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A Ground Shift for Union Organizing in Charter Schools: The NLRB Decision in *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc.*

INTRODUCTION

Initially conceived as a conservative, free market approach to improve educational outcomes,[1] publically funded charter schools have gained broad, bipartisan support over their more than twenty years of existence.[2] As widespread support has grown, so has the proliferation of charters. In 1991 the first charter school law in the country was passed in Minnesota. There are now laws allowing for charter schools in 42 states.[3] Since the year 2000, charter schools in the United States have boomed from 1,651 to 5,714 schools that serve nearly 2 million students.[4]

Despite the growing support for charter schools, one interest group has been outspoken in their opposition: the teachers unions.[5] Charter schools are privately incorporated entities and the vast majority of charter schools operate without unionized teachers.[6] Charter school supporters claim that a lack of unionization provides the necessary ecosystem for innovation, as opposed to

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[1] Martin H. Malin and Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 No. 3 Harvard Journal of Law and Public Policy 886 (2007), http://www.law.harvard.edu/students/orgs/jlpp/Vol30_No3_Malinonline.pdf.

[2] Malin and Kerchner, *supra* at 888.

[3] *Laws and Legislation*, Center for Education Reform, http://www.edreform.com/issues/choice-charter-schools/laws-legislation/.

[4] Statistics from the Center for Education Reform, methodology is available at http://www.edreform.com/wp-content/uploads/2012/03/National-Charter-School-Enrollment-Statistics-2011-12.pdf.

[5] Malin and Kerchner, *supra* at 886, 902.

[6] Mitch Price, *Are Charter School Unions Worth the Bargain?*, The Center for Reinventing Public Education (2011), http://www.crpe.org/sites/default/files/CRPE_pub_Unions_Nov11-2_0.pdf.

the restraints and standardization that are inherent to collective bargaining agreements.[7] Union supporters argue that non-unionized charter schools are an attempt to bust unions, privatize education, and hire cheaper labor.[8] What is certain is that as non-unionized schools proliferate, there will be a correlating decrease in the number of teachers paying union dues. As the unions see lower revenues, they will have a growing interest to protect against these losses.

An obvious solution to these losses, which is being pursued, is to unionize the charter school teachers. This strategy was predicted by a union official, who in 1994 stated, "We'll fight charter schools tooth and nail; then after we lose, we'll figure out that we can organize the teachers who teach in them."[9] As of the 2009-10 school year, 12% of charter schools were operating under a collective bargaining agreement.[10]

Many of these charter school organizing campaigns are being conducted in strategically selected states like California, New Jersey, and Illinois, where unions plan to benefit from the application of labor-friendly state laws. [11] As these campaigns have gained momentum, however,

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[7] *Public Charter Schools and Unions*, The National Alliance of Public Charter Schools, http://www.publiccharters.org/editor/files/NAPCS%20Documents/PublicCharterSchoolsandTeachersUnions.pdf.

[8] Gillian Russom, *The Case Against Charter Schools*, International Socialist Review 71 (May 2010), http://isreview.org/issue/71/case-against-charter-schools; Gary Anderson, *Teachers Unions No More: Are we Prepared for the Union Busters?* (December 19, 2010) http://www.huffingtonpost.com/gary-anderson/teachers-union-busters-education-reform_b_797984.html.

[9] Malin and Kerchner, *supra* at 902.

[10] *Public Charter Schools and Unions*, The National Alliance of Public Charter Schools, http://www.publiccharters.org/editor/files/NAPCS%20Documents/PublicCharterSchoolsandTeachersUnions.pdf.

[11] Tim Walker, *NEA Steps Up Organizing Efforts in Non-union Charter Schools*. Available at http://neatoday.org/2013/07/08/nea-steps-up-organizing-efforts-in-non-union-charter-schools/.

a question has arisen that could significantly change the strategy for both sides: Do federal or state labor laws apply to charter schools, and which governmental agencies have jurisdiction over labor-related activities?[12]

Section I of this paper will examine the vision of charter schools as independent, innovative schools. Section II will review relevant federal labor law, the development of the test for exempting states and their subdivisions from these laws, and the significance to charter schools. Section III will analyze the political subdivision test as applied to charter schools, including the recent National Labor Relations Board (NLRB) decision that held a charter school is *not* a political subdivision exempt from federal labor law. Section IV will explore the odd effect this decision has on labor issues in charters, and will also argue that Congress should empower the states by creating an exemption for charter schools from federal labor laws.

I. CHARTER SCHOOLS AS INCUBATORS OF INNOVATION

Charter schools are tuition-free, publically funded school options open to the public and often referred to as a part of the public school system.[13] However, they are privately incorporated and they have privately selected governing boards operating independently from the public school district or school board.[14] Typically, charter schools apply to become a school through a

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[12] Preston C. Green III, Bruce D. Baker, Joseph O. Oluwole, *Having it Both Ways: How Charter Schools Try To Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 No. 303 Emory Law Journal 304, 313-318 (2014), http://www.law.emory.edu/fileadmin/journals/elj/63/63.2/GreenBakerOluwole.pdf.

[13] *What is a Charter School?*, The Center for Education Reform, http://www.edreform.com/2012/03/just-the-faqs-charter-schools/.

[14] *Id*.

government designated authorizer,[15] and during the application process the charter's board will explain how they will operate autonomously. If the school's application is approved, it receives a "charter" and is appropriated public dollars for each student to fund its operations.[16]

Charter schools were referred to as "incubators of innovation" in a recent Presidential Proclamation issued by President Obama.[17] The waivers received by charter schools grant freedom from mandates to which traditional public schools must adhere, like prescribed curriculums, class-size requirements, length of school days and years, as well as the employment rules like teacher licensing, tenure, and seniority-based pay scales and layoffs.[18] In addition to being given the freedom to pursue diverse approaches, charter schools are also subject to an increased level of accountability because parents may choose to enroll, or disenroll, their child in the school.[19] This makes charters a "free market" operator of a government funded service.

In contrast, teachers unions have used collective bargaining and political advocacy to push for standardization of many aspects of traditional public school operations, like the length of the school day and year, class sizes, specific curriculums, and seniority-based compensation

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[15] *Id*.

[16] *Id*.

[17] Press Release, The White House Office of the Press Secretary, *Presidential Proclamation – National Charter Schools Week 2012* http://www.whitehouse.gov/the-press-office/2012/05/07/presidential-proclamation-national-charter-schools-week-2012.

[18] Malin and Kerchner, *supra* at 891; *What are public charter schools?*, The National Alliance for Public Charter Schools, http://www.publiccharters.org/get-the-facts/public-charter-schools/.

[19] *What is a Charter School?, supra.*

and procedures for layoffs.[20] These one-size-fits-all policies conflict with the autonomy at the core of the vision for charter schools.[21]

In addition to school operations, charter school teachers are given more flexibility and decision-making authority, allowing them to develop creative approaches to teaching.[22] However, in exchange for this autonomy they sacrifice the heightened employment protections, gained through union advocacy, typical for teachers in traditional schools.[23] The union push for standardization and seniority-based decision making is, again, at odds with the autonomy and accountability envisioned for charters, which has created a tension between the two movements.

II. POLITICAL SUBDIVISIONS EXEMPT FROM THE NATIONAL LABOR RELATIONS ACT

Union organizing, elections, collective bargaining and other labor issues between employers and employees in the private sector in the United States are generally governed by the federal National Labor Relations Act (NLRA),[24] and disputes that arise under the NLRA are within the jurisdiction of the NLRB.[25] However, when the NLRA was passed, Congress wanted to avoid questions of federal overreach by creating an exemption from the law for "political

[20] *Id*. at 897-902.

[21] Malin and Kerchner, *supra* at 892.

[22] Malin and Kerchner, *supra* at 892.

[23] *Id*.

[24] 29 U.S.C.A. § 152 (West).

[25] 29 U.S.C.A. § 153 (West).

subdivisions" of the states.[26] This is understood to be an exemption for state subdivisions when acting as public employers.[27] This allows each state to regulate its own employees.[28]

A. THE POLITICAL SUBDIVISION EXEMPTION

Congress did not provide a clear definition of what entities qualify as political subdivisions, leaving it to the NLRB and courts to refine.[29] In most cases, applicability is straightforward,[30] when the employing entity is an obvious department or branch of the state government.[31] However, a gray area is created when private entities enter into contracts with state governments to provide services typically provided by the state itself.[32] At what point is a private contractor so similar to the state that it becomes a political subdivision?

In early decisions, the courts allowed the states to define what they considered to be political subdivisions of their state.[33] For example, if a state called any school a "public school" of the state, then it was considered to be a public employer. However, this policy was short-lived

[26] 29 U.S.C.A. § 152(2) (West).

[27] 78 Cong.Rec. 10351 et seq.; *Hearings on Labor Disputes Act before the House Committee on Labor*, 74th Cong., 1st Sess., 179; 93 Cong.Rec. 6441 (Sen. Taft).

[28] *Id*.

[29] M. Edward Taylor, *The Political Subdivision Exemption and the National Labor Relations Board's Discretionary Authority*, 733 Duke Law Journal 734 (1982), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2818&context=dlj.

[30] *Id*. at 733.

[31] *Id*. at 739.

[32] *Id*. at 734.

[33] Taylor, *supra* at 735.

and now courts find a state's labeling of an entity to be only persuasive, not controlling.[34]

B. STATE PUBLIC SECTOR LABOR LAWS

Since each state can create its own legal framework for state employee labor issues, a patchwork of labor laws has emerged. In twenty-seven states and the District of Columbia there are comprehensive labor laws, similar to the NLRA, for state workers.[35]

The remaining states have either no public sector labor laws,[36] or have enacted laws that cover only certain groups of state employees.[37] The laws are not always favorable to unions, for example some states have laws that expressly prohibit collective bargaining for state employees.[38] In states that have no public sector labor laws, or that have laws that prohibit collective bargaining, the political subdivision test becomes a crucial determination.

If an employer is a political subdivision under the test, then state law defines the rights of workers, which can be drastically different than the NLRA laws that would apply if that

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[34] *Id*. at note 19.

[35] Malin and Kerchner, *supra* note 130. These states include: Alaska, California, Conneticut, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, and Washington.

[36] *Public Sector Collective Bargaining Laws*, The American Federation of State, County, and Municipal Employees, http://www.afscme.org/news/publications/for-leaders/public-sector-collective-bargaining-laws. These states include: Alabama, Arkansas, Arizona, Colorado, Louisiana, Mississippi, South Carolina, Utah, and West Virginia.

[37] *Id*. States & types of workers are: Georgia (firefighters), Idaho (firefighters, teachers), Indiana (teachers), Kentucky (firefighters, police), Maryland (homecare workers, teachers, and other state personnel), Missouri, North Dakota (teachers), Oklahoma (firefighters, police, teachers), Tennessee (teachers), Texas (firefighters, police), Wisconsin (firefighters, police), and Wyoming (firefighters).

[38] Malin and Kerchner, supra note 133. These states include: North Carolina and Virginia.

employer is deemed to not be a political subdivision.

C. THE NLRB POLITICAL SUBDIVISION TEST

In 1971 the NLRB decided a case in which there was a dispute as to whether or not a utility district in Tennessee was a political subdivision exempt from the NLRA.[39] The Plumbers and Steamfitters Local 102 successfully organized the employees of the Natural Gas Utility District of Hawkins County (utility district) pursuant to the NLRA.[40] After the union won the election it attempted to bargain, but the employer refused to bargain, claiming exemption from the NLRA as a political subdivision of Tennessee.[41] The union filed a complaint with the NLRB seeking to enforce the results of the election and force the employer to the bargaining table.[42]

The NLRB applied a two-prong test to determine if the utility district was a political subdivision. This test is satisfied if the employer is either 1) created directly by the state, so as to constitute governmental departments or administrative arms, or 2) administered by individuals who are responsible to public officials or to the general electorate. If so, then the employer is an exempt political subdivision. [43] The NLRB applied this test and held that the utility district was a private entity, not a political subdivision of the state because the entity was created by local residents, not the state; and the governing board was appointed by a local judge, not through

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[39] *N.L.R.B. v. Natural Gas Util. Dist. of Hawkins Cnty., Tenn.*, 402 U.S. 600, 91 S. Ct. 1746, 29 L. Ed. 2d 206 (1971).

[40] *N.L.R.B. v. Natural Gas Util. Dist. of Hawkins Cnty., Tenn, supra* at 1748.

[41] *Id.*

[42] *Id.* at 1747.

[43] *Id.*

elections.[44] Therefore, the NLRB ruled that the union election was properly conducted pursuant to the NLRA and the employer was legally required to collectively bargain.[45]

Unsatisfied with this decision, the Utility District continued its refusal to bargain and the NLRB sought enforcement of its order in federal court and the case eventually went before the U.S. Supreme Court.[46] What is most notable about this case is that the Supreme Court upheld the two-prong test articulated by the NLRB, even though the court overturned the NLRB's decision because it held that the board had misapplied its own test to the facts of the case.[47]

The Supreme Court held that the utility district was administered by individuals responsible to public officials because the governing board of the entity was appointed by an elected judge, and was additionally subject to removal proceedings by the governor.[48] This fact satisfied the second prong of the test because it only requires the board to be *responsible to* (appointed by or removed by) elected officials, not requiring the board to be elected officials themselves.[49] Therefore, the utility district was a political subdivision exempt from the NLRA and subject to state labor law.[50]

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[44] *Id*. at 1749-50.

[45] *Id*.

[46] *N.L.R.B. v. Natural Gas Util. Dist. of Hawkins Cnty., Tenn., supra* at 1748.

[47] *Id*. at 1750.

[48] *N.L.R.B. v. Natural Gas Util. Dist. of Hawkins Cnty., Tenn., supra* at 1750.

[49] *Id.*

[50] *Id.*

D. THE NLRB CONSIDERS OTHER FACTORS

In the years after the *Hawkins* case, NLRB decisions have added more case-specific factors, creating a less reliable method for predicting the outcomes of these cases. When determining if employers satisfy the first prong the Board has considered: 1) any special state statutes that enabled the creation of the employing entity;[51] 2) whether the employees of the employing entity participate in the state's retirement system;[52] 3) the amount of public funding received by the employing entity;[53] or 4) the extent of government control over the employing entity's budget or operations.[54]

When determining if employers satisfy the second prong the NLRB has considered: 1) the percentage of the members of the employer's board of directors that are elected officials or

[51] *In Re Hinds Cnty. Human Res. Agency*, 331 NLRB 1404 (2000) (A Mississippi state statute gave county commissioners the authority to form entities to deliver services to those in poverty. Because that statute was needed to form the entity the board considered it to be created by the state, and therefore exempt as a political subdivision); *Research Foundation of the City Univ. of NY*, 337 N.L.R.B. 965, 968 (2002) (A private corporation that had a contract with a public university to manage all of its grants to programs within the university system was considered to not be a political subdivision. One part of the NLRB consideration was if any special statutes were needed for its creation, and there were not any).

[52] *In Re Hinds Cnty. Human Res. Agency* at 1405 (The court found that the employees participating in the state pension system was evidence that the entity was an administrative arm of the state).

[53] *Jervis Public Library Ass'n, Inc.*, 262 N.L.R.B. 1386, 1387 (1982) (A library incorporated privately in 1894 was found to be a political subdivision due, in part, to the fact that almost its entire budget was public funds).

[54] *Id.* (The board also found it compelling that the library's budget was subject to review by the local city government).

appointed by elected officials;[55] 2) whether the relationship between the employer's board and government agencies is contractual, or if it is direct accountability;[56] and 3) the extent of regulation and oversight to which an employer is subject from the state.[57]

III. CHARTER SCHOOLS AND THE NLRB POLITICAL SUBDIVISION TEST

In 2006, the National Education Association (union) filed a petition to represent the employees of Los Angeles Leadership Academy (LALA), a charter school, pursuant to state law.[58] LALA objected, contending that it is a private entity subject the NLRA.[59]

The Regional Director (RD) examined an expansive number of factors[60] and decided that because the school is regulated by the state Department of Education, state law classified the school as a "public school," and a majority of its funds were public monies that it was an

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[55] *University of Vermont*, 297 N.L.R.B. at 291 (1989) (Twelve of a university's board members out of twenty one were appointed by elected officials. Since policy was generated by a board majority, and since a majority of the board members were responsible to elected officials in this case, it satisfied the second prong); *Truman Medical Center, Inc. v. N.L.R.B.*, 641 F.2d 570, 573 (1981) (Thirty one of a hospital's board members out of forty nine were not appointed or subject to removal by public officials, and since a majority of the board members were not responsible to public officials; it did not satisfy the second prong).

[56] *Truman Medical Center, Inc.* at 573 (A privately incorporated hospital was formed to take the place of a public hospital. Even though the hospital had extensive contracts with agencies of the state, there was no statute requiring accountability to these agencies. Contracts entered into voluntarily by both parties, the state agencies and the private hospital, did not amount to a level of accountability that made the hospital a political subdivision).

[57] *Shelby County Health Care Corp.*, 343 N.L.R.B. No. 48 (2004) (A privately incorporated hospital was formed to take the place of a public hospital. The NLRB found that it was a political subdivision due to extensive regulation and oversight by the state).

[58] *Los Angeles Leadership Academy*, Case No. 31-RM-1281 at 1.

[59] *Id*.

[60] *Los Angeles Leadership Academy, supra* at 3-15.

administrative arm of the state, even though it was incorporated as a private entity by private individuals.[61] The RD found that LALA also satisfied the second prong of the test, though both parties agreed that the school's board of directors were selected privately, because the board had to report on accountability metrics to the state, and had to receive approval of its budget as a condition of maintaining its charter.[62]

The LALA decision was never appealed to the NLRB. However, the Board has ruled on other cases related to charters, including a case in which the Board determined that a charter management company, hired by the charter as a contractor, was not a political subdivision.[63] It was not until recently that the NLRB decided if a charter school is a political subdivision.

A. THE NLRB APPLIES THE TEST TO A CHARTER SCHOOL[64]

In 2003 the Chicago Mathematics and Science Academy (CMSA) was founded by private individuals as a non-profit and was granted a charter by Chicago Public Schools.[65] In 2010 the Chicago Alliance of Charter Teachers and Staff (union) filed a petition pursuant to state

[61] *Id.* at 4-12.

[62] *Id.* at 12-15.

[63] *Charter Sch. Admin. Servs., Inc. & Michigan Educ. Ass'n/nea, Petitioner*, 353 NLRB 394 (2008).

[64] The case discussed in this section, *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc.*, was decided in December of 2012 and therefore may be vacated pursuant to the U.S. Supreme Court decision in *Noel Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013) cert. granted, 133 S. Ct. 2861, 186 L. Ed. 2d 908 (U.S. 2013).

[65] *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc.*, 359 NLRB No. 41 (Dec. 14, 2012).

law to represent the teachers at CMSA.[66] The school responded by petitioning the NLRB to assert jurisdiction, claiming that it is a private entity not subject to state labor law.[67]

In an analysis similar to the LALA case, the RD determined that CMSA satisfied the first prong of the political subdivision test.[68] Even though CMSA was incorporated privately, the RD determined that the school was defined by law as a public school, subject to expansive rules and regulations by agencies of the state, and it was responsible to an elected chartering authority.[69]

In analyzing the second prong, the RD conceded that CMSA's board was not appointed by or subject to removal by public officials or the general electorate.[70] However, the RD considered other factors like budget oversight, reporting requirements, and general accountability of the school to its elected charter authorizer to determine that the school satisfied prong two.[71]

On appeal the NLRB rejected the determinations, for both prongs, made by the RD and reversed the decision.[72] The NLRB analysis found that CMSA did not satisfy the first prong of the test because, simply, it was a private entity created by private individuals, not the state.[73] The state's labeling of the school as part of the public system, its reliance on public funds, and the

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[66] *Id*.

[67] *Id*.

[68] *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc., supra* at 1.

[69] *Id.* at 4-5.

[70] *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc., supra* at 6-9.

[71] *Id*.

[72] *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc., supra* at 6-12.

[73] *Id*. at 6-7.

other factors analyzed by the RD were only persuasive, and not persuasive enough in this case.[74] The decision noted that the NLRB regularly asserts jurisdiction over privately incorporated entities that have similar arrangements or contracts with states to provide public services.[75]

The NLRB determined that CMSA did not satisfy the second prong because it was administered by a privately selected board.[76] The NLRB rejected the RD's analysis, emphasizing that the test simply looks at the *process* for appointment and removal of board members, and whether or not it is done by elected officials or the electorate.[77] It does not examine reporting requirements, oversight, or other factors.[78] Drawing a clear line, the NLRB stated that:

> "Where the appointment and removal of a majority of an entity's governing board members is controlled by private individuals – as opposed to public officials – the entity will be subject to the board's jurisdiction."[79]

Having failed to satisfy either prong of the test, the Board asserted jurisdiction of the charter school as a private entity.[80] It is noted in the decision that it only applies to the facts in

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[74] *Id*. at 7.

[75] *Id*.

[76] *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc., supra* at 7-10.

[77] *Id*. at 9.

[78] *Id*.

[79] *Id*.

[80] *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc., supra* at 11-12.

that particular case, and that there could be different outcomes for charters from different states.[81] However, the analysis in this decision has already been followed in other states. [82]

B. THE DISSENT

In his dissent, NLRB member Hayes concurred with the majority decision of his colleagues that CMSA did not satisfy either prong of the test, but he argued that the board should exercise its discretion, expressly granted in law, to decline jurisdiction.[83] This argument is based on two major principles, 1) the "state-regulated nature" of charter schools and 2) the "local in nature" function of providing a free, public education, since both rationales had been invoked in past NLRB decisions to decline jurisdiction.[84]

Hayes first argued that the charter school is highly regulated by and entangled with the state, noting that this reasoning has been cited to decline jurisdiction of employers in the horse and dog racing industries.[85] Hayes noted the long list of the ways in which the state and the school are related,[86] including the state's intent to create charters as a part of its public school

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[81] *Id*. at 1.

[82] *Buffalo United Charter Sch. v. New York State Pub. Employment Relations Bd.*, 107 A.D.3d 1437, 965 N.Y.S.2d 905 (2013) (Relying on the CMSA decision, a Pennsylvania administrative law judge determined the Pennsylvania Labor Relations Board lacked jurisdiction of a Pennsylvania charter school. 45 PPER ¶ 8; A state court in New York reversed a ruling by the New York Public Employee Relations Board regarding a collective bargaining dispute at a charter school because, based on the ruling in CMSA, the jurisdiction is properly with the NLRB).

[83] *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc., supra* at 12.

[84] *Id*.

[85] *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc., supra* at 12.

[86] *Id* at 13.

system, an express law that labeled charter school employees as public employees subject to state labor laws, and a requirement that the schools be free and open to the public.[87]

Hayes cited the laws to which the school was subject, laws which normally only applied to public entities, including open meeting and freedom of information laws, financial, tax, and payroll audits, tort immunity laws, approval from a public body to hire subcontractors for the school, and a legal requirement that the employees participate in the state-run retirement system.[88] In a previous decision, the NLRB declined jurisdiction over Temple University, which Hayes noted was a privately incorporated and operated entity, on the basis of its elaborate regulatory relationship and entanglement with the state of Pennsylvania.[89]

The second principle advanced by Hayes is that free, public education has historically been local in nature.[90] Hayes pointed out two cases in which states had contracted with private schools to provide special education services and, even though the schools were private entities, the board declined jurisdiction because they operated as "adjuncts" of the state's public school system.[91]

IV. THE IMPACT OF CMSA ON PUBLIC POLICY

Though the full impact of this NLRB decision is yet to be seen, the potential effects of this decision are profound. Fundamentally, school teachers in traditional public schools will have

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[87] *Id*.

[88] *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc., supra* at 13.

[89] *Id*.

[90] *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc., supra* at 14.

[91] *Id*.

state-based labor laws, while teachers in charter schools will be covered by the NLRA. Having two sets of employees that do similar work being subject to two different sets of labor laws may not be unusual. For example, road construction workers for a private company with state contracts could be working side-by-side with construction workers for the state's department of transportation. Each worker, in this example, would be subject to different laws.

What creates the peculiarity with the CMSA decision, however, is that one of the main purposes of creating charter schools was to provide freedom from the standardization created, in part, by unionization and restrictive collective bargaining agreements.[92] This effect becomes particularly odd in those states that have weak or no labor laws for public school teachers. In those states, charter teachers now receive greater protections and more ability to organize, under the NLRA, than their traditional public school counterparts do under state law.

A. COLLECTIVE BARGAINING FOR CHARTER SCHOOL TEACHERS

In states with state labor laws designed to be similar to the NLRA, the NLRB decision in CMSA will have less of an impact because charter and traditional teachers will follow similar laws. It is in states that have no labor laws for teachers, or even more in states that prohibit collective bargaining for teachers, that the CMSA decision will have an enormous reach into the policy making functions of local governments.

For example, a school board in Douglas County, Colorado recently bucked tradition by letting a collective bargaining agreement with the teachers union expire.[93] Colorado is a state that does not have well-articulated labor laws for teachers. Case law provides a way for school boards

[92] Malin and Kerchner, *supra* at 887.

[93] Nancy Mitchell, *DougCo Contract Talks Fall Short*, Ed News Colorado (June 29, 2012). http://www.ednewscolorado.org/news/education-news/dougco-contract-talks-fall-short.

to voluntarily enter into agreements with unions, but they are not required to do so.[94] Once the board let the contract expire, the union had no legally binding way to force the district back to the bargaining table.[95] The district was able to move ahead and implement their own proposals without having to negotiate anything further with the union.[96]

In that very same school district, due to the decision in the CMSA case, charter school teachers could organize, collectively bargain, and have the full weight of the federal NLRA and binding rulings of the NLRB backing them up to force their employer to bargain. In an odd shift for Colorado and similar states, teachers in charter schools, which were envisioned to be independent and autonomous from traditional forces in education like teachers unions, now have more power to organize and collectively bargain than traditional public school teachers.

B. THE RIGHT TO STRIKE FOR CHARTER SCHOOL TEACHERS

Currently, there are only 11 states that allow strikes by public school teachers.[97] However, the right to strike is expressly granted to employees covered by the NLRA and will now include charter school teachers in all 50 states.

While strikes are considered to be legitimate economic weapons in the private sector that can hurt an employer's pocketbook and push them to the bargaining table, public sector strikes

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[94] *Littleton Educ. Ass'n. v. Arapahoe County Sch. Dist.*, 553 P.2d 793 (Colo. 1976).

[95] *Id*.

[96] Nancy Mitchell, *DougCo Moves Ahead Without Contract*, Ed News Colorado (July 3, 2012). http://www.ednewscolorado.org/news/dougco-moves-ahead-without-contract.

[97] Heather Kerrigan, *Why Public-Sector Strikes Are So Rare*, Governing (October 10, 2012). http://www.governing.com/topics/public-workforce/col-why-public-sector-strikes-are-rare.html.

remain controversial.[98] Customers, during a private sector strike, conceivably have other options for receiving their goods and services, so it is purely an economic pressure on the employer.[99]

In the public sector, on the other hand, strikes create overwhelming societal pressure because when public services, which are usually set up as a monopoly, shut down it leaves constituents with no other alternatives for receiving these services.[100] In addition, public services are usually necessary services for maintaining civil society.[101] This type of strike can create an inordinate amount of political pressure on an employer, who often must face the voters in an election, to the point that some states view it as an unfair tactic and have prohibited public sector strikes.[102]

This inordinate pressure was on display recently in Chicago when thousands of students were left to roam the streets unsupervised, as parents went to work and the schools were closed during a teacher strike.[103] In any city such circumstances can cause chaos, but particularly in a city with an abnormally high rate of violent crimes involving youth.[104] This can create an

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[98] Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. Mich. J.L. Reform 313, 317-18 (1993).

[99] *Id*.

[100] Malin, *supra* at 335-36.

[101] *Id*.

[102] *Id*.

[103] Kari Huus, *Chicago Teachers Strike Affects 350,000 Students*, NBC News (September 10, 2012), http://usnews.nbcnews.com/_news/2012/09/10/13778800-chicago-teachers-strike-affects-350000-students?lite.

[104] Kari Lydersen, *More Young People are Killed in Chicago than Any Other American City*, The Chicago Reporter (January 25, 2012), http://www.chicagoreporter.com/more-young-people-are-killed-chicago-any-other-american-city#.U2cDmfldW8A.

overwhelming pressure on the employer and give an unequal bargaining advantage to the employees. Under the CMSA decision, states will no longer be able to prohibit strikes by charter school teachers.

C. STATES SHOULD REGULATE CHARTER SCHOOL LABOR ISSUES

Charter schools were created by state legislatures as a way to provide more options for educating children. Ultimately, the states should be the ones to decide how they want these publicly funded options to be structured – including the labor relations between the school and its employees. Creating an express exemption from the NLRA for charter schools would allow give each state the ability to craft laws that fit its vision for charter schools.

This won't mean that charter school teachers won't be able to organize; it just leaves it up to the states. Some states will grant charter teachers the ability to organize and collectively bargain and some won't. The same will be true for charter school teacher strikes, and any other labor issues that might arise in an employment situation.

As was argued in the dissent to the CMSA case, providing a free and public education has historically always been within the purview of the states.[105] Each state has historically been able to develop a public school system that, in its view, best fits the needs of its state. In some states that means charter schools with a certain level of autonomy, in other states it may mean something different, but that is ultimately a question for each state to decide.

The most efficient method for overruling the CMSA decision would be for Congress to pass an amendment to the NLRA that explicitly exempts schools that have been labeled by states as charter schools from the NLRA and jurisdiction of the NLRB. Such an exemption would

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[105] *In Re Chicago Mathematics & Sci. Acad. Charter Sch., Inc.* at 14.

return the decision about how to regulate labor issues within charter schools back to the states, where they can be tailored to fit the specific needs of each state's charter school system.