bracelets would be detention and then suspension. This was modified to say that the bracelets could be worn if turned inside out so that the wording could not be seen. The reason for banning the bracelets was that they were seen as sexual innuendo in violation of the dress code. The bracelets were seen as a "distraction that it was inappropriate slang, and that other people, including some teachers, were offended." K. J. filed suit alleging a violation of the First Amendment right to free speech and requesting a temporary injunction. The district court denied the injunction, relying on the decision in *Bethel School District No. 43 v Fraser, 478 U.S. 675 (1986)* which stated that school officials could prohibit certain lewd, vulgar, or offensive terms at school. While these terms had never been defined in the 7th Circuit, the court looked to other circuits where such things as "sexual innuendo and profanity" were included. The court concluded that "Fraser permits schools to prohibit vulgar or offensive speech that is related to, but falls just short of being, profane, obscene, or indecent." The phrase "I heart Boobies" straddled the line between vulgar and mildly inappropriate; it is sexual innuendo in the context of the middle school. The district court stressed that the anti-cancer "campaign uses these hints of vulgarity and sexuality to attract attention and provoke conversation, a ploy that is effective for its target audience of immature middle students."

Jamie S. v Milwaukee Pub. Sch., Nos. 09-2741/09-3274 (7th Cir. Feb. 3, 2012): A Class action suit was filed against the Milwaukee Public Schools alleging widespread violations of the IDEA. The district court rejected the plaintiff's "class" which was comprised of "all school age children with disabilities who reside in the Milwaukee Public School District boundaries and who are or may be eligible for special education and related services under IDEA and Wisconsin law." Instead, the court certified a small class comprised of "students eligible to receive special education from MPS who are, have been or will be denied or delayed entry into or participation in the IEP

process.” This smaller class focused the lawsuit on violations of the IDEA “child find” requirements. Violations were found and, over the objections of the MPS, the district court approved a settlement which included a complex remedial scheme requiring MPS to set up a court-monitored system to identify children. MPS appealed the remedial order and the class-certification decision. Looking at the claim that the class was improperly certified, the appellate court stated that the district court had the authority to certify a class so long as it complies with the requirements of numerosity, commonality, typicality, and adequacy of representation. Using these criteria, the circuit court found several basic flaws with the district court’s class certification decision including its lack of definiteness, commonality, and the possible remedy. Therefore the court vacated the class-certification order. As regarding the settlement agreement to which the MPS did not agree, the court found that “because DPI cannot unilaterally force MPS to take specific remedial action, a settlement that attempts to do exactly that prejudices MPS’s legal rights by requiring more of MPS than Wisconsin law permits DPI to impose. It found the district court’s conclusion to be an error of law, it also was vacated.

P. K. v Caesar Rodney High Sch., No. 10-783 (D. Del. Jan. 27, 2012): P. K. was in an abusive relationship with a fellow student, G. R. P. K.’s mother alerted teachers and students about the abusive relationship. Eventually the school resource office became involved. He told them that they could no longer share a locker and attempted to limit interaction between the two. G. R. and his father started to harass and threaten P. K. and were charged with criminal harassment. When G. R. assaulted P. K. in school, G. R. was arrested, suspended from school for three days, and removed from the baseball team, after which P. K. became the target of retaliation from G. R.’s friends. P. K. finished out the year on homebound instruction. She filed suit alleging that the school district violated Title IX and Delaware law by failing to remedy and/or protect P. K. from student-on-student harassment. The district court granted the school district’s motion for summary judgment on the Title IX claims. Looking at Delaware law, the court discussed whether the school district had exhibited “deliberate indifference” to known acts of sexual harassment; whether the district’s response was “clearly unreasonable.” As regarding the “deliberate indifference” the court found that the district had responded in a proactive manner by arresting and suspending G. R., allowing P. K. to finish the year at home, and encouraging the family to involve the Dover police for off-campus harassment. As regarding “clearly unreasonable” the court found that the school district had used practically every method known to diffuse the situation.

EMPLOYEE RIGHTS

Sanders v Lee County Sch. Dist. No. 1, No. 10-3240 (8th Cir. Feb. 28, 2012): Sanders was employed by Lee County School District. She and the superintendent were the only two white administrators. After the school board became primarily (4–3) black, Sanders and the superintendent were reassigned; Sanders to food service assistant. The board attempted to eliminate the position but lacked a majority. Sanders went on sick leave from November 2007 to August 2008. After being threatened with termination for excessive sick leave, Sanders resigned and filed suit in federal district court alleging race discrimination, hostile work environment, and constructive discharge based on race in violation of Title VII. The claim for hostile environment was dismissed on summary judgment, but the discrimination allegations went to trial. Sanders was awarded \$10,000 in compensatory damages for emotional distress and anguish, \$60,825 for lost wages and benefits, \$8,000 in punitive damages. The district court set aside the jury verdict

in part. On appeal to the Eighth Circuit, the lower court was reversed and the jury award for lost wages and benefits was reinstated. The court concluded that “a reasonable jury could conclude the change in position from finance coordinator to food services assistant was a demotion with a diminution in title and significantly decreased responsibilities, and that a reasonable employee in Sanders’s position would find the reassignment demeaning.”

Birkholz v City of New York, No. 10-4719 (E.D.N.Y. Feb. 22, 2012): Birkholz, a gay man, was employed as a guidance counselor by the New York Department of Education (NYDE). During his tenure, several fifth grade teachers expressed to Birkholz, through the building principal, that they did not want their students being counseled by a gay man. At a subsequent meeting Birkholz was told that he could no longer participate in activities in which the fifth grade students were participating. Finally, Birkholz was informed that his position was being eliminated for lack of funds. Shortly thereafter, the principal informed Birkholz that there was an opening at another school, and the principal counseled him to take that position rather than returning to his original school. However, Birkholz did not return after a medical leave, and he was assigned to teach; an activity for which he claimed he was not licensed. After a meeting with administration, he received a letter of insubordination. Birkholz took another medical leave. The principal informed him that he had no more leave left and to return to work immediately. After more back and forth, Birkholz filed suit against the City of New York and NYDE alleging discrimination and retaliation under Title VII and ADEA based on sexual orientation, gender, and age. The district court granted NYDE motion to dismiss in part. It dismissed Birkholz’s claim of a violation of Title VII because of sexual orientation and gender. The court stated that “the law is well-settled in this circuit that Title VII does not prohibit harassment or discrimination because of sexual orientation.” As regarding gender, the court said that Birkholz’s pleading were insufficient to show gender discrimination. In reality, the court found that Birkholz was attempting to support a Title VII claim for “gender stereotyping” which included the stereotype that gay men are more likely to be pedophiles. However, the court concluded that the “gender stereotyping” claim was nothing more than an attempt to “bootstrap protection for sexual orientation into Title VII.” As regarding his claim of retaliation based on his sexual orientation, gender, and age, the court concluded that Birkholz had alleged sufficient adverse employment action and causation to support the claim.

Chicago Teachers Union, Local No. 1 v Board of Educ. Of the City of Chicago, 2012 IL 112566 (Ill. Feb. 17, 2012): The question before the court was whether the new teacher evaluation and tenure law recently passed in Illinois provided new substantive rights under the Fourteenth Amendment. The federal district court, in granting a Chicago Teachers Union a preliminary and permanent injunction order the Chicago Board of Education to rescind its recent economic layoff of tenured teachers, and bargain a procedure for future layoff and recall rules, found that the law “provides tenured teachers some residual property rights in the event of an economic layoff.” On appeal to the 7th Circuit, the court stated that while the teachers do have a 14th Amendment right to due process to recall procedures when new positions become available, the state school code does not require those procedures to be collectively bargained. It was decided that the Illinois Supreme Court should be able to interpret the new law, the following issues question was certified to the Illinois Supreme Court: Does Illinois law give laid-off teachers either (a) the right to be rehired after an economic layoff; or (b) the right to certain procedures during the rehiring process? If so, what is the scope of that right? A majority of the Illinois Supreme Court concluded that Illinois law did not confer a substantive right to rehire or specific

procedures. “In the present case, the existence of a recall provision in one section of the School Code and the absence of such a provision in another is further indication that section 34-18(31) does not give laid-off tenured Chicago public school teachers a substantive right to be rehired after an economic layoff. Had the legislature intended to provide substantive rehire rights to laid-off tenured Chicago public school teachers, it would have done so, as it did for all other school districts in Illinois.”

Thayer v Washington Cnty. Sch. Dist., No. 09-565 (D. Utah Feb. 2, 2012): The drama coach conferred with the school resource officer as to how to handle a gun that fired blanks that he had obtained permission from the administration to use for his production of “Oklahoma.” All the rules laid out were being followed until, for some unknown reason 16-year old sophomore Tucker Thayer was allowed to shoot the gun during rehearsals. After a convoluted string of events, Thayer died from shooting himself in the temple with a blank fired from the gun. Thayer’s parents sued claiming a substantive due process violation based on a “danger creation” theory. The school filed for summary judgment. The “danger creation” doctrine permits liability against a state actor only when there is either actual wrongful intent or recklessness that is sufficiently egregious to shock the conscience; outrageousness is required. The parents claimed that the school resource officer failed to take any action to ensure that the rules were actually followed, and that he specifically disregarded the rules when he knew that an unauthorized person had carried the gun into the school. The court applied a six-part test to determine whether liability existed:

- Did the resource officer create the danger or increase Thayer’s vulnerability to it?
- Was Thayer part of a limited and specifically defined group?
- Did the resource officer’s conduct put Thayer at substantial risk of serious, immediate and proximate harm?
- Was the risk known or obvious?
- Did the resource officer act recklessly in conscious disregard of that risk?
- Does the resource officer, viewed in total, shock the conscience?

The court found that, after reviewing the six criteria, that the school resource officer was not guilty of dangerous creation.

STUDENTS’ RIGHTS

Doe v Fournier, No. 11-30155 (D. Mass. Feb. 22, 2012): Jane Doe, a high school student, became sexually involved with Van Amburgh, a guidance counselor and assistant football coach. Van Amburgh had been found to have been inappropriate with students before. Doe alleged that he even bragged about having sex with students; participating in a contest with another school employee to see who could have sex with more students. When the sexual relationship with Doe began, Doe was 17 which was over the age of consent. When Doe’s mother found out about the affair, Van Amburgh was placed on paid administrative leave during the pendency of an investigation. Van Amburgh was ultimately terminated. Doe filed suit in federal district court against the town, the superintendent, the principal and Van Amburgh alleging a violation of her Fourteenth Amendment right to substantive due process because Van Amburgh’s behavior had

deprived her of her right to bodily integrity. She also alleged a violation of Title IX. Defendant's moved to dismiss. In denying the motions to dismiss, the district court rejected the claim that the consensual nature of the relationship negated the allegations. The court stated that the unequal power between a guidance counselor and a student may render "consent" virtually impossible. The court also found that Van Amburgh was "clothed with the authority of state law." The court stated, "It may be inferred from these allegations that Van Amburgh enjoyed the opportunity to harass Plaintiff and solicit sex from her by virtue of the authority he had as a high school guidance counselor and football coach." Finally, although the court agreed that the school district acted swiftly after Doe's mother alerted to the existence of the affair, the court found that the allegations made by Doe were "sufficient to show that school officials had actual notice of, but failed to investigate or stop Van Amburgh's sexual harassment of students long before Plaintiff's mother approached [them.]" This pattern of failure to act was sufficient to show deliberate indifference in order to attach liability.

Facebook continue to be in the news. It was reported that the ACLU of Minnesota has filed suit against the Minnewaska Area School District and the Pope County Sheriff's Office alleging violation of a student's right to free speech. One suit involved a student, R. S., who posted a comment on her Facebook page stating her dislike of a school staff member. The comment was posted at home on R. S.'s personal computer. When the district found out about the comment, R. S. was disciplined. R. S. then cursed on her Facebook page about the fact that someone reported her and she was disciplined further. The ACLU of Minnesota alleged a violation of R. S.'s First Amendment right to free speech. The second suit involved a student being coerced by the school principal to turn over her password and login information to her Facebook and e-mail accounts because the school had heard that the student had been involved in online conversations about sex with another student. The conversations were alleged to have been done off campus. The student was threatened with discipline unless she complied. Parents were not informed. The ACLU of Minnesota is alleging a violation of her Fourth Amendment right to be free from unreasonable searches.

Parents, Families, and Friends of Lesbians and Gays, Inc. v Camdentown R-III Sch. Dist., No. 11-4212 (W.D. Mo. Feb. 15, 2012): The ACLU filed suit on behalf of four gay rights groups—Campus Pride, DignityUSA, PFLAG National, and a Catholic organization in support of people we are gay, lesbian, bisexual, or transgender – against the Camdentown R-III School District alleging that the district was blocking the websites of these organizations with its custom-built filtering software. The allegation was this software blocked all LGBT-supportive information. The groups sought an injunction barring the district from using the software. Finding that the plaintiffs had satisfied the required factors for a preliminary injunction (viewpoint discrimination, likelihood of irreparable harm, intentionality, likelihood to prevail on the merits), the court granted the injunction and ordered the district to "discontinue within 30 days, its Internet-filter system as currently configured, and any new system selected must not discriminate against websites expressing a positive viewpoint toward LGBT individuals." The court likened the district's filtering software to the viewpoint censorship seen in the United States Supreme Court case of *Bd. of Ed., Island Trees Un. Free Sch. Dist. No. 26 v Pico*, 457 U.S. 853 (1982). It concluded, "Because the Court has found that Camdentown's Internet-filter system discriminates based on viewpoint, that system must be struck down unless Camdentown can demonstrate that allowing access to websites expressing a positive viewpoint toward LGBT individuals would

materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”

Burlison v Springfield Pub. Sch., No. 10-3395 (W.D. Mo. Jan. 25, 2012): A sweep with drug dogs was done in the Springfield Public Schools. Students were taken out of the classroom and the dogs were brought in. The dog did not alert on anything in the classroom. When student C. M. returned he claimed that some of the zippers on his backpack were unzipped, although he claimed to have zipped them all before he left. Student H. M. was late that day so was not there when the dogs were brought through. The parents of C. M. and H. M. filed suit alleging a violation of their Fourth Amendment right to be free of unreasonable search and seizure. The court stated that the use of a drug sniffing dog alone could not be the basis for the claim of an unreasonable search and seizure. The sheriff coordinating the search could not be held liable in his official or individual capacity because “there is nothing unconstitutional about the canine sniff . . . and there was no reason for Defendant Arnott to believe or even suspect that his deputies would violate the established policies.” As regarding the school administrators, the court granted their motions for summary judgment on the ground that no evidence had been produced to prove that they were even involved in the drug sweep. Regarding the school district, the court found that H. M. had no claim because she wasn’t there, and C. M. had no claim because “no seizure of student possessions occurred when school officials required students to leave their belongings in the class and required the students to leave the school while drug detection dogs proceeded through the school.”

Hannemann v Southern Door Cnty. Sch. Dist., No. 11-2529 (7th Cir. March 15, 2012): Hannemann was expelled from high school until his 21st birthday for violation of the weapons policy. He was reinstated after just one year on the conditions that there would be no other instances of gross misconduct. After two more incidents that year, however, he was permanently expelled. He still came on campus to use the weight room. Once that was found out, he was immediately banned from being on school property. Hannemann filed suit alleging violation of his procedural due process. The district court held that the school district has the ability to ban a non-student from school property because members of the public have no constitutional right to have access to public school property. The 7th Circuit affirmed the lower court, stating that the restriction was indefinite and that before Hannemann could assert a right to due process, he had to show a right to be on school property. As a non-student he did not possess that right. Hannemann also asserted a liberty interest “stigma plus” in his good name and in his right to partake of intrastate travel. As regarding his good name, the court stated that Hannemann “had not identified any statements made by the school district that would constitute defamatory statements if false, nor did he show any defamatory statements that had caused an alternation in his legal status.” As regarding intrastate travel, the court found that Hannemann was in no manner limited in his travel in Door County.

Bell v Itawamba Cnty. Sch. Bd., 11-0056 (N.D. Miss. Mar. 15, 2012): Bell posted a rap song that he had composed and recorded on his Facebook page. His song accused two coaches of flirting and inappropriate contact with female students. He was suspended and sent to an alternative school for five weeks for the post after the school found it to be harassment, threat, and intimidation of school teachers. Bell filed suit alleging a violation of his First Amendment right to free speech. The district court based its review on the language of *Tinker*, specifically whether his speech caused material and substantial disruption at school, or whether it was reasonably

foreseeable to school officials that the song would cause a material and/or substantial disruption at school. Agreeing with the school that the song did indeed constitute harassment, threat, and intimidation, the court found that such behavior does cause a material and substantial disruption, or that such possible disruption could be reasonably foreseen. “It is reasonably foreseeable that a public high school student’s song (1) that levies charges of serious sexual misconduct against two teachers using vulgar and threatening language and (2) is published on *Facebook.com* to at least 1,300 “friends,” many of whom are fellow students, and the unlimited internet audience on *YouTube.com*, would cause a material and substantial disruption at school.”

RELIGION

Bronx Household of Faith v board of Educ. Of City of New York, 10-8598 (S.D.N.Y. Feb. 24, 2012): Bronx Household of Faith (BHF) applied numerous times to be allowed to hold Sunday morning services at a school building. Every request was denied. The religious organization filed suit seeking to overturn the district policy prohibiting its use of school facilities for religious services. The district court granted BHF a permanent injunction barring the district from enforcing its policy. The 2nd Circuit reversed, stating that the district policy did not violate the First Amendment. After finding that a limited public forum had been created, the court concluded that the policy was viewpoint neutral. It focused on the prohibition of “religious worship services” not a prohibition against a “house of worship.” Such a prohibition was limited to a type of “activity” not to a specific “viewpoint.” BHF filed a writ of certiorari to the United States Supreme Court, which was not granted. Therefore the case went back to the district court which issued a temporary restraining order against enforcement of the prohibitive policy and allow the worship services to continue. The reason, was that since the injunction was to maintain the status quo rather than overturn the status quo, the court used a much lower burden of proof. The court agreed that if BHF could not continue with its worship services the financial burden on BHF would force it “to reduce or eliminate ministries to the members and local community.” The court also found a likelihood that BHF would prevail on merits because the policy in question “refers to a religious practice without a secular meaning discernible from the language or context, . . . it discriminates between those religions that fit the ‘ordained’ model of formal religious worship services and those religions whose worship practices are far less structured.” Regarding the expressed concern of the school district that it could be in violation of the Establishment Clause, the court stated that it was unlikely that a reasonable observer would perceive that that district allowing a religious group to hold a church service in an available school building was an endorsement of that religion.

SPECIAL EDUCATION

Weidow v Scranton Sch. Dist., No. 11-1389 (3d Cir. Feb. 7, 2012): Weidow was bipolar. She began attending high school in fall 2004. Once her diagnosis became known she was harassed at school. She transferred to another high school in the district. She returned in 2005 and the harassment resumed. She was home schooled until her senior year when she returned, but after being threatened, she finished her education in home schooling. Weidow filed suit against the Scranton school district alleging violations of the ADA and the Rehabilitation Act. In entering a summary judgment for the school district, the district court stated, “Whatever the limitations

on Weidow's ability to interact with others may have been, they were caused by the harassment she experienced at school, rather than her bipolar disorder." The court found no triable issue of fact regarding a disability. The 3rd Circuit affirmed the lower court. "To make out a prima facie claim for discrimination under the ADA or Rehabilitation Act the plaintiff must establish that she has a disability, that she is otherwise qualified to participate in the services, programs, and activities of the school, and that she was subjected to discrimination because of her disability. Weidow's medical records did not support the conclusion that her bipolar diagnosis significantly restricted a major life activity, therefore the ADA did not apply.

Changes to ADA and Rehabilitation Act: The US Department of Education's Office for Civil Rights has issued a Dear Colleague letter [<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html>] and FAQs [<http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>] on the changes to the ADA and Rehabilitation Act. In the Dear Colleague Letter the ED:

1. Directs that the ameliorating effects of mitigating measures (other than ordinary eyeglasses or contact lenses) may not be considered in determining whether an individual has a disability.
2. Expands the scope of "major life activities" by providing non-exhaustive lists of general activities and major bodily functions
3. Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
4. Clarifies how the ADA applies to individuals who are "regarded as" having a disability

The FAQ broadens coverage so that student who may not have been determined to have a disability under Section 504 or the ADA in the past may now be found to have a disability under those laws. For example:

5. A student who has an allergy and requires allergy shots to manage the condition may be covered under the laws if, without the shots, the allergy would substantially limit a major life activity.
6. A student with bipolar disorder would be covered by the laws if, during manic or depressive episodes, the student is substantially limited in a major life activity such as thinking, concentrating, or neurological function.
7. A nondisabled student whose mother is a well-known AIDS activist in the community may be protected by the laws if he is mistakenly regarded as having AIDS and is harassed by other students

It is important that districts amend their policies accordingly.

Niehaus v Huppenthal, No. 2011-017911 (Ariz. Super. Ct. Jan 25, 2012): Plaintiff attempted to permanently enjoin the enforcement of a scholarship program known as the Arizona Empowerment Scholarship Accounts. The "scholarships" were for qualified students with disabilities. Plaintiff's argument was that distributing such scholarships to students at private and/or religious schools violated the state constitution. The Superior Court denied plaintiff's motion on the grounds that the money was going into a general fund and it was the decision of the parents, not the state, as to how the money awarded would be spent.

LEGISLATION

HB 5290 Bullying: This bill would require school districts to adopt an ISBE-designed school board policy on bullying. Questions and concerns have arisen regarding the proscriptive and burdensome nature of the requirement that districts adopt the specific wording of the ISBE. Amendments addressing those concerns have been proposed.

HB 5114 CPR Requirements: This bill requires elementary school students to view a training video on how to perform CPR.

HB 5602 Law Enforcement Contact: This bill requires that each school designates one individual who would be the contact for law enforcement agencies regarding information on a student's history of arrest for an offense relating to drugs or violence. This individual would also be responsible for reporting information to law enforcement. Concerns have been raised about student privacy.

HB 3826 Assistance Dogs: Clarifies the definition of the dogs that must be allowed in classrooms. It extends the definition to include dogs that have been trained to assist students with autism, mobility impairments and psychiatric and other conditions.

HB 5263 Illinois Controlled Substances Act: Adds a definition of school to the Act.

HB 592 Expelled Students: This bill requires that all students who have been suspended or expelled for any reason other than weapon violations be immediately transferred to an alternative school setting.

HB 1196 Back Ground Checks: This bill extends the requirement for background checks of all school employees to those hired before 2004.

HB 1248 Community Service: This bill would require that all high school students to complete at least 15 hours of community service each year in order to graduate.

HB 1963/SB 3410 Concussions: This bill would not allow students who had suffered a concussion to return to physical activity without a physician's release.

HB 3925 Vision/hearing Screening: Allows screening for preschool students to be administered once every two years prior to kindergarten.

HB 4029 Transportation: This bill allows increased flexibility in the bidding and awarding of contracts for school transportation.

HB 4621 Compulsory Education: This bill would raise the age of compulsory education from 6 to 17 to 6 to 18.

HB 5076 Special Education: This bill would require that special education and related services must be provided within 10 days after parental notification instead of at the beginning of the next semester as the current law reads. It also requires that a school cooperative or the state respond within ten days to a written complaint filed by the parents of a special education student.

HB 3027 Health Education: This bill would require instruction on contraception in addition to abstinence and would require sex education to be medically accurate, age appropriate, and evidence based.

HB 5002 Background Check: This bill would allow that if a teacher retires and then immediately goes back to substitute for his or her former employer, he or she would not need to undergo another criminal background check.

HB 5659 Charter Schools: This bill would add charter schools to the list of public bodies to which a school district could sell property without conducting an auction or collecting sealed bids.

HB 5575 Special Education: This bill would exclude from the count of special education students in a classroom those students with IEPs for whom instruction in the general education classroom does not require modification to the content of the general education curriculum.

SB 3367 Drivers Education: This bill extensively revises the law on drivers' education including such things as public notice of district board hearings relating to waiver requests on fees and course content, charges for students who live in the district but attend a non-public school, credentials of businesses contracting with schools to provide drivers education and/or vehicles, and various reporting requirements.

SB 3022 Drivers Education: This bill would repeal the law requiring schools to provide drivers' education (Illinois Drivers Education Act).

SB 3405 Immunizations: This bill would require school-specific immunization data to be made publicly available by December 1 of each year.

SB 3408 Trans-fat: This bill would limit the amount of trans-fat in food or drink consumed by students.

SB 3495 Epi-Pens: This bill requires schools to allow the use of Epi-Pens by students or school nurses when necessary.

SB 3415 School Violence: This bill would strengthen reporting requirements of violence at schools by criminalizing the failure of teachers and administrators to report such incidents

There are several bills in the dealing with the Chicago Public Schools:

SB 3239 imposes a moratorium on school closings and consolidations in Chicago

SB 3362 limits the number of students that can be assigned to teachers.

SB 3394 would not allow CPS to dismiss teachers after the first day of school because of decreasing class sizes or curriculum changes.

HB 209 requires the CEO to hold a Masters of Education degree and a current teaching certificate by July 1 or lose his job.

HB 291 Physical exams of student athletes would be required to include an EKG test.

Public Schools, Private Employers?

A Closer Look at the Labor Relations of Public Charter Schools

Stephanie Klupinski, Lindsay Nichols, and Kevin Stanek*

I. INTRODUCTION

When public charter schools burst upon the education scene over two decades ago, they ushered in a new era for public education. Premised on the idea that freedom from some of the regulations governing other public schools could foster innovation and improve student learning, charter schools were viewed by some as much-needed competitors to traditional schools or as innovation labs whose successes and failures could help all schools improve. Charter schools can look very different between and within states—some function much like their traditional public school counterparts, while others are more akin to private schools. Still, public charter schools across the nation share some important characteristics: they do not charge tuition, they are non-sectarian and non-discriminatory, and they are primarily funded by some combination of local, state, and federal dollars.¹

Central to the charter school movement is the idea of choice: charter schools provide an opportunity for parents and students to select a public school of their choosing, and they also offer a chance for teachers to choose a school that best suits their educational philosophy. Some charters target specific population of students, such as autistic students, or those at-risk of dropping out. Others might have an Afro-centric curriculum, emphasize the arts, or use an inter-generational approach. The quality of charters also varies greatly: some are among the highest achieving public schools in their states, while others find themselves in newspaper headlines for less noteworthy reasons.²

Charter schools, like traditional public schools, are creatures of state law, which explains the differences in charter law and policy from state to state. It is thus not surprising, then, that these differences, combined with charter schools' relatively recent entry into the public school system and their exemption from many traditional state education regulations, have created a number of gray areas surrounding the schools that are still being explored, debated, and litigated.

One of these gray areas concerns whether charter schools fall under state or federal labor law. This paper examines a case currently before the National Labor Relations Board involving teachers at a Chicago charter school which addresses that question: Are charter schools employers pursuant to the National Labor Relations Act? Ultimately, the answer hinges on whether charter schools are classified as a political subdivision of a state. If they are political subdivisions, then they are exempt from the federal National Labor Relations Act, and applicable state law governs their labor relations.

Part II of the paper provides a brief background on charter schools and collective bargaining. Part III provides information on the National Labor Relations Act, which governs federal labor law and provides the necessary background for the Chicago charter school case. Part IV looks at a case now before the NLRB regarding whether the teachers at the Chicago Mathematics and Science Academy charter school can bargain under federal or state law. Finally, Part V considers the implications of the matter on the charter school movement as a whole.

II. BACKGROUND ON CHARTER SCHOOLS AND COLLECTIVE BARGAINING

A. *General Background*

The idea of charter schools is often credited to Albert Shanker, the late president of one of the nation's largest teacher unions, the American Federation of Teachers. He proposed the idea of charter schools as places where teachers could try creative and innovative approaches to reach students, envisioning them as "a new kind of school governance framework under which successful teachers would become 'empowered' to create innovative programs at existing schools—but only with the express approval of their union."³

Minnesota passed its charter law in 1991, and the first charter school opened there a year later.⁴ Since then, the charter school movement has spread extensively, with all but ten states now having laws enabling the creation of the schools. Today, more than 1.6 million students attend the nearly 5,000 charter schools across forty states and the District of Columbia.⁵ Charter school supporters are a diverse bunch, including republicans and democrats, free market economists, civil rights leaders, religious fundamentalists, advocates for the poor, and public educators, among others. Large, national foundations, such as the Bill and Melinda Gates Foundation and the Walton Foundation, have funneled millions of dollars toward charters. President Barack Obama is a charter supporter, and his billion-dollar Race to the Top program considers the willingness of a state to embrace and encourage charters as a key component of its application for the federal funds.⁶

Charter schools contract with an authorizer (also called "sponsors") that provide oversight and make decisions on whether to renew or terminate a school's contract. Charter schools must adhere to the same federal accountability requirements under No Child Left Behind, and must comply with the Individual with Disabilities Act and other relevant federal law. But on a state level, they often are exempted from many of the other regulations applicable to traditional public schools.

As a result, the structure and law governing charter schools vary widely. Some states require that charter school authorizers can only be state or local government entities, like a state board or a district. Other states, like Ohio and Minnesota, allow private, non-profit entities to be among the many types of authorizers from which schools can choose.⁷ Some states allow for on-line charter schools, some only allow what are called "brick and mortar" charters. A few states allow charter school boards to basically outsource the operations of the school to for- or non-profit organizations.⁸ In twenty-four states, charter teachers are required to participate in the state pension plans for public school teachers; the other sixteen states let the schools decide whether they want to participate.

These examples are just a small sampling of the many different ways states can set up their charter schools. They help illustrate that in some states, charter schools function remarkably like a traditional public school, and in others, they operate more like private schools. Charter schools, as one scholar noted, "provide a window into how states are redefining what is meant by 'public education.'"⁹

B. *Collective Bargaining in Charter Schools*

Not surprisingly, there are also many differences across the states when it comes to collective bargaining and charter schools. Data from the National Alliance for Public Charter

Schools indicates that 604 charter schools (roughly 12 percent) have collective bargaining agreements.¹⁰ In some states, charter schools are required to be part of the existing collective bargaining agreement.¹¹ Some have such laws that only apply to certain types of charter schools. For example, Ohio law depends on whether the school is a start-up charter or a conversion school, which is a district school that the school board has decided to “convert” to a charter. The converting district is the authorizer of the conversion charter school, and its teachers are, by law, part of the district collective bargaining agreement unless a majority of the staff votes otherwise.¹²

Some charter supporters are staunchly opposed to any talk of unionized charter schools. In a 2009 *Wall Street Journal* op-ed, conservative education scholar Jay P. Greene opined, “If unions force charters to enter into collective bargaining, one can only imagine how those schools will be able to maintain the flexible work rules that allow them to succeed.”¹³ In April 2011, an Ohio bill aiming to curtail public employee bargaining rights included a provision that would prohibit charter schools teachers from engaging in collective bargaining.¹⁴ The bill was signed into law, but is currently subject to public referendum to be decided this November.

Others are warmer—or at least, not hostile—to the idea of unions in charters. In May 2006, a group of charter and union leaders met to discuss areas of agreement and disagreement. The report from that meeting noted that “most charter school operators understand that their teachers have the right to form unions if they think it necessary ... [and some] have found organized teachers can make good partners. Both groups realize they have to work together”¹⁵ Meanwhile, in some states, teacher unions have created their own charter schools. Some charter school networks, like the Green Dot Charter Schools, have created their own contracts that are more aligned with the schools’ visions.

Moreover, as the charter school movement grows, so do the number of teachers working at the schools. Their teachers tend to be younger and less experienced than teachers at traditional schools, but this is changing slightly as charter schools grow, and could lead to more teachers looking to unionize.¹⁶

The future of charter schools and teacher unions is still uncertain. Some charter supporters will continue to push to severely curtail or completely eliminate the collective bargaining rights of charter teachers, while others will explore how such rights could foster a better, more collaborative work environment. The question currently before the National Labor Relations Board is not whether charter teachers can unionize, but whether federal or state law applies. The next section explains the federal law governing labor law and its exemption for political subdivisions that is at the center of the case.

III. THE NATIONAL LABOR RELATIONS ACT AND DETERMINING POLITICAL SUBDIVISIONS

A. Background

The National Labor Relations Act was passed in 1935, following a period of great strife between employers and workers. Also known as the Wagner Act after Senator Robert R. Wagner of New York, the Act aims to guarantee employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection.”¹⁷

The Act also created the National Labor Relations Board (NLRB) to enforce and maintain those rights. The board has five members who are appointed by the president, and there are

regional offices spread throughout the county. Their work includes determining proper bargaining units, conducting elections for union representation, and investigating charges of unfair labor practices by employers.

B. NLRA Jurisdiction

The NLRA applies to most employers engaged in interstate commerce. There are a few exceptions: the United States government, any Federal Reserve Bank, or any person subject to the Railway Labor Act.¹⁸ Additionally, employers that are political subdivisions do not fall under the NLRA's jurisdictions: "The term employer . . . shall not include . . . any state or political subdivision thereof."¹⁹ Excluded entities are not subject to the NLRA because they do not fall under its jurisdiction.

Whether an entity falls under the NLRB's jurisdiction is usually not a difficult question. Most private companies are under the NLRB, and airlines, railroads, and agriculture are not. Government workers and other employees of political subdivisions are not under the NLRB's jurisdiction. During the early years of the law, the NLRB had little difficulty identifying political subdivisions: they included a turnpike created by the state legislature; a harbor district administered by election officials, and so on.²⁰

But in recent years, as the lines between private and public blur, it has become more difficult to make the political subdivision determination. Charter schools are a prime example. They are public schools that receive state and/or local tax dollars. Like all public schools, they must adhere to the federal laws affecting education. They are exempt from some, but not all, state laws, and so charter schools vary considerably from state to state in terms of how public or private they appear.²¹

Compounding matters is that, despite the "far-reaching ramifications of whether an entity is a political subdivision,"²² Congress did not define political subdivision in the NLRA. Because the NLRA leaves the term undefined, the NLRB was forced to create a definition that gave the term meaning and applicability.

C. Determining "political subdivision": the Hawkins Test

The United States Supreme Court addressed how the term "political subdivision" should be defined in *N.L.R.A. vs. Natural Gas Utility Dist. of Hawkins County, Tenn.* The issue in the case was whether federal or state law controlled negotiations between a county-operated utility district and its employees.²³ The utility district argued that it was a political subdivision and thus exempt from the NLRB's jurisdiction.

In addressing the issue, the Court had to first determine what was meant by the phrase "political subdivision." The NLRB had created a two-prong test stating that an entity is a political subdivision if it is "either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general public."²⁴ When Hawkins came before the NLRB, the Board applied the test and found that the utility was not a political subdivision, meaning that the NLRB had jurisdiction over it. The case was appealed to federal court, and the Sixth Circuit affirmed the NLRB's finding.²⁵

On appeal to the U.S. Supreme Court, the Court adopted the two-prong test and is now known as the *Hawkins* test. However, it overturned the NLRB's decision, finding that the utility

district was a political subdivision under the second prong of Hawkins and that the Board had “erred in its reading ... of the Board’s own test.”²⁶ Among the many factors that the Court used in reaching its decision were that the district was created with the authority of state law, it was subject to state public record laws, and its board of commissioners was composed of individuals responsible to elected officials.²⁷

The Court also helped clarify the relationship between state and federal law, agreeing with the Board that “while state law and declarations are given careful consideration ... they are not necessarily controlling” and that federal, not state law, governs the determination of whether an entity is a political subdivision under the NLRA.²⁸ This was a critical point because it established that the application of federal law cannot be dependent on state law.²⁹ This is not to say that state law is not to be given important consideration: state laws are important because they affect the operations and characteristics of the entity. But while such declarations and interpretations can assist when looking at the actual operations and characteristics of an entity, they are not determinative.³⁰ Thus, a state declaring that an entity is a political subdivision for the purposes of state law does not make it so.

While the Court in Hawkins clarified that federal law governs the political subdivision determination, it reached its finding by examining the state law creating the utility districts and establishing the regulations for the districts’ operations. Among the factors particularly important to its decision were that the utility district commissioners were “beholden to an elected public official for their appointment, and subject to removal procedures applicable to all public officials.” These factors satisfied the second prong of the test.³¹ But the Court also addressed other factors, including the utility district’s power of eminent domain, public records requirements, subpoena power, nominal compensation, exemption for state and local taxes, and the requirement of public notice and comment. To what extent they tilted the scale in favor of the utility district being a political subdivision, however, were not entirely clear. These characteristics supplemented the second prong of the political subdivision test, but no single factor stood out as being determinative in the Court’s political subdivision finding.³²

The fact that both a literal reading of the test and an examination of the entity’s characteristics led the Court to find that the utility district was a political subdivision has led to some variation in Hawkins’s subsequent application. The fact that the Supreme Court has never again addressed the issue has led to the NLRB struggling to apply a single standard.

IV. THE CHICAGO MATHEMATICS AND SCIENCE ACADEMY AND THE POLITICAL SUBDIVISION QUESTION

A case currently before the NLRB illustrates another question over whether an entity is a political subdivision. The matter involves teachers at a Chicago charter school. The teachers attempted to unionize under Illinois law, but the school administration has refused to begin negotiating a contract, arguing that the school falls under the NLRB’s jurisdiction.³³ Thus, this case hinges not on the question of whether or not the teachers can unionize, but on the question of who has jurisdiction over the school, the Illinois Educational Labor Relations Board or the NLRB.

A. Background

The Chicago Mathematics and Science Academy (CMSA) was formed in October 2003 by a group of private individuals.³⁴ After CMSA was incorporated, it applied to the Chicago Public School district (CPD) for a charter, which it was granted.³⁵ CMSA’s first charter contract

with CPS ran for five years, from July 2, 2004 through June 30, 2009; it was then renewed for another five-year term, effective from July 1, 2009, through June 30, 2014.³⁶

CMSA employs about 50 people, 35 of whom are teachers.³⁷ CMSA has a contract with Concept Schools, which is a non-profit charter management company that provides management services to CMSA and other charter schools.³⁸ The business manager and principal of CMSA are employed by Concept Schools; the rest of the staff is employed by CMSA.³⁹ Concept Schools was created by private individuals, and none of its employees or board of directors are appointed or subject to removal by a government entity.⁴⁰

CMSA operates on an annual budget of \$5.6 million, with the majority of its funds coming from the Chicago Public Schools (CPS).⁴¹ Less than two percent of its funding comes from private sources.⁴²

In June 2010, the teachers attempted to unionize under the Illinois Educational Labor Relations Act, the Illinois public sector collective bargaining law. The teachers chose to form a union with the Chicago Alliance of Charter Teachers and Staff, which filed a petition seeking certification as the bargaining representative of CMSA's teachers with the Illinois Labor Relations Board. On July 29, 2010, CMSA then filed a petition with Region 13 of the National Labor Relations Board, contending that because it was an employer under the NLRA act, the teachers could only form a unit under the federal law. A hearing was held, and on September 20, 2010, the Acting Regional Director for Region 13 issued a Decision and Order dismissing CMSA's petition because it found that CMSA was a political subdivision under both prongs of *Hawkins*.⁴³

Under the first prong, which considers whether the entity was "created directly by state so as to constitute a department or administrative arm of the government,"⁴⁴ the Regional Director found that although CMSA is a nonprofit, a look at its actual operations "negate a finding that CMSA is a private employer."⁴⁵ It found that the Charter School Law of Illinois provided for significant public funding and significant oversight over CMSA, and that any autonomy CMSA had over hiring and firing staff "is outweighed by the fact that these employees are required to possess certain credentials, may participate in the Chicago Teacher's Pension Fund, and are subject to government immunity."⁴⁶

The regional director also found that CMSA was a political subdivision under prong two of *Hawkins*, which asks whether the entity is administered by individuals responsible to public officials or the general electorate. Again, the regional director found that: "CMSA is the charter school itself with direct reporting and compliance responsibilities to public officials and is therefore a political subdivision of the state exempt from NLRB jurisdiction."⁴⁷ CMSA's board must submit annual financial audits, a detailed budget, and quarterly statements; over 80 percent of its operating budget comes from CPS; and CPS has the authority to reject CMSA's budget submissions.⁴⁸ Thus, the director found that although CMSA's board is neither appointed by nor subject to removal by public officials, they are accountable to CPS "to such an extent that its governing body is responsible to public officials or the general electorate."⁴⁹

CMSA filed a request for review of the decision to the National Labor Relations Board in October 2010. The request was granted on January 20, 2011.

B. Arguments

The *Hawkins* test provides two possible avenues to making the political subdivision determination. This section summarizes the arguments made by the parties and its amici under each prong.

1. Was CMSA created directly by the state so as to constitute a department or administrative arm of the government?

The Union and its amici argue that CMSA is a statutorily-created charter school under the Illinois Charter Schools Law and is therefore exempt from NLRB jurisdiction as a political subdivision under *Hawkins*.⁵⁰ The Union emphasizes that although state law is not determinative in deciding the political subdivision question, “[s]tate law declarations and interpretations are given careful considerations” and that the NLRB must consider the actual operations and characteristics of the entity.⁵¹ Its prong one argument thus draws heavily on Illinois law.

As the Union points out, CMSA is only able to operate as a public charter school because of its agreement with the Chicago Public School (CPS) system. CMSA was created by the Chicago Public School System pursuant to the Illinois Charter Schools Law which states that “[a] charter school shall be a public school” that falls “within the public school system.”⁵² In fact, the only reason that CMSA is able to operate as a charter school is because it was granted a charter by the Chicago Public School System; charter schools “have no existence outside of the particular state law which authorizes their creation, their continued existence and often their funding.”⁵³ Furthermore, CMSA was created seven years after Illinois passed its charter legislation and exists only for the purpose of operating a charter school.⁵⁴ The Union also points out that both the Illinois Charter Schools Law and the Illinois Educational Labor Relations Act (IELRA) provide that charter schools are public employers that are subject to and required to comply with the IELRA.⁵⁵ Additionally, CMSA is almost entirely funded by CPS.

CMSA and its amici argue that it was not directly created by the state, and that there is an important difference between being directly created by a state and being created within a legislative framework.⁵⁶ The Illinois Charter Schools Law, they explain, “simply establishes a procedure by which private individuals can seek approval to run a charter school . . . Nowhere in the Illinois Charter Schools Law is there a specific directive by the Illinois General Assembly to ‘create’ CMSA, nor any other charter school for that matter.”⁵⁷ Moreover, CMSA is a privately-run company that existed as a corporation before the charter was granted, and it could continue to exist after the charter ends. As the National Alliance for Public Charter Schools explain in their amicus brief, the Regional Director “skipped over the requirement of first finding that CMSA was directly created by the State of Illinois and focused instead on issues of state oversight that should never have been reached.”⁵⁸

2. Is CMSA administered by individuals who are responsible to public officials or to the general electorate?

According to the Union, CMSA is administered by officials who are responsible to the general electorate, and thus is also a political subdivision under the second prong of *Hawkins*.⁵⁹ The Union catalogues examples from both Illinois laws and the charter agreement between CMSA and CPS that make those administering CMSA responsible to public officials or the general electorate. The Illinois Charter Schools Law declares that charter schools are part of the Illinois public school system,⁶⁰ and, as such, are subject to a number of obligations. In addition to being subject to the IELRB, CMSA is subject to the Illinois Open Meetings Act and the Illinois Freedom of Information Act.⁶¹ These declarations of Illinois state law are to be given careful consideration under the *Hawkins* decision, and the natures of these requirements “betoken a state, rather than private, instrumentality.”⁶²

Furthermore, the charter agreement between CPS and CMSA call for the school to adhere to a number of requirements and standards, including funding (which is contingent on maintenance of attendance records), the submission of quarterly budgets and annual financial audits, the inability to make any curriculum changes inconsistent with charter agreement, and the fact that CPS oversees the student discipline code. When considering all of these factors, the Union argues, it is clear that CMSA is responsible to CPS—a group of public officials—via its charter agreement, and it is responsible to the general electorate at large via statutory requirements.

CMSA argues that it is not administered by individuals responsible to public officials or the general electorate. The relevant inquiry, the school maintains, is whether the individuals are appointed by and subject to removal by public officials, which is not true of CMSA's board members.⁶³ In its amicus brief, the NAPCS points out that the decisions of the Board “are focused on who controls the governing board of the employer” and noted that the only instance in which the Board had declined jurisdiction under the second prong was where the state had the opportunity to appoint and remove a board's members—which, again, is not the case for CMSA.⁶⁴

CMSA also argues that the Acting Regional Director erred in relying on the public funds that CMSA receives, and regulatory oversight it must adhere to, as proving that CMSA qualifies as a “political subdivision” under *Hawkins*.⁶⁵ Many entities that receive public funds and are subject to regulatory oversight are not “political subdivisions” exempt from NLRB jurisdiction.

Finally, CMSA stresses that the Regional Director erred in relying on the Illinois Charter School Law's characterization of charter schools as “public.”⁶⁶ Such an overreliance on state law is improper and problematic, because the definition of public schools could change as quickly as local state politics modifies laws. A charter school could continually switch from public to private, and such a ping-pong categorization would be highly problematic for the teachers seeking to unionize. CMSA also points out that the NLRB should not deny employees the protections of the NLRA by broadly interpreting the term “political subdivision,” and it maintains that recent NLRB decisions show a desire to narrow the “political subdivision” exemption.

C. Status of the Case

The NLRB had yet to decide on the case by time this paper was written. But the case has garnered considerable attention from the charter school community and beyond. The NLRB could decide narrowly, limiting its finding to the specific facts of this case and providing little guidance to charter schools outside of Chicago, or more broadly, deciding whether all public charter schools are political subdivisions. The implications of the possible decisions are explored in the next section.

V. PUBLIC SCHOOLS, PRIVATE EMPLOYERS? WHAT THE NLRB DECISION COULD MEAN FOR THE CHARTER SCHOOL MOVEMENT

The Board's decision, whenever it comes down, could have great impact not just on the CMSA community, but for those involved in or influenced by the charter school moment across the nation. This section first examines how the Board's decision could affect other charter schools in other localities with regard to the political subdivision issue. Then, the paper concludes with a consideration of how the NLRB's decision could have impact on the charter school movement that extends beyond labor relations. If charter schools continually describe themselves as “public” schools, how would a finding that they are not political subdivisions affect their “public” perception? What risks do charter schools face by being public for only some purposes,

and how should the charter school community address these risks?

A. *Examining the Possible Impact on Charter Schools*

Of particular interest in the CMSA case will be how the Board reaches its decision. Although a finding that CMSA is a political subdivision under the first or second prong will yield the same result, a prong one result could have an effect across the nation that would afford less discretion for charter schools. This could provide needed clarity by removing the question from debate, but it could impinge upon the autonomy and flexibility that are guiding principles of the charter school movement. A prong two analysis would continue to allow flexibility, but would require such a fact-intensive, school-by-school approach that it could leave the political subdivision question unanswered until litigated. And if the Board finds for the school (and that the charter school is not a political subdivision), it might have little reach than outside that particular case, absent a ruling that all charter schools come under NLRB jurisdiction.

The Regional Director found that CMSA was a political subdivision under both prongs of *Hawkins*—that is, that the school is both an administrative arm of government and a body responsible to public officials or the general electorate. In support of the prong one finding, the CMSA regional decision referred to another Board case, *Hinds County Human Resources Agency*, in which the NLRB found that an agency administering low-income assistance programs was exempt from NLRA coverage.⁶⁷ In *Hinds*, the Board relied principally upon the language of the enabling statute, which demonstrated the legislature's clear intent that the government retained control over the agency.⁶⁸ In a 2006 regional NLRB decision involving a California charter school, *Los Angeles Leadership Academy*, the Regional Director drew heavily on *Hinds* to conclude that the Academy was a political subdivision, noting that it incorporated with the intent to operate as a public school and that the state had the authority to renew or revoke the school's charter.⁶⁹ Both of these cases were distinguished when the New Hampshire Supreme Court found that the nonprofit Pinkerton Academy was not a political subdivision.⁷⁰ Pinkerton Academy was not a public charter school; it initially operated as an independent day and boarding school before later entering into contractual agreements with nearby districts to provide high school education.⁷¹ The New Hampshire Supreme Court explained, "Unlike charter schools in California, where legislation expressly states that the government intends to retain control over them, we conclude that Pinkerton Academy was not created by the State of New Hampshire so as to constitute an administrative arm of the government as that standard has been interpreted by the NLRB and the courts."⁷²

In light of these decisions, a prong one finding by the NLRB will likely place much focus on the state statutes enabling the creation of charter schools. Where these laws emphasize that charters are part of the public education system, as in Illinois and California, charter schools will have a hard time arguing that they are not political subdivisions.⁷³

Alternatively, the NLRB might find that the charter school is a political subdivision only under prong two, which looks at whether the entity is administered by individuals responsible to public officials or the general electorate. A prong two finding arguably requires a more fact-intensive, case-by-case analysis. In *Charter Schools Admin Services*, the NLRB found that a charter school management company was not a political subdivision. The bulk of the issue entailed the *Hawkins* prong two analysis.⁷⁴ But the Board found that there was no indication that the employer's board of directors or its corporate officers had any direct personal accountability to public officials or the general electoral.⁷⁵ The Board's reasons included, among others, that the

governing board members were not appointed by or subject to removal by public officials or the general electorate, the board had no direct reporting requirements to the state, and the board did not have to submit its budget to the State for review found.⁷⁶

If the Board finds that CMSA is not a political subdivision under prong one, it may agree with the CMSA that because CMSA is a private entity, whose board members are not appointed or subject to removal by public officials, it fails the prong two analysis again. The Board might, however, use the myriad of other factors offered by the Union to find that they combine to make CMSA an entity that satisfies prong two. In any case, a prong two finding will likely lead to less clarity for other schools. What the Board deems significant in its calculus to a prong two analysis for one charter school might look different for another.

Finally, the Board may find that because CMSA is not a political subdivision. Such a finding will be helpful to other charter schools, but depending on the Board's reasoning, might also leave confusion as to which factors were most relevant in coming to this finding.

B. Beyond CMSA: Walking the Public/Private Line

Both parties agree that CMSA operates a public charter school. The Union's arguments stress that the school is part of the Illinois public school system. CMSA agrees with this characterization, but it maintains that it is a private employer operating a public school. This is true for others charter schools as well, according to CMSA's amicus, the National Alliance for Public Charter Schools: "Although public, most charter schools are different from traditional public schools where the school district employs the staff. Instead, public charter schools typically employ their teachers and other employees independently through a private entity."⁷⁷

NAPCS goes on to explain that "the fact that charter schools are public schools does not make them political subdivisions of the states in which they operate." As explained *supra* Sections III and IV, the *Hawkins* decision made it clear that federal law governs the political subdivision determination, although state law can be given careful consideration. The NLRB might indeed find that CMSA is a private employer for the purposes of labor law, without that decision changing the fact that CMSA operates a public charter school. Accordingly, one can be part of the public school system without being considered, under the NLRA, a political subdivision.

That might seem perplexing. But while the term "political subdivision" strongly implies a public nature about that entity, a public entity is not necessarily a political subdivision for all times and all purposes. "Political subdivision" is a widely-used term, with different and sometimes contradictory meanings in federal and state law. As explained in a recent report by William Bethke, the term "is often used by legislative drafters in a very technical to carve out a part of the public sphere for forced regulation (or exemption)—and *not* to capture every public entity."⁷⁸ Bethke's research focuses on the many and sometimes contradictory definitions of the term "political subdivision" and its application to charter schools.⁷⁹ As its author explains, "we can easily imagine an entity that is or is not a 'political subdivision,' as expressly defined by some state statute. But that definition alone will not tell us whether the same entity is a 'political subdivision' under an unrelated state statute, a federal statute, or some line of federal or state law."⁸⁰ Thus, charter schools could be found not to be political subdivisions under the NLRB, while being political subdivisions under other laws, all the while calling themselves public schools.⁸¹

Even though an entity can be public without being a "political subdivision" for some purposes, the shifting classifications can contribute to confusion over the public nature of charter schools. The "quasi-public"⁸² nature of charter schools, as some have described it, can be

used by charter school opponents to beef up their claims that charter schools are an attempt to privatize public education. Even among those who support charter schools, some think they are private schools, or are at least puzzled by their status.⁸³ Many charter school organizations, including the authors of this paper and the National Alliance for Public Charter Schools, continually emphasize that charter schools are public schools—and include the word “public” in their names.⁸⁴ The headline of a recent Ohio news article highlights the confusion: “Surprise! Charter Schools Are Public Entities!”⁸⁵

Thus, charter schools often find themselves in a conundrum: they want to be viewed as public, while still enjoying some freedom from rules and regulations that apply to other public schools. Indeed, treating charter schools exactly the same as all other public schools would negate the reason for their existence. But allowing them too many exemptions from laws applicable to other public entities undermines their claim to the public status.

The definition of “public” was not handed down along with the Bill of Rights, and charter schools are helping shape what it means in education. But it is a laborious task, one that, as Bethke notes, requires the “difficulty of slogging through a host of regulatory statutes to determine how charter schools should be treated for one purpose or another.”⁸⁶ The CMSA case is just one example of many debates regarding the extent to which private aspects of charter schools should affect their legal status. As more legal challenges emerge, and as the public continues to be puzzled about charter schools’ public status, it would behoove charter schools to consider whether walking the tightrope between public and private is worth it. Perhaps, as Bethke suggests, charter schools should consistently advocate as public schools, and, through that approach, directly address the areas in which they need different treatment under the law.

The complexities presented by the CMSA case show that there are no easy answers. Whatever conclusion the Board draws as to CMSA’s status, it is important to remember that “political subdivision” and “public” are not synonymous. Differentiating between these two concepts will continue to be a difficult task, given how closely associated the two terms are. While it is important for public officials and charter school leaders to appreciate the distinction, the ultimate goal of providing quality education is not dependent on charter schools being decisively classified. The key is to understand when charter schools fall in one camp or another and the policy implications of that classification.

Endnotes

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¹ Brief for National Alliance for Public Charter Schools as Amicus Curiae in Support of Employer’s Request for Review, Case No. 13-RM-1768.

² See, e.g., Philip Gleason et al., *The Evaluation of Charter School Impacts*, MATHEMATICA POLICY RESEARCH (2010).

³ Joseph Murphy & Catherine D. Shiffman, UNDERSTANDING AND ASSESSING THE CHARTER SCHOOL MOVEMENT 24 (Teachers College Pr, 2002) (identifying a speech Shanker gave in 1988 before the National Press Club).

⁴ Minn. Stat. §124D.10 (2011)

⁵ See National Alliance for Public Charter Schools website, available at <http://www.publiccharters.org/aboutschools>.

⁶ John White, *States Open to Charters Start Fast in ‘Race to Top’: Education Secretary Seeking Autonomy with Real Accountability for School Innovators*, UNITED STATES DEPARTMENT OF EDUCATION (Oct. 14, 2011), <http://www2.ed.gov/news/pressreleases/2009/06/06082009a.html> (“States that do not have public charter laws or put artificial caps on the growth of charter schools will jeopardize their applications under the Race to the Top Fund,” Secretary Duncan said. “To be clear, this administration is not looking to open unregulated and unaccountable schools.”)

We want real autonomy for charters combined with a rigorous authorization process and high performance standards.”).

⁷ Louann Bierlein Palmer, Progressive Policy Institute, “‘Alternative’ Charter School Authorizers,” (2006).

⁸ Martin H. Malin & Charles T. Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL’Y 885, 892-93 (2007).

⁹ Julie F. Mead, *Devilish Details: Exploring Features of Charter Schools that Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 351 (2003). Mead asserts that “...it is beyond argument that [charter schools’] special characteristics redefine public education. It is also beyond argument that state legislatures and charter school authorizers and operators have used these new types of public school to push the boundaries of what has traditionally marked schools as public institutions.” *Id.* at 352.

¹⁰ Rebecca Vevea, *Unions Move in at Chicago Charter Schools, and Resistance is Swift*, N.Y. TIMES, April 7, 2011, available at <http://www.nytimes.com/2011/04/08/us/08cncharter.html?pagewanted=all>.

¹¹ *Measuring Up to the Model: A Ranking of State Charter School Laws*, NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS (Oct. 13, 2011), <http://www.publiccharters.org/publication/?id=117>

¹² Ohio Rev. Code §3314.10 A (3).

¹³ Jay P. Greene, *The Union War on Charter Schools*, WALL ST. J, April 16, 2009, <http://online.wsj.com/article/SB123985052084823887.html>.

¹⁴ Am. Sub. S.B. 5, 129th Gen. Assembly (Ohio 2011).

¹⁵ Paul T. Hill, Lydia Rainey, & Andrew J. Rotherham, *The Future of Charter Schools and Teachers Unions: Results of a Symposium*, NATIONAL CHARTER SCHOOL RESEARCH PROJECT, Oct. 2006, at 1, available at http://www.ncsrp.org/downloads/charter_unions.pdf.

¹⁶ Courtney L. Malloy and Priscilla Wohlstetter, *Working Conditions in Charter Schools: What’s the Appeal for Teachers?*, 35 EDUC. AND URBAN SOC’Y, 219 (2003).

¹⁷ National Labor Relations Act, 29 U.S.C. § 157.

¹⁸ National Labor Relations Act, 29 U.S.C. §§ 151-169, §152 (2) (1935).

¹⁹ *Id.* at § 152 (2).

²⁰ M. Edward Daylor, *The Political Subdivision Exemption of the National Labor Relations Act*, 1982 DUKE L. J. 733, 734 (1982).

²¹ For a good discussion of these differences, see Louann Bierlein Palmer, Progressive Policy Institute, “‘Alternative’ Charter School Authorizers,” (2006).

²² “Despite the far-reaching ramifications of the determination whether an entity is a political subdivision, Congress failed to define the term ‘political subdivision’ in the NLRA.” Daylor, *supra* note 20, at 733.

²³ *N.L.R.B. v. Natural Gas Util. Dist. of Hawkins County, Tenn.*, 402 U.S. 600 (1971).

²⁴ *Id.* at 604.

²⁵ *N.L.R.B. v. Natural Gas Util. Dist. of Hawkins County, Tenn.*, 427 F.2d 312, 315 (6th Cir. 1970) *aff’d but criticized sub nom. N.L.R.B. v. Natural Gas Util. Dist. of Hawkins County, Tenn.*, 402 U.S. 600, 91 S. Ct. 1746, 29 L. Ed. 2d 206 (1971)

²⁶ *Hawkins*, 402 U.S. at 601-02.

²⁷ *Id.* at 606-09.

²⁸ *Id.* at 602 (citing 167 N.L.R.B. at 691).

²⁹ *Id.* at 600 (citing *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60 (1965)).

³⁰ *Id.* at 600.

³¹ *Id.* at 608.

³² *Id.* at 609 (“and this together with the other factors mentioned satisfies us that its relationship to the State is such that respondent is a “political subdivision” with the meaning of s 2(2) of the Act.”).

³³ Rebecca Vevea, *Unions Move in at Chicago Charter Schools, and Resistance is Swift*, CHICAGO NEWS COOPERATIVE, April 7, 2011, available at <http://www.nytimes.com/2011/04/08/us/08cncharter.html?pagewanted=all>.

³⁴ Chicago Mathematics and Science Academy and Chicago Alliance of Charter Teachers and Staff, Case 13-RM-1768, page 2 (National Labor Relations Board January 10, 2011).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 3.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Chicago Mathematics and Science Academy and Chicago Alliance of Charter Teachers and Staff, Case 13-RM-1768, page 3 (National Labor Relations Board Sept. 20, 2010).

⁴¹ *Id.* at 5.

⁴² *Id.* at 6.

⁴³ *Id.* at 8.

⁴⁴ *Hawkins*, 402 U.S. at 604.

⁴⁵ Chicago Mathematics and Science Academy and Chicago Alliance of Charter Teachers and Staff, Case 13-RM-1768, page 11 (National Labor Relations Board Sept. 20, 2010).

⁴⁶ *Id.*

⁴⁷ Chicago Mathematics and Science Academy and Chicago Alliance of Charter Teachers and Staff, Case 13-RM-1768, page 13 (National Labor Relations Board Sept. 20, 2010).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Brief for Chicago Alliance of Charter Teachers and Staff, IFT, AFT, AFL-CIO at 18, Case No. 13-RM-1768 (2011) [hereinafter *Union Brief*].

⁵¹ *Id.* at 18 (citing *Hawkins*, 402 U.S. at 602).

⁵² Brief for American Federation of Labor and Congress of Industrial Organizations and the American Federation of Teachers, AFL-CIO, as Amici Curiae Supporting Union-Respondents, Chicago Mathematics and Science Academy Charter School, Inc. v. Chicago Alliance of Charter Teachers & Staff, IFT, AFT, AFL-CIO, at 1, 13-RM-1768 (2011).

⁵³ Brief for the Nevada Local Government Employee-Management Relations Board as Amicus Curiae Supporting Union-Respondents, Chicago Mathematics and Science Academy Charter School, Inc. v. Chicago Alliance of Charter Teachers & Staff, IFT, AFT, AFL-CIO, at 2, 13-RM-1768 (2011).

⁵⁴ *Union Brief*, *supra* note 50, at 22.

⁵⁵ *Id.*

⁵⁶ Chicago Mathematics & Science Academy Charter School Brief at 25, Case No. 13-RM-1768 (2011) [hereinafter *Employer Brief*]; see also Brief for National Alliance for Public Charter Schools, as Amici Curiae Supporting Employer-Petitioners, Chicago Mathematics & Science Academy Charter School at 8, Case No. 13-RM-1768 (2011) [hereinafter *NAPCS Brief*].

⁵⁷ *Employer Brief*, *supra* note 56, at 8.

⁵⁸ *NAPCS Brief*, *supra* note 56, at 8.

⁵⁹ *Union Brief*, *supra* note 50, at 23.

⁶⁰ *Id.* at 28.

⁶¹ *Id.*

⁶² Brief Amicus Curiae of the National Edu. Ass'n, the California Teachers Ass'n, the Illinois Edu. Ass'n, and the New Jersey Edu. Ass'n at 13, Case No. 13-RM-1768 (2011) (quoting the *Hawkins* opinion, explaining how an "operations and circumstances" inquiry must assess the enabling legislation).

⁶³ Charter School Administrative Services, 353 NLRB 35 (2008) (A recent NLRB decision did state that the appointment and removal process was the relevant inquiry, but that decision was by a two member board and is not binding.)

⁶⁴ *NAPCS Brief*, *supra* note 56, at 15.

⁶⁵ *Employer Brief*, *supra* note 56, at 13.

⁶⁶ *Id.* at 2.

⁶⁷ *Hinds County Human Resource Agency & International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers*, AFL-CIO, 331 NLRB 1404 (2000).

⁶⁸ *Id.*

⁶⁹ *Los Angeles Leadership Academy*, 31-RM-1281 (National Labor Relations Board 2006).

⁷⁰ *Appeal of Pinkerton Academy*, 155 N.H. 1 (2007).

⁷¹ *Id.*

⁷² *Id.* at 11.

⁷³ William P. Bethke, *Are Charter Schools "Political Subdivisions?"*, at 112 (National Alliance of Public Charter Schools, Working Paper, Sept. 14, 2011) ("Assuming these cases do not undergo some sudden transformation, it is difficult to imagine a Colorado, Michigan, or Minnesota charter school not being classified as a 'political subdivision' for NLRA or FLSA purposes.")

⁷⁴ *Charter Schools Admin Services*, 353 NLRB 35 (2008).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *NAPCS Brief*, *supra* note 56, at 2-3.

⁷⁸ Bethke, *supra* note 73, at 7.

⁷⁹ *Id.* at 7. Among Bethke's findings were that Arizona law had 24 different definitions of "political subdivision," with 18 of those being substantively different from one another; Minnesota had 25 definitions, with 25 of them distinguishable. He found circular definitions (e.g., " 'political subdivision' means... 'and all other political subdivisions.'").

⁸⁰ *Id.* at 6.

⁸¹ Indeed, Bethke found that charter schools clearly fall within some definitions of political subdivision, they are

clearly outside other definitions, and in numerous definitions, their political subdivision status is unclear. *Id.*

⁸² Sandra Vergari, *Introduction* in *THE CHARTER SCHOOL LANDSCAPE*, 1, 2 (Sandra Vergari, ed., 2002)

⁸³ StudentsFirst, the nonprofit organization started by former Washington, D.C., schools chancellor Michelle Rhee, recently addressed the confusion on its website: "Charter schools are public schools that operate with more flexibility than traditional district schools. Yet, many people mistakenly refer to them as 'private,' or say they simply don't understand what category they fall into," *available at* <http://www.studentsfirst.org/blog/entry/understanding-public-charter-schools#> (last visited Oct. 14, 2011).

⁸⁴ The first question on the most frequently asked questions on the NAPCS site is, "What are Public Charter Schools?" with the response being: "Charter schools are tuition-free public schools that are free to be more innovative and are held accountable for improved student achievement," *available at* <http://www.publiccharters.org/About-Charter-Schools/Frequently-Asked-Questions.aspx>.

⁸⁵ The story concerned a recent finding by a county judge in a case where charter school boards brought a filed suit against a management company. StateImpact Ohio, a collaborative among National Public Radio and three local public radio stations, reported the story on its website on October 13, 2011. *available at* <http://stateimpact.npr.org/ohio/2011/10/13/surprise-charter-schools-are-public-entities/> (last visited Oct. 14, 2011).

⁸⁷ Bethke, *supra* note 73, at 1486